REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: **26236/2017**

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

24/7/17

Date: **WHG VAN DER LINDE**

In the matter between

BUTCHER BLOCK HOLDINGS (PTY) LTD APPLICANT

and

ZURIFLO (PTY) LTD T/A BUTCHER BLOCK PINESLOPES RESPONDENT

JUDGMENT

Van der Linde, J:

Introduction

[1] This is an urgent application for an interim interdict pending an action which has already been instituted. The applicant is the franchisor of the well-known *"Butcher Block"* franchise and the respondent the franchisee of *"Butcher Block Pineslopes."* The terms of the interdict sought are: *"That pending the outcome of the action (as defined in the Applicant's Founding Affidavit) and the counterclaim envisaged by the Respondent in its affidavit resisting summary judgment, the Respondent be interdicted from selling and/or otherwise disposing of the franchised business which franchised business includes the restaurant at Pineslopes and/or any of the assets used by or in the operating/running of the restaurant."*

[2] The prohibition in the franchise agreement against selling the franchise business or any parts of it without the franchisor's written consent is set out in clause 16.1. In the pending action only the summons has yet come into existence. The particulars claim from the respondent and its surety some R1,8m, interest and costs, all of which had already accrued by 14 March 2017.

[3] The respondent resists the interim relief. It explains that the business ran into financial difficulties and was forced to cease trading. The business therefore came to an end and closed its doors on 14 July 2017, before the urgent application was launched. The respondent has since sold the equipment, not the business, to a third party, and has procured the consent of the landlord to substitute the third party as tenant.[1]

[4] In oral submissions the applicant rejects this defence as a ruse, submitting that in fact the business has not come to an end. It has merely closed its doors during the owner's switch-over, says the applicant, but will reopen these and continue trading from those premises as

[1] See generally answering affidavit, paras 7.4, 16.4, 16.5, 23, 26, 34.1, and 37; see also respondent's heads of argument paras 13 – 18.

a restaurant, just as before, but without the get-up of the previous owner, the franchisor. That then is the factual dispute.

The essential opposing submissions

[5] As to the law, Mr Kaplan for the applicant submitted that the de-franchising of the business is contractually precluded; that the closing of the doors for some two weeks does not result without more in the closing of the business; and that if the interim interdict were not granted, the applicant would lose irreparably its right of pre-emption in respect of the business or, for that matter, *"any part thereof,"* as the contract says. *Pacta sunt servanda.*

[6] For the respondent Mr Mundell, SC submitted first that in truth the application was one for a final interdict because the applicant's action is for accrued rights, and the interdict sought is unconnected with protecting those. In other words, the applicant's claim in its summons needs not this interdict for it to be realised down the line when the trial court gives judgment in favour of the applicant for the R1,8m.[2] That being so, the respondent's version of the facts – particularly that of the implosion of the business – stonewalls the applicant's prospects for an interdict.

[7] Second, he submitted that since the business was at an end, if a suitor for its equipment were not permitted to follow through, the several parts of the whole would simply disintegrate anyway: the landlord would obtain default judgment for arrear rentals, evict the respondent, attach the equipment under the landlord's hypothec, and sell these in execution at a fire-sale price. The resultant commercial apocalypse of the business would not serve the interests of anyone. In the present scenario, all the respondent was legitimately doing was to regulate, in its own financial best interests, the business' commercial disintegration and to recover some return on the equipment which was, after all, indisputably its own property.

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[2] See respondent's heads of argument, paras 8 – 11.

Discussion

[8] It is unavoidable, given the respondent's position, to start off by restating the very different approaches an interdict court employs to overcome factual disputes on affidavit. If the application is for a final interdict, for more than a century now our law has authoritatively required the applicant to show a clear right, an injury actually committed or reasonably apprehended, and no alternative remedy.[3] When a final interdict is sought on motion, factual disputes are bound to arise on the affidavits. When that does, an applicant can only succeed if the respondent's version plus those portions of the applicant's version which the respondent cannot really dispute, together justify final interdictory relief.[4]

[9] If the application is for an interim interdict, two further requirements are added: the right need not be clear, provided it is *prima facie* established although open to some doubt; and the balance of convenience must favour the relief claimed.[5] Bridging a factual dispute then arising involves taking the applicant's version plus those portions of the respondent's version which the applicant cannot really dispute, and to ask whether the applicant *should* obtain final relief at the trial on that basis. If so, then the respondent's version is taken, and it is considered whether that version casts serious doubt on the applicant's case. If it does, the applicant fails.

[10] It will be appreciated that on this approach an applicant has a lesser burden when the relief it seeks is merely temporary. That has led some applicants to dress up their application as one for interim relief whereas in substance it is one for final relief. In those instances, the courts strip away the form, look at the substance of what is being claimed, and apply the

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[3] Setlogelo v Setlogelo, 1914 AD 221 at 227.
[4] SFW Ltd v Stellenvale Winery (Pty) Ltd, 1957 (4) SA 234 (C) at 235 E – G; Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd, 1984(3) SA 623 (A) at 634H.
[5] Setlogelo op cit; Gool v Minister of Justice and Another, 1955 (2) SA 682 (C) at 688.

test described above to the substance of the applicant's case.[6] In short, in that scenario they look to see whether the applicant succeeds on the respondent's facts.

[11]What is one dealing with here? The relief sought by the applicant in the pending action is, as pointed out by the respondent, for an indebtedness already accrued some months ago. It is not for the enforcement of the right of first refusal conferred in clause 16. 2 of the franchise agreement. It is not anticipated in the notice of motion that the applicant will amend its case to include appropriate relief aimed at enforcing the first refusal; and perhaps this is not surprising, given the financial collapse to which the respondent has alluded in correspondence preceding the application, and in the answering affidavit itself.

[12]The point about this is that interdicting the sale of the business (on the applicant's version) will not secure for the trial court the relief for which the applicant is currently suing. The entitlement for which the applicant is currently suing arose, on the applicant's case, long before the sale which it seeks now to interdict.

[13]On this basis it could be argued that the interdict sought is then really one that finally determines the rights of the parties relative to whether the franchise agreement between them is still extant. If that is right, then the matter must be approached on the basis of the respondent's version. And on that version, the franchise business no longer exists, so that the restrictive conditions in the franchise agreement, even if the agreement were still enforceable, would find no application.

[14]On reflection it seems to me that this approach takes too narrow a view of what the applicant's case is really about. In truth the relief sought in this application is truly for an interim interdict because what the applicant seeks here, and also in the pending action, is ultimately enforcement of the franchise agreement.[7] The summons with its claim for accrued entitlements came into existence before sale of the business/equipment was on the

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[6] BHT Water Treatment (Pty) Ltd v Leslie & Another, 193 (1) SA 47 (W) at 55 A – F.

[7] See applicant's letter dd 12 July 2017, and respondent's opposition thereto dd 14 July 2017, respectively annexures MS 9 and MS 10, pp 231 – 232, and 233; see also applicant's heads of argument para 11.

horizon, and thus before the applicant found it necessary to claim a final interdict against disposal of the business. There is ample space yet for the applicant to amend its summons to update the accrued money claim, and to add claims relative to the enforcement of the agreement.

[15]On this basis then the question is whether the respondent's version casts serious doubt on the applicant's case as pled in its notice of motion and founding affidavit. And this brings one back to Mr Kaplan's submission that the respondent's defence of a collapsed business is a ruse. Here counsel relied specifically on what was described as a sparse answering affidavit with little detail supplied, particularly of the sale of the equipment on which the respondent relies. Mr Mundell's answer to this was that the respondent had only 24 hours within which to prepare its answering affidavit, and so it cannot be criticised for the lack of detail.

[16]This is an attractive riposte, but only at first blush. The respondent could have explained quite easily precisely what equipment was being sold, and at what price. It could, at least, have told whether the sale agreement was oral or in writing, in which event discovery could have produced the agreement for all to see. It says the negotiations are "on-going"; but why?[8] And in what respect? What aspects are firm? What is the price for those? It follows that I agree that the answering affidavit is too sparsely offered. This has the important consequence that the extinguishment of the business cannot be accepted, at least for purposes of this application, as having been established.

[17]Consider the following. Assume that the business, while it was being run, consisted of a full house of equipment, a lease, various suppliers' contracts, and various employees' contracts. If the franchisee stops trading on a given day, does it then follow that the next morning there is no longer a business? I do not believe that is a realistic view of things. All there is the next morning is a business which is not trading. But its wherewithal is still there, waiting to be started up again.

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[8] Answering affidavit, p250, para 23.

[18]It seems to me then that a *prima facie* right to enforce the franchise agreement, although open to some doubt, has been established. That brings one to the balance of convenience. The franchise agreement proscribes the sale of the business without the franchisor's prior written consent that may not be withheld unreasonably, and it confers on the applicant a first refusal in respect of a sale. If the current sale were permitted to continue and no interim interdict were granted, those two rights would simply be brushed aside as if they never existed.

[19]These are very real and meaningful commercial rights, and if the opportunity for their enforcement were not protected now, they cannot somehow be revived down the line; they are either exercised right now, in the terms set out in the agreement, or not at all – if the sale proceeds.

[20]From the respondent's perspective, it seems to me that it ought to involve not insurmountable effort or protracted time to demand the applicant's reasonable consent to the sale; and also to afford the applicant the opportunity to exercise its first refusal. The balance of convenience weighs, in these circumstances, in favour of the applicant.

Conclusion

[21]In the circumstances I believe the relief sought ought to be granted, and I make an order in the following terms:

(a) It is declared that the matter is urgent, and the applicant's non-compliance with the rules relating to notice and service of process is condoned.

(b) Pending the action instituted by the applicant against the respondent, the respondent is interdicted from disposing of the business which the respondent conducted as Butcher Block Pineslopes, or any part of it, without first complying with the provisions of clause 16.1 and 16.2 of the written franchise agreement between the parties.

(c) The respondent is directed to pay the costs of this application.

WHG van der Linde
Judge, High Court
Johannesburg

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Date argued: Friday, 21 July 2017
Date judgment: Monday, 24 July 2017