IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 2024-027809

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

26 FEBRUARY 2026 [redacted]
DATE SIGNATURE

In the matter between:

A PLUS STUDENTS (PTY) LTD Applicant

(Registration number: 2014/074214/07)

and

AMANDA HERBST Respondent

Coram: B R Kahn AJ

Heard: 31 October 2025

Judgment Delivered: 26 February 2026

JUDGMENT

B R KAHN AJ

Introduction

1

1.1 If there is one constant on the calendars of the various divisions of the High Court in South Africa, it is this; restraint of trade issues will be ventilated on an ongoing and constant basis, and this is one of them.

1.2 The Applicant in this matter has sought interim relief in respect of two of its prayers (but without either the traditional part B of the notice of motion and without the grant of same pending some or other future hearing for final relief) and final relief in respect of two of its other prayers (a cease and desist order and payment of certain monies by way of pre-liquidated damages).

Relief sought

2 To understand the observation referred to in paragraph 1.2 above, it is important that I quote the whole of the relief sought by the Applicant, which I do hereunder:

'1 An interim interdict compelling the Respondent to immediately cease operating Abagility Maths;

2 An interim interdict prohibiting the Respondent from using confidential information to which the Applicant has a proprietary right and legal interest in, including but not limited to the Applicant's customer client list;

3 An order that the Respondent immediately cease and desist from doing business with, approaching for business, or making contact with any client from the Applicant's customer client list;

4 A declaratory order that the Respondent pay the sum of R250 000.00 (Two Hundred and Fifty Thousand Rand) as per clause 17.2 of the

Franchise Agreement, together with interest thereon at the legal rate of 11.25% a tempore morae'.

Background to the Parties' relationship

3

3.1

3.1.1 On 18 October 2014, the Applicant (who claims to be the holder of certain rights) entered into a franchise agreement with the Respondent (the 'Franchise Agreement') in terms of which the Applicant asserted that it had 'originated a business system for the purposes of establishing and operating various courses in the use of Abacus and mental computation methods to teach the skill of fast and accurate math calculation and is the owner of certain intellectual property rights used together with the business system' (clause 3 of the Franchise Agreement).

3.1.2 There is some reference in the Franchise Agreement to the Respondent acting on behalf of an entity to be registered but nothing further is addressed by the parties in this regard even though clause 4 of the Franchise Agreement asserts (confusingly) that the Franchise Agreement 'is with an (sic) corporate legal entity ....'.

3.1.3 Given that the parties do not address same further in the papers before the court (and it is not an issue in the proceedings) neither shall I.

3.2 Clause 4 of the Franchise Agreement provides that the franchisee – that is to say the Respondent – 'desires to establish and operate the business of teaching various courses and the use of abacus and mental computation methods to teach the skill of fast and accurate math calculation and for this purpose to use the franchisor's business system and intellectual property rights'.

3.3 In addition to the Franchise Agreement concluded between the Applicant and the Respondent (the Parties thereto) there was a further agreement concluded between them headed 'Memorandum of Agreement' and dated 26 October 2015 ('the MoA') which provides in clause 2.5 thereof that the recipient (that is to say the Respondent) shall:

'2.5 'not at any time use the confidential information to elicit or entice a way or endeavour to elicit or entice away any customers of or employees of the discloser, either to join the recipient or for any other purpose' (the discloser in this particular instance being the Applicant);

3.4 The core of the restraint provisions is contained in three sub-clauses contained in clause 16 of the Franchise Agreement. It emerges however from the papers and as confirmed by the Applicant's counsel during argument, that the Applicant was only relying on clauses 16.1 and 16.3 of the Franchise Agreement, which I quote hereunder:-

'16.1 Upon the termination of this agreement, the Franchisee will not gain any monetary value from advising or teaching math calculation methods by means of the system of operating the product of education of Japanese Soroban (Abacus) Mental Arithmetic (the 'Japanese Model'), including the use of abacus and mental computation methods to teach the skill of fast and accurate math calculation, for a period of thirty six (36) months after the termination of this agreement, and for the Territory of South Africa and SADC countries as set out in 1.14.

16.3 The franchisee hereto undertake and agree, that it will not participate, own, manage, either by agency, representation or family connections, compete with the franchisor in any manner or form relating to a max educational entity irrespective of the mythology or any such like, pertaining to the training of individuals'.

4

4.1 Clause 16.1 quoted above is to be read together with the definition of 'Territory' in clause 1.14 of the Franchise Agreement, which is the Republic of South Africa and 'SADC', (an acronym for the Southern African Development Community) and because the Territory plays such an important role in this application, it is as well that I identify the Territory by reference to the 16 member states of SADC which are, in alphabetic order, Angola, Botswana, Comoros, Democratic Republic of Congo, Kingdom of Eswatini, Kingdom of Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, United Republic of Tanzania, Zambia and Zimbabwe, totalling (based on my own research) 11.2 million square kilometres in area, with an estimated population of 340 million people, that even the most generous of judges will, I have no doubt, consider somewhat excessive, if not absurd.

4.2 When I drew the above absurdity to counsel arguing the Applicant's position in this matter, she invited me to read down the Territory and exercise my discretion in this regard. I deal more fully herewith later in this judgment.

4.3

4.3.1 It bears mention that (subject to the observations referred to in paragraph 4.3.2 hereunder) the restraint provisions relied upon by the Applicant (which find a home in the Franchise Agreement) do not contain the severability provisions that one often sees in a restraint agreement, the purpose whereof is to allow a court (if it is so minded) to – as the word 'severability' asserts – draw down on one or other of the provisions (whether with regard to period or territory – or perhaps both) when judging the enforceability or not of the restraint.

4.3.2 Clause 20.4 of the Franchise Agreement beneath the sub-heading 'severability' reads as follows:

'All the provisions of this agreement will be severable and no provision will be affected by the invalidity of any other provision of this agreement'.

4.3.3 During argument when the topic or subject of a possible drawdown was addressed, the Applicant's counsel made no reference to this clause in the Franchise Agreement – and correctly so, because this severability clause does not apply to the situation in which there is a drawdown, but in circumstances where one clause (for example, a consent to jurisdiction or the scope of the indemnity in clause 10.16) may be found to be invalid; that bad apple in the bushel (ie, that one clause) will not taint (or invalidate) the other apples (ie,the remaining clauses).

4.4 I deal more fully herewith later in this judgment.

5 As invariably occurs before a party approaches a court to enforce a restraint provision, the Parties fell out and issues arose between them. In this instance, the issues culminated in the termination of the Franchise Agreement, but whether the termination was for cause (as the Applicant contends), or as a result of Applicant's repudiation (as the Respondent contends), is not relevant for the purposes of this judgment. That the Franchise Agreement terminated is common cause.

6 The Applicant alleges that the Respondent is operating a competitive business, Abagility Maths, in breach of the Franchise Agreement, and in doing so the Respondent is (so the Applicant says) in breach of:-

6.1 clauses 16.1 and 16.3 of the Franchise Agreement; and

6.2 clause 2.5 of the MoA.

7 The Applicant, concerned about the Respondent's conduct, addressed various demands to the Respondent which were primarily of a cease-and-desist nature; the Respondent denied being in breach of any of her contractual obligations in favour of the Applicant and consequently failed to cease or desist from what she was doing or to comply with any other demand made of her and so the scene was set for litigation, which ultimately found a home in this application.

Legal principles relating to interim and final relief

8 I mentioned in paragraph 1.2 above that the Applicant clearly not only sought interim relief (paragraphs 1 and 2 of the notice of motion) but final relief (paragraphs 3 and 4 of the notice of motion) and all the reliefs sought by the Applicant relied on the same factual matrix and allegations as set out in the founding affidavit.

9 It is trite law that an Applicant seeking interim relief has a different onus to an Applicant seeking final relief.

10 In interim relief an Applicant has to establish that they have:

10.1 a prima face right to the requested protection;

10.2 an apprehension of irreparable harm should the relief not be granted;

10.3 indicated a balance of convenience – i.e., that the harm to be suffered should the court refuse the relief, outweighs the harm that the other party will suffer if the relief is granted; and

10.4 no alternate satisfactory remedy.

11 In final relief however the Applicant needs to demonstrate:

11.1 that a clear – not just prima facie – right has been established;

11.2 the injury complained of must be actually committed (and not apprehended); and

11.3 the absence of any other satisfactory remedy.

Legal principles to restraints of trade

12 Ever since the decision in Magna Alloys & Research (S.A.) (Pty) Ltd v Ellis[1] ('Magna Alloys') which, put at its most simple, altered the law in South Africa in regard to the enforceability (or not) of restraints of trade, it is trite that contracts in restraint of trade were no longer prima facie contrary to public policy and therefore invalid – which was prior thereto and for decades – if not longer – the legal position, but rather were in general enforceable, unless to enforce them would be unreasonable and therefore contrary to public policy.

