
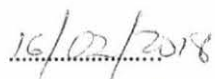




**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: ✓
	
	

CASE NO: 60085/2014

16/2/18

In the matter between:

GOOD FUTURE TRADING & PROJECTS 264 CC

PLAINTIFF

and

SCOOTERS PIZZA (PTY) LTD

DEFENDANT

JUDGMENT

THOBANE AJ,

Introduction

[1] The plaintiff, Good Future Trading & Projects 264 CC, a close corporation duly incorporated and registered in terms of the company laws of the Republic of South Africa, instituted an action against the defendant, Scooters Pizza (PTY) LTD, a company duly incorporated in terms of the company laws of the Republic of South Africa, for damages arising out of alleged fraudulent and/or negligent misrepresentation to a contract.

[2] The plaintiff's case is that as a result of the fraudulent and/or negligent misrepresentation, plaintiff's authorized employee signed the franchise agreement and paid all the required deposit as well as full payment, sold his immovable property in Middelburg, resigned from his job and relocated to Cape Town where the franchise was to be established.

[3] The plaintiff is therefore seeking compensation for damages brought about by the alleged fraudulent and/or negligent misrepresentation.

[4] The defendant on its part denies that there was any fraudulent or negligent misrepresentation in any shape or form.

Plaintiff's case

[5] The plaintiff led the evidence of Mr Jacobus Petrus Botha, the authorized employee, who testified that he became interested in franchises and that one

of those, which pricked his interest, was Scooters Pizza. He made an online enquiry and application which led to a visit by an official of the franchise to his house in Middelburg. The franchise costs as well as payment terms in respect thereof were explained to him and he got interested even more. The concept of "turn key" resonated with him and he found himself drawn to it. At the time he was not aware of Scooter's Express concept. He was informed about the joining fee of R575 000-00 and a further R1.1 million for the franchise to be operational. He was further informed about working capital which he needed to have. He informed the Scooter's representative that he will consider his options and revert. Locations were discussed and he opted for Worcester because it had a "platteland" feel to it. Swellendam was suggested but it did not resonate with him.

[6] He arranged an appointment with a Eugene Stander (Eugene) and met him. They discussed the plaintiff's interest in establishing a business in a town like Worcester. He was informed by Eugene that there was a franchise named St Elmos which did not do that well. He was therefore advised that it would not be a good idea to establish a pizza franchise in that area. The option of establishing such a franchise at the Cape Gate Mall was discussed but it did not find traction. They also discussed the "slice away" concept which they agreed was only available in Durban and not in Cape Town. Eugene undertook to conduct a survey to check patronage at Cape Gate, the so called "feet", and revert. Subsequently, Eugene sent him set up costs as well

as other pieces of relevant information which included five sales projections from which he deduced that in light of the cash flow projections and what he was informed by Eugene, namely, that investing in the project would be a “gold mine” that he could have a thriving business. He contacted Eugene with the view to confirming the projections as he had a loan to service. He was informed, so he testified, that all was in order,

[7] He resigned from his employment and moved to Cape Town on 04 July 2011. He also sent an SMS to Eugene advising him that he was settling very well. Around this time he observed that he was struggling to get hold of Eugene whether through telephone or email. Eventually he was informed that Eugene had resigned. On 24 July 2011 training of staff commenced. Opening was scheduled to take place on 9 August 2011. There was however no one from the defendant side to open the business so that staff could be trained. Eventually the opening of the business was moved back by about 4 to 5 days. The income projections he was given by Eugene, Renier and Vicus all differed. He ran the business full time until 31 July 2012. Although he had been given income projections of between R250 000-00 and R350 000-00 per month, his own calculated projections came to about R50 000-00 per month and this much he communicated to the representatives of the defendant. The cash flow projections were also inaccurate. Eventually the center management, where the franchise was situated, wanted some money which he did not have and consequently he was forced to close shop.

[9] The opening of the business did not take off seamlessly as promised for various reasons. Whereas he was promised a turnkey business it did not turn out that way. The location of the shop in the center was problematic. Marketing thereof was inadequate. It seemed to him not enough research was done in the run up to the opening of the business. The profit projections were overly inflated, the set up costs inaccurate and the marketing off the mark.

[10] During cross examination he stated that he had considered other franchises but settled for Scooters Pizza as it looked to him more cost effective. He also weighed the risks involved in the business environment accepting that not all businesses succeed. He stated that his case had not been watered down but that it had always been about the numbers that were provided to him by the defendant which were no where near the projections given to him. This prompted him to adjust his numbers by some 20% so as to accommodate his own conservative projections as he had reservations about the figures received from Eugene. This is in spite of assurances from Eugene that the franchise was going to be a gold mine. He accepted the risks of running a business which is why he signed as surety. He knew that in the event of the business failing he was going to be held personally liable. He committed himself fully to the business and was therefore certain that he

could make a living from it. It was put to him that the figures disclosed to him were said to be achievable but not guaranteed. This he disputed forthrightly.

Defendant's case

[11] Eugene Stander testified that he was at the time the franchise agreement was concluded, the Regional Franchise Manager at Scooters. He was responsible for operating standards, day to day running of franchises and also the opening of new franchises. In calculating the projections and set up costs, he obtained information from their Johannesburg office. He stated that he was careful not to mislead but to emphasize that the figures were only estimates and not guaranteed. He stated that the approach of Scooters was to be cautious so as to protect the brand. As a result locations where the franchise is set up is chosen with care. On a yearly basis information is compiled detailing amongst others failures of businesses. This information is made available to prospective franchisees. He confirmed that the figures he gave to the plaintiff were an estimate but were achievable and that much was conveyed to the plaintiff.

[12] During cross examination he confirmed that Worcester as well as Wellington were considered as options where the franchise could be set up but were discarded. He stated that it was difficult to give the exact turnover of the franchise at the Cape Gate Mall. He readily conceded that in the document he sent the plaintiff it was not indicated that the income projections

were estimates. With regard to market research figures that the plaintiff requested he stated that at the time of negotiations there certainly would have been market research or foodcourt headcount figures. The headcount figures would have been obtained from the Property Manager at the mall. Milos, who sat in the Johannesburg offices, was the researcher who did all the research. Although he sent the information to Milos he does not know where the information ended up, also whether it was still in the defendant's system. The figure of R250 000-00 was calculated by Milos and although it was an estimation, was achievable. Lots of variables are factored into the figures. In this instance he would have sent information to Milos who would have calculated the projections then he in turn would have conveyed the information to the plaintiff. He stated that ordinarily he would not have used the term "gold mine" to describe the franchise business.

[13] Renier Hattingh testified that he had extensive experience in the franchise business having worked for Yum Yum Brands previously. His duties included managing businesses, starting up new projects, marketing as well as supplies. He is well aware, he stated, of the procedure when someone contemplates establishing a franchise business. The process usually begins with email contact, followed by telephone calls, email exchanges, and moves on to arranging meetings and the dissemination of information pack. Subsequently the location of the intended business is visited. In the case of Cape Gate footcount was obtained from the Center Management. The other

measure that is considered is the LSM (Living Standard Measurement). Such information is obtained from the center or from surrounding environment in this instance it would have been Durbanville and Kraaifontein. In relation to the projected monthly sales of R250 000-00, that information would have been informed by market research and the average household income of the area. It would have been difficult, he testified, to make a comparison with other Scooters Pizza stores elsewhere due to the location of the plaintiff's store in a mall. He acknowledged that there was limited interaction between him and the plaintiff. The interaction was limited to discussing set up costs of the business as well as a monetary contribution from the landlord.

[14] He stated during cross examination that the projections presented to the plaintiff would have come from Milos, given to him and handed to Eugene Stander. He would have checked the transactional account as well as the footcount at the center. With regard to the market research of the estimated 1% of R800 000-00 or R250 000-00, he is certain that if the company pulls out its records it would find the information. He stated that there would have been other documents relied upon detailing the breakdown of the projections but these were not specified. He also could not explain why they have not been placed before court.

The parties' pleaded cases

[15] The plaintiff's pleaded case is that the defendant's authorized employees namely, Eugene Stander, Milos Mazelak, Vicus Els and Renier Hattingh made inter alia the following representations that;

15.1. The joining fee for the Scooters Pizza franchise was the sum of R75 000-00, payable immediately;

15.2. The purchase costs were the sum of R750 000-00 excluding VAT;

15.3. It was viable to open a franchise at the Cape Gate Mall and not at Wellington and that a sum of R80 000-00 would be contributed by the Cape Gate Mall management towards opening the franchise;

15.4. The Scooters Pizza outlet would be profitable;

15.5. The gross monthly sales per month was the sum of R250 000-00;

15.6. The proposed opening date would be 1 August 2011;

15.7. Market research showed that Scooters Pizza would be a viable business at the Cape Gate Mall.

[16] The representations, the plaintiff pleaded, led to him selling his immovable property, resigning from his job, signing the franchise agreement and paying all the requisite fees and then relocating to Cape Town. The said representations, according to the plaintiff, were false in that no market research was done, the set up costs were more than the amount stipulated in

the agreement, there was no contribution from Cape Gate Mall, staff was not trained as undertaken and the monthly sales were far below those indicated by the defendant. The plaintiff pleaded in the alternative that in the event of the court finding that there was no fraudulent or negligent misrepresentation, then in that event the agreement fell foul of the provisions of the Consumer Protection Act, 68 of 2008.

