



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

Case No: 8209/2014

In the matter between

PICK 'n PAY RETAILERS (PTY) LTD

Applicant

and

PINE VALLEY SUPERMARKET (PTY) LTD

Respondent

JUDGMENT

Delivered on: 20 March 2015

MOODLEY J

[1] The applicant seeks an order permitting it to perfect its security under and in terms of a general notarial bond registered in favour of the respondent, and to exercise its rights as contemplated therein.

[2] Pursuant to an urgent application launched by the applicant, interim relief was granted on 22 July 2014 by way of a consent order in terms of which, pending the final determination of the application, the applicant through its duly authorised representative, was authorised and empowered to take certain steps of intervention in the operation of the respondent's business.

[3] The remainder of the relief sought was to be determined by the court before which the application was to be argued. The respondent was granted leave to file a supplementary affidavit in respect of its submissions on whether any provision of the **Competition Act No 89 of 1998** and **Consumer Protection Act No 68 of 2008** finds application to and/or in any way impacts on or affects any of the terms of the

agreements entered into between the parties, the provisions of the Notarial Bond granted in favour of the applicant and/or any of the applicant's practices that affect the respondent as franchisee. The application was adjourned to the opposed motion roll on the 31 October 2014 and the costs occasioned by the adjournment were reserved.

[4] The applicant now seeks final relief as set out in paragraphs 2 and 3 of the Notice of Motion and costs of the application on 22 July 2014.

[5] The application for final relief and the costs aforesaid are opposed by the respondent.

The Applicant's submissions

[6] The applicant's case is premised on the following grounds:

- (i) the respondent has failed to effect payment as stipulated in the Franchise Agreement (FA) entered into by the parties at Johannesburg on 30 September 2009¹;
- (ii) the Notarial General Bond No. BN18068/69 (the bond) which was registered as security for the respondent's indebtedness to the applicant, has become executable as against the respondent because:
 - a) the respondent has by its own admission², failed to effect payments due by it to the applicant as and when the payments fell due; and
 - b) the applicant reasonably believes that its interests are being imperilled as contemplated in the Franchise Agreement³ by a director and shareholder of the respondent, Gerhardus Francois Maritz (Maritz), who has admitted that he has defrauded the respondent and committed certain 'irregularities'⁴;

¹ FA para 8.16

² Answering affidavit para 22-24; and para 27

³ FA: para 10.5.7, 10.5.7.5, 10.5.7.7

⁴ Answering affidavit para 78

The applicant is therefore entitled to exercise its rights as set out in clauses 6.1.1 to 6.1.11 of the bond.⁵

- (iii) Further, as the respondent breached its obligations in terms of clauses 17.4 and 19.4 of the Franchise Agreement, the amount due in terms of the Payment Variation Agreement (PVA) entered into subsequently by the parties has become due and payable in terms of the acceleration clause⁶ and the applicant is owed an amount in excess of R8 million, including the amount owed in terms of the Payment Variation Agreement.
- (iv) The Consumer Protection Act (CPA) does not apply to the Franchise Agreement, as submitted by the respondent, because the Franchise Agreement is a pre-existing agreement as defined in Schedule 2 of the Consumer Protection Act⁷ as it was entered into before the general effective date of the Act (CPA), which is 23 October 2010.⁸
- (v) The applicant is not in breach of Section 5(1) of the Competition Act (CA) nor does the Franchise Agreement contravene Section 5(2) thereof.⁹ There are substantial benefits which accrue to and are enjoyed by the respondent in terms of the Franchise Agreement.

The respondent, on the other hand, has failed to discharge its *onus* to prove the existence of an agreement which has substantially prevented or lessened competition in the market, the market in which the competition is undermined, and that the agreement has effectively caused a substantial prevention or erosion of the competition. The Franchise Agreement does not contain an express prohibition relating to minimum resale prices nor does the applicant prescribe a practice of minimum resale price maintenance.

⁵ FA: para 10.5

⁶ Annexure FA6 clause 3.9

⁷ Read with S121 of the CPA

⁸ Schedule 2 Item 2(2) read with the definition of 'general effective date' in Schedule 2 Item 1

⁹ No 89 of 1998

The respondent has therefore failed to prove either an element of coercion, or that a '*de facto*' minimum resale price maintenance exists.

- (vi) The provisions of the Notarial bond are neither unfair nor unreasonable, as confirmed by the Supreme Court of Appeal in **Juglal NO & Another v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division**.¹⁰
- (vii) After Lopes J, who was seized of the urgent application, indicated that perfection applications are by their nature urgent, the parties arrived at an interim consent order. The applicant was therefore substantially successful and is entitled to the costs incurred on 22 July 2014; alternatively the applicant is entitled to the aforesaid costs as the application was urgent and premised on substantive grounds.

The Respondent's submissions

[7] The respondent has advanced the following arguments to sustain its resistance to the relief sought :

- (i) In its founding affidavit, the applicant relies on the failure of the respondent to pay amounts due under the Franchise Agreement within the 28 day time period stipulated in clause 17.4 and to comply with Clause 8.2.5 of the bond viz the failure by the respondent to pay timeously amounts due on 24 June 2014, 1 July 2014 and 8 July 2014. However the debts on which the applicant relies were paid off approximately 2 weeks after they fell due.
- (ii) As the overdue amounts relied on are no longer outstanding, the applicant cannot seek an order declaring the bond executable on the basis that the payments were overdue when the application was brought¹¹; nor should the applicant be permitted to rely on the provisions of clause 6.1 of the bond for marginally late payments.
- (iii) As the applicant relies on a breach of the Franchise Agreement by the respondent, the applicant's case ought to have been predicated on

¹⁰ 2004 (5) SA 248 (SCA) pages 257-260 para 11,13,15,19-21,26 & 27

¹¹ *Juglal NO* para 26-27

clause 8.2.8 of the bond. The applicant however relies on clauses 8.2.5, which duplicates clause 8.2.8, and 8.2.7. A cause of action advanced on the basis of clause 8.2.7 is 'impermissible' and falls to be disregarded.

- (iv) The respondent would be subjected to undue hardship should the applicant take over its business. The relief sought is drastic, unreasonable and an abuse of the applicant's contractual powers and runs contrary to the principles of good faith, fairness etc emphasized by the Constitutional Court.¹²
- (v) The amount of R7 231 199.99 referred to by the applicant as having fallen due under the Payment Variation Agreement as a result of the respondent's breach, was in terms of that agreement to be paid off in 169 monthly tranches with effect from 3 April 2014 until 27 June 2017. The historical debt under the Franchise Agreement has been novated, and it is common cause that the respondent has met its weekly payments under the Payment Variation Agreement.
- (vi) Although the Payment Variation Agreement provides that a breach by the respondent of clause 17.4 of the Franchise Agreement renders the whole sum owing under the Payment Variation Agreement immediately due and payable, the applicant cannot rely on that breach to declare the bond executable.
- (vii) The irregularities committed by Maritz are an internal matter between the respondent and Maritz, have not occasioned the applicant loss, and irrelevant to the application. The amount in issue has been debited against Maritz's loan account with the respondent.
- (viii) The enforcement of the notarial bond would be unfair, unreasonable, unduly oppressive and *contra bonos mores*, particularly as the position

¹² *Botha v Rich* NO 2014 (7) BCLR 741 (CC) at para 45-46; and *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) at para 22-24 & 71-72

of the respondent is attributable to a franchise agreement which is contrary to the Consumer Protection Act.

- (ix) The Franchise Agreement as varied on 30 November 2012 and by the Payment Variation Agreement, falls within the parameters of the Consumer Protection Act which came into effect on 31 March 2011; alternatively, the Franchise Agreement as amended subsequent to the Consumer Protection Act, is in conflict with the provisions of the Act (CPA), which renders its implementation and enforcement *contra bonos mores*.
- (x) The Franchise Agreement and its implementation by the applicant infringe Section 5(1) and 5(2) of the Competition Act through the purchasing restrictions and applicant's fixing of the franchisee's prices respectively, which is effectively, *de facto* resale price maintenance. In terms of Section 65(2) of the Competition Act, this court does not have the jurisdiction to consider an issue concerning conduct that is prohibited in terms of the Competition Act, as the issue is not the subject of an order of the Competition Tribunal. Therefore the issue should be referred to the Tribunal and the application stayed until the Tribunal rules, unless this application is dismissed.
- (xi) The interim relief falls to be discharged and the application dismissed with costs, including the costs of the hearing on 22 July 2014, as the urgency was unwarranted, the applicant approached the court on unreasonably short notice to the respondent and the relief sought would have been tendered if sought from the respondent.

Issues that require determination

[8] The issues that require determination are whether:

- (i) the applicant is entitled to perfect its security in terms of the provisions of the bond pursuant to the respondent's breach of the terms of the bond and the Franchise Agreement;

- (ii) the Franchise Agreement contravenes the provisions of the Consumer Protection Act No. 68 of 2008 and in particular sections 13(1) and 48 thereof;
- (iii) the Franchise Agreement contravenes the provisions of the Competition Act No. 89 of 1998 and in particular sections 5(1) and 5(2) thereof; and
- (iv) the applicant or respondent is liable for the costs that were incurred on 22 July 2014.

The incidence of the *onus* of proof

- [9] (i) The applicant bears the *onus* to prove that it is entitled to perfect its security in terms of the provisions of the Notarial Bond.
- (ii) The respondent bears the *onus* to prove its allegations that the Franchise Agreement as amended contravenes the provisions of sections:
- a) 13(1) and 48 of the Consumer Protection Act; and
 - b) 5(1) and (2) of the Competition Act.

Summary of Facts

[10] It is common cause that:-

- (i) On 30 September 2009 the applicant and respondent concluded a written franchise agreement (“the agreement”) which was signed by the respondent on 16 September 2009, and the effective date of which was 1 October 2009.
- (ii) The respondent executed a notarial general bond in favour of the applicant on 17 September 2009, which was registered on 1 October 2009 in the Deeds Registry, Pietermaritzburg, under number BN 18068/09.
- (iii) On 8 July 2011 the applicant and respondent concluded a written addendum to the franchise agreement, effective from 1 March 2011.

- (iv) On 30 November 2012 the applicant and respondent concluded a Liquor Store Addendum Agreement.
- (v) As at 3 April 2014, the respondent was in arrears with its payments in terms of the FA in the sum of R7 721 200.33. On 22 May 2014 the applicant and respondent concluded a Payment Variation Agreement, which was signed by the respondent on 7 May 2014.
- (vi) 24 June 2014 – the amount of R265 287.73 (balance of amount owed for week 21) fell due.
- (vii) 1 July 2014 - The respondent failed to pay an amount of R1 294 799.39 (owed for week 22).
- (viii) 2 July 2014 - The applicant addressed a letter to the respondent in accordance with the provisions of clause 40 of the Agreement affording the respondent 48 hours' notice to remedy its breach of non-payment of the arrears in the total amount of R1 560 087.12 comprised by R265 287.73 (due on 24 June 2014) and R1 294 799.39 (due on 1 July 2014).
- (ix) 2 to 4 July 2014 - The respondent paid the amount of R367 811.80 to the applicant leaving a balance of R1 192 275.62.
- (x) 4 July 2014 - The applicant handed a letter of demand to the respondent demanding immediate payment of the balance of R1 192 275.62.
- (xi) The applicant conducted an investigation of the respondent's business and established that Maritz had committed certain irregularities and had defrauded the respondent by obtaining fictitious invoices from the applicant's suppliers, who on receipt of payment on the invoices, handed the money to Maritz.

On 4 July 2014 Maritz was confronted by the applicant's representatives about his fraudulent conduct, and admitted to defrauding the respondent.

- (xii) 5 July 2014 - A meeting was held between the applicant and the respondent's representatives discussing the increasing debt to the applicant.
- (xiii) 7 July 2014 - Respondent offered to sell its business to applicant for R11.5 million; applicant did not respond.
- (xiv) 8 July 2014 - A further payment of R1 056 048.43 (owed for week 23) became due and owing to the applicant which the respondent was unable to pay.
- (xv) 9 July 2014 - The applicant addressed a letter of demand to the respondent giving the respondent 48 hours to remedy its breach of non-payment in the total amount of R1 594 758.65 comprised by R 538 710.22 due on 1 July 2014 and R1 056 048.43 due on 8 July 2014.
- (xvi) 14 July 2014 - Applicant launched application as a matter of urgency, and set it down for 22 July 2014.
- (xvii) 4 July to 15 July 2014 - Respondent paid the amount of R1 294 799.39 due on 1 July with payments on 4 July, 5 July, 7 July, 8 July, 9 July, 11 July, 14 July and 15 July 2014.¹³
- (xviii) 15 July to 22 July 2014 - Respondent the paid amount of R1 056 048.43 due on 8 July 2014.

Is the Applicant entitled to perfect its security in terms of the provisions of the Notarial Bond?

[11] The applicant relies on the breach of the following clauses in the Franchise Agreement (as amended by the addendum thereto):

'17. SUPPLY BY THE FRANCHISOR ON BEHALF OF THE FINANCIER

¹³ Page 248 para 21.3 p 287

17.4 If the period of credit granted by a supplier to the franchisor in respect of any of the products and/or check-out packaging which has been purchased by the franchisee from the franchisor in terms of this clause 17 is:-

17.4.1 shorter than the period allowed, in terms of clause 17.3, for payment by the franchisee to the franchisor; or

17.4.2 reduced at any time during the currency of this agreement, then the franchisor shall be entitled, at its election, to notify the franchisee in writing of such shorter period or reduction, as the case may be, and the period allowed for payment in terms of clause 17.3, shall, if the franchisor notifies the franchisee in writing to that effect, be reduced in respect of the products and/or check-out packaging concerned, by a number of days equal to the difference between such shorter period or reduced period, as the case may be, and the period allowed for payment in terms of clause 17.3¹⁴

‘19. SUPPLY NOMINATED OR APPROVED SUPPLIERS

19.4 Subject to the provisions of clause 19.5, all amounts (including VAT thereon, if any) owing by the franchisee to the financier in respect of such purchases of products and/or check-out packaging in terms of clause 19.3, shall be paid by the franchisee to the financier, without deduction or set-off, on the 28th (twenty-eighth) calendar day after the cut-off date stipulated in the relevant end of week statement in which such amounts are reflected, provided that such aforementioned 28th (twenty-eighth) calendar day is a Saturday or Sunday, such payment shall be made on the immediately succeeding Monday. In the event that such succeeding Monday is not a business day, payment shall be made on the first business day thereafter.’¹⁵

[12] The respondent resists the application on the ground that the applicant cannot legitimately seek to perfect its security because all arrears or outstanding amounts as set out in the founding affidavit were paid and that the relief sought is *contra bonos mores*.

[13] But it is common cause that payments were not effected by the respondent in accordance with the aforesaid clauses and therefore the Payment Variation

¹⁴ Vol 2 page 190

¹⁵ Vol 1 page 99

Agreement was entered into, to assist the respondent to liquidate the arrears concurrently with the payments under the Franchise Agreement. The Payment Variation Agreement provided for the repayment of the arrear indebtedness in the sum of R7 721 200.33 (seven million seven hundred and twenty one thousand two hundred rand and thirty three cents) as at 3 April 2014, in 169 instalments subject to the terms and conditions set out in clause 3 thereof,¹⁶ the relevant clauses of which provide:

‘3.4 As from 8 April 2014 and for the duration of this Payment Variation Agreement all other payments due and payable by the Franchisee to the Franchisor shall be paid strictly in accordance with the terms and conditions contemplated in clause 17.4 and clause 19.4 of the Main Agreement.

3.5 The instalment payments referred to in clause 3.3 above shall be made over and above and in addition to the normal weekly payments to be made as per the weekly statement due.

3.6

3.7

3.8 Should any instalment due in terms hereof not be made on due date:

3.8.1 interest shall be charged on the late payment in accordance with provision of clause 10 of the Main Agreement;

3.8.2 the Franchisor may regard the balance of the Debt owing in terms hereof as due and payable immediately and shall be entitled to set off the Debt or any part thereof against any payments due by the Franchisee to the Franchisor for whatever reason. The Franchisor may also issue summons on the remaining balance of the Debt in any competent court without notice or demand to the Franchisee.

3.9 In the event the Franchisee breaches the terms and conditions in clauses 17.4 and 19.4 of the Main Agreement after signature of this Payment Variation Agreement, and/or in the event of the liquidation of the Franchisee

¹⁶ Vol 3 page 207-210

and/or if the Franchisee commits an act of insolvency, the Debt shall become due and payable immediately.’¹⁷

[14] According to the applicant’s letter of demand dated 9 July 2014, the total amount owing was R1 594 758.65 comprised by R 538 710.22 due on 1 July 2014 and R1 056 048.43 due on 8 July 2014.

[15] Although the respondent did make payments in respect of its indebtedness to the applicant after the application was launched, on its own version the respondent had fallen into arrears and was in breach of its obligations in terms of the Franchise Agreement on that date: the payment due on 24 June 2014 was paid on 4 July 2014; the amount due on 1 July was paid off over 2 weeks and settled on 15 July 2014; and the sum due on 8 July 2014, was paid off in 3 instalments - on 15, 16 and 22 July 2014, the last date being the date when this matter was before Lopes J.

[16] However in its answering affidavit the respondent alleges, contrary to the foregoing facts, that it has complied fully and timeously with its obligations in terms of the Payment Variation Agreement¹⁸, but admits ‘at worst’ that it is in arrears with its payments to the applicant for stock which amounts to R4.4m to R4.8m per month. But after setting out the payments effected between 4 -15 July 2014, it admits that ‘whilst the Respondent may **sometimes be late** (*my emphasis*) with payments, it makes payments on a regular (often daily) basis until the invoices have been paid in full very shortly **after** (*my emphasis*) they were due.’¹⁹

[17] It is therefore apparent that the respondent was in breach of its obligations in terms of both the Franchise Agreement and the Payment Variation Agreement, and had not remedied the breach by the time the application for urgent relief was launched.

[18] Further, contrary to the assertion by Mr Farlam that the main debt was novated by the Payment Variation Agreement, that agreement specifically provides:

‘4 NO NOVATION OF NOTARIAL BOND

¹⁷ Vol 3 Clause 3.9 page 208

¹⁸ Vol 3 AA para 6.2-6.4 p 244; para 21.1 page 248

¹⁹ Vol 3 AA para 21.4 page 249

The parties record that the conclusion of this Payment Variation Agreement does not and will not constitute a novation or a waiver of the rights of the Franchisor relating to the general notarial mortgage bond (“Notarial Bond”) granted to in terms of clause 24, read together with annexure “F” of the Main Agreement, whether or not this Payment Variation Agreement is concluded –

- 4.1 after the perfection of the Notarial Bond by the Franchisor; or
- 4.2 at a time when the Franchisor has not made an application to perfect the Notarial Bond.’²⁰

[19] Further, the extent of the variation of the Franchise Agreement contemplated by the Payment Variation Agreement is specifically stated as follows:

‘5 SAVINGS CLAUSE

Save as specifically or by necessary implication modified in or inconsistent with the provisions of this Payment Variation Agreement, the Main Agreement shall continue in full force and effect and no variation hereof shall be of any force or effect unless it is reduced to writing and signed by both parties.’²¹

[20] Therefore, in my view, the respondent’s assertions are misplaced as it fails to acknowledge the fact that the respondent was in breach of both the Franchise Agreement and the Payment Variation Agreement, the effect of the breach on the acceleration clause, and that the novation of the bond and the debt under the Franchise Agreement was specifically excluded in the Payment Variation Agreement, as the terms and conditions in respect of the main debt and the arrear debt, except as specifically varied in respect of the repayment of the arrear debt only, were maintained in the Payment Variation Agreement.

[21] Consequently the respondent was in breach of its obligations, as contended by the applicant. But does this breach render the bond executable?

[22] The applicant has submitted that the bond has become executable because the respondent has failed to effect payments due by it timeously, and its interests are being imperilled by Maritz who has defrauded the respondent and committed other

²⁰ Vol 3 clause 4 page 210

²¹ Vol 3 clause 5 page 210

'irregularities', and that the applicant is therefore entitled to exercise its rights as set out in clauses 6.1.1 to 6.1.11 of the bond.

It is common cause that the bond was registered as security for the respondent's obligations to the applicant until all the obligations were fully discharged.²²

[23] The bond provides as follows :

'8 Notwithstanding anything to the contrary herein contained, this bond will become executable against the MORTGAGOR if -

8.1.....

8.2

8.2.1 the MORTGAGOR commits any breach of any of the terms and conditions of this bond;

8.2.5 the MORTGAGOR shall fail to pay any amount due to the CREDITOR promptly on due date therefor;

8.2.7 the CREDITOR reasonably believes that its interests are being imperilled by any action of the MORTGAGOR or any of its officers or servants or creditors;

8.2.8 The MORTGAGOR breaches any of the terms and conditions of the Franchise Agreement concluded between the MORTGAGOR and CREDITOR.'²³

[24] The respondent's contention on the applicant's reliance on clauses 8.2.5 and 8.2.8 is that the applicant's case ought to have been predicated on clause 8.2.8 of the bond, but as it then admits that clause 8.2.5 duplicates 8.2.8, this is a non-issue that deserved no mention.

²² Vol 2 clause 24.3 page 105

'24 SECURITY DOCUMENTS

24.3 As security for all and any of the franchisee's obligations to the franchisor in terms of, pursuant to, arising from or under this agreement, including but not limited to the franchisee's obligation to reimburse and indemnify the franchisor in terms of clause 24.2, the franchisee shall, at the franchisee's cost, furnish to the franchisor the security stipulated in Part 2 of Annexure "F", which security may be held by the franchisor until all of the franchisee's aforesaid obligations have been duly, fully and finally discharged.'

²³ Vol 2 pages 178-179

[25] The respondent's second objection is that a cause of action advanced on the basis of clause 8.2.7 is 'impermissible' and falls to be disregarded because the irregularities committed by Maritz are 'an internal matter between the respondent and Maritz, have not occasioned the applicant loss, and irrelevant to the application. The amount in issue has been debited against Maritz's loan account with the respondent.'

[26] Under the Franchise Agreement the following rights and duties are imposed on the Respondent:

'Conduct of the business

15.1 The franchisee shall at all times during the currency of the agreement:-

.....

15.1.11 not, and ensure that none of its employees, officers, agents or representatives, perpetrate or commit, whether directly or indirectly, any fraud or fraudulent misrepresentation in respect of or pertaining to the business or the conducting thereof or any aspect thereof.'²⁴

[27] Maritz's admission of his fraud is a contravention of the aforesaid clause and in my view cannot be excluded under either clauses 8.2.7 and 8.2.8 of the bond. The fact that Maritz may have paid the money back by debiting it against his loan account, is in my view, not a resolution which renders the applicant's reliance on clause 8.2.7 'unreasonable' or 'impermissible'. The respondent was in arrears for a substantial amount as reflected in the Payment Variation Agreement and unable to meet its payments under the Franchise Agreement, and yet monies were being diverted by Maritz for his own benefit. This conduct, in my view, was adverse to and imperilled the applicant's interest, as it placed the recovery of monies due to it by the respondent at risk.

The provisions of the General Notarial Bond

[28] Relying on **Juglal NO & Another v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division**²⁵ the respondent has contended that in seeking to take over the

²⁴ Vol 1 page 78

²⁵ 2004 (5) SA 248 (SCA) at para 26-27

business of the respondent, the applicant is acting unreasonably, abusing its contractual powers, and inflicting undue hardship on the respondent.

[29] In response, relying on the similarity of the provisions which the Supreme Court of Appeal held was not oppressive or *contra bonos mores* in **Juglal NO** and the notarial bond under scrutiny, Mr Smith has submitted that the provisions of the bond are neither unfair nor unreasonable nor oppressive to the respondent.

[30] In **Juglal NO, Heher JA** held that the contractual provisions will be held to be contrary to public policy only:

‘if there is a probability that unconscionable, immoral or illegal conduct will result from the **implementation** (my emphasis) of the provisions according to their tenor. (It may be that the cumulative effect of implementation of provisions not individually objectionable may disclose such a tendency.) If, however, a contractual provision is capable of implementation in a manner that is against public policy but the tenor of the provision is neutral then the offending tendency is absent.’²⁶

[31] Although Heher JA held that:

‘[19] The franchise agreement was premised on an ongoing relationship of debtor and creditor’,²⁷

he held further that:

‘[14] To regard the case as simply one of a creditor exacting security in return for lending money to his debtor,is a gross over-simplification. The relationship between the parties was complex and the bond was an important element in its regulation.’²⁸

[32] In respect of the rights of the franchisor in the event of default by the franchisee, and the relationship between the franchise agreement and the bond, Heher JA stated:

‘[23] The agreement manifested a clear intention that should the appellant default or the business fail the respondent would have the right to keep the

²⁶ *Juglal NO* supra para 12 page 258

²⁷ *Juglal NO* supra page 259F

²⁸ *Juglal NO* supra page 248 H-I

lease of the premises alive (clause 12.10.1), take over operation of the store and continue the business at the same location (clauses 12.10.2 and 12.10.3), with the obvious, albeit unstated, purpose of affording the respondent an opportunity of finding a new franchisee who would be able to take over an existing business. On termination of the franchise agreement the appellant would be excluded from any further involvement at the location, in the business or in a competing business (clauses 17.4 and 17.6).

[24] A comparison of the terms of the agreement with the conditions of the bond, particularly clause 14, demonstrates the complementary effect of the latter. The thread which connects the two is the importance of maintaining the business as a going concern in a single location irrespective of the success or failure of the appellant's enterprise.²⁹

[33] On the allegation that the provisions of the bond were unfairly oppressive, **Heher JA** stated:

‘[26] While the taking over of a business as a going concern to secure a debt is a fairly drastic step which can, if abused, inflict hardship on a debtor, the context of the contractual powers in the bond under consideration renders the provision and exercise of the power commercially intelligible and combines adequate protection of the (largely perishable) security with realisation of it in a manner calculated to achieve a realistic price (which would certainly be a lesser prospect were the creditor tied to a forced sale). Moreover, as counsel for the respondent pointed out, in exercising the discretionary powers inherent in operating and selling the business and the assets the respondent is obliged to act reasonably and to exercise reasonable judgment (*arbitrio boni viri*): *NBS Boland Bank Ltd v One Berg River Drive CC and Others*; *Deeb and Another v ABSA Bank Ltd*; *Friedman v Standard Bank of SA Ltd* 1999 (4) SA 928 (SCA) ([1999] 4 B All SA 183) at 937A - F (SA). Moreover, the effect of clause 14.2.2 is that the mortgagee acts to all intents and purposes as the agent of the mortgagor in exercising its powers and subject to the duties in law that flow from that relationship.’³⁰

²⁹ *Juglal NO supra* page 260 A-D

³⁰ *Juglal NO supra* page 261B-F

[34] Clause 14.2.2 referred to *supra* is similar to clause 6.1.3 of the bond herein. Therefore not only are the provisions relied on by the applicant 'commercially intelligible' and achieve a balance between the security of the applicant and realization of the security at a realistic price, the same obligations to act reasonably and to exercise reasonable judgment attach to the applicant. The reliance by the respondent on the aforesaid judgment to resist the relief sought on the grounds of unfairness, prejudice and undue hardship, is therefore in my view misplaced.

[35] **Heher JA** also pointed out that the clauses in the bond which empower the mortgagee to take and retain at the expense of the mortgagor possession of the business and/or the assets of the mortgagor hypothecated as security for any amounts owing to the mortgagee in terms of the bond and to conduct the business of the mortgagor in name and for the account and risk of the mortgagor, and entitle the mortgagee to sell and dispose of the business and/or the hypothecated assets, must be read subject to the clause which provided that :

'[27]..... As soon as the default or imperilment which gave rise to the enforcement of the rights they provide has been overcome the *causa* for the retention of the business would fall away and the respondent would be obliged to restore the business to the appellant (if it has not already been lawfully sold or the franchise agreement cancelled). If the respondent were to seek improperly to manipulate the powers to draw out its hold on the business the appellant would have its remedies. Of course the likely concomitant of a sale of the business is a cancellation of the franchise agreement which is the trigger for the assignment or transfer of the lease, the closure of the store and the cessation of trading at the location. These are all consequences which the respondent is entitled to bring into operation under the franchise agreement. They are not under attack. That they exist independently of the bond, illustrates once again that the supposedly unhappy results of the exercise of the powers under the bond are in reality no more radical than the appellant has willingly and, commercially speaking, fairly exposed itself to without complaint under the contract.'³¹

³¹Juglal NO *supra* page 261G- 262A

[36] As stated above, similar provisions are contained in clauses 6 and 8 of the bond, which reinforce the terms of the Franchise Agreement. Consequently I am satisfied that the implementation of the provisions of the bond by the applicant is not unreasonable, unjust or oppressive.

[37] Relying further on **Juglal** supra³² the respondent contends that as it was not in arrears with its payment as a date of the application and sum appropriated by Maritz had been debited to his loan account, no *causa* existed for the relief sought by the applicant. However the respondent fails to recognize that the acceleration clauses in the bond, the Franchise Agreement and the Payment Variation Agreement have been triggered by its breach to effect payments timeously. It therefore it cannot claim to be unfairly prejudiced by the agreements or the bond, to which it has 'willingly and, commercially speaking, fairly exposed itself to, without complaint.'³³

[38] Further, I am not persuaded that the respondent's contention that the applicant is seeking to exact an unrealistic standard of near perfection from the respondent who is burdened by the terms of the agreements and bond, when clearly the Payment Variation Agreement was a consequence not of a single breach, but a series of breaches by the respondent.³⁴ In any event the respondent has admitted that from about 2010 it has 'had difficulties in making timeous and full payments to the Applicant'³⁵.

[39] In my view the respondent is also being disingenuous in suggesting that the applicant is opportunistic in failing to consider favourably the offers to purchase the respondent's business as the sale of the business prior to the fifth anniversary of the opening date or the effective date (whichever date is the later)³⁶ is prohibited by Clause 25.1 of the Franchise Agreement. The fifth anniversary of the opening date is 19 November 2014. The offers referred to by the respondent predate this anniversary date.

³² Para [26] and [27] pages 260-262 in particular [27 G-H]

³³ *Juglal* NO page 262A

³⁴ *OK Bazaars (1929) Ltd v Cash-In CC* 1994 (2) SA 347 at 361C-D

³⁵ AA para 11 page 246

³⁶ Schedule 1 of the FA: 19 November 2009 pages 135-136

[40] From the foregoing considerations, I am satisfied that the bond has been rendered executable on the grounds relied on by the applicant. The respondent is in breach of its contractual obligations and cannot rely on a contention that contractual relief sought is pernicious and unconstitutional. In my view, this is not a matter in which the factual matrix obliges me to develop the common law or strike out the contractual clauses complained of by the respondent as unconstitutional or declare the enforcement of the bond *contra bonos mores*.

[41] In the premises I am satisfied that the applicant that the applicant has discharged its *onus* on this issue and is entitled to the relief sought under the provisions of the bond, unless there is merit in the remaining defences raised by the respondent.

Does the Consumer Protection Act apply to the Franchise Agreement?

[42] The date of commencement of the **Consumer Protection Act** is 31 March 2011, unless otherwise indicated. The general effective date and a pre-existing agreement are defined in Item 1 of Schedule 2 to the Act:

‘**general effective date**’ means the date on which the provisions mentioned in item 2(2) took effect;

‘**pre-existing agreement**’ means an agreement that was made before the general effective date;’

Under the provisions of **Item 2** which sets out the incremental effect of the **Consumer Protection Act, Item 2(2)** reads:

‘Subject to sub-item (3), and items 4 and 5, any provision of this Act not contemplated in sub-item (1) takes effect on the date that is 18 months after the date on which this Act was signed by the President.’

[43] The effective date calculated at 18 months after date of assent viz 24 April 2009, is 23 October 2010.

As **Item 3** provides that:

‘ Application of Act to pre-existing transactions and agreements.—

(1) Except to the extent expressly set out in this item, this Act does not apply to—

(a)

(b) any transaction concluded, or agreement entered into, before the general effective date; or.....’

and the Franchise Agreement was signed on 30 September 2009, the Franchise Agreement is therefore a pre-existing agreement in terms of the Consumer Protection Act.

[44] I am in agreement with the submission of Mr Smith that the provisions of **Sections 13** and **48** of the Consumer Protection Act upon which the respondent relies, do not apply to a pre-existing agreement as the sections are not included in the table of applicable sections under **Item 3(2)**, and consequently the Franchise Agreement does not fall within the ambit of the Act.

[45] However the Addendum to the Franchise Agreement was signed on 8 July 2011 although effective from 1 March 2011, the Liquor Store Addendum signed on 30 November 2012 and the Payment Variation Agreement was concluded on 22 May 2014, and therefore these contracts were concluded after the general effective date of the Consumer Protection Act.

