IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

28/9/2016
DATE SIGNATURE

29/9/16

Case number: 67971/2016

Case number: 67970/2016

In the matter between:

ENJOY BEAUTY (PTY)LTD Applicant

And

PETROVIA AND SMIT BEAUTY SALON CC First Respondent

KARAL JACOBUS SMIT Second Respondent

ANGELINA PETROVIA-SMIT Third Respondent

NEUKIRCHER AJ

1] Two urgent applications served before me between the same parties and the relief sought by the applicant against the three respondents in both matters is the same and it is for that reason that this judgment will read as it does. I will separate the two matters where necessary, but for all intents and purposes the argument that was presented was a singular argument save for one issue which I will deal with in the judgment. At the outset, Ms Kilmartin informed me that the suit has been withdrawn against the second respondent and that the relief sought in prayers 2 and 3 are abandoned in the matter under case number 67971/2016 and prayer 2 is abandoned in the matter under case number 67970/2016. This relief pertains to an order for specific performance and will be relevant later. What the applicant does ask is for interim relief pending the final determination of this application or an action to be instituted within 30 court days as follows:

1.1 the enforcement of its restraint of trade clause set out in the franchise agreement until 14 August 2017;

1.2 an interdict preventing the first and third respondents from infringing the PERFECT 10 trademarks.

THE FACTS

2] Imbalie Beauty Limited is a company which is listed on the Johannesburg Stock Exchange. It is the holding company of Enjoy Beauty (Pty)Ltd (the applicant) as well as a number of other companies including Dream Nails Beauty (Pty)Ltd, Placecol Fresh Beauty (Pty) Ltd and Placecol Skin Care (Pty)Ltd.

3] The Imbalie Group renders a comprehensive range of health and beauty services through franchised and company owned beauty salons operating under the names and trademarks such as Dream Nails Beauty, Placecol, World of Beauty and PERFECT 10 which names and trademarks belong to various companies within the Imbalie Group. The group also sells and distributes a range of beauty products through these franchise operations and large retailers nationwide.

4] According to the applicant, the PERFECT 10 franchise, which is the one under discussion in these matters, renders nail and beauty services and provides beauty products. These services and products are defined in the operations manual and software managements system which the franchisees are required to use and this incorporates details of the recommended service and product charges.

5] The products and services rendered by the PERFECT 10 franchise include skincare products and services which one may typically find in beauty salons: facials, manicures, body and skin treatments, waxing etc. PERFECT 10 also had what one may term an exclusive brand "look" which is the use of the red and grey colours, and the trade marks, type face, store lay-out and signage (to name but some) and then of course with this was the use of the Skinderm range of products and then there was the development of what is termed the "HeadStart salon management system" which is the new point of sales system which the applicant required all its franchisees to start using during approximately 2012.

6] On 18 May 2006 the second and third respondents, as members of the first respondent signed a franchise agreement. The agreement was, in essence, to operate a franchise of PERFECT 10 from the Woodlands Boulevard, Pretoria.[1] This agreement sets out the duties and obligations of both the franchisor and the franchisee quite clearly. And purporting to be part of that franchise agreement was a "Deed of Suretyship" which is signed by the second and third respondents on 1 May 2006[2]. I will return to this issue in due course.

7] It would appear that the relationship between the parties was a happy one until the occurrence of two events:

7.1 the roll out of the HeadStart operating system in 2012 which became a contentious issue during approximately August 2016; and

7.2 the insistence of the applicant that its franchisees sell only the SKINDERM range of products at the end of 2015.

1 On 27 July 2012 the Menlyn agreement was signed.

2 The franchise agreement was renewed on 7 March 2016 on exactly the same terms and conditions and the 2006 agreement. Interestingly enough the suretyship attached to the Menlyn agreement was unsigned.

