REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 1580/2018

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

24/08/18
DATE

SIGNATURE

In the matter of:

CLASSIC NUMBER TRADING 171 (PTY) LIMITED Applicant

and

PICK ń PAY RETAILERS (PTY) LTD Respondent

JUDGMENT

BESTER AJ

[1] The applicant, as plaintiff, instituted an action against the respondent, as defendant, for three alternative claims, all founded in a written franchise agreement previously in existence between the parties. The defendant delivered a notice in terms of rule 23(1), contending that the plaintiff's

particulars of claim are excipiable, either because it is vague and embarrassing or because it lacks averments necessary to sustain a cause of action. In an attempt to deal with these objections, the plaintiff delivered a notice of its intention to amend the particulars of claim in several respects. This notice was objected to. The plaintiff now applies to court for an order allowing it to effect the proposed amendments.

[2] The facts pleaded by the plaintiff, seemingly common to the three permutations of its claim, may briefly be summarised as follows:

a) The plaintiff and the defendant entered into a written franchise agreement in September 2009. In March 2017 one of the shareholders and directors of the plaintiff was complicit in dealing in stolen product and/or obtaining products through illegal means; and he subsequently pleaded guilty to a charge of theft.

b) Pursuant thereto, the defendant obtained a court order in terms of which it took possession of the plaintiff's business that it operated in terms of the franchise agreement. It also cancelled the franchise agreement on 10 November 2017, as it was entitled to do in these circumstances in terms of clause 40.4 of the franchise agreement. In the notice of cancellation, the defendant also gave notice that it exercised

its irrevocable option to purchase the business from the plaintiff, to which clause 40.6 of the franchise agreement entitled it.

c) Clause 40.6 reads as follows:

> "40.6 If the franchisor and/or financier is entitled to cancel or terminate this agreement in terms of clause 40.1 or in terms clause 40.4 and does so cancel or terminate this agreement, the franchisor shall further be entitled, in addition to and without prejudice to such cancellation or termination, to simultaneously exercise the irrevocable option to purchase the business hereby granted by the franchisee to the franchisor on the terms and conditions set out hereunder;
>
> 40.6.1 if the franchisor wishes to exercise such option, it shall do so by giving written notice to that effect to the franchisee contemporaneously with the giving of notice to the franchisee of the cancellation or termination of this agreement, failing which such option shall lapse;
>
> 40.6.2 upon the exercise of such option:-
>
> 40.6.2.1. a sale of the business, by the franchisee to the franchisor, shall come about on the terms and conditions, including the purchase price, agreed to by the parties, and failing such agreement being reached on the date on which such obsolete exercised, as determined by the franchisor's then auditors as being fair and reasonable. In determining what a fair and reasonable and price is for the business, the franchisor's then auditors shall take into the account the factor of goodwill, save insofar as such goodwill is associated with, attaches to, arises from or is derived from the intellectual property. In addition:

40.6.2.1.1 the effective date of the sale of the business shall be the date on which the notice contemplated in clause 40.6.1 is given by the franchisor to the franchisee;

40.6.2.1.2 a stock take shall be conducted by the representatives of the franchisor and the franchisee on effective date of the sale of the business in respect of the products then located in or on the premises;

40.6.2.1.3 the provisions of section 197(1) of the Labour Relations Act, 1995, shall apply to the sale of the business;

40.6.2.1.4 the business shall be delivered by the franchisee to the franchisor on the effective date of the sale of the business; and

40.6.2.1.5 the franchisee's rights and obligations under the lease agreement or sub-lease agreement in terms of which or under which the franchisee possesses the premises shall provided that the franchisee's landlord or sub-landlord, as the case may be, under such lease agreement or sub-lease agreement has consented thereto, *ipso facto* be assigned by the franchisee to the franchisor with effect on and from the effective date of sale of the business."

d) In its letter of cancellation, the defendant stipulated a purchase price of R10 000 000,00, and attached a written set of proposed terms and conditions. It required the plaintiff to accept the terms proposed, or to make a counter-offer by 1 PM on the same day.

