

REPUBLIC OF SOUTH AFRICA



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

CASE NO: A5060/2018

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

27 AUGUST 2019

FHD VAN OOSTEN

In the matter between

FOURNEWS DEVELOPMENTS (PTY) LTD

APPELLANT

and

BRAND CONTACT CONSULTANT CC

RESPONDENT

J U D G M E N T

VAN OOSTEN J:

Introduction

[1] At issue for determination in this appeal is whether the appellant (Fournews) repudiated the franchise agreement, concluded between the parties on 24 October 2014 (the agreement). In terms of the agreement the respondent (Brand Contact) was granted a licence by Fournews to operate a News Café restaurant and coffee bar at the Bram Fischer Airport in Bloemfontein (the premises). Brand Contact sued Fournews for damages in the sum R5 180 567.00, arising from Fournews' alleged

repudiation and consequent cancellation of the agreement. The matter came up for hearing before Coppin J who, at the instance of the parties, ordered a separation and adjudication of the issue whether Fournews repudiated the agreement and whether Brand Contact accepted the repudiation and deferred the hearing of the remaining issues for later determination. Brand Contact called the only witness to testify at the trial, Monwabisi Loyiso Thethe, the chief executive officer of Brand Contact. At the end of the trial on the separated issue, Coppin J decided the issue in favour of Brand Contact and reserved the costs. The appeal against that order is with leave of the Supreme Court of Appeal.

Broad factual background

[2] The facts of the matter are not in dispute and are fully and comprehensively set out in the judgment of Coppin J. I do not consider it necessary to repeat those save by way of a summary, highlighting certain salient facts for purposes of this appeal.

[3] Brand Contact was awarded a tender by the Airports Company of South Africa (ACSA) to operate a coffee bar and restaurant at the premises. In terms of the agreement, Brand Contact, as the franchisee, acquired the right by way of a licence from Fournews, to establish and operate the coffee bar and restaurant under the News Café brand, in accordance with its business system, operating manual and the terms of the agreement.

[4] The contentious clause in the agreement, for the purpose of this matter, is clause 7 dealing with the development costs. It provides that Brand Contact shall, on receipt of a written notice to do so, pay to Fournews, into a 'development fund' 'the total estimated costs of developing the franchised business into a complete 'turn-key' operation' that complies with Fournews' requirements.

[5] Written notice, by way of an email dated 13 February, was given to Brand Contact requiring payment of the estimated development costs in accordance with a schedule thereto, on 9 March 2015 and 1 June 2015. Although Brand Contact had obtained the green light of approval in regard to its applications for finance at First National Bank and SEFA (The Small Enterprise Agency (SOC)), it was still awaiting payment.

Brand Contact's cause of action: repudiation

[6] ACSA became anxious about the exact date the new restaurant would start operating. On 14 July 2015 Bongani Zulu, the regional retail manager of ACSA, called an urgent meeting with Thethe and Michael Deftereos, representing Brand Contact and Fournews respectively, for the next Tuesday, concerning the way forward (the ACSA meeting).

[7] Then followed the events on which Brand Contact relied as 'conduct, jointly and divisibly' constituting a repudiation of the agreement by Fournews. The first thereof occurred prior to and at the ACSA meeting, which was held on 21 July 2015. Shortly before the commencement of the meeting, Thethe and Deftereos in private discussed the way forward, obviously to face ACSA as a united front, concerning the date of completion of the project which was becoming in the words of Thethe, 'sensitive'. They agreed to convey to ACSA that the date 1 October 2015 would be the date of completion of the restaurant and coffee bar, which to ACSA was of crucial importance to be ready for the expected influx of festival goers attending the Macufe music festival, which was scheduled for the first week in October 2015. I interpose to mention that Thethe, in an email to Zulu and Deftereos, dated 23 July 2015, confirmed that Brand Contact would start with the store renovations in the first week of August 2015, to which he added that 'the funding institution has assured me that they will have the funds available to commence the work' and concluded 'As stated in the meeting, we are committed to get the ball rolling and make it in time for the Macufe rush and October opening'.

[8] Reverting to the pre-ACSA meeting between Thethe and Deftereos: Deftereos demanded payment of the full upfront development costs by 31 July 2015, in order to enable Fournews to organise its building team to start working there. Deftereos added that he would convey to ACSA later at the meeting that should those costs not be paid, Fournews 'are going to walk away'. At the ACSA meeting Deftereos repeated that if the cut-off date was not met, 'they (Fournews) are drawing a line in the sand'.

[9] The further conduct alleged by Brand Contact to constitute repudiation occurred when Deftereos, on 24 July 2015, wrote in an email to Thethe that he was 'insistent that if the money was not available by the 31st of July, then we will advise ACSA that News Café is no longer an option for Bloem Airport'. On the same date Deftereos

sent an email to Zulu, in which he confirmed that if the funds were not confirmed and validly in place by the 31st of July 'we will have no alternative but to draw a line in the sand and refuse the franchise to Brand Contact'. In closing it is stated in the email: 'I'm hoping that within the next week these issues will be finalised and we can proceed as planned but I do think the situation must be carefully monitored, and that we must not rush into closing the existing operation...'

[10] Thete's response to Deftereos's email on 27 July 2015, is instructive. There he stated:

'Mike

I hear you.

As discussed with all the parties concerned at ACSA, August start times are crucial. 31st July re full payment there is a strong chance I won't make. However, I have committed to the 1st week of August by the 7th August.

ACSA still has to do demolition at Bloem to give us a workable shell, which would take them +- 7-9 working days.

I so hear you and understand your valid concerns about a potential disaster that could ensure should the funds not be forthcoming. Given your date of the 31st of July I'd like to explore other options of potential franchisors that can come to the party at such short notice. I do want to work with you but I would also like to see what my best options in trying to make the dates possible and come up with a win-win plan for all concerned to make the ACSA dates for 8 weeks renovations.

Thanks and hoping to discuss further.'

[11] It is Brand Contact's case that Fournews's repudiation of the agreement was accepted in an email, dated 7 August 2015, in which Thethe stated the following:

'I have decided not to pursue the opportunity of using Newscafe for Bram Fischer as per your cut-off date of July 31st. I haven't managed to meet the date as a result of terms of getting the funds upfront.

As a result, I am looking at getting a franchise that can stagger my payments over time as opposed to upfront payments. There is also the dates that need to complete the store by the 1st of October.

I am awaiting the final response from SEFA which if coming on time, can change the picture completely, however, we know how they take time and looking at the schedules, I'm not sure we can make the deadline for Macufe (1st week in October).

I will liaise with ACSA and submit my plans to them accordingly.'

The alternative act of repudiation

[12] The alternative, alleged to have constituted 'a stand-alone ground of repudiation', is contained in an email by Deftereos to Zulu, dated 10 August 2015, in which he stated:

'It has never been our intention to not open a store in Bloemfontein. However after the fiasco at George airport we had to protect the integrity of our business and protect our loyal suppliers, who have taken a significant risk at George.

We are still very keen to open a store at Bram Fischer Airport and have a qualified BEE franchise ready to open a store, if required, within the prescribed period. However, I fully understand if this is not possible, and stand by our earlier decision that we cannot support Monswabi (Thethe) if he does not have the full capital amount available immediately.'

[13] The acceptance of the repudiation is alleged to have taken place in an email by Thethe to Deftereos, dated 21 August 2015. Although there is no reference to the 10 August 2015 email, it is stated in the opening sentence of the email:

'Please note that this is a confirmation email that Brand Contact Consultant will not be pursuing the News Café franchise for Bram Fischer Airport.'

The reason for the decision is stated in no uncertain terms, in the next paragraph of the email, as follows:

'As you clearly stated about the George fiasco, I would not want to pursue such again. I have made it clear to ACSA about my decision not to continue with Fournews Development and have given them my way forward regarding Bram Fischer Airport. I have made this decision based on the current relationship and what will be beneficial for me as a business in the long run.

I requested additional quotes from some reputable shop fitters based on the same quote that was rendered to me which came to R1,2 million less than the current costings. Please see attached.'

The order of the court a quo

[14] Having found that the main act of repudiation and acceptance thereof alternatively the alternative act of repudiation were duly proven, the learned judge a quo made the following order:

'It is declared that the defendant repudiated the agreement on or about 14 August 2015 (the date should read 14 July 2015)¹, alternatively, on or about 10 August 2015 and that the respondent elected to and duly terminated the agreement on or about 7 August 2015, alternatively, on or about 21 August 2015, as it was entitled to do in the circumstances.'

[15] In view of the order, it is necessary for this court to consider both the repudiation on 14 July 2015 and the alternative repudiation, on 10 August 2015.

Evaluation

[16] For purposes of this appeal, I consider it apposite to reiterate the well-entrenched principles regarding repudiation enunciated in *Nash v Golden Dumps (Pty) Ltd* 1985 (3) SA 1 (A) 22D-H, where Corbett JA explained that a repudiation occurred 'Where one party to a contract, without lawful grounds, indicates to the other party in words or by conduct a deliberate and unequivocal intention no longer to be bound by the contract'. In *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* [2000] ZASCA 82; 2001 (2) SA 284 (SCA) para 16, Nienaber JA observed that in determining whether there was an unequivocal intention not to fulfil contractual obligations, the 'emphasis is not on the repudiating party's state of mind, on what he subjectively intended, but on what someone in the position of the innocent party would think he intended to do; repudiation is accordingly not a matter of intention, it is a matter of perception. The perception is that of a reasonable person placed in the position of the aggrieved party' (Cf *B Braun Medical (Pty) Ltd v Ambasaam CC* 2015 (3) SA 22 (SCA) para [11]).

[17] The court a quo found that the reasonable person in the position of Thethe would have perceived the demands made by Deftereos prior to and at the ACSA meeting, together with the contents of the 14 July 2015 email by Deftereos, as a repudiation of the agreement. The learned judge a quo reasoned that the demands were not in writing and therefore not in compliance with clause 24.1 of the agreement, and were 'serious and unequivocal, in that it was threatened that unless payment of the full amount of the development costs was available in the account (ie

¹ The date is incorrect. As set out in paras [6] and [7] above, the ACSA meeting was summoned on 14 July 2015 for the next Tuesday, which was 21 July 2015.

the defendant) by 31 July, the defendant was going to withdraw from the agreement *without more*; that ACSA was to be informed accordingly and the defendant did, in fact do so' [emphasis added].

[18] The court a quo, in my view, misconceived the nature and import of the demands and moreover, the evidence for the reason that Deftereos never indicated in any way that he will, in his own words, 'walk away' or 'draw a line in the sand', *without more*.

[19] Clause 24.1.1 of the agreement requires that if a party was in breach, the innocent party was entitled to cancel the agreement only after having afforded the guilty party a period of 7 days to remedy the breach. The court a quo predicated its finding that the demands did not comply with clause 24.1 on the assumption that the demands were meant to constitute demands in terms of the clause. In my view for the reasons that follow, the court a quo fundamentally misconceived the position.

[20] For a better understanding of the demands it is necessary to place them in context having regard to the surrounding circumstances at the time they were made. The starting point, and crucial to both parties was the ACSA cut-off date for completion of the project agreed upon by all parties, which as I have alluded to, was 1 October 2015. The written demands by Fournews to Brand Contact for payment of the development costs made some five months earlier, did not produce the desired results, except for Brand Contact's applications for finance which although promised would be successful, were much to the dismay of Brand Contact, still not finalised. Time went by with nothing happening and it was only when ACSA became itchy about the progress of the project that an urgent meeting with all parties was summoned for the purpose of being updated.

[21] The private pre-ACSA meeting between Thethe and Deftereos had this significance: Both parties were acutely aware that time was by now fast becoming of the essence in regard to the completion of the project which, it must be remembered could only be accomplished once the development costs were paid by Brand Contact. The sole purpose of the meeting was clearly to give ACSA the assurance that the project would be finalised in time. Deftereos indeed determined 31 July 2015 as the cut-off date for payment of the development costs and made it clear that

failing payment, cancellation of the agreement will result. He never said that cancellation would follow immediately upon non-payment. Thethe as well did not understand that immediate cancellation would follow: He testified that he understood Deftereos to have said 'Listen, we need to get the costs. We need to get the money upfront' and that he was going to relay to ACSA 'If we cannot get the money upfront by this date, they (Fournews) *are going to have to walk away*' [emphasis added].

[22] The question arising is whether the demands evince 'a deliberate and unequivocal intention no longer to be bound by the contract'. The simple answer in my view, is no. The threat of cancellation was clearly intended to emphasize urgency and give impetus to Brand Contact's obligation to pay. In the email of 24 July 2015 to Zulu, Deftereos reiterated his stance *vis-a-viz* Brand Contact but in closing, expressed the hope that within the new week the issues would be finalised to which he added 'we can proceed as planned but I do think the situation must be carefully monitored and that we must not rush into closing the existing operation'. This is evidently irreconcilable with an intention no longer to be bound by the agreement. Much the same attitude is to be found in Thethe's email to Deftereos, on 27 July 2015,² three days after the alleged repudiation: He once again blamed the only holdback, hampering the progress of the project, as: 'Funds are not forthcoming'. Counsel for Fournews correctly pointed out that had it been Thethe's perception that Deftereos repudiated the agreement, this would have been the appropriate time one would have expected him to respond to and deal with it. On the contrary, appreciation for 'your valid concerns' and the hope of working together and conducting further discussions are expressed. In this context, not unsurprisingly, nothing is mentioned that could in any manner be construed as a reference to or for that matter acceptance, of the alleged repudiation.

[23] The cut-off date (31 July) was if not expressly, then tacitly and by conduct accepted by Thethe and accordingly agreed upon by both parties. It is of significance that Thethe's evidence is notably silent, whether he raised any objection to the cut-off date, as one would have expected had he disapproved it, either at the pre-ACSA meeting, or at the ACSA meeting which was specifically aimed at obtaining clarity and certainty as to the date of completion of the project. Two days after the ACSA

² Para [10] *supra*.

meeting, on 23 July, Thethe wrote to Zulu and confirmed that 'we would like to commence with renovations around the first week of August' [emphasis added], which would have been possible only after payment of the development costs by the cut-off date. In the meanwhile, Thethe proceeded to pursue the applications for finance after having been given the green light. When time was running out he latched onto the number of days the demolition at the premises would take before construction could commence, in an attempt 'to buy' an extension of the cut-off date by two to three weeks.³

[24] To sum up: In my view the evidence fails to show that the conduct of Fournews evinced the intention no longer to be bound by the agreement. To the contrary, both parties, ever so eager to please the 'tender-giver', ACSA, did their utmost best to keep the agreement alive. The only stumbling block that eventually led to the failure of the project was the inability of Brand Contact to obtain finance. It was only when failure became self-evident that both parties started exploring alternatives, which typically is what was to be expected of astute businessmen endeavouring to get the better of the deadlock that had arisen.

[25] This brings me to the 'acceptance' of the alleged repudiation. A plain reading of the 7 August 2015 email reveals the one and only reason for Brand Contact's dilemma: its inability to obtain finances. The contents of the email cannot in any way be reconciled with an acceptance of repudiation.

[26] Finally, I turn to deal with the alternative act of repudiation. Counsel for Brand Contact sought to find an attempted 'subversion of the tender' in the email by Deftereos to Zulu, dated 10 August 2015,⁴ in informing ACSA that Fournews no longer wished to proceed with the agreement and attempting to interpose another *BEE* partner to replace Brand Contact. The contention is short-lived: a plain reading of the email reveals an alternative strategy put forward by Deftereos on the assumption of the agreement failing as a result of Brand Contact's inability to pay the full capital amount immediately. The email once again, does not evince a 'deliberate and unequivocal intention no longer to be bound by the contract'.

³ As explained by Thethe in evidence, with reference to the email referred to in para [10] *supra*.

⁴ Para [12] *supra*.

[27] In conclusion, in view of the finding that there was no act of repudiation, the question of acceptance no longer needs to be addressed.

[28] For the reasons given, the appeal must succeed.

Order

[29] In the result the following order is made:

1. The appeal is upheld.
2. The order of the court a quo is set aside and replaced with:

‘The plaintiff’s claim is dismissed with costs’

3. The respondent is to pay the costs of the appeal.


 FHD VAN OOSTEN
 JUDGE OF THE HIGH COURT

I agree.


 R KEIGHTLEY
 JUDGE OF THE HIGH COURT

I agree.


 A CRUTCHFIELD
 ACTING JUDGE OF THE HIGH COURT

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DATE OF HEARING

7 AUGUST 2019

DATE OF JUDGMENT

27 AUGUST 2019