[46] The respondent contends that the Franchise Agreement was effectively varied by the aforesaid agreements and therefore falls within the parameters of the Consumer Protection Act; alternatively, the agreement as amended subsequent to the promulgation of the Consumer Protection Act, is in conflict with the provisions of the Act, which renders its implementation and enforcement *contra bonos mores*.³⁷

[47] I therefore turn to a consideration to each of the aforesaid agreements concluded subsequent to the general effective date of the Consumer Protection Act.

Addendum to the Franchise Agreement dated 8 July 2011

The reasons for and the objective of the Addendum are stated in clause 2:

‘2 BACKGROUND

³⁷ Supplementary Answering affidavit para 21

- 2.1 Since the execution of the Main Agreement, the following occurrences have had a material effect on the provisions of the Main Agreement:
- 2.1.1 certain material practices relevant to the Main Agreement being amended in practice through the mutual conduct of the franchisor and franchisee;
 - 2.1.2 certain changes in legislation applicable to the Main Agreement being effected; and
 - 2.1.3 the financier under the Main Agreement falling away as a party to the Main Agreement due to the internal restructuring and consolidation of group operations by the Pick n Pay group of companies.
- 2.2 The parties therefore wish to record, by way of this Addendum, the variations and additional terms and conditions which they have agreed as a result of the circumstances referred to in 2.1 above.’³⁸

[48] The Addendum also provides that:

‘4 Savings Clause

Save to the extent specifically or by necessary implication modified in or inconsistent with the provisions of this Addendum, all the terms and conditions of the Main Agreement shall *mutatis mutandis* continue in full force and effect.’³⁹

[49] The applicant contends that the main agreement was amended with effect from 1 March 2011, (notwithstanding its date of execution)⁴⁰ only in respect of variations arising from:

- (i) necessary consequential cross-referencing changes;
- (ii) change in branding;
- (iii) the financier falling away as party;
- (iv) the repeal of Regional Services Councils legislation;
- (v) the varied definition of “gross turnover”; and
- (vi) the actual practice relating to payment dates

³⁸ Vol 2 page 185

³⁹ Vol 1 page 195

⁴⁰ Vol 2 page 185

[50] The first submission by the respondent is that extensive amendments were made to clause 17 of the Addendum which draw it within the scope and ambit of the Consumer Protection Act.

[51] Clause 17 falls specifically within the variations relating to the deletion of the financier as a party to the Franchise Agreement, consequent to the internal restructuring and consolidation of group operations, as reflected in paragraph 2.1.3 of the addendum as quoted supra, and does not affect or amend the rights and obligations of the parties to the Franchise Agreement otherwise.

[52] However I am unable to find, as contended by Mr Farlam, that the amendments to clause 17 effectively bring the Franchise Agreement within the scope and ambit of the Consumer Protection Act. I am, to the contrary, satisfied that while the variations to clause 17 are in accordance with the requirements necessitated by the factors expressed in clause 2.1.3, the amendments do not serve to change the status of the Franchise Agreement from 'a pre-existing agreement' as defined in Schedule 2 of the Consumer Protection Act to 'a franchise agreement' as defined in Section 1 of that Act, nor does the amended Franchise Agreement constitute 'a new franchise agreement or a franchise agreement renewed after the general effective date' as provided for in Section 2(4) of the Regulations to the Consumer Protection Act.⁴¹

[53] Further, as the Paragraph 17.4 as set out in the Addendum replaces paragraph 17.4 in the Franchise Agreement, the complaint of the respondent in respect of this clause has already been dealt with earlier in this judgment.

Liquor Store Addendum

[54] The Franchise Agreement provides for the interpretation of 'business' in clause 1.2.4 as:

'the business of a retail supermarket offering the products for sale to members of the general public, to be conducted by the franchisee only from the premises and always in accordance with the provisions of this agreement and

⁴¹ 'A franchise agreement which is renewed after the general effective date is a new franchise agreement for the purposes of sub-regulations (2) and (3)'.

by having access to and utilising the intellectual property, including the System, the trading trade mark and the name;'⁴²

[56] In the Liquor Store Addendum the interpretation of 'business' is amended as follows:

4. VARIATION OF FRANCHISE AGREEMENT

4.1 The definition of "business" as contained in clause 1.2.4 of the Franchise Agreement shall be amended to read as follows:

***"business"** means business of a retail supermarket **and liquor store** (my emphasis) offering the products for sale to members of the general public, to be conducted by the franchisee only from the premises and always in accordance with the provisions of this agreement and by having access to and utilising the intellectual property, including the System, the trading trade mark and the name.*

and accordingly all terms and conditions in the Franchise Agreement shall apply *mutatis mutandis* in respect of the Liquor Store.'⁴³

[57] Further the '**SAVING CLAUSE**' provides:

'Save to the extent specifically or by necessary implication modified in or inconsistent with the provisions of the Liquor Store Addendum Agreement, all the terms and conditions of the Franchise Agreement shall *mutatis mutandis* continue in full force and effect.'⁴⁴

[58] The Liquor Store Addendum therefore effectively only extends the ambit of the business conducted by the respondent, as set out in clause 1.2.4 of the Franchise Agreement to include the operation and premises of the liquor store with which the respondent intended to expand its business and the consequences flowing from the inclusion of such an operation in the franchise, albeit from separate premises.

[59] Consequently I am unable to find any merit in the contention that the effect of the Liquor Store Addendum, although concluded on 30 November 2012, is to bring the Franchise Agreement within the scope of the Consumer Protection Act.

⁴² Vol 1 page 52

⁴³ Vol 2 page 200

⁴⁴ Vol 3 page 201 clause 5

Payment Variation Agreement

[60] The Payment Variation Agreement refers to a Franchise Agreement entered into on 25 January 2006 as the Main Agreement. It is common cause that the only Franchise Agreement entered into by the parties is the Franchise Agreement entered into on 30 September 2009 and that the Payment Variation Agreement varied the Franchise Agreement in respect of the arrear payment due by the respondent in terms of the Franchise Agreement. Neither party placed the date in dispute, but that the date 25 January 2006 is an error is borne out by the references in the Payment Variation Agreement to 'clauses 17.4 and 19.4 of the Main Agreement'⁴⁵ and 'general notarial mortgage bond (Notarial Bond) granted to it in terms of clause 24 read together with annexure 'F' of the Main Agreement'.⁴⁶

[61] I have therefore accepted that 'the Main Agreement' referred to in the Payment Variation Agreement, is the Franchise Agreement between the parties dated 30 September 2009.

[62] Clause 2 of the Payment Variation Agreement provides that:

- '2.1 The Main Agreement contains certain terms and conditions which the parties have agreed to vary as a result of changed circumstances and in order to reflect more correctly the intention of the parties.
- 2.2 The Franchisee has failed to pay amounts due in terms of clauses 17.4 and 19.4 of the Main Agreement, which amounts are outstanding, due and payable as at the 3rd April 2014.
- 2.3 The Franchisor is prepared to accept repayment of the outstanding amounts of the normal practice of the Main Agreement by amending the terms and conditions of the Main Agreement with effect from the 3rd April 2014 as follows:'⁴⁷

[63] The Terms and Conditions relating to the repayment in the Payment Variation Agreement⁴⁸ stipulate that the payments due in terms of the Franchise Agreement

⁴⁵ Vol 3 page 206 clause 2.3

⁴⁶ Vol 3 page 216 clause 4 read with Vol 3 page 105 clause 24

⁴⁷ Vol 3 Page 206

⁴⁸ Vol 3 page 207 clause 3

'be paid strictly in accordance with the terms and conditions contemplated in clause 17.4 and clause 19.4 of the Main Agreement'.⁴⁹

[64] Similarly the Savings Clause in the Payment Variation Agreement protects the integrity of the Franchise Agreement as it provides:

'Save as specifically or by necessary implication modified in or inconsistent with the provisions of this Payment Variation Agreement the Main Agreement shall continue in full force and effect and no variation hereof shall be of any force or effect unless it is reduced to writing and signed by both parties.'⁵⁰

[65] Therefore in my view, the Payment Variation Agreement did not effect or contemplate any variations or changes to the Franchise Agreement, which modified it to the extent that the Franchise Agreement was brought within the scope of the Consumer Protection Act, either as a new or renewed agreement, as advanced by the respondent. I am accordingly satisfied that the reliance of the respondent on the date on which the Payment Variation Agreement was concluded and the effect of the contents thereof to bring the Franchise Agreement within the ambit of the Consumer Protection Act, is misplaced. The Payment Variation Agreement provides specifically for the repayment of the arrears due by the respondent and stipulates that the Franchise Agreement remains in full force and effect, and the clauses in relation to payments in terms thereof remain effective. Further Clause 4 of the Payment Variation Agreement stipulates that the Payment Variation Agreement does not constitute a novation of the notarial bond.⁵¹

⁴⁹ Vol 3 page 207 clause 3.4

⁵⁰ Vol 3 page 210 clause 5

⁵¹ Vol 3 page 210: **'4 NO NOVATION OF NOTARIAL BOND**

The parties record that the conclusion of this Payment Variation Agreement does not and will not constitute a novation or a waiver of the rights of the Franchisor relating to the general notarial mortgage bond ("Notarial Bond") granted to in terms of clause 24, read together with annexure "F" of the Main Agreement, whether or not this Payment Variation Agreement is concluded –

- 4.1 after the perfection of the Notarial Bond by the Franchisor; or
- 4.2 at a time when the Franchisor has not made an application to perfect the Notarial Bond.

[66] Consequently, neither the original Franchise Agreement nor the Franchise Agreement as amended by the Addendum, the Liquor Store Addendum and the Payment Variation Agreement, constitute agreements which fall within the scope of the Consumer Protection Act. I am therefore satisfied that the respondent has failed to discharge its *onus* on this issue as there is no merit in the respondent's contention that the Franchise Agreement falls within the parameters of the Consumer Protection Act or that the Franchise Agreement as amended, is in conflict with the provisions of the Consumer Protection Act, in particular sections 13(1) and 48 thereof.

[67] I am also not persuaded that Section 4(2) of the Consumer Protection Act which enjoins the courts to 'develop the common law as necessary to improve the realisation and enjoyment of consumer rights' and 'promote the spirit and purposes of the Act' are pertinent to or required by the facts of this matter.

Does the Franchise Agreement contravene the provisions sections 5(1) and 5(2) of the Competition Act No. 89 of 1998?

[68] Section 5 provides that:

'5 Restrictive vertical practices prohibited

(1) An agreement between parties in a vertical relationship is prohibited if it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement can prove that any technological, efficiency or other pro-competitive, gain resulting from that agreement outweighs that effect.

(2) The practice of minimum resale price maintenance is prohibited.'

[69] In terms of Section 65(2) of the Competition Act this court does not have the jurisdiction to consider an issue concerning conduct that is prohibited in terms of the Competition Act when that issue is raised in civil proceedings, unless that issue has already been the subject of an order of the Competition Tribunal.

[70] However this court is obliged to refer that issue to the Tribunal only if satisfied that the issue is not raised in a frivolous or vexatious manner and the resolution of that issue is required to determine the final outcome of the application/action.⁵²

⁵² **65 Civil actions and jurisdiction**
(1).....

[71] It is not in dispute that franchise agreement is a vertical relationship and regulated under Section 5 of the Competition Act. It is common cause that the *onus* lies on the respondent to prove that the Franchise Agreement has the effect of substantially preventing or lessening competition in the relevant market and that the applicant effectively practises minimum resale price maintenance.

[72] The respondent contends that the Franchise Agreement and its implementation by the applicant infringe Section 5(1) and 5(2) of the Competition Act, through the purchasing restrictions and applicant's effective fixing of the franchisee's prices respectively. The respondent argues that it may be able to obtain similar advantages or be in a more favourable position without the applicant's purchasing restrictions, and that the applicant effectively has a *de facto* system of resale price maintenance.⁵³

[73] It avers further that the franchise model adopted by the applicant makes it difficult for small businesses including the respondent, to make full and timeous payments of substantial sums on a weekly basis, which has caused franchises to fall into arrears with payments, which in turn has led to the conclusion of payment variation agreements with the applicant. It alleges that as 'most' franchises have concluded these variation agreements, the applicant is aware that these are general difficulties experienced by the franchise businesses.

[74] It is common cause that the applicant enters into payment variation agreements to facilitate payment of arrears by its franchisees. However the respondent has failed to provide a factual basis, supporting documentation or confirmatory affidavits in respect of its averments that the financial difficulties are caused by the franchise models utilised by the applicant or that 'most' franchisees

(2) If, in any action in a *civil court*, a party raises an issue concerning conduct that is prohibited in terms of *this Act*, that court must not consider that issue on its merits, and-

(a) if the issue raised is one in respect of which the Competition Tribunal or Competition Appeal Court has made an order, the court must apply the determination of the Tribunal or the Competition Appeal Court to the issue; or

(b) otherwise, the court must refer that issue to the Tribunal to be considered on its merits, if the court is satisfied that-

(i) the issue has not been raised in a frivolous or vexatious manner; and
(ii) the resolution of that issue is required to determine the final outcome of the action.

⁵³ Vol 4 AA para 14-19 pages 342-347

find themselves in similar straits because of the constraints imposed by the franchise agreements or that it may be able to obtain similar advantages or be in a more favourable position without the applicant's purchasing restrictions.

[75] The aforesaid unsupported averments are, in my view, insufficient to discharge the *onus* on the respondent as it has failed, *inter alia*, to define the relevant market, to show that the Franchise Agreement has lessened or prevented competition in that market, and that such lessening and prevention is substantial in compliance with the requirements of Section 5(1). Consequently it is not incumbent upon the applicant to prove any technological, efficiency or other pro-competitive gain from the Franchise Agreement.

[76] Further, the respondent significantly admits that the Franchise Agreement does not contain an express prohibition relating to minimum resale prices and that it is possible for the franchisees to implement their own pricing systems by overriding the applicant's SAP system, albeit impractical and unviable, according to the respondent.

[77] The applicant avers that it merely sets up a recommended retail price for its franchise stores and the franchisee can, at its election, increase the recommended retail price of a product by a maximum of 3% or sell any number of products at a lower price.⁵⁴

[78] The respondent, on the other hand, has not referred to any provision in the Franchise Agreement which indicates that there is uncertainty as to the price at which the respondent may sell a product or which imposes a direct or indirect penalty for not selling at the recommended price. Further despite the allegation of coercion, the respondent cites no specific clause which sustains the allegation nor has the respondent established a factual basis which proves coercion on the part of the applicant.

[79] The respondent has therefore failed to discharge *onus* on it to prove that the applicant effectively implements a *de facto* system of resale price maintenance.

⁵⁴ Vol 4 Supp RA para 25-27 pages 369-370 and Vol 1 clause 15.3.8 of the FA page 81

[80] Consequently I am satisfied that the complaint of anti-competitiveness and the request for a referral to the Competition Tribunal is contrived, without merit and dilatory. In my view, the respondent seeks to obfuscate the crisp issue of whether its failure to pay amounts in terms of the Franchise Agreement and Payment Variation Agreement timeously as stipulated in the aforesaid agreements and its subsequent failure to remedy its breach have rendered the bond executable, which entitles the applicant to perfect its security in terms of the provisions of the bond.

[81] There is therefore no hurdle constituted by Sections 5(1) and 5(2) of the Competition Act to a determination of the merits of this application by this court.

URGENCY

[82] In my view the applicant properly relies on the conduct of Maritz and the indebtedness of the respondent to justify the urgent application. On the respondent's own version Maritz was dishonest and acted in breach of the terms of both the Franchise Agreement and the bond, despite the fact that he may have subsequently rectified the situation by paying back the monies he had misappropriated when the applicant confronted him. The applicant's concern that its interests were imperilled and jeopardized by such fraudulent misconduct was consequently reasonable and justified.

[83] Further, despite its allegation that the applicant had 'misdescribed' its financial situation and its compliance with its financial obligations, on its own version the respondent had fallen into arrears with its payments. As already held, the acceleration clause did consequently become effective and a substantial sum in excess of R8m was due, owing and payable by the respondent by 9 July 2014, sustaining the applicant's right to seek perfection of its security under the bond. I am in agreement with the reported remarks of Lopes J that perfection applications are generally inherently urgent and am satisfied that this application was no different. Consequently the applicant's conduct in seeking to protect its interest in the respondent by way of the urgent application was justified.

[84] Furthermore the consent order taken by the parties on 22 July 2014 effectively placed the respondent's business under the applicant's control, and implemented a substantial portion of the relief sought by the applicant to assert its

right to seek perfection of its security. The applicant was therefore substantially successful in its application.

[85] I am therefore satisfied that the applicant is entitled to the reserved costs of 22 July 2014.

Costs

[86] There is no reason why costs should not follow the result. In terms of clause 47.2 of the Franchise Agreement the applicant is entitled to costs on an attorney and own client scale. In my view an appropriate order is costs on an attorney and client scale.

Order:

In the result the following order do issue :

1. The applicant through its duly authorised representative, alternatively the sheriff of this Honourable Court is authorised and empowered for the purpose of perfecting its security in terms of Notarial General Bond with No. BN 18068/09 to exercise the rights as contemplated in clauses 6.1.1 to 6.1.11 of the Notarial General Bond, *inter alia*
 - 1.1 to claim and recover from the respondent forthwith all and any sums for the time being secured by this bond, whether then due for payment or not; and/or
 - 1.2 for the purpose of perfecting its security hereunder to enter upon the premises of the respondent or any other place where any of its assets are situated, and to take possession of its assets; and/or
 - 1.3 to conduct the business of the respondent in the name, place and stead of the respondent and to do all such things in respect of or incidental to the business as the respondent would itself have been able to do including, but without limiting the generality of the foregoing –
 - 1.3.1 to engage and dismiss staff in its absolute discretion and on such terms as it may determine;

- 1.3.2 to purchase goods of every description provided that the applicant shall be restricted to the normal course of the respondent's business;
- 1.3.3 to lock, and change the locks on the premises of the respondent;
- 1.3.4 to receive, uplift, open and keep in its custody post whether addressed to the business or the respondent;
- 1.3.5 to operate on any banking account conducted by the respondent;
- 1.3.6 to discharge the debts of the respondent and other liabilities including its liabilities to the applicant in terms hereof;
- 1.3.7 to sue and recover from any debtor of the respondent all and any debts and monies owing by such debtors on account of the purchase price of any goods;
- 1.3.8 to draw and endorse cheques, bills of exchange, promissory notes and other negotiable instruments; and/or
- 1.4 to discharge the respondent's liabilities to it in terms hereof by selling the business of the respondent and any of its assets either as a going concern or piecemeal and whether as principal or agent as the applicant in its absolute discretion determines, by public auction or, on reasonable notice to the respondent not exceeding 7 (seven) days, by private treaty; and/or
- 1.5 to take over the respondent's business as a going concern or the respondent's assets as at a valuation placed thereon by an independent chartered accountant or other independent expert appointed by the applicant's auditors; and/or

- 1.6 to apply for and procure the transfer of all licences, quotas, permits, registration certificates and the like that may have been issued to the respondent; and/or
 - 1.7 to sign or subscribe on behalf of the respondent to all applications or agreements for or transfer of licences, quotas, permits, registration certificates and the like which relate to the assets hereby mortgaged; and/or
 - 1.8 to sub-let, cede and/or assign such rights and/or obligations in respect of any leases or sub-leases of the premises of the respondent; and/or
 - 1.9 to do all such other acts as may be necessary or desirable to record the sale, disposal and/or transfer, as the case may be, of any assets hereby mortgaged; and/or
 - 1.10 to employ such other remedies and to take such other steps against the respondent as are in law allowed.
2. The respondent is directed to pay the costs of this application and the reserved costs of the hearing on 22 July 2014 on an attorney and client scale.

MOODLEY J

Date of Hearing: 31 October 2014

Date of Judgment: 20 March 2015

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