

IN THE HIGH COURT OF SOUTH AFRICA

Reportable

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO:

3413/02

DATE:

3-10-2002

In the matter between:

DIE DROS (PTY) LTD

First Applicant

(Registration Number: 9905766/07)

KRUGKOR FRANCHISE (PTY) LTD

Second Applicant

(Registration Number: 9905766/07)

and

TELEFON BEVERAGES CC

First Respondent

PIETWYN CC

Second Respondent

MARTIQ 631 CC

Third Respondent

LLEWELLYN FREDERICK KAPP

Fourth Respondent

LYNETTE HILDA KAPP

Fifth Respondent

METROPOLITAN LIFE (PTY) LTD

Sixth Respondent

J U D G M E

N T

VAN REENEN, J:

1] The first applicant operates a business known as the Dros Restaurant and Wine Cellar at Stellenbosch. This business consists of a restaurant and wine cellar with décor designed to create the ambience of a wine cellar. The first applicant franchises the Dros Restaurant and Wine cellar concept by entering into franchise agreements with natural persons and legal entities in terms whereof they are entitled to use, in specified areas, the Dros Restaurant and Cellar concept; the intellectual

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property rights appertaining thereto; and the business system devised by the applicant against an initial payment, monthly royalties and contributions made towards marketing/advertising.

2] The second applicant, in terms of a written agreement entered into with the first applicant, attends *inter alia*, to the marketing of the Dros Restaurant and Cellar operations, both individually and as a group, and monitors compliance with prescribed standards and methods as regards the serving of food and drinks; the use of prescribed equipment and fittings; and the training of personnel.

3] The first respondent is a close corporation registered under number CK 97/47792/23. The fourth respondent and Petrus Johannes van der Westhuizen ("Van der Westhuizen") were originally the members thereof. Van der Westhuizen is no longer a member of the first respondent.

4] The second respondent is a close corporation registered under number CK96/6409223. Van der Westhuizen and fourth respondent were originally the members of the second respondent. Fourth respondent is no longer a member of second respondent. The second respondent, pursuant to a franchise agreement entered into with the first applicant, operated a Dros Restaurant and Wine Cellar at 1 Omnicron Building, Main Road, Paarl until 24 February 2002.

5] In terms of a written agreement of lease entered into between the sixth and second respondents during August 1997, the latter hired from the former until 31 August 2002 (with an option for a further five years) Shop No 15, Plattekloof Centre, Plattekloof, Parow (hereinafter referred

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to as "the premises"). The first applicant bound itself to the sixth respondent to remedy any breach resulting in the cancellation of the said agreement of lease by operating "the business" until a lease with a new franchisee, acceptable to it, is concluded whilst continuing to fulfil all the obligations of the lessee in terms of the original agreement of lease.

6] The fourth respondent and Van der Westhuizen in their capacities as *"members of a Close Corporation to be formed"* on 4 February 1998 entered into a franchise agreement with the first applicant in terms whereof the right was acquired to operate a Dros Restaurant and Wine Cellar at the premises as from 1 June 1997 to 31 May 2002 with an option to renew the agreement on six months' notice.

7] It is common cause that despite the fact that the agreement of lease in respect of the premises was entered into between second respondent and sixth respondent the first respondent, after its incorporation, occupied the premises; conducted a Dros Restaurant and Wine Cellar operation thereon; and paid rental to the sixth respondent.

8] The franchise agreement contains the following term:

"16.8 If the franchisee is acting for or as a nominee or as a trustee for a Company/Close Corporation to be formed, or in any other representative capacity then the franchisee shall be personally liable as franchisee in terms of this Agreement unless the said Company/Close Corporation is formed and in addition adopts, ratifies and confirms the

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terms /...

terms of this Agreement, within 60 (sixty) days from signature hereof by the franchisee.

If the said Company/Close Corporation or Trust so formed adopts and ratifies and confirms all the terms of this Agreement, then the franchisee by his signature hereto binds himself to the franchisor as surety and co-principal debtor in solidum with the said Company/Close Corporation or Trust under renunciation of the benefits of execution, division and cession of action for the due performance by the said Company/Close Corporation or Trust of its obligations in terms hereof."

9] As it is common cause that the first respondent was duly incorporated and adopted/ratified/confirmed the franchise agreement within 60 days of the signing thereof, the fourth respondent and Van der Westuizen's obligations under the franchise agreement were limited to their being sureties and co-principal debtors in solidum with the first respondent to the first applicant for the due performance of the former's obligations in terms of the franchise agreement. First respondent and Van der Westhuizen on 4 February 1998 executed a separate Deed of Suretyship in favour of first applicant for the proper fulfilment by the first respondent of its obligations in terms of the

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franchise agreement.

10] As the franchise agreement was not extended as provided for in clause 11 thereof, the first respondent operated a Dros

Restaurant and Wine Cellar on the premises until 31 May 2002.

11] The Franchise Agreement contains the following restraint of trade provision:

"10.3 Upon termination of this agreement the franchisee will not participate either directly or indirectly in the management or control of a business which conducts business in the nature of or similar to the franchise business within the territory for a period of 12 (twelve) months. The franchisee acknowledges that this restraint is a reasonable one in order to protect the franchisor's business system and intellectual property rights."

12] It is common cause that the premises has been converted into a De Kelder Restaurant operated under franchise by the third respondent, a close corporation incorporated under No. CK 2002/029531/23, of which the fourth respondent's brother Mr Ettiene Kapp - who also operates other De Kelder Restaurants - is the only member.

13] First and second applicants, contending that the provisions of clause 10.3 of the franchise agreement are being breached instituted proceedings out of this court against the respondents in which they, *inter alia*, claimed orders -

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"3. /...

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"3. Directing that First, Second, Third and Fourth Respondents be and hereby are interdicted from participating either directly or indirectly in the management or control of any restaurant

business in the nature of/or similar to the Applicants' business at Shop 15 Platteklouf Centre for a period of 12 months from 1 June 2002;

4. *Directing that First and Fourth Respondents and any other Respondent opposing the application pay the applicants' costs of suit, including the costs of two counsel; the said liability to be joint and several, the one paying, the other(s) being absolved;*

5. *Alternatively to paragraphs 3 and 4 above:*

5.1 *Directing that pending the determination of an action to be instituted by the Applicants within 10 days for final relief in the terms set out in paragraph 3 above, or until **31 May 2003**, whichever is the earlier, the First to Fourth Respondents be and hereby are interdicted from participating either directly or indirectly in the management or control of any restaurant business in the nature of/or similar to the applicants' business at Shop 15 Platteklouf Centre;*

5.2 *That the costs of this application be*

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determined by the Court which determines the action."

14] Answering and replying affidavits were filed and the matter was set down for hearing in Fourth Division on the semi-urgent roll.

15] At the hearing of the matter before me, Mr Binns-Ward, who with Mr Ferreira appeared for the applicants, confined the relief sought in prayer 3 of the notice of motion to first and fourth respondents and in view of the factual disputes thereanent, requested that the question whether fourth respondent is involved in the restaurant business conducted by third respondent known as the De Kelder Restaurant at the premises, be referred to oral evidence in terms of Rule 6(5)(g) on an urgent basis, to be heard on a date to be determined by the Judge President of this Court or, in his absence, the Deputy Judge President, after compliance with such directions as may be given in respect of discovery and the obtaining of evidence by subpoena, including subpoenas *duces tecum*.

16] The applicants aver that the first and fourth respondents are, in terms of clause 10.3 of the franchise agreement, prohibited from participating either directly or indirectly in the management or control of a business that conducts business in the nature or similar to the franchised business within the magisterial districts of Bellville and Goodwood for a period of twelve months from 1 June 2002 and that fourth respondent is using third respondent as a front to conduct the business of a De Kelder Restaurant at the premises where the Dros Restaurant and Wine Cellar had previously been conducted.

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17] /...

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17] The fourth respondent disputes that the restraint of trade clause in the franchise agreement is binding on him personally; denies that he is in any way involved in the conduct of a De Kelder Restaurant on the premises; and disavows any intention of becoming involved therein in the future. Mr Etienne Kapp, the fourth respondent's brother, confirms that he was the only member of the third respondent and that fourth respondent has

neither any interest nor involvement therein.

18] As the relief sought in prayer 3 of the notice of motion is final of nature, real and genuine disputes of fact must be resolved by applying the test enunciated in Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623 (A) at 634E-G namely, that the relief sought may be granted only if the facts as stated by the respondents, together with the admitted facts in the applicants' affidavits, warrant the granting thereof. It is implicit in the request that the factual issues be referred to oral evidence, that the applicants accept that the respondents' averments are not so far-fetched or untenable that their rejection is warranted merely on the papers; that the disputes of fact are genuine and real; and that on an application of the test enunciated in the Plascon-Evans case, they have not succeeded in showing on a balance of probabilities that they are entitled to the relief which they are seeking. The decision whether or not factual disputes should be referred to oral evidence depends on the outcome of two enquiries. The first is an assessment of the probabilities in respect of the disputed issues: the more the probabilities favour a respondent's version, the less likely it is that a court will exercise its discretion in favour of referring disputed factual

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issues to oral evidence (See: Kalil v Decotex (Pty) Ltd & Another 1988(1) SA 943 (A) at 979G-I). The second is a consideration of the prospects of viva voce evidence tilting the probabilities in favour of the party bearing the onus.

19] Mr Treurnich SC, who with Mr H L du Toit appeared for first, third and fourth respondents, opposed the application to have the factual disputes referred to oral evidence. He did so on the basis that unless the applicants succeed in showing that the restraint of trade embodied in clause 10.3 of the franchise agreement is binding on the fourth

respondent, their resolution is pointless.

20] The applicants in their replying affidavit articulated the issues between them and the respondents as being two-fold. The first is a legal question, namely whether the fourth respondent is prohibited by the terms of clause 10.3 of the franchise agreement from carrying on the business of a restaurant at the premises, either in his personal capacity, or through a corporate entity. The second is a factual question, namely whether the fourth respondent is in fact carrying on a restaurant business on the premises in the guise of or in association with the third respondent. First and second applicants want the second issue to be referred for oral evidence. First, third and fourth respondents want the first issues to be adjudicated first as its outcome will determine whether or not the referral for oral evidence will serve any purpose.

21] The restraint of trade embodied in clause 10.3 of the franchise agreement binds "the franchisee". The concept "franchisee" is not defined in the franchise agreement. The fourth respondent and Van der

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Westhuizen /...

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Westhuizen are parties to the franchise agreement "in their capacities as members of a Close Corporation to be formed (hereinafter called the 'franchisee')". Whatever obligations resided in the fourth respondent and Van der Westhuizen as signatories of the franchise agreement prior to its incorporation and the adoption, ratification and confirmation of the terms thereof, they thereafter became merely sureties and co-principal debtors to the first applicant for the contractual obligations of the first respondent. Any possible uncertainty about whom the parties to the franchise agreement considered to be the franchisee is dispelled by the terms of the

separate suretyship agreement entered into by fourth respondent and Van der Westhuizen in which the first respondent is signified as the franchisee. In view of the foregoing, I incline to the view that *ex facie* its provisions, clause 10.3 of the franchise agreement are binding only on the first respondent.

22] The case made out by the applicants in their founding papers is that:

"...the Fourth Respondent is endeavouring to avoid the restraint of trade obligations undertaken by him and First Applicant (read first respondent) by using the entity of Third Respondent as an ostensibly unrelated and independent person" (underling provided).

Although the applicants appear to have formulated the aforementioned legal issue therein identically, their case in reply appears to have evolved somewhat. The applicants by asserting that first and second respondents were regarded by them as a corporate manifestation of first

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respondent /...

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respondent and Van der Westhuizen's interest *"...in the franchise outlet"* and that first respondent is merely the vehicle through which fourth respondent conducted his business, appear to disregard the first respondent's separate legal personality and equating it and fourth respondent, resulting in the restraint undertaken by the first respondent becoming binding also on the fourth respondent. The third respondent is then further categorised as merely a corporate vehicle used as a front by fourth respondent to disguise his involvement with the De Kelder Restaurant which is being conducted on the premises in conflict with the restraint of trade embodied in clause 10.3 of the franchise agreement.

23] Courts do not have a general discretion to disregard a company's separate legal personality whenever they consider it just or convenient to do so. The then Appellate Division (per Smalberger, JA who wrote the majority judgment) in Cape Pacific Limited v Lubner Controlling Investments (Pty) Ltd & Others 1995(4) SA 790 at 803 G-H and I-J expressed the view that it is a salutary principle that courts should not lightly disregard a company's separate legal personality, but should strive to give effect to it, as to do otherwise would negate and undermine the policy and principles that underpin the concept of separate corporate personality and the legal consequences that attach thereto, but held that where fraud, dishonesty or other improper conduct is present, other considerations come into play, in which event, the need to preserve the separate corporate personality of a company has to be balanced against policy considerations favouring the piercing of the corporate veil.

24] Courts permit the separate corporate personality of a close
3-10/10:28 corporation /...

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corporation or company to be disregarded where a natural person who is subject to a restraint of trade, uses a close corporation or company as a front to engage in the activity that is prohibited by an agreement in restraint of trade (See: Le'Bergo Fashions CC v Lee & Another 1998(2) SA 608 (C); Gilford Motor Co Ltd v Horne [1933] CH 935 (CA); [1933] All ER Rep 109). Those decided cases could be invoked as authority for restraining fourth respondent if the applicants succeed in overcoming two evidential obstacles. The first is that the restraint embodied in clause 10.3 of the franchise agreement is binding on fourth respondent. The second is that fourth respondent is using the third respondent as a front to engage in the activities prohibited by the said clause.

25] I have already found that ex facie the provisions of the franchise agreement, the provisions of clause 10.3 thereof are binding only on the

first respondent. The fact that fourth respondent bound himself as surety and co-principal debtor to the first applicant for the due and proper fulfilment by the first respondent of all its obligations in terms of, in connection with or arising in any way whatsoever out of the franchise agreement, in relation to clause 10.3 of the franchise agreement, amounts merely to the guaranteeing of the performance of a negative obligation on the part of the first respondent (See: Segell v Kerdia Investments (Pty) Ltd 1953(1) SA 20 (W); Demetriou v O'Flaherty & Another 1973(4) SA 691 (D & CLD) at 694D-E) and did not impose the obligations embodied in clause 10.3 of the franchise agreement on the fourth respondent personally. A surety and co-principal debtor is no more than a surety and does not undertake a separate independent

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liability as a principal debtor (See: Peimer v Finbro Furnishers (Pty) Ltd 1936 AD 177).

26] The language used by the applicants to describe the relationship between the fourth respondent and first respondent, namely that the latter is merely a corporate vehicle which the former conducted business as a franchisee of the first applicant, is redolent of the first applicant being the alter ego of the fourth respondent. M S Blackman: Lawsa (1st Reissue) Volume 4, Part 1, paragraph 46 provides the following helpful exposition of the alter ego concept in the context of the disregarding of a corporate entity's separate legal personality:

"A company is said to have been the... the 'alter ego' of its controlling shareholders where it does not, in truth, carry on its own business or affairs, but acts merely in the furtherance of the business or affairs of its shareholders, in other words, its controllers do not treat it as a separate entity, at least not in the full sense. Although the form is that of a separate

entity carrying on business to promote its stated objects, in truth the company is a mere instrumentality or business conduit for promoting, not its own business or affairs, but those of its controlling shareholders. For all practical purposes the two concerns are in truth one. In these cases there is usually no intention to defraud although there is always abuse of the company's separate existence (an attempt to obtain the advantages of the separate personality of the company without in fact

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treating it as a separate entity)."

27] As the applicants, impermissibly amplified their case in reply, the respondents have not had an opportunity to deal with the applicants' averments relating to the relationship between the fourth respondent and first respondent.

28] It is trite law that the affidavits in motion proceedings serve to define not only the issues between the parties, but also to place the essential evidence before the court (See: Swissborough Diamond Mines (Pty) Ltd & Others v Government of the Republic of South Africa & Others 1999(2) SA 279 (W) at 323G) for the benefit of not only the court, but also the parties. The affidavits in motion proceedings must contain factual averments that are sufficient to support the cause of action on which the relief that is being sought is based. Facts may either be primary or secondary. Primary facts are those capable of being used for the drawing of inferences as to the existence or non-existence of other facts. Such further facts, in relation to primary facts, are called secondary facts (See: Willcox & Others v Commissioner of Inland Revenue 1960(4) SA 599 (A) at 602A; Reynolds N.O. v Mecklenberg (Pty) Ltd 1996(1) SA 75 (W) at 78I). Secondary facts, in the absence of the primary facts on which they

are based, are nothing more than a deponent's own conclusions (See: Radebe v Eastern Transvaal Development Board 1988(2) SA 785 (A) at 793C-E) and accordingly do not constitute evidential material capable of supporting a cause of action.

29] Even if regard is had to the averments that the applicants made in their replying affidavits in amplification of the case made out in their

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founding papers, there is an almost total absence of primary facts that show that the fourth respondent used the first respondent as a mere instrumentality or business conduit for the promotion of his personal business affairs. The applicant's entire case is based on secondary facts. Assuming, without deciding, that in the event of the first respondent being the fourth respondent's alter ego, the restraint embodied in clause 10.3 of the franchise agreement would be binding on the latter, the applicants, in my view, have failed to discharge the onus of showing, on a balance of probabilities, that the first respondent was the fourth respondent's alter ego.

30] In view of the foregoing I have come to the conclusion that the applicants have failed to show that the provisions of clause 10.3 of the franchise agreement are binding on the fourth respondent. Accordingly the resolution of the factual issues that the applicants wish to be referred for oral evidence, namely, whether the fourth respondent in fact is carrying on the business of a restaurant at the premises, under the guise of or in association with the first respondent, will not have any purpose whatsoever. Accordingly the application to have that issue referred for oral evidence cannot be granted.

31] As the applicants - any lack of locus standi on the part of the

second applicant was not ventilated on the papers or in argument before me - have failed to show any act of interference with any clear right that vests in them (See: Sanachem (Pty) Ltd v Farmers Agri-Care (Pty) Ltd & Others 1995(2) SA 781 (A) at 788J-790C) they, in my view, are not entitled to an interdict in the terms sought. Because of the narrow

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ambit of the application, I have not given consideration to whether any of the applicants are entitled to relief against any of the respondents on the basis of any other legal causa, and accordingly, refrain from expressing any views thereanent.

32] In view of the conclusion arrived at herein it is not necessary to deal with the application to strike out parts of the applicants' founding and/or replying papers.

33] Accordingly, the application is dismissed with costs, such costs to be taxed on a party and party scale including the costs occasioned by the employment of two counsel.

VAN REENEN, J