13 Subsequent to Magna Alloys, Didcott J succinctly set out the effect of the Magna Alloys judgment in J Louw & Co (Pty) Ltd v Richter & Others[2] as follows:-

'Covenants in restraint of trade are valid. Like all other contractual stipulations, however, they are unenforceable when, and to the extent that, their enforcement would be contrary to public policy. It is against public policy to enforce a covenant which is unreasonable, one which unreasonably restricts the covenantor's freedom to trade or to work. Insofar as it has that effect the covenant will not therefore be enforced. Whether it is indeed unreasonable must be determined with reference to the circumstances of the case. Such circumstances are not limited to those that existed when the Parties entered into the covenant. Account must also be taken of what has happened since then and, in particular, of the situation prevailing at the time enforcement is sought. Therefore, a party who seeks to enforce a contract in restraint of trade must invoke the contract and prove the breach thereof thereafter, a Respondent who seeks to avoid the restraint bears an onus to

[1] [1984] ZASCA 116
[2] [1987] (2) SA 232 (N)

demonstrate, on a balance of probabilities, that the restraint agreement is unenforceable because it is unreasonable'.

14 To determine whether the restraint of trade is reasonable or not, the court in the case of Basson v Chilwan and Os[3] enunciated four principles that must be applied:

14.1 does the one party have an interest that deserves protection after termination of the agreement?;

14.2 if so, is that interest threatened by the other party?;

14.3 in that case, does such interest weigh qualitatively and quantitively against the interest of the other party not to be economically inactive and unproductive?; and

14.4 is there an aspect of public policy having nothing to do with the relationship between the parties that requires the restraint be maintained or rejected?

15 In some instances, a fifth principle has also been recognised, namely: is the restriction necessary to protect the applicant's interests, or does it go further than is necessary to protect the applicant's interests?[4]

16 In Basson v Chilwan and Others[5] (a judgment that is most helpful) it was stated:

'The incidence of the onus in a case concerning the enforceability of a contractual provision in restraint of trade does not appear to me in principle to entail any greater or more significant consequences that in any other civil case in general. The effect of it in practical terms is this: the covenantee seeking to enforce the restraint need do no more than to invoke the provisions of the contract and prove the breach; the covenantor seeking to

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[3] [1993] ZASCA 61
[4] Kwik Kopy (SA) (Pty) Ltd v Van Haarlem and Another 1999 (1) SA 472 (W)
[5] Supra 3 at para 2

avert enforcement is required to prove on a preponderance of probability that in all the circumstances of the particular case it will be unreasonable to enforce the restraint; if the court is unable to make up its mind on the point, the restraint will be enforced. The covenantor is burdened with the onus because public policy requires that people should be bound by their contractual undertakings. The covenantor is not so bound, however, if the restraint is unreasonable, because public policy discountenances unreasonable restrictions on people's freedom of trade ...'

17 The reasonableness of a restraint requires a court to make a valued judgment. This judgment is premised on the factual matrix of each case as emerges from the papers. In Reddy v Siemens Telecommunications (Pty) Ltd[6], the following was held:

'A court must make a value judgment with two principal policy considerations in mind determining the reasonableness of a restraint. The first is that the public interest requires that parties should comply with their contractual obligations, a notion expressed by the maxim *pacta servanda sunt*. The second is that all persons should in the interests of society be productive and be permitted to engage in trade and commerce or the professions. Both considerations reflect not only common law but also constitutional values. Contractual autonomy is part of freedom informing the constitutional value of dignity, and it is by entering into contracts that an individual takes part in economic life. In this sense, freedom to contract is an integral part of the fundamental right referred to in s 22. In applying these two principal considerations, the particular interest must be examined. A restraint would be unenforceable it if prevents a party after termination of her employment from partaking in trade or commerce without a corresponding interest of the other party deserving of protection. Such a restraint is not in the public interest. Moreover, a restraint which is reasonable as between the parties may for some other reason be contrary to the public interest'.

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[6] Reddy v Siemens Telcommunications (Pty) Ltd (251/06) [2006] ZASCA 135

18 Fundamental to the Applicant's right to relief is the requirement that it demonstrates that it has an interest worthy of protection[7].

19 The reported judgment of Experia in South Africa (Pty) Ltd v Haynes[8] explains it thus:

'It is well established that the proprietary interest that can be protected by a restraint agreement, are essentially of two kinds, namely: The first kind consists of the relationships with customers, potential customers, suppliers and others that go to make up what is compendiously referred to as the 'trade connection' of the business, being an important aspect of its incorporeal property known as goodwill. The second kind consists of all confidential matter which is useful for the carrying on of the business and which could therefore be used by a competitor, if disclosed to him, to gain a relative competitive advantage. Such confidential material is sometimes compendiously referred to as 'trade secrets'.'

