



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: 7609/2023

In the matter between:

AMIR WAFAI

First Applicant

MYRELL WAFAI

Second Applicant

ARIANOGEN (PTY) LTD

Third Applicant

and

SA CASUAL DINING CONCEPTS (PTY) LTD

First Respondent

STELIO NATHANAEL

Second Respondent

Coram: Bishop, AJ

Dates of Hearing: 16 November 2023

Date of Judgment: 6 December 2023

JUDGMENT

BISHOP, AJ

[1] Look out for track changes. That seems to be the lesson others should learn from this case. Sadly, this application for summary judgment does not require an examination of the intricacies of Microsoft Word's track changes function. Rather it turns on the remedies available when one party claims a contract existed and it cancelled it, and the other claims there was no contract at all.

A Franchise Deal Falls Apart

[2] The First Applicant (**Mr Wafai**) and the Second Applicant (**Mrs Wafai**) are married in community of property. In 2022, they decided to buy a chicken restaurant franchise. They partnered with the Second Respondent (**Mr Nathanael**) to purchase a Chicking franchise from the First Respondent (**Casual Dining**). (Mr Nathanael was also the director of Casual Dining.) Chicking, for those unfamiliar, is a chicken fast food restaurant that serves everything from pizzas to wings, rice to wraps, and burgers to buckets.

[3] The Wafais first paid a refundable deposit of R250 000 to Casual Dining. Mr Wafai and Mr Nathanael then formed a company – the Third Applicant (**Arianogen**) – as the vehicle to own that franchise. Casual Dining would hold 51% in Arianogen, the Wafais would hold the other 49%, and the Wafais would be the only directors. The

heart of the agreement was that Arianogen would pay Casual Dining R901 600 for the Chicking franchise (the R250 000 deposit would count as part of that payment if the franchise agreement was concluded).

[4] The dispute arises because of changes Mr Wafai made to Casual Dining's standard franchise agreement. Mr Nathanael sent Mr Wafai the standard agreement by email. He sent it in Microsoft Word because Mr Wafai indicated his attorneys may wish to propose changes. Mr Nathanael said he did so on the express understanding that any alterations to the standard agreement would be pointed out.

[5] The Applicants' version is that the standard form agreement did not reflect what they had understood the agreement to be because it made no provision for Casual Dining to provide a point of sale system as part of the franchise. Mr Wafai amended the standard agreement to include clause 5.1, which provided that Casual Dining "shall, at its cost, provide a turnkey operation to the Franchisee, which includes, inter alia, the construction of the store, and supply all equipment thereto." They claim the change "was clearly marked up and visible to the Defendants. The changes which had been made to the Franchise Agreement were patent and in any event readily visible in Microsoft Word".

[6] Mr Nathanael received the document, but claims that the changes were not brought to his attention, and he was unaware that any changes had been made to it. He thought it was just the standard agreement. On that basis he signed it on behalf of Casual Dining and the Wafais signed on behalf of Arianogen.

[7] The parties then went about implementing the agreement. The Wafais paid the balance of the R901 600. They looked for a location. Initially, they planned to set up shop on Long Street, but the Wafais thought their restaurant would do better in Salt

River. There is a dispute about whether Mr Nathanael agreed to this move South, but nothing turns on it. Arianogen signed a lease for the Salt River premises. And the Wafais signed a surety to guarantee that Arianogen would pay its rent under the lease. For its part, Casual Dining paid for an architect to prepare drawings for the franchise, which the architect did.

[8] Things seemed to be going according to plan. Then the Applicants indicated that they expected, in terms of the contract that had been signed, that Casual Dining would provide the point of sale system. Mr Nathanael was surprised, as the standard form agreement did not require Casual Dining to do so. Then he discovered clause 5.1.

[9] On 23 November 2022, Casual Dining wrote to the Applicants. It claimed Casual Dining had not contemplated the clause, that it had been “‘discreetly’ inserted”, and accused the Wafais of “taking a ‘fat chance’ to acquire a free business”. It explained that Casual dining “is not in the business of providing free franchised businesses to franchisees and this was clearly not what the Franchisor intended”. As a result “there was no common intention, nor a meeting of the minds regarding the terms of the Franchise Agreement”. Casual Dining therefore terminated the agreement. But it left open the possibility of continuing with the franchise if the Wafais were willing to conclude “a standard Chicking franchise agreement”.

[10] The Applicants’ attorney responded on 21 December 2022. They denied they had surreptitiously inserted the offending clause. But they too indicated that they wished to proceed with the agreement. On their version, they refused to accept what they regarded as Casual Dining’s repudiation of the franchise agreement. Unfortunately, the parties failed to reach any new agreement.

[11] Instead in May 2023, the Wafais and Arianogen launched an action against Casual Dining and Mr Nathanael consisting of three claims:

[11.1] The return of the R901 000 that the Wafais had paid;¹

[11.2] Damages caused to them as guarantors for Arianogen's obligations under the lease agreement; and

[11.3] Loss of profit flowing from representations that Mr Nathanael is alleged to have made.

[12] Only the claim for the return of the R901 000 was pursued in these summary judgment proceedings. The manner in which that claim was pleaded is important.

[13] The Applicants regarded the letter of 23 November 2022 as a repudiation of the franchise agreement. They initially refused to accept it. But, so they plead, "the Defendants persist with their repudiation". Therefore, in their particulars of claim, the Applicants stated that they "have now elected to accept the aforesaid cancellation/repudiation". As a result they claim that they "are entitled to restitution of the R901 000 which they paid to" Casual Dining. It is a claim for cancellation and restitution.

[14] The Respondents opposed the action and filed a plea. How did they answer the claim for restitution? They admit receiving the R901 600. They admit that the franchise agreement was signed.

¹ The extra R600 seems to have got lost somewhere along the way.

[15] But they deny that the written agreement reflected the actual agreement between the parties. They allege that the parties agreed that no alterations to the standard agreement would be made unless they were expressly pointed out to the other party. They deny that the alterations the Applicants made were clearly visible, or were pointed out to Casual Dining. And they deny that Casual Dining accepted the alterations.

[16] They plead that Arianogen or Mr Wafai “misrepresented to the defendants that the contract was unaltered, *alternatively*, failed to point out to the defendants the respects in which the document was altered while it/they had a legal obligation to do so before the signature thereof”.

[17] The Respondents also deny that the Applicants cancelled the franchise agreement – if there was an agreement, then the Respondents claim they cancelled it in the letter of 23 November 2022. They also pleaded that Arianogen “has failed to tender restitution of the benefits which it had received under the alleged franchise agreement and accordingly is legally precluded from claiming restitution.”

[18] The Respondents do not expressly deny that there was an agreement. However, to my mind, the plea is open to that interpretation, particularly when it is read with the letter of 23 November 2022, and the response to the application for summary judgment.

The Application for Summary Judgment

[19] The Applicants now seek summary judgment. Their argument is that, whether there was a contract or not, and whoever cancelled the contract, they are entitled to

the return of the R901 000 they paid, and for which they ultimately received nothing. They also contend that their failure to tender the restitution of benefits does not preclude their claim because the Respondents failed to identify any benefits that the Applicants received from the franchise agreement. “There were none”, they assert.

[20] The claim for R901 000 is only against Casual Dining, and only it opposes the application for summary judgment. It asserts the following defences:

[20.1] There was no consensus and therefore no contract. The Applicants’ claim is bad because the only claim they have pleaded depends on the existence of a contract.

[20.2] If there is an agreement, the franchise agreement is voidable due to a misrepresentation by Arianogen (failing to draw attention to the track changes). It was Casual Dining as the innocent party that was entitled to cancel it, which it did on 23 November 2022. The Applicants’ purported cancellation was of no effect.

[21] Casual Dining also raised certain preliminary defences:

[21.1] It argues that the Applicants failed to comply with rule 32(2)(b) because they did not identify the points of law they rely on, or explain why the plea does not raise a defence.

[21.2] It complains that by claiming for both restitution of the R901 000, and loss of profit, the Applicants have impermissibly raised mutually destructive claims.

