

**IN THE HIGH COURT OF SOUTH AFRICA (TRANSVAAL
PROVINCIAL DIVISION)**

CASE NO. 18637/2007

In the matter between

Applicant

ALRETTE RENTAL CC and

SEVEN BRIDGES TRADING (PTY) LTD t/a ABBA CAR RENTAL

SEAN LANTZ

First respondent

**AFFORDABLE CAR HIRE CC t/a ABBA CAR RENTAL
NORTH RAND**

Second respondent

CORAM: EBERSOHN AJ DATE

Third Respondent

HEARD: 23rd APRIL 2008

JUDGMENT HANDED DOWN ON: 24th OCTOBER 2008

JUDGMENT

EBERSOHN AJ.

[1] In this matter the applicant applied for a final interdict to enforce an alleged restraint of trade provision against the respondents. The application is also based on unlawful competition in terms of the common law.

[2] The applicant, according to the papers, entered into an agreement (annexure "A" to the papers record (pp. 26-49)) with a close corporation called Trade First 2002 CC in terms of which applicant purchased the business of the seller which conducted business as Abba Car & Combi Hire in Boksburg, Gauteng. and included the business name "Abba Car & Combi Hire East Rand and/or any other business " on the effective date, namely the 3^d January 2006.

[3] The sale of the business was further subject to the applicant entering into a franchise agreement with a third company namely Seven Bridges Trading (Pty) Ltd. the third respondent. This the applicant alleged he did which agreement was for a 2 year period from the 31st October 2006.

[4] A termination agreement "Ontbindings ooreenkoms" was entered into between the applicant and the first respondent on the 31st October 2006. This agreement cancelled the franchise agreement between the applicant and the first respondent.

[5] Reference must be made to several clauses of the "Ontbindings ooreenkoms" which are quoted in extenso:

- "2. Die konsessiehouer betaal 'n bedrag van R125 000.00 (BTW ingesluit) op die effektiewe datum op voorwaarde dat die konsessiehouer BTW fakture ontvang vir alle bedrae betaalbaar aan die konsessiegewer.**
- 3. Die konsessiehouer sal onder sy eie naam besigheid bedryf. Die oorgangsfase vir sodanige veranderinge sal binne 'n periode van 6 maande geskied.**
- 4. Die konsessiegewer sal vir die balans van die termyn van die konsessie ooreenkoms soos wat dit geblyk het onmiddelik voor ondertekening van hierdie ooreenkoms nie 'n Abba Car Rental-tak in die Oos Rand (die gebied soos uiteengesit, in die konsessie-ooreenkoms) bedryf nie alternatiewelik nie 'n soortgelyke besigheid bedryf vir die gemelde termyn nie.**
- 5. Die konsessiehouer sal geregtig wees om die perseel waarop hy tans besigheid bedryf te huur op dieselfde voorwaardes as wat dit tans daaruit sien tot en met**

Desember 2008. waarna 7% eskalasie per jaar in werking sal tree op die huurbedrag en die huurkontrak geldig sal wees vir 'n verdere termyn van 2 jaar.

- 6. Indien die konsessiegewer sou besluit om die eiendom waarop die konsessiehouer huidiglik die besigheid vanaf bedryf, te verkoop, sal hy die konsessiehouer die eerste opsie gee om 'n aanbod op die eiendom te maak."**

[6] It is the applicant's case that clause 4 of the termination agreement also restrains the first respondent from opening competing franchise businesses in the East Rand or to enter into a franchise agreement with other franchisees in respect of that area, or to assist another person or entity to do business in competition with the applicant in the East Rand area.

[7] The first respondent thereafter duly terminated its franchise agreements in other areas.

[8] The first respondent at a time unknown to the applicant entered into a new franchise agreement with the second respondent who is trading as Affordable Car Hire CC t/a Abba Car Rental North Rand, the third respondent herein.

[9] The matter between the applicant and the first respondent was settled out of court and the applicant is proceeding against only the second and third respondents.