20

20.1 Applying that principle to the facts in this matter, the following emerges; the Respondent is not, as alleged by the Applicant, operating a competitive business – whether under the name of Abagility Maths or otherwise. The Respondent is employed by her husband in a business called Abagility Maths which, it would appear, uses the Japanese Model, although it is not clear at all from the papers how and in what circumstances Abagility Maths (owned by the Respondent's husband) acquired those rights.

20.2 In argument, the Applicant asserts that it is the same Japanese Model as commercially exploited by the Applicant, and assuming in favour of the Applicant that it is, it follows therefore that the Applicant is not the only person which enjoys rights in South Africa from the originator of the Japanese Model, in spite of creating the impression in the founding papers that she effectively had a form of (contractual) monopoly within

[7] Supra 3

[8] [2012] ZAGPJHC 105 and Sibex Engineering Services (Pty) Ltd v Van Wyk and Another 1991 (2) SA 482 (T)

the Territory on the learning model that was the subject matter of the Franchise Agreement.

20.3 The Applicant, notwithstanding its protestations, does not however make any effort – let alone present any evidence – as to the similarities (if any) of the learning methods that it, the Applicant, commercially exploits and the learning methods that Abagility Maths commercially exploits. This omission – ie, putting the court in the position of being able to identify a commonality of methodology (which would or should be the starting point in the inquiry) is missing. It is a major weakness in the Applicant's case.

21

21.1 I now deal with the question of the Applicant's 'confidential information' and 'trade secrets' (which for the purpose of this judgment I will refer to collectively as the 'Confidential Information'). Besides simply asserting the existence of Confidential Information (and an oblique reference to a customer list), there is a dearth of information as to what is the Confidential Information claimed by the Applicant and how and in what circumstances the Respondent is using and/or exploiting same – even less so is there anything contained in the Applicant's founding papers as to how and if Abagility Maths is using and/or misusing the Applicant's Confidential Information.

21.2 In fact, there is no indication in the Applicant's founding papers as to what methodology Abagility Maths employs and how it unlawfully intrudes on and applies or exploits the Confidential Information. A bald assertion is insufficient – and yet the Applicant appears to content itself with same.

22

22.1 The Applicant also alleges that the Respondent had 'unlawfully used the Applicant's customer list and contacted at least one customer of the A Plus Students franchise in order to solicit and entice such customer away from the Applicant in order to take up custom with the competitive business being run by the Respondent'.

22.2 The Respondent rebuts such allegation in some detail; it is clear from the Respondent's answer that at no stage did she solicit the Applicant's customers (let alone the one person referred to by the Applicant in its founding papers), but over and above that, there is a further compelling feature that mitigates against the Applicant's claims and that is this; the Applicant is a franchisor, not a franchisee and does not conduct the business of teaching learners mathematics to improve on what is seemingly a notoriously difficult subject amongst South African learners.

22.3 The Applicant does not allege that it, itself, teaches the Japanese Model or for that matter whatever model over which it enjoys (at least on the Applicant's version) some form of proprietary monopoly; on the contrary, the Applicant is a franchisor and if I am to accept that to be the case (and if I have regard to the former relationship between the Applicant and the Respondent evidenced by, inter alia, the Franchise Agreement, I must accept this to be the case) the Applicant generates income by commercially exploiting franchises, not by teaching mathematics lessons with whatever model or tool it claims to have devised and/or acquired.

23

23.1 In the Applicant's replying affidavit there is the allegation (for the first time) that the Applicant has spent approximately 19 years and approximately R29 595 200.00 (a very specific amount) to develop the 'niche teaching solutions and methods', but this assertion is not contained in the founding papers and consequently – at least for the purposes of this application – I should not have regard thereto, but assuming that I am wrong in this regard (and I should have regard thereto) there is no attempt by the Applicant to identify how the extraordinarily large sum averaging approximately R1 557 600.00 per annum (approximately R130 000.00 per month) has been spent by the

Applicant in circumstances when, at least absent any explanation, it makes no economic sense whatsoever.

23.2 In fact common sense dictates that it stretches credulity to believe that this vast sum of money was spent by the Applicant on a business in which the origins or genesis of the teaching methodology emanates from Japan (as opposed to being developed by the Applicant itself), but even if I am wrong in this regard and that the Confidential Information and the business model claimed by the Applicant is completely homegrown, the same incredulity applies equally.

