Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 13097/2018

Before: The Hon. Mr Justice Binns-Ward
Hearing: 5 June 2019
Judgment: 5 June 2019

In the matter between:

PRIMI WORLD (PTY) LTD Plaintiff / Respondent

and

DANIEL JASON SCHOLTZ First Defendant / Excipient

DANIEL JOHANNES JACOBUS SCHOLTZ Second Defendant / Excipient

JUDGMENT

BINNS-WARD J:

[1] This matter concerns an exception taken by the first and second defendants to the pleading of one of the claims advanced in the particulars of claim in the action instituted by the plaintiff against them as sureties for, and co-principal debtors with, Garden Route Culinary (Pty) Ltd ('GRC'). The claims, which are pleaded as two components of the total amount in which a judgment sounding in money is sought against the defendants, arise from GRC's obligations to the plaintiff in terms of, and pursuant to, a franchise agreement GRC had entered into, qua franchisee, with the plaintiff, qua franchisor. The essence of the

defendants' objection is that the particulars pleaded in support of the first component of the money claim are lacking in allegations necessary to sustain the claim.

[2] It is evident from the pleading that the franchise agreement, which had been concluded on 19 August 2011, had been entered into for a period of ten years. It obligated GRC during the currency of the franchise to pay the plaintiff a 'royalty and service fee' in the amount of 10% of the gross sales revenue of the enfranchised business. It is not necessary for present purposes to go into the somewhat complicated provisions, including the application of the consumer price index ('CPI'), regulating the finite calculation of the amounts due in terms of this provision of the agreement. It suffices to say that payment of them was due weekly.

[3] The plaintiff, as franchisor, also incurred certain obligations to GRC as the franchisee under the agreement. Various examples of these obligations are identified at paragraph 22 of the defendants' heads of argument in support of the exception. I shall mention but some of them. The plaintiff was obliged to make available to GRC 'the system and trademarks' identified in clauses 2.1 and 2.4 of the franchise agreement; it also had to furnish GRC's management with a training program for the operation of the enfranchised business and make available operating manuals and 'market and promote the image of [the franchise] in an endeavour to develop general public recognition of the Trademarks and increase patronage of [the enfranchised] businesses in general (including advertising, promotions, public relations and other marketing programs) …'.

[4] It follows that the nature of the franchise agreement was that of a bilateral contract, in which an exchange of performance by the principals was contemplated. After all, if the plaintiff failed to provide the use of the trademarks and the operating manuals, training and marketing support required of it in terms of the agreement, what possible commercial basis would there be for GRC's assumption of the royalty and service fee obligations of a franchisee? I think it is clear that the contract demonstrates a sufficient relationship between the relevant obligations to be performed by the franchisee and the performance due by the franchisor as to indicate that the former were undertaken in exchange for the latter.[1]

[5] Innes JA pointed out in *Hauman v Nortje* 1914 AD 293 at 300 that 'in the absence of special agreement to the contrary neither party can enforce [a bilateral contract] unless he has performed or is ready to perform his own contractual obligations'. The principle so stated

[1] Cf. *ESE Financial Services (Pty) Ltd v Cramer* 1973 (2) SA 805 (C) at 809 D-E.

gives rise to quite self-evident implications for the proper pleading of a claim by a party to such a contract for the enforcement of its rights thereunder against the counterparty. The axiom is illustrated in the following dictum of Corbett J in *ESE Financial Services (Pty) Ltd v Cramer* 1973 (2) SA 805 (C)[2] at 809F: 'Where a plaintiff sues to enforce performance of an obligation which is conditional upon performance by himself of a reciprocal obligation owed to the defendant, then the performance by him of this latter obligation (or, in cases where they are not consecutive, the tender of such performance) *is a necessary pre-requisite of his right to sue and should be pleaded by him*.' (Italicisation provided for emphasis.)

[6] The plaintiff makes the following allegations in its particulars of claim:

1. That GRC fell into default in respect of its obligation to pay royalties and service fees.
2. That a demand was made on GRC on 14 September 2017 to pay the amount in arrears in respect of royalties and service fees, inclusive of interest as provided for in the agreement, in the sum of R2 117 772.
3. That GRC stopped operating the enfranchised business in November 2017.
4. That consequent upon GRC's breaches of the franchise agreement, the plaintiff cancelled the contract on 18 March 2018.

[7] In paragraph 15 of the particulars of claim the plaintiff alleged:

> 15. As a result of GRC's breaches the Plaintiff has suffered damages in the sum of R8 762 521,00, made up as follows:
>
> 15.1 R2 307 911,00 in respect of unpaid royalties and service fees between 5 November 2012 and November 2017:
>
> 15.1.1. a summary of the unpaid royalties and service fees is attached marked **"POC 5"**;
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> 15.1.2. the details of every week's royalties and service fees is attached marked "**POC 6**";
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> 15.1.3. the interest calculations on the royalties and service fees is attached marked "**POC 7**";
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> 15.1.4. GRC's payments are set out in "**POC 8**";
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> 15.1.5. an interest rate history is attached marked "**POC 9**";
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> 15.1.6 a table of CPI rates is attached marked "**POC 10**";
>
> 15.1.7. a table of GRC's turnover history is attached marked "**POC 11**";
>
> 15.2 R6 454 610,00 in respect of minimum royalties and service fees for the unexpired period of the franchise agreement as set out in **"POC 12"** hereto.

[2] A judgment of this court in which Van Winsen J concurred.

It is evident from the annexures to the particulars of claim that the claim for payment of the aforementioned sum of R2 307 911 is in respect of the balance of the royalties and service fees, including interest, due and payable by GRC in terms of the agreement up to and including the end of November 2017.

[8] The defendants' exception to the particulars of claim is predicated on the complaint that the R 2 307 911 component of the plaintiff's claim amounts to a claim in respect of accrued rights in terms of the agreement before its cancellation and is advanced in the pleading without any allegation by the plaintiff that it had complied with its reciprocal obligations under the agreement. The point, obviously made with regard to the principle discussed earlier in this judgment, was encapsulated in paragraph 4 of the notice of exception as follows:

> Although the amount of R2, 307, 911.00 is alleged to be '*damages*', the claim is in actual fact, a claim for specific performance in the form of payment for '*unpaid royalties and service fees*'.

[9] The plaintiff sought to argue that the defendants' objection ran against the express tenor of the pleading, which on its face represented the claim as being one for 'damages', not one for performance or the exacting of an accrued right under the agreement. The plaintiff's counsel (who did not draft the particulars of claim) emphasised that for the purposes of deciding an exception a court must proceed on an acceptance of the pleaded allegations at face value.

[10] In my view, notwithstanding that the aforementioned contentions advanced on the plaintiff's behalf are in principle correctly stated, they apply the principle too simplistically in the context of the case in hand. If it is evident *on the pleaded material* that what the pleader has chosen to label as 'damages' is a misnomer in respect of the claim described in paragraph 15.1, the court is not constrained by the misnomer when deciding whether an exception to the pleading is good or bad. Adjudicating an exception requires of the court to read the pleading as a whole in a fair manner, not being unduly astute to find fault with it. If on that approach it is evident *on the pleading* that what the pleader has chosen to label as 'damages' is in point of fact a claim for a contractually accrued entitlement, as distinct from damages for breach of the contract, then the court will not be misled by the misnomer.

[11] It is well established law that the cancellation of the agreement in March 2018 would not have extinguished any rights accrued - in the sense of accrued, due, and enforceable at

that time as a cause of action independent of any executory part of the contract - to any party to the contract prior to its termination; cf. *Crest Enterprises (Pty) Ltd v Rycklof Beleggings (Edms) Bpk* 1972 (2) SA 863 (A) and *Walker's Fruit Farms Ltd. v Sumner* 1930 TPD 394.[3] The right to enforcement of such rights by the party in whose favour they had accrued survives the cancellation; and the character of a claim for the enforcement of those rights is quite distinguishable from that a claim for payment in damages in compensation for the loss the innocent contracting party suffers as a result of the cancellation of the contract by virtue of the guilty party's breach.

[12] In their most simple manifestation, the first type of claim is for what is due under the contract, the second, which properly falls to be called 'a claim for damages', is directed at placing the innocent party in the financial position it would have been had the contract not been cancelled. In the current case the parties had agreed as to how the franchisor's damages would fall to be calculated if the contract were cancelled by reason the franchisee's breach, but that makes no difference to the principle of the aforementioned distinction between claims for the enforcement of contracts and those for contractual damages sustained as a consequence of the termination of the contract as a result of the other party's breach or repudiation of the agreement. It is clear *ex facie* the pleading that the claim advanced in terms of paragraph 15.1 of the particulars of claim is of the first of the aforementioned types. It is an enforcement claim; and the pleader's manifestly inaccurate description of it as a 'damages' claim has not disguised its actual character. As articulated in the dictum from *ESE Financial Services* quoted earlier,[4] the discernibly pleaded claim requires to be supported by the allegations that are necessary to sustain it. Put differently, facts demonstrating the satisfaction of the legal prerequisites for the claim's viability have to be pleaded.

[13] The particulars of claim do not contain any allegation that the plaintiff had complied with its obligations in terms of the agreement with GRC. It was rightly not in contention that in its claim against the defendants based on their suretyship undertakings the plaintiff had to make out in the pleading a proper basis for its entitlement to payment against the principal debtor, for such entitlement was after all the very basis for the alleged accessory obligations

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[3] The judgment in *Thomas Construction (Pty) Ltd. (in Liquidation) v Grafton Furniture Manufacturers (Pty) Ltd* [1988] ZASCA 2; 1988 (2) SA 546 (AD); [1988] 2 All SA 228 confirmed (at 564 SALR), to the extent that might have been thought necessary, that the principle embodied in the pertinent part of the decision in *Crest Enterprises* was not confined to cases of rescission following upon repudiation and applies in 'all forms of breach culminating in cancellation'.

[4] In paragraph [5].

of the defendants in respect of which the plaintiff sought performance. In the circumstances it is therefore evident that the exception was well taken.

[14] The following order will issue:

1. The defendants' exception is upheld with costs.
2. That part of the plaintiff's claim set out in paragraph 15.1 of its particulars of claim is struck out.
3. The plaintiff is afforded an opportunity to amend its particulars of claim within 15 days of the date of this order in order to remediate the excipiability of the pleading.

A.G. BINNS-WARD
Judge of the High Court

APPEARANCES

Excipient defendants' counsel:	**D.J. Coetsee**
Excipient defendants' attorneys:	**Martins & De Lange Attorneys** **George** **Michalowsky, Geldenhuys & Humphries Attorneys** **Cape Town**
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