In the KwaZulu-Natal High Court, Pietermaritzburg

Republic of South Africa

Case No : 1783/2011

In the matter between :

Hot Dog Café (Pty) Limited Applicant

and

Daksesh Rowen's Sizzling Dogs CC First Respondent

Rowade Rajah Second Respondent

Judgment

Lopes J.

[1] The applicant in this matter conducts business as a franchisor of 'Hot Dog Café'. It franchises businesses under this name and style. Those businesses consist of vending units and outlets selling hotdogs and ancillary items. The first respondent is one of its franchisees, and the second respondent is its sole member who runs the franchise.

[2] It is common cause that on the 18th January 2010 a franchise agreement was concluded between the applicant and the respondents. Pursuant to that

agreement the respondents have conducted the franchise business from Shop No. 36, Liberty Midlands Mall, 5 Sanctuary Road, Pietermaritzburg.

[3] Pursuant to a dispute between the parties the applicant has purported to cancel the franchise agreement and seeks an order directing the respondents forthwith to cease trading as a Hot Dog Café franchise, return to the applicant the signage containing the applicant's trademarks and trade names, and compelling the first respondent to sell those items of a tangible nature which were used in the first respondent's business to the applicant in terms of the provisions of the franchise agreement. The applicant also seeks an order compelling the respondents to comply with the restraint of trade clause contained in the franchise agreement.

[4] The breach of the franchise agreement relied upon by the applicant is that the first respondent failed to pay, in terms of clause 12.3, in cash and without deduction or set off, a monthly advertising levy in respect of each trading period of one calendar month, which levy would be equal to four percent of the gross revenue of the first respondent in that month plus VAT.

[5] It is common cause that the first respondent did not pay over the advertising levy for the month of November 2010 to the applicant. It allegedly paid the monies to its attorneys, to be held by them pending the outcome of the resolution of a dispute which it claims to have with the applicant regarding the

use to which advertising levies have been, and are to be, put.

[6] In argument before me the following two defences were raised on behalf of the respondents :-

(a) the applicant failed to specify in its letters of demand the exact amount due for the advertising levy; and

(b) the defence of *exceptio non adimpleti contractus* – i.e. that the applicant could not rely on the respondents non-payment of the advertising levy because the applicant was in breach of its reciprocal obligation to provide advertising in terms of the franchise agreement.

[7] It was submitted in argument on behalf of the respondents that because the letters of demand did not set out the exact amount of the advertising levy which the respondents should have paid in November 2010, they were not placed in mora. I disagree. The amount of the advertising levy, being four percent of the gross revenue of the first respondent for the month of November (plus VAT) was something solely within the knowledge of the respondents. In those circumstances any complaint that the applicant should have stated in its letters of demand the exact amount, is without substance.

[8] With regard to the second defence, I was referred to Thompson v Scholtz 1999 (1) SA 232 (SCA) which lays down that the *exceptio* is available as a defence to a party from whom performance is demanded by the other contracting

party whose reciprocal performance has not been rendered precisely or in full. The facts in that case involved a claim for occupational interest pursuant to the sale of a farm. A deduction was allowed against the full occupational rental payable because the seller failed to vacate the farmhouse on the farm prior to the registration of transfer into the name of the purchaser.

[9] There seems little doubt that the obligations of the applicant and the respondents in this regard are reciprocal. The payment of the advertising levy is, in terms of clause 14.1 of the agreement to be applied as follows :-
'The monthly advertising levy payable by the Franchisee to the Franchisor will be used by the Franchisor to defray the expenses to be incurred by it for the purpose of national or regional advertising, marketing, promotional and related activities as the Franchisor shall deem reasonable and necessary from time to time to develop general public recognition of the Trade Marks, Trade Names, as well as the franchise business concept contemplated in this Agreement.'

[10] The remainder of clause 14 prohibits the respondents from carrying on any advertising or the display of promotional items without the prior written approval of the applicant.

[11] It is clear that the respondents were unhappy with the way in which the advertising levy was being expended by the applicant. In this regard they addressed certain correspondence to the applicant. The applicant's attorneys in

correspondence recorded that on the 2nd December 2010 the applicant provided the respondents with details of how the advertising levy was being utilised. That however is not the end of the matter. Clause 12 of the franchise agreement provided :-

'12.3 In addition, the Franchisee shall pay to the Franchisor, in cash and without deduction or set-off, a monthly advertising levy in respect of each trading period of one calendar month (being the period from the first day to the last day of a month), which fee shall be equal to 4% (four percent) of the Gross Revenue of the Franchisee in that month, plus VAT.

12.4 The fees and levies referred to in clauses 12.2 and 12.3 shall be paid by the Franchisee on or before the 7th day of the month following the month in respect of which they are due.

12.5 Notwithstanding the above, it is recorded and agreed by the parties that all payments due are payable in cash, without deduction or set-off of any kind whatsoever.'

[12] Given the clear wording of clauses 12.3 – 12.5 of the agreement, the first respondent was not entitled to withhold payment of the monthly advertising levy for the reason given. If the respondents were unhappy with the way in which the advertising levy was applied by the applicant, the proper course of conduct was to address those concerns in writing and, if they were not satisfied, to bring an application to compel the applicant to comply with the provisions of the

agreement relating to the application of the advertising levy. In any event, the respondents' complaint appears to have been that the respondents wanted to be provided with a breakdown of how those funds were spent. This was because they suspected that the funds paid over were being used for purposes other than advertising. The fact that the applicant may have applied the advertising levy in a way which displeased the respondents, in no way entitled the respondents to desist from complying with their obligation to pay the advertising levy. The first respondent's failure to comply with payment of the advertising levy is a breach of the franchise agreement entitling the applicant to cancel it.

[13] In this regard I refer to the matter of Altech Data (Pty) Ltd v M B Technologies (Pty) Ltd 1998 (3) SA 748 (W) at 761B – 763B. The agreement between the parties clearly precludes the respondents from withholding payment of the advertising levy. That does not mean that the respondents are in any way precluded from pursuing any complaints they may have with regard to the use to which the advertising levy monies are being allocated by the applicant. I am accordingly of the view that these two defences raised have no merit.

[14] Clause 19.1 of the franchise agreement states :-

'Should the Franchisee or the Individuals :

…

19.1.2 commit any other breach of this Agreement or fail to pay any amount due to the Franchisor as provided for in this Agreement and

fail to remedy such breach within 7 (seven) days after written notice to do so from the Franchisor; or

…

then the provisions of 19.2 shall apply.

19.2 In the event of any breach of the aforesaid, the Franchisor may, without prejudice to any other rights or remedies available to it :

19.2.1 forthwith cancel this Agreement and claim all its damages;

…'

[15] It was accordingly incumbent upon the applicant to deliver a notice to the first respondent requiring it to remedy its breach within seven days after delivery of the written notice. One Liza Pietersen addressed an email to the respondents dated the 15th December 2010, drawing their attention to the fact that the advertising levy for November of 2010 had not been paid. The relevant provisions of the franchise agreement were set out in full. The respondents deny having received that email. They do so by simply denying the allegations in the paragraph of the founding affidavit alleging the sending of the email. No reasons are given.

[16] That email concluded by recording that a registered letter of demand would be posted to the domicilium citandi et executandi of the respondents, and requiring the first respondent to remedy the breach within seven days, failing which the applicant would start proceedings to cancel the franchise agreement

and claim damages.

[17] On the 20th December 2010, the applicant's attorneys addressed an email to the respondents' attorneys recording, inter alia, that on the 15th December 2010 the applicant had sent to the respondents, by registered post and email, a letter of demand, giving them seven days from the date thereof within which to remedy the breach of their failure to pay the November 2010 advertising levy. The respondents denied receiving this letter of demand. They do so by denying the allegations in the relevant paragraph, and by stating that :-

(a) their attorneys' offices closed on the 15th December 2010; and

(b) denying that the letter dated the 20th December 2010 was received by them on the 20th December 2010.

[18] On the 13th January 2011, the applicant's attorneys addressed a further letter to the respondents' attorneys, recording the respondents' failure to remedy the breach recorded in the letter of the 20th December 2010 and other letters of demand, and cancelling the franchise agreement with immediate effect. The letter then calls on the respondents, inter alia, to cease trading as a Hot Dog Café. Once again the respondents deny the allegations regarding the sending of this letter, recording only that the relevant paragraph is denied 'in its entirety'.

[19] The respondents' attorneys, however, replied to that letter on the 14th January 2011. They referred to the previous concerns which the respondents

had raised in their letter of the 15th December 2010. They recorded that the threat to cancel the agreement was 'most unreasonable' and concluded by refusing to give the applicant an undertaking to cease trading.

[20] On the 17th January 2011 the applicant's attorneys then sent an email to the respondents' attorneys recording that the second respondent had told the applicant that they had never received a copy of the applicant's attorneys' letter of the 20th December 2010. On the 18th January 2011 the respondents' attorneys replied stating that they were 'now in receipt of your email dated 20th December 2010'. Certain without prejudice suggestions were then made, which I have not in any way considered for the purpose of this application.

[21] The attitude of the applicant's attorneys was thereafter that the applicant had lawfully cancelled the franchise agreement (in terms of the letter dated the 13th January 2011). It is important to note that in the email of the 15th December 2010 the applicant's Liza Pietersen recorded that the registered letter of demand would be posted off to the respondents' domicilium citandi et executandi, requiring the first respondent to remedy the breach. Clause 24 of the franchise agreement refers to 'ADDRESSES AND NOTICES' and records at sub-paragraph 24.2 that :-

'Any notice to be given in terms of this Agreement may be :

24.2.1 delivered by hand, in which event it will be deemed to have been received on the date of delivery; or

24.2.2 sent by prepaid registered post, in which event, unless the contrary is proved, it shall have deemed to have been received 5 (five) business days after it has been posted;

24.3 For all purposes under this Agreement and in particular under this clause, the Parties hereby choose as their domicilium citandi et executandi the following physical addresses :

…

24.3.2 Franchisee and the Individuals :At the physical address of the Franchisee's Premises as set out in Annexure "A" hereto.'

24.4 The parties further choose the following addresses for the delivery of notices in terms of this Agreement :

24.4.1 by hand – the respective domicilium address specified above;

24.4.2 by post;

…

24.4.2.2 Franchisee and Individuals : at the postal address as set out in annexure "A" hereto.

[22] Annexure "A" to the franchise agreement records :-

'…

2. Physical Address of Franchisee's business

[left blank]

3. Postal address

T/A Hot dog Café

c/o Postnet Suite 540

Private Bag X9118

Pietermaritzburg

3201

8. Premises

The Hot Dog Café at Liberty Midlands Mall.'

[23] The agreement accordingly states that notices could be delivered to the respondents' physical address in Annexure "A" (which was left blank) or by hand at the respondents' domicilium address in Annexure "A" (which was the physical address left blank, although under the heading 'Premises' the physical address of the business is set out) or by post. The postal address of the respondents is set out in Annexure "A" at clause 3, and a different postal address is recorded under the heading 'Residential and Postal Address' below the second respondent's signature as '3 Railton Crescent, Bellevue, Pietermaritzburg, 3201.'

[24] The email of the 15th December 2010 addressed by Liza Pietersen to the respondents records that the registered letter of demand would be posted off to the respondents' domicilium citandi et executandi. The applicant however did not put up any proof of the actual posting of the letter of demand foreshadowed in the email of the 15th December 2010, nor did it indicate how, or to which address the letter of demand was to be sent.

[25] In its opposing affidavit the respondents denied that the Liberty Midlands Mall address of its premises was its chosen domicilium citandi et executandi, and averred that the correct domicilium citandi et executandi of the respondents was at 3 Railton Crescent, Bellevue, Pietermaritzburg.

[26] The question then is whether I should be satisfied that the applicant properly placed the respondents in mora for their breach of contract in not paying the November advertising levy and properly cancelled the contract.

[27] Significant aspects of the respondents' opposing affidavit in this regard are :-

(a) that the respondents deny that there has been any lawful cancellation of the agreement;

(b) the respondents rely for that statement on the fact that the first respondent had paid the November 2010 advertising levy into their attorneys' trust account where the money remained;

(c) somewhat disingenuously the respondents deny having received the applicant's email of the 20th December 2010. The basis for that is :-

(i) the offices of their attorney closed on the 15th December 2010;

(ii) the letter dated 20th December 2010 was not received 'on the 20/12/2010'. The respondents' opposing affidavit does not in any way state when the respondents' attorneys re-opened, or when the respondents received the email of the 20th December 2010;

(d) the respondents in their opposing affidavit denied paragraph 18 of the applicant's founding affidavit which alleges the sending of the letter of the 13th January 2011. It is clear from the letter addressed by the respondents' own attorney on the 14th January 2011 that the applicant's letter of the 13th January 2011 was not only received, but appreciated and dealt with, by the respondents' attorneys.

[28] Given the tenor of the responses raised by the respondents and the contents of their affidavit, and considering the contents of the emails and letters exchanged by the parties and their representatives, I find on a balance of probabilities that the respondents were well aware of the fact that the applicant regarded the short payment of the November 2010 advertising levy as a breach of the franchise agreement, and required that the respondents remedy that breach within seven days. It was their considered stance that they would not pay that amount to the applicant, and instead paid it to their attorneys. That remains their stance, and constitutes a deliberate and continuing repudiation of the agreement.

[29] In those circumstances the applicant has properly cancelled the franchise agreement between the parties. The vague and ambiguous denials in the respondents' answering affidavit places the respondents' defences in the category of those which do not raise real, genuine or bona fide disputes of fact as envisaged in Plascon-Evans Paints Ltd v van Riebeeck Paints (Pty) Ltd 1984(3)

SA 623 (A) at 634 H – I. I am accordingly of the view that the applicant has correctly cancelled the agreement in terms of the letter dated 13th January 2011.

[30] No argument was addressed to me at the hearing of the application, that in the event of my finding the agreement was properly cancelled, that the applicant is not entitled to the relief sought in its notice of motion. However, it would seem that the relief sought by the applicant in prayer 3.2 is so vague and onerous that I am not prepared to grant an order in those terms.

[31] I accordingly grant an order in terms of paragraphs 2, 3.1 and 4 of the notice of motion dated 17th February 2011 with the following amendments :-

a) in sub-paragraph 2.3 by the insertion of the words ‘to the applicant’ after the word ‘sell’ in the first line thereof;

b) in sub-paragraph 2.3, by the insertion of the words ‘as an expert’ between the words ‘valuer’ and ‘shall’ in the second last line thereof.

Date of hearing : 13th June 2011

Date of judgment :14th July 2011

Counsel for the applicant : E Bezuidenhout (instructed by D’Amico Incorporated)

Counsel for the respondent : V Moodley (instructed by Serge Brimiah &

Associates)