IN THE HIGH COURT OF SOUTH-AFRICA

GAUTENG LOCAL DIVISION, PRETORIA

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

DATE 7.11.2022 SIGNATURE

CASE NO: 10135/2021

IN THE MATTER BETWEEN:

ECO AFRICA INVESTMENTS (PTY) LTD T/A SNAPPY CHEF (WC) E BOTSWANA — APPLICANT

AND

SNAPPY CHEF TRADING (PTY) LTD — RESPONDENT

JUDGMENT

Strijdom AJ

INTRODUCTION

1. In this matter the Applicant sought the following relief:

1.1. Declaring the purported cancellation by the Respondent of the Franchise Agreement to be unlawful and of no force and affect as the right to cancel has not accrued to the Respondent;

1.2. Declaring that the Applicant's respective franchise agreement remains extant;

1.3. Ordering Respondent to comply with the terms of the Franchise Agreement and to ensure performance in terms of the agreement, more specifically the supplying of stock;

1.4. Ordering Respondent to make available for inspections the independent marketing fund bank statements and its audited financial statements for the periods between 2016 until 2021 within a period of 30 days (Thirty days) from date of the order;

1.5. Declaring Respondent's purported cancellation to be a repudiation;

1.6. Declaring clause 26 ("the restrain provision") in the agreement to be *contra bonos mores*, of no force and affect, to be struck from the agreement;

1.7. Alternatively declaring the agreement to be cancelled with an alternative for damages.

BACKGROUND FACTS

2. On or about the 21st of June 2012 the Applicant and Respondent entered into a Franchise Agreement, which comprised of the Franchise Agreement and its operational manual ("the Franchise of Western Cape and the territories of Western Cape and Botswana ("the Territories").

3. The Franchise Agreement was renewed for a further 5 (five) years as from the 21st of June 2017, which agreement will come to an end on the 20th of June 2022.

4. The agreement would be for a period of 5 (five) years which thereafter will be renewed by election of the parties by extending the current agreement. The renewal of the Franchise Agreement would be conditional on Applicant's compliance with the terms and conditions of the Agreement, which include that the minimum performance standards are met as set out by Respondent and listed, as outlined in clause 3.3.3 until 3.4 of the agreement.

THE CANCELLATION OF THE FRANCHISE AGREEMENT

5. The Applicant's contentions as to why the Respondent was not entitled to cancel the agreement relates to three issues:

    5.1. A failure to implement proper and reasonable minimum performance standards by the Respondent
    5.2. Alleged stock shortages caused by the Respondent and,
    5.3. A 'change' in the ordering system and the centralization of national retailers

6. Clause 29 of the agreement provides as follows:

    "The Parties shall prior to the Commencement Date and at the end of every 6 (six) months thereafter in consultation agree on reasonable minimum performance standards for the next (six) months, failing which these will be determined by the Franchisor, giving due and

reasonable consideration to all relevant factors including the performance of other franchises or Snappy Chef Outlets in the Franchise System. The standards in effect at the Commencement Data are reflected in Annexure "1" (the Minimum Performance Standard). [1]

7. Clause 12.36 of the agreement provides as follows:

   "The Franchisee shall comply with the stock management levels, policies and procedures, as set out in the Operations Manuel and shall ensure that at all times it has a stockholding of not less than 3-4 (three to four) weeks and that 80% (eighty percent) of the total range of products is available for purchase, unless there is a national shortage or supply problem."

8. In the 6 November 2020 email referred to above, the Applicant was informed once again that it failed to carry the requisite 4 to 6 weeks stockholding required by clause 12.36, based on forecast turnover as was the case in the past. The Applicant's stock was below the required stockholding of approximately R500 000.00 at that point in time[2].

9. The performance standards concerned was set by the Respondent in accordance with clause 29.

10. Attached to the 6 November email was the stock valuation report which indicated the stockholding of the Applicant[3]. As reflected on this stock valuation report, the Applicant only had a stockholding of R80 354.86. The decline in the stockholding of the Applicant and its concomitant breach of clause 12.36 of the agreement is further evidence by the average stock keeping summary attached to the answering affidavit. [4]

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[1] Caselines: p001-105
[2] Caselines: p009-163
[3] Caselines: Annexure AA25, p009-164 to 165
[4] Caselines: p009-249

11. The performance standards that applied to the Applicant since 2012 in relation to the minimum stockholding requirements had been set by the Respondent at the commencement of each relevant interval as a projection of the Applicant's previous years turnover with a CP 1 increase thereon, which performance standards were discussed at regular interval with the Applicant[5].

12. Prior to the institution of the current litigation and for the past 10 years, the Applicant never requested or sought a formal consultation on the CP 1 increase performance standards set by the Respondent for the preceding 10 years since 2012[6]. Clause 29 of the agreement leaves the obligation on the Respondent to set performance standards where no consultation is held.

13. It was submitted by the Applicant that the right to cancel the agreement has not accrued to the Respondent since Applicant has complied with the agreement.

14. It was further submitted that the right to cancel the agreement never accrued as clause 12.36 should never have been invoked due to stock supply problems and that Respondent has failed to prove that Applicant carried insufficient stock.

15. Applicant stated that it carried sufficient stock for 3-4 weeks which range consisted of 80% across the board as stipulated by the agreement and that the unavailability of stock by Respondent cannot cause Applicant to be penalized[7]. Applicant stated that it was in constant communication with the Respondent re: Stock problems.

16. It was argued by the Applicant that the Respondent by its unilateral changes and amendments to the procedures and agreement and its changing of the business model as is evident from the directives deviated from the nature of the franchise agreement which is a repudiation in its own right. This is contrary to the terms of the non-variation clause contained in clause 34.2.

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[5] Caselines: p009-14 para 16.9 Answering affidavit
[6] Caselines: Answering affidavit, p009-19 para 17.21
[7] Caselines: p001-15 para 19

17. In its cancellation notice, the Applicant was advised that it had failed to comply with its obligations to take all necessary steps to sell the franchise business as demanded in paragraph 13 of the 10 November 2020 email and again in the 11 December 2020 email. It was further drawn to the Applicant's attention that notwithstanding the Respondent affording the Applicant a reasonable period of more than 60 days to advise the Respondent of the steps that it would take to rectify the breaches and / or sell the franchise business the Applicant failed to comply[8].

18. It was submitted by the Applicant that if it is found to have been in breach of the agreement, such breach was due to the Respondent's stock supply issues and or as a result of directives issued by the Respondent unilaterally and / or 'changes' to the ordering system.

19. The Applicant on the contrary stated that it was '...able to supply all my customers with adequate stock since I ensure that I hold 3-4 weeks of stockholding and further insured that I could supply at least 80% of the total product range[9].

20. It was stated by the Respondent that the franchise systems are designed for an organised advance ordering system on a bulk basis rather than a per item ordering system. This is why clause 12.36 requires a 3-to-4-week stockholding by the franchisees. [10]

21. The Applicant was fully aware that certain products require advanced special notification as the products are manufactured in China and may require a 20-day manufacturing period together with a 20 to 25 day in transit period before it arrives at Durban Harbour and could only thereafter be delivered[11].

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[8] Caselines: p 001-168 para 4
[9] Caselines: Founding affidavit p001-14 para 18
[10] Answering affidavit: Caselines p009-14-009-15
[11] Answering affidavit, Caselines: p009-10 para 15.8

22. Despite the Applicants' purported reliance on stock shortages, the Respondent was nevertheless able to maintain stock level at 90% to 95% of available stock items.

23. As a result of the short notice ordering practices unilaterally implemented by the Applicant, the Respondent on 4 December was necessitated to issue a revised order and shipping trade directive. [12]

24. From the 2016/2017 financial year until the end of the 2019/2020 financial year the Applicant's franchise declined in performance by 39%, whilst during the same period, the Respondent's business grew by 37%.

25. The directives issued by the Respondent were issued to improve operational challenges and ongoing requirements of the franchise business, as the business grew[13].

26. In my view the issuing and implementation of directives do not constitute amendments to the agreement.

27. The agreement expressly provides for the issuing of directives in clauses 12.33 and 12.38.

28. A further issue raised by the Applicant is the 'change' in the ordering system and the centralization of the national retailers.

29. The Respondent denies the Applicant's version and sets out in detail the developments in the ordering system, specifically the online ordering platform, together with the reasons for the centralization with national retailers. [14] The Applicant does not dispute the benefits to it occasioned by the online platform.

30. The Applicant further alleges that the conduct of the Respondent amounted to repudiation[15].

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[12] Caselines: Annexure AA72, o009-427
[13] Answering affidavit: Caselines: p009-16 to 17
[14] Answering affidavit, Caselines: p006-26
[15] Founding affidavit, Caselines: p001-23

31. After the institution if this application the Applicant addressed a letter dated 6 April 2021 to 'directors, retailers and respective buyers' in which it states the following[16]:

"As you are aware Eco Africa Investments (Pty) Ltd T/A Snappy Chef Western Cape ceased trading as a Snappy Chef Franchise since 14th February 2021. The Company and the Franchisor are currently in a hand-over phase, and I appreciate your assistance and patience in the process…I would appreciate if you would be so kind as to arrange for the display units to be removed from your displays areas for my team to collect same without any disruption. "

32. The Applicant reached out to the Respondent's major supplier of induction stoves on 25 September 2020 and sought to procure its own products through the Respondent's supplier[17].

33. It is trite that if the Plaintiff with knowledge of the breach does an unequivocal act which implies that he has made his election one way, he will be held to have made his election that way. [18]

34. From the evidence before me it is clear that the Applicant accepts the cancellation of the agreement. The Applicant by its expressed conduct has waved reliance on a continued existence of a contractual relationship.

RESTRAINT OF TRADE

35. The Applicant contends that the restraint provision in clause 26 of the Franchise Agreement is entirely against public policy and fails to protect the interest of the Applicant for the following reasons, as Applicant:

35.1. purchased the territory ("Western Cape"), from the Respondent as he resides and conducts most of his business dealings within the aforesaid jurisdiction;

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[16] Caselines: Annexure AA90, 009-541
[17] Caselines: Answering affidavit: p009-41
[18] Vide: Peters V Schoeman [2001] ALL SA 155, 2001 (1) SA 872

35.2. has operated the current franchise business within this territory for the last 10 years;

35.3. is a 49-year-old white male with industry specific knowledge. The chances of Applicant obtaining reemployment or starting a different business in a totally different field would be near impossible and even, if the possible would take years before it provided Applicant with the same footing as the current business and or industry Applicant currently finds himself in;

35.4. is in a different area to Respondent whose main area of trade has been Gauteng as that company is registered there;

35.5. is no longer trading as a franchise and has removed any and all association with Snappy Chef and is currently trying his best to earn an income while ensuring compliance of the restraint to the best of his abilities which has curtailed his earning drastically.

36. In Magna Alloys and Research (SA) Ltd V Ellis [19] the Appellate Division (as it then was) held that agreements in restraint of trade were prima facie valid and enforceable unless the party seeking to avoid its obligations in terms of the agreement could show (and carries the onus) that the restraint was unreasonable and therefore against the interest of the pubic under the circumstances.

37. The reasonableness of a restraint clause is determined at the time enforcement is sought and only after a consideration by a court on the basis of factors which might not necessarily have been present to the minds of the parties when they entered into the agreement.

38. In this matter the Respondent has not sought to enforce the restraint and is also not presently seeking to enforce it.

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[19] Vide: 1984 (4) SA 873 (A)

THE CONSUMER PROTECTION ACT (ACT 68 OF 2008)

39. It was submitted by the Applicant that the conduct of the Respondent was unfair and contrary to the C.P.A. This issue was never raised in the affidavits by the Applicant.

40. It is trite that in motion proceedings a party must make its case in its papers[20].

41. The Applicant is not entitled to reply on the CPA defence as it was not pleaded in the affidavits and the Respondent was not called upon to answer any case based on the CPA.

MARKETING FUND BANK STATEMENTS

42. It was argued that the Applicant has not received accurate proof of the existence of the marketing fund or verification that the fund has been operated independently to the Respondent's bank account as stipulated in clause 8 of the Franchise Agreement to which Applicant is entitled.

43. Clause 8.3.2 deals with two distinct circumstances, one where an audit has taken place, and the other where no audit has taken place.

44. The documentation provided by the Respondent, including the handwritten certification by the accounting officer would not be issued pursuant to the 'audit' – provisions of clause 8.3.2 as no audit was conducted but in terms of the 'unaudited' provisions of clause 8.3.2.

45. The Applicant on 11 January 2021 was provided with the financial statements and management accounts sent to the director which documents contained the written certifications of the accounting officer.

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[20] Fischer and Another V Ramahlele and Others 2014 (4) SA 614 (SCA) at 620

CONCLUSION

46. Having regard to the evidence in this matter and the submissions made by the parties I concluded that;

46.1. The Applicant was in breach of clause 12.36 of the agreement read with clause 29 and that the Respondent was entitled to cancel the agreement;

46.2. The Applicant by its expressed conduct accepts the cancellation of the agreement;

46.3. The reasonableness of a restraint clause is determined at the time enforcement is sought. In this matter the Respondent has not to enforce the restrain. The factors to be considered by the court in the assessment of the reasonability of the restraint has therefore not yet arisen;

46.4. No case was made out for damages as part of the Applicant's prayer 7 of the Notice of Motion.

47. In the result:

47.1. The Application is dismissed with costs, including the costs consequent upon the employment of two counsel.

STRIJDOM JJ
ACTING JUDGE OF
THE HIGH COURT
OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Heard on: 19.08.2022
Judgement on: 7.11.2022.

APPEARANCE

For the Applicant:	Adv M Garces
Instructed by:	V W3 H Attorneys

For the Respondent:	Adv S Wagener SC
Instructed by:	George Rautenbach Attorneys