IN THE HIGH COURT OF SOUTH AFRICA

(SOUTH GAUTENG HIGH COURT, JOHANNESBURG)

CASE NO: 20650/11

DATE: 2011-08-12

NOT REPORTABLE

In the matter between

BURGANDY ROSE TRADING 53 (PTY) LTD **APPLICANT**

and

SHARNE BRESSLER **FIRST RESPONDENT**

QUINNETTE BRITS **SECOND RESPONDENT**

Restraint of trade – franchise agreement - application for enforcement of restraint –– contractual provisions for the restraint to come into operation not complied with – application dismissed but ancillary relief granted

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JUDGMENT

VAN OOSTEN,J: This is an application by the applicant to enforce a restraint of trade provision which is embodied in a franchise agreement (the agreement). The applicant is

the South African franchisee of Semas Abacus and Mental Arithmetic Academy Pvt Ltd, registered in India, (Semas International) holding the sole and exclusive rights to teach, distribute and deal with an educational system and product known as the Japanese Soroban and Mental Arithmetic System in South Africa. The system and product essentially comprise the teaching of mathematical skills to scholars by making use of an abacus instrument. The applicant, in turn as a franchisor of the product in South Africa, sells the rights and licence to utilise and conduct Semas courses for the duration of a specified time to franchisees, of which there are at present 16 in different locations throughout South Africa.

On 4 August 2009, the applicant and the respondent concluded the agreement in terms of which the respondents obtained a Semas franchise for the Westrand area, which included Roodepoort and Krugersdorp, until 30 June 2011. The respondents received extensive training in the Semas educational system, its business model, concept and training courses, and they succeeded in establishing a successful business enterprise.

During January 2011, disputes occurred between the applicant and the respondents. The agreement eventually came to an end in circumstances I will presently refer to, but the respondents continued with their business, in particular, teaching mathematics to established clients. The applicant alleges that the respondents conduct is in breach of a restraint of trade clause contained in the agreement, which prompted it to launch the present application. The relief sought by the applicant against the respondents, is the following:

‘1. That the respondents be interdicted and restrained for a period of five years, calculated from 12 May 2011:

1. from dealing in and or operating the SEMAS courses and/or any similar type of courses and/or concepts dealing in Abacus educational materials, including material issued by the respondents for conducting the courses and/or any resemblance thereof;
2. From operating any form of business venture wherein they describe themselves as a franchisee of the applicant in any manner whatsoever.

2. That the respondents be ordered to forthwith make payment to the applicant of the amount of R49 907.00 being the money outstanding due and payable to the applicant as from 12 May 2011;
3. That the respondents be ordered to forthwith return to the applicant all SEMAS materials which were provided to the respondents for conducting and/or managing the SEMAS courses;
4. That the respondents be ordered to pay the costs of the application on a scale as between attorney and client.'

A number of defences have been raised against the main relief sought. One thereof is that the respondents' continued teaching of mathematics, after the termination of the agreement, is no longer based on the Semas model and that they are no longer utilising any Semas products. Although there are indications to the contrary, as can be gleaned from certain emails and letters by the respondents addressed to principals of schools where they are teaching, and others, I, in the view I take of this matter, do not consider it necessarily to decide this issue. A more fundamental issue which in my view is the decisive of this matter, concerns the question whether the applicant, in any event, having regard to the terms of the agreement, is entitled to enforce the restraint of trade clause against the respondents. I turn now to a determination of that question.

At the outset it is necessary to quote the restraint of trade clause in its entirety. It reads as follows:

'**TERMINATION**

9.1 In the event of occurrence of any of the events of default stated in Clause 5 hereof, the Company (the applicant) shall have the right to terminate this Agreement any time by giving notice in writing to the Franchisee (the respondents) and upon proper consultation between the parties regarding the default. The Company shall give the Franchisee thirty (30) days to comply with he terms of the discussion conducted between the parties. In the case of such negotiation not being fruitful the parties shall nominate a mediator to mediate a settlement between the parties. In the unlikely event of such negotiation not being successful the Company may request from the Franchisee to:

....

(e) cease to operate the SEMAS courses and any similar type of courses and concepts dealing in abacus educational materials, including material issued by Franchisee for conducting the Courses and or any resemblance thereof for a period for a period of Five (5) years after the termination of this Agreement or any extension of the Agreement.'

The applicant relies on a cancellation of the agreement by way of a letter dated 15 may 2011 by the applicant's attorneys addressed to only the first. The relevant portion of the letter reads as follows:

"2. Kindly be advised that Burgandy Rose Trading 53 (Pty) Ltd (hereinafter "Semas") with immediate effect terminates the contract as entered into between the parties on 1 July 2009 and signed on 4 August 2009 and on the basis of material breach.

3. It is indeed so that the contract provides for notice and in effect for a period granted to rectify your breach, however in the circumstances the breach is of such material consequence that our

client has no option but to protect its interests with immediate effect and such limits to damages intended to be caused by yourself.

4. In particular, be advised that our client is taking over all teaching and attendance functions as from 1 May 2011 and that you are prohibited from that point onwards to have any dealings further with SEMAS West Rand.

