/SG

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

DATE:
CASE NO: 3253/2015

24/7/2015

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

20/7/2015

DATE SIGNATURE

In the matter between:

FRANCHISING TO AFRICA (PTY) LTD	PLAINTIFF
And	
SPKC HOLDINGS (PTY) LTD	1ST DEFENDANT
SUDESHAN PILLAY	2ND DEFENDANT

JUDGMENT

JORDAAN, J

This is an opposed application for summary judgment. In the application for summary judgment the plaintiff claims:

1. An amount of R258 438.40 plus interest in respect of arrear rental.

2. An amount of R52 183.59 plus interest in respect of royalties.

3. An order that the first and second defendants seize making use of the intellectual property of the plaintiff. (See page 191 to 192 of the papers)

It is not an issue that on 1 February 2014 a franchise agreement between the parties commenced. Also relevant is a sub-lease agreement that was entered into and a surety agreement.

It was argued on behalf of the plaintiffs that the defendants do not disclose a single point that discloses a defence on summary judgment.

It is not an issue that the amounts payable in respect of rent and royalties are in arrears. Since February 2014 only two payments and a further two short payments were made in respect of rental and no payments were made in respect of royalties. The defendants rely on the *exceptio non adimpleti contractus*.

In respect of the amounts claimed for rental the defendants allege that the amounts are inflated. I do not think that there is merit in this submission. The amounts claimed are inclusive of water and electricity supplied by the municipality which will of course vary from month to month.

It is also important to note that in its plea and counterclaims the defendants do not raise the point that the amounts in respect of rental were miscalculated neither do they do so in correspondent to the plaintiffs. See annexures "SP3" "SP4" and "SP5".

The main point raised by the defendants is that (amongst other documentation) the plaintiff's did not supply it with an Operations Manual. They allege that for that reason they are not obliged to pay the amounts in arrears.

In its counterclaims the defendants claim amounts that are in excess of the amounts claimed by the plaintiffs. The argument is that there should be a set off and that the plaintiff's claim is extinguished thereby. However, clause 5.3 of the franchise sub-lease agreement at page 73 of the papers reads as follows:

> "All monthly rent shall be paid on or before the due date as per the main lease agreement, without any deductions or set off."

It was argued on behalf of the plaintiff, and I agree, that there is no clause in the agreements that relates to the *exceptio non adimpleti contractus*.

As stated above the main complaint by the defendants is that they were not supplied with an Operations Manual as plaintiffs were obliged to do and they therefore do not have to pay the amounts in arrears. One must accept that an Operations Manual was not supplied but one must keep in mind that the business that is run by the defendants is a pizza outlet. One wonders what Operations Manual is needed to bake a pizza. Since the start of the business up to now, for about one and a half years, the defendants made and supplied pizzas to the public. Nowhere in their papers is there any allegation that they were unable to do so because they did not have an Operations Manual. In my view by no stretch of imagination can the supply of an Operations Manual be an essential element of the agreements warranting a complete failure to pay any amount in rental or royalties to the plaintiffs. Furthermore as correctly pointed out during argument on behalf of the plaintiffs the Operations Manual is in the interest of the plaintiffs, not the defendants.

The practical situation is that the defendants are in possession of the premises without paying a cent.

I agree with the argument on behalf of the plaintiffs that the *exceptio* is not available as a defence to its liquid claims for rent and royalty due to the fact that the first respondent was already in default by the end of March 2014.

Of significance is the fact that on the front page of the Sale of Existing Store and Franchise Agreement (page 23 of the papers) provision is made for a cooling-off period of ten days during which the agreement can be cancelled. Instead of complaining the defendants made initial payments in respect of rental but thereafter failed to do so.

In *Minister of Public Works and Land Affairs and Another v Group 5 Building Limited* 1996 (4) SA 280 (A) it was held:

> "Reciprocity of debt in law does not exist merely because the obligations which are claimed to be reciprocal arise from the same contract and each party is indebted to the other in the same way or the other. A far closer and more immediate correlation than that is required. See *BK Tooling (Edms) Bpk v Scope Engineering (Edms) Bpk* 1979 (1) SA 391 at 415H-418C."

The payment of rent and the alleged non-providing of the manual could never mean interdependent reciprocal obligations.

It is important to note that only in September 2014 the Operations Manual was complained of, months after the defendants have been in default.

Some of the paragraphs in the answering affidavit on behalf of the defendants need to be scrutinised.

In paragraph 16 thereof it is alleged that financial statements books and records have not been provided by the plaintiffs. It was correctly pointed out on behalf of the plaintiffs that the defendants did not buy shares in the business. They bought a going concern. There was no obligation on the plaintiffs to provide these documents.

In paragraph 17 thereof it is stated that not all of the claims of the plaintiff are for a liquidated amount. This implies that it is admitted that some are.

In paragraph 27 it is complained that an invoice for the payment of R627 000.00 for the franchise was not provided. Why the defendants want such an invoice is clear to me.

In paragraphs 28 to 34 the defendants allege that the second contract was signed under considerable pressure and they did not have time to peruse it or to seek legal advice. Fact of the matter is they did sign it and there was a cooling-off period provided for.

In paragraph 35 the failure to provide the Operations Manual and management accounts financial statements the business bank account etc are bemoaned. Again the defendants lose sight of the fact that bought going concern, not shares.

It is also bemoaned in these paragraphs that the store did not generate the profit that was conveyed to the defendants by the plaintiffs.

Clause 29 at page 57 of the papers expressly states that no representations or guarantees regarding *inter alia* the prospects of success of the business were made and no party may rely on any representation not recorded in the agreement.

Also of fundamental importance in this regard is clause 35 at page 58 to 59 of the papers. This clause reads as follows:

"Disclosure and acknowledgement

The franchisee and the principal(s) acknowledge and confirm that

35.1 Full and accurate written disclosure of all information material to the franchise relationship was given to them prior to them signing this agreement.

35.2 This agreement was presented to them in consequence of them having expressed the desire to own and operate the franchised business.

35.3 They have read this agreement in its entirety and they are entitled prior to signing this agreement in writing to request the franchisor to provide them with a written explanation of any terms or sections of this agreement not fully understood by them.

35.4 The franchisor has recommended to them that they submit this agreement to their legal advisors for perusal, explanation and comment thereon.

35.5 The franchisor has recommended to them that in addition to the abovementioned legal assistance, they also seek such other expert advice as they may deem necessary regarding the commercial viability and prospects of the business.

35.6 They recognise the importance of operating the business in strict conformity with the system.

35.7 Investment in business involves business risks and that the success of the business is primarily dependent on their business abilities and efforts.

35.8 All goodwill will endure to the benefit of the franchisor."

The many changes made on the agreement in writing for example at page 38, 46, 47, 53, 54 and 55 is indicative of the fact that the contract was thoroughly went through.

Paragraphs 37 to 39 relates to alternative business premises the defendants wanted to be relocated to. Although such relocation was discussed between the parties such relocation was not reduced to a written undertaking. The agreement contains a non-variation clause in terms of which all amendments to the contract shall only be valid and enforceable if reduced in writing.

Paragraphs 41 and 42 refer to letters sent by the defendants to the plaintiffs (SP3, SP4 and SP5).

I agree with the submissions on behalf of the plaintiffs that with the exception of the Operations Manual no clause in the agreement is referred to the plaintiffs are in breach of.

In the result I am of the view that summary judgment should be granted in the amounts set out in the application for summary judgment.

I, however, agree with the contention of behalf of the defendants that the relief sought in prayer 3 of the application for summary judgment cannot be granted in terms of rule 32.

Costs

The matter was previously before ISMAIL J on 13 March 2015. He postponed the matter due to certain defects in the papers. He directed that the costs of that day be argued at the final hearing of the matter. It is clear to me that the blame for the defects in the papers on that day cannot be placed on the plaintiffs or the defendants. Costs for the hearing on 13 March 2015 should therefore follow the result.

The following order is made:

In respect of claim 1 judgment is granted against the first and second defendants in the amount of R258 438.40 plus interest *a temore morae* at a rate of 9% per annum on the said amount calculated from the date of summons to date of final payment.

In respect of claim 2 judgment is granted against the first and second defendants in the amount of R52 183.59 plus interest *a temore morae* at a rate of 9% per annum on the said amount calculated from the date of summons to date of final payment.

The defendants are to pay the costs of this application, including the costs for 13 March 2015 jointly and severally, the one paying the other to be absolved.

E JORDAAN
JUDGE OF THE GAUTENG DIVISION, PRETORIA

Heard on:
For the Plaintiff: Adv
Instructed by:
For the Defendants: Adv
Instructed by:
Date of Judgment: