IN THE GAUTENG DIVISION, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE NO: 21168/2014

DATE: 25 MARCH 2015

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

RUMARCH INVESTMENT HOLDINGS (PTY) LTD **1st APPLICANT**

(Registration Number: 2005/015490/07)

And

OLD FASHIONED FISH AND CHIPS (PTY) LTD **RESPONDENT**

(Registration Number: 2012/103847/07)

JUDGMENT

MSIMEKI J:

INTRODUCTION

[1] The applicant seeks an order that the respondent be finally wound up in the hands of the Master of the High Court and that the costs of the application be costs in the winding up.

[2] Advocate J L Myburgh (Mr Myburgh) and advocate A Thompson (Ms Thompson) acted for the applicant and the respondent respectively.

[3] The applicant brought the application on the basis of the respondent's inability to pay its debts, alternatively on the basis that it is just and equitable that the respondent be wound up. The applicant relies on Section 344 (f) read with Section 345 of the Companies Act, 61 of 1973 ("the old Act") alternatively Section 344 (h) of the Act, further alternatively, Section 81 of the Companies Act, 71 of 2008 ("the New Act").

APPLICANT'S CASE

[4] The applicant's version is that the applicant and the respondent concluded a franchise agreement on 11 December 2012. This was after the applicant, represented by Inbavathie Pather, the Executive Director of the applicant, and the respondent represented by Emilia de Sousa ("Emilia"), the Chief Executive Officer, Nicol Mandonca (Nicol) the respondent's financial Director and Paula Dos Santos, its franchising consultant, had discussed the applicant's wish to obtain the right to operate an Old Fashioned Fish and Chips franchise in Beacon Bay, East London. The applicant and the respondent, at the time, were not strangers to each other. The applicant owns a franchise in Queenstown. The respondent granted the applicant a non-exclusive licence to operate an Old Fashioned Fish and Chips Franchise (OFFC) in Queenstown. The applicant was informed that the area was available in Beacon Bay. The respondent gave the applicant an application form annexure "B" which the applicant completed and returned to the respondent. The area that was available that the respondent referred to was shop 39 which was in the Beacon Bay Retail Park ("shop 39"). The shop, according to the applicant, had already been secured for the applicant by way a lease agreement annexure "C" in respect of shop 39 to the applicant. Pather's son inspected and took photographs of shop 39. The photographs are annexures "D1", - "D5" to the founding affidavit. The respondent informed the applicant that its application for the Beacon Bay OFFC franchise had been approved. On learning about the approval, the applicant then paid the franchise fee in an amount of R648 355.00. Early payment was made because Emilia did not want other potential buyers to take the store. Annexure "F" is confirmation of the franchise fee to the respondent's nominated bank account. The applicant and the respondent represented by the deponent to the founding affidavit and Paula, Emilia and Viki Shaw respectively held a meeting on 11 December 2012 where the lease agreement was discussed and the franchise agreement signed. Early in January 2013 Paula called Pather and informed her that they could not attend to their initial obligations, pursuant to the franchise agreement, because the respondent could not access shop 39. Growth-Point, the owner of shop 39, made it difficult for the respondent and the applicant to enter into any sub lease negotiations. It, by this time, became clear that the applicant would not get shop 39 as promised. No other suitable premises, according to Paula, were available in Beacon Bay from which OFFC franchise could be operated. Pather established that the respondent, indeed, had leased shop 39 from GrowthPoint since March 2012 but that the respondent had failed to honour its obligation and that the lease, as a result, had been cancelled by GrowthPoint which, at the time, had leased shop 39 to a different lessee. Pather advised Paula that the franchise fee needed to the refunded. Paula promised to inform Emilia and revert to her. She then addressed an email to Paula and

Emilia annexure "H" informing them about her desire to have the franchise fee refunded. Subsequent to this email the applicant was invited to a breakfast meeting of March 2013. The meeting was held but failed to address the issues that she raised in her email of 7 February 2013. Meetings were arranged between the applicant and the respondent but were all cancelled by the respondent. On 4 April 2013 she directed an email to Emilia and Paula dealing with the refund. Paula responded the same day and copied Vivian Warland (Emilia's personal assistant) ("Vivian") and Johan Potgieter the respondent's project co-ordinator. The email reads:

> "Hi Charmaine,
>
> Hoping this email finds you well. I am really sorry about this whole Beacon Bay issue. I know it isn't your fault. I was thinking would you consider taking Daku in Port Elizabeth. The store is ready. All it needs is equipment. According to Johan the site is excellent and it will do very well. I believe it is an industrial area. Please advise. If you not interested I will hand your file over to Vivian for refund", (my emphasis)

The applicant declined the offer. This was communicated to Paula on 9 April 2013. The refund of the franchise fee was again communicated to Paula. An email annexure "K" to the founding affidavit was directed to Emilia on 30 April 2013. This was copied to the respondent general email. When no response was forthcoming the applicant decided to approach Mr Heetesh Patel ("Heetesh") a franchisee and a member of one of the respondent's subcommittees for assistance. This helped. On 15 May 2013 Vivian replied from Emilia's email address directing the email to Heetesh. The email reads:

> "SUBJECT: CHARMAINE PATHER- BEACON BAY
>
> Dear Heetesh,
>
> Trust you keeping well. Your email addressed to Emilia De Sousa regarding the above mentioned franchise has been brought to her attention.
>
> Emilia advises that upon her return to office on 3rd June 2013 she will attend to these refunds" (my emphasis)

This email is annexure "M" to the founding affidavit. Heetesh has provided a confirmatory affidavit in the form of annexure "N" to the founding affidavit. The franchise fee has to date not been refunded.

[5] The respondent, notwithstanding the respondent's undertaking to refund the franchise fee on 3 June 2013, has to date not done so.

[6] The applicant, on 4 September 2013, addressed a letter in terms of item 9 of schedule 5 of the New Act, to the respondent. This is annexure "O". The letter constitutes a demand in terms of section 345 of the Old Act. The demand was duly served on the respondent on 23 September 2013 at 15h15.

[7] Pather's testimony is that the applicant concluded the franchise agreement on the assumption that the applicant would operate the franchise agreement from shop 39. It later became apparent that this would not happen. The respondent was also unable to provide any alternative suitable locations from which the applicant could operate the franchise in Beacon Bay. No effect, according to the applicant, could be given to the franchise agreement which had to be cancelled. The applicant contends that the respondent, notwithstanding the undertakings, has failed to refund the franchise fee or any part thereof.

THE RESPONDENT'S CASE

[8] The respondent agrees that the franchise agreement was concluded by the applicant and the respondent. The respondent, however, has proffered the following defences:

1. It disputes that it is indebted to the applicant alleging that the franchise fee paid by the applicant is non-refundable under the franchise agreement.

2. It contends that it is solvent

3. it contends that the applicant has no *locus standi* to bring the application

4. it lastly contends that it is not just and equitable that the respondent be wound up.

[9] The respondent avers that the front cover of the franchise agreement states:

> "A FRANCHISEE MAY CANCEL A FRANCHISE AGREEMENT WITHOUT COST OR PENALTY WITHIN 10 BUSINESS DAYS AFTER SIGNING SUCH AGREEMENT, BY GIVING WRITTEN NOTICE TO THE FRINCHISOR. THEREAFTER, ANY CANCELLATION IS GOVERNED BY THE TERMS OF THIS AGREEMENT."

The cooling off period, according to the respondent, during which the applicant could cancel the agreement has come and gone. The terms of the franchise agreement now govern the cancellation thereof.

[10] The respondent relies on **clause 8.1** of the franchise agreement which reads:

> "The franchisee shall pay to the franchisor an initial non-refundable upfront franchise fee in the amount of R500 000.00 (five hundred thousand rand) within Gauteng and/or the amount of R552

630.00 (five hundred and fifty two thousand six hundred and thirty rand) for any other region within South Africa; plus Value Added Tax at 14% on the amount which will be due and payable on signature of this agreement."

