

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, PORT ELIZABETH)

In the matter between:

Case No: 1628/2011

CUBANA LATINO CAFFE CC

Applicant

And

GAPWEDGE PROPERTIES 53 (PTY) LTD

Respondent

Coram: **Chetty, J**

Date Heard: **27 October 2011**

Date Delivered: **3 November 2011**

Summary: *Contract – Whether a clause in a franchise agreement requiring the franchisee to conclude an agreement of lease with the landlord of premises a suspensive condition or a term of the contract*
Held that it was a term of the contract – Respondent consciously refraining from advising applicant that lessor not the landlord for more than one year after gaining such knowledge – Respondent estopped from contending that franchise agreement void ab initio – Applicant entitled to relief sought

JUDGMENT

Chetty, J

[1] In his authoritative treatise¹, the learned author, R.H. Christie, defines a contract in the modern Roman Dutch Law of South Africa as “*an agreement (arising*

¹ The Law of Contract in South Africa, 6th Edition (2011) at page 2

from either true or quasi-mutual assent) which is, or is intended to be enforceable at law.”

Although the common cause facts attest to the fact that in appending their signatures to the franchise agreement the parties intended such a result, the respondent, rather disingenuously, seeks to resile from its contractual obligations on the basis of non-fulfilment of what it contends was a suspensive condition. As a general proposition, the non-fulfilment of a suspensive condition renders a contract void *ab initio* unless the parties have agreed otherwise.

[2] The alleged suspensive condition which the respondent contends rendered the contract void *ab initio* is clause 17 of the franchise agreement which, under the rubric “*Agreement of lease*” provides as follows –

“It shall be a condition precedent to this franchise agreement that the franchisee signs an agreement of lease with the landlord of the premises on terms and conditions that are acceptable to the franchisor.”

[3] The immediate question which arises is whether the clause constitutes a term of the contract or is a true condition. The essential difference, as pointed out by Botha J², is that –

“In the case of a suspensive condition, the operation of the obligations flowing from the contract is suspended, in whole or in part, pending the occurrence or non-occurrence of a particular specified event (cf. Thiart v Kraukamp, 1967 (3) SA 219 (T) at p. 225). A term of the contract, on the other hand, imposes a contractual

² In Design and Planning Service v Kruger 1974 (1) SA 689 (T) at 695C-D

obligation on a party to act, or to refrain from acting, in a particular manner. A contractual obligation flowing from a term of the contract can be enforced, but no action will lie to compel the performance of a condition (Scott and Another v Poupard and Another, 1971 (2) SA 373 (AD) at p. 378 in fin.).”

[4] There can be no doubt that Clause 17 constitutes a term of the franchise agreement. It did not suspend either parties obligations flowing from the contract pending the happening or failure of some uncertain future event. It merely required that an agreement of lease be concluded prior to the parties signing the franchise agreement. That was in fact done. The seed of destruction of the respondent's case arises from its own rendition of the factual matrix which gave rise to this litigation but before dealing therewith, a brief historical overview of the premises.

[5] The MacArthur Pool and Leisure Centre (the complex) is a landmark on the Port Elizabeth beachfront. It evolved from its earlier manifestation as the MacArthur Swimming Baths, to its current locale in vogue on the beachfront. In October 2002 the Nelson Mandela Metropolitan Municipality (**NMMM**) and Clink Properties (Pty) Ltd (Clink), also known as Bel Essex, concluded a management agreement in terms of which Clink was appointed to manage the entire complex and, in consideration, be entitled to receive all revenues generated from various entities which leased the shops in the complex.

[6] During the currency of their management of the complex, the existing

lessee of the premises left for reasons not germane to this judgment. Actuated no doubt by the allure of its locality and the potential for business the respondent entered into negotiations with the applicant to establish and operate a social cafe under the well known name and style of Cubana Latino Caffè (Cubana). On 12 January 2010, Mr *Ben Hilarius Nyaumwe (Nyaumwe)*, a director of the respondent, who had represented it from the outset in the business negotiations sent an e-mail³ to the applicant's representative, Mr *John Hatzipolychronis (Yanni)*, of relevance, the first two paragraphs which reads –

“Hie (sic) Yanni

I hope you had a good break and are well rested for the new year. I am very excited about our new project. I spoke to a couple of people whilst in CT recently and there is such a strong positive sentiment about a Cubana PE at the our proposed site. Since returning to office yesterday i have prepared a proposal for our landlord. He asked that we articulate what we want to do in a document. Bel Essex our landlord is one of the largest Industrial corporations in South Africa. They operate and run the McArthur pool baths on behalf of the municipality as a service to the city. We will sublease the premises from them. I have confirmed to their CEO and founder Mr Chris Steenkamp and his Financial Director Peter Merrington that we are proceeding with the lease and in turn they wanted us to document what establishment we want to develop. They would want to ensure that it is a high end classy operation that we want to develop and that is the purpose of the request. I will meet with Chris and Peter this week to do a short presentation and finalise further lease details.

