



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 5757/17

(1)	REPORTABLE:
(2)	OF INTEREST TO OTHER JUDGES:
(3)	REVISED.
31/10/25	
DATE	SIGNATURE

In the matter between:

FIAMME HOLDINGS (PTY) LTD

Applicant

and

DIKHUTLO ENTERPRISES (PTY) LTD

First Respondent

MOLOKO BENNET NCUBE

Second Respondent

In re:

TASTE FOODS FRANCHISING (PTY) LTD

Plaintiff

and

DIKHUTLO ENTERPRISES (PTY) LTD

First Defendant

MOLOKO BENNET NCUBE

Second Defendant

JUDGMENT

MBONGWE, J:

INTRODUCTION

- [1] This is an interlocutory application brought by Fiamme Holdings (Pty) Ltd ('the Applicant') for an order substituting it as plaintiff in an action instituted by Taste Foods Franchising (Pty) Ltd ('Taste Foods'), a liquidated company, against the respondents for payment of R1,092,969.72, arising from an alleged breach of a Business Sale Agreement and a Franchise Agreement concluded in June 2015. The application is opposed by the Second Respondent, the erstwhile sole director and surety of the first respondent, an entity that was finally deregistered in 2024.

Factual Background

- [2] The Applicant and the First Respondent concluded a Business Sale Agreement and a Franchise Agreement on 1 June 2015. The Franchise Business was to endure for a period of five years commencing on 1 June 2015. The First Defendant, without the consent of the Plaintiff, ceased to operate the franchise business and vacated the business premises during June 2017.
- [3] Taste Foods instituted action against the respondents claiming a total amount of R1,092,969.72 consisting of:-

R344 546.84 in outstanding business purchase price

R180 577.57 franchise purchase price

R318 559-29 in outstanding franchise fees

R249 286.02 in outstanding marketing fees contributions

TOTAL R1 092 969.72

- [4] The respondents defended the action and filed a counterclaim for damages in the amount of approximately R3 million.
- [5] In November 2019, the Plaintiff sold its franchising business to the Applicant and ceded its rights to the claim against the respondents to the Applicant. Approximately three months after it had sold its franchising business to the Applicant and ceded its rights in the pending litigation against the respondents on 15 November 2019, Taste Foods went into voluntary liquidation.
- [6] Despite acquiring the business and the claim in November 2019, and serving a notice in terms of Rule 15(2) of the Uniform Rules of Court on the respondents' attorneys, the Applicant only brought this application for its substitution as Plaintiff on 1 October 2022, that is, four days before the matter was scheduled for hearing on 5 October 2022.
- [7] The Second Respondent opposes the substitution on the following four grounds:
- (i) That he will be prejudiced by the Applicant's delayed bringing of the substitution application in that the 1st Respondent was deregistered in 2024 and the witnesses to the misrepresentations that the plaintiff's

representatives had made to the first respondent may no longer be available or have forgotten the facts.

- (ii) That the liquidators of Taste Foods had abandoned the action.
- (iii) The First Respondent's counterclaim would fall away as a result of the liquidation of Taste Foods and cannot be pursued against the Applicant.
- (iv) The Applicant's right to the action has allegedly prescribed, so contends the Second Respondent.

Legal Principles Pertaining To The Respondent's Grounds for Opposition

[8] Rule 15(2) permits substitution where there has been a transfer of interest in the subject matter of litigation. The discretion to grant substitution must be exercised judicially, with due regard to considerations of fairness, prejudice, and the interests of justice.¹ There is no merit in the Respondent's first ground for opposing this application. Nor is the alleged prejudice established. These factors together with the speculation relating to the Respondents' witnesses ought to be rejected.

[9] A cession of rights in pending litigation does not terminate the proceedings, but entitles the cessionary to be substituted as plaintiff. In *Engen Petroleum Ltd v Flotank Transport (Pty) Ltd*², the Supreme Court of Appeal confirmed that an out-and-out cession transfers full rights to the cessionary, including the right to litigate, even where the cedent is later liquidated. In the present matter the Plaintiff had already ceded its right to the litigation when it went into liquidation.

¹ *United Watch & Diamond Co (Pty) Ltd v Disa Hotels Ltd* 1972 (4) SA 409 (C) at 415H–416A.

² *Engen Petroleum Ltd v Flotank Transport (Pty) Ltd* [2022] ZASCA 98 (21 June 2022).

The liquidators of the Plaintiff had nothing to do with the Plaintiff's ceded claim, let alone abandoning it. The Respondent's contention stands to be rejected.

[10] Prescription is governed by the Prescription Act 68 of 1969. In *Van Deventer and Another v Nedbank Ltd*,³ the court held that prescription runs against a creditor unless interrupted by judicial demand or acknowledgment of liability. Prescription of a right to claim finds no application to pending litigation, nor does it affect a party substituting the initial claimant in the pending litigation.

[11] As to counterclaims post-liquidation, *Knoop NO and Others v SAFIC (Pty) Ltd*⁴ clarified that the liquidation of a party does not extinguish a counterclaim against it or its successor, provided the cause of action remains intact and procedural substitution is effected.

Application of Law to Facts

[12] The cession of the claim to the Applicant cannot be gainsaid. The Applicant has acquired the right to pursue the claim and is entitled to be substituted as plaintiff. The liquidation of Taste Foods does not extinguish the ceded claim, nor does it render the counterclaim nugatory. The counterclaim remains extant and may be pursued against the substituted plaintiff, subject to procedural amendment.

[13] While the delay in bringing the substitution application is regrettable, the respondents have not demonstrated material prejudice that cannot be addressed by appropriate directions or a costs order. The Rule 15(2) notice

³ *Van Deventer and Another v Nedbank Ltd* 2016 (3) SA 622 (WCC).

⁴ *Knoop NO and Others v Safic (Pty) Ltd* [2024] ZAGPJHC 1 (4 January 2024).

was served before trial, and the respondents were aware of the sale and cession.

- [14] The contention that the right to the action has prescribed due to abandonment by the liquidators is misplaced. The cession of the Plaintiff's rights to the claim against the Respondents occurred before the Plaintiff went into liquidation. The liquidators had nothing to do with the claim. The Respondent's contention stands to be rejected. The substitution does not create a new cause of action but merely reflects the change in locus standi. The Applicant's right to the pending action flows from the cession and is not extinguished by the passage of time.
- [15] The argument that the counterclaim falls away due to the liquidation of Taste Foods is misconceived. The counterclaim may be pursued against the Applicant, who would step into the shoes of Taste Foods should this application be granted. The Respondents retain their procedural remedies and may amend their pleadings accordingly.

CONCLUSION

- [16] The Applicant has established its entitlement to be substituted as plaintiff. The opposition is without merit and appears to be tactical. The interests of justice favour granting the relief sought.

ORDER

[17] The following order is made:

1. The Applicant, Fiamme Holdings (Pty) Ltd, is substituted as plaintiff in place of Taste Foods (Pty) Ltd;
2. The respondents are granted leave, if so advised, to amend their pleadings within 20 days of this order.
3. The respondents are directed to pay the costs of this application on Scale B.


MPN MBONGWE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES

For the Applicant:

Advocate NSH Ali

Instructed by:

Lanham-Love Galvraith-Van Reenen Inc

For the Second Respondent:

Advocate E. Mann

Instructed by:

Langenhoven Pistorius Modihapula Attorneys

Date of hearing:

24 April 2025

Date of judgment:

31 October 2025