Clause 8.2 reads:

"The franchisee acknowledges that the non-refundable, initial franchise fee, referred to in paragraph 8.1 above, is payable in respect of:

8.2.1. Being granted the right to operate the franchise business;

8.2.1. The right to use and exploit the franchise business system;

8.2.3. Initial training;

8.2.4. On - site support;

8.2.5. Setting up the physical premises and assistance from the franchisor with the set - up of the franchise business."

[11] Ms Thomson submitted in their heads of argument that the store was located outside of the Gauteng area in Beacon Bay where the non- refundable franchise fee would be R 552 630.00 plus Vat at 14% amounting to R77 367.00 together totalling R629 998.20. The applicant's claim being R648 355.00 the difference between the two amounts would be R18 356.80 which, according to Ms Thomson, the respondent, in a letter dated 9 September 2014, unconditionally tendered to pay to the applicant. This is a clear indication that the respondent is, indeed, indebted to the applicant.

[12] Clause 40.1.1 that Ms Thomson also referred to reads:

WAIVER *I* VARIATION

"40.1.1. This agreement constitutes the entire agreement between the parties regarding the matters set out herein or related thereto and no representation or warranties not set out in writing in this agreement shall be binding upon the parties. No variation, abandonment or waiver of rights or obligation under this agreement or consensual cancellation of the agreement shall be binding unless it is in writing and signed by the franchisee and the franchisor."

[13] The respondent holds the view that the payment made by the applicant forming the subject matter of its claim against the respondent, is non - refundable as evidenced by clause 38.4.5 which reads:

> "38.4.5. The franchisee shall not be entitled to receive any rebate or refund of any money paid pursuant to this agreement."

The respondent, in paragraph 18 of its answering affidavit, states:

> "The refund of the franchise fee is a process which has to be followed. If the applicant did not obtain shop 39 it was obliged to seek alternative premises. Annexure "H", the email from Paula Dos Santos does not state that the franchise fee would be refunded. The agreement clearly states that the payment is not refundable. One of the biggest problems which the respondent experiences is that potential franchisee simply walk away. This they cannot do, they are obliged to comply with the terms of the Franchise Agreement."

[14] The alleged "offer to refund and undertaking to refund" that the applicant relies on, according to Ms Thomson, does not demonstrate an unequivocal offer and undertaking as alleged by the applicant. Ms Thomson contends that no clear waiver by the respondent of its clear contractual right to retain the deposit paid by the applicant, has been demonstrated.

[15] There is, according to Ms Thomson, a *bona fide* dispute relating to the applicant's claim. It has, according to her, not been established that the respondent is unable to pay its debts.

[16] Ms Thomson referred the court to the Badenhorst rule which came about because of the matter of **Badenhorst v Northern Construction Enterprises (Pty) Ltd 1956 (2) SA 346 (T) at 347-348** where it was said that winding up proceedings ought not to be used to enforce payment of a debt the existence of which is in dispute on reasonable grounds. The procedure is also not designed to resolve disputes relating to the existence or no-existence of a debt. I agree.

[17] Ms Thomson submitted that the applicant failed to establish its *locus standi* as a creditor of the respondent in terms of section 344 (f) read with section 345 (1) (a) of the Old Act. This, according to her, should result in the dismissal of the application.

[18] The respondent annexed the following bank statements to its answering affidavit:

1. Standard Bank current account number 0[...] for the period 6 May 2014 to 5 August 2014.

2. Nedbank account number 1[...] for the period 2 May to 31 July 2014.

3. Nedbank account number 19[...] for the period 2 May to 31 July 2014. The respondent did this to prove that it is able to pay its debts as and when they fall due.

[19] It is noteworthy that the financials that the respondent annexed to its answering affidavit relate to a different entity and not the respondent. The documents relate to Old Fashioned Fish and Chips Distribution. It is not very clear why this entity is brought into the picture. The respondent's answering affidavit does not say much about this entity. That wrong financials were annexed to the answering affidavit is common cause. The explanation given for annexing wrong financials is that that was an oversight. Again, it is noteworthy that the annexures are many. One would have expected the respondent to have noticed this and to have properly dealt with the problem as the name of the respondent is not even on the documents. This, indeed, is inexplicable and hard to understand.

[20] Once the problem of the wrong entity was pointed out by the applicant, the respondent then procured a letter from its auditors which states:

> "As at 28 February 2014 and in terms of the unaudited management accounts we are satisfied that the company (being the respondent) is solvent and that the assets exceed the liabilities".

One would have expected the respondent to have procured the relevant and acceptable financials. The auditors' letter can hardly be said to be helpful. It is an unsubstantiated document which does not take the respondent's case anywhere. The accounts are unaudited. There is just nothing further to demonstrate that the respondent is solvent and that its assets exceed the liabilities. Failure to produce the correct documents by the respondent speaks volumes. The letter from the auditors, in my view, is unhelpful. It fails to demonstrate that the respondent is indeed solvent. The letter is unacceptable as proof of what it purports to prove or demonstrate.

JUST AND EQUITABLE WINDING UP

[21] Ms Thomson submitted that this ground was not helpful to the applicant in that it failed to establish any of the recognised grounds for the winding up of the company (the respondent) on just and equitable grounds. No further ground according to her has been established. The submission has merit. Mr Myburgh, in any event, and correctly in my view, indicated that they were abandoning the ground.

[22] Ms Thomson submitted that the respondent has almost 400 successfully operated franchises and that the winding up of the respondent would have far reaching consequences for the owners, operators and employees of those 400 Old Fashioned Fish and Chips franchises. This, in my view, does not assist the respondent's case. If the respondent is insolvent and is unable to pay its debts as and when they fall due then there is no way in which the respondent can be rescued and protected.

[23] As Ms Thomson correctly submitted, the court always has a discretion to refuse to grant a winding up order regardless of the section of the Act upon which the application is based. **(See Kyle v Maritza Peterse**

Inc [2002] 3 ALL SA 223 (T) at 225).

ANSWERING AFFIDAVIT AND THE ANNEXURES

[24] The applicant served and filed a Notice to remove cause of complaint in terms of Rule 30. This, because the respondent filed its answering affidavit on 19 May 2014; the applicant's replying affidavit was filed on 5 June 2014; and the respondent filed a further affidavit on 12 September 2014. The further affidavit, according to the applicant, ought to be disallowed as inadmissible. The respondent was given 10 days within which to remove the cause of complaint alternatively remedying the irregularities. When nothing happened, the applicant brought an application in terms of Rule 30.

[25] Regarding the respondent's answering affidavit a comedy of errors was pointed out. Attorney Barry Whitter (Mr Whitter), the respondent's attorney of record served and filed an answering affidavit in the applicant's application in terms of Rule 30. He explains therein that the bank statements referred to in paragraph 21 of their answering affidavit had not been attached at the time the affidavit was commissioned or when the affidavit was filed.

[26] There were errors when the answering affidavit was commissioned. This, according to Mr Whitter, necessitated the recommissioning of the affidavit. He contends that this did not prejudice the applicant and that the Rule 30 application should be dismissed with costs.

THE ISSUE

[27] The issue to be determined is whether the respondent is commercially insolvent and unable to pay its debt. Put differently the question to be answered is whether the applicant has made out a case for the relief that it seeks.

[28] The applicant attacked the respondent's answering affidavit stating that it never attained the status of an affidavit and that it ought to be disregarded when the matter was heard. The reasons advanced by the applicant are as follows:

FORMALITIES NOT COMPLIED WITH.

1. The affidavit does not comply with the formalities that are prescribed by the Justice of the Peace and Commissioner of Oaths Act 16 of 1963 in that the Commissioner of oaths wrote "no" to the question:

> "Do you consider the prescribed oath to be binding on your conscience?

It was argued that the Commissioner of oaths could not administer an oath but an affirmation which was not done.

Ms Thomson, for the respondent, submitted that the “no” was erroneously written. The deponent to the affidavit deposed to another affidavit explaining that that indeed had been an error. The explanation, in my view, is acceptable.

SIGNING BEFORE COMMISSIONER OF OATHS

2. The deponent did not sign the affidavit in the presence of the Commissioner of Oaths. This, because the Commissioner of Oaths fails to identify the deponent as either male or female. The gender in this matter was indicated as “he/she”. Neither the “he” nor “she” was deleted to properly denote that the deponent is “he” or a “she”. This in my view, is common occurrence in documents. This is clearly an error. The matter of **ABSA Bank Ltd v Botha NO and Others 2013 (5)SA 563 (GNP)** which the applicant relies on is distinguishable. The facts of the two cases are indeed distinguishable. In ABSA Bank case the incorrect gender had been recorded whereas *in casu* no specific gender was indicated. That has been left as “he/she”. The “he" should have been deleted. The fact that the oath is not contained or set out in the document does not mean that the oath was not uttered. The certificate of the Commissioner of oaths clearly shows that the oath was uttered. The certificate reads:

> “I certify that the deponent has acknowledged that he/she knows and understands the content of this declaration which was sworn to before me and the declarant’s signature was placed thereon in my presence." (my emphasis)

3. NO COMMISSIONER

Ms Thomson’s submission that the handwriting of the Commissioner of oaths is ugly and leaves much to be desired does not render the seal a nullity. Indeed people’s handwritings will never be the same. Ms Thomson’s submission has merit.

4. ALTERATION AFTER SIGNATURE

The submission on behalf of the respondent is that the addition of annexures after signature of the answering affidavit was an error just as the omission to include the annexures referred to in paragraph 21 of the answering affidavit clearly was an error. Ms Thomson further submitted that the errors were removed once the affidavit was recommissioned. Mr Whitter in his answering affidavit in the applicant’s application in terms of Rule 30 explained that the affidavit served on 12 September 2014 which the applicant complains of is exactly the same as the answering affidavit that was filed on 19 May 2014. The difference in the two affidavits relates only to the recommissioning of the affidavit and the inclusion of the omitted annexures. According to him, there can be no prejudice to the applicant. This seems to be the case. In any event, the inclusion of the annexures seems to bolster the applicant's case.

[29] In Erasmus: Superior Court Practice, the following at B1-193 under subrule (3) is said :

> "The court has a discretion and it is not intended that an irregular step should necessarily be set aside. The discretion must be exercised judicially on a consideration of the circumstances and what is fair to both sides. The court is entitled to overlook in proper cases any irregularity which does not work any substantial prejudice to the other party." **See also Northern Assurance Co Ltd v Somdaka 1960 (1) SA 588 at 595B; Trans-African Insurance Co Ltd v Maluleke 1956 (2) SA 273 (A); Meyer Curtis v Meyer 1973 (1) SA 363 (T) at 367F; Cape Sheet Metal Works (Pty) Ltd v J J Calitz Builder (Pty) Ltd 1981 (1) SA 697 (0);Standard Bank of South Africa Ltd and Another v Malefane and Another: In re Malefane v Standard Bank of South Africa and Another 2007 (4) SA 461 (TK) and Radue Weir Holdings Ltd t/a Weirs Cash & Carry v Galleus Inv Cc t/a Bargain Wholesalers 1998 (3) SA 677 (E).**

[30] Having due regard to the matter I resolved that it would be prudent and in the interest of justice that no evidence be disregarded.

[31] The respondent's case is that:

1. It is not indebted to the applicant in that the money that the applicant paid to it is non-refundable;

2. It is not insolvent; and

3. It disputes that it is just and equitable that it be wound up.

<u>THE RESPONDENT'S INDEBTEDNESS TO THE APPLICANT</u>

[32] The respondent in paragraph 18 of the answering affidavit states that "the refund of the franchise fee is a process which has to be followed". The respondent adds that such process is discretionary. This clearly evinces that notwithstanding the statement that the franchise fee is non-refundable, refund can still take place. It is not a blanket "no".

[33] The franchise agreement has a non-refundable clause which reads:

"No variation, abandonment or waiver of rights or obligations under this agreement or consensual cancellation of the agreement shall be binding unless it is in writing and signed by the franchisee and the franchisor."

[34] Paula's email to Charmaine dated 4 April 2013 clearly invites the applicant to accept a refund of the franchise fee if it is not interested in taking Daku in Port Elizabeth as shop 39 is gone. Pather directed an email dated 9 April 2013 which is annexure "J" on page 137 of the papers to Paula Dos Santos communicating that the applicant was not taking Daku in Port Elizabeth. The applicant, instead, preferred a refund. Mr Myburgh's interpretation of the two emails, in my view, is correct. The refund was offered, and the applicant, by way of its email of April 2013, accepted the offer. Mr Myburgh submits that the emails were in writing and were signed by Paula and Charmaine on behalf of the respondent and the applicant respectively. Any other interpretation attachable to the two emails, according to Mr Myburgh, will not be in line with common sense and logic. I agree.

[35] Mr Myburgh, correctly in my view, holds the view that:

1. the respondent repudiated its obligation in terms of the franchise agreement and offered alternative performance - to refund the franchise fee.

2. the applicant accepted the respondent's repudiation and accepted the respondents offer to refund the applicant's money.

3. the franchise agreement was cancelled and a new agreement came into being - the undertaking by the respondent to refund the applicant's money which the applicant accepted.

IN THE ALTERNATIVE

4. the franchise agreement was varied to enable the respondent to refund the applicants money. The non-variation clause, according to Mr Myburgh, does not find application if the old franchise agreement was cancelled and replaced with the new agreement to refund the applicant's money. However should it be found that the franchise agreement was varied to enable the respondent to refund the applicant's money, then the non-variation provisions of the franchise agreement finds application and the provisions of the Electronic Communications and Transactions Act 25 of 2002 (ECTA) also finds application.

[36] **In Natal Municipality Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)** the court, dealing with interpretation of documents, said:

> “The present state of the law can be expressed as follows: interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument or contract having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence”.

Consideration, in the process, must be given to the language used in the light of the ordinary rules of common grammar and syntax, the context, the apparent purpose to which it is directed and the material known to those responsible for its production. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to unsensible or unbussinesslike results or document. The context and the language are paramount in the process of interpreting the documents.

[37] It is important to have regard to sections 1, 12, 13 (1) and 13 (2) and 22 of Electronic Communications and Transactions Act No 25 of 2002. Section 1 deals with definitions. Of significance in this section are the definitions of data, data message and electronic signature.

> “data means electronic presentations of information in any form.
>
> “data message” means data generated, sent, received or stored by electronic means and includes:
>
> > (a) Voice where the voice is used in an automated transaction; and
> >
> > (b) A stored record.
>
> “electronic signature” means data attached to, incorporated in or logically associated with other data and which is intended by the user to serve as a signature.

[38] Section 12 provides:

> “12. **Writing** - A requirement in law that a document or information must be in writing is met if the document or information is -
>
> > (a) In the form of a data massage; and
> >
> > (b) Accessible in a manner usable for subsequent reference.”

Section 13 (1), (2) and 3 provides

> “13 **Signature** - (1) where the signature of a person is required by law and such law does not specify the type of signature, that requirement in relation to a data message is met only if an advanced

electronic signature is used

(2) subject to subsection 1, an electronic signature is not without legal force and effect merely on the grounds that it is in electronic form.

(3) where an electronic signature is required by the parties to an electronic transaction and the parties have not agreed on the type of electronic signature to be used that requirement is met in relation to a data message if-

(a) A method is used to identify the person and to indicate the person's approval of the information communicated: and

(b) Having regard to all the relevant circumstances at the time the method was used, the method was as reliable as was appropriate for the purpose for which the information was communicated."

Section 22 provides

"22 **formation** and **variation** of **agreements. -** (1) An agreement is not without legal force and effect merely because it was concluded partly or in whole by means of data messages."

(2) An agreement concluded between parties by means of data massages is concluded at the time when and place where the acceptance of the offer was received by the offerer."

