IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 25682/11

In the matter between:

WOOLWORTHS (PTY) LTD **Applicant**

and

DULA INVESTMENTS (PTY) LTD **1st Respondent**

HARESH OUDERAJH **2nd Respondent**

JUDGMENT : 8 NOVEMBER 2012

TRAVERSO, DJP

[1] In this matter the papers were voluminous, but in the end the Court was called upon to decide only a very narrow point.

[2] The first respondent, of which the second respondent is the sole shareholder and director, operates three Woolworths franchised stores in KwaZulu-Natal pursuant to franchise agreements with the applicant. Two of those stores are in Ballito, and the other is in Stanger. The franchised store to which this application relates is located at Shop 43, Lifestyle Centre, Ballito ("*the Lifestyle store*"). The other Ballito-based store is situated at Ballito Bay Mall, about one kilometre away ("*the Ballito Mall store*").

[3] The dispute which has given rise to this application relates to whether the first respondent is entitled to extend the franchise agreement for the Lifestyle store ("*the Lifestyle*

franchise agreement") for a further five years after the end of the ten year period provided for in clause 7.1 of the agreement. As the Lifestyle franchise agreement commenced on 10 December 2003, the question is thus whether the first respondent is entitled to extend the agreement for a further five years from 10 December 2013, or whether the Lifestyle franchise agreement will instead come to an end on 9 December 2013.

[4] This issue is governed by clause 7.2 of the Lifestyle franchise agreement, which reads in relevant part as follows:

> ***"The Franchisee shall have the right to extend this Agreement for a period of 5 (five) years reckoned from the effluxion of the period in clause 7.1.2 ('the initial period'), provided that the Franchisee shall:***
>
> ***7.2.1*** ***have given Woolworths written notice of its intention to extend this Agreement by not later than 12 (twelve) months prior to the effluxion of the Initial Period; and***
>
> ***7.2.1*** ***not have committed any breach of any of the provisions of this agreement at any time during the initial period (regardless of whether or not Woolworths shall have given the Franchisee notice to remedy such breach, whether under clause 28 or otherwise)."***

[5] In considering this question it is important to bear in mind that this clause deals with a right to extend the franchise agreement, and not with the question of cancellation which is dealt with in clause 28 of the agreement.

[6] The applicant alleges that the first respondent has committed several breaches of the Lifestyle franchise agreement, both financial and non-financial, which breaches the applicant alleges had an impact on its goodwill and reputation. Examples of the financial breaches include failure to pay rental timeously, making late payments of amounts due for clothing and home, late payments for food stock and a failure to submit turnover certificates timeously for onward conveyance to the landlord. Of the non-financial breaches alleged to have been committed by the respondents, one of the most significant breaches is the failure by the respondents to keep the store at the Lifestyle Centre premises adequately stocked and by directly or indirectly diverting business from the

applicant in the Lifestyle Centre to the store at the Ballito Bay Mall.

[7] In the circumstances the applicant seeks an order declaring that the first respondent does not have the right to renew the Lifestyle franchise agreement after the effluxion of the 10 year period provided for in clause 7.1.2. In addition the applicant applies for an order directing the first respondent to cease operating the franchise business at the Lifestyle store from at least the expiry of the 10 year period.

[8] The respondents contend that this application is brought with the purpose of adversely affecting the first respondent's trade at the Ballito Mall store, and basically blame all the ills of the Ballito Mall store on the applicant. The respondents further contend that the relief claimed in this application constitutes a repudiation of the agreement and therefore dispute that the applicant is entitled to bring this application. They also contend

that the applicant waived reliance on any breach committed prior to October 2010.

[9] The respondents had also brought a counter-application against the applicant. However, at the hearing of the matter Mr. Burger, who appeared for the respondents, indicated that the respondents would not be persisting with their counter-application, and confined his argument to the correct interpretation of clause 7.2 of the franchise agreement. In this respect, it was contended that the applicant had adopted an overly literal construction of such clause in that in the view of the applicant, any breach, no matter how slight, would be sufficient for it to be invoked. It was argued that such a construction rendered the clause unworkable and illusory in the real world, and that it had to be avoided.

[10] Many other defences were raised by the respondents in the papers. I do not intend dealing with them. I will confine

myself to matters raised during argument. In certain cases they rely on an extension of the due date for payment. This does not assist the respondents as the applicant is not seeking the cancellation of the franchise agreement. It is merely attempting to prevent a renewal thereof.

[11] The respondents chose not to challenge any of the breach allegations made in respect of the period preceding October 2010 – rather they state that those breaches are irrelevant. It is the view of the respondents that the conclusion of the franchise agreement in respect of the Ballito store resulted in all breaches prior to that date being extinguished, the argument being that the applicant, by allowing the Ballito Mall store to be opened, conveyed to the first respondent in October 2010 that its conduct was satisfactory.

[12] In my opinion such an argument is unsound. It is the applicant's contention that it was indeed only after the

respondents had been given the Ballito Bay franchise that the first respondent started breaching the Lifestyle agreement in the manner set out above. However, it was not in October 2010 that the decision to grant the further franchise to the first respondent was made, but rather in September 2009, when the memorandum of agreement (attached to Ms Rylands' affidavit) was signed. As it stands, the breach allegations prior to 21 October 2010 remain uncontested.

[13] The allegations of financial breaches, in respect of the period after October 2010, were met with bald and unsubstantiated denials. On the papers I am satisfied that the applicant has shown that the first respondent was in arrears in vast amounts. This situation persisted over a protracted period. In particular the correspondence attached to the papers show that by and large the first and/or second respondent did not deny their indebtedness. In fact several attempts were made to reach a settlement in respect of the repayment of the outstanding amounts and to remedy other breaches such as

the failure to submit turnover certificates timeously. For example, on 14 May 2010 a written agreement was entered into between the parties containing the following recordals:

> ***"WHEREAS certain amounts are due and outstanding to Woolworths by the Franchisee arising from the Lifestyle Agreement both in respect of Stock and rental; and***
>
> ***WHEREAS certain financial statements and management accounts are required by Woolworths from the Franchisee arising from the Lifestyle Agreement; and***

I am furthermore satisfied on the papers that the applicant failed to timeously submit turnover certificates.

[14] Insofar as the non-financial breaches are concerned, when confronted with these breaches the second respondent, on behalf of the first respondent, initially acknowledged them, undertook to remedy the situation and sought the applicant's assistance to do so. Later the respondents denied these breaches. It is in my view that these allegations are beyond any *bona fide* dispute. Firstly, it is clear from the photographs

attached to the papers that the stocks of the Lifestyles store were depleted. There were, in addition, numerous customer complaints. These allegations were not disputed.

[15] That then, briefly, is the factual background. It is my view that insofar as the respondents dispute the factual allegations of the numerous breaches of the Lifestyle franchise agreement, the defences raised and as set out above are frivolous.

[16] As stated earlier the entire matter was argued on the basis that the applicant pinned its colours to the mast by giving paragraph 7.2 a literal interpretation by contending that <u>any</u> breach, no matter how slight, would be sufficient for it to be invoked and a cancellation of the agreement to follow. But, in my view, the papers do not support this submission, and this was clearly not the interpretation given in clause 7.2.2 by the applicant.

[17] The applicant relied, in its founding affidavit, on numerous material breaches of both the franchise agreement and the lease agreement, breaches of both a pecuniary and non-pecuniary nature. The breaches were outlined by Mr. Fraser, the deponent to the founding affidavit, and Mr. Muller, who was at the time the applicant's Financial Debtors' Manager. They make it clear that the first respondent on numerous occasions failed to make payments when they were due, or, alternatively, failed to make payment of the full amount due. Mr. Muller set out these breaches in detail. The first respondent deals with these allegations by only reiterating that the conclusion of the franchise agreement in October 2010 in respect of the Ballito store resulted in all breaches prior to that date being extinguished. The respondents go as far as to say that reference to these prior breaches amounts to "*misrepresentation*" and "*deceit*" on the part of the applicant. This conduct, it was contended, was contrary to the principles of good faith and the notion of Ubuntu. These arguments were, not surprisingly, not persisted with at the hearing.

[18] That the applicant regarded the respondents' breaches as serious becomes apparent from the correspondence attached to the applicant's papers. It is therefore wrong to contend that the applicant adopted a literal approach in its interpretation of the said clause.

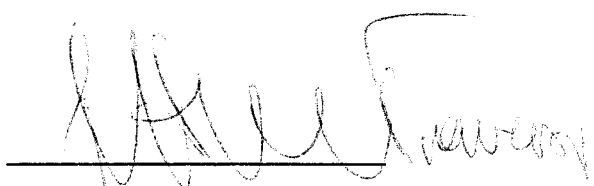
[19] To therefore submit, as Mr Burger did, that the right to the extension of the franchise agreement is illusory because it vests the applicant with a discretion to decide entirely in its own discretion whether to allow an extension or not, is untenable and not in accordance with the facts of this matter. The correspondence shows that there were several indulgences granted to the respondents in respect of material breaches. The clause under consideration must be interpreted in a manner to give it business efficacy and is clearly inserted by the applicant in order to avoid being saddled, after the expiry of the franchise agreement, with a franchisee whose performance of its obligations during the currency of the agreement has been unsatisfactory.

[20] In the circumstances I conclude that the applicant is entitled to the relief sought and make an order in the following terms:

20.1 It is declared that the first respondent does not have a right to renew the franchise agreement appended to the founding affidavit as "JS3" (the "*franchise agreement*") after the effluxion of the period referred to in clause 7.1.2 of the franchise agreement (i.e. 9 December 2013);

20.2 It is declared that the first respondent must cease operating the "*Franchised Business*" (as defined in the franchise agreement) at the "*Premises*" (as defined in the franchise agreement) at least upon the expiry of the period referred to in clause 7.1.2 of the franchise agreement (i.e. 9 December 2013);

20.3 It is ordered that the costs of this application be paid by the respondents, jointly and severally, including the costs of two Counsel, where so employed.



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