5. The ground for cancellation is twofold and as follows:

> 5.1 in terms of the contract between the parties you were obliged to advise SEMAS in writing six months prior to the end date of your intention to renew, which has not been forthcoming.
>
> 5.2 Despite the above, SEMAS does have the right to not engage in a new contract on the basis of, in essence, material breach.
>
> 5.3 At this stage it is not our client's intention to deal with this aspect exhaustively, but suffice to place on record that this can be dealt with in the correct forum should the need arise.
>
> 5.4 Our client did leave the door open and has invited yourself to deal with any aspects, but it has become clear that this never was your plan and in the long term, as it is aptly illustrated below.'

and, further, in the same letter

'10. The writer is not going to set out your sum total of your breaches nor instances of blatant disregard to the terms of the contract, but incorporate herein paragraph 3 and 5 of the agreement as between the parties and as such deem same to be read into this correspondence.

11. The writer further places on record that you are restrained in terms of the agreement between our client and yourself and have each and every intention to enforce same should it become necessary.'

In response to the letter the respondent's attorneys, on 24 May 2011, advised that the applicant's cancellation of the agreement constituted a repudiation thereof which was accepted resulting in the agreement being cancelled.

The applicant's cancellation of the agreement, in my view, was unlawful and therefore constituted a repudiation of the agreement. Clause 9 of the agreement, as quoted above, provides for the steps to be taken by the applicant once a right to terminate the agreement arises. The wording of the clause is peremptory: the word "shall" imposes an obligation on the applicant to indeed take the steps provided for prior to the coming into effect of *inter alia* sub clause (e) which provides for the restraint of trade now relied upon. It is common cause between the parties that none of these steps were implemented by the applicant. On the contrary, and as is indicated in no uncertain terms in the letter of cancellation, it was with immediate effect.

Counsel for the applicant submitted that the applicant, in view of the respondents' material breach on which reliance was placed, was entitled to simply disregard the preliminary steps provided for in clause 9. The argument is fallacious. The clause does not provide for a discretionary implementation of the preliminary steps. The applicant, accordingly, was bound in terms of the agreement, to comply with the provisions in clause 9 prior to the restraint provisions coming into effect. That the applicant has failed to do and it follows that the main application for this reason alone, must fail.

The applicant's claim for return of Semas materials, contained in prayer 3, can swiftly be disposed of. Counsel for the applicant very properly conceded that the respondents' denial having purchased Semas materials, stands uncontroverted, and he, for that reason, did not persist in the relief sought.

This brings me to the payment claimed of the sum of R49 907.00. The respondents do not dispute that they in fact are in arrears with the payment of certain amounts due in terms of the agreement. They admit their indebtedness in the sum of R41 725.00. Counsel for the applicant, for the purpose of this application, accepted the correctness of the lesser amount. I will revert to this aspect later.

This brings me to the respondents' counter application. The agreement, it is alleged, was void *ab initio.* In support thereof reference was made to the license agreement, in terms of which the applicant was appointed by Semas International as the franchisee for South Africa. Upon closer scrutiny of the document it is apparent that it was issued on and therefore valid from, 23 October 2010. The agreement we are now concerned with, having been concluded on 4 August 2009 and thus prior to this date, so the argument went, was therefore void as the applicant, at the date of the conclusion thereof, was not the appointed franchisee and therefore could not transfer any rights to the respondents. Based on these assumptions, the respondents instituted a counter application in which they seek a refund of all monies paid to the applicant pursuant to and in terms of the agreement, amounting to R354 970.82.

The applicant has specifically addressed this issue in the replying affidavit. Annexed to it is a copy of an earlier license certificate issued by Semas International to the applicant, dated 29 June 2009, and valid until 22 September 2010. This of course cures the apparent defect relied upon by the respondents in order to attack the validity of the agreement. But, counsel for the respondents was not prepared to accept the authenticity of the earlier license certificate. Nothing of substance however, was raised in support of the perceived scepticism. Counsel therefore sought an order for the

referral to trial of the counter application, which would have the added benefit of determining the amount of the respondents' indebtedness, which I have already dealt with. Such referral, so the argument went, would enable the respondents to fully investigate this aspect and then, depending on the possible outcome thereof, to decide whether to proceed with the trial. Counsel however was unable to offer any explanation why nothing had been done regarding this aspect since the date of the filing of the replying affidavit on 13 July 2001. I am accordingly not prepared to accede to the request for a referral to trial.

An order for the payment by the respondents of the admitted amount will be appropriate. As for the balance of the claim the applicant remains at liberty to institute proceedings for the recovery thereof. As to costs, the respondents are substantially successful in the main application. The costs relating to the main application are accordingly to be paid by the applicant.

In the result I make the following order:

1. Prayers 1 and 3 of the notice of motion are dismissed.
2. The respondents are ordered to pay to the applicant the sum of R41 725.00 together with interest thereon at the rate of 15,5% per annum, from 12 May 2011 to date of final payment.
3. The applicant is ordered to pay the costs of the main application.
4. No order is made on the counter application.

Counsel for the applicant *Adv G Beytel*

Counsel for the Respondents *Adv S Guldenpfennig*