IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED.

CASE NO.: 56882/2018

11/10/2019

In the matter between:

THE LASER BEAUTIQUE FRANCHISOR CC	**Applicant**
and	
AMOR ET SPES (PTY) LTD *t/a* THE NORTHCLIFF LASER BEAUTIQUE (REGISTRATION N0:2013/089926/07)	**First Respondent**
KERRY LEA PETERKIN (IDENTITY NO: [….])	**Second Respondent**
THE NORTHCLIFF LASER BEAUTIQUE	**Third Respondent**
AMRICHPROP 19 PROPERTIES (PTY) LTD (REGISTRATION NO: 2003/019264/07)	**Fourth Respondent**
BEST LASERS (PTY) LTD	**Fifth Respondent**

JUDGMENT

VAN DER WESTHUIZEN, J

[1] The applicant is a franchisor, a seller and distributor of beauty treatment equipment, known as "Apilus", which it sells to franchisees and non-franchisees. The applicant also provides training in the use of the Apilus-apparatus, to franchisees and non-franchisees in respect of the training that it receives from the manufacturer of that apparatus.

[2] On or about 9 July 2013, the applicant and the first respondent concluded a franchisee agreement in respect of beauty treatment to be conducted by the first respondent. In that regard, the agreement included certain restraint of trade type clauses, and more specifically clause 32 thereof records that the applicant's business system and/or intellectual property or any part thereof, cannot be used at any other location for any purpose. A restraint of trade in respect of the conducting or association with a similar business during the term of the franchise agreement as well as a period of twenty-four months after termination of the said agreement and within a radius of fifteen kilometres of the location of the said franchisee business.

[3] The applicant alleges that the first and second respondents are in breach of the said agreement and thus, it is entitled to interdictory relief in that respect.

[4] The first and second respondents oppose the relief being granted. The second respondent is the alleged owner of the first respondent. The third respondent is alleged to be the same business as that of the first and second respondents continuing with the franchise business. The third respondent similarly opposes the relief sought.

[5] The franchise agreement expired on 8 July 2018 and the first respondent did not seek to extend it for a further period.

[6] This application is directed at enforcing the restraint of trade clause contained in the franchise agreement. It is required of a party, when enforcing a restraint of trade, to disclose such facts necessary to show that it has a protectable interest worthy of protection.[1]

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[1] *Basson v Chi/wan* 1993(3) SA 742 (A)

[7] In this regard, the applicant alleges the following in its written heads of argument:

> *"There is in fact a protectable interest of the Applicant, which is sought to be protected by the covenance of the restraint of trade in question. The restraint of trade seeks to protect the Applicant's goodwill, its business system which has been comprehensively and meticulously designed, planned and strategically developed, the Applicant's confidential information, its intellectual property, its know-how, and its trade secrets."*

[8] In the founding affidavit, the deponent merely provides definitions of the categories listed in the passage quoted above. There is a clear lacking in particularities of each category, other than a generalised definition. In my view, the applicant has clearly not proven what precise interest is worthy of protection.[2] It follows that the applicant fails on that issue. The applicant has not proven the first requirement set out in *Basson v Chilwan, supra.*

[9] Furthermore, the training that the applicant provides to franchisees is the same training that it provides to non-franchisees, in particular with reference to the machines it on-sells to non-franchisees. In any event, the training on such machines was originally obtained from the manufacturer and can hardly constitute a protectable interest worthy of protection. The applicant further alleges that through its trade connections, it sources products at special prices and then provides it to its franchisees. The fact of the matter is that the applicant acknowledges that it also provides those products to non-franchisees.

[10] The applicant further alleges that it is the owner of all the equipment supplied to the first respondent to enable it to conduct the franchise. In this respect the applicant alleges that it supplied an Apilus Senior 3G machine with serial number 1D807-3440 and a Soprano ICE machine with serial number S121CE0089 to the first respondent. In correspondence through

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[2] *Kwik Kopy (SA) (Pty) Ltd v Van Haar/em et al* 1999(1) SA 472 (W)

its attorneys, the applicant invoked its option to take over the said machines.

[11] The ownership of the said two machines does not rest with the applicant. The Soprano machine clearly belongs to the . third respondent. It purchased it as early as August 2015, prior to the launch of these proceedings. The Apilus machine is the property of the intervening party, an allegation not denied by the applicant.

[12] It is clear that the applicant is not candid in its founding affidavit, and that the applicant glibly flits over issues without providing the full and correct detail required. In this regard, the applicant creates the impression in its founding affidavit that it is unaware of the true position of the third respondent. However, in correspondence exchanged with its legal representatives, they were acutely aware of the status of the third respondent and how it fits within the scenario of the franchise agreement. It sought not to provide the full detail.

[13] The third respondent is an entirely independent and separate legal entity. The applicant was acutely aware of that fact, yet it has the audacity to state in its founding affidavit *"The Third Respondent is THE NORTHCLIFF LASER BEAUT/QUE, seemingly a business operated by the Second Respondent, whose further and/or full particulars are to myself unknown."*

[14] During 2014, and about August 2014, an email was sent from one Ms Cosani to the deponent of the founding affidavit. The content of that email reads:

> *"Hi Neil*
>
> *We need to sign* a *revised franchise agreement in the name of the new company.*
>
> *Attached is the registration certificate. When you have* a *chance, please can you send the amended franchise agreement for us to sign.*

Thanks!

Kind Regards."

[15] Ms Cosani was introduced by the deponent to the founding affidavit to the second respondent at the deponent's residential address. The purpose for the introduction was due to the fact that one of the directors of the first respondent had resigned and the first respondent found itself in financial distress. The aim was to foster a working relationship between the second respondent and Ms Cosani in respect of the first relationship. Ultimately, an arrangement was arrived at where the third respondent would take over the franchise agreement. That much was well-known to the applicant. At least at the stage when the aforesaid email was directed at the applicant.

[16] The respondent attached proof of the shareholders agreement and the incorporation of the third respondent. The incorporation of the third respondent was in fact provided to the applicant under the aforesaid email.

[17] The applicant was acutely aware of the existence of the third respondent, its legal status and the purpose of its incorporation. It was clear to all that the third respondent would conduct the business of the franchise. The applicant's purported unawareness of the true position of the franchise business is questionable to say the least.

[18] Ms Cosani sent a further email to the applicant on 8 September 2014, wherein the amended or new franchise agreement was requested. It knew full well that it was to enter into a new or amended franchise agreement with the third respondent. This much is clear from the instructions it gave to its legal representatives. On 8 September 2014, the deponent to the founding affidavit addressed an email to its legal representative requesting advice. The true position was explained that a new entity would conduct the franchise business. It thus required a redrafting or amendment of the

franchise agreement. The deponent to the founding affidavit responded to Ms Cosani on the same date, advising her that the requested documents were to be drafted.

[19] The applicant was acutely aware that the initial franchise agreement was no longer to be of effect. The applicant was also acutely aware of the requirement that a franchise agreement had to be in writing. It clearly mentions this in its founding affidavit, albeit on a different issue.

[20] In my view, the applicant was aware that the franchise agreement concluded in 2013 was no longer in effect and that a franchise agreement was to be concluded with the third respondent. No amended franchise agreement was concluded with the third respondent. Thus, the applicant has not proven that it is entitled to restrain any of the first, second and third respondents under restraint of trade. The application for the enforcement of the franchise agreement of 2013 cannot succeed.

[21] There remains the issue of equipment, products and operating manuals and the like. The applicant has no right to any of the equipment for the reasons advanced earlier. The return of manuals and the like were tendered as far back as 10 July 2018. In that tender it was clearly stated that no future use would be made of any of the applicant's manuals etc. An undertaking was also provided to remove any signage that could refer to the applicant. In fact, it was well-known to the applicant prior to the launce of this application that the signage had already been removed and that a new trade name was being used.

[22] It follows that the applicant is not entitled to any of the relief sought in the Notice of Motion.

I grant the following order:

(a) The application is dismissed;

(b) The applicant is to pay the costs on a scale as between attorney and client.

C J VAN DER WESTHUIZEN
JUDGE OF THE HIGH COURT

On behalf of Applicant:	**J de Beer**
Instructed by:	**Smit Van Wyk Attorneys**
On behalf of Respondent:	**Ms C Marynowski**
Instructed by:	**Chiba Jivan Attorneys**