IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

9/7/15

CASE NO: 42145 /2012

Delete whichever is not applicable

(1) Reportable Yes / No
(2) Of interest to other Judges Yes / No
(3) Revised.

Date: 09 July 2015

Signature.............

In the matter between:

JOHN DORE CARPETS FRANCHISE CC	**Plaintiff**
and	
FLOR PRO PRETORIA [previously JOHN DORE CARPETS MENLYN]	**First Defendant**
PIETER WILLEM DU PLESSIS	**Second Defendant**
MARYNA DU PLESSIS	**Third Defendant**
HERMAN DICKS	**Fourth Defendant**

JUDGMENT

Ismail J:

Background

[1] This matter concerns a franchise agreement entered into between the plaintiff, as franchisor, and the first defendant as franchisee. The franchise agreement related to a carpet and wooden floor business.

[2] Initially plaintiff and First Defendant entered into a franchise agreement during 2006 regarding a John Dore shop in Menlyn. This business was referred to as " John Dore Menlyn".

[3] During 2010 the plaintiff sold two further franchises to the Second and Third defendants. These franchises were known as the John Dore Fourways and John Dore Westrand stores. The franchise model relating to these stores was that of an existing John Dore store.

Plaintiff's claims against the Defendants

[4] The plaintiff instituted proceedings against the defendants due to their failure to comply with the written agreement. The defendants failed to comply with the written agreement in that they without just reason cancelled the John Dore Menlyn and John Door Westrand agreements.

[5] The plaintiff claims two amounts from the defendants, arising out of a franchise agreement entered into between the plaintiff and the first defendant, for the amounts of R475 739.81 and R93 995,24.

[6] The defendants pleaded that the amounts claimed by the plaintiff were due to the plaintiff, however they alleged that the amounts due are to be set off against the amount claimed by them in their counterclaim.

[7] The plaintiff also sought an order that the defendants in respect of all three franchise agreements render a full and proper account, supported by documents specified in its claim of the full turnover of the franchises since the inception thereof until the cancellation thereof.

[8] During the trial the plaintiff led the evidence of three witnesses in furtherance of its case. The defendants in turn called Mr Du Plessis, the second defendant as a witness to substantiate the counterclaim.
The plaintiff led the evidence of Mrs Leta Sehanke, a procurement Manager, of the plaintiff to testify. Her evidence related to how the franchisor ordered goods on behalf of the franchisee, and that the franchisor would settle the account with the distributor. The franchisor would than on a monthly basis invoice the franchisee for the purchasers over that period. Her evidence was not challenged.

[9] Whilst Mrs Shanke was testifying, the matter stood down and the parties agreed upon the amount in respect of claim 2 between them to be R58 616, 70 instead of the amount originally claimed, namely R93 995, 25

[10] The second witness for the plaintiff was one, Mrs Drepaniotis. She stated that she was the sole member of the plaintiff, close corporation, since 2008. The plaintiff supplied carpets and wooden floors to franchisees. She sketched the relationship with the defendants in respect of their first franchise in Menlyn and their subsequent franchises in Fourways and Decorpark.

She testified that the franchisee did the royalty calculations. She requested the books from the franchisee, however they never furnished her with the books. She also asked Mr Du Plessis for the financial statements and once again he did not respond to her request.

Mrs Drepaniotis was referred to the client summary[1] and asked who completed those forms and she stated that it was received from the client. Those documents do not indicate any pending jobs and she testified that she did not receive payments in the majority of instances for pending or outstanding jobs.

She testified about a letter [2] which her attorneys Jarvis Jacobs

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[1] From pages 138 -140; 147; 150; 152-155

Raubenheimer wrote on her behalf. At paragraph 4 of the letter the following appears:

" 4 In accordance with the provisions of clause 9 of the franchise agreement , you are hereby afforded a period of 14 days from date of this notice to remedy your breach by payment of the amount specified herein above into our trust account with details as set out herein under, failing by (sic) our client shall execute upon its contractual common law remedies which shall include but will not be limited to:

4.1 Cancellation of the franchise agreement reserving its rights to claim damages;

4.2 calling upon for an order for specific performance of the agreement."

The amount referred to in the letter which the second defendant was instructed to pay was an amount of R309 308,03. This amount is an error and the amount ought to have been R209 308.05.

[11] This amount reflects the amount which plaintiff seeks for the purchase of the Fourways franchise in the sum of R600 000,00 of which only R290 691,97 was only paid.

[12] The defendants in their counterclaim seek the return of the sum of R290 691, 03 which they paid. They allege that the plaintiff failed to comply with it's end of the agreement by not handing over the customer book containing the list of customers to the business.

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[2] Dated 6 September 2011 (appearing at pages 19 and 20 of bundle marked A)

[13] It is self- evident that the claim referred to in par [9], supra, on behalf of the plaintiff and the claim referred in par [11 supra arises out of the sale of the Fourways franchise which for the amount of R600 000.00.

[14] Regarding this claim for the payment of the balance of the purchase price of the Fourways franchise, and the concomitant claim in the counter-claim for the refund of the money which was paid to the plaintiff, the court must examine the evidence of Mrs Drepanotis; Mr Dicks and Mr Du Plessis. The version of Mr du Plessis was that the client book was not given to the defendants. The failure to hand over the client book was a material or and significant failure or breach on the part of the plaintiff which rendered the agreement to be cancelled.

[15] The evidence of Mrs Drepaniotis on the other hand was that there was a client book available although she could not say with certainty that Mr du Plessis received it.

[16] Mr Dicks on the other hand testified that the book was at all times at the franchise business. Mr Dicks testified that he was a shareholder together with Mr du Plessis in the Fourway franchise. He also managed the Fourways franchise. He testified that when he was given the task to manage the branch there was a client book which was received from Mr Van der Berg. He also testified that before the business was closed there was a request from Mrs Drepaniotis for the financials of the franchise store.

[17] In determining this issue in particular, as well as the case as a whole the court is bound to look at the probabilities, in view of the two mutually opposed versions presented to the court. I am therefore enjoined to follow the approach laid down by Nienaber JA in *Stellenbosch Farmers' Winery Group Limited and Another v Martell et Cie and Others*[3]. I do not for reasons of prolixity incorporate the principle to be followed as it is well known to the litigants.

[18] Mr du Plessis whilst testifying before me came across as a confident and astute businessman. I did not gain the impression that he was a novice in business or that he was inexperienced. His manner of testifying was that that of a confidence and hubris. He testified that he requested the client book verbally from Mrs Drepaniotis on several occasions. No dates were given when those request were made. Even if one is to assume that he requested the client books during the first quarter or even the second quarter of the purchase of the franchise, and that no client book was forthcoming. It boggles the mind why he personally did not write a letter or send an e mail to Mrs Drepaniotis for the client book. After all his evidence was that the client book was part of a going concern which he purchased. He testified that he had to start the business as if it was a new business.

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[3] 2003 (1) SA 11 (SCA) at 14I-15D, par [5]

I find his failure to demand the client book to be out of kilter considering that he is an astute businessman and he failed to discuss this with Mrs Drepaniotis.

[19] The first time that a letter [4] is dispatched regarding the client book is on the 22 August 2011.

[20] The letter is on a John Dore letterhead and the author thereof is Mr Du Plessis, the second defendant. The letter gives a breakdown of figures regarding the Fourway franchise and queries the outstanding amount which differs with the plaintiff's. Of significance is what appears in the letter under 1.

" 1. I never received any client list or any sort of documentation regarding the client basis- goodwill-that I have every right to"

[21] I have the following difficulties with this letter, namely:

(1) that it was only sent in August 2011 when the premises were already occupied in July 2010. The point being made is that the letter was sent some 13 months after the purchase of the

[4] Letter appears on pages 236-237 of exhibit A

franchise

(2) the letter is not addressed to anybody specifically nor does it have an address on it;

(3) it is not an e-mail as it does not indicate details regarding when, to whom and from whom it was sent;

(4) it is not a facsimile as it does not have a fax transmission report;

(5) the letter is merely addressed to " Dear ". It does not say dear madam; or dear Carol or dear Mrs Drepaniotis ; and

(6) when Mr du Plessis testified he never stated that the letter was hand delivered, nor does the letter itself indicate that it was hand delivered.

[22] These aspects must be viewed together with the version of Mrs Drepaniotis who denied having received the letter. This must also be seen in the light of Mr Dick's testimony, who was the fourth defendant in this matter, that there was a client book.

[23] The probabilities favour the plaintiff's version that the second defendant had the client book, for the reasons referred to above, coupled with the objective evidence of Mr Dick's. Counsel for the plaintiff submitted that Mr Dick's had no reason to lie as he was a co-defendant in this proceedings. I am in agreement with counsel's submission in this regard. In any event I heard his testimony and it was straight forward and to the point, above all his mendacity was not challenged at all. See *President of the Republic of South Africa and Others v South African Rugby Football Union and Others.*[5]

[24] On this issue namely the question of whether the outstanding amount should be paid as damages after the cancellation of the contract, or whether the defendants counterclaim should succeed and for that reason the purchase price should be repaid to the defendants, Mr Maritz, submitted that the defendants did not tender restitution of the business to the plaintiff. For that reason the counterclaim should be dismissed on this aspect[6].

[25] In the plea the defendants stated that they returned the business to the plaintiff, however when Mrs Drepaniotis testified the following question

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[5] 2000 (1) SA 1 (CC) see paragraphs [61], [63] [64] and [65] at 36J-37B-C and 37D-38C

[6] Marks Ltd v Laughton 1920 AD 12 at 21; Van Zyl v Credit Corporation od south africa Ltd 1960 (4) SA 582 (AD) at 589-590 and Feinstein v Niggli and another 1981 (2) SA 684 (A).

was asked of her.

Q: The defendants stated in their plea that they returned the business to you, was it returned?

A: No- they did not.

In argument before me Mr Kruger, for the defendants, submitted that there was nothing left to return to the plaintiff. If that was so why does the plea indicate the contrary view. The view expressed in the plea could only come from one or other of the defendants which ultimately was exposed as being false. Apart from this the defendants relied on a tacit term which was not pleaded in their plea. The tacit term conflicted with an express term of the agreement. In this regard see *Transnet Ltd v Rubenstein.*[7]

[26] Mr du Plessis in my view was not a good witness. He repeatedly evaded questions and at times questions had to be repeated twice or thrice before he answered the question. He refused to make simple concessions and eventually had to concede after he was doggedly cross examined by plaintiff's counsel.

The fact that he was not a good witness does not *per se* mean that the plaintiff's case has ipso facto been proved.

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[7] [2005] 3All SA 425 (SCA) at para par [18] and [25].

[27] The two claims for R475 739.81and R58 616.70 on behalf of the plaintiff had been conceded and those claims clearly must succeed. The third claim for payment of the balance of the purchase price or damages claim in my view should also succeed as the overwhelming probabilities favour the plaintiff's case.

Counterclaim:

[28] The defendants in their counterclaim raised three claims against the plaintiff. In brief they can be referred to as: Firstly the insurance claim; the second claim is what was referred to as the 'vat on vat claim' relating to the franchise fee calculations and the claim for the return of the purchase price of the sale of the Fourways franchise.

[29] Regarding the Fourways franchise and whether the defendants are entitled to the refund of the money paid, this aspect has been dealt with above in par [18] to [23], *supra*. In my view the letter referred to in par [19] and [20] is an after- thought on the part of the second defendant who for some or other reason intended to cancel the agreement and. The client book was a pretext to terminate the agreement. For fear of repeating myself, the second defendant is a savvy businessman and the timing of the letter indicates the point I wish to make. Why did he wait for thirteen months before demanding the book.

I will not deal with the sale of the Fourways franchise any further, as I believe this aspect has adequately been dealt with.

[30] During the trial the matter stood down and the parties thereafter agreed that the amount due to the defendants in respect of the insurance claims equates to R114 336. 24. Therefore this amount should be paid to the defendants. Although the claim was in excess of the amount agreed. The original amount claimed by the defendants was for R335 693, 17. A substantial amount had prescribed.

[31] This leaves me then with the question of the defendants claim in respect of the 'vat on vat' calculations. The defendants allege that they had to pay what has been described as VAT on VAT in calculating the franchise fee. The evidence indicated that this amount was calculated by the defendants personally when they tendered the franchise fee due to the plaintiff.

[32] In the absence of the so called vat on vat calculation being *contra bonis mores* there is nothing precluding the parties to a contract negotiating such terms. It would appear that the defendants raised their dissatisfaction in the manner the franchise fee was calculated, however the plaintiff was adamant on this aspect and the agreement was concluded between them. The agreement prescribed the manner in which the franchise fee was to be calculated. The principle of our law is *pactum sunt servanda*- namely that agreements are to be observed.

[33] A I understood Mr Kruger's submissions, this aspect although not waived, was conceded. This claim should therefore not succeed. Mr Maritz raised the question how would the defendants prove this claim when the plaintiff was seeking a debatement of account and financials in order to verify whether the franchise fee was correctly calculated or not.

[34] Accordingly I am of the view that the so called vat on vat claim should be dismissed.

Costs

[35] The plaintiff submitted that the costs should follow the results and that it proved its claims and succeeded on all the claims in the counter-claim but for the insurance claim. For that reason it should be awarded costs of the in respect of its claim as well as the counter claim.

[36] On behalf of the defendants it was submitted that the plaintiff should be awarded costs on its claim and on those claims where the defendant established in the counter-they should be awarded costs.

[37] The granting of costs is within the discretion of the court. In this

matter there were claims on behalf of the plaintiff and counterclaims by the defendant. Where the counterclaim is quite distinct from the claim as in the case of the insurance claim, such costs are generally awarded to the party who succeeds on it.[8]

[38] Accordingly I make the following order:

Defendants are ordered to pay the plaintiff jointly and severally the one paying the other to be absolved

(1) payment in the amount of R534 355,51 to the plaintiff (i.e R475 739.81 plus R58 616,70);

(2) payment in the amount of R209 308,05;

(3) Interest on the aforementioned amounts calculated at a rate of 15.5% per annum a tempore morae;

(4) The first to Third defendants are ordered to render to the plaintiff the following documents:

4.1 Bank statements of the first defendant from October 2006 until 31 December 2011;

[8] Fripp v Gibbon & Co 1913 AD 354 ; Ihlenfeldt v Rieseberg 1960 (2) SA 455 (T).

(6) Plaintiff is ordered to pay the costs of the counterclaim in respect of the insurance claim on a party and party scale.

M. Ismail

Judge of the High Court

APPEARANCES :

For the Plaintiff :	Adv S Maritz instructed by Jarvis Jacobs Raubenheimer Inc, Pretoria.
For the first to third Defendants	Adv T P Kruger instructed by De Klerk Mandelstam Inc, Pretoria.
Date of hearing:	29 May 2015; 1 June 2015 and 2 June 2015; and 24 June 2015.
Judgment delivered :	09 July 2015