[17] The defendant on its part admits to concluding the various agreements but denies that any misrepresentations were made. The defendant pleaded specifically that no factually incorrect information was provided to the plaintiff which information would have induced the plaintiff into concluding the agreements. The defendant retorted with a counterclaim for repudiation of the franchise agreement and claimed damages arising from cancellation of the franchise agreement. I hasten to say that the counter claim was not persisted with at the trial.

Legal principles and the law

[18] Legodi J, as he then was, opens his judgment in ***SPF and Another v LBCCT/A LB and Another (26492/13) [2016] ZAGPPHC 378 (20 April 2016)***, with the following *dicta* as extracted from ***Law of Contract in South Africa by Christie 4 edition Chapter 7 page 313***;

[1] *"The general effect of misrepresentation and fraud on a contract can be shortly stated: A party who has been induced to enter into a contract by misrepresentation of an existing fact is entitled to rescind the contract provided the misrepresentation was material, was intended to induce him to enter into the contract and did so induce him."*

[19] It is trite that fraud must be pleaded clearly and distinctively. If fraud led to the conclusion of a contract, cancellation may be claimed. (See in this regard ***North West Provincial Government v Tswaing Consulting CC [2007] 2 ALL SA 365 (SCA)***). It is permissible for one to keep the contract alive and claim damages. (See ***Feinstein v Niggli 1981 (1) SA 684 (A)***.)

[20] In ***Brink v Humphries & Jewell (Pty) Ltd [2005] 2 All SA 343 (SCA)*** Cloete JA stated that -

"The law recognises that it would be unconscionable for a person to enforce the terms of a document where he misled the signatory, whether intentionally or not. Where such a misrepresentation is material, the signatory can rescind the contract because of the misrepresentation, provided he can show that he would not have entered into the contract if he had known the truth. Where the misrepresentation results in a fundamental mistake, the "contract" is

void ab initio. In this way the law gives effect to the sound principle that a person, in signing a document, is taken to be bound by the ordinary meaning and effect of the words which appear over his/her signature, while at the same time protecting such a person if he/she is under a justifiable misapprehension, caused by the other party who requires such signature, as to the effect of the document."

[21] In ***Du Toit v Atkinson's Motors Bpk [1985] 2 All SA 149 (A)*** Van Heerden JA referred to Denning, LJ, in ***Curtis v Chemical Cleaning and Dyeing Co Ltd (1951) 1 All ER 631***, 634, in the context of an exemption clause:

*"In my opinion, any behaviour by words or conduct is sufficient to be a misrepresentation if it is such as to mislead the other party about the existence or extent of the exemption. If it conveys a false impression, that is enough. If the false impression is created knowingly, it is a fraudulent misrepresentation; if it is created unwittingly, it is an innocent misrepresentation. But either is sufficient to disentitle the creator of it to the benefit of the exemption. It was held in **R. V. Kysant (Lord) (3)** that a representation might be literally true but practically false, not because of what it said, but because of what it left unsaid. In short, because of what it implied. This is as true of an innocent misrepresentation as it is of a fraudulent misrepresentation."*

[22] In the **Law of Agency 4 ed by A J Kerr, at Chapter 14, pp 221-222**, it is said:

"If the agent both (1) makes the representation, and (2) knows (i.e. is conscious of the fact) that it is false, or (b) does not have an honest belief in its truth, being reckless, careless whether it be true or false, the legal position is the same as if the principal himself had made the representation with the requisite state of mind..... The Rand Bank case was concerned with problems of non-disclosure and in the court a quo Trollip J said:

'The principle is that where an agent contracting in the course of his employment within the scope of his authority, fraudulently conceals or otherwise fails to disclose a fact known to him which, having regard to the nature of the contract, he ought to have disclosed to the other contracting party, his principal is liable for and must therefore suffer the consequences of his concealment or non-disclosure. That responsibility of the principal attaches, at any rate in regard to the voidability of the contract even if he himself had no knowledge of the fact not disclosed or fraudulently concealed.'"

[23] Misrepresentation is said to be a false statement of fact, not law or opinion, made by one party to another before or at the time of the contract

concerning some matter or circumstance relating to it. A party that places reliance on misrepresentation to avoid a contract or to claim damages must prove that;

- (a) the representation relied upon was made;
- (b) it was a representation as to a fact;
- (c) the representation was false;
- (d) it was material, in the sense that it would have influenced a reasonable person to enter into the contract; and
- (e) it was intended to induce the person to whom it was made to enter into the transaction sought to be avoided.

(See *Novick & another v Comair Holdings Ltd & others* 1979 (2) SA 116 (W).)

Application of legal principles

[24] The numerous instances of representations made by the defendant are set out in paragraph 7 of the plaintiff's particulars of claim. In its plea the defendant denies the representations and contends that the terms of engagements of the parties are those set out in the agreements the parties concluded. Evidence however suggests that most of the representations, defendant's refutations notwithstanding, are either common cause or were not disputed during testimony. The following, conveyed by the defendant to the plaintiff therefore can be taken as established; the joining fee, the total costs of the franchise, the viability of the business at the identified and agreed

location, the contribution by the landlord, the monthly gross sales, the proposed opening date, the training of staff and the fact that the projected figures disclosed by the defendant were based *inter alia* on market research.

[25] The decision to resign from one's job, uproot yourself from your community and start a new life in another part of South Africa is manifestly a difficult one, involving the weighing of many competing interests. It is therefore not a decision that can be easily made. Mr Botha is the person who would have considered whether relocation was worth his while. In his testimony he stated that as part of the decision making he had a discussion with his family to weigh the options. The information sourced from the defendant undoubtedly would have been central to the plaintiff's decision making, for it would not make sense to resign, relocate and start a business that has been projected to be unprofitable.

[26] It came out during evidence that market research as the basis for among others projected sales, was central to the decision of the plaintiff to decide whether or not to conclude the franchise agreement. It however became clear that the market research was mythical. It had been requested by the plaintiff through emails however none was forthcoming. The importance of the market research relied upon is accentuated by the plaintiff's decision to adjust the supplied projections to be more in line with what he deemed to be achievable profit margins. On his calculations the projections

came to R50 000-00 per month. This was in sharp contrast to those given by all the defendant's representatives. Those being R250 000-00, R300 000-00 and R350 000-00 given by Eugene, Renier and Vicus respectively. The plaintiff ever concerned about the reliability of the figures had a discussion with Eugene who confirmed that the figures he supplied were "rarely wrong". Eugene was at pains during his testimony to assert that the figures he supplied were nothing but "achievable estimates", but could point at no proof of conveyance of such information to the plaintiff. I can only conclude from his testimony, that the figures, particularly the turn over of the business, were not presented as estimates.

[27] In relation to the market research that allegedly, on the version of the defendant, informed the estimates, Eugene testified that such research was conducted by him, the property manager and Milos and that between them they would have among other things inspected the location of the business. The information obtained would have been converted by Milos into figures. The amount of R250 000-00 being the gross profit was calculated by Milos having considered information obtained from other outlets and having incorporated certain variables. The fact that critical information that is said to be market research, and which informed the projections presented to the plaintiff was not made available to the plaintiff on request, Eugene vouches for its centrality and yet does not know its whereabouts, is in my view a clear indicator of its non existence. When Renier Hattingh was cross examined

about the whereabouts of the market research he stated; *"I am sure if they pull the records they will find the information"*. He also stated that although he got the figures from Milos, Milos was not a market researcher but a Property Manager. It is easy to conclude that the market research, touted to have been the pillar of the defendant's projections, has, on the evidence, not been shown to exist.

[28] It is an established principle of our law that failure to disclose amounts to misrepresentation. (See ***Stainer v Palmer-Pilgrim 1982 (4) SA 205 (O)***). In this instance, I am of the view that the defendant failed to disclose material information, I must find as a corollary, that the failure amounts to misrepresentation. Despite a thorough search, I could find no such disclosure. It follows that the defendant failed to disclose and that the information sought to be disclosed was not only material but was relied upon by the plaintiff in his decision to conclude the agreement and subsequently relocate his family.

[29] The defendant sought to project that Scooters Pizza franchise was viable and that the plaintiff would derive profits therefrom. The representation was presented as a fact, and had it not been for the representation, the plaintiff would not have concluded the franchise agreement, uprooted his life from Middelburg and relocated to Cape Town. It was therefore material. The representation was false in that no market research information about the

viability of the business at the Cape Gate Mall existed. The fact that the business failed to meet the defendant's projected figures or even the plaintiff's revised conservative estimates, is a clear indication that the touted figures were not informed by market research. It would be generous, in my view, to characterize the touted figures as estimates. Even if they were estimates they ought to have been based on something much more empirical than was the case.

[30] It seems the defendant delivered less than what was promised in the agreement. The contribution from the landlord was not forthcoming, the training of the plaintiff was not timeously done so was the training of staff, the opening date could not be met and marketing of the business was totally inadequate. Further, whereas the parties agreed on a turnkey business, same was not delivered. I am in the circumstances satisfied that the the plaintiff has on a balance of probabilities succeeded in proving its case.

[31] I therefore make the following order;

1. The defendant is directed to pay the plaintiff the sum of R750 000-00
(Seven hundred and fifty thousand rand);
2. Interest on the aforesaid amount at the rate of 15.5% per annum;
3. Costs of suit.

A handwritten signature in black ink, consisting of several loops and flourishes, positioned above a horizontal line.

SA THOBANE

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA