IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

2/11/2016.

CASE NO:72639/16

Date of hearing: 28 October 2016

In the matter between:

EVY GONCLAVES 1ST Applicant/Plaintiff

PEDRO MIGUEL DUNCAN GONCLAVES 2ND Applicant/Plaintiff

and

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE YES/NO
(2) OF INTEREST TO OTHERS JUDGES YES/NO
(3) REVISED

2/11/2016

DATE SIGNATURE

FRANCHISING TO AFRICA (PTY) LTD Respondent/Defendant

T/A GOLD BRANDS

JUDGMENT

BRENNER AJ

1. The first and second plaintiffs, Evy Goncalves ("Evy") and Pedro Miguel Duncan Goncalves ("Pedro"), applied for summary judgment against the defendant, Franchising to Africa (Pty) Ltd t/a Gold Brands ("FTA"), for payment of R560 000,00 plus interest and costs.

2. The cause of action was based on claims arising from a written cancellation agreement executed by the above parties on an unknown date in 2016 ("the cancellation agreement").

3. The agreement cancelled a franchise agreement previously concluded between them in terms of which a ChesaNyama franchise store in Presidia Building, Pretoria, was acquired by Evy & Pedro from FTA for a price of R700 000,00 ("the franchise agreement"). The purchase price was duly paid by Evy and Pedro on or about 3 February 2016.

4. When the hand-over of the store was imminent, Evy and Pedro discovered that, contrary to alleged representations made to them by FTA:

   4.1 the store was not trading;

   4.2 the store was in a dilapidated state for various reasons;

   4.3 there was no valid operational liquor licence for the store

5. They accordingly refused to take possession of the store. However, when given FTA's assurance that repairs and upgrades would occur, they took possession of same. But the repairs and upgrades were not effected.

6. In May 2016, the parties agreed to cancel the franchise agreement, and executed the cancellation agreement. The precise date of the cancellation agreement is not apparent ex facie the document but nothing turns on this. They agreed that FTA would retake possession of the store from 8 June 2016.

7. Three clauses of the cancellation agreement are germane to the issues.

8. FTA chose as its *domicilium citandi et executandi* for service of all legal processes at 195 Witch Hazel Avenue, Highveld, Centurion, Pretoria. Vide clause 11.2.2.

9. In terms of clause 12, if a breach of the agreement occurred and the breaching party failed to remedy same within 7 days of receipt of written notice from the other party to rectify the breach, the aggrieved party was

entitled without prejudice to any other rights it may have in law, to take such legal action as may be necessary in the circumstances.

10. The most material clause, from which the focal issues arose, is the clause pertaining to the refund amount and payment thereof, namely, clause 3. It is quoted verbatim below, (the Franchisor being FTA and the Franchisee being Evy and Pedro Goncalves).

"3 REFUND AMOUNT AND PAYMENT

3.1 The Franchisor shall refund to the Franchisee an amount of R700 000-00 (One Hundred Thousand Rand) subject to terms and conditions contained in clause 3.3

3.2 The capital amount of R700 000-00 (Seven Hundred Thousand Rand) shall be repaid to the Franchisee by the Franchisor in of 5 (Five) equal monthly instalments of R140 000-00 (One Hundred and Forty Thousand Rand) per month with the first instalment being payable on or before the 7th July 2016 and thereafter on or before the 7th of each and every following month until such a time the amount is paid in full.

3.3 The above amount shall be paid by the Franchisor subject to the following conditions:

3.3.1 the deduction of the sum as per signed schedule being the current indebted amount;

3.3.2 the deduction of any amounts that may be owed and outstanding in terms of Clause 4 hereunder;

3.3.3 the deduction of any amounts that may be due and owing in respect to any employee prior to the Take-Over Date in terms of Clause 7 below;

3.3.4 the Parties agree that upon entering into this Agreement in any way affects, detracts from, limits, and/or operates as a waiver or as a novation of the obligations of the Franchisees or the rights of the Franchisor in terms of the Franchise Agreement including that of the Franchisor;

3.3.5 In order to facilitate the provisions of clauses 3.1, 3.2 and 4 an adjustment account shall be prepared by the Franchisor setting forth amounts to be paid against such amounts as to be subtracted as contemplated by the Parties."

11. Regarding clause 3.3.1, there was no signed schedule providing for the "current indebted amount".

12. In part-performance of its obligations, FTA paid the first instalment of R140 000 to Evy and Pedro on 7 July 2016. In breach of the cancellation

agreement, however, it failed to pay any further instalments, with effect from 7 August 2016, or thereafter.

