REPUBLIC OF SOUTH AFRICA

HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 36230/2014

2/6/2014

(1) REPORTABLE: **NO**

(2) OF INTEREST TO OTHER JUDGES: **NO**

(3) REVISED.

2014·06·02 .....
DATE

.....
SIGNATURE

In the matter between:

ELEPHANT AND FRIENDS (PTY) LTD Applicant

and

PALCOLINE (PTY) LTD First Respondent
JUAN VENTER Second Respondent

J U D G M E N T

MAKGOKA, J:

[1] The applicant seeks, on an urgent basis, an interlocutory interdict preventing the first respondent from continuing its breach of a franchise agreement concluded between the applicant and the first respondent on 15 August 2012, as franchisor and franchisee, respectively. At all times the applicant was duly represented by its sole director and shareholder, Mr Morné Reichert (Reichert), while the first respondent was represented by the second respondent, who is the directing mind of the first respondent.

[2] The interim relief is sought pending the determination of an action to be instituted by the applicant for specific performance against the first respondent. The franchise is that of a pub and grill sports bar, with a casual ambience for patrons to enjoy light meals and drinks, to the sound of live entertainment.

[3] The first and second respondents (the respondents), in addition to contesting urgency, oppose the application on the ground that the franchise agreement is void and unenforceable for failure to comply with the provisions of the Consumer Protection Act 68 of 2008 (the CPA). First, it is alleged that that disclosure agreement, which, in terms of the CPA, must precede the conclusion of the franchise agreement, was not furnished at least 14 days before the signature of the franchise agreement. Second, it is common cause that the applicant did not comply with regulation 3(3) of the CPA, which prescribes that the disclosure agreement must be accompanied by a certificate by an auditor of the applicant certifying certain prescribe information about the applicant. The respondents further contend that the relief sought by the applicant is not competent.

[4] Before I consider the contentions of the parties, the following brief background is necessary. Pursuant to the conclusion of the agreement on 15 August 2012, the applicant provided the necessary training and installed and set up the systems which enabled the first respondent to commence business. The first respondent commenced trading on 3 September 2012. During March 2013 the parties concluded an addendum to the agreement, in terms of which the first respondent's royalties were reduced from 5% to 3%.

[5] During December 2013 the second respondent intimated to Reichert that due to an incident which had occurred at the business, he wished to be released from the agreement. No agreement could be reached, and Reichert indicated to the second respondent that the applicant would hold the first respondent to the

terms of the agreement. During February 2014 the second respondent, offered to R500 000 for the first respondent to be released from the agreement. Reichert rejected the offer. Sometime later, there reports that the first respondent was 'de-franchising'. What that entailed, basically, was that the first respondent would no longer conform to the terms of the franchise agreement with regard to methods, standards, pricing, specifications and operating procedures. In addition, it would no longer be obliged to source goods from the suppliers prescribed by the applicant.

[6] As a result of this, Reichert caused a letter, dated 1 April 2014, to be written to the second respondent, in which the second respondent was informed, among others, that the first respondent was not entitled to 'de-franchise', and that it will be held strictly to the terms of the agreement. A letter was also directed to the applicants' suppliers on 16 May 2014, informing them that to the extent there might be a dispute between the applicant and the first respondent, the franchise agreement would be enforced by the applicant.

[7] On 9 April 2014 the respondents' attorneys responded to the letter dated 1 April 2014, in which certain further particulars were sought with regard to the Disclosure Document, hinting that not all formalities had been complied with, in the build-up to the signature of the franchise agreement. The applicant's attorneys responded on 17 April 2014, and persisted that all formalities were complied with. On 30 April 2014, the respondents' attorneys formally mentioned that the Disclosure Agreement was not properly 'constituted' as the first respondent had not been furnished with the information prescribed in the Consumer Protection Act 68 of 2008.

[8] In particular, it was pointed out that the disclosure agreement was not accompanied by a certificate by an auditor of the applicant certifying certain prescribed information about the company. This, according to the respondents'

attorneys, rendered the franchise agreement between the parties, void ab initio. It was however, suggested that the parties should meet after 7 May 2014 to discuss an amicable solution.

[9] On the same day, 30 April 2014, the applicant's attorneys agreed in principle to the suggestion of negotiations in an endeavor to amicably resolve the impasse, but also placed on record that it had come to the applicant's attention that an entity known as Rhino's Pub & Grill (Rhino) was preparing to operate from the same premises as the franchise business. In the light of that, it was suggested that the parties meet earlier than the 7 May. There was no response to this letter, and on 5 May 2014 the applicants' attorneys enquired from the respondents' attorneys whether they were amenable to an earlier meeting. A response was demanded by 9 May 2014, failing which legal steps were threatened.

[10] On 13 May 2014 the respondents' attorneys responded and mentioned that the first respondent had, on 7 May 2014, ceased trading as a franchise of the applicant, and that, in the light thereof, there would be no purpose in convening a meeting between the parties. In the penultimate paragraph of the letter, it was stated that 'the remaining issue is whether…a legal and binding franchise agreement has been concluded' between the parties. In that regard, the first respondent was said to be intending to institute a counter-claim for the repayment of all monies paid pursuant to the franchise agreement.

[11] In the meanwhile, it also came to the attention of the applicant that a lease agreement had been signed between the landlord of the premises from which the first respondent operated, and Rhino. However, it appears that the agreement was concluded by an agent of the landlord without proper authority. In this regard, the agent of the landlord, Mr Tony Parau, on 16 May 2014, confirmed in

writing that he signed the lease agreement between Rhino and Jordi Properties, the landlord, without its authority. I shall revert to this aspect later.

[12] That, in brief, is the factual background to the matter. I now briefly consider the issue of urgency, which has been placed in dispute by the respondents. It was contended that the applicant's urgency was self-created as it complained as early as 1 April 2014 of the first respondent's breaches of the franchise agreement, yet it only launched this application only on 16 May 2014. This contention is disingenuous, as it is clear from the correspondence between the attorneys, referred to above, that there were efforts by the parties, through their legal representatives, to amicably resolve the issue.

[13] From the tone and tenor of the correspondence, it was not unreasonable on the part of the applicant to assume that the matter could be resolved amicably. It therefore created an expectation that there was room for a settlement. The door was therefore not shut for a possible amicable solution. It was only on 13 May 2014 when it was confirmed that the first respondent had indeed perfected his 'de-franchising', that a point of no return was reached. This application was launched shortly after that information was conveyed. I am therefore satisfied that the application is urgent.

[14] I now turn to the requisites for an interim interdict, which are trite. The applicant has to establish:

(a) a prima *facie right*;

(b) a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;

(c) the balance of convenience favours the granting of the interim relief;

(d) the absence of any other satisfactory remedy.

[15] In order to establish its *prima facie* right, the applicants must establish that its right to enforce the franchise agreement is not open to serious doubt. The applicant need not show that right on a balance of probabilities. The facts alleged by the applicant, together only with those alleged by the respondent that the applicant cannot dispute, must be considered, to determine whether the applicant should obtain relief at the trial in due course (*Spur Steak Ranches Ltd v Saddles Steak Ranch*).[1]

[16] It is common cause that there has not been compliance with regulation 3(3), to the extent that the disclosure agreement was not accompanied by an auditor's certificate as prescribed in the regulation. The respondents argue that this renders the franchise agreement void. The applicant contends otherwise. This is a legal dispute. The application of the *prima facie* requirement to cases where legal issues are in dispute is not at all clear, and has led to different views. For example, in *Mariam v Minister of the Interior and Another*,[2] the test was applied to a disputed point of law while in *Fourie v Olivier en 'n Ander*[3] it was held that the test was not applicable in such cases. In *Beecham Group Ltd v B-M Group Ltd*[4] the court applied the *prima facie* right test but held that 'where difficult questions of law' were raised they had to be dealt with at the trial and not at the interlocutory stage. In *Ward v Cape Peninsula Ice Skating Club*[5] Blignault AJ suggested it was possible to reconcile *Fourie v Olivier* with *Beecham* if due regard is had to the expression 'difficult questions of law': the reference to 'difficult' implied that ordinary questions of law could be decided at the interlocutory stage of the proceedings.

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[1] 1996 (3) SA 706 (C).
[2] 1959 (1) SA 213 (T).
[3] 1971 (3) SA 274 (T).
[4] 1977 (1) SA 50 (T).
[5] 1998 (2) SA 487 (C).

[17] In my view, the question of law in the present case, is a difficult one such as was contemplated in the *Beecham* case, involving, as it does, a social security ministerial regulation. As seen in the recent past, similar Acts of parliament and their regulations have given rise to vexing and difficult questions of interpretation, some even reaching the Constitutional Court.[6] I have not, in the constrained nature of a busy urgent court, had the benefit of 'detailed argument and mature consideration'[7] to dispose the issue at this stage.

[18] I have pointed out that the applicant has indicated its intention to institute an action for enforcement of its rights in terms of the franchise agreement. The first respondent, on the other hand, has also made its intention clear to file a counter-claim for the repayment of all the monies made pursuant to the agreement. For that reason, I am of the view that the court which hears that action, should best be suited to determine the validity of the franchise agreement. It is by no means a foregone conclusion that the franchise agreement would be declared null and void, as the court might decide differently, having due regard to, among others, the purpose of the regulation and the relationship between the parties. To that extent, the applicant has established a clear right, although open to some doubt.

[19] With regard to irreparable harm, there can be doubt about that there is. The first respondent is, on the respondents' own version, in the process of continuous, serious and wholesale breach of the franchise agreement, as a result of which the applicant is suffering harm to its franchise brand and image. It should be borne in mind that Rhino conducts the same business as the applicant, that of a pub and grill. What the second respondent does, effectively, is to allow Rhino to simply replace the first respondent as a tenant in the

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[6] For example the National Credit Act 34 of 2005.

[7] *Ward v Cape Peninsula* (*supra* at 498C, 498G-H).

premises and conduct the same business as that of the first respondent. In this manner, he allows Rhino to ride on the back of the goodwill of the applicant's franchise. That is a contrived scheme, which is likely to result in deception and confusion, or even dilution of the applicant's brand. If an interim interdict is not granted, and the applicant ultimately succeeds in persuading the court that the non-compliance with the regulation does not invalidate the agreement, there would be no way of reversing the harm that would have been visited upon it by the first respondent's 'de-franchising'.

[20] It is not clear yet, as to the nature of the relationship between the second respondent and Rhino. What we know is that the second respondent has some business relationship with the sole director of Rhino. To that extent, it is not a far-fetched proposition that the second respondent facilitated the 'take over' of the first respondent's business and replaced it with that of Rhino. I also take a dim view of the second respondent's conduct in this matter. It would be recalled that he, through his attorneys, suggested that the parties should meet after 7 May 2014, knowing fully well that he was in the process of facilitating the 'take over' by Rhino, and without disclosing this fact to the applicant. It is no coincidence that it was later revealed that Rhino had commenced trading on the very same day he suggested the meeting should be deferred to. This demonstrates a clear lack of bona *fides* on his part.

[21] As to the balance of convenience, I must consider the applicant's prospects of success. I take into account that the general approach where a contract has been concluded in non-compliance with a statutory provision, is that such agreement is void. However, this is not an inflexible rule. Where, as here, the regulation does not expressly state that non-compliance therewith invalidates the contract, the question as to the validity of that contract depends on the intention of the legislature.

[22] To that extent, the applicant has prospects of success in persuading the trial court that on the facts of this case, invalidity should not arise. In para [18] above, I have alluded to the fact that the question of invalidity could be decided either way. On the other hand, the only possible inconvenience on the part of the first respondent is that it is compelled to trade as a franchise of the applicant, which it has done since September 2012. Therefore, nothing unnecessarily onerous is demanded of the first respondent. For that reason, I conclude that the balance of convenience clearly favours the granting of an interlocutory relief.

[23] With regard to the final requirement, the applicant clearly has no other satisfactory relief. Although a claim for damages might be instituted, there can be no measure of compensation for the harm done to the reputation of the applicant's franchise and brand. The respondents contend that the applicant has only two franchise stores, and therefore, presumably, no large scale damage can be done. In my view, it is precisely for that reason that an interdict should be granted. The applicant's franchise is new, and the applicant, seeking to establish it in the market, and can ill-afford the damage that is being done to its image. I am therefore satisfied that the status *quo* should therefore be preserved.

[24] Lastly, I deal with the respondents' residual argument that the relief sought by the applicant is not competent. This is premised on the argument that the first respondent has no right to trade from the premises, since Rhino has signed a lease agreement in respect of the same premises, and that Rhino will not vacate the premises without setting up a legal fight. The short answer to this argument is an email to Reichert dated 21 May 2014, by the director of Jordi Properties, the landlord, in which he confirms the validity of the (original) lease agreement in terms of which the first respondent would trade from the premises. He further states the landlord has no intention of to sign any other lease, and that the premises were opened under the applicant's franchise, and further that the landlord supports the operation under that name. He concludes by saying

that the landlord would like the business to continue under the applicant's franchise. This demonstrates that there is no logistical or legal impediment in the first respondent resuming trade at the premises.

[25] The sum total of all the above, is that I am satisfied that the applicant has made out a case for an interim interdict. In the notice of motion, the applicant has prayed for a very detailed order. In my view, it is not necessary to fashion the order in such manner. Indeed, some of the prayers come down to compliance with the terms of the franchise agreement. It would serve the purpose were the first respondent to be ordered to comply fully with the terms of the franchise agreement. It is fair and just that costs should be in the main action.

[26] In the result I make the following order:

1. Pending the finalization of an action in which the rights of the parties in terms of the franchise agreement are finally determined, the first respondent is:

   1.1 ordered to continue operating Elephants and Friends, Helderkruin, at the premises situated at Westways Shopping Centre, 200 Ouklip Street, Helderkruin ;

   1.2 restrained and interdicted from breaching the franchise agreement in any manner, including but not limited to:

      1.2.1 using the premises described above, for any other purpose other than the operation of Elephants and Friends, Helderkruin;

      1.2.2 making the said premises available to any person or entity, or permitting the use of the premises for any other purpose or activity;

2. The applicant is ordered to institute an action envisaged in paragraph 1 above, within 15 days of the date of this order;

3. The costs of this application shall be costs in the main action.

TM MAKGOKA
JUDGE OF THE HIGH COURT

DATE OF HEARING : 27 MAY 2014

JUDGMENT DELIVERED : 2 JUNE 2014

FOR THE APPLICANT : ADV. W. GIBBS

INSTRUCTED BY : KMG & ASSOCIATES INC., PRETORIA

FOR THE RESPONDENTS : ADV. L. BALANCO

INSTRUCTED BY : CHRISTO BOTHA ATTORNEYS, PRETORIA