e) The fair market value of the plaintiff's business on 10 November 2016 was R16 500 000,00. The defendant's imposition of a deadline of 1 PM

on the same day for a response to the proposed purchase price and terms and conditions of the sale, were unfair, materially unjust, unreasonable and unconscionable. The defendant purported to purchase the plaintiff's business for an undisclosed amount and on the same day sold the business to a Mr Georghiades for an undisclosed amount.

f) The defendant conducted a stocktake on 10 November 2017, in the absence of the plaintiff's representatives. The plaintiff's director did not participate in the stocktake due to the unreasonable time limit of 1 PM.

g) There was no agreement between the parties as to the terms and conditions of the sale and the purchase price. The defendant's auditors did not on that day determine either the purchase price or the terms and conditions of the sale.

h) The defendant, in the absence of an agreement, purported to purchase the plaintiff's business in terms of the clause 40.6 of the franchise agreement, but has not disclosed the purchase price to the plaintiff, and has not made payment of the purchase price to the plaintiff.

i) From the aforesaid the plaintiff then concluded (in paragraph 32) that:

> "Accordingly, the plaintiff's business and its stock was unlawfully acquired by the defendant in the absence of an agreement as to the purchase price;

> the absence of an agreement as to the terms and conditions of the sale; and in the absence of a determination having been made by the defendant's auditors as being fair and reasonable price.

[3] The plaintiff then pleads three claims in the alternative. The demarcations of the claims are not clear from the pleading, and the headings utilised do not necessarily assist. In the body of the particulars of claim, the three alternatives seem to be dealt with under the headings "the plaintiff's damages", "plaintiff's first alternative claim" and "plaintiff's second alternative claim". In the prayers, however, the claims are identified with the following headings: "in respect of the plaintiff's first claim", "in respect of the plaintiff's alternative claim", and "in respect of the first alternative claim". When the reader seeks to match the different sets of allegations with the relief sought, it seems that the second and third alternatives have been swapped around in the prayers. To avoid confusion, I will simply refer to the claims as the main claim, the first alternative and the second alternative respectively.

[4] I should also point out that many allegations are repeated more than once, in the particulars of claim. This does not assist with the readability of the document.

[5] The further allegations, in addition to what has been summarised above, for purposes of the main claim, are the following:

a) The fair and reasonable market value of the business as at 10 November 2017 was R16 500 000,00, and the stock on hand on that day R5 899 634,74. The defendant has not made any payment in respect of the business and the stock to the plaintiff.

b) The plaintiff has accordingly suffered damages in the amount of R22 399 634,00, being the total of the above two amounts (ignoring the cents).

c) The plaintiff's damages arise directly as a result of the defendant's conduct in purporting to purchase the plaintiff's business in the absence of an agreement as to the purchase price in the terms and conditions, and/or purchasing the plaintiff's business in the absence of a determination made by the defendant's auditors as to a fair and reasonable price, and in taking possession of the plaintiff's stock in hand.

d) In the premises the defendant is indebted to the plaintiff in the sum claimed.

[6] The defendant complained, under Rule 23, that there are several defects in this claim. It serves no purpose to consider that notice in detail. The plaintiff, in an attempt to deal with those complaints, seek to substantially amend and expand paragraph 37, and insert new paragraphs 38.1 and 38.2 (with the existing 38 and 39 to become 39.1 and 39.2 respectively).

[7] The proposed amended paragraphs 37 and 38 would read as follows:

"37. The plaintiff's damages arise directly as consequence of the defendant's breach of clause 40.6 of the franchise agreement, with particular reference to clause 40.6.2 thereof in that the defendant, having exercised its irrevocable option to purchase the plaintiff's business, failed to reach agreement with the plaintiff on the terms and conditions of the sale, including the purchase price, alternatively, failing such agreement then on terms and conditions and at a purchase price determined by the defendant's auditors, resulting from:

37.1 the defendant's conduct in purporting to purchase the plaintiff's business in the absence of an agreement as to the purchase price and the terms and conditions and/or;

37.2 purchasing the plaintiff's business in the absence of a determination made by the defendant's auditors as to a fair and reasonable price and;

37.3 the defendant, having taken possession of the plaintiff's stock in hand as at 10 November 2017, which had a value of R5 899 634,74, failed to pay such amounts received from the stock to the plaintiff.

38.

38.1 As a result of the defendant's breach of the agreement of franchise and its failure to pay the plaintiff the purchase price of the business and the stock, the plaintiff has suffered damages to its patrimony in the sum of R16,500,000.00 for its business and R5,899,634.74 for its stock.

38.2 When the agreement of franchise was entered into, it was within the contemplation of the plaintiff and the defendant that in the event of the defendant breaching the franchise agreement, the plaintiff would suffer damages aforesaid."

After which the sub-paragraphs follow.

[8] The defendant objected to this portion of the amendment on two grounds. The first, which was not relied upon by Mr Mundell SC in his heads of argument and was expressly disavowed at the hearing, was that the paragraphs relied on a breach of an agreement to agree, which is impermissible. The concession was properly made.

[9] The second ground, with which Mr Mundell persisted, was that the proposed amendment would render the pleadings excipiable because the proposed allegations are controverted by the contents of the pleaded terms of the franchise agreement itself, and in particular clause 40.6.

[10] The proposed paragraph 37, alleges two ways, in the alternative, in which the defendant breached the provisions of clause 40.6.2. In the first instance, the allegation is sought to be made that the defendant's failure to reach agreement with the plaintiff on the terms and conditions of the sale, including its purchase price, constitutes a breach of that clause. When I pointed out to Mr Cohen, who appeared on behalf of the plaintiff, that it requires both the plaintiff and the defendant to agree to any terms, including the purchase price, he readily conceded the point. However, when I enquired whether he agrees that the allegation made must of necessity imply that the plaintiff is also in breach of clause 40.6.2 for the same reason, he refused to make the

admission, but could not explain why. He merely persisted with the contention that the allegation made constitutes a breach of the clause.

[11] The proposition seems to me inherently untenable. I agree with the defendant's complaint that the statement that the failure to reach agreement constitutes a breach by the defendant, is controverted by the wording of clause, which requires the parties to agree. If they do not agree, the clause provides a mechanism by which to resolve the ensuing impasse.

[12] However, the plaintiff also proposed to plead that, in the alternative to the first alleged manner in which the agreement was breached, the defendant breached clause 40.6.2 in that it failed to reach an agreement with the plaintiff on terms and conditions and at a purchase price determined by the defendant's auditors.

[13] The burden in an application to amend is on the applicant for the amendment to convince the court that objections raised to the amendment should not prevent the amendment. However, where the objection is that the amendment will render the pleading excipiable, it should be considered whether the proposed amended pleading is excipiable on every reasonable interpretation, as Mr Cohen pointed out. He argued the pleading, and specifically with reference to paragraph 37, as proposed, is not excipiable on every reasonable interpretation thereof. However, he could not readily set

out the reasonable interpretation that would pass muster. In my view the proposed claim will remain excipiable.

[14] The plaintiff's first alternative claim currently consists of two paragraphs. The first of those (paragraph 40) bears no meaning, because it seeks to repeat earlier paragraphs which are not identified. It seems to have been a typographical omission in the drafting of the document, in that the paragraph numbers were not inserted. Not surprisingly, the defendant, in its notice to remove causes of complaint, identified this as a reason why it contended that the particulars were vague and embarrassing.

[15] The next paragraph states that, in the event of it being found that the defendant validly purchased the plaintiff's business, and/or the defendant's auditors determined a fair and reasonable price for the business as at 17 November 2017, the defendant claims payment of that purchase price. In what seems to be the corresponding prayers, the plaintiff claims payment of the purchase price, which is not identified, and payment of the value of the stock, which is not specifically stated in this claim, but which value has been pleaded as part of the main claim.