23.3 This conundrum has, I fear, been created by the Applicant itself. Who owns the sole and exclusive rights in the Territory to the Japanese Model? The Applicant is silent in this regard but we do know that the Respondent's husband – through Abagility Maths – is operating the same or a substantially similar learning model to the Japanese Model (at least according to the Applicant) but given my finding in regard to the lack of a protectable interest, I need not dwell thereon.

23.4 There is however one residual observation I should make; the Applicant company was formed in 2014; it is not possible for the Applicant to have spent some almost R30 000 000.00 (thirty million rand) over 19 years given that it has only been in existence for 11 years, which raises questions as to the legitimacy and veracity of the Applicant's allegations in this and other respects and a propensity to exaggerate and/or mislead.

23.5 I should also mention that no attempt whatsoever is made by the Applicant to give a breakdown of how the sum of almost R30 000 000.00 (thirty million rand) has been expended nor to attach any annual financial statements in which this expenditure is recorded.

The Applicant's founding papers; the requirement for a complete and substantiated case

24 In Select PPE (Pty) Ltd v Ryan Holmes and Another[9], the Labour Court held that 'the Applicant should make out a complete and substantiated case in the founding affidavit why it believes the enforcement of the restraint would be reasonable, no matter where the onus lies. If the Applicant fails to make out a proper case in the founding affidavit that the enforcement of the restraint would be reasonable, it cannot remedy the failure on reply and then rely on the issue of onus as a basis to justify this'.

25 The High Court in Fine and Country South Africa (Pty) Ltd v Tradelink Properties (Pty) Ltd[10] and in Airports Company of South Africa (SOC) Ltd v Tswelokgotso Trading Enterprise CC[11] similarly held that all the necessary allegations must be contained in the Applicant's founding papers, which must be self-contained.

26 This principle – the requirement that a litigant's case must be made out in their founding papers – has been made clear by our courts so often that it has become trite law and yet the Applicant's founding papers are sparse in the extreme; the threads are frayed and the fabric does not hold up. I have dealt therewith in some respects above and I also deal therewith more fully hereunder.

Protectable interests

27 I focus now on the protectable interests claimed by the Applicant (which of course the Applicant must claim in order to at very least have a foot in the door) because absent a protectable interest, the rest of the Applicant's case (such as it is), is doomed to failure – and for reasons referred to hereunder (whether the Applicant is seeking an interim order or a final order) there is simply no protectable interest identified by the Applicant in its founding papers but if I am wrong in this regard and there is a shadow – or even something a little more than a shadow – of a protectable interest, the

[9] [2024] ZALCJHB 484 at para 41
[10] [2024] ZAGPJHC 586
[11] [2022] ZAGPJHC 410

Respondent deals therewith clearly and unambiguously which the Applicant avoids dealing with in its reply.

28

28.1 As indicated above, the Territory within which the Respondent is prohibited from conducting herself in terms of the restraint, comprises 11.2 million square kilometres with a population of over 300 000 000 persons.

28.2 There is no attempt by the Applicant to explain in its founding affidavit why an imposition of an area comprising the Territory within which the Respondent is to be precluded from undertaking certain activities, is reasonable to protect its interests. Recognising this difficulty, the Applicant invited me (through its counsel during argument) to read down the Territory and replace it in my discretion (acting judiciously) with another (reduced) territory that I might be inclined to order, but this presents four difficulties as I see it, being (in no order if importance) the following:

28.2.1 firstly, and as pointed out in paragraph 4.3 above of this judgement, the Franchise Agreement (or at least the restraint component thereof) has no severability provisions.

28.2.2 secondly, the question of a drawdown in relation to the Territory is not dealt with in the Applicant's founding affidavit and consequently, the Respondent is simply not able to deal therewith – other than to protest the Applicant's request made during argument;

28.2.3 thirdly, whether it is in the interests of justice to reward the Applicant (or any party who claims to be the beneficiary of a restraint) who has sought to impose a patently (even grossly) unreasonable prohibition on a restrainee, the benefit of the court's intervention (even with an appropriate severability provision) to read down the original area / territory; and

28.2.4 fourthly, if it possible or judicious to do so, whether a court is able in the absence of evidence as to what would in the circumstances be reasonable, to replace one territory / area with another and so, to use the old proverb 'make a silk purse out of a sow's ear' (this difficulty being linked to that referred to in paragraph 28.2.2 above).

