

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA



CASE NO.: 69578/2015

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

19/3/18

19/03/2018

In the matter between:

ZACHARIA SEHLOHO MOFOKENG

PLAINTIFF

and

FRANCHISING TO AFRICA (PTY) LTD t/a GOLD
BRANDS

DEFENDANT

JUDGMENT

VAN DER WESTHUIZEN, J

- [1] During 2014 the plaintiff attended an EXPO in respect of franchise opportunities. The plaintiff was particularly interested in a franchise of the defendant with specific reference to that known as CHESANYAMA.

- [2] Thereafter, the plaintiff attended at the defendant's offices in Centurion. His attention was drawn to a specific opportunity of an existing shop in Sunward Park Mall, Boksburg. He investigated the opportunity and was satisfied of the viability thereof.
- [3] It is common cause that the parties thereafter entered into a written franchise agreement that was signed by the plaintiff on 17 October 2014. The franchise agreement is attached to the plaintiff's particulars of claim. It is further common cause that the attached franchise agreement is that concluded between the parties.
- [4] The plaintiff took over the said existing franchise operation on 1 November 2014 and commenced conducting that business from that date.
- [5] The plaintiff was unable to secure a lease with the landlord in respect of the premises at which the said business was operating.
- [6] During or about June/July 2015, the Sheriff attached the assets of the business and locked the premises on the strength of a warrant of attachment and a warrant for eviction following on a judgment in favour of the landlord.
- [7] The plaintiff instituted action proceedings against the defendant. The plaintiff claimed repayment of the amount that the plaintiff had paid to the defendant in respect of the purchase price of the said operation. The plaintiff claims an amount of R700 000.00. However, that amount is now limited to repayment of the actual amount paid, namely R500 000.00.
- [8] The defendant defended the action and counterclaimed for payment of amounts owing and due in terms of the provisions of the said franchise agreement. The defendant also claimed upon a written acknowledgement of debt signed by the plaintiff. The defendant further

claimed an amount that is conditional upon a third party instituting proceedings against the defendant for payment in that amount. However, the defendant seeks that that claim be postponed *sine die*.

- [9] Initially a firm of attorneys represented the plaintiff. However, the attorneys withdrew during February 2017. Consequently, the plaintiff represented himself at the trial. He indicated that he did not wish to engage the services of another legal representative. The plaintiff would act in his own stead. Mr Stone appears on behalf of the defendant.
- [10] The plaintiff's claim for repayment of the paid purchase price is premised upon an alleged misrepresentation that allegedly induced him to enter into the said written franchise agreement. The alleged misrepresentation related to the defendant falsely indicating that it had entered into a lease agreement in respect of the premises. It is further alleged that the intention of the defendant was to induce the plaintiff in entering into the written lease agreement whilst knowing that the representation was false. The plaintiff further alleges that he, so induced, entered into the written agreement and paid the purchase price. The plaintiff then alleges that had he known the true facts, he would not have purchased the franchise operation at all. The plaintiff tendered return of the franchise operation against repayment of the amount paid.
- [11] In conducting his own defence, the plaintiff testified and did not call any witnesses in support of his evidence or his case.
- [12] A claim premised upon misrepresentation either relates to a fraud committed, or an innocent representation or a negligent representation. A fraudulent representation can either be based upon a contract or a delict. Considering the plaintiff's allegations recorded above, it appears that the claim may be premised upon an alleged fraudulent representation that led to the conclusion of the franchise agreement.

The representation that is relied upon does not in my view fall within the ambit of either innocent or negligent representation. In this regard, it is not alleged that the representation was material and that it was foreseeable that the representation could induce the party to whom the representation is made to conclude the agreement. It is trite that a party relying on either innocent or negligent misrepresentation has to prove the aforementioned two requirements in addition to that required in respect of fraudulent misrepresentation.¹

[13] The plaintiff did not allege in his particulars of claim, nor did he state in evidence, that the representation complained of was material and/or that the defendant foresaw that the plaintiff would act upon that negligent misrepresentation and enter into the said franchise agreement.

[14] It follows that the plaintiff is required to prove that a fraudulent representation was made upon which he was induced to enter into the said franchise agreement. It is trite that fraud is not easily inferred. In this regard the requirements that are to be proven are:

- (a) A representation made by the defendant or its agent;
- (b) Fraud, i.e. knowledge on the part of the agent or principle that the representation is false;
- (c) Causation, i.e. that the representation induced the plaintiff to so act.

[15] The plaintiff relies upon the terms and conditions of the said franchise agreement attached to his particulars of claim. It is gleaned from that agreement, and in particular with reference to the provisions of clauses 8.1 and 8.2 thereof, that the plaintiff was obliged to either take over the

¹ See *Phame(Pty) Ltd v Paizes* 1973(3) SA 397 (A)

existing lease agreement or to enter into a new lease agreement. Those clauses provide as follows:

- (a) "8.1 The parties record that the Franchisor has entered into a lease agreement for the Store with the Landlord. A copy of the Lease Agreement is attached hereto as Schedule E."
- (b) "8.2 The Franchisee is obliged to either take over the lease agreement, alternatively to enter into a new lease agreement with the landlord as and when requested to do so by the Franchisor, and in any event within in a period of not more than two months calculated from the Take - Over Date."

[16] It is further gleaned from the afore quoted clauses, that although it is recorded that the defendant has entered into a lease agreement with the landlord in respect of the relevant premises, the plaintiff nevertheless was obliged to take-over that lease agreement, or to enter into a new lease agreement. That obligation was to have been complied with within a period of two months from the date of occupation, i.e. in the present instance from 1 November 2014.

[17] Furthermore, clause 8.3 of the said franchise agreement stipulates that notwithstanding the non-take over of the lease or the entering into a new lease agreement with the landlord, the plaintiff is obliged to, and is liable for, payment of the required monthly rental payments as if the plaintiff is a party to the lease agreement.

[18] It follows that in so far as a representation is made in clause 8.1 of the franchise agreement, such presentation is to be read in conjunction

with the stipulations of clauses 8.2 and 8.3 of the franchise agreement.²

- [19] Consequently, the representation in clause 8.1 is qualified in clauses 8.2 and 8.3 of the franchise agreement. It remained the plaintiff's obligation to continue to pay the monthly rental in respect of the relevant premises.
- [20] It follows that the plaintiff has failed to prove that a representation was fraudulently made on the part of the defendant that induced him to enter into the said franchise agreement. Further in that regard, the plaintiff admits in his evidence to paying the rental for November 2014 and that he was liable to pay the rental of each succeeding month.
- [21] The plaintiff alleged in his evidence under cross-examination that he has in fact made all subsequent rental payments. However, he could only prove the payment for November 2014. He had no documentary proof of the payments of the subsequent due monthly rentals that accrued. In correspondence relied upon by the plaintiff that originated from his erstwhile attorneys on his admitted instructions, no mention is made of payment of any rentals in respect of the relevant premises.
- [22] Furthermore, the defendant's erstwhile attorneys do not indicate in the correspondence to either the defendant or to the landlord that any misrepresentation had been made upon which the plaintiff was induced to enter into the said franchise agreement.
- [23] The plaintiff admitted that he had not taken over the existing lease or that he had entered into a new lease within the period of two months as stipulated in clause 8.2 of the said franchise agreement. But for his evidence that he has paid the due rentals, no proof thereof was presented.

² Provisions of a contract must be read in the context of the whole document. See *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012(4) SA 593 (SCA)

- [24] It follows that the plaintiff has not proven any alleged misrepresentation, whether fraudulent, innocent or negligent.
- [25] The plaintiff further admitted that the franchise operation was no longer conducting any business since July 2015. The closure of the business and the plaintiff's eviction from the premises on the part of the Sheriff prevented that.
- [26] It is further common cause that the plaintiff could not tender return of the assets of the said franchise operation that were attached by the Sheriff. Despite a threat on the part of the plaintiff's erstwhile attorneys to institute interpleader proceedings in respect of the attached assets, no such proceedings were instituted.
- [27] Accordingly, the plaintiff cannot honour his tender of the return of the business against repayment of the amount paid in respect of the purchase price.
- [28] It follows that the plaintiff has not proven his claim for repayment of the amount of R500 000.00 and his claim stands to be dismissed.
- [29] There remains the issue of the defendant's counterclaim. The gist of the counterclaim is recorded above.
- [30] The defendant elected not to call any witnesses in support of its counterclaim and argued the various counterclaims with reference to the provisions of the said franchise agreement and the conclusion of an acknowledgement of debt on the part of the plaintiff.
- [31] As recorded above, the conditional claim, claim 1 in the counterclaim, is to be postponed *sine die*, the fulfilment of the condition not arising as yet.

[32] The defendant claims, in respect of its second claim, payment of royalties under the franchise agreement that would have accrued to the defendant had the said franchise agreement not come to an end, but for the cancellation of the said franchise agreement. In that regard, the defendant alleges that the said franchise agreement would have endured for a further period of 50 months from 1 September 2015 until 31 October 2019. Clause 13.2 of the said franchise agreement provides for the payment of royalties to the defendant. The amount stipulated in respect of the royalties payable is R2 500.00 per month, which amount will increase annually at 10% on a compounded basis.

[33] Clause 23.4 of the said franchise agreement provides as follows:

"Termination of the Agreement by the Franchisor, as a result of the default or breach thereof by the Franchisee will be without prejudice to any existing rights and/or claims that the Franchisor may have against the Franchisee and the Franchisee will be liable, in addition to any other claims that the Franchisor may have against the Franchisee for damages or otherwise, to pay to the Franchisor all Royalties that would have been paid for the remainder of the Term of this Agreement, but for such default or breach, and which royalties will become immediately due, owing and payable."

[34] The term of the said franchise agreement is defined to be for a period of five years from the take-over date, in the present instance since 1 November 2014

[35] The defendant has calculated the mount of royalties in accordance with the provisions of the said franchise agreement and has recorded that calculation and the amount due, owing and payable in its counterclaim.

[36] The plaintiff accepts his liability in respect of the royalties as provided for in the said franchise agreement and the amount calculated. His

only defence being that where the franchise operation has ceased on the closing thereof as a result of the Sheriff's execution of the warrants issued, he no longer conducts the business in respect of which he can pay the royalties. There is no merit in that defence.

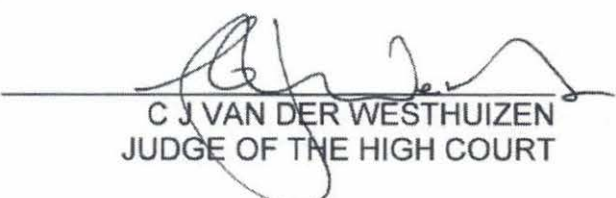
- [37] The defendant's third claim relates to the plaintiff's refusal to pay the royalties payable for the month of August 2015 timeously or at all. In that regard, an amount of R2850.00 is due, owing and payable to the defendant. Claim 3 also includes the non-payment of market fund contributions, as provided for in the said franchise agreement, for the month of August 2015. An amount of R570.00 is due, owing and payable. The plaintiff raises a similar defence as in the case of the royalties of claim 2, namely that the business was not operational during August 2015 and hence no payment is due. The plaintiff further alleges that the defendant did not undertake any marketing. In this regard, clause 18.3 of the said franchise agreement provides for the contribution to a Marketing Development Fund of the franchisor in the amount of R500.00 per month (excluding VAT) that would increase at the rate of 10% per annum on a compounded basis.
- [37] Claim 4 of the counterclaim relates to an acknowledgment of debt signed by the plaintiff on 28 May 2015. In that acknowledgment of debt the plaintiff admitted liability for the payment of the amount of R38 405.28 that was due and payable in respect of services rendered and goods sold and delivered. The plaintiff admitted his liability in respect of the acknowledgment of debt and conceded that his signature appears thereon. No defence was raised against this claim.
- [38] There has been no compliance with the terms of the said acknowledgment of debt and the plaintiff is liable to pay the amount of R33 420.00 in respect thereof.
- [39] In my view, the defendant has proven claims 2, 3 and 4 contained in the counterclaim and is entitled to the relief claimed in that regard.

[40] There remains the issue of costs. Mr Stone submitted that the plaintiff is liable to pay cost on the scale as between attorney and client in terms of the provisions of clause 23.2.3 of the said franchise agreement. Although the issue of costs fall within the court's discretion, it is trite that when the parties have an agreement in respect of the scale of costs, the court would not likely interfere with that agreement.

I grant the following order:

- (a) The plaintiff's claim is dismissed;
- (b) Judgment is granted in favour of the defendant against the plaintiff for:
 - (i) Payment of the amount of R180 294.36;
 - (ii) Interest *a tempore morae* on the amount of R180 294.36 at a rate of 9% per annum to date of final payment;
 - (iii) Payment of the amount of R3 420.00;
 - (iv) Interest *a tempore morae* on the amount of R3 420.00 at a rate of 9% per annum to date of final payment;
 - (v) Payment of the amount of R33 640.62;
 - (vi) Interest *a tempore morae* on the amount of R33 640.62 at a rate of 9% per annum to date of final payment;

- (c) Plaintiff is ordered to pay the defendant's costs on a scale as between attorney and client;
- (d) Plaintiff's first counterclaim (claim 1) is postponed *sine die*.



C J VAN DER WESTHUIZEN
JUDGE OF THE HIGH COURT

On behalf of Applicant: In person
Instructed by:

On behalf of Respondent: J S Stone
Instructed by: Hatting & Ndzabandzaba Attorneys