[22] The basic question in summary judgment proceedings is whether the respondent has “a defence which is both bona fide and good in law”.² The prospects the defence will succeed are irrelevant; it need only show a defence raised in good faith which, if it was established at trial, would answer the claim.³

[23] I do not intend to traverse all Casual Dining’s defences; there is one that, to my mind, is decisive.

A Defence to the Plead Claim

[24] The Applicants have pleaded a case which rests on the existence of a contract. They allege that the tracked amendments were part of the contract, that Casual Dining refused to comply with the contract, that it was entitled to cancel the contract, and it is now entitled to restitution of the moneys paid. They have not pleaded a claim, even in the alternative, in unjust enrichment.

[25] But Casual Dining denies that contract exists because Arianogen or Mr Wafai misrepresented the content of the agreement. Whether they did or not seems at least arguable based on what is before me.

[26] If they did misrepresent the content of the contract, there are two possibilities. If the mistake was so fundamental that there was no assent at all, then there was no

² *Maharaj v Barclays National Bank Ltd* 1979 (1) SA 418 (A) at 426C.

³ *Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC) at para 13.

contract and it is void *ab initio*. If the mistake was not so fundamental, then Casual Dining had an election; to stand by the contract, or claim rescission.⁴

[27] I focus only on the first possibility. Mr Nathanael attests that he believed he was signing Casual Dining's standard form franchise agreement, and that he would not have signed the agreement had he known it included the new clause. It seems at least arguable to me that this mistake was so fundamental that there was no meeting of minds, and therefore no contract. There is a significant difference between providing a franchise, and providing a "turnkey operation". Not only would the cost be different, the *thing* being sold is different.⁵

[28] If Casual Dining can establish all this at trial – a misrepresentation, that induced the contract, that was so fundamental there was no agreement – then it will have an absolute defence to the claim as pleaded. That claim is framed as one for restitution. It relies on the existence of the contract, and the cancellation of that contract by Arianogen. If there was no contract, the claim for cancellation and restitution must fail.

[29] The Applicants do not contend that it will not be possible at trial for Casual Dining to establish that there was no contract. They argue it would make no difference

⁴ *Brink v Humphries & Jewell (Pty) Ltd* 2005 (2) SA 419 (SCA) at para 2 ("The law recognises that it would be unconscionable for a person to enforce the terms of a document where he misled the signatory, whether intentionally or not. Where such a misrepresentation is material, the signatory can rescind the contract because of the misrepresentation, provided he can show that he would not have entered into the contract if he had known the truth. Where the misrepresentation results in a fundamental mistake, the 'contract' is void *ab initio*.")

⁵ See, for example, *Maresky v Morke* 1994 (1) SA 249 (C) where mistake as to the nature of the merx meant the contract was void *ab initio*.

because they would still be entitled to the return of the R901 000. But it *does* make a difference. If there is no contract, then the Applicant's case – as pleaded – will fail.

[30] The Applicants likely have an alternative claim of unjust enrichment. They could plead an alternative claim that, if there was no contract because there was no meeting of the minds, that Casual Dining has been unjustifiably enriched by R901 000, and they are entitled to payment of that amount. But the Applicants have not pleaded that case. They have only pleaded a case resting on cancellation of a contract. To that case, the Respondents have a bona fide defence.

[31] It is not necessary to consider the merits of the Respondents' technical defences to summary judgment, or the bona fides of its other defences on the merits. The existence of one bona fide defence is enough to justify refusing summary judgment.

[32] There is no reason that costs should not follow the result. Casual Dining sought a special costs award in terms of rule 32(9)(a). I do not think such an order is justified. While I do not uphold the application for summary judgment, I do not believe it was abusive in the manner that rule contemplates.

[33] Accordingly, I make the following order:

1. That the application for summary judgment is dismissed.
2. That the Applicants shall pay the First Respondent's costs.

M J BISHOP
Acting Judge of the High Court

Counsel for Applicants:*Attorneys for Applicants***Adv P Tredoux***JG Swart Attorneys Inc***Counsel for First Respondent:***Attorneys for Applicant***Adv BH Steyn***Christo Coetzee Attorneys*