THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 9118/2022

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED

08 January 2024

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DATE SIGNATURE

In the matter between

WINE CO 1 (PTY) LTD	PLAINTIFF
and	
KERBYN 31 (PTY) LTD	FIRST DEFENDANT
MANUEL EKIAS PITA	SECOND DEFENDANT
HENRIQUE VARIELA PITA	THIRD DEFENDANT

This judgment was handed down electronically by circulation to the parties/and or parties' representatives and uploading on CaseLines. The date and time of hand-down is deemed to be 08 January 2024 at 10h00.

JUDGMENT

JORDAAN AJ:

INTRODUCTION

[1] This is an opposed exception brought by the Defendants against the Plaintiff's particulars of claim on the basis that it lacks averments necessary to sustain an action for Claim1, in which payment of the "Damages Amount", as per the Franchise Agreement[1], is claimed. The parties will for the sake of convenience be cited as in the main action.

[2] The Plaintiff relies for its claim against the First Defendant on a Franchise Agreement concluded on or about the 27th of October 2014 at or near Johannesburg between Mike's Kitchen Franchising (Pty) Ltd (MKF) and the First Defendant.[2] Simultaneous with the conclusion of the Franchise Agreement, the Second and Third Defendants bound themselves in favour of MKF as sureties and co-principal debtors *in solidum* with the First Defendant for the due and punctual payment of all monies which the First Defendant may owe MKF for any reason whatsoever.[3]

[3] On or about the 19th of November 2019, MKF sold its entire business as a going concern to the Plaintiff and ceded to the Plaintiff all its rights, title and interests in and to the Franchise Agreement.[4]

[4] The Plaintiff instituted action against the Defendants suing in Claim 1 for the payment of the "Damages Amount", as per the Franchise Agreement[5]. The action is premised on the breach of the Franchise Agreement by the First Defendant. The breach arises from the First Defendant falling into arrears with the payment of Brand Development Fee and/or the Brand Management Fees and denying that it is bound by the terms of the Franchise Agreement.

THE EXCEPTION

[5] It is to this particulars of claim that the Defendant's raised an exception on the basis that it lacks averments which are necessary to sustain an action for Claim 1, in which payment of the "Damages Amount", as per the Franchise Agreement[6], is claimed.

[6] The exception is in essence as follows:

"1. The plaintiff's claims are alleged to arise from a written franchise agreement which was concluded on about 27 October 2014, the express terms of which are contained in the document which is annexed to the particulars of claim marked "POC1".
2. Under section 7 of the Consumer Protection Act, 2008 a franchise agreement is

[1] CaseLines pages A27-A68
[2] Particulars of Claim CaseLines page A7 paragraph 5
[3] Particulars of Claim CaseLines page A18 paragraph 22 to 23
[4] Particulars of Claim CaseLines page A15 paragraph 11
[5] CaseLines pages A27-A68
[6] CaseLines pages A27-A68

required to be in writing.
3. In terms of clause 1.1.9.10 of the written franchise agreement -
'Damages Amount' means an amount calculated in accordance with the formula A/B × C where:
1.1.9.10.1 A is the aggregate of all Brand Management Fees that the Franchisee has, in terms of this Agreement, become liable to pay between the Effective Date and the date upon which this Agreement actually terminates, irrespective of whether the Franchisee has actually paid such Brand Management Fees to the Franchisor;

1.1. 9.10.2 B is the aggregate number of completed Months that have expired between the Effective Date and the date upon which this Agreement actually terminates; and

1.1.9.10.3 C Is the aggregate number of complete Months between the date on upon which this Agreement actually terminates and the date upon which this Agreement would have terminated in terms of clause 4.1, had it not terminated on an earlier date.

4. The plaintiff alleges in paragraph 8.7 of its particulars of claim that first defendant's obligation to pay Brand Management Fees to the plaintiff arises from clause 8.4 of the written franchise agreement which is Annexure "POCI" to the particulars of claim.

5. However, it appears from the face of Annexure "POCI" to the particulars of claim that the parties deleted clause 8 in its entirety, including clause 8.4, indicated on the document in manuscript that the clause is "NOT APPLICABLE, and initialled next to these amendments."

THE LAW

[7] In terms of Rule 23(1) of the Uniform Rules of Court, there are only two possible grounds of exception namely:
4.1 that the pleading is vague and embarrassing; or
4.2 that the pleading lacks averments which are necessary to sustain an action or defence, as the case may be.

[8] An exception is thus a pleading in which a party states his objection to the contents of a pleading of the opposite party on the grounds that the contents are vague and embarrassing or lack averments which are necessary to sustain the specific cause of action or the specific defence relied upon.[7]

[9] As a result, where an exception is taken, a court should look only to the pleading excepted to as it stands and thus takes the facts alleged in the pleading as correct.[8] This is

[7] Herbstein and van Winsen: The Civil Practice of the High Courts of South Africa, Fifth edition, page 630
[8] Marney v Watson 1978 (4) SA 140 (C) at 144

however limited in operation to allegations of fact, and cannot be extended to inferences and conclusions not warranted by the allegations of fact. This principle does not stultify a court to accept facts which are manifestly false and so divorced from reality that they cannot possibly be proved.[9]

[10] The general principles governing exceptions were summarised by Makgoka J in Living Hands (Pty) Ltd v Ditz[10] as follows:

"(a) In considering an exception that a pleading does not sustain a cause of action, the court will accept, as true, the allegations pleaded by the plaintiff to assess whether they disclose a cause of action.
(b) The object of an exception is not to embarrass one's opponent or to take advantage of a technical flaw, but to dispose of the case or a portion thereof in an expeditious manner, or to protect oneself against an embarrassment which is so serious as to merit the costs even of an exception.
(c) The purpose of an exception is to raise a substantive question of law which may have the effect of settling the dispute between the parties. If the exception is not taken for that purpose, an excipient should make out a very clear case before it would be allowed to succeed.
(d) An excipient who alleges that a summons does not disclose a cause of action must establish that, upon any construction of the particulars of claim, no cause of action is disclosed.
(e) An over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit.
(f) Pleadings must be read as a whole and an exception cannot be taken to a paragraph or a part of a pleading that is not self-contained.
(g) Minor blemishes and unradical embarrassments caused by a pleading can and should be cured by further particulars."

[11] In order to disclose a cause of action, the Plaintiff's pleading must set out "*every fact(material fact) which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."* [11]

[12] It is trite that where an exception is taken to a pleading that no cause of action is disclosed, the excipient carries the onus to demonstrate that, *ex faci*e the allegations made by a plaintiff and any document upon which his or her cause of action may be

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[9] Voget v Kleynhans 2003 (2) SA 148 (C) at 151
[10] 2013 (2) SA 368 (GSJ)
[11] Herbstein and van Winsen: The Civil Practice of the High Courts of South Africa, Fifth edition, page 638 to 639

based, the claim is (not may be) bad in law.[12]

[13] The law applicable to Franchise Agreements is contained in section 7 of the Consumer Protection Act[13] which provides:

"Requirements of franchise agreements

7. *(1) A franchise agreement must—*

(a) be in writing and signed by or on behalf of the franchisee;

(b) include any prescribed information, or address any prescribed categories of information; and

(c) comply with the requirements of section 22.

(2) A franchisee may cancel a franchise agreement without cost or penalty within 10 business days after signing such agreement, by giving written notice to the franchisor.

(3) The Minister may prescribe information to be set out in franchise agreements, generally, or within specific categories or industries."

DEFENDANT'S SUBMISSIONS

[14] It was submitted by Adv Clark, on behalf of the Defendants, that the Plaintiff's claim against the First Defendant is based on the written Franchise Agreement, which contain the express terms of the agreement between the parties as stated in paragraph 5[14] of the Plaintiff's particulars of claim.

[15] The Defendants submitted that the Plaintiff in paragraph 8.15[15] of their particulars of claim allege that if the Franchise Agreement is cancelled in terms of Clause 24.4 of the Franchise Agreement, the Plaintiff shall be entitled to claim damages from the First Defendant calculated in accordance with the "Damages Amount" as provided for in Clause 24.5 of the Franchise Agreement.

[16] Adv Clark then submitted that the Plaintiff in paragraph 8.16 of their Particulars of Claim[16] gave an exposition of what the "Damages Amount" is, relying on Clause 1.1.9.10 of the Franchise Agreement as follows:

'Damages Amount' means an amount calculated in accordance with the formula A/B × C where:

[12] Vermeulen v Goose Valley Investments (Pty) Ltd 2001(3) SALR (A)
[13] Act 68 of 2008
[14] Particulars of Claim CaseLines page A7 paragraph 5
[15] Particulars of Claim CaseLines page A12 paragraph 8.15
[16] Particulars of Claim CaseLines page A13 paragraph 8.16

8.16.1 A is the aggregate of all Brand Management Fees that the Franchisee has, in terms of this Agreement, become liable to pay between the Effective Date and the date upon which this Agreement actually terminates, irrespective of whether the Franchisee has actually paid such Brand Management Fees to the Franchisor;

8.16.2. B is the aggregate number of completed Months that have expired between the Effective Date and the date upon which this Agreement actually terminates; and

8.16.3 C Is the aggregate number of complete Months between the date on upon which this Agreement actually terminates and the date upon which this Agreement would have terminated in terms of clause 4.1, had it not terminated on an earlier date."

[17] It was the Defendant's submission further that it was essential for the computation of the "Damages Amount" that the Defendant should have an obligation to pay Brand Management Fees in terms of the Franchise Agreement. The Defendant submit, that the Plaintiff in paragraph 8.7 of their Particulars of Claim[17] allege that the First Defendant's obligation to pay Brand Management Fees arises from Clause 8.4 of the written Franchise Agreement.

[18] The Defence submitted certain Clauses of the Franchise Agreement have been deleted of which one of the clauses deleted is the entire Clause 8 titled "FRANCHISEE'S OBLIGATIONS:PAYMENT OF FEES" and in particular, Clause 8.4. Accordingly the Defence submit, the provision in the Franchise Agreement that would have introduced the obligation to pay Brand Management Fees was expressly deleted by the parties and said to be "NOT APPLICABLE".

[19] It was further submitted by the Defendants that subsequent payments by the Defendant cannot be said to be payment of Brand Management Fees nor can it be said that the payment of Brand Management Fees is a tacit term, as alleged by the Plaintiff. This is so, because the contract is a Franchise Agreement subject to the Consumer Protection Act and Regulations, which require that the contract should be in writing.

[20] The defendants therefore move an order upholding their exception with costs and that Claim 1 be struck out.

PLAINTIFF'S SUBMISSIONS

[21] Adv Stoop, on behalf of the Plaintiff, submitted that the Plaintiff indeed relied on the Franchise Agreement, for its claim against the Defendant.

[17] Particulars of Claim CaseLines page A10 paragraph 8.7

[22] It was his submission that the Defendants obligation to pay Brand Management Fees is pleaded in their particulars of claim in paragraph 8.7 as:[18]

"The First Defendant shall pay the Brand Development Fee (equal to 1% of the First Defendant's monthly net turnover) and the Brand Management Fee (in the amounts set out in Annexure A to the Franchise Agreement) to MKF on or before the 7th of each month as from the effective date (Clause 8.4 read with Clause 1.1.9.3 read with Clause 1.1.9.4 read with Annexure A to the Franchise Agreement)"

[23] It was the Plaintiff's submission further that the fact that Clause 8.4 of the Franchise Agreement is deleted does not mean that it is not binding. The Plaintiff supported this by submitting that paragraph 13 of their particulars of claim assert that the Defendant paid monthly Brand Development Fee and Brand Management Fees, which, they argue, supports their interpretation that the Plaintiff and the First Defendant contracted on the basis that the Plaintiff would be liable to pay Brand Management Fees.

[24] It was further submitted by Adv Stoop that the parties did not delete the definition of Brand Management Fee in Clause 1.1.9.3 of the Franchise Agreement and they did not delete the Brand Management Fee and the amounts due as contained in Annexure A paragraph 6 on page 37 of the Franchise Agreement. Consequently, Adv Stoop submits, if it was not an express term of the Franchise Agreement that the First Defendant would pay to the Plaintiff the Brand Management Fee and Brand Marketing Fee, that term was a tacit or implied term of the Franchise Agreement, as on no other conceivable basis would the parties have retained the definition and amounts comprising the Brand Management Fees in Annexure A to the Franchise Agreement.

[25] The Plaintiff further contended that the deletion of clause 8.4 of the Franchise Agreement has the words "NOT APPLICABLE" added and the initials of the parties, it is not for the court at this stage to interpret the meaning of the words and relying on the case of Mirchandani[19] submitted that the fees were payable. It was further submitted that parties are not precluded from having a tacit agreement.

[26] The Plaintiff requested the exception be dismissed with costs.

APPICATION OF THE LAW

[27] Having regard to the facts attendant to this application, the parties are *ad idem* that Claim 1 is based on the Franchise Agreement entered into by them on the 27th of October 2014 and that Clause 8.4 of the Franchise Agreement is deleted.

[18] Particulars of Claim CaseLines page A10 paragraph 8.7
[19] Unica Iron and Steel (Pty) Ltd v Mirchandani 2016 (2) SA 307 (SCA) par [21]

[28] Franchise Agreements are regulated by the Consumer Protection Act[20] which provides in section 7:

*"7. (1) A franchise agreement **must**—*

(a) be in writing and signed by or on behalf of the franchisee;"

[29] Having regard to the peremptory provision of the Consumer Protection Act in regard to Franchise Agreements, it is unassailable that the terms of the Franchise Agreement must be in writing and signed by or on behalf of the franchisee.

[30] The reliance by the Plaintiff on the case of Mirchandani[21] is misplaced and does not find application in this case as the Mirchandani case was based on a labour contract, which is not regulated by the peremptory provisions of the Consumer Protection Act.[22] For the same reasons any subsequent payments cannot bring a tacit term for payment of Brand Management Fees into existence in circumstances where the obligation was expressly deleted in the Franchise Agreement.

[31] It was aptly pointed out that the definition of Brand Management Fee in Clause 1.1.9.3 of the Franchise Agreement and the Brand Management Fee amounts as contained in Annexure A paragraph 6 on page 37 of the Franchise Agreement has not been deleted.

[32] Both the definition as well as Annexure A however, does not confer an obligation on the Defendant to pay Brand Management Fees. Clause 1.1.9.3 contains nothing more than a definition of Brand Management Fees, while Annexure A contain the list of calculated amounts of Brand Management Fees. These amounts contained in the Annexure A to the main body of the Franchise Agreement, represent the amounts of Brand Management Fees that would have been due in terms of the obligatory provisions in Clause 8.4 to pay Brand Management Fees had it not been deleted.

[33] In the calculation of the "Damages Amount", if the Brand Management Fees is non-existent, the Damages Amount will be zero.

[34] Having considered the facts attendant to this application and fortified by the legal provisions applicable to exceptions, it is clear that the particulars of claim read with the Franchise Agreement on which the Plaintiff sues, does not contain the averments which are necessary to sustain an action for the payment of the "Damages Amount" as claimed under Claim 1. I therefore make the following order:

ORDER

[35] 35.1 The exception is upheld

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[20] Act 68 of 2008
[21] Unica Iron and Steel (Pty) Ltd v Mirchandani 2016 (2) SA 307 (SCA) par [21]
[22] Act 68 of 2008

35.2 The Plaintiff is granted leave to amend its particulars of claim within 15 days of the granting of this order

35.3 The Plaintiff is to pay the costs of this exception

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M T Jordaan

Acting Judge of the High Court

Johannesburg

HEARING DATE:	08 March 2023
JUDGMENT DATE:	08 January 2024

APPEARANCES

1. COUNSEL FOR PLAINTIFF:	Adv. BEN STOOP SC Brooklyn Chambers EMAIL: benstoop@law.co.za
2. ATTORNEY FOR PLAINTIFF:	DENEYS ZEEDERBERG ATTORNEYS Denys Zeederberg EMAIL: deneys@dzalaw.co.za
3. COUNSEL FOR DEFENDANTS':	Adv. MATTHEW CLARK EMAIL: clark@counsel.co.za
4. ATTORNEY FOR DEFENDANTS':	BRIAN KAHN INC. Brian Kahn and Mikayla Barker EMAIL: brian@briankahn.co.za; mikayla@briankahn.co.za