13. It merits mention that the cancellation agreement did not contain an acceleration clause regarding payment of the instalments.

14. On 10 August 2016, the attorneys for Messrs Goncalves addressed a letter of demand to FTA, to two email addresses not mentioned in the domicilium clause, to demand payment of the August 2016 instalment, by the following day. A further demand on 22 August 2016, for payment of the August 2016 instalment, met with no response.

15. On 20 September 2016, Evy and Pedro Goncalves served summons in which they claimed payment of the full balance of R560 000,00. The full balance was prematurely claimed. This because of the absence of an acceleration clause. By 20 September 2016, only two further instalments of R140 000 each, for August and September 2016, were due, owing and payable.

16. The summons was served on the chosen domicilium of FTA.

17. Following an appearance to defend on 3 October 2016, a Summary Judgment Application was launched and served on 11 October 2016. The main deponent was Evy. The oath section of his affidavit dated 4 October 2016 refers to "he/she" throughout. Pedro signed a confirmatory affidavit on 7 October 2016 in which it is acknowledged that "she" knows and understands the contents of the affidavit. Both affidavits were signed at police stations.

18. The affidavit opposing summary judgment was signed on 25 October 2016 by Efpraxia Nathanael on behalf of FTA. The copy in the court file appears to have omitted one page of this affidavit. I was informed that the attorneys for the Goncalves also received an incomplete affidavit. Nevertheless, what is gleaned from the affidavit is the following.

19. It is contended for FTA that Evy's affidavit is invalid in that the oath section refers to the deponent as "he/she" and the oath section of Pedro's affidavit refers to the deponent as "she". Although Pedro had confirmed Evy's affidavit, FTA contended, without justification, that Pedro had not given Evy authority to depose to an affidavit on his behalf.

20. At paragraphs 6.4 and 6.5 of the opposing affidavit, the following is stated:

> *"6.4 The applicants are, however, not entitled to claim the full balance of the purchase price as no provision is made in the agreement for accelerated payment of the purchase price.*
>
> *6.5 The summons, as issued by the applicants, has therefore been issued prematurely as the balance of the purchase price has not yet become due and payable and the applicants are therefore not entitled to judgment for the amount claimed or at all."*

21. This, then, was the gravamen of the defences raised by FTA.

22. In argument before me, counsel for FTA raised what he termed legal points, which were to be considered in addition to the contents of the opposing affidavit. He did so without prior notice. He mentioned that the refundable amount was subject to the deductions stated in clauses 3.3.1 to 3.3.3 of the cancellation agreement. There was no allegation in the summons that the deductions had taken place. He pointed out that there was no schedule attached to the document, as contemplated by clause 3.3.1. He argued that Messrs Goncalves had failed to send a prior demand to FTA's domicilium affording FTA seven days within which to remedy the breach. In the result, he contended that the summons was excipiable, and lacked averments necessary to complete a cause of action, and therefore, for this reason simpliciter, summary judgment could not be granted

23. In addressing legal issues, Counsel for FTA relied on the case of ***Arend and Another v Astra Furnishers (Pty) Ltd 1974 (1) SA 298 C***, at p314, where Corbett, J, held:

> *"Accordingly, I hold that defendant in summary judgment proceedings is not precluded from raising issues relating to the validity of the plaintiff's application merely because he has not referred to these matters in his opposing affidavit."*

24. To support his contention that Evy and Pedro had not adhered to the domicile clause regarding prior demand, counsel for FTA referred to ***Shepard v Emmerich 2015 (3) SA 309 (GJ)***. In ***Shepard***, an agreement provided for the chosen domicilium of the defendant at his attorney's address, "Routledge Modise Moss Morris, 2 Pybus Road, Sandton (Marked for D Janks 2nd Floor). The sheriff had served the summons by affixing same to the principal door of

this address, but not on the second floor of the building, and not on Mr Janks. By the date service took place, the attorneys had relocated offices. At par 4 of ***Shepard***, the Court approved of the principle that *"where a specific method of effecting service is contractually agreed, that method should be strictly complied with"*. The rescission of the default judgment granted in favour of the plaintiff was held to have been rightly ordered, owing to improper service.

25. The Shepard ratio is distinguishable from the facts in casu because the summons in casu was served on FTA's chosen domicile and was indeed received, since FTA entered an appearance to defend. There was no suggestion of improper service in the opposing affidavit.

26. Regarding the need to address a prior seven day demand as a precursor to the summons, I do not consider the terms of clause 12 peremptory. Service of such notice is stated as being "without prejudice to any other rights ... in law". Arguably, the summons in casu served as the demand, and more than seven days have elapsed since service.

27. I will proceed to address ad seriatim the technical point on the validity of the affidavits supporting summary judgment, and the legal point that the deductions in clause 3.3.1 to 3.3.3 were not fulfilled.

28. I respectfully disagree with the judgment in ***Absa Bank Ltd v Botha NO & Others 2013 (5) SA 563 (GNP)***. In practice, the "he/she" reference in the oath section of affidavits is a frequent occurrence, as is an incorrect reference to gender. These are innocuous and inadvertent errors in the main. I am of the respectful view that judicial notice may be taken of this established fact, and that one should subordinate form to substance. It is plain from the body of Evy's affidavit that she is female and from the body of Pedro's affidavit that he is male. The affidavits in casu substantially complied with the formalities prescribed by the Justice of the Peace and Commissioner of Oaths Act 16 of 1963.

29. Concerning the purported non-fulfilment of clauses 3.3.1 to 3.3.3, the following is pertinent. If clause 3.3.1 is void owing to the omission of the schedule, then it is severable from the rest of the agreement and clause 14 provides for such divisibility. Moreover, no mention is made in FTA's opposing

affidavit about the deductions. The issue is not only one of law but of fact. Factually, FTA should have stated whether the deductions had been made and how they had been calculated. It was obliged to do so in terms of clause 3.3.5, 4, and 6, so as to prepare an adjustment account. It inexplicably failed to do so. Significantly, the only comment FTA has to make on the claim is that payment of the full balance is premature. This is the sum total of its defence on the subject.

30. Rule 32(3)(b) of the Uniform Rules obliges a respondent in summary judgment proceedings to adduce a bona fide defence to the action by way of an affidavit which discloses "fully the nature and grounds of the defence and the material facts relied upon therefor".

At page B1-223 of Erasmus, Superior Court Practice, the author states:

"If, however, the defence is averred in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy, that will constitude material for the court to consider in relation to the requirement of bona fides."

This much was stated in the case of ***Breitenbach v Fiat SA (Edms) Bpk 1976 (2) SA 226 (T)***. At p228 the Court held as follows:

"It must be accepted that the subrule was not intended to demand the impossible. It cannot, therefore, be given its literal meaning when it requires the defendant to satisfy the Court of the bona fides of his defence. It will suffice.....if the defendant swears to a defence, valid in law, in a manner which is not inherently and seriously unconvincing."

31. I fully subscribe to the sentiments expressed in the case of ***Majola v Nitro Securitisation 2012 (1) SA 226 SCA***. I quote from paragraph 25F et sequitur, at p232:

"The purpose of summary judgment is to "enable a plaintiff with a clear case to obtain swift enforcement of a claim against a defendant who has no real defence to that claim. It is a procedure that is intended "to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights." If a court hearing an application for summary judgment is satisfied that a defendant has no bona fide defence to a plaintiff's claim and grants summary judgment as a consequence, it should be slow thereafter to grant leave to appeal, lest it undermine the very purpose of the procedure."

32. I am satisfied on a conspectus of the relevant facts, and the law, that FTA failed to prove a convincing bona fide, genuine defence to a portion of the claim against it. The summons for the full balance of R560 000,00 was plainly precipitate. What was owing at the date of service of same was R280 000,00. Based on the aforegoing grounds, the plaintiffs are justified in securing summary judgment for this amount, plus *mora* interest, and costs, owing to substantial success. Leave to defend regarding the balance of the claim is required to be granted.

33. The following order is made:

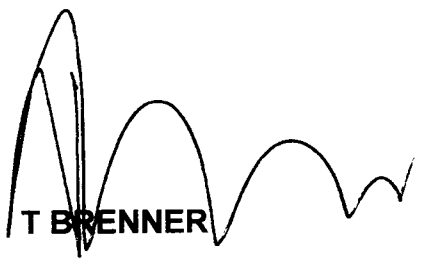
33.1 summary judgment is granted in favour of the plaintiffs against the defendant for:

(i) payment of the sum of R280 000,00;

(ii) interest thereon at the rate of 9% per annum from date of service of summons to date of payment;

(iii) costs of the application for summary judgment;

33.2 leave to defend is granted to the defendant in respect of the balance of the claim raised in the plaintiff's particulars of claim.



T BRENNER

ACTING JUDGE OF THE HIGH COURT

Counsel for Applicants:	Adv. K. Fitzroy
Instructed by:	Muthray and Associates Inc.
Counsel Respondent:	Adv L Kellermann
Instructed by:	Hattingh & Ndzabandzaba Attorneys
Date of Judgment:	3 November 2016