IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO : 5367/14

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

27 /02/14.
DATE

.....
SIGNATURE

In the matter between:

NAEEM GOOLAM **APPLICANT**

and

GOLDEN FRIED CHICKEN (PTY) LTD **RESPONDENT**

JUDGMENT

MONAMA J

[1] The applicant is a businessman who operates a franchise business of Chicken Licken in Van Der Bijl Park. The respondent is an owner of a well-known trade mark and a brand in South Africa. On or during 16 February 2004 it entered into the written Franchise Agreement ("the Agreement"). The agreement was for a fixed period of ten years.[1]

[2] On 17 February 2014 the applicant launched an urgent application against the respondent for; *inter alia*, the following two-fold relief.

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[1] Answering affidavit: P71 paragraphs 8.1; 8.2.1 – 8.2.9

3.1 Dispensing with the forms and service provided for in the Uniform Rules of Court and directing that the application be heard on an urgent basis in terms of Uniform Rule of Court 6(12);

3.2 That the respondent, and any person or persons acting under their direction or control, in particular Vector Logistics, be interdicted and directed to restore all normal trade in the applicants business operating at the Chicken Liken Shop No 1 DF Malan Street, Van Der Bijl Park forthwith, pending the final determination of the relief sought in Part B of this application;

3.3 Ordering that the respondent (and those acting under their control and direction) be restrained and interdicted in future from causing any further business and normal trade interruptions at the applicants business as defined above, pending the final determination of the relief sought in Part B of his notice of motion; and

3.4 Ordering costs in respect of Part A of the notice of motion to be determined at the hearing of Part B of the notice of motion, unless the respondent oppose the relief sought in Part A.

During the hearing the application was vehemently opposed. The respondent submitted that the application is *mala fide* and deserves to be dismissed in entirety.

[4] After hearing the preliminary arguments on 17 February 2014, I issued the following interim order:

4.1 That the matter is one of urgent;

4.2 That the respondent is directed to restore all normal trade in the applicants business operations at the Chicken Licken, shop No. 1 DF Malan Street, Van Der Bijl Park forthwith and to instruct any person or persons acting under the direction or control in particular Vector Logistics to act as aforesaid, pending further hearing of the matter on Thursday, 20 February 2014 at 14h00 or as soon thereafter as counsel may be heard.

4.3 That the respondent (and those acting under their control and direction) be refrained from causing and further business and normal interruptions at the applicants business as defined above, pending the further hearing of the matter on the aforesaid date.

4.4 That the applicant will continue to comply with its obligations under the Franchise Agreement.

4.5 The respondent be directed to file an answering affidavit on or before 16h00 on Tuesday 18 February 2014.

4.6 That the applicant be directed to file its replying affidavit (if any) on or before 16h00 on Wednesday 19 February 2014
4.7 Costs are reserved for determination.

The purpose of this interim relief was to allow the *status quo* to operate pending the filing of answering and replying affidavits. The court felt it would be unfair to disrupt the business until then.

[5] The essence of this application is to allow the applicant to continue to exploit the brand notwithstanding the provisions of the Agreement relating to the duration.

[6] The following facts are common cause and are not in dispute. The parties entered into a written Agreement in terms whereof the applicant was to operate a Chicken Licken business outlet. The franchised premises were at DF Malan Street, Van Der Bijl Park. The Agreement was to endure until at best 18 February 2014. The applicant was contractually bound to revamp and redecorate the franchised premises five years after the conclusion of the Agreement. The applicant was in default to revamp during 2009 as stipulated in the Agreement. He was threatened with a cancellation and only effected the upliftment two years down the line. Finally, it is accepted that on 17 January 2013 the respondent delivered a letter to the applicant informing him that the agreement would terminate on 16 February 2014.

[7] The real issue for determination is whether there was any oral agreement between the parties to renew the agreement and whether such an agreement was dependent upon the successful undertaking of major renovation to the franchised premises as alleged and disputed by the applicant and respondent respectively. During the submission the applicant abonded any reliance on the renewal *per se* or by reference.

[8] The material terms of the Agreement included the definition of the franchise territory, that the Agreement will not be renewed, that the respondent will not give another person the Agreement within territory of the franchise [which is 100 meters] from shop 1, The Mall, DF Malan Street, Van Der Bijl Park during the existence of this Agreement and the refitting and redecoration of the shop after five years. There are also the provisions which deal with auditing of the business look and the equipments to be fitted.

[9] The requirements of the interim interdict are well-known which the applicant is required to establish requirements of an interim in order to succeed with his application for the relief in Part A of his application. These requirements are, *inter alia*, the existence of a prima facie right, the reasonable apprehension of harm, absence of an alternative remedy and the balance of convenience. Any disputes, will be resolved according to the Plascon – Evans Rule[2].

[10] I now turn to the affidavits. First, the applicant states that there was an oral agreement. The terms of the alleged agreement are set out in paragraphs 5.4.1 to 5.4.4 of the founding affidavit. In short the applicant alleges that in August 2011 he was conducting a major revamp on the franchised store. During the process the respondent agreed to the renewal. The whole application is based on the redecoration of the franchised premised, and the impression gained by the applicant.

[11] The respondent denies ever making any oral agreement to renew. The denial extends to the period when the redecoration and refitting were being carried out. In fact the critical correspondence relied upon by the respondent indicate otherwise[3].

[12] The application is fraught with enormous difficulties. As stated above the applicant somewhat jettisoned its initial position. During the argument, counsel for the applicant submitted that they now rely on the expectation to renew and expectation to enter into a new franchise agreement. Initially he relied on his claim for a prima facie right on Clause 5 read with Clause 7.10.2 of the Agreement. Clause 5 of the Agreement deals with "renewal" while Clause 7.10 provides major refitting and major redecoration. Clause 5 clearly descent any renewal therefore any reliance thereon is redherring and must be rejected.

[13] However, as the applicant sought to rely on Clause 7.10.2 it is necessary to reflect on this clause. The Clause 7.10.2 provide that:

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[2] Plascon – Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623 (AD) at 634 - 635
[3] Annexures NG"3" and "6" on pages 67 and 71 respectively.

> *"If so requiring by written notice from the **Franchisee** serving notice upon the **Franchisee** (in terms of 5.1 (requiring an extension of the term of franchise)*
> *Commission at the **Franchisee's** entire cost and expense refitting and major redecoration of the premises in accordance with plans designs, specifications and schedules od finishes to be furnished by the **Franchisor** (all in accordance with the reasonable requirements of the **Franchisor**, taking into account the **Franchisor's** established policy of adopting a fresh image every 5 (five) years and the necessary implication thereof that all shop fitting and decoration and furnishing costs should be fully depreciated over no more than 5 (five) years to the **Franchisee** and to complete that major refitting and major decoration to the **Franchisor's** absolute satisfactions and schedules of material and standard of workmanship within 3 (three) months of date of delivery of the said plan, designs, specifications ad schedules of finishes to the **Franchisee**. The provisions of 7.2. 7.3, 7.4, 7.5 and 7.8 shall apply mutatis mutandis to this clause 7.10. The Franchisor shall have the right to refuse to renew the franchise (as contemplated in5) and/or to refuse to consent to any transfer of the franchise as contemplated in 19 or 20 or 21 or any change of directors and/or shareholders (or of members in the case of a close corporation) and/ or any change of control of a corporate Franchisee as contemplated in 22 unless and until the Franchisee shall have first duty complied with all the provisions of this clause 7.10."* [Underlining mine]

The reliance on this clause as the revival of Clause 5 is highly misplaced and mischievous. There is non-variation clauses which would have prohibited any oral agreement. Furthermore any further allegation of the oral Agreement stands to fail because the agreement which governed the parties' relationship had a non- variation clause. The applicant's attempts to rely on the above provisions to suggest that the Agreement is renewable are without merit. Finally, the concession by the respondent that contract has expired is properly made.

[14] The respondent has, correctly, in my view, submitted that the applicant bears the onus to proof the basis for its conclusion that there was an expectation to renew. The applicant has failed to provide any shred of evidence to demonstrate the alleged oral agreement. The applicant failed to produce any letters, emails, to support such oral agreement. During the period of the negotiation on revamp the parties exchanged correspondence. None of those correspondences from the applicant's attorney or account alluded to the said agreement. That lead me to state that such a failure is consistent with the version of denial put forward by the respondent.

[15] In the circumstances the applicant has failed to establish the critical requirement necessary for an interim interdict. Therefore, the agreement came to an end properly by effluxion of time.

[16] The applicant alleges that he will suffer irreparable harm. This allegation stands to be rejected because the respondent is only protecting its brand. The respondent is only removing its brand and the applicant can still can still operate without using the brand. In addition the respondent has waived the enforcement of the restraint of trade clause. Accordingly the allegation of irreparable harm is without merit.

[17] The balance of convenience favours the respondent. The respondent alleged that the applicant was problematic franchisee who took time to effect the refurbishment and had no interest in the training offered by the respondent. These allegations have not been disputed and on the Plascon-Evans Rule I accept same.

[18] Finally, the bona fides of the applicant in this application have been put in issue. I agree that the applicant was less frank in his allegations. By way of illustration he created an impression that Vector Logistics (Pty) Ltd was under the control of the respondent whereas it is an independent contractor.

[19] The argument that the parties agreed to enter into an agreement constitute what is called "agreement to agree"[4]. Such arrangement is unenforceable because it involves uncertainty. This brings to the last issue. This is Part B of the notice of Motion. The court cannot order parties to enter into agreement. The parties must have the necessary intention and the court cannot substitute their intention. Therefore the entire application must fail.

Order

[20] The application is dismissed with costs including the costs of 17 February 2014.

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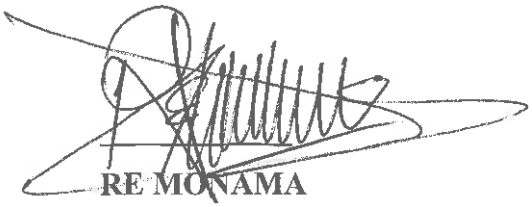
[4] Premier, Free State and Others v Firechem Free State (Pty) Ltd 2000(4) SA 413 SCA at 431 G - J



RE MONAMA

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances

For the applicant:	Adv. X Mazibuko
Instructed by:	Magabane Inc, Johannesburg
For the respondent:	Adv. P Carstensen Adv. A Schluep
Instructed by:	
Date of hearing:	17, 20 and 21 February 2014
Date of judgment	27 February 2014