In the interim I have passed on the franchise agreement to Michael

³ Annexure “C2” at page 83 of the founding affidavit.

White who is my lawyer. He is busy reviewing and I am doing the same. Can we meet next week to discuss the franchise agreement and try and conclude the essentials of the document. There are a couple of worrying items i picked up when i had cursory look through it.”
(emphasis supplied)

[7] The lease contemplated in paragraph 1 of the e-mail finds expression in the franchise agreement postulated in paragraph 2 of the aforementioned e-mail, the self same clause 17, the buttress upon which the entire edifice of the respondent’s case is predicated. As a precursor to signature of the franchise agreement, the applicant attorneys, *inter alia*, sought production of the management agreement and the lease agreement from the respondent’s then attorney, Mr *White*. It is not disputed that only the lease agreement was furnished to the applicant’s attorneys, the management agreement, rather conveniently withheld⁴.

[8] The condition precedent thus having been fulfilled, the franchise agreement was signed by the applicant and respondent on 14 and 13 May 2010 respectively. Unbeknown to the applicant, however, the respondent, shortly after signature of the franchise agreement, came into possession of the management agreement. By **Nyaumwe’s** own admission, a cursory reading thereof indicated that the lease agreement was invalid in as much as *“the lease agreement between the respondent and Clink Properties (Pty) Ltd was concluded with the incorrect entity . . .”*

⁴ The omission of furnishing the management agreement was, clearly a calculated decision.

Galvanised into action, **Nyaumwe** addressed a letter⁵ to the **NMMM**. It is unfortunately necessary, given the vital importance of the letter, to reproduce it in full for a number of reasons. *Firstly*, to show that in contradistinction to various e-mails penned by **Nyaumwe** it, syntactically, attests to the receipt of legal advice. *Secondly*, to demonstrate the intent, presaged in the e-mail⁶ to the applicant on 25 January 2010 of Auspex⁷ becoming a partner of Bel Essex and thus to be a “*the landlord and a tenant at the same time*” and *thirdly*, to show that shortly after signing the franchise agreement and long before Cubana being opened for business, **Nyaumwe** was fully aware that the lease agreement was invalid and a nullity.

[9] It reads as follows –

*“The Executive Director
Mr Rio Nolutshungu
Corporate Services and Administration
Nelson Mandela Metropolitan Municipality
12th Floor, Room 1203
Lilian Diedericks Building*

18 May.

2010

*Ref: The Mc Arthur Baths Management Contract Proposal Auspex
Property*

Dear Mr Nolutshungu

5 Annexure “GP16” at page 353 of the opposing papers.

6 Annexure “C3” at page 84 of the founding affidavit.

7 The property holding company in the group of which Nyaumwe was the managing director.

Following our presentation to the Mayoral Committee Meeting on the 5th May 2010 we would like to follow up on the proposal and bring additional information to your attention, for your appropriate action and follow-up as the custodian department of the municipality responsible for management and operation of the physical assets at Mc Arthur.

It is important to note that these issues have only just come to our attention and were not raised at the presentation as we did not have sight of the agreements which we now have in our possession. The matters relate to the conduct of Bell Essex through its subsidiary Clinck Properties and the serious breach of contract they have committed and general abuse of their authority as contracted operator of the Municipality Property Mc Arthur Baths. We state as follows.

- 1. Bel Essex has concluded a lease with Auspex subsidiary Gapwedge properties. We however have established and have legal opinion that Bel Essex does not have the legal right or power to do so in terms of their agreement with the Nelson Mandela Metro in terms of their operators agreement management contract, copy which is attached. Bel Essex can only nominate a lease to the municipality the property owner. The actual lease must be entered into between Leasee and the Nelson Mandela Municipality even though the contract allows for rental income to be payable to Bel Essex. This is in breach of clause 13.1 and grounds for cancellation of contract by the Municipality.*

Clause 13.1

“The operator shall be entitled to nominate a leasee in respect of the premises or any portion thereof, provided the proposed lease is on commercial arms length terms, will be concluded between the NM3 and the nominated lease;....”

