IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED. ✓

15/4/2016
DATE

SIGNATURE

15/4/2016.

Case Number: 22712/2016

In the matter between:

JOHN FREDERICK SCHICKERLING N.O.

(In his capacity as duly appointed business Rescue practitioner for Ashraf Alli Gani Investments CC) First Applicant

ASHRAF ALLI GANI INVESTMENTS CC Second Applicant

and

CHICKENLAND (PTY) LTD t/a NANDO'S Respondent

JUDGMENT

POTTERILL J

[1] The applicant is applying on an urgent basis that a mandatory interdict be granted in favour of the second applicant in terms of which the respondent is ordered to fulfil all its obligations towards the second applicant in terms of the provisions of the franchise agreement entered into by and between the second applicant and the respondent on 1 December 2009. The second applicant offers reciprocal performance of its obligations in terms of the same agreement. This mandatory interdict is pending the outcome of the pending action between the second applicant and the respondent under case number 3880/2015. The applicants are also requesting that the respondent be ordered to notify all suppliers to the second applicant to continue to supply the second applicant with product in terms of the provisions of the agreement on the same cash on delivery basis as before.

Background facts

[2] The first applicant is the business rescue practitioner of the second applicant Ashraf Alli Gani Investments CC.

[3] The respondent is franchisor of a chain of fast foods commonly known as Nando's.

[4] The second applicant and the respondent on 18 February 2009 concluded a franchise agreement. This agreement was subject to an option for the renewal of the contract which was to expire on 30 November 2014.

[5] The option to renew the franchise agreement is before this court under case number 3880/2015 and set down for trial on 31 October 2016.

[6] On 28 November 2014 the members of the second applicant adopted a resolution to commence business rescue proceedings. On 19 February 2015 the applicant proposed a business rescue plan which was adopted.

[7] In the business rescue plan the following proposal was adopted:

> *"PROPOSALS*
>
> *Pending the outcome of the action under case number 3880/15 the company will continue to trade under the name and style of a Nando's branded franchise from the current leased premises and undertake to*

substantially comply with the franchise agreement concluded with Chickenland (Pty) Ltd, to the extent that it is consistent with the adopted business rescue plan.

That the practitioner may appoint any individual from time to time, at his sole discretion, to attend the training provided in terms of the franchise agreement with Chickenland (Pty) Ltd."

[8] On 24 February 2015 the attorney of the respondent gave a written undertaking which reads as follows:

"(1) Pending finalisation of the declaratory issued under case number 3880/15, Ashraf Alli Gani Investment CC (in business rescue) ("the franchisee") and Chickenland (Pty) Ltd ("the franchisor") will comply with their respective contractual obligations provided for in the franchise agreement concluded between the parties on 18 December 2009, as if the franchise agreement was still in existence.

(2) It is recorded that the franchisor agrees hereto in order to avoid unnecessary costs in litigation and does not hereby waive any rights that it has flowing from the expiry of the franchise agreement on 30 November 2014, alternatively determination thereof by the franchisor.

(3) Insofar as supply of products through Vector Logistics (Pty) Ltd and other suppliers are concerned, the continued supply thereof is dependent upon the franchisee meeting its obligations with such suppliers."

[9] On 22 March 2016 the respondent sent a letter to the four sureties and co-principal debtors as well as to the first and second applicant. The relevant paragraph reads as follows:

"3. Since inception of the business rescue proceedings our client has had cause on no less than four occasions to place the Corporation in breach of its obligations under the Franchise Agreement. In such regard you are referred to the contents of our letters dated 31 July 2015, 21 October 2015 (breach notices), 8 December 2015 (operational directive), 15 January 2016 (breach notice) and 18 January 2016 (breach notice). These letters are in the possession of your client and the contents thereof are incorporated herein be reference.

4. Moreover, our instructions are that your client has failed to pay the royalty fees and other amounts due to our client for February 2016 in the amount of R88 000.00. Your client has also not paid the

December 2015 nor January 2016 royalty and fees in the respective amounts of R102 665.48 and R94 791.57.

5. *Accordingly your client is currently indebted to our client in the sum of R285 457.06 which amount is due, owing and payable.*

6. *On 25 January 2016 we addressed a letter to Mr Derick Schickerling (a copy of which is attached hereto) requesting that he provide our client with information regarding why the outstanding royalties had not been paid and enquiring that he indicate the ability of the Corporation to continue to pay its future debts. Our client is yet to receive answers to the questions posed in the letter of 25 January 2016.*

11. *Accordingly, and with full reservation of our client's rights, your client is hereby advised that should the arrear royalty fees and other amounts due to our client in the amount of R285 457.06 being calculated as per the attached statements, not be paid and reflect in our client's bank account as cleared and available funds by no later than Tuesday, 29 March 2016, that our clients rights are reserved to proceed to terminate the interim franchise arrangement and seek its recourse against not only the Corporation but also the sureties and the business rescue practitioner, Mr Schickerling."*

[10] Paragraph 17.1.2 of the franchise agreement reads as follows:

"17.1 Notwithstanding any other provision contained in this agreement it is agreed that this agreement shall terminate, at the FRANCHISOR's sole and absolute discretion at any time subsequent to the happening of any of the events listed below, notwithstanding that there may be a delay between the event and the exercising of the election in the event that the FRANCHISEE:-

17.1.1 ...

17.1.2 fails to timeously pay the franchise, royalty, marketing fee or any other amount due and owing by it to the FRANCHISOR; ..."

[11] The royalties were not paid but were paid in on 30 March 2016 reflected at the respondent on 31 March 2016.

Applicants' version

[12] The applicants contend that the termination letter does not comply with the franchise agreement in that the letter of termination was not addressed to the second applicant nor delivered to the second applicant's domicile as required in terms of clause 25.3.3 of the franchise agreement.

[13] The current status of the business rescue plan has achieved the purpose of business rescue as required in the Companies Act and will benefit all the interested parties including the body of creditors.

[14] The respondent is deliberately attempting to frustrate the business rescue proceedings by bringing out vexatious and exaggerated performance reports, has failed to allow for and provide training of the staff of the applicant as required by the business plan and franchise agreement. The work force of the second applicant has also been enticed away from the business through neighbouring franchises. The employees are informed that the second applicant's business is in dire straits and that they should leave the employ and join other franchises. It is averred that these dire consequences of the respondent's vexatious attack culminated in the so-called letter of termination.

[15] The respondent also informed all the suppliers as follows:

> *"Please note that Nando's Laudium has been closed with immediate effect. Please stop all supply."*

[16] The respondent also acted contrary to the provisions of section 134 of the Companies Act by on 5 April 2016 disabling the computer based point of sale software programme installed at the business. The first applicant submitted that he

did not in terms of section 134(1)(c) grant permission for the respondent to disable the computer software.

[17] All of the above actions are detrimental to the body of creditors and the ten remaining employees.

[18] The applicant has accordingly complied with urgency as well as the requisites for an interim interdict.

The respondent's version

[19] The respondent denies that the application is urgent. The reason for this is the applicants already on 22 March 2016 knew that termination was threatened with if the royalties were unpaid. The applicants since 30 March 2016 have been aware that the respondent terminated the agreement. Yet they only served the urgent application on 8 April 2016, 17 days after 22 March 2016. There are no reasons set out as to why it took 17 days, neither did they explain the 8 days which elapsed after receiving the notice of termination. The applicant also failed to give the respondent prior notice of the application. The respondent was on the papers afforded half a business day to answer to the urgent application. In ***Gallagher v Norman's Transport Lines (Pty) Ltd*** **1992 (3) SA 500 (W)** at 503B the reason for the deviation must be set out and applicant's actions is contrary to ***Luna Meubels Vervaardiger v Makin and Another*** **1977 (4) SA 135 (W)** at 137A-E.

[20] The respondent further submitted that the termination was valid and therefore the applicants do not have a *prima facie* right to approach the court. The royalties for December 2015 and January and February 2016 were unpaid. Clause 17.1.2 of the franchise agreement constitutes a *lex commissorio*. Reliance was placed on ***Oatorian Properties (Pty) Ltd v Maroun*** **1973 (3) SA 779 (A)** at 785A that a *lex commissorio* is enforceable and in law and the court does not enquire into the conscionableness or unconscionableness thereof.

[21] The termination is valid because the business rescue practitioner in terms of section 140(1)(a) of the Companies Act has "full management control of the company in substitution of its board and pre-existing management."

[22] Furthermore in terms of ***Swart v Vosloo*** **1965 (1) SA 100 (A)** at 112H-113A the respondent *in casu* has proved that it came to the knowledge of the applicants and therefore failure to the address the notice under contract of a designating *domicilium* did not invalidate the notice.

[23] The applicant has accordingly not established a *prima facie* right entitling him to continue to operating the franchise after the valid termination thereof.

[24] The respondent also raised the point that there is no irreparable harm because the applicants can still operate a restaurant. The alternative sources of suppliers etc. are well-known to the applicants. Paragraph 25 of the answering affidavit set out all these alternatives to which the only answer in the replying affidavit is that the suggestions set out in paragraph 25 is a figment of the imagination of the respondent and in fact an impossibility.

[25] The applicants also seek an order that the interim interdict should operate pending the outcome of the main action. The issue in the main action is however not at all related to non-payment of royalties leading to a breach and termination. It is thus unclear on what basis the interim relief suggested could be granted.

Reasons for decision

[26] I find the matter to be urgent. I entertain it, but non-compliance with the rules and directives pertaining to "urgents" may impact on the costs order. The test to be applied in assessing whether the applicant has past the hurdle for obtaining an interim interdict is set out in ***Reckitt & Colman SA (Pty) Ltd v S C Johnson & Son (SA) (Pty) Ltd*** **1995 (1) SA 725 (T)** on 730B:

> "*When the applicant cannot show a clear right, and more particularly where there are disputes of fact relevant to a determination of the issues, the Court's approach in determining whether the applicant's right is prima facie*

established, though open to some doubt, is to take the facts set out by the respondent which the applicant cannot dispute , and to consider whether, having regard to the inherent probabilities, the applicant should (not could) on those facts, obtain final relief at the trial in the main action. The facts set out in contradiction by the respondent must then be considered and if serious doubt is thrown upon the case of the applicant it cannot succeed."

In ***Spur Steak Ranches Ltd v Saddle Steak Ranch*** **1996 (3) SA 706 (CPD)** at 714D-H the following is stated:

"The proper approach is to take the facts set out by the applicants together with any facts set out by the respondents, which the applicants cannot dispute, and to consider whether having regard to the inherent probabilities the applicants should, not could, on those facts obtain final relief at the trial.

It is also necessary to repeat that although normally stated as a single requirement, the requirement for a right prima facie established, though open to some doubt, involves two stages. Once the prima facie right has been assessed, that part of the requirement which refers to the doubt involves a further enquiry in terms whereof the Court looks at the facts set up by the respondent in contradiction of the applicant's case in order to see whether serious doubt is thrown on the applicant's case and if there is a mere

contradiction or unconvincing explanation, then the right will be protected. Where, however, there serious doubt then the applicant cannot succeed. See ***Webster v Mitchell 1948 (1) SA 1186 (W)*** *at 1189;* ***Gool v Minister of Justice and Another 1955 (2) SA 682 (C)*** *at 688."*

[27] The crux of this matter is thus the cancellation. If there was a valid cancellation of the contract then the applicants do not have a *prima facie* right open to some doubt to approach this court on a cancelled agreement.

[28] I am satisfied that on the common cause facts the royalties were only paid after the date set out in the cancellation letter. I am satisfied that clauses 17.1 read with 17.1.2, the cancellation clause, constitutes a *lex commissorio*. Thus even if the respondent is an unwilling party to the current *de facto* and *de jure* situation it does not affect the *lex commissisorio* and the cancellation.

[29] I find that the letter of cancellation came to the knowledge of the first applicant. I find that it should have come to his notice as the business rescue practitioner who was responsible to ensure payment of these royalties. This is further enunciated by section 140 of the Companies Act. Even if I am wrong and there must be compliance with the franchise agreement in that the second applicant must receive notice of the termination at the *domicilium* address reflected in the contract I am satisfied that in fact the second applicant had knowledge of this letter of termination.

It was served on his attorneys via e-mail and more bizarrely the applicants never in the founding affidavit set out that the second applicant had no knowledge. I am accordingly satisfied that there was a proper cancellation of the agreement.

[30] The only question the court must then ask itself is whether the adopted business rescue plan can in any way impact on the cancellation of the agreement. The applicant could not provide any section in the Companies Act, or any case law, that the mere fact that there are business rescue proceedings impacting on the cancellation. Upon a perusal of the sections in the Companies Act relating to business rescue no such prohibition could be found. When interpreting the Companies Act the Act must be interpreted and applied in a manner that gives effect to the purpose of section 7. It could be argued that the cancellation does not conform to the purpose of section 7(d). Section 7(d) reads as follows:

> *"reaffirm the concept of the company as a means of achieving economic and social benefits".*

The employees have already been approached to work at other franchises and it would seem that they could receive social benefits. The fact that the royalties were not paid for three months by a third party did not reaffirm the concept of the company as a means of achieving economic benefits.

[31] The mere fact that I do not address the other issues raised does not infer that I have not considered them.

[32] The urgency of the matter requires that I only refer to the crux.

[33] I accordingly make the following order:

The application is dismissed with costs.

S. POTTERILL

JUDGE OF THE HIGH COURT

CASE NO: 27712/2016

HEARD ON: 13 April 2016

FOR THE APPLICANTS: ADV. J. KLOPPER

INSTRUCTED BY: Lacante Henn Incorporated

FOR THE RESPONDENT: ADV. A.C. OOSTHUIZEN SC

INSTRUCTED BY: Ashersons Attorneys

DATE OF JUDGMENT: 15 April 2016