8] Now this was an issue because of the fact that the first respondent had been operating its franchise since inception by marketing and offering its customers various other skin products such as Nimue, Guiot, Environ and Bio Sculpture (the latter being a nail product). Furthermore, the point of sale system used was known as the "Salon Iris" system which accommodated all these products and was well known to the respondents and their staff and which, according to third respondent, worked well. It would appear that the intention of the applicant was, at the end of 2015, to withdraw all other brands of product from its franchisees stores other than the SKINDERM range which, as Mr Arnoldi put it during argument, would be "commercial suicide" for his client.

9] However, what was even more onerous and contentious was the issue surrounding the implementation of the HeadStart operating system. In 2012 when this issue was first raised, the third respondent says that she pointed out the shortcomings of that system to one Ms Colyn of the applicant. These shortcomings ranged from the cost of the system to issues such as: it had no staff scheduler, it could not program treatment durations per therapist in order to schedule appointments, it could not indicate treatment rooms to allocate appointments, it could not convert quotes and price enquiries into actual ticket invoices. Accordingly, the developer of the system, a certain Mr Koekemoer, undertook to effect certain critical changes to the system within 2 weeks. This is significant as it was during this time that the Menlyn agreement was signed and it was based upon the promises and undertakings made by Mr Koekemoer that the third respondent accepted that the shortcomings in the HeadStart system would be addressed. This was important as paragraph 10.29 of the Menlyn agreement entitles the applicant to insist on the respondents switching to the HeadStart system at the Menlyn branch.

10] According to the respondent, the advantage of the HeadStart system was that the applicant could control the franchisee's database and monitor their businesses on an ongoing basis. Interestingly enough this is not denied by the applicant.

11] In 2012 the applicant then allowed the respondents to continue using the Salon Iris system for another 4 years until 2016 when the applicant began insisting that the HeadStart system be implemented.

12] As Mr Arnoldi put it during his argument, the applicant was quite willing to allow the respondents to run 2 point of sale systems (ie the Salon Iris system and the HeadStart system) but that this would create chaos for his clients and was clearly unsustainable and counter-productive for the respondent's business. And this, he argued, was a clear repudiation of the franchise agreement. His argument is also that there is no clause in the Woodlands franchise agreement which allows the applicant to insist that the respondent change to the HeadStart point of sale system (unlike the Menlyn agreement where clause 10.29 provides for this change). The argument goes further and runs to the issue of the SKINDERM range of products: likewise, he argues, the applicant cannot insist that the respondent discontinue the use of all other brands of products and market only the SKINDERM range. This, for the respondents would be unsustainable for their business and inasmuch as is affects their business, it is a repudiation of the agreement between the parties.

13] Ms Kilmartin for the applicant argued that the HeadStart system was a superior operating system which was implemented during 2012. Any "bugs" that were there had been ironed out by Mr Koekemoer and she referred to his affidavit which is attached to the application. In this affidavit Mr Koekemoer states that *".all matters referred to have been addressed and form now integral features of HeadStart".* Whilst this is interesting, in my view it does not take the matter any further as Mr Koekemoer does not explain how he addressed the issues raised by the third respondent nor how he has facilitated the shortcomings listed by her. It would not be necessary to explain the code he used to program this facility but how the push of the button (so to speak) would bring up one menu and so on. In other words, in "plain speak" there is no explanation on when and how he finalised these improvements and I thus do not find his affidavit particularly helpful.

THE REPUDIATION

14] The issue of which party actually repudiated the franchise agreement is, of course, in dispute. The applicant alleges that the respondents repudiated the agreements by refusing to implement the HeadStart system and by refusing to roll-out and exclusively market the SKINDERM range of products; the respondents allege that the applicant repudiated the franchise agreements by insisting that they implement the HeadStart system and exclusively market the SKINDERM range of products. Whatever the situation, it is not in dispute that the respondents sent a letter to the applicants on 15 August 2016 in which they state that they are cancelling the franchise agreements. Both Mr Arnoldi and Ms Kilmartin are *ad idem* that for purposes of the interim interdict, it is not necessary for me to decide the issue of the repudiation – it is sufficient for me to accept that there has been a cancellation of the franchise agreement and it is from this point of view that I view the facts before me.

<u>THE INTERDICT AND THE TRADE MARK INFRINGMENT</u>

15] It is Ms Kilmartin's submission that, given the cancellation of the franchise agreement, the respondents are no longer allowed to utilize the PERFECT 10 trade mark or branding anywhere inside or outside of either the Woodlands or Menlyn stores. She pointed out that, despite the fact that the letter of 15 August 2016 cancels the agreement, and the letter of 16 August 2016 states that the respondents will

"...shortly take the necessary steps to remove all reference to Perfect 10, including the removal of signage, in accordance with the cancellation of the Franchise Agreement", only the signage outside the Woodlands and Menlyn Stores were removed, and this after the application was launched, and thus the

interdict sought in the Notice of Motion is necessary to protect the proprietorship of its trade mark as it appears that the respondents are still trading using the Perfect 10 branding.

16] Mr Arnoldi's argument is the following: the respondents started taking down the applicant's signage but were advised to stop doing so upon receipt of this application. The reason for this, he argues, is quite clear – if one has regard the specific performance relief which was originally sought, it would have meant that had the applicant persisted with and been successful with that relief, they would have been entitled to receive a store "in tact" (as he put it). It was only at the hearing of the matter that the relief was abandoned which meant that his clients would not be in contempt were such an order to be granted and now his clients could continue removing all branding and signage belonging to the applicant. He argues that thus there can be no possibility of the respondents infringing on the applicant's trade marks at this stage.

17] The argument is a cogent one. The applicant originally sought relief in the alternative. On the one hand it sought relief which would have seen the store run in tact of its branding and signage and on the other it sought relief, in the alternative, preventing the respondents from using the branding and signage. It was only upon the election of one of the alternatives (or if persisted with upon judgment) that the respondent would know where it stood. Thus the position that the respondent found itself in was actually of the applicant's making – had it communicated its election sooner, perhaps this situation could have been avoided.

18] It is clear from the respondents conduct that they had not intended to infringe on the applicant's trade mark and I thus find that on the issue of the trade mark infringement the application is premature and the applicant has failed to make out a case, at this stage, for the relief sought.

THE RESTRAINT OF TRADE

19] The argument on the issue of the restraint of trade is more complex and holistic and hinges on the issue of the goodwill that ensures to the PERFECT 10 brand and the Woodlands and Menlyn stores as a result.

20] Whilst one may think that the PERFECT 10 brand is simply about the logos and branding, Ms Kilmartin has submitted that it goes beyond that. She submits that we are also dealing with products and services which are provided and sold in the PERFECT 10 stores. She submitted that the customers are attracted to the Woodlands and Menlyn stores because of the branding and once inside they are exposed to the products and services. She submitted that even were the PERFECT 10 branding and logos to be removed, the customers would still remember where the PERFECT 10 stores were and they may even remember the therapist who provided their treatment and seek them out there again. Thus, it is about the goodwill of the location which is provided by the PERFECT 10 brand.

21] The respondents allege that they have no intention of infringing or confusing or deceiving customers which is exactly why they have undertaken to remove all branding, logos, promotional material and other identifiable marks of the applicant and return it to the applicant.

22] The applicant however, alleges that this will not go far enough to protect its goodwill, It alleges that the restraint clause must be applied as:

22.1 the applicant has established a substantial reputation and goodwill in the unique trading style of the franchised businesses;

22.2 the respondents have had access to and been privy to the applicant's business systems;

22.3 the respondents have acquired knowledge regarding the specific needs and requirements of the customer;

22.4 the respondents have had access to the applicant's trade secrets and confidential information regarding its products, services and suppliers.

23] The particular restraint clause provides for a restraint for a period of 1 year upon termination of the agreement anywhere in the territory which is described as follows:

23.1 in the Woodlands agreement it *"...means the area of Woodlands Boulevard, Woodhills, Pretoria plus a 5km radius and the first refusal for: Menlyn Shopping CENTRE, Brooklyn Mall and Irene Mall."*

23.2 in the Menlyn agreement it *"...means the areas of Menlyn Park Shopping Centre, cnr Atterbury Road and Lois Ave and a radius of 5 kilometres of this shopping centre or as indicated on the attached map, If applicable."*

24] There was no argument that the restraint was not reasonable and correctly so. The attack was as against the suretyship signed by the third respondent. The argument for the applicant was that clause 3 of the suretyship bound the third respondent to the provisions of the restraint. This clause reads as follows:

"3. The SURETIES hereby acknowledge and agree that any undertaking given by or obligation placed upon the FRANCHISEE in the franchise agreement to be entered into simultaneously with the signing of this deed of suretyship shall be equally binding upon and enforceable against each SURETY."

25] Mr Arnoldi argues that, whatever the provision, the suretyship is void as it was not entered into *"simultaneously"* with the franchise agreement – it was signed prior to the franchise agreement and it is thus unenforceable. I would agree with this. The main Woodlands franchise agreement was signed by the second and third respondents on 18 May 2006 and by the applicant's representative of 19

May 2006. The suretyship however was signed on 1 May 2006. In any event were one to read the provisions of the suretyship carefully[3], it is quite clear that the intention of the document is to provide for the ongoing indemnification by the second and third respondents of the first respondents monetary obligations towards the franchisor in respect of the franchise agreement. In my view to read the provisions of the suretyship in isolation of each other is not an argument which holds water. I am also of the view that had it been the intention of the agreement to hold the second and third respondents to the restraint, the franchise agreement itself should have made better provision for it – it did not. Whatever the situation, it is my view that the third respondent is not bound to the provisions of the restraint clauses in either the Woodlands agreement or the Menlyn agreement.

26] The question now is: what of the first respondent? It is trite that it is lawful for a business franchisor with a protectable interest to provide for a restraint of trade in a franchise agreement that the franchisee will not engage in a similar business within a specified area for a certain period of time.

27] The legal principles relating to the enforcement of the restraint of trade agreements are well established and can be summarised as follows:

27.1 restraint of trade agreements are enforceable where an applicant's protectable interests are infringed by an unlawful act, unless they are

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33 Whether regarding Menlyn or Woodlands

contrary to public policy. The onus to prove the latter lies with the party who asserts that the agreement offends against public policy[4];

27.2 in order to determine the reasonableness of a restraint of trade agreement the court must consider the following:

(i) does the applicant have an interest that deserves protection after termination of the agreement?

(ii) if so, is that interest threatened by the respondent?

(iii) does the applicant's interest weigh qualitatively and quantitatively against the interests of the respondent to be economically active and productive?

(iv) are there other aspects of public policy, having nothing to do with the relationship between the parties, that require the restraint to be enforced?[5]

(v) does the restraint of trade agreement go further than what is reasonably required to protect the interests of the applicant?[6]

27.3 Restraint of trade agreements may be declared to be partially enforceable or unenforceable.[7]

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4 Magna Alloys and Research (Pty) Lyd v Ellis 1984 (4) SA 784 (A)

5 Basson v Chilwans and others 1993(3) SA 792 (A)

6 Reddy v Siemans Telecommunications (Pty)Ltd 2007 (2) SA 486 (SCA)

7 Aranda Textile Milla (Pty)Ltd v Hurn [2000] s All SA 183 (E)

28] There can be absolutely no doubt that the present restraint as it stands is reasonable both in time frame and geographical extent and so the question is: what is the protectable interest? According to Ms Kilmartin it is the applicant's goodwill built up over the years in respect of the PERFECT 10 brand.