[16] The defendant complained about the formulation of this claim. The defendant listed a number of allegations that had not been made, such as:

a) That the defendant validly exercised the option;

b) That a sale agreement for the business arose as the result of the exercise of the option;

c) That the defendant's auditors have determined a fair and reasonable purchase price for the business;

d) That the defendant breached the sale agreement; and

e) That the plaintiff is entitled to specific performance through payment of the purchase price determined by the auditors.

[17] Some of these allegations have been made in the earlier part of the particulars of claim. This exposes a difficulty in manner of pleading in the particulars of claim: The way in which the first alternative claim is pleaded, suggests to the reader that it is intended to be a self-contained claim. This is so, because it firstly seeks to repeat certain (as yet unidentified) paragraphs from earlier in the document, with add on allegations in the next paragraph. Thus, the author of the document creates the impression that only the paragraph specifically referred to (by way of stating that it be "repeated") should be taken to form part of this claim. Because those paragraphs are not identified (albeit, on the face of it, by mere omission), it is impossible to understand what the claim entails. It should be borne in mind that some of the allegations in support of the main claim are inconsistent with the facts that will support the first

alternative claim. It is not for the reader of the pleading to select some facts and discard others from the earlier portion of the pleading.

[18] The plaintiff evidently considered there to be some merit in the complaints, and it proposes to amend its first alternative claim substantially. Firstly, it seeks to correct the omissions in paragraph 40, by expressly causing it to refer to paragraphs 10 and 32 of the particulars of claim. Paragraph 10 set out the wording of clause 40.6 of the franchise agreement. Paragraph 32 draws a conclusion in the following terms:

> "Accordingly, the plaintiff's business and its stock was unlawfully acquired by the defendant in the absence of an agreement as to the purchase price; the absence of an agreement as to the terms and conditions of the sale; and in the absence of a determination having been made by the defendant's auditors as being a fair and reasonable price."

[19] It is difficult to understand how the exposition of this alternative claim can go from stipulating the wording of the clause directly to a conclusion, or set of conclusions, as contained in paragraph 32. The plaintiff further proposes to substantially add to paragraph 41, by renumbering the current text as paragraph 41.1, and inserting paragraphs 41.2 to 41.6. In paragraph 41.2 the plaintiff proposes to plead that:

> "The plaintiff's claim for damages arises from the defendant's breach of the franchise agreement under circumstances where:

(a) the defendant exercised the option in terms of clause 40.6.1 of the franchise agreements; and

(b) the defendant, having exercised its option in terms of clause 40.6.1 of the franchise agreement to purchase the plaintiff's business, failed to agree with the plaintiff on the terms and conditions of the sale, including the purchase price, alternatively, failing such agreement, the terms and conditions of the sale and the purchase price were not determined by the defendant's auditor; and

(c) the defendant purchased the business for an undisclosed amount and thereafter sold the business to Georghiades for an undisclosed amount."

[20] This the plaintiff proposes to follow with a conclusion that the plaintiff is accordingly entitled to an amount equating the fair and reasonable price of the business and the stock, which the defendant has not paid, and an allegation that as a result of the defendant's breach of the agreement and its failure to pay the purchase price, the plaintiff has suffered damages in the same amounts in respect of the value of the business and the value of the stock, as pleaded in the main claim.

[21] On a plain reading of the proposed first alternative claim, the plaintiff, in the same breath, seeks to allege that there was a sale agreement in respect of the business for which a price had been determined by the auditors, and that the defendant breached the agreement causing the plaintiff damages. The defendant claims the same amount formulated as being derived from three different concepts: the purchase price determined by the auditors, the fair

and reasonable price for the business and stock, and damages. These incompatible approaches are not proposed to be pleaded in the alternative.

[22] In these circumstances the defendant objects to the proposed amendment, contending that it will not contain the necessary averments to sustain a cause of action (because no specific breach has been alleged), or that the proposed amended alternative claim would be vague and embarrassing. I agree.

[23] I should further point out that, insofar as the first alternative claim is for damages, it seems indistinguishable from the main claim. At the commencement of the hearing I requested Mr Cohen to identify, for my benefit, what the three alternative claims were, in order for me to distinguish them from one another. Mr Cohen identified the main claim as a claim for contractual damages. He then had some difficulty in stating the nature of the first alternative claim, first considering it to be delictual damages, and thereafter settling on it being contractual damages. Significantly, the plaintiff itself identifies this claim as a damages claim, and not for specific performance. On a reading of the proposed amended pleading, the defendant thus, without it being evident from the pleading itself, ignored the allegations pertaining to specific performance. The plaintiff's own explanation of its pleading shows why the proposed first alternative claim is vague and embarrassing.

[24] Further, because it purports to be self-contained by virtue of the manner in which it is pleaded, it should contain all the necessary allegations for a damages claim. I have already referred to the omitted allegations identified by the defendant, and I agree that those are necessary averments to have been made. The proposed amendment does not cure these shortcomings and remains lacking in essential averments.

[25] In addition, it is impossible on a reading of the proposed amended pleading, to distinguish between the main claim and the first alternative claim: they are both for damages flowing from the same events claiming the same amount. Mr Cohen was unable to identify the distinction.

[26] Mr Cohen had substantial difficulty in identifying the nature of the second alternative claim, ultimately settling on calling it a claim for an "restitutory interdict". When pressed on the nature of this claim, Mr Cohen, upon instructions from his attorney, formally withdrew the whole of the second alternative claim, being current paragraphs 42 to 49 of the particulars of claim, together with prayers 2.1 to 2.3. It is thus not necessary to further consider the objections to the proposed amendment to the second alternative claim.

[27] The plaintiff's notice of its intention to amend divided the proposed amendments into eight parts. Paragraph 8 is no longer relevant, as it pertains to the withdrawal of the second alternative claim. Paragraphs 1 and 2,

pertaining to the proposed amendments to the main claim, and paragraph 4, which proposed the amendments to the first alternative claim, can not succeed, for the reasons stated above.

[28] Mr Mundell stated that the defendant does not specifically object to the amendments proposed in paragraphs 3, 5, 6 and 7 of the notice. Paragraph 3 seeks to correct paragraph 40 by referring to paragraphs 10 and 32 where no paragraph numbers have been stipulated in the existing particulars of claim. This amendment, however, is pointless in the light thereof that the claim will remain objectionable.

[29] Paragraph 5 seeks to amend the dates of 17 November 2017 in paragraph 41 to read 10 November 2017. It is evident from the particulars of claim that the notice terminating the franchise agreement, and exercising the option, was delivered on 10 November 2017. However, a difficulty remains: the plaintiff did not seek to also amend this date in the prayers pertaining to the first alternative claim. In the circumstances it makes no sense to correct a date in one place, only to keep it in the prayers. Perhaps a more thorough consideration of the shortcomings of the pleading in a further notice of intention to amend would be appropriate.

[30] Paragraph 6 seeks to delete the words "spoliation and" from the heading between paragraphs 25 and 26, which currently reads "the defendant's

spoliation and acquisition of the plaintiff's business and stock". This amendment would be proper to make, as the plaintiff, by abandoning the second alternative, has abandoned any reliance on spoliation (or depravation, as it sought to change it in the proposed amendment that is no longer relevant). Paragraph 7 seeks to replace an incorrect attachment, POC3, to the particulars of claim with the correct one, namely the court order in terms of which the defendant took possession of the business and assets of the plaintiff. It is obviously a necessary amendment.

[31] The applicant has substantially failed in this application. The costs should follow this result.

[32] I therefore make the following order:

a) The plaintiff's particulars of claim are amended by deleting the words "spoliation and" from the heading between paragraphs 25 and 26, and by replacing current annexure POC3 with the document marked POC3 to the notice of intention to amend.

b) The applicant shall pay the costs of the application.

Andy Bester
Acting Judge of the High Court

Heard: 13 August 2018.
Judgment: 24 August 2018

For the Applicant: Adv RG Cohen
Instructed by: Glynnis Cohen Attorney.

For the Respondent: Adv ARG Mundell SC
Instructed by: Edward Nathan Sonnenberg Inc.