[10] The second and third respondents regard it that if they do not oppose the application, that it may at a later stage be said that they consented to the order sought by the applicant and it may mean that the third respondent is no longer able to conduct its business from the address "set out above" (there is, however, no business address set out in the said answering affidavit).

[11] The second and third respondents also attacked the said paragraph 4 as being solely designed to prevent competition and that is doesn't protect any property interest of the applicant and also that the whole "Ontbindings ooreenkoms" was invalid according to the common law and that it is also invalid when regard is had to the provisions of sections 4 and 5 of the Competition Act, No. 89 of 1998.

[12] Restraint of trade agreements are not invalid and contra bonis mores per se. A party may rely upon it.

[13] A party wishing to enforce a restraint of trade agreement need only allege and prove the agreement and its breach by the other party (See **Nel v. Drilec (Pty) Ltd.** 1976 (3) SA 79 (D) and **Hunt h/a Realtv 1 Elk Estates v. Dermann** [1997] 4 All SA 665(T)).

[14] A party wishing to be absolved from a restraint of trade agreement has to allege and prove that the enforcement of the restrictive condition would be contrary to public policy (see **Magna Alloys Research (SA)(Pty) Ltd. v Ellis** 1984 (4)SA 874(A)) at 893.)

[15] The applicant presented evidence that by entering into a franchise agreement with the first and second respondents, and by assisting them in the car rental business in the East Rand resulting in a car rental business being operated by them within the same geographical area as the applicant, the first respondent was in breach of the terms of the Ontbindings ooreenkoms.

[16] It is the case of the applicant that the second and third respondents were joined in the application in view of the breach of the agreement by the first respondent and the first respondent assisting the second and third respondents to breach the agreement.

[17] Second and third respondents opposed the relief sought originally on the following basis as set out in paragraph 6 of their answering affidavit:

"6. I have read the affidavit made on behalf of the applicant and having regard to what is stated on behalf of the applicant, it appears to me that if I do not oppose the application, that it may at a later stage be said that I and the third respondent consent to the order granted and it may on a certain interpretation of the relief which is being sought, mean that the third respondent is no longer able to conduct its business from the address set out above. I point out that the cancellation agreement concluded between the first respondent and the third

respondent was concluded before the application was issued and before I was aware of the fact that an application was contemplated against the first respondent."

[18] In the replying affidavit applicant stated clearly that second and third respondents have acted as joint wrongdoers with first respondent in respect of first respondent's breach of the agreement which was entered into between applicant and the first respondent. However, the relief in the notice of motion was sought against the first respondent only, with a conditional prayer for costs against the second respondent in the event of the second respondent opposing the application.

[19] Sections 4 and 5 of the Competition Act are also clearly not applicable.

[20] Mr. du Plessis, who appeared with Me Alheit for the applicant, moved for an order in terms of prayers 1 and 2 against the first respondent with no order as to costs against the first respondent and only for an order for costs against the second and third respondents. This was opposed by Me Veldsman who appeared for the second and third respondents. She argued that costs was not sought against the third respondent in the notice of motion. She was, however, not mindful about the prayer for further and or alternative relief.

[21] In prayer 1, the order is sought as until the 31st April 2009. It is apparently a typing error and should read "30th April 2009,"

[22] There being no merit in the opposition against the application the following order is made:

1. **The first respondent is prohibited, until 30 April 2009, to conduct any business of whatsoever nature relating to car rentals, or to be involved, directly or indirectly, in such business, or to assist any other person to be involved in any such business, directly or indirectly, in any way whatsoever, in the municipal areas of Boksburg, Benoni, Brakpan, Kempton Park and Springs, as well as in the business area surrounding the O.R. Tambo Airport.**
2. **The first respondent is prohibited from entering into, or proceeding with any franchise agreement with any franchisee, including second respondent, or any entity wherein second respondent may have an interest, in respect of the area referred to in paragraph 1 or this order.**
3. **The second respondent and third respondents are to pay the costs of the application, jointly and severally, the one paying the other to be absolved, which costs shall include the costs of one counsel only.**


P Z EBERSOHN
ACTING JUDGE OF THE HIGH COURT

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