29] The franchise agreement itself actually defines the goodwill and states the following:

"2.7 The GOODWILL: means the goodwill arising out of the use of the BUSINESS SYSTEM and the INTELLECTUAL PROPERTY by the FRANCHISOR and/or its franchisees, including the FRANCHISEE"

30] The "business system" is defined as *"the system operating the nail studio and beauty salon business, designed, compiled and finalised by the FRANCHISOR an essentially reflected in the OPERATIONS MANUAL and includes any improvements or variations made thereto by the FANSHISOR from time to time."*

31] The "intellectual property" is defined as *" including, without limitation:*

2.8.1 The KNOW-HOW;

2.8.2 The COPYRIGHT;

2.8.3 The GOODWILL;

2.8.4 The TRADE DRESS;

2.8.5 The TRADE MARKS; and

2.8.6 The TRADE SECRETS..."

32] The "KNOW HOW" is defined as *"includes without limitation, all confidential, technical, and commercial information relating to the operation of the FRANCHISE SYSTEM and BUSINESS SYSTEM existing from time to time, including, without limitation, information contained in the OPERATIONS MANUAL or other documents, together with unrecorded information known to the FRANCHISOR and to individuals who are office bearers, employees, partners, directors, members or shareholders of the FRANCHISOR, as well as information known to franchisees of the FRANCHISE SYSTEM."*

33] Given the aforementioned it brings to mind the words of Wunsh J[8] :

"The know-how and confidential information which are described in the agreement and the founding affidavit are particularly unimpressive. The information and advice offered and given by the applicant seem to be geared to assist an inexperienced business person to set up a business and to manage and market it. There is no list of any special techniques or methods of printing and copying or of any unique marketing methods"[9]

and

8 Kwik Kopy (SA) (Pty)Ltd v Van Haarlem and Another 1999 (1) SA 472 (W)

9 At pg 486E-F/G

"...none of the information which the applicant undertook to and did convey to the first respondent is worthy of the protection of the law."[10]

34] Applied to this matter it means that the operations manual and operating system was unique to the applicant as was their own specific product, branding and logos and everything that constituted their trade marks. Absent of this, there was nothing unique about their services that they allege are offered by their franchisees ie the specific beauty services such as the nail services, waxes, skin and body treatments etc. In fact, if one recollects the answering affidavit, the marketing of other products than the exclusivity of the SKINDERM range was one of the main reasons that this relationship came to an abrupt end.

35] Once the applicant has taken back both the Salon Iris and HeadStart operating systems, removed the SKINDERM products and stripped the respondents of all identifying features of the PERFECT 10 branding, the question is what is left?

36] And the question is whether or not the applicant must be protected against competing business from the respondents? In this specific matter it is not in dispute that the respondents, in addition to selling the applicant's products, also sold a range of other products. The applicant however, placed no information before me pertaining to the sales figures of its own products as opposed to products belonging to other brands marketed and sold by the respondents.

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10 At p487H-J

Similarly, no information was placed before me that the treatments offered by the PERFECT 10 franchises are unique in any way or that any specific trade secrets pertain to those treatments. Had the applicant done so, it may have been clearer what the protectable interest was that the restraint sought to cover. Had the respondents exclusively sold, marketed and used the applicant's products, this may also have cast a different light on the matter sufficient to warrant a different outcome.

37] It must be said that a restraint will not be enforced when it merely serves to prevent competition[11] and on the facts placed before me I cannot find that there is a sufficient protectable interest to warrant the restraint being enforced. I am thus of the view that in both the Woodlands and the Menlyn matters, the applicant has failed to make out a case to warrant an interim order.

38] Thus the order that I make is the following:

38.1 In case number 67970/2016 the application is dismissed with costs which costs are to include the costs consequent upon the employment of senior counsel.

38.2 In case number 67971/2016 the application is dismissed with costs which costs are to include the costs consequent upon the employment of senior counsel.

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11 Pam Golding Franchise Services (Pty)Ltd v Douglas 1996 (4) SA 1217 (D)

B NEUKIRCHER AJ

28 September 2016