IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No. **7348/2021**

DRIVECONSORTIUM HATFIELD (PTY) LTD Applicant
(previously known as **HENRI JACOB (PTY) LTD**)

and

TAKEALOT ONLINE (RF) (PTY) LTD Respondent

Date of hearing: 12 May 2021 and 13 May 2021
Date of Judgment: 26 May 2021 (to be delivered via email to the parties' legal representatives at 09h00)

JUDGMENT: 26 MAY 2021

HENNEY, J

Introduction:

[1] This is an application for urgent interim relief pending the finalisation of proceedings instituted at the National Consumer Commission, alternatively, in the Western Cape Division of the High Court, to interdict the respondent from exercising its rights under clause 35.3.2, read with clause 5.2, of the franchise agreement

concluded between the applicant and the respondent, dated 29 October 2018 (the "**franchise agreement**"). Further also to restore the applicant's business to the position in which it existed prior to the respondent's exercise of its rights (on 30 April 2021) under clause 35.3.2, read with clause 5.2, of the franchise agreement.

[2] The respondent is a well-known online retailer, which sells all of its products on the Takealot website. Customers purchase products online at www.takealot.com, and the respondent then, in terms of the franchise agreement, delivers the purchased products to the various customers. In order to effect these deliveries, the respondent could deliver the parcels itself or by means of third-party couriers; however, in most cases, delivery is by means of its respective franchisees.

The relevant provisions of the franchise agreement:

[3] In terms of clause 5.1 of the franchise agreement, a franchisee, like the applicant, acquires certain rights. These are: the right to establish a franchised outlet in the protected area, with the effect that, subject to the remaining terms of the agreement, Takealot shall not grant the right to establish a franchised outlet in the protected area to any other Takealot franchisee; and a right to perform P2P services in respect of consumables outlets located within the consumables collection area on the basis, as a general rule, that the franchisee shall a have preferential right (but not an exclusive right) in relation to the performance of such P2P services within the consumables collection area, as against any other Takealot franchisee.

[4] It further recognises that overlaps may occur between the areas allocated to the franchisees, and that where there is such an overlap, Takealot will allocate the instruction to perform the relevant P2P services to the franchisee that, in Takealot's discretion, is, having regard to the relevant circumstances applying at that point in time (including volume of demand and the capacity of the respective franchisees to meet that demand), best placed to perform such services; aside from the preferential right a franchisee has, it is further granted a non-exclusive right to perform franchised services in the protected area and such other areas as Takealot may, in its discretion, from time to time, direct. A 'protected area' is described in the

agreement as an area in which the franchisee is granted the right to establish a franchised outlet.

[5] The respondent is a franchisor of the Takealot franchise group and the applicant is one of the franchisees, in terms of an agreement entered into between them on 29 October 2018. At the heart of the dispute between the two parties, is the invoking of the provisions of clause 5.2, notwithstanding the provisions of clause 5.1, as referred to above. More particularly, clauses 5.2.1, 5.2.2 and 5.3. Clause 5.2 states:

'Takealot retains the right to at any time perform any Franchised Service itself or to have any Franchised Service performed by any of its affiliates, by any other Takealot franchisee or by 3PL courier, if in Takealot's discretion it is appropriate, having regard to the relevant circumstances applying at that point in time (including the demand and the capacity of the respective franchisees meet that demand).'

Clause 5.2.2 states:

'If the Franchisee fails to meet any two or more of the service levels required by Takealot as set out in the Operational Directions and Instructions . . . during any month and, after the receipt of written notice to do so, again fails to meet any more of the required service levels (whether or not these are the same service levels as those previously failed) during the month following such written notice, Takealot shall be entitled, by way of written notice given to the Franchisee, either to itself establish or to permit any other person (including one of its Affiliates) to establish, one or more other franchised outlets . . . in the Protected Area and to reduce or to adjust the Franchisee's Protected Area to such a scale as in the discretion of Takealot is appropriate to the capacity of the Franchisee when taken in relation to the demand for the Franchised services in the area in which the Franchisee operates. In such event and regardless of anything else to the contrary to this agreement, Takealot shall bear no obligation to first offer the Franchisee the right to establish the new Franchised outlet as provided clause 6.'

Clause 5.3 states:

'The Franchisee agrees that the terms of clause 5.2 are reasonable and necessary to protect the interests of Takealot and to protect the interest of each Takealot franchisee.'

[6] The respondent alleges that the applicant committed a breach of the agreement that resulted in it invoking the provisions of clause 35.2. It further alleges that it took the steps as contemplated in clause 5.2, after the occurrence of an event of default, as contemplated in clause 35.2 of the agreement. More particularly, the occurrence of an event of default in terms of clause 35.2.6, which, read with clause 35.2, states that:

'An event of default shall occur if-

35.2 . . .

35.2.6 the Franchisee engages in any conduct that Takealot in its discretion considers may adversely affect the Trademarks, the System and/or the Takealot franchised Group or the reputation of any of the aforegoing, or the Franchisee breaches any provision of this agreement or the Operational Directions and Instructions in relation to the use of the Trademarks, and fails to remedy such default within 5 (five) days of receiving written notice from Takealot requiring the default to be remedied, provided always that if such default is not reasonably remediable within the 5 (five) day period or at all, that no such remedy shall apply.'

[7] Clause 35.3 states that: 'Upon, with any time after the occurrence of an event of default, the franchisee's rights in relation to the protected area and the consumable collection area shall immediately fall away, should Takealot give the franchisee written notice to that effect; Takealot may exercise its rights in terms of 5.2; and/or Takealot may immediately terminate the agreement upon the written notice thereof to the franchisee.'

The scope of the relief and the alleged event of default

[8] These steps to invoke the provisions of clause 5.2 were taken after the respondent became aware, at the beginning of April 2021, of letters the applicant had sent to the Franchise Council, and also to the independently contracted drivers, which was of great concern to the respondent. According to the respondent, the applicant made the following statements in its communiqué to the Franchise Council:

1) that the applicant has 'been targeted by HO since the EFF strike experience last year';
2) a suggestion that the applicant is ignorant as to why the respondent has acted as it has, or its reasoning;
3) that the applicant has acted 'under duress';
4) that the respondent has chosen to ignore all correspondence with regards to its areas of operation;
5) that (as a result of the respondent's actions) 250 independent contractors and staff will therefore be without an income "as from tomorrow";
6) that any direct instructions from the respondent would be 'at complete risk' of the independently contracted drivers;
7) 'that the respondent is jeopardising the livelihoods of independent contractors and staff';
8) that the respondent failed to give an explanation for its actions;
9) that the respondent holds the franchisees in poor regard and has little regard for the livelihoods of hundreds of people or respect for the franchise agreements or the law;
10) that the respondent is using bullying tactics and will treat smaller franchisees poorly.

[9] The respondent alleges that similarly, in its letter to the independently contracted drivers, the applicant suggested that:

1) the respondent's conduct would pose 'a massive threat to the livelihood of all independent contractors not just in Pretoria but nationally';

2) repeating the suggestion that the respondent has ‘little regard and respect for the livelihoods of hundreds of people’; and
3) suggesting that the respondent made common cause with those who perpetrated the strike. In its letter to the drivers it expressed the hope that all independent contractors would refuse to work in the areas ‘appropriated by Mr. D/Takealot at the cost of many innocent individuals’.

[10] As a result of these communiqués to these entities, the respondent, on 20 April 2021, sent a breach notice to the applicant, wherein it notified the applicant that it had disseminated incorrect information in relation to the respondent and the applicant’s dispute. Furthermore, that it had also disseminated comments which were likely to result in damage to the respondent’s brand and trademarks. The notice also informed the applicant that such conduct constituted a breach of the terms and conditions of the agreement, and an event of default under clause 35.2, entitling the respondent to exercise its rights under clause 5.2. It furthermore advised that it would do so from 1 May 2021.

[11] The respondent contends that the applicant’s case initially was that the conduct complained of by the respondent, did not entitle the respondent to exercise its rights in terms of clause 5.2, by reducing applicant’s volumes. More importantly, the applicant stated that the respondent did not rely on an ‘event of default’ in taking this action, to which the respondent replied in its answering affidavit that it did rely on an event of default, and thus that it had acted in terms of clause 35.2, and not directly in terms of clause 5.2. According to the respondent, after realising its error, the applicant attempted to argue that notwithstanding the provisions of clauses 35.2 and 35.3 (to which it does not object), the respondent’s conduct in exercising it rights under clause 5.2 was neither reasonable nor appropriate. The respondent submits that this is simply unsustainable, in light of the agreement between the parties that the respondent was contractually permitted to do so under clauses 35.2 and 35.3.

[12] According to the applicant, it does not believe that its actions constituted a breach of the franchise agreement, but that even if it did, it denies that that gave the respondent cause to appropriate its entire business. It further submits that the

appropriation of the Hatfield area would cause the applicant's inevitable demise and winding up. It has various contractual obligations, including obligations in terms of agreements of lease. The obligations relating to the rental of premises amounts to approximately R160 000 per month. These lease agreements will only expire in 2024. The loss suffered in this respect alone would exceed R5.8 million. The applicant employs 51 full-time staff and has more than 700 drivers providing a service to the business, and who generate a living from the business.

[13] The applicant further claims that the respondent afforded it 10 days' notice that '100% of the order volumes of Hatfield hub shall be removed with effect from 1 May 2021'. Therefore that the respondent gave 10 days' notice that the applicant's business would be completely shut down, based on nothing more than correspondence sent by the applicant, to a limited group of recipients, out of frustration and in incredibly challenging circumstances. Further that the respondent thereafter, without approaching the court, attended the applicant's premises and removed its goods, which resulted in the applicant being prevented from conducting its business.

[14] The applicant submits that the respondent's conduct amounted to unlawful and impermissible self-help. In this regard the applicant referred to *Bock and Others v Duburoro Investments (Pty) Ltd*[1] that has recognised (in the context of parate executie clauses, but also with reference to remedies such as a mandament van spolie) that '[o]ur common law has always recognised that self-help is unlawful.'.

[15] The applicant submits further that whilst the respondent has a discretion under clause 5.2 of the franchise agreement to perform franchise services, or to have the services performed by another franchisee (consequently reducing the applicant's volumes), such discretion must be exercised appropriately, reasonably and fairly. It submits also that the drastic steps taken by the respondent, to shut applicant's business on 10 days' notice and without any compensation, do not remotely constitute an appropriate, fair or reasonable exercise of its discretion.

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[1] [2003] 4 All SA 103 (SCA).

[16] Furthermore, that the respondent's contention that the relief sought by the applicant is not competent, is without any substance and fundamentally misconceived. Firstly, because the applicant's fundamental complaint is not that clause 5.2 of the franchise agreement is unreasonable, unfair or unjust; it is but one of several complaints the applicant has highlighted. More importantly, the applicant objects to the respondent's decision to usurp and appropriate the applicant's territory, and it seeks relief that will prohibit the respondent from removing the applicant's order volumes.

[17] Its primary concern relates to the respondent's conduct, not to the provisions of the franchise agreement. Whilst clause 5.2 facilitates the respondent's conduct, and consequently establishes a basis for the applicant's complaint that the terms of the franchise agreement are unreasonable, unfair and unjust, the thrust of the applicant's complaint is that the manner in which the respondent invoked clause 5.2, and acted upon it, is unfair, unreasonable and unjust.

[18] Secondly, the applicant additionally submits that the franchise agreement is governed by the provisions of the Consumer Protection Act 68 of 2008 ("the CPA"), which has as its object to promote fair business practices and to protect consumers (which includes the applicant) against unfair trade practices. It entails that suppliers, such as the respondent, are prohibited from entering into agreements on terms that are unfair, unreasonable or unjust, or to impose any such terms as a condition of entering into a transaction.

[19] A supplier may also not administer any agreement in a manner that is unfair, unreasonable or unjust. In this regard the applicant relies on sections 48 (1) (a) (ii) and 48 (1) (b) of the CPA. Also that in terms of the CPA a consumer (such as the applicant) may not be required to waive any rights or assume any obligations or terms that are unreasonable, unfair or unjust, while such terms would be considered unfair if they are excessively one-sided or so adverse as to be inequitable. In this regard the applicant refers to sections 48 (1) (c) and 48 (2) (a).

[20] Furthermore, that sections 51 (1) (a) (i) and 51 (1) (i) (i)[2] of the CPA prohibits specific terms which have as their general purpose or effect to defeat the purpose and policy of the CPA, or to enter premises and take possession of good forming the subject matter of the agreement. The remedies available to consumers in terms of section 52 (3) of the CPA, would be declaratory relief, indicating that certain terms of the agreement are invalid or unenforceable, and also to restore property. Section 114 of the CPA further provides that the court is entitled to entertain interim interdictory relief if certain requirements are met.

[21] The applicant further submits that, in addition, the regulations made in terms of section 120 (1) of the CPA[3] provide that: 'A franchise agreement has to contain provisions which prevent conduct which is unnecessary or unreasonable in relation to the risks to be incurred by one party or to prevent conduct which is not necessary for the protection of the legitimate business interests of the franchisor. Any provision in conflict with the regulations is void to the extent of such conflict.' It submits that this provision is also applicable to this case.

Requirements for an interlocutory Interdict

[22] The requirements for an interlocutory interdict, such as that sought by the applicant, are well established. It has to satisfy the following requirements[4]:

'(a) *prima facie* right;

(b) a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;

(c) a balance of convenience in favour of the granting of the interim relief; and

(d) the absence of any other satisfactory remedy.'

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[2] Roman numeral one.
[3] Government Notice No. R293 of 1 April 2011 in Government Gazette No.34180 of 1 April 2011, regulation 2 (2) (b) (ii)-(iii) and 2 (2) (e).
[4] Van Loggerenberg & Bertelsmann: *Erasmus: Superior Court Practice*, at RS 15, 2020, D16A-16B.

[23] These requirements should not be considered separately or in isolation, but in conjunction with one another, in order to determine whether the court should exercise its discretion in favour of the granting of the interim relief sought.

[24] Section 114 of the CPA also make provision for the granting of interim relief, and the relief relevant to this case and on which the applicant relies is contained in section 114 (1) (b), (c) and (d). In terms of subsection (b) a complainant might apply for an interim order alleging that it is reasonably necessary to prevent serious irreparable damage, or to prevent the purposes of this Act being frustrated. In terms of subsection (c) an order may be granted after the respondent had been given a reasonable opportunity to be heard, having regard to the urgency of the proceedings; and in terms of subsection (d) the balance of convenience should favour the granting of the order. Subsection (2) provides that an order granted in terms of this section may not extend beyond the earlier of (a) the conclusion of the hearing of the application or complaint; or (b) the date that is six months after the date of the issue of the interim order. Subsection (3) provides that if an interim order has been granted and the hearing into that matter has not been concluded within six months after the date of that order, the court or tribunal, on good cause shown, may extend the interim order for a further period not exceeding six months.

[25] Regarding the first requirement for interdictory relief, it is the applicant's case that it disputes that it breached the agreement between it and the respondent, and that the respondent due to an event of default, justified to invoke clause 5.2 of the agreement. The applicant contends that the manner in which the respondent invoked its discretion under clause 5.2 was not reasonable or fair. Furthermore, the applicant contends that the respondent did not act fairly or reasonable in exercising its contractual powers, which it is compelled to do in terms of sections 48 and 51 (1) of the CPA.

[26] According to the applicant, as mentioned earlier, it cannot be reasonable or appropriate for the respondent to take the applicant's business away, simply because it regards itself as having been insulted by the applicant in letters the

applicant had written to other parties. It was drastic action that was disproportionate to the alleged breaches upon which it relies.

[27] The respondent and the other hand submits that it exercised its contractual powers, which are undisputed. An interdict is aimed at preventing illegitimate and unlawful activities. It would impermissibly interfere with the respondent's undisputed rights and legitimate actions, and decisions it needs to take on an almost daily basis.

[28] The respondent further submits that the applicant's prima facie right can derive solely from its allegation that the respondent's conduct was prohibited by the CPA as being unfair, unjust or unreasonable in the particular circumstances.

Evaluation:

[29] In my view, the conduct which the respondent alleges constituted an event of default in terms of clause 35. 2, and in particular as described in clause 35.2.6, may very well lead to an event of default, given the nature of the allegations the applicant made in the letters it addressed to the Franchise Council and the independent drivers mentioned, which portrays the respondent's conduct as callous, unjust, intimidating and unreasonable, without appraising the recipients of the letters of the full facts as to the dispute between them. Whether this can be regarded as a breach of the agreement is not for this court to decide, and it remains a dispute between the parties.

[30] I also agree with the respondent that the interdict would interfere with its contractual rights, especially with regards to the provisions of clause 5.2, which gives it the right, when circumstances arise, to have another franchisee perform services in the protected area, or for the respondent to do so itself. The issue the applicant complains of in this matter, however, is firstly the manner in which, and the circumstances under which, the provisions of clause 5.2 is to be exercised, which the applicant submits will in this case be disproportionate to the breach it has allegedly committed. Secondly, and more importantly, the interference with those contractual rights of the respondent based on the terms of clause 5.2 is justified because it cannot be regarded as fair and reasonable.

[31] In my view, the applicant has satisfied this court that it has a prima facie right given the circumstances and the manner in which the respondent has exercised its contractual rights in terms of the provisions of clause 5.2. The question whether the provisions of clause 5.2 are inconsistent with the provisions of the CPA is also for another forum to decide. Especially whether the provision is not in compliance with section 48 and the referred to provisions of section 51(1) of the CPA.

[32] It is my *prima facie* view that a court may well come to the conclusion that the provisions of clause 5.2 are unfair and overbroad, as it gives a franchisor the power to seize and reduce the areas of operation, and the volume and size of a business operation, of a franchisee, for any reason or, at the very least, for reasons that cannot be properly justified. In my view, the right that the applicant has to establish has been explained in *Webster v Mitchell* 1948 (1) SA 1186 (W), at 1189, to be the following: '[T]he right to be set up by an applicant for a temporary interdict need not be shown by a balance of probabilities. If it is "*prima facie* established though open to some doubt" that is enough.'

[33] It is also my *prima facie* view that the respondent, by seizing the order volumes without a court order, may have have acted unlawfully and, secondly, may have acted in breach of section 51(1)(i)(i)[5] of the CPA.

[34] Although there is a dispute as to the basis upon which the applicant contends that it still has rights in terms of the agreement, it seems that the parties are in agreement that the applicant still has such rights, although the respondent argues that certain of the rights have been limited or have fallen away, due to the applicant's past conduct. The respondent submits that, at the very least, in terms of clause 5.1.3 the applicant had rights in terms of this contract, which it legitimately exercised, but as a result of an event of breach, in terms of 35.2.6, the respondent was entitled to take those rights away from the applicant in the manner it did.

[35] The respondent does not say anything about the fact that it exercised its right in terms of the agreement in a heavy-handed and arbitrary manner, when on the

[5] Roman numeral one.

evening of 30 April 2021 it arrived at the applicant's place of business, seized the order volumes (goods) that the applicant was supposed to deliver to some customers in terms of the agreement, without an appropriate court order. This conduct amounted to unjustifiable self-help, no matter how egregious and defamatory the applicant's conduct was[6]. Nowhere in the agreement is such conduct explicitly permitted. And even if it were, it would *prima facie* be a direct contravention of section 51 (1) (i) (i)[7] of the CPA. The respondent contends, it seems, that it is entitled to do so in terms of the agreement. It then begs the question whether, if the terms of the agreement permit the respondent to act in this manner, the terms of the agreement can be regarded as fair, reasonable and just, in terms of the provisions of section 48 of the CPA.

[36] In my view, on the circumstances and the facts of this case, the applicant made out a *prima facie* case that the terms of the agreement, as well as the conduct of the respondent, are unfair, unreasonable and unjust. That being the case, in my view, the agreement is *prima facie* unlawful, subject to another court coming to a final conclusion in this regard.

[37] I am also satisfied that the applicant has shown a well-grounded apprehension of irreparable harm if the interim interdict is not granted. It is not disputed that the applicant's business is suffering, and will suffer further, should the interim relief not be granted, mainly because some of the order volumes (goods) that was in the possession of the applicant, which applicant had to deliver to customers, were seized by respondent. The respondent's only answer to this was that it was because of the business relationship between itself and the applicant, that the applicant was in a position to conduct its own business, which means the applicant's business is entirely dependent on the respondent's business, and any conduct on the part of the respondent will directly interfere with the applicant's business.

[38] I am furthermore satisfied that the balance of convenience favours the applicant. The respondent will not be unduly prejudiced should the interim relief be

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[6] Bock para 7.
[7] Roman numeral one.

granted. The only point that the respondent raises in this regard is that it would be embarrassing and unbearable to continue to conduct business with the applicant, which will lead to an uncomfortable and stressed business relationship between them, given the applicant's conduct. This, in my view, is not enough reason for the balance of convenience not to favour the applicant.

[39] Regarding the question whether the applicant has any other satisfactory remedy, the respondent submits that in terms of clause 38.2 of the agreement, in the case of a dispute between the parties, such shall be determined by an independent expert (who shall act as an expert and not as an arbitrator) appointed in terms of this clause. The clause further provides that only the respondent has a discretion to elect whether it would make use of an expert as contemplated in clause 38.2. If the respondent does not elect to appoint an expert, the matter shall be referred for arbitration in terms of the provisions of clause 39.2.

[40] In my view, the relief the applicant seeks could not have been resolved by any means other than seeking urgent interim relief, given the nature of the allegations against the respondent (that it is unfair, unreasonable and unjust). Also, that *prima facie* the terms of the agreement, especially clause 5.2, are inconsistent with the provisions of sections 48 and 51 (1) (i) (i)[8] of the CPA. Furthermore, the applicant also relies on the provisions of section 114 of the CPA, which only a court can grant.

[41] In the result therefore, I am satisfied that the applicant has satisfied the requirements for urgent interim relief. In granting the relief, the provisions of section 114 (3) of the CPA must be considered, which provides that the hearing of the matter must be concluded within six months of the date of the order, which may only be extended, on good cause shown, for a further period not exceeding six months. Any order of the court must be cognisant of these provisions. Furthermore, it must be emphasised that the order should not prevent the respondent from lawfully exercising its rights in terms of this agreement, under circumstances other than those which justified the granting of this interim order.

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[8] Roman numeral one.

I therefore make the following order:

1. Pending the finalisation of proceedings instituted at the National Consumer Commission, alternatively, in the Western Cape Division of the High Court, the respondent be interdicted from exercising its rights under clause 35.3.2, read with clause 5.2, of the franchise agreement concluded between the applicant and the respondent and dated 29 October 2018 (the "**franchise agreement**") in reliance upon the applicant's communication to the Franchise Council, dated 31 March 2021, and to the independent contract drivers, dated 6 April 2021, and the related WhatsApp messages, as more fully described in paragraph 5.2.12 of the respondent's answering affidavit;

2. The respondent is to restore the applicant's business to the position in which it existed prior to the respondent's exercise of its rights under clause 35.3.2, read with clause 5.2, of the franchise agreement on 30 April 2021;

3. The applicant is ordered to institute proceedings against the respondent at the National Consumer Commission, alternatively in the Western Cape Division of the High Court, within 10 days from the date of this order, failing which the interim interdict granted in favour of the applicant is to be discharged with costs;

4. The respondent is to pay the costs of the application, including the cost of two counsel, where so employed.

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R.C.A. HENNEY

Judge of the High Court