REPUBLIC OF SOUTH AFRICA

HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO 07946/2016

(1) REPORTABLE: Yes / No
(2) OF INTEREST TO OTHER JUDGES: Yes / No
(3) REVISED.

....
DATE SIGNATURE

In the matter between

BOLDPROPS 1110 CC (IN LIQUIDATION) **APPLICANT**

And

AUTOMATIC HOLDINGS (PTY) LTD **FIRST RESPONDENT**

BLUE NIGHTINGALE HOLDINGS (PTY) LTD **SECOND RESPONDENT**

J U D G M E N T

MOOSA AJ:

[1] During March 2016 the Applicant (the liquidators) launched an application in which the Applicant sought an order that the Respondent's be directed to render a full account relating to all monies received by them and a debate of that account.

[2] The Respondents opposed the main application and delivered an answering affidavit. In the replying affidavit the Applicant annexed ("**GVV15**") a written franchise agreement.

[3] The Respondents brought an application to strike out Annexure "**GVV15**" to the Applicant's relying affidavit on the following grounds:

[3.1] That the Applicant had alleged that they would file a copy of the franchise agreement in a separate bundle, however this was not done making it difficult for the Respondent to identify and respond to the document the Applicant relied on.

[3.2] That the Applicant "seemingly" relied on the franchise agreement for that allegation that a cession had occurred, which allegation the Respondent denied.

[3.3] The Respondent contends that the cession process was not part of the written franchise agreement and was an out and out cession.

[3.4] The Applicant's attachment of the written franchise agreement in reply was thus an attempt to seek to establish its principle case in reply and to preclude the Respondents from answering thereto, thereby placing the burden on the Respondents to apply for leave to file a further affidavit.

[3.5] That the Applicant is not entitled to "attempt to present new evidence in reply to supplement lacunas in the case presented in the Applicant's founding affidavit".

[4] In response the Applicant contended:

[4.1] That it made specific mention in its founding affidavit that the First Respondent is contractually obliged to account to the Applicant in terms of "the franchise agreement".[1]

[4.2] That in the Respondent's answering affidavit, the Respondent denied that in terms of the franchise agreement, it was not contractually obliged to account to the Applicant in respect of money recovered on the Applicant's behalf in terms of the provisions of the Companies Act, 1973 and the Insolvency Act 1936, accordingly the Respondent's knew exactly the terms of the franchise agreement.

[4.3] That in the Respondent's replying affidavit, it was stated that the franchise agreement contains no reference to such a cession that it was later stated that the franchise agreement is the document sent to the Applicant's attorneys by the Respondent's attorneys and that this is a document produced by the First Respondent.

[4.4] That the Respondents could not have availed itself of the provisions of Rule 35(12) of the Uniform Rules of Court and that the reason that they did not do so was because they had the franchise agreement in the first place.

[1] Para 10.1 of the founding affidavit (page 8)

[5] Having regard to the above and the relevant authorities cited, I am of the view that, the Respondents have not been prejudiced by the non-attachment of the franchise agreement to the Applicant's founding Affidavit as by their own admission they have denied accountability to the Applicant based on the terms of the franchise agreement, moreover what is most telling, is that the Respondents were the authors of the franchise agreement.

[6] The allegation that by annexing the franchise agreement to the answering affidavit, thus causing the Respondent the burden of applying for leave to supplement its Answering affidavit cannot be sustained as the Applicant in its answering affidavit clearly stated that it would have no objection to the Respondents filing a further Affidavit should it be allowed to do so.

[7] The contention that the Respondents in their replying affidavit attempted to supplement its founding affidavit is accordingly not sustainable as the Respondent was merely replying on a defence raised by the Applicant. The existence and nexus of the franchise agreement having been premised already in the Applicant's founding affidavit. [Notwithstanding its failure to file the franchise agreement in a separate bundle.]

[8] The application to strike out is accordingly dismissed with the Respondents to pay the costs of such application.

T.MOOSA
ACTING JUDGE OF THE HIGH COURT

COUNSEL FOR THE APPLICANT	**Adv M.A. Kruger**
COUNSEL FOR THE RESPONDENTS:	**Adv. J. Nel**
DATE OF HEARING:	**1 August 2016**
DATE OF JUDGMENT:	**5 August 2016**