- 2. It is our assertion that Bel Essex has acted in breach of the*

provision of 12.3 and 13.3. It was unbeknown to us that Bel Essex did not seek permission from the Municipality prior to giving us occupation or approval for us as a tenant. A request was made to Bel Essex by a municipal official on the day we presented to Council to provide a motivation as why Auspex had been given occupation and chosen as tenant.

- 3. Bel Essex has refused Auspex access to or sight of the current management agreement with the Municipality and it is now understandable why. This agreement was handed to us by the Portfolio Chairman for Economic Development & Tourism to review following our presentation to Council.*
- 4. Bel Essex has failed to draw up a JV agreement with Auspex and instead have advised Auspex that they want a very loose informal agreement. This is contrary and misleading in terms of what was tabled with the Municipality in their own application for contract extension. This is tantamount to an act of breach in terms of the provisions of good faith and conduct as per the management agreement.*
- 5. Bel Essex have failed to assist Auspex with necessary approvals from the city and other authorities but instead have acted like an approving authority often making requests beyond that required by the competent and responsible authorities. This has been a breach of contract with the City in terms of clause 12.3 where they are bound to act in a way that promotes the City's vision for promotion of Tourism and Investment in the City.*
- 6. Bel Essex has failed and refused to provide a set of accounts for the operation and running of Mc Arthur Complex to Auspex their purported JV partner. This constitutes an act of bad faith by Bel Essex and a total disregard to us and a condescending attitude which does not bode well for working in partnership.*
- 7. No undertakings or firm date has been given for the so called proposed renovations and proposed maintenance activities to the Mc Arthur facility. With the world cup only a few weeks away we fear we could open our new restaurant to currently unsightly*

pools and facilities.

8. *Bel Essex have failed to market and promote the Facilities as required of a landlord and in terms of their agreement with the city. This has resulted in the low foot traffic coming to the facility. This is a clear lack of performance of obligations of the operator as setout and required by the management agreement.*

Auspex under these circumstances reaffirms its decision to make its own independent application to operate, manage and market the Facilities on behalf of the City at its own cost without any further participation or involvement of Bel Essex. We call upon the City to enter into the lease with Auspex subsidiary Gapwedge Properties as per the conditions of the management contract without further delay as per 13.2.

Clause 13.2

If the lease (proposed) is on commercial terms and contains no unusual or onerous clauses, NM3 shall enter into the lease without unreasonable delay.

We further call upon the Municipality to cancel the management agreement with Bel Essex as per remedies available to it in terms of Clause 20 and its provisions without delay and to enter into a new Management contract with Auspex Property.

In closing we remind the Council that Auspex is a significant investor in Tourism facilities in the city. Auspex has made a further investment of R6million into the Mc Arthur facility at risk and will bear the largest rental burden of all tenants contributing approximately 80% of the estimated running costs of the facility. We reiterate that Mc Arthur should fall under The Radisson management with 142 strong local staff supported by an extensive international network and staff. This team is in a much better position to promote

and properly market Mc Arthur going forward. There would be hope that the original vision of Mc Arthur as a major tourist draw card for the City could finally be realized. Bel Essex can add no value to this process apart from maintenance of the pools. The maintenance team of the Hotel would be extended by taking on all staff currently employed to maintain and Operate Mc Arthur.

Our new restaurant at Mc Arthur Cubana Port Elizabeth will create 60 new permanent jobs in the Metro when fully operational. Auspex is a 100% wholly black owner and managed company that is a proud corporate citizen of Port Elizabeth. We trust that the City will act expediently in concluding a legal, binding and valid lease agreement with our subsidiary company Gapwedge Properties.

We thank you for your support and assistance thus far and look forward to working with the City to grow and promote tourism in our city and create a better life for all.

Yours Sincerely

*Ben Nyaumwe
Managing Director*

Attachments:

- 1. Management Agreement Between Clinck Properties & Nelson Mandela Bay Municipality*
- 2. Lease Agreement between Gapwedge and Clinck Properties.*

Copy: Mr Elias Ntoba Acting Municipal Manager Nelson Mandela Municipality.” (emphasis supplied)

[10] It is not in issue that at no stage was the applicant appraised of the

invalidity of the lease agreement. The first inkling it had to the contrary was on receipt of the respondent's then attorneys' letter advising it of the invalidity of the lease agreement one year later, during May 2011.

[11] During argument I enquired from Mr *Buchanan* whether the respondent at any stage informed the applicant of the true state of affairs. The riposte was that there was nothing to have precluded the applicant from itself obtaining a copy of the management agreement where all would have been revealed. The response typifies **Nyaumwe's** disingenuity. The plethora of documentary evidence demonstrates that the applicant had no reason to doubt that the negotiations were not being conducted in good faith. There was accordingly no need to investigate and seek corroboration that the lease agreement had in fact been concluded with the correct party. **Nyaumwe** had identified Clink as the "*landlord*" prior to both the lease agreement and franchise agreement being signed.

[12] The true reason for the respondent seeking to resile from the franchise agreement is not difficult to fathom - it no longer wished to be burdened with the obligation to pay the royalty stipulated in clause 4.3 of the agreement. The suggestion⁸ made by **Nyaumwe** that it was motivated by the decline in the profitability of the business due to the applicant's poor operating systems is contrived as the e-mail⁹ to the **NMMM** on 7 October 2010 establishes. Therein he, *inter alia*, waxed lyrically about the success of the business hitherto and its

⁸ At paragraph 17.1 of the opposing affidavit.

⁹ Annexure "GP18" to the opposing affidavit at page 361.

profitability for the foreseeable future.

[13] The extent of the respondent's duplicity is furthermore evidenced by its conduct post May 2010. Again, unbeknown to the applicant, it furtively endeavoured to itself conclude a lease agreement with the **NMMM**. It finally did so on 6 May 2011, **Nyaumwe** himself signing on behalf of the respondent. One of its terms was the retrospective operation of the lease to 1 May 2010. It is astonishing, to say the least, that when the respondent's attorney notified the applicant on 19 May 2011 of the respondent's decision to resile from the agreement, that the existence of the new lease was suppressed.

[14] It is against this background that the question whether the alleged non-fulfilment of the so-called suspensive condition must be determined. In my judgment it would be inimical to the very foundation of our jurisprudence to uphold the respondent's contention. The "*defence*" raised must fail on a number of reasons. In the first place the respondent is estopped from doing so. This is a classic case of estoppel. Prior to the doors of the premises being opened for business, the respondent deliberately, with full knowledge of the invalidity of the lease agreement and far more than a year, during which he conducted a highly successful business under the Cubana brand, withheld such information from the applicant. By its unconscionable conduct it inveigled the applicant into believing that the lease agreement was valid. Secondly, in treating clause 17 of the franchise agreement as having been fulfilled and regarding the lease as having

been validly concluded, the parties tacitly agreed to treat both the lease and franchise agreements as valid despite their invalidity. Mr *Van Riet* correctly submitted that the test for a tacit relocation agreement is an objective one and that it is immaterial that one of the parties might not have realised that the contracts were invalid, or had lapsed. As pointed out by Harms J.A., in **Golden Fried Chicken (Pty) Ltd v Siraad Fast Foods CC and Others**¹⁰ “ . . . in determining whether a tacit contract was concluded a court has regard to the external manifestations and not the subjective workings of minds (*Fiat SA at 138H-139D*)”.

[15] In my judgment there is no warrant to contend that the applicant is not entitled to the relief it seeks. It derives from clause 11.4 of the franchise agreement which provides that upon termination of the agreement, for whatever reason, the applicant would be entitled to the orders sought. In the result the following orders will issue –

1. It is declared that, as at 19 May 2011, the franchise agreement, annexure “C1” to the founding affidavit, concluded between the parties was valid and enforceable and that the applicant thereafter validly terminated such agreement;

2. The respondent is ordered to forthwith vacate the

¹⁰ 2002 (1) SA 822 (SCA) at page 825, paragraph [4]

premises known as Shop 1, MacArthur Pool and Leisure Centre, Beach Road, Humewood (erf 595 Port Elizabeth);

2. It is ordered that the applicant is entitled, pursuant to the provisions of clause 11.4.4.3 of the agreement, to purchase the fixtures, fittings and assets of the business being conducted at the premises at their nett asset value.

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

D. CHETTY
JUDGE OF THE HIGH COURT

On behalf of the Applicant: **Adv R.S. Van Riet SC** instructed by Friedman
Scheckter, 75 Second Avenue, Newton Park, Port
Elizabeth, Tel: (041) 395 8446, Ref: Mr Q. Spuyt

On behalf of the Respondent: **Adv R.G. Buchanan SC** instructed by
Badenhuizen Inc Attorneys, 109 Albert Road,
Walmer, Port Elizabeth; Tel (041) 503 9908; Ref:
E.J. Badenhuizen