

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(MPUMALANGA DIVISION, MBOMBELA)**

CASE NO: 4832/2021

(1) REPORTABLE:NO

(2) OF INTEREST TO OTHER JUDGES: YES

(3) REVISED: YES

DATE: 26/03/2024

SIGNATURE

In the matter between:

DYNACHEM HOLDINGS SA (PTY) LTD

Applicant

and

MICHEM CLEANING SUPPLIES CC

First

Respondent

MICHELLE SUZANNE SCHNEPEL

Second

Respondent

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 26 March 2024 at 10:00.

J U D G M E N T

MASHILE J:

INTRODUCTION

[1] This is an interlocutory application in terms of Uniform Rule of Court 35(7) compelling the Respondents to discover certain documents required in terms of uniform Rules of Court 35(3) and (6) ("Rule 35 Notice"). The Respondents oppose the application on the grounds that the matter has firstly prescribed and secondly, that the nature of the franchise agreement ("the agreement"), which is the subject matter of the main action, between the parties is founded on reciprocity, which entitles the innocent party to the *exceptio non adimpleti*. As such, if the Applicant ("Dynachem") has failed to observe the terms of the agreement, the Respondents cannot be expected to comply, or put differently, Dynachem must have adhered to its side of the bargain to hold the Respondents to the letter of the agreement. Dynachem in this application is the Plaintiff in the main action and the First and Second Respondents are the First and Second Defendants respectively.

FACTUAL MATRIX

[2] The background facts are largely common cause and they are tersely described in the heads of the Respondents from which I intend to borrow extensively. The main case to which I have alluded to above was founded on a franchise agreement but the parties did not furnish this Court with the date of its conclusion or commencement. The agreement was, however, cancelled on 14 October 2021. On 22 November 2021, Dynachem initiated the action proceedings in the main case against the Respondents in this Court. The summons was served on the Respondents on 25 November 2021 and the relief sought as per the founding papers, and as it pertains to this application, was, as against the First Respondent, firstly, for the latter to deliver a full account, supported by vouchers, of all sales and gross revenues made in each month for the period of January 2018 until 14 October 2021. Secondly, debatement of the aforesaid account.

[3] The Respondents delivered their notice to defend the action and served and filed their plea on 17 January 2022. For purposes of this application, the defence raised in the action is that they deny that Dynachem is entitled to demand and/or receive an account and debatement thereof from the First Respondent. The Respondents did not contest that an agreement was concluded between the parties providing for an account and debatement. However, they denied that Dynachem had complied with its obligations in terms of the agreement and was therefore not entitled to demand compliance with the agreement from the First Respondent.

[4] Subsequently, Dynachem served the Rule 35 Notice on 23 May 2022. The Respondents denied the right of Dynachem to discovery of the requested documents at that juncture. To this end, they filed an affidavit explaining their approach on 21 June 2022. This was followed by Dynachem delivering the present application in terms of Rule 35(7) to compel the Respondents to comply with the Rule 35 Notice on 17 October 2022. The Respondents served their answering affidavit on 26 of October 2022 wherein they explained that they denied that Dynachem was entitled to claim performance in terms of the agreement between the parties in circumstances where it has failed to comply with its reciprocal duties since entering the agreement in 2006.

[5] The Respondents further raised a special plea of prescription which may have a material bearing on the right of Dynachem to discovery of all the requested documentation and information for the period claimed. The basis of the prescription defence is that the relevant period commenced in January 2018 and culminated on 14 October 2021. Considering the fact that summons were issued on 25 November 2021, part of the entitlement to the information demanded had already prescribed by the time the action was instituted.

ASSERTIONS

[6] Dynachem contends that in terms of the agreement between the parties, it is entitled to a full account supported by vouchers of all sales and gross revenues made in

each month for the period of January 2018 until 14 October 2021 and debatement of the aforesaid account. Dynachem asserts further that the issue whether or not it is entitled to a full account should be decided simultaneously with the question of debatement of the account. In short, it is arguing that it will be convenient to decide the two issues together at one sitting.

[7] The Respondents, on the other hand, assert that Dynachem has not made a case entitling it to a full account and debatement thereof from MCS. The Respondents are convinced that Dynachem's characterisation of the defence of the Respondents is completely misguided hence its insistence on full account and debatement thereof. In setting the record straight, the Respondents point out that they never denied that the agreement concluded by the parties provided for an account and debatement.

[8] Their defence, they state, is anchored on *exceptio non-adimpleti contractus*. Fundamental to the *exceptio non-adimpleti contractus* is the notion of reciprocity. A party wishing to demand compliance with the contractual terms of an agreement can only do so in circumstances where it has itself, observed and performed in line with those terms. The Respondents denied that Dynachem complied with its obligations in terms of the agreement between the parties. As such, Dynachem is not entitled to demand compliance with the terms of the agreement from the First Defendant unless, of course, it demonstrates that it has complied.

ISSUES

[9] The main issue for determination is whether or not Dynachem is entitled to a full account and debatement of the account. Put differently, are there grounds on which the Respondents can refuse to furnish the alleged required documents. Assuming that they are, should this Court consider the question of entitlement to a full account discretely from the debatement of the account or decide the two simultaneously at one sitting?

LEGAL FRAMEWORK

[10] To the extent that the Respondents argue that the *exceptio non adimpleti contractus* finds application on the facts of this matter, it could be useful to refer to the matter of *Beadica 231 CC & Others v Trustees, Oregon Trust & Others*¹ where the Constitutional Court endorsing *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk*² held as follows: "...The *exceptio* permits a party sued for non-performance of a contract to resist judgment by showing that the other party did not perform their side of the bargain ..."

[11] To the extent that franchise agreements have as their component, reciprocity, the Court In *TH Restaurants (Pty) Ltd v Rana Pazza (Pty) Ltd and others*³, concluded that *exceptio non adimpleti contractus* was available for invocation by parties to a franchise agreement. In this regard the Court said the following at Para 30:

"As stated in the preceding paragraph, in bilateral contracts, the *exceptio* is available as a defence in those circumstances where the parties' obligations are reciprocal. The issue to determine, therefore, in the determination of the question as to whether the first respondent can invoke the *exceptio* as a defence is the question as to whether, based on a proper interpretation of the contract, the parties' obligations are closely linked with one another to justify a finding that the one obligation has to be undertaken in return for the other. In short, the question to be answered, based on a proper interpretation of the contract, is whether the parties' obligations are reciprocal to justify the invocation of the *exceptio* as a defence against the applicant's claim. This, invariably, will involve an analysis of the parties' obligations in terms of the contract."

¹ 2020 (5) SA 247 (CC)

² 1979 (1) SA 391 (A)

³ 2012 (5) SA 378 (BCC)

[12] The elements of this type of action were stated and explained in *Doyle & Another v Fleet Motors PE (Pty) Ltd*⁴ where the Court said:

“In the absence of rules, the following general observations might be helpful:

1. The Plaintiff should aver

(a) his right to receive an account, and the basis of such right, whether by contract or by fiduciary relationship or otherwise;

(b) any contractual terms or circumstances having a bearing on the account sought;

(c) the defendants’ failure to render an account.

2. On proof of the foregoing, ordinarily the Court would in the first instance order only the rendering of an account within a specified time.

3. The Court might find it convenient to prescribe the time and procedure of the debate, with leave to the parties to approach it for further directions if need be. Ordinarily the parties should first debate the account between themselves. If they are unable to agree upon the outcome, they should, whether by pre-trial conference or otherwise, formulate a list of disputed items and issues. These could be set down for debate in Court. Judgment would be according to the Court’s finding on the fact.

4. The Court may, with the consent of both parties, refer the debate to a referee”

⁴ 1971 (3) SA 760 (A) at 762 E

EVALUATION

ENTITLEMENT TO A FULL ACCOUNT

[13] It is the argument of Dynachem that it is entitled to a full account and debatement because the franchise agreement contains such provision and that the information furnished by the Respondents so far is insufficient. The Respondents deny that they have supplied any information at all. On the contrary, they aver that they have not and will not because Dynachem has failed to perform in line with its reciprocal duties arising from the agreement. Those respects are that Dynachem:

- 13.1 Has not provided the MCS with the exclusive right and licence to manufacture, market, supply and distribute the relevant products within the territory of Mpumalanga as agreed;
- 13.2 Has not supplied the First Respondent with all technical expertise, formulations, know-how and information to manufacture and distribute the products as provided for in the agreement;
- 13.3 Has not supplied MCS with sufficient technical and marketing information to market the products as provided for in the contract;
- 13.4 Has failed to supply MCS with the formula to enable First Defendant to manufacture the relevant products as provided for in the agreement;
- 13.5 Has failed to provide MCS with advice, know-how, assistance, guidance, support and training for the operation of its business as provided for in the agreement.

[14] In replying to the respects of its failure to adhere to the performance of its obligations, Dynachem merely made a bare denial. It is common cause that the

franchise agreement is bilateral in nature and that each party has obligations that arise from the agreement, which each is anticipated and obliged to observe. In short, it contains reciprocal terms. It being settled that the *exceptio non adimpleti contractus* is part of our law: *Beadica 231 CC and Others supra* and that it applies to franchise agreements: *TH Restaurants supra*, it must be available to the Respondents.

[15] As such, Dynachem is not entitled to the information that it seeks from the Respondents as it has not adhered to its side of the bargain. Consequently, it has lost any right that it might have had to them. I agree with the Respondents that Dynachem appears to be at cross purpose with the contention of the Respondents insofar as it persists that the information that has been supplied is insufficient. The question of sufficiency or insufficiency does not arise in this instance at all. It is only the determination of entitlement to the full account that ought to be considered. It is only upon finalisation of entitlement to the full account that the issue of debatement will arise. This is clearly set out in the matter of *Doyle supra*.

[16] Given my conclusion that Dynachem is not entitled to a full account, it will be gratuitous to proceed to consider the question of sufficiency. In fact, this is the end of the road for Dynachem. Besides, other than Dynachem being not entitled to a full account as a result of its failure to observe and perform in terms of its obligations arising from the agreement, entertaining this kind of relief would result in untold prejudice and unfairness on the Respondents. That has to be the case because Dynachem has upon termination of the franchise agreement with the Respondents opened a similar business venture in the same territory that is in direct competition with the business that the Respondents are conducting.

[17] The information will arm Dynachem with detail of the First Respondent's client basis and the identity of its clients. Furthermore, if granted, it will provide Dynachem with the detail of the MCS's business model and trade secrets. As stated earlier, in consequence of the private nature of the information requested, it will turn out to be exceptionally prejudicial to the business of the Respondents especially where it might

turn out that Dynachem was not, as is the case here, entitled to a full account in the first place.

[18] Mindful of the further defence of prescription raised by the Respondents, I do not think that it is warranted to explore the question as the *exceptio non adimpleti contractus* has already warded off the relief sought by Dynachem. In the result, the application fails and I make the following order:

The application is dismissed with costs of two Counsel, where so employed.

B A MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

APPEARANCES:

Counsel for the Applicant:

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SC

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Instructed by:

Date of Judgment:
2024

26 March