IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE – PORT ELIZABETH)

Case No.: 134/2010
Date heard: 16 March 2010
Date delivered: 15 June 2010

In the matter between:

CHICKENLAND (PROPRIETARY) LIMITED Applicant

and

GIRISH SINGH First Respondent

KAMALAM SINGH Second Respondent

J U D G M E N T

DAMBUZA, J:

[1] This is an application for summary judgment.

[2] In the main action the plaintiff is Chickenland Proprietary Limited, commonly known as Nandos. The first defendant (the first respondent in this application) is Girish Singh. The second defendant (the second respondent in this application) is Kamalam Singh, the mother to the first defendant.

[3] The plaintiff's two claims in the summons are founded on three Deeds of Suretyship signed by the respondents. The principal debtor in all the Deeds of Suretyship is the Leaping Dolphin Fast Food CC, a close

corporation duly incorporated in terms of the Close Corporations Laws of the Republic of South Africa.

[4] In the first claim, the applicant pleads that on 4 April 2009 it concluded a franchise agreement with the principal debtor, in terms of which it granted to the principal debtor the right to operate a franchise business at Shop 1A Dolphins Leap Shopping Centre, Beach Road, Port Elizabeth. The first claim of R145,753.92 is money owing and payable by the principal debtor to the applicant in respect of royalties and marketing fees due in terms of the franchise agreement. In relation to this claim the applicant relies on a Deed of Suretyship (the first suretyship) signed by the respondents on 20 March 2009, in which the respondents bound themselves jointly and severally, as sureties and co-principal debtors *in solidum* with the principal debtor in favour of the applicant for due and proper performance by the principal debtor of all its obligations from any cause whatsoever and in an unlimited amount.

[5] The second claim relates to a franchise agreement concluded between the applicant and the principal debtor on 5 April 2009, in terms of which the applicant granted to the principal debtor the right to operate a franchise business at Shop 42, Boardwalk Casino Complex, Marine Drive, Summerstrand, Port Elizabeth. This claim is for an amount of R84,726.44 owing and payable by the principal debtor to the applicant in terms of this second franchise agreement. In respect of the second claim the applicant relies on two Deeds of Suretyship signed by the first and second respondents on 20 and 26 March 2009 respectively, in which they bound themselves jointly and severally, with the principal debtor as in the first suretyship. The two

franchise agreements are signed by the first respondent who, in opposing this application, has deposed to an affidavit on his own behalf and on behalf of the second respondent.

[6] In the opposing affidavit, the first respondent refers to an agreement of sale in terms of which he bought 80% of the members' interest in the principal debtor on 24 February 2009 from four previous members of the principal debtor. According to the first respondent 20% of the members' interest in the principal debtor remains in the hands of a certain DA Singh. The effective date of this sale agreement was 24 February 2009. At the time of the sale, the principal debtor had already been conducting the business which is the subject of the franchise agreement at the two premises already referred to above.

[7] According to the first respondent when the franchise agreements were negotiated the applicant was disinclined to continue doing business with the four members whose interest was bought by the first respondent. Consequently, the applicant, and more particularly, a certain Mr C Sam, was reluctant to conclude a final and binding franchise agreement prior to the conclusion of the sale of the 80% members' interest and insisted that no final and binding agreement would come into existence until the first respondent had lawfully acquired 80% of the member's interest and that the membership was lawfully transferred to him.

[8] The respondents' case is that such intention on the part of the applicant is not recorded in the franchise agreements and therefore the franchise agreements stand to be rectified. The respondents contend that to reflect the true intention of the parties, the definition of "sale agreement" in the franchise agreement should read:

> "The agreement concluded by Girish Singh in terms of which Girish Singh purchased 80% of the members' interest in the franchisee".

[9] Presently, the sale agreement is defined in clause 1.3.2.26 of the franchise agreements as the agreement concluded by the franchisee (the principal debtor) in terms of which the franchisee purchased the business.

[10] Further to the above, the respondents contend that paragraph 3.1 of the franchise agreement (relating to suspensive conditions) should refer to the sale of members' interest and that the definition of "sale agreement" falls to be rectified by adding the following at the end of the current definition:

> ". . . and further provided that Girish Singh becomes the lawful registered member of 80% of the membership interest in the Franchisee prior to the date of last signature of this agreement."

[11] Presently in both franchise agreements this paragraph (3.1) provides that:

> "This agreement (other than this clause 3 and 29) is conditional upon the sale agreement becoming unconditional in accordance with its terms on or before effective date or such later date as the parties may agree in writing."

[12] In essence the respondents' case, as I understand it, is that the deeds of suretyship do not cover the franchise agreements as the franchise agreements never came into existence because of the unfulfilled suspensive condition; the details of unfulfilment of the suspensive condition being the absence of the requisite consent by the 20% member (DA Singh) to the sale of the 80% members' interest as required in terms of section 37 of the Close Corporations Act No. 69 of 1984. In the opposing affidavit the first respondent states that the 80% membership interest sold to him by the four members of the principal debtor was never <u>lawfully transferred</u> to him prior to the last signing of the franchise agreement and accordingly, no contractual relationship came into existence either between the principal debtor and the applicant and also in respect of the respondents as purported sureties for obligations towards the applicant.

[13] It is trite that a respondent in a summary judgment application does not have to formulate his/her opposition to the application with the precision that would be required in the plea; but when he/she advances his/her contention in resistance to the plaintiff's claim he/she must do so with a sufficient degree of clarity to enable the court to ascertain whether he/she has deposed to a defence which, if proved at trial, would constitute a good defence to the action.[1] All that the court requires, in deciding whether the defendant has set out a *bona fide* defence is, (a) whether the defendant has disclosed the nature and grounds of his defence and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a

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[1] **Barclays Western Bank Ltd v Bill Jonker Factory Services (Pty) Ltd and Another** 1980 (1) SA 929 (SE).

defence which is *bona fide* and good in law.[2] Whether a defence is *bona fide* or not depends upon the merits of the defence as raised in the defendant's replying affidavit.[3] The sub-rule does not require the defendant to satisfy the court that his/her allegations are believed by him/her to be true. It will be sufficient if the defendant swears to a defence, valid in law, in a manner which is not inherently or seriously unconvincing; or, put differently, if his/her affidavit shows that there is a reasonable possibility that the defence he/she advances may succeed on trial.[4]

[14] During argument it was submitted on behalf of the applicant that even if the amendments on which the respondents rely are accepted, in the end they have not advanced a *bona fide* defence. The applicant was prepared, for argument's sake, to read the proposed amendments into the franchise agreements. *Mr Scott* then submitted, on behalf of the applicant, that when the first respondent signed the franchise agreements and the suretyship agreements, approximately a month after the effective date of the sale of the 80% membership interest he must have either had the requisite consent by the remaining member to the sale and transfer thereof or did not have such consent and fraudulently entered into the franchise agreement with the plaintiff. In the event of the latter, so it was argued, the court should not come to the assistance of the respondents as reliance by a party on his own fraud as a defence would not be *bona fide*.

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[2] **Maharaj v Barclays National Bank Ltd** 1976 (1) SA 418 (A) at 426.

[3] **Silverleaf Pastry and Confectionary Co (Pty) Ltd v Joubert and Another, NN.O** 1972 (1) SA 125 (C) at 129.

[4] Farlam, Fichardt, Van Loggerenberg; Erasmus on Superior Court Practice; at B1-224 and the authorities cited therein.

[15] I am, unable to make a finding, on the evidence before me, as to which of the two suggested scenarios prevailed when the first respondent signed the franchise agreements. As I have stated, in the opposing affidavit the first respondent merely asserts that the 80% membership interest was <u>not lawfully</u> transferred to him. It is not clear whether the contention is that the membership interest *was* transferred but such transfer is tainted by the absence of the requisite consent or that the membership interest *was never* transferred at all. If the membership interest was transferred there is no evidence on how it was transferred without the requisite consent. There is also no explanation as to why the issue of the absence of consent was never raised prior to the institution of the action by the applicant.

[16] A further submission on behalf of the applicant was that in terms of the sale of members' interest agreement, on conclusion of the agreement the seller had to deliver to the first respondent an amended founding statement in the form prescribed by the Close Corporations Act which form had to be appropriately completed and signed by the sellers. Further, the amended founding statement had to be lodged with the Registrar for registration in the prescribed form within 28 days after the change of membership. The amending founding statement had to be signed by or on behalf of <u>every member</u> of the corporation and by or on behalf of any person who would become a member on such registration.[5] If these steps were taken this would mean that the 20% interest holder did give his consent to the sale and transfer of the 80% membership interest. However, the opposing affidavit is

[5] See section 15(1) of the Close Corporations Act, Act No. 69 of 1984.

silent on whether these steps were taken towards registration of the amended founding statement.

[17] But even with these concerns, my view is that it would not be proper to grant summary judgment in this case. What is relevant is that if the respondents would prove, at a trial that the requisite consent was never obtained then a valid defence would have been established. The suspensive conditions in the franchise agreements do stipulate that the franchise agreements are conditional upon the sale agreements being unconditional in accordance with their terms on or before the effective date. On the papers before me I am unable to make a definite finding that the intended change in the membership of the principal debtor became effective as required in terms of the Close Corporation Act. It is my view that there is a reasonable possibility that if the respondents prove the absence of the requisite consent at a trial, a valid defence may be established.

[18] Further, it was submitted by *Mr Ronaasen* who appeared on behalf of the respondents that, a further defence which the respondents have is that the summons do not disclose a cause of action as there is no allegation in the summons that the conditional clause (3.1) was fulfilled. I am not persuaded by the submission by *Mr Scott*, in reply, that because the plaintiff's claim against the respondents is founded on the Deeds of Suretyship rather than the franchise agreements such fulfilment need not be pleaded in the summons. If the defence of non-fulfilment of the conditional clause would be available to the principal debtor, it is equally available to the sureties. It is

trite that a surety may rely upon and plead all the defences which the principal debtor has against the creditor, except those defences which are personal to the principal debtor. [6]

[19] Consequently, my order is as follows:

(a) Summary judgment is refused;

(b) The respondents are given leave to defend the action;

(c) The costs of this application shall be costs in the cause.

N. DAMBUZA
JUDGE OF THE HIGH COURT

[6] **Barclays National Bank v Von Varendorff** 1985 (2) SA 544 (D) at 549.

Appearances:

For the applicant: Adv PWA Scott instructed by Spilkins Attorneys of Port Elizabeth

For the respondents: Adv O Ronaasen instructed by McWilliams & Elliot Inc Attorneys of Port Elizabeth