

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE :	YES /NO
(2) OF INTEREST TO OTHER JUDGES :	YES /NO
(3) REVISED	
DATE <u>29-1-10</u>	<u><i>RR Smit</i></u> SIGNATURE

Date: 2010-02-01

Case Number: 39051/2009

In the matter between:

MOCHACHOS BRANDS (PTY) LTD

Plaintiff

and

EST ACG TRADING ENTERPRISES CC

First Defendant

GHELANI, ATUL CHHOTALAL

Second Defendant

JUDGMENT

SOUTHWOOD J

- [1] The plaintiff applies for summary judgment against the defendants, jointly and severally, for payment of the sum of R211 512,00, interest and costs on the scale as between attorney and own client. The plaintiff's claim against the first defendant is based on a written franchise agreement entered into on 15 March 2006 in terms of which the plaintiff granted to the first defendant the right to operate the franchise business, use the plaintiff's trade marks and intellectual property and have access to the plaintiff's expertise, knowledge,
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experience, research, business acumen and operating manual and the first defendant undertook to pay to the plaintiff an agreed royalty. The amount claimed represents the unpaid royalties for the period July 2006 to May 2009. The plaintiff's claim against the second defendant is based on a deed of suretyship in terms of which the second defendant bound himself as surety to the plaintiff for the punctual payment of all sums which may become due by the first defendant to the plaintiff in terms of the franchise agreement.

- [2] The defendants oppose the application and have filed an unsworn statement by the second defendant entitled 'Opposing Affidavit' (apparently prepared in October 2009) which was signed and initialled by the second defendant but not commissioned before a commissioner of oaths, and have delivered an opposing affidavit signed by the second defendant on behalf of both defendants on 20 January 2010. It should be noted that the plaintiff served this application for summary judgment on 24 July 2009 and it has been postponed twice, on 22 September 2009 and 18 November 2009, to enable the defendants to file opposing affidavits.
- [3] To avoid summary judgment a defendant must file an affidavit which demonstrates that the defendant has a *bona fide* defence to the action and which fully discloses the nature and grounds of the defence and the material facts relied upon therefor – see Rule 32(3)(b). This means that the defendant must set out in the affidavit facts which, if proved at
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the trial, will constitute an answer to the plaintiff's claim and swear to this defence in a manner which is not inherently and seriously unconvincing. The latter requirement means that the defendant must set out the material facts sufficiently fully to persuade the court that what the defendant has alleged, if it is proved at the trial, will constitute a defence to the plaintiff's claim. If the defence is averred in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy, that will constitute material for the court to consider in relation to the requirement of *bona fides* – see *Breitenbach v Fiat SA (Edms)* Bpk 1976 (2) SA 226 (T) at 227G-228F.

- [4] At the outset it must be accepted that the unsworn statement filed by the defendants must be taken into account in deciding whether the defendants have a *bona fide* defence. The defendants' counsel argued that the court could not look at the statement because it is not an affidavit but it is clearly the defendants' statement and he could not explain why it is irrelevant and/or inadmissible. It seems to me that if a defendant chooses to place an unsworn statement as well as a sworn statement before the court in answer to an application for summary judgment both statements must be considered by the court when it assesses the *bona fides* of the defence. The unsworn statement does not dispute any of the allegations in the plaintiff's particulars of claim and the defence raised is that the first defendant has a counterclaim for more than R4 million against the plaintiff. No details are supplied which could satisfy a court that there is a *bona fide* defence: clearly
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the defence is averred in a manner which is needlessly bald, vague and sketchy. Furthermore, the counterclaim does not appear to be based on a breach of contract as none is alleged. It is striking that the statement does not refer to the defence now raised in the opposing affidavit dated 20 January 2010: namely that the parties agreed that no royalties would be payable in terms of the agreement until the first defendant had reached a break-even point. It is inconceivable that if this was agreed in July 2006 as the defendants allege, it would not be mentioned in the statement.

- [5] The opposing affidavit in which this defence is raised does not explain why the unsworn statement does not refer to the defence or why the defendants no longer rely on the counterclaim. In order to comply with the non-variation clause in the agreement (i.e. that variations to the agreement can only be of force and effect if reduced to writing and signed by the parties) the second defendant states that the agreement was reached by an exchange of correspondence. However he says that the letters cannot be attached. According to the second defendant 'despite diligent search the two letters cannot be traced for the moment'. However he furnishes no facts to justify the conclusion that a diligent search was made. It is simply a bald statement. It is highly improbable, if not inconceivable, that such important letters would go astray and in the absence of a more detailed and convincing explanation it must be concluded that there was no such agreement.
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[6] The fact that the plaintiff did not present a claim for royalties before the summons was served does not establish a defence. While it may be consistent with the agreement averred, the plaintiff may have been content to let the royalties accumulate until it was clear that action should be taken. This is consistent with the defendants' unsworn statement where the defendant refers to a discussion in May 2009 between the plaintiff's financial director and the second defendant when the financial director delivered an ultimatum to the second defendant: either sell the franchise to the plaintiff for R400 000 or the plaintiff would hold the defendant liable for the royalties.

[7] In view of the inconsistencies between the two statements and the absence of material facts which demonstrate a defence I am not satisfied that the defendant has made out a *bona fide* defence to the plaintiff's claim and the plaintiff is entitled to summary judgment.

[8] The following order is made:

Summary judgment is granted against the first and second defendant jointly and severally, the one paying the other to be absolved for:

1. Payment of R211 512,00;
2. Interest on R211 512,00 calculated at the rate of 15,5 % per annum from 16 July 2009 to date of payment.

3. Costs of suit on the scale as between attorney and own client.

A handwritten signature in black ink, appearing to read "B.R. Southwood", written over a horizontal line.

B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT

CASE NO: 39051/2009

HEARD ON: 20 January 2010

FOR THE PLAINTIFF: ADV. E.B. CLAVIER

INSTRUCTED BY: Friedland Hart Solomon & Nicolson

FOR THE DEFENDANTS: ADV. A. WILKINS

INSTRUCTED BY: Van den Berg & Meintjes Inc.

DATE OF JUDGMENT: 1 February 2010