IN THE NORTH GAUTENG HIGH COURT, PRETORIA

REPUBLIC OF SOUTH AFRICA

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

16.02.10 ...... pp. Davel AJ
DATE SIGNATURE

CASE NO: 22532/07

DATE: ~~2008-06-13~~ 16/2/2010

In the matter between

NORTHERN LIGHTS TRADING 123 (EDMS) BPK	Applicant
and	
ACM SHOPFITTERS BK	Respondent
CATTLE BARON STEAK RANCH FRANCHISING (PTY) LTD	Third Party

IN RE:

ACM SHOPFITTERS BK	Applicant
and	
NORTHERN LIGHTS TRADING 123 (EDMS) BPK	Respondent
CATTLE BARON STEAK RANCH FRANCHISING (PTY) LTD	Third Party

JUDGEMENT

DAVEL AJ

[1] The present matter originally came to court in the opposed motion court on 13 June 2008 where the applicant (respondent in reconvention)

sought an order against the respondent (the applicant in reconvention) for payment of the amount of R560 885.50, together with interest from 5 April 2007 at 15.5% per annum, alternatively, a declarator that the applicant is entitled on the basis of a reservation of ownership to remove the goods delivered and installed at the Cattle Baron Restaurant, Rosebank, against repayment of the amount of R454 781.43 to the respondent. In order not to confuse matters unduly, I will refer to the parties as per the original application.

[2] The applicant, ACM Shopfitters CC, a closed corporation represented by Grobler, based its claim on an agreement, "the shopfitting agreement", allegedly concluded in November 2006 between the applicant and the respondent, Northern Lights Trading 123 (Pty) Ltd, a private company represented by the director Korb, to arrange and install the Cattle Baron Restaurant in Rosebank.

[3] The respondent's case was based on a franchising agreement between the respondent and the franchisor, Cattle Baron Franchising Company (Pty) Ltd, represented by the managing director, Dick, with its main office in the Cape Province. The crux of the respondent's case was the allegation that the "shopfitting agreement" was not concluded between the applicant and the respondent, but rather between the applicant and the franchisor.

[4] Two distinctly different versions were portrayed in the affidavits presented to court and the papers, no doubt, contained several disputes as to facts. In *Fakie v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) Cameron JA stated as follows in this regard:

> [55] That conflicting affidavits are not a suitable means for determining disputes of fact has been doctrine in this court for more than 80 years. Yet motion proceedings are quicker and cheaper than trial proceedings and, in the interests of justice, courts have been at pains not to permit unvirtuous respondents to shelter behind patently implausible affidavit versions or bald denials. More than 60 years ago, this Court determined that a Judge should not allow a respondent to raise 'fictitious' disputes of fact to delay the hearing of the matter or to deny the applicant its order. There had to be 'a bona fide dispute of fact on a material matter'. This means that an uncreditworthy denial, or a palpably implausible version, can be rejected out of hand, without recourse to oral evidence. In *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634-5 per Corbett JA, this Court extended the ambit of uncreditworthy denials. They now encompassed not merely those that fail to raise a real, genuine or bona fide dispute of fact but also allegations or denials that are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.
>
> [56] Practice in this regard has become considerably more robust, and rightly so. If it were otherwise, most of the busy motion courts in the country might cease functioning. But the limits remain, and however robust a court may be inclined to be, a respondent's version can be rejected in motion proceedings only if it is 'fictitious' or so far-fetched and clearly untenable that

> it can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of credence. (Footnotes omitted.)

Also see *Rosen v Ekon* 2001 (1) SA 199 (W) at 215B-D, where Wunsh J stated as follows:

> Bearing in mind the approach to contradictory affidavits mandated by *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 635H–636C, but agreeing with the statement in *Truth Verification Testing Centre v PSE Truth Detection CC and others* 1998 (2) SA 689 (W) at 689I-J, referred to by the applicant's counsel, that the so called 'robust, common sense approach' which was adopted in cases such as *Soffiantini v Mould* 1956 (4) SA 150 (E) in relation to disputed issues on paper 'should also be applied in assessing a detailed version which is wholly fanciful and untenable', I consider the respondent's defence to be unsustainable.[1]

[5] The applicant's version was corroborated on vital issues by accompanying affidavits. One such affidavit was filed by Naude, a project manager in the employee of Cattle Baron Steak Ranching Franchising (Pty) Ltd. It confirmed several allegations contained in the applicant's founding and replying affidavits with regard to certain important facts, such as his involvement as project manager, the drafting of a "fault list" with Grobler and the fact that these shortcomings were attended to, to the satisfaction of Korb. It also confirmed the fact that Korb accepted liability. Another example of a confirming affidavit was that of Du Plessis, the managing director of Patin

[1] See also *Tecmed (Pty) Limited v Hunter and Metha* [2008] JOL 21468 (W).

Trading 167 (Pty) Ltd, a filial of Cattle Baron Franchise Company (Pty) Ltd. He corroborated the applicant on very important facts such as the "key money", his dealing with Korb and receiving payment directly from Korb. Furthermore he was clear on the fact that Korb was the person that accepted the quotes and explained satisfactorily the dust and plaster on the kitchen equipment that was taken over by the respondent from the previous owner of the premises. He confirmed that the work was completed and inspected by Korb at some stage.

[6] On the other hand, Korb's affidavit contained inaccuracies, such as the fact that it referred to an annexure "BC6" as being email to the franchisor where *prima facie* it was a fax from Protech Facilities Management CC. Furthermore, annexure "BC1" also created suspicion because the heading clearly states, "ESTIMATED SETTING UP EXPENDITURE – <u>HARTENBOS</u>" (own emphasis) which justified an inference that it could not be relevant in the present matter. Not a single confirming affidavit was presented to corroborate the allegations in the answering affidavit. The replying affidavit by the respondent also contained bare denials without any substance and far-fetched, untenable statements, eg. that the work on the ceiling was not acceptable ie. sub-standard and poorly executed, that the air-conditioning was faulty, that there was no variation order regarding the "shop front", that the applicant acted as both shopfitter and project manager (while from the documents presented to court it was clear that the respondent himself sourced quotation), that annexures "B" "BC1" and "BC2" contained not merely an estimate of what setting up costs could probably entail while the headings

explicitly stated: "ESTIMATED SETTING UP EXPENDITURE" (own emphasis) etc.

[7] The respondent's version was considered to be unsustainable. On the one hand his argument entailed that there was no agreement between the parties, but on the other hand he did at some stage admit that he owed the applicant money. The "dispute" regarding the parties to this shopfitting agreement seemed far-fetched. The papers made it clear that Korb concluded the agreement for a company to be registered and that company was then duly registered. At no stage was there any uncertainty regarding the identity of the shopfitting company. One could have expected that the franchisor and/or its employees would have confirmed the allegations made by the franchisee, but the contrary happened.

[8] In light of the above, I found the respondent's version to be unsustainable and unworthy of credence. I found some allegations and denials of the respondent to be far-fetched and untenable in motion proceedings. The respondent's version was therefore rejected.

[9] The respondent furthermore sought an order declaring that Cattle Baron Franchising (Pty) Ltd, "the third party" is liable to indemnify the respondent against any money judgment if such a money judgment is awarded against the respondent. A third party notice was served on the third party by the respondent in terms of Rule 13 of the Uniform Rules of Court. However, the third party notice was issued in the form of a declaration and not

in the form of an affidavit. It therefore contained no facts or evidence. The applicant as *dominus litis* chose the forum, in this case the motion court. However, the respondent decided that disputes of fact will arise and issued a declaration to secure a referral to trial. The issue in respect of the third party notice could not be referred to trial because what the respondent sought from the third party was an indemnity.

[10] Counsel for the third party convincingly argued in the opposed motion court that Rule 6(14) of the Uniform Rules makes the other Rules *mutatis mutandis* applicable to motion proceedings. The words "*mutatis mutandis*" mean "all necessary changes having been made"[2] or "subject to necessary alterations"[3]. In this context the necessary changes related to adopting the appropriate proceedings. Applying motion court proceedings, it would have meant issuing or delivering the third party notice in the form of an affidavit. The only other way to bring the issues between the respondent and the third party to the court's attention would have been to deal with it in the answering affidavit. However, this was not the route that the respondent took.

[11] In the light of the above, the following order was made:

ORDER

1. Proceedings against the third party are dismissed with costs.

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[2] *Black's Law Dictionary* Bryan A. Garner (ed) 8th ed Thomson West Publishing (2004) at 1044.
[3] *Dictionary of Legal Words and Phrases* vol 3 R. D. Claassen, LexisNexis (1997) at 74.

2. The respondent is ordered to pay the amount of R560 855.50 with interest on this amount from 5 April 2007 at a rate of 15.5% to the applicant.

3. The respondent is ordered to pay the costs of this application.

[12] The Respondent filed an Application for Leave to Appeal on the 24th June 2008, but due to unknown circumstances the application only came to my attention in September 2009 and the Application for Leave to Appeal was argued on 18 September 2009.

[13] Due to the fact that the original court file was not available, judgment was reserved and counsel for the parties were requested to compile a duplicate of the file.

[14] The Application for Leave to Appeal related to the whole of the order of the 13th June 2008. I find it possible that another court may come to a different finding.

The following order is made:

ORDER:

1. Leave to appeal the order made on 13th June 2008 is granted.
2. Cost to be cost in the cause.

RP DAVER. AJ

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