28.3 In the Applicant's founding papers, the Applicant stands fast in seeking to prohibit the Respondent from conducting herself in a particular manner within the Territory; there was no attempt by the Applicant to pause and consider how irrational such a claim is and recognising the irrationality, to then at least attempt (in its founding papers) to arm the court with information pertinent to what the Applicant considers necessary (at least in relation to the Territory) to protect its interests, which would not only enable a court to apply its mind to the possibility of a read down (assuming this is even possible without a severability clause) but of equal (and perhaps greater) importance, to give the Respondent an opportunity of dealing therewith.

28.4 All the Applicant has done in this instance is, when I posed the difficulty to Applicant's counsel, simply ask the court to assist it with an alternate area / territory (ie, to read down) but without any information necessary to enable the court to do so.

29

29.1 In restraint matters where territory (or any area of prohibition) plays a role, the restrainor (or proposed restrainor) should, when formulating the terms of the restraint (housed in a restraint agreement), apply their minds carefully to the nature of the interests to be protected and how same may – applying commercially reasonable safeguards and appropriate checks and balances – be achieved, and where they fail to do so (as in the case of the current restraint provisions) they must face the consequences of their choice.

29.2

29.2.1 I would expect to read in founding papers where an Applicant who seeks to enforce a restraint that involves territory, to explain (particularly where the territory appears – at least prima facie – to be excessive – perhaps even unreasonable) why the territory provided for in the Franchise Agreement is reasonable in the circumstances and if an applicant (who conceivably may not have been the author of the restraint agreement and more particularly the territory referred to therein) considers that perhaps, with wisdom of hindsight or looking at the particular facts as they have unfolded in the matter (and whilst preparing their founding papers and crafting the relief they will seek), concludes that the territory as identified is (perhaps in retrospect) unreasonable and that an alternate or other (lesser sized) territory is to be claimed as part of the relief sought, to then provide therefore in the founding papers and give the court context – not only as to why the territory embodied in the Franchise Agreement is perhaps / arguably unreasonable, but why another sized territory (clearly identified) would in all the circumstances of the matter be reasonable (but then of course to identify what are the circumstances that underpin or motivate that proposition so that the court can make an informed decision) and then invite the court to consider and to order a read down of the territory as originally contracted for and replace same with another territory that is appropriate.

29.2.2 In addition thereto, a respondent in these circumstances will then have an opportunity of dealing with the Applicant's case insofar as a (proposed) read down of the contractual territory plays a role.

29.2.3 The Applicant has done none of the aforesaid.

29.3 It is trite that circumstances and criteria will differ from one matter to another; much depends on the nature of the activity to which the restraint pertains, the nature of the business in which a restrainor is seeking protection, the nature, extent and severity of the restrainee's conduct, the economic environment within which the parties conduct their commercial activities, the source of the Applicant's income relating to the business in question, the existence or not of bespoke or Confidential Information, the client / customer profile of the business whose interests are sought to be protected, as well as the client / customer profile of the competitive business or activity, the catchment area of the restrainor's (and even the restrainee's) custom, the nature and source of the restrainor's (or the Applicant's) business' goodwill, together with a myriad of other factors that allow a court to have a good sense and understanding of the restrainor's business activities, as well as the restrainee's business activities or other (allegedly) offensive / unlawful activities as may be alleged by an applicant – if any exist – together with such other factors that will weigh on a court in determining whether it is able to come to the assistance of a restrainor applicant and if so, on what basis. These are fact specific. None of these or other or similar facts are to be found in the founding affidavit in this matter.

29.4 A perusal of the Franchise Agreement reveals the following:

29.4.1 the Respondent is to enjoy 'use of Abacus and mental computation methods to teach the skill of fast and accurate math calculation devised and originated by the franchisor and recorded in the operating manual, and includes any improvements or variations made to the business system' (clause 1.1 of the Franchise Agreement);

29.4.2 where, how and on what basis the use of the business system is made is not identified.

29.5 From where within the Territory the Respondent will actually make use of the business systems (presumably somewhere within an 11.2 million square kilometre territory) is not referred to in the Franchise Agreement. The Franchise Agreement is silent in this regard – a fundamental item of information that any court would require – and nowhere in the founding affidavit does the Applicant identify an address from which Abagility Maths operates.

30

30.1 If a party's position (maybe even a default position) is that it will impose a prohibition within a certain (exessive) area / territory that will, even if found to be unreasonable, be read down (not struck down) by a court (i.e, to convert an unreasonable territory to a reasonable territory), and so present a restrainor (usually an applicant in motion proceedings) with a type of safety net, a court may end up inadvertently fostering a culture or attitude that .... 'I will ask for as much as I conceivably think I can get – and maybe even not really apply my mind to the matter – and I will leave it to the court to read down from there and so I will end up with something that I wanted anyway – or something close to it'.

30.2 Such an approach is unacceptable – made even more so because it evidences an unthinking, lazy and sloppy way of seeking to protect interests (and simultaneously placing obligations on restrainees), and it is not for a court to intervene and, as I said earlier, reward an applicant with something which is better than nothing. A court cannot conjure up out of thin air a territory (protectable interests aside although all these factors are interwoven) that would in certain (unidentified) circumstances be reasonable.

30.3

30.3.1 In any event it seems to me that the persons who are best qualified to determine how to protect their interests are restrainors themselves and if they cannot take the time or the trouble to apply their minds to the matter, I ask myself this question; why should a court be placed in the difficult and onerous position of converting a restraint that is unenforceable (example the territory is completely unreasonable) into one that is enforceable (the territory is reasonable) save in the rarest of circumstances – perhaps in any circumstances?

30.3.2 Of course territory is but one of a number of factors in determining reasonableness; I simply use territory to make my point but the other factors that need to be present can be used by way of examples as well.

30.3.3 If however I am wrong in taking this approach to the matter and it behoves a court to attempt to convert a frog into a prince (as it were) the absence of any or sufficient information to enable a court to apply its mind to the matter puts an end to that possibility.

31

31.1 I must however make this clear lest I leave the wrong impression; a court has, in the exercise of their discretion and acting in the interests of justice the ability to draw down on a territory (and perhaps other features of a restraint where the contract between the parties envisages such a possibility) but it should do so sparingly, only in appropriate matters and never in my view without appropriate and sufficient information (advanced by an applicant and dealt with or not by a respondent as it chooses) so as to make an informed and fair decision.

31.2 It is so that many restrainors will apply their minds to what is a reasonable territory (or for example a reasonable period attached to a restraint) in order to ensure that their contractual rights extend no further than is necessary to protect their interests, but in spite of their best efforts in this regard, a court may not support that argument, but if in the founding papers sufficient information is made available to enable the court not only to understand an applicant's rationale, but to enable a respondent an adequate and fair opportunity of rebutting or trying to rebut same, a court should then be possessed of sufficient information in respect of the competing claims to enable it to venture into draw down territory but absent that, there can in my view be no reward for a prima facie unreasonable (and particularly a grossly unreasonable) restraint.

32 In this matter, the Applicant has – not surprisingly – not explained the basis for incorporating the Territory as defined in the Franchise Agreement. The Applicant has not even taken the trouble to motivate or explain exactly why a reduced (read down) territory might be reasonable (and what that reduced territory might actually be) in all the circumstances. Nothing appears in the founding affidavit as to, for example:-

32.1 the profile of the Applicant's franchisee's client base (whether in general or in particular in the case of the Respondent);

32.2 the typical catchment area for a franchisee's client base (whether in general or in particular in the case of the Respondent); as well as

32.3 that information to which there is reference in paragraph 29.3 above,

to name a number of important features that a court would require to enable it to apply its mind to a (possible) reading down.

33 Notwithstanding all my above concerns in relation to the Territory and a possible read down thereof, during argument I endeavoured to understand more about the Respondent's income generating activity whilst the Franchise Agreement was extant, and it would appear that the Respondent relied for its income / custom on parents of young children who need assistance in math.

It follows therefore that a catchment area that might be appropriate would be within a certain number of kilometres of where the Respondent would have been carrying on her business (where the learners attend for what I assume to be extra lessons in mathematics) utilising the Applicant's business model but no such information has been tendered by the Applicant and the court is left in the dark. In addition thereto such engagement from the bar is not on oath and is of no or limited value. The Respondent has not answered same anyhow and indeed has no obligation so to do. I therefor cannot have any regard thereto.

34

34.1 What however constitutes a final death-blow to the Applicant's prospects of success is the Respondent's assertions in paragraph 2 (Caselines page 009 – 12) and paragraph 5 (Caselines page 009 – 13) of the Respondent's answering affidavit in which she says in paragraph 2 that 'the Applicant had further closed down the Meyerton branch' (to which the Applicant in her replying affidavit deals with obliquely and evasively by stating that 'save to deny that the content of the answering affidavit is true and correct', 'or that any hearsay evidence ought to be admitted' the remainder of these paragraphs is noted.

34.2 What is it that is noted? That the Meyerton branch has closed down and whilst the Respondent does not deal with 'the Meyerton branch' as clearly and succinctly as she could perhaps have done (and to be clear, if there is any obligation on one of the parties to deal with the so-called 'Meyerton branch' – whatever that may be – it was the Applicant's obligation but yet it said nothing in regard thereto) it seems sufficiently clear from the papers as a whole that the Respondent was teaching the Applicant's methods at or through or via the Meyerton branch (wherever that was) and when I put this to Applicant's counsel enquiring what this meant, the Applicant's counsel was (not surprisingly) unable to give me any finite – or for that matter any approximate – idea as to what area or territory the Meyerton branch comprised;

34.3 In paragraph 5 of the Respondent's answer she asserts that 'the Applicant does not have a monopoly of math tutors <u>in the area .....</u>('my emphasis') – once again an unidentified and undisclosed area and I do not believe that I can assume that it is the Meyerton area and even if I could assume it were the Meyerton area I am not able to identify what this area comprises; is it a magisterial area, a municipal area, an area identified by way of a radius and if so, what is the radius? five, ten, 15 kilometres? and if so, what point is the centre of the radius – or is it something else?

34.4 What also renders a (further) mortal wound to the Applicant's case was its concession during argument that the Applicant does not have a presence or another franchisee in the Meyerton area (I repeat; whatever that area may be) which confirms – if further confirmation were required – that the Applicant does not have an identifiable interest worthy of protection which is being breached or infringed by the Respondent.

35 The Respondent however having raised the matter would necessarily have invited the Applicant to reply thereto – to the extent that the Applicant was not raising new matter – but in dealing ad seriatim with paragraphs 2 and 5 of the Respondent's answering affidavit (containing very significant and material allegations), the Applicant takes no issue therewith in its reply.

36 There is another feature that concerns – indeed disturbs me – greatly and that is this; there appear to be two systems alluded to by the Applicant and there is confusion as to whether Abagility is using:

36.1 the Japanese Soroban model / method; or

36.2 the Applicant's system which it alleges to have developed over 19 years and spending almost R30 000 000.00 in the process, to teach mathematical arithmetic and exactly what Abagility is doing and by extension what the Respondent is doing in working for Abagility. There are vague assertions of confidentiality (broad outline) but nothing specific, but by virtue of my finding in regard to the Applicant not having an interest worthy of protection, I need not make a finding in this regard.

37 All the above is, in my view, fatal to the Applicant's case; its founding papers are sparce and the Applicant seemed to be content to make bald allegations in the (wrong) belief that on some or other basis – and without further ado – they would suffice for the purposes of relief in motion proceedings.

38 Against the aforesaid backdrop and in all the circumstances, I consequently find that the Applicant has not identified an interest worthy of protection, and so must fail in its efforts to obtain the relief sought.

39

39.1 Having found that the Applicant has not established an interest worthy of protection this would be the end of the matter but there is another feature that I should deal with and that is this; the manner in which the Applicant has couched the relief she has sought.

39.2 The Applicant seeks interim interdicts in respect of prayers 1 and 2, but there is no reference whatsoever to those interim interdicts (if granted) being granted pending some other determination (often a part B in the notice of motion for final relief or even the outcome of an action to be instituted) and so the two reliefs sought in prayers 1 and 2 are in any event incompetent.

39.3 Whilst the failure to incorporate some future final relief in the notice of motion would not necessarily have been fatal had the founding affidavit dealt clearly therewith, the founding affidavit too is silent in this regard. Consequently, the relief sought in prayers 1 and 2 cannot be granted anyway.

40 Insofar as the relief sought in prayers 3 and 4 are concerned same would be dependent upon the Applicant having established, inter alia, an interest worthy of protection. The Applicant has not, and so these two prayers too must fail.

41 I also remain cognisant of the Respondent's constitutional right to freedom of trade and occupation as entrenched in s 3 of the Constitution of the Republic of South Africa, 1996, but given what is referred to above I need not linger in regard to this constitutional imperative as to how it might impact, or might have impacted, on the Applicant's case.

42 All in all the whole of the Applicant's cause of action – at least as presented – was misconceived and incapable of judicial support.

Order

43 The following order is therefore made:-

43.1 the application is dismissed;

43.2 the Applicant is ordered to pay the Respondent's costs including costs of counsel on scale B.

[redacted]

B R KAHN AJ
Judge of the High Court
Johannesburg

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