3/9/2010

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH AND SOUTH GAUTENG HIGH COURT, PRETORIA)

DATE: 3 SEPTEMBER 2010
CASE NO: 12311/2009

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
03/09/2010
DATE SIGNATURE

In the matter between:

EMILIA DE SOUSA t/a OLD FASHIONED FISH AND CHIPS	PLAINTIFF
And	
HENDRIK ANDRIES JOHANNES LOUWRENS	FIRST RESPONDENT
ANNIE MAGRIETA HELENA GETRUIDA LOUWRENS	SECOND RESPONDENT
ADRIAAN JAKOBUS LOUWRENS	THIRD RESPONDENT

J U D G M E N T

PHATUDI, J

[1] The plaintiff, a sole proprietor and franchisor of Old Fashioned Fish and Chips, formulates her claim against the defendants as follows:

'Claim 1

An order confirming the cancellation of the Franchise Agreement;

Claim 2

An order against ...defendant's jointly and severally, the one to pay the other to be absolved, for

- Payment of outstanding royalties in the amount of R14 000.00
- Payment of damages in the amount of R132 520.00

Claim 3

An order restraining the Defendant's from carrying on or being interested, directly or indirectly, in the business of a fast food restaurant outlet within 1 (one) kilometre of the Old Fashion Fish and Chips Restaurant, Shop 2, 225 Vermeulen Street... Pretoria, up to and until 10 November 2009".[1]

[2] The Defendants filed a counterclaim for restitution of the purchase price of the franchise they paid to the plaintiff in the amount of R399 000.00 due to the plaintiff's non performance.

[3] It is common cause between the parties that a franchise agreement was concluded on 18 January 2008. It is further common cause that the defendants secured Shop 2, 225 Vermeulen Street, Pretoria (the premises) by concluding a lease agreement on the 18

[1] Page 13 and 14 Pleading bundle

March 2008. The defendants were afforded a free rental month[2] to equip and fit the premises. The keys to the premises were handed over to the defendants on the 1 April 2008. They informed the plaintiff and allowed her to fit and equip the premises with equipment specified in Annexure C[3] to the franchise agreement within the given rent holiday period.

[4] Emilia De Sousa (Mrs De Sousa) testifies that she is the founder and owner of Old Fashion Fish and Chips (Old Fashioned). She registered the business with the Franchise Association of South Africa (FASA)[4]

[5] The Third Defendant (the defendant) approached her because he has an interest in Old Fashioned. She then explained all requirements to the defendant. On the 18 January 2008, a franchise agreement was signed by all defendants who there and then paid a deposit in the amount of R100 000.00. The premises were not as yet identified. She told the defendants to find the premises as soon as possible. She informed them that R299 000.00 will only be payable once the premises has been identified.

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[2] referred to as rent holiday
[3] Page 44 pleadings bundle
[4] FASA is an association that regulate and control all franchise in South Africa

[6] She further testifies that she explained to the defendants that she will only proceed with fittings of equipment in the premises and train the staff once the purchase price is settled in full.

[7] She says the defendant called her and informed her of his interest in a site situated in Bloed Street, Pretoria. She informed him that the Bloed Street site has already been booked. He later identified the premises at Vermeulen Street, Pretoria (the premises). She intimated to him that the premises were close to those at Bloed Street. Few days later, she met with the defendant who gave her pages 4 and 5 of the franchise agreement with intent to "remove" the exclusive area clause. She is under the impression that the both intended the provisions set out in pages 4 and 5 not to be regarded as part of the contract. It is in those bases she allowed him to proceed with the premises at Vermeulen Street. The balance in the amount of R299 000.00 was paid. She equipped the premises in accordance with the franchise agreement and lastly trained the defendant's staff for a period of 2 weeks.

[8] Vusi Vumase (Mr Vumase) testifies that he is employed by the plaintiff as manager and staff trainer. He confirms to have trained the

defendant's staff members at Vermeulen Street. He cannot recall the dates and days of the month upon which such training was conducted.

[9] He is confronted under cross-examination with the photos taken on one of the days training was conducted. He concedes that 3 (three) of the people on the photos are not members of the defendant's staff.

[10] The third defendant, Adriaan Jakobus Louwrens (the defendant), confirms in his testimony, the correctness of the plaintiff's testimony as far as the signing of franchise and the lease agreements for Vermeulen Street are concerned. He further confirms that a "rent holiday" was indeed negotiated by both the plaintiff and himself for the months April and May 2008 respectively. The Landlord granted the rent holiday only for April month. The plaintiff equipped the premises as agreed during the 4th week of April into the first week of May 2008. The shop opened on the 6th May 2008.

[11] He further testifies that on the opening day certain items were not in an acceptable condition. The window was dirty. The pillar in the shop was not tiled up to the roof and the ceiling was not cleaned. He concedes that the plaintiff uplifted pages 4 and 5 of the franchise

agreement with intent to change the commencement date and dates on which royalties are payable. He testifies that the Plaintiff informed him that the amended contract will be returned back to him, by Friday. The idea, as discussed between them, was to cause royalty payable by the end of June 2008.

[12] He denies having ever been interested in the Bloed Street premises. He only learned some months later from other Franchisees that other Old Fashioned have been opened at:

Sunnyside, which was opened in September 2008.

Bosman to be opened in October 2008

Bloed Street to be opened in November 2008.

[13] He tried on numerous occasions to secure an appointment with the plaintiff with intent to discuss the exclusive area clause vis-à-vis the opening of the said shops but to no avail.

[14] He claims, in his counterclaim, non performance on the part of the plaintiff. He indicates that certain goods were not delivered to the shop. He refers me to the plumbing problems he had since opening. I enquired from him if the plaintiff was liable to maintain the plumbing in

the shop, and if so, which clause in the franchise agreement so provides. He then refers me to clause 4.2 that provides:

'In consideration for the grant of it of the right to use the **SYSTEMS, PROCEDURES AND KNOW-HOW**, in terms of 3.2 above...'

He further refers me to item 9 of Annexure C[5] that states:

'All indoor plumbing.'

[15] He further testifies that he effected payment for royalties for the months September and October 2008 respectively. He caused a set off for the months June and July 2008 over R5000.00 the plaintiff owes in respect of the steel work made by the first defendant at her instance.

[16] Hendrik Andries Johannes Louwrens (first defendant) testifies that he is indeed one of the signatories of the franchise agreement. He was never hands on in the business. He confirms having made 5 (five) steel barriers at the special instance and request of the plaintiff at a price of R1000.00 each. She took 1 (one). The remaining 4 (four) are still in his possession. He confirms having agreed with the plaintiff on the said order. To date nothing has been paid to that effect save to mention the set off the defendant caused.

[5] Page 154 Evidence bundle

[17] In evaluating the evidence tendered, it is common cause that the franchise agreement was concluded on the 18 January 2008. At that time the defendants had no premises to operate at. The plaintiff testified that the defendant was first interested in the Bloed Street premises which she indicated to have been "booked" by another prospective franchisee. The premises were then identified. She alleges to have indicated to the defendant that the identified premises are within 4 km radius of Bloed Street, which would encroach on clause 8.1 of the franchise agreement. She further alleges that the defendant removed pages 4 and 5 of the agreement and handed same to her. Pages 4 and 5 of the franchise agreement contain royalty and exclusive area clauses respectively.

[18] In rebuttal thereto, the defendant testified that the plaintiff is the one who took the said two pages with intend to amend the date of payment of royalties and not to "remove" the exclusive area clause from the agreement.

[19] The two pages are indeed not part of the properly signed franchise agreement discovered in the evidence bundle. The plaintiff annexed an

unsigned copy with her particulars of claim. It is not clear what the parties intended at the time of uplifting the said pages. The plaintiff contends that the aim was to uplift the Exclusive area clause to enable the defendants to conduct the business at Vermeulen Street to avoid Bloed street business encroaching clause 8.1 of the agreement. The defendant alleges not to have been aware of this. The defendant alleges to have been under the impression that the exclusive area clause is applicable. He says he brought this to the attention of the plaintiff on discovery of Essellen street franchise and later at Bosman Street and Bloed Street respectively. He denies having intended to uplift the exclusive area clause.

[20] The defendant, on the other hand, alleges that the upliftment of the pages from the contract was to give effect to amendment of commencement date from 1 April 2008 to 1 June 2008 respectively. He alleges that the amendment would correspond with the 'rent holiday" offered by the landlord in the lease agreement. The plaintiff denies these averments. She, however, concedes that she equipped the defendants' premises during April month.

[21] The parties' versions create two destructive versions on royalty fee payable (if any) and exclusive area clauses. The plaintiff alleges that the royalty fee is payable from 1 April 2008 whereas the defendant alleges the 1 June 2008 as the commencement date.

[22] The Plaintiff concedes under cross-examination that the two pages were uplifted almost the same time with the defendants' occupation of the premises. She further concedes that the franchise fee is not payable for the month of setting and equipping the shop. She concedes that the defendant did not operate during the April month due to the setting of infrastructure. She further concedes after it was put to her during cross examination that no royalties are payable for April month. She surprisingly includes April in her claim.

[23] Contrary to the said averments, the Defendant alleges to have effected payment on royalty fee for the month of August and September while June-July payment had been set off.

[24] I find it incomprehensible for the Plaintiff to allege that the franchise fee is payable from April 2008 while she, on her testimony,

concedes that the month of setting the shop is not payable and normally not included for purposes of computing the franchise fee.

[25] It is trite law that the plaintiff must prove her case on a balance of probabilities. It is further trite law that where an amount is payable in monthly instalments that such instalments are due and payable at the end of that month.

[26] The plaintiff concedes under cross-examination that she regularly cause issue of monthly invoices and statements for royalties payable. She however, failed to annex or discover for trial purposes, any invoice(s) and or statement(s) to prove her claim on franchise fee payable. I find it strange as to why she did not demand payment from April but wait until 27 October 2008.

[27] I infer from the defendants' testimony that the plaintiff got annoyed by the defendants' telephone calls seeking a meeting to discuss the exclusive area clause ***vis-à-vis*** the Essellen street, Bosman street, Bloed street franchise opened or to be opened, prompted her to cause issue of her letter of demand dated 27 October 2008.[6]

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[6] Page 1 evidence bundle

[28] Mr Kellermann, counsel for the Plaintiff, submits that the defendants' alleged payment made in September 2008 as indicated on the defendants' bank statements is classified as an "S", which would indicate that it was made for stock and not for royalties. The "S" referred to is a hand written mark which I could not verify if that was "S" as submitted by Mr Kellermann. Mr Broodryk's efforts to introduce the defendants' bank statement bearing similar inscription were objected to on hearsay basis. Mr Broodryk submits that the auditor whose handwriting it is has since died. I ruled that such evidence is inadmissible.

[29] Mr Kellermann refers me to **Nel v Cloete 1972(2) SA 150 (A)** and to Christie; Law of Contract, 4th Edition, page 584[7] where the principle of general rule of law is that obligations for the performance of which no definite time is specified are enforceable forthwith.

[30] Much as I accept the rule is trite, I find that a debt cannot be enforceable forthwith without it being due and payable. For a debt to be due and payable, an invoice or a statement must be issued to bring to the debtor's attention that such a debt is due for payment. It is empirical

[7] 4th edition has since been replaced by 5th edition and no such page in 5th edition was found.

to "demand" payment and place the debtor in ***mora***. The plaintiff failed, in my view, to demand or place the defendant in ***mora from*** April 2008 in that no invoices or statements were issued to that effect notwithstanding her allegation of having same "somewhere" in her office. In my view, the plaintiff fails to prove on a balance of probabilities that defendants are indeed indebted to her in the amount of R14, 000.00 as claimed. Cancellation of a contract may be performed without the assistance of the court. A court order would, however, simply confirm that which the party seeking cancellation had already carried out. It is, however, desirable to have a court order of cancellation for certainty of the contract's status. The plaintiff had already cancelled the contract which stands to be confirmed.

[31] On the defendants' claim of non performance by the plaintiff, the defendants rely on various breaches by the plaintiff. In terms of the franchise agreement, the plaintiff is obliged to:

> 6.1 Make the systems, procedures and know-how AVAILABLE TO THE Franchisee on signature of this contract;
>
> 6.2 Equip the APPROVED PREMISES with equipment as specified in annexure "C" attached hereto;
>
> 6.3 Train the FRANCHISEE'S staff with regard to The SYSTEMS, PROCEDURES and KNOW-HOW;

> 6.4 Obtain at the FRANCHISOR'S cost, all the necessary trading licenses to enable the FRANCHISEE to carry on the business from the APPROVED PREMISES;
>
> 6.5 Have the necessary sign writing affixed to the APPROVED PREMISES including the logo;
>
> 6.6 Save for the installation of the three phase electricity and the straightening of the walls, which shall be for the cost of the FRANCHISEE, fit out the APPROVED PREMISES, including the tilling, plumbing and the installation of the gas accessories.'[8]

[32] The defendant testified in his examination in chief that the plaintiff failed to:

- equip the approved premises with equipment specified in annexure C. [9]
- Train the defendant staff in re, system, procedures and know- how.
- Obtain on her costs, the trading license for the premises and
- Fit and equip the premises including tiling and plumbing.

[33] In evaluating the defendant's testimony, I find it difficult to comprehend how a person can buy a business and continue to trade without manual and the operational system of the business which he is not acquainted with. The defendant denied under cross examination to have been furnished with the Operations Manual.[10] He further denied having been provided with any "KNOW HOW". He says that' made it

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[8] Annexure A to the agreement, page 32 pleadings on 145 evidence bundle
[9] Page 154 evidence bundle
[10] Page 28-42 evidence bundle

difficult for him to prepare the russians properly because they kept on bursting in the boiling oil and would at times come out hard like a biltong.

[34] He concedes that all equipment specified in annexure C have been delivered and or installed save for 1(one) wash basin[11], and a hand wash basin.[12]

[35] In evaluation the evidence to equipping the premises, I find the plaintiff to have promptly complied with her duty. The non delivery of the hand wash basins cannot, in my view, sustain a claim of non performance.

[36] The defendant conceded under cross-examination that training took place. He, however, allege that the said training was not proper. He says his staff did not know how to peal the potatoes or how to braai or warm the russians or cheese viannas. He further conceded that the plaintiff and Mr Vumase were indeed in the premises on the opening day and conducted training on some of his staff members though not enough. He says they only came for 2 days whereas the plaintiff's evidence is that they conducted training for two weeks.

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[11] Item 2 annexure C, page 154 evidence bundle
[12] Item 3, annexure C, page 154 evidence bundle

[37] I find in my evaluation that training was indeed conducted by the plaintiff or Mr Vumase at the instance of the plaintiff. It is clear from the photos annexed that Mr Vumase was indeed in the premises. I accept Mr Vumase's unchallenged evidence that he trained the defendants' staff including the defendant himself. He conceded that some of the staff members were from Thembisa, another franchise opened almost the same time as that of the defendants. Of importance, I find that training was conducted on the defendants' staff members by the plaintiff at Vermeulen Street.

[38] On the plaintiff's obligation to obtain a trading license to enable the defendant to carry on the business from the approved premises, the plaintiff testified that she gave the defendant the relevant form to complete. She testified that the defendant undertook to procure a license. The defendant denies this. He says the Plaintiff failed to obtain the said license. He was later summoned by the relevant authorities to pay a fine to that effect. He subsequent thereto applied for the license but to no success.

[39] Mr Kellermann refers me to **Manufacturers Development CO and Others 1975(2) SA 276 W)**.[13] On perusal of the law report as cited. I find the case being different from the one Mr Kellermann refers.

[40] On perusal of the clause 6.4 of annexure A,[14] I find the franchisor to have had a duty to "obtain" at the franchisors' costs, all the necessary trading licenses [15]to enable the franchisee to carry on with the business." The plaintiff testified that she gave the defendant a form to complete. It is not clear from her evidence what form it is and where she got it from. She could not even say from which office she got the form from. In my view, the clause places a stringent duty on the franchisor to ensure that the franchisee is awarded or granted a licence by the relevant authorities to enable him/her to carry on with the business. I thus find that giving the franchisee a "form" to complete not being enough for obtaining a license.

[41] However, the Defendant proceeded to conduct a business without the said licence. The defendants' never complained or placed the plaintiff on terms with regard to the license issue. The defendant took a risk and operated without the required license. The non compliance with the contract does not render the contract void.

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[13] Page 14 of his HOA
[14] See para [28]
[15] My underline

[42] The question to consider is whether the plaintiff's' non compliance rendered the defendants' performance impossible. The defendant accepted the premises and proceeded to conduct business notwithstanding all such non compliance. I enquired from him if he accepted the business from the plaintiff on the day it was handed over to him despite all the alleged breach. He concedes that he accepted the business notwithstanding all that complained of. I, on that basis, thus find the plaintiff's non compliance not having hampered the defendants from conducting the business.

[43] The principle set out in **Palmer v Poulter 1983 (4) SA 11 (T)**, is that; "If the appellant, with full knowledge of the facts has so conducted herself that a reasonable person would conclude that he had waived his accrued right to cancel the agreement or had affirmed the agreement, a mental reservation to the contrary will not avail him."

[44] I find the principle fits like a glove in a hand with the matter before me. I, in the result thereof, equally find the defendant to have failed prove his claim on a balance of probabilities and thus not entitled to restitution of the purchase price.

[45] It is trite that costs follow the event. The defendant succeeded in defending the main claim. Equally, the plaintiff succeeded in defending the defendants' counterclaim.

[46] I thus make the following order.

[46.1] Cancellation of the franchise agreement entered into by and between the parties on the 18 January 2008 is hereby confirmed.

[46.2] The plaintiff's claim is dismissed

[46.3] The defendants' counterclaim is dismissed

[46.4] There is no order as to costs

AML PHATUDI
JUDGE OF THE NORTH GAUTENG HIGH COURT

Heard on: 23 to 26 August 2010
For the Appellant: Adv BROODRYK
Instructed by: Messrs GROENEWALD VAN DYK INC
For the Respondent: Adv KELLERMANN
Instructed by: Messrs WNA ATTORNEYS.
Date of Judgment: 3 SEPTEMBER 2010