[39] **In Spring Forest Trading 599 CC v Wilberry (725/13) [2014 ZASCA 178 (21 November 2014)** the Supreme Court of Appeal of South Africa had to deal with a situation which is similar to the facts of the case *in casu.*

The parties in the Spring Forest case concluded an agreement in terms of which the appellant was appointed as the respondent's operation agent. The agreement contained a non-variation clause which required any consensual cancellation to be in writing and signed by the parties. The appellant was unable to meet its rental commitments towards the respondent. The parties had a meeting and as a way of solving the problem the appellant was given four options to choose from. On 25 February 2013 at 11 h44 the appellant addressed an email to the respondent requiring it to confirm the four options that were given to it by the respondent. At 12h18, on the same day, the respondent using an email confirmed that the four options had been correctly recorded in the email. On the same day, at 04h02, the appellant using an email informed the respondent that it had accepted the second option. The appellant contended that the agreement was validly cancelled and that the cancellation met the requirements for the information to be recorded in writing and signed by the parties in terms of section 13 (3) of ECTA. The respondent held a different view explaining that the emails did not meet the requirement of section 13 (1) of ECTA which provided that an advanced electronic signature was required. The agreement, according to the respondent, was not validly cancelled.

[40] The SCA had to decide whether cancellation of an agreement by email was valid in circumstances where the agreement, like in the current case, contained a non-variation clause which required cancellation to be in writing and signed by the parties. The SCA rejected the respondent's contention stating that the emails had been clear and unambiguous. The formal requirement of writing and signature imposed by statute or the parties, according to the SCA, can generally be satisfied through electronic transaction. The court found that a legal requirement for an agreement to be in writing is satisfied if it is in the form of a data message and emails meet the requirement. The crux of the matter is that where the law requires a signature section 13 (1) applies whereas section 13 (3) applies where parties to an electronic transaction themselves require a signature but have not specified the type of electronic signature to be used, the requirement if a method is used to identify the person and to indicate the person's approval of the information communicated the requirement is met and in that case section 13 (3) applied. The SCA further found that as long as the data in the email is intended by the user to serve as a signature and is logically connected with other date in the email the requirement for an electronic signature is met.

[41] The names of the parties at the foot of the emails identify the users and constitute data that is logically associated with the data in the body of the emails. This is in line with the definition of electronic signature described above. The names authenticate the information contained in the emails.

[42] The respondent's affidavits demonstrate no dispute regarding the reliability of the emails, the accuracy of the information communicated or the identities of the persons who appended their names to the emails. The Spring Forest case is on all -fours with the current case.

[43] Mr Myburgh submitted that the requirement for an amendment to be in writing is satisfied because the emails exchanged between the respondent and the applicant constitute a data message referred to in ECTA. The requirement for the amendment to be in writing was, according to him, satisfied. The emails, according to him, are clear and unambiguous and constitute an offer and an acceptance. They satisfy the requirement of the non- variation clause in the franchise agreement.

[44] Ms Thomson argued that the applicant could not rely on the provision of the ECTA as it placed no reliance on the ECTA, in its affidavit. Mr Myburgh dismissed the argument adding that the agreement was flawed and untenable in law. This, according to him, is caused by a failure to appreciate the distinction between formal (procedural) law and (substantive) law. ECTA according to him, does not create or define rights and obligations and does not form part of substantive law. He submitted that procedural law is not

pleaded. Practitioners simple follow it while the courts apply it.

[45] The emails clearly and in so many words demonstrate that the respondent, once shop 39 could not be obtained, and the applicant did not want to take Duka in Port Elizabeth, realised that the franchise fee paid as deposit had to be refunded. The emails are clear on this issue. The respondent can hardly be heard to say that the franchise agreement was not cancelled. The respondent can also not be heard to

say that the applicant was not informed in so many words that the money would be refunded.

[46] The emails between the applicant and the respondent satisfy the requirements of the non- variation clause, the cancellation of the franchise agreement and the coming into being of the new agreement in terms of which the respondent would refund the money that it received from the applicant.

[47] Applying the principles which found application in the Spring Forest case to the facts of the current case it becomes clear:

1. that the non-variation provisions of the franchise agreement do not apply to the new agreement

2. that the emails were in writing

3. that the emails were signed by the applicant and the respondent

4. that the emails satisfy the requirement of writing

5. that the requirement of the signature is satisfied by the writing of a name at the end of the email

6. that section 13 (3) and not 13 (1) of the ECTA applies to the current case

7. that it is not necessary to refer to ECTA in the affidavits

8. that the respondent is indebted to the applicant in the amount of R648 455.00

9. that the applicant has the necessary *locus standi* to bring this application

10. that the defence that the respondent does not owe the applicant because the franchise fee is non-refundable has been destroyed by the emails.

[48] The defence that the respondent is solvent has no substantiation. The respondent annexed wrong documents relating to a different entity in an endeavour to prove that it is solvent. No sound explanation was proffered because the correct documents were never produced. It is doubtful if the correct documents exist.

Indeed if they existed same would already have seen the light of the day.

[49] The respondent avers that it has 400 successful operating franchises and a distribution centre, namely Old Fashioned Fish and Chips Distribution Centre (Pty) Ltd. It is noteworthy that this entity was placed under provisional winding up in the hands of the Master of the High Court on 5 December 2014 under case number 31745/2014 (South Gauteng High Court). Old Fashioned Fish and Chips Distribution Centre (Pty) Ltd was placed under final winding up in the hands of the Master of the High Court under the same case number on 2 February 2015.

[50] The document that the respondent's auditors provided it with is unhelpful. It demonstrates nothing in terms of the respondent's solvency. The respondent was served with the demand in terms of section 345 of the Old Companies Act. The respondent, for three weeks, failed to pay the money that the applicant demanded. The respondent, accordingly, pursuant to the provisions of section 345 of the Old Act was duly deemed unable to pay its debts. Ms Thomson, in their heads of argument, submitted that the respondent, in its letter dated 9 September 2014, unconditionally tendered to pay to the applicant the amount of R18 356.80. This amount, to date, has not been paid. The applicant, is indeed, a creditor of the respondent and has the necessary *locus standi* to bring this application.

[51] The respondent is in no way assisted by the annexures that it has attached to its opposing affidavit. The documents are evidently an irrelevant balance sheet and an out-dated unsigned irrelevant and inadmissible financial statement all relating to a completely different entity. The documents in terms of section 345 of the Old Act, do not enable the respondent to rebut the presumption of its inability to pay its debts. This clearly demonstates and supports the presumption that the respondent is indeed, commercially insolvent.

Mr Myburgh submitted that the Old Act applies to the facts of this matter because the respondent is commercially insolvent. He, accordingly, implored the court to grant and order for the wingding up of the respondent in terms of the provisions of section 344 (4) read with section 345 (1) (a) of the Old Act.

[52] The cases Ms Thomson referred the court to are unhelpful to the respondent because the facts of the case clearly demonstrate that the applicant has been able to make out a case for the relief that it seeks.

[53] I do not agree with Mr Myburgh where he requests the court to grant an order finally winding up the respondent in the hands of the Master of the High Court. Those that have interest in the matter deserve to be given a chance to show why the respondent should not be finally wound up. The circumstances of the matter warrant an order provisionally winding up the respondent.

[54] I, in the result, make the following order:

1. The respondent is placed under provisional winding up in the hands of the Master of the High Court.

2. The respondent and all other interested parties must show cause on why a final order should not be granted.

3. the costs of this application shall be costs in the winding up.

M.W MSIMEKL

JUDGE OF THE GAUTENG DIVISION

PRETORIA

COUNSEL FOR THE APPLICANT: ADV J L MYBURGH

INSTRUCTED BY: S E ARCHARY JNCORPORATED

COUNSEL FOR THE RESPONDENT: ADV A THOMPSON

INSTRUCTED BY: GEO ISSEROW & T L FRIEDMAN ATTORNEYS

C/0 FRIEDMAN HART SOLOMON & NICOLSON

DATE OF HEARING: 17 NOVEMBER 2014

DATE OF JUDGMENT: