

iAfrica Transcriptions (Pty) Ltd/LAD

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 08276/14

DATE: 2014-10-01

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO.

(3) REVISED.

01/10/2015

DATE

SIGNATURE

In the matter between

SOFT COFFEE (PTY) LTD

PLAINTIFF

10 And

MOLAI PROPERTY DEVELOPMENT

Defendant

J U D G M E N T

SPILG J:

INTRODUCTION

20 This is an *ex tempore* judgment, if there is a need to clarify or
amend, as long as the content is the same, I will do so. I will refer to the

parties as in the main action or by abbreviated name. Molai Property Development (Pty) Ltd sued Soft Coffee (Pty) Limited and Soft Coffee Holdings (Pty) Limited, for, *inter alia* the following orders:

- 10 a) declaring that Soft Coffee contravened a number of provisions of the Consumer Protection Act 68 of 2008 (CPA) in respect of a franchise agreement concluded in July 2013 by Molai with Soft Coffee for the exclusive right to operate a business under the name Capello, utilising the latter's trademark and knowhow in a shopping centre in Brooklyn, because:
1. it supplied the plaintiff with grossly exaggerated turnover projections in contravention of sections 41(a), (b) and (c) of the Criminal Procedure Act, the disclosure of which was material to the conclusion of the agreement;
- 20 2. it failed to specify the information prescribed under regulation 23(Y) of the Consumer Protection Regulations, as read with section 7(1) (b) and 7(3) of the Criminal Procedure Act;
3. it failed to disclose or state the purchase price for the granting of the franchise businesses required under regulation 2(3) (y) (v); and
4. It failed to provide a disclosure document under regulation 3.

b) declaring that the franchise agreement is void under section 52(4) (a) (i) (bb) of the CPA, and directing Soft Coffee

to repay the purchase price of R3 245 401.00 together with interest as from 24 January 2014, being the date when the franchise business was formally returned by the plaintiff, or was tendered by the plaintiff, to Soft Coffee.

10 The particulars of claim are some 23 pages in length and contain precise details of the alleged breaches of, and noncompliance with, the provisions of the CPA and its regulations. Although the defendants served a notice of intention to defend in good time, they failed to file a plea by due date (which was 23 April 2014).

Although a notice of bar was delivered on 29 April the defendants did not plead within the five days allowed. This prompted the plaintiff to deliver an application for default judgment on 20 May.

20 The defendant then filed a bare denial plea on 27 May. Since they had already been barred from pleading it was necessary to uplift the bar; hence the present application by them which attempts to deal with the issues.

THE ISSUES

The plaintiff took a number of preliminary points. One was that the defendants were precluded from filing replying affidavits since they had set the application down on the unopposed roll; the argument being that this amounted to approbating and reprobating.

I ruled that setting the matter down on the unopposed roll was not an unequivocal act precluding the defendants from contending that the matter was not opposed. The issue of whether a matter is opposed or not is not an election made by a party but is a question of fact.

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The plaintiff challenged both the reasonableness of the default and the *bona fides* of the defence.

EXPLANATION FOR DELAY

The defendants provided an explanation as to the extensive travelling commitments of their director, which resulted in the failure to file the plea in time. Moreover on receipt, the notice of bar was simply filed by a clerk. Accordingly it was not brought to the attention of the attorney dealing with the matter.

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A bare bones plea was subsequently filed in an attempt to remedy the delay. However, the plaintiff refused to accept it and delivered a Rule 30 notice.

The defendants were not seriously out of time, and the failure to

file a plea after receipt of the bar cannot be attributed to the clients as they would have been unaware of it; as was the attorney dealing with the matter.

There was accordingly an explanation for the relatively short delay in filing the plea.

Nonetheless it is somewhat disconcerting that there had been an inordinate delay in bringing the application to court, which cannot be
10 fully explained. It required the plaintiff to secure the set down of this matter so that it can be decided upon.

BONA FIDE DEFENCE

At the outset it is evident that the plea contains bare denials and fails to plead pertinently to the serious allegations made against the defendants; and in particular with regard to the alleged gross misrepresentation of the turnover figures.

At page 17 of the summons the following (with grammatical
20 corrections) is alleged at paragraph 8.4:

"8.4 The First and/or the Second Defendant had, on 03 May 2013, sent an e-mail to Molai. The sales projections which were provided to the plaintiff by the first and second defendants, which is item 4 of the

attached documents to the e-mail of 03 May 2013, did not form part of the information which was required in terms of the disclosure document prescribed in terms of the CPA regulation 31(d).

8.4.1 The projections were false, misleading or deceptive representations and in contravention of Section 41(a) to (c) of the CPA, in that the projected figures for month one were projected to be R510 487.20, and for month two R518 144.51, and in month three R525 916.68 respectively. A copy of the projections for month one to month 24 is attached hereto marked SC1. Yet after the handover date of 12 October 2013 the actual figure for month one from 12 October to the end of October 2013 was R40 270, for month two, November 2013 was R114 323, and for month three, December 2013 was R150 388.40 respectively. Molai, on behalf of the plaintiff brought these projection discrepancies (that is, the actual sales against projected sales), amongst other things, to the attention of Mr Domenico Picone since the end of October 2013. Mr Domenico Picone, who is one of the first defendant's directors, has since the end of October 2013 never responded to the plaintiff at all."

This again is dealt with in the answering affidavit in the present application at page 60, paragraph 4.4.

The only reply is at page 80, paragraph 6. It is headed a reply to paragraphs 4.2 to 4.5.2 and accordingly includes the allegations made in paragraph 4.4 of the answering affidavit. I have already indicated that paragraph 4.4 repeats the substance of the contents of the particulars of claim as set out earlier.

10 “6 AD PARAGRAPHS 4.2 TO 4.5.2

 "6.1 Although numerous allegations are made on behalf of the respondent in these paragraphs regarding noncompliance with certain provisions of the Consumer Protection Act (CPA), it is denied that the applicant actually failed to comply with the provisions in the Act and the regulations thereto, which issue is an issue to be dealt with at trial.

 6.2 However, even if it is accepted for purposes
20 of this application that there was the noncompliances complained of by the respondent, then that in itself does not mean that the franchise agreement is automatically null and void. In this regard I specifically refer to the contention that there was noncompliance with regulations 2 and 3 of the

regulations promulgated under CPA, and it must be pointed out that the Act itself makes provisions for a remedy for such noncompliance in the form of chapter 3 of the CPA, which deals with the enforcement of the rights by a consumer, which involves referral of the matter to a tribunal or the commission. It will be argued that in this regard the particulars of claim are also excipiable in that they do not make out a cause of action.

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6.3 Insofar as the respondent contends that there was a contravention of Section 41(a) to (c) of the Act, such an inquiry is a factual inquiry, and only after the court has investigated and made such a factual inquiry as envisaged in Section 52, then can an order for return of the monies be made. It will be argued that the inquiry in terms of Section 52 is in any event limited to cases of contravention of Section 41, 41 (repeated) and 48 and not in
20 contravention of regulation 2 or 3.

That is the full extent of the engagement with what clearly is an actionable material misrepresentation if not a fraud.

In my view the issue of what constitutes a *bona fide* defence may be informed by the similar tests applied in summary judgment proceedings in order to determine whether leave to defend ought to be granted or in rescission of judgment cases.

The cases regularly cited on the test for a *bona fide* defence are *Maharaj v Barclays National Bank Limited* 76(1) SA 418 (A) and *Breytenbach v Fiat SA Edms Beperk* 76(2) SA 226 (T). The observation by Coleman J in *Breytenbach* infra at 228A-B is apposite despite it being
10 made in the context of *bona fides* in summary judgment proceedings, the defence will fail to overcome summary judgment if:

"The court, with due regard to all the circumstances, receives the impression that the defendant has or may have dishonestly sought to avoid the dangers inherent in the presentation of their further or clearer version of the defence which he claims to have."

In applying the test I am satisfied that Soft Coffee has failed to disclose a *bona fide* defence. It has not engaged the issue of the
20 projected figures at all and it does not even attempt to suggest that it was the manner in which Molai conducted its business that resulted in the turnover figures not materialising. Nor is any documentation produced to indicate that the projected turnover figures that had been provided were based on any substantive historic turnover figures.

All this, in my view is [indistinct]. I also wish to refer to *Standard*

Bank of SA Limited v EL-Naddaf and Another 1999 (4) SA 779 (W) a judgment of Marais J where he referred to previous authority, and adopted a similar position regarding what constitutes a *bona fide* defence.

Finally as regards what does and does not constitute a *bona fide* defence I refer to the judgment of Zulman J in *Diesel Power Plant Hire CC v Master Diggers (Pty) Limited* 1992 (2) SA 295 (WLD) at 298 C-F where the context in which the plaintiff has set out its case must be
10 addressed in a proper way by a defendant, having regard to the substance of the contentions raised.

In this case the substance of the contentions raised is clear. They however were not engaged at all; as is demonstrated from the submission of a bare denial in the plea, and the failure to deal with the contents of the answering affidavit in any relevant way in the replying affidavit.

I therefore do not have to deal with any of the other issues
20 regarding the further failures to comply with the CPA. I simply note that similarly the defendants failed to engage those matters as raised by the plaintiff. All they had to do was to submit or demonstrate that they did comply. No such documentation was provided.

I am therefore satisfied that there has not been a disclosure of a *bona fide* defence as required under law.

ORDER

Accordingly the defendant's application that the notice of bar dated 29 April 2014 be uplifted is refused with costs.

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SPILG, J

DATE OF HEARING: 29 September 2014

DATE OF JUDGMENT: 1 October 2014

LEGAL REPRESENTATIVES:

FOR PLAINTIFF/RESP: Adv MS Sebola
Nchupetsang Attorneys

FOR DEFENDANT/APP: Adv B Gradidge

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Da Dadic Attorneys