IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 013187/2022

DATE OF HEARING: 30-09-2022

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO.
(3) REVISED ON 7 FEBRUARY 2024
SIGNATURE: KUNY J

In the matter between

CREAM WE GO (PTY) LTD	First Applicant
SONJA BOSHOFF	Second Applicant

and

PAUL'S HOME MADE (PTY) LTD	First Respondent
ARBITRATION FOUNDATION OF SOUTHERN AFRICA	Second Respondent
ADV AE BHAM SC N.O.	Third Applicant
NATIONAL CONSUMER COMMISSION	Fourth Applicant

***EX TEMPORE* JUDGMENT**

KUNY J:

1. The first and second applicant are respectively Cream We Go (Pty) Ltd and Ms S Boshoff. They seek an interim interdict to stay arbitration proceedings initiated in terms of clause 22 of a franchise agreement concluded between the first applicant and the first respondent. The relief is sought pending Part B of the application wherein the applicant seeks the following relief:

> 1 It be declared that the third respondent has no jurisdiction to adjudicate the dispute between the First Respondent and the Applicants and that the dispute between the First Respondent and the Applicants do not stand to be adjudicated by way of arbitration;
>
> 2. That it be declared that the arbitration agreement (clause) as contained in clauses 21 and 22 of the franchise agreement concluded between the First Respondent and the First Applicant dated 30 August 2020 (alternatively 14 September 2020) is void and unenforceable;
>
> *Alternatively to prayers 1 and 2 above:*
>
> 3. That the arbitration agreement, as contained in clause 21 and 22 of the franchise agreement between First Respondent and First Applicant be, in terms of Section 3(2)(a) of the Arbitration Act, 42 of 1965, set aside;
>
> *Further alternatively:*
>
> 4. An order in terms of Section 3(2)(b) of the Arbitration Act that the particular dispute currently pending between First Respondent and the Applicants, as referred to arbitration before the Third Respondent, shall not be referred to arbitration;
>
> *Further alternatively:*
>
> 5. An order in terms of Section 3(2)(c) of the Arbitration Act that the arbitration agreement, as contained in clauses 21 and 22 of the franchise agreement between First Respondent and First Applicant, shall cease to have

effect with reference to the dispute current referred to for adjudication before the Third Respondent;

6. That the costs of this application be paid by any party opposing it;

7. Further and/or alternative relief.

2. The first respondent terminated the franchise agreement on 24 June 2021 arising from the alleged failure on the part of the first applicant to remedy breaches of the franchise agreement.

3. In February 2021 the first respondent commenced arbitration proceedings through AFSA. The first respondent claims payment from the first applicant based on alleged outstanding accounts, penalties and damages in respect *inter alia* of lost royalties, and a loss of an option. Some of the claims are in the alternative (002-211 of CaseLines). The total amount claimed is in the region of R6 million.

4. The first respondent also seeks to hold the second applicant liable in the arbitration proceedings on a suretyship entered into at the same time as the franchise agreement. The second applicant contends that she is non-suited in the arbitration proceedings because, as surety, she is not bound by the arbitration clause in the franchise agreement.

5. It is not in dispute that the Consumer Protection Act ("CPA") applies to the transaction, and that the respondent is a supplier, and the applicants are consumers, as envisaged in terms of the CPA.

6. Clause 22 of the franchise agreement requires parties to submit disputes to arbitration. Clause 22.2 provides in this regard:

22.2 Save as may be expressly provided for elsewhere in this Agreement for the resolution of particular disputes, any other dispute arising out of or in connection with this Agreement or the subject matter of this Agreement including any disputes concerning:

22.2.1 The existence of the Agreement apart from this clause;

22.2.2 the interpretation and effect of this Agreement;

22.3.3 the Parties' respective rights and obligations under this Agreement;

22.2.4 rectification of the Agreement;

22.2.5 the breach, termination or cancellation of the Agreement or any matter arising out of the breach, termination or cancellation; or

22.2.6 damages in delict, compensation for unjust enrichment or any other claim, whether or not the rest of the Agreement apart from this clause is valid and enforceable,

Shall be decided by arbitration as set out in this clause.

7. In February 2022 the respondent initiated the arbitration proceedings referred to above. In response, the applicants filed a notice in terms of Rule 6.4.1 of AFSA's commercial rules, objecting to the proceedings. The notice is lengthy and detailed. The first and second applicant seek to avoid the arbitration agreement on various grounds. I summarise the following advanced in support of this application:

7.1. The first applicant contends the rights, remedies and defences afforded to it under the CPA (and by extension, to the second applicant), in respect of the first respondent's claims, falls outside the scope of the arbitration agreement and they are not justiciable in the arbitration proceedings (see para 62.2 of the Rule 6.1.4 notice).

7.2. Second applicant contends that clause 22 of the franchise agreement (the agreement to arbitrate), did not form part of the deed of suretyship entered into by the second applicant. Accordingly,

she contends that she is not compelled to arbitration (see para 62.1 of the rule 6.1.4 notice).

8. The applicants contend that in light of the protections afforded to the first applicant in terms of the CPA and more especially section 52 thereof , the high court is the correct forum in which the disputes between the parties should be adjudicated. They seek to stay the arbitration, pending the referral of the first respondent's claim for adjudication in the high court.

RULING OF THE ARBITRATOR

9. On 18 July 2022, the third respondent, AE Bham SC ("the arbitrator"), dismissed the applicants' challenge to his jurisdiction to determine the first respondent's claims.

10. The arbitrator determined that the proper approach to be adopted when there was a jurisdictional challenge was as laid down by Nugent JA in *Radon Projects (Pty) Ltd v NV Properties (Pty) Ltd and another* 2013 (6) SA 345 (SCA). I accept that the approach the arbitrator adopted was correct. The following dictum set out in the above judgment encapsulated the position:

> If the Arbitrator's jurisdiction is challenged, he should not refuse to act until it has been determined by some court which has the power to determine it finally. He should enquire into the merits of the issue to satisfy himself as a preliminary matter whether he ought to get on with the arbitration or not, and if it becomes abundantly clear to him that he has no jurisdiction then he might well take the view that he should not go on with the hearing at all.

11. The arbitrator held that the second applicant was bound by the arbitration clause for the following reasons:

11.1. In terms of clause 2 of the suretyship, the surety agreed that any undertaking or obligation placed on the franchisee (the first applicant) in the franchise agreement, was equally binding and enforceable against the surety.

11.2. The suretyship was executed simultaneously with the franchise agreement and the second applicant signed both documents as the surety and as the representative of the first applicant. She had full knowledge of the terms of the franchise agreement when executing this suretyship.

11.3. The word “agreement” in the franchise agreement was so defined as to refer to all annexures including the deed of suretyship.

11.4. On a proper interpretation of the franchise agreement, it must have been intended that the first respondent could pursue claims against the second applicant (the surety) in the arbitration proceedings instituted against the first applicant. The parties could not have intended that the arbitration was applicable to the franchise agreement and not the suretyship.

12. The arbitrator accordingly found that by executing the suretyship, the second applicant bound herself and is subject to the arbitration provision set out in clause 22 of the franchise agreement.

13. Paragraph 40 of the arbitrator’s ruling, refers to “clause 2” of the suretyship as follows:

> The Surety hereby acknowledges and agrees that any undertaken given by or obligation placed upon the franchisee in the franchise agreement to be entered into simultaneously with the signing of this deed of suretyship shall be equally binding upon and enforceable against each surety.

14. The franchise agreement (with all annexures to the said agreement) is Annexure FA 1 to the applicants' founding affidavit. It was not placed in dispute by the respondents. However the suretyship (Annexure F, CaseLines page 002-112) does not contain the said clause 2 referred to the by arbitrator, or indeed any clause 2. The last paragraph in the preamble is as follows:

> And whereas the surety agrees and acknowledges that she wishes to stand surety for all the obligations (of a monitory nature or otherwise) of the Franchisee to the Franchisor in terms of the franchise agreement to be entered into simultaneously with signing of this deed of suretyship.

15. The two clauses quoted above are materially different. The clause quoted by the arbitrator was referred to in support of his reasoning that the second applicant agreed to the arbitration provision in the franchise agreement. I consider this to be a misdirection as, on my reading of the papers, the quoted clause 2 does not appear in the suretyship.

16. The arbitrator further reasoned that because the suretyship was annexed to and forms part of the franchise agreement, and because the second applicant had signed the franchise agreement on behalf of the franchisee ,she had, as surety, impliedly agreed to be bound by the arbitration clause. I differ from the arbitrator in this regard. It seems to me that the fact that the franchise agreement referred to and incorporated the suretyship, does not mean that the surety expressly or impliedly agreed to be bound by the arbitration provision in the franchise agreement. In my view, the question as to whether the surety is bound by the arbitration agreement (particularly in light of the challenge in relation to section 52 of the CPA), requires consideration by the court. Even if I am wrong on the misquoted clause 2, I would nevertheless stay the proceedings against the second applicant pending a decision in term of Part B of the application as to whether she is, as surety, compelled to submit to arbitration.

SECTION 52 OF THE CPA

17. The arbitrator dealt with what he called the "CPA defences" in paragraphs 53 to 67 of the ruling. The essence of arbitrator's finding in relation to section 52 is encapsulated in paragraph 67 of his ruling, where he found:

> 67. Accordingly, in relation to the challenges to the arbitration jurisdiction raised by the defendants (applicants herein) with reference to the CPA, I am of the view that the defendants have not set out a factual basis to suggest that those sections could be invoked.

And further at paragraph 68 he said:

> 68. I emphasise that in adopting the approach set out by the SCA in Radon Projects, I am mindful that the defendants are fully entitled to approach a court to challenge my jurisdiction. But, unless and until a court makes a finding to the contrary, I have a responsibility to continue with arbitration proceedings."

18. It follows from this that the arbitrator did not in any way deal substantively with the implications and effect of section 52 on his jurisdiction to adjudicate the complaints raised by the first applicant to the franchise agreement. He found that he did not have to do so because the applicants had not laid a factual basis to invoke section 52. For these reasons, the arbitrator did not consider the finding in *Takealot Online (RF) (Pty) Ltd and Driveconsortium Hatfield (Pty) Ltd*, Case No 7348/2021, 11 October 2021, at paragraph 15, where the court said:

> [15] ..... In any event this argument, in my view, is misplaced, because in terms of the provisions of section 52 of the CPA, which was conceded by

> the applicant in its answering affidavit as was referred to earlier, only a court of law can deal with the issues raised regarding unfair, unreasonable or unjust contract terms in terms of section 48 of the CPA. An arbitrator, the Commission or Tribunal, is not empowered in terms of the act to deal with these kinds of matters. This ground of appeal, in my view, is also without merit.

19. I considered the question of whether, and if so, the extent to which, the Arbitrator's jurisdiction to adjudicate defences raised in terms of section 52 of the CPA constitute serious triable issues. As pointed out by the applicants' counsel, the remedy set out in the above section have a public law aspect to it . This, so it was argued, is apparent from section 52(3)(b)(iii) where, if it is determined that the transaction or agreement was unconscionable, unjust and unreasonable or unfair, a court may require a supplier to cease or alter any practice, form or document as required, to avoid a repetition of the supplier's conduct. As to the public law nature of the CPA, see generally *Sebola and Another v Standard Bank of South Africa Ltd and another*, 2012 (5) SA 142 (CC), at paragraph [41] and the authorities referred to therein. It has been held that an arbitration tribunal does not exercise public powers. See *Zamani Marketing and Management Consultants (Pty) Ltd and Another v HCI Invest 15 Holdco (Pty) Ltd and Others*, 2021(5) SA 315 (GJ) at paragraph [18].

20. A further ground that was raised is the contention that the arbitration agreement is void in terms of section 51(3) of the CPA. Section 51 of the CPA relates *inter alia* to prohibited terms and conditions in an agreement, such as a term, the effect of which is to defeat the CPA's purpose of policy objectives. Also, a term that purports either directly or indirectly, to waive a consumer right in terms of the CPA, is not permitted. This has a direct bearing of clause 23 of the franchise agreement and whether section 52 is applicable in arbitration

proceedings. These provisions of the CPA were not considered by the arbitrator.

21. Both parties in argument of the matter appear to be of a like-mind that the test to be applied in deciding whether to grant a stay is the test that is applicable in the grant of interim interdicts. To my mind this is not entirely correct. Although a form of a restraint is sought, the issues at hand involve questions of law. In *Takealot Online* (supra) the court at paragraph 13 held:

> [13] Our courts are called upon to make difficult decisions regarding novel legal issues, and have to interpret legislation such as the CPA on an urgent basis in applications like this. It is difficult to deal with such issues during an application for an interim interdict, and our courts have in the past concluded that in such cases where a legal issue is in dispute, it need not be dealt with finally during the application for an interim interdict..."

22. I consider the approach in *Gois trading t/a Shakespeare's Pub v van Zyl and Others* 2011 (1) SA148 (LC) to be more appropriate in these circumstances, where the court is required to consider whether to grant a stay of the arbitration proceedings. In that case, the court summarised the principles applicable to the granting of the stay in execution as follows:

> [37] The general principles for the granting of a stay in execution may therefore be summarised as follows:
>
> (a) A court will grant a stay of execution where real and substantial justice requires it or where injustice would otherwise result.
>
> (b) The court will be guided by considering the factors usually applicable to interim interdicts, except where the applicant is not asserting a right, but attempting to avert injustice.
>
> (c) The court must be satisfied that:

(i) the applicant has a well-grounded apprehension that the execution is taking place at the instance of the respondent(s); and

(ii) irreparable harm will result if execution is not stayed and the applicant ultimately succeeds in establishing a clear right.

(d) Irreparable harm will invariably result if there is a possibility that the underlying *causa* may ultimately be removed, ie where the underlying causa is the subject-matter of an ongoing dispute between the parties.

(e) The court is not concerned with the merits of the underlying dispute - the sole enquiry is simply whether the *causa* is in dispute.

23. The requirements for the grant of interim relief in matters such as these were discussed at length by Henny J in the *Takealot* case. After referring to various authorities, the court held at paragraph 14:

> "[14] In my view, it was therefor perfectly permissible for this court, even thought there was no disputes of fact, to find that, there being a number of legal issues and difficult questions of law, between the two parties, a *prima facie* right has been established."

24. This statement is equally applicable in these proceedings. I am of the view that the applicants have satisfied all the requirements for the grant of a stay of the proceedings before the third respondent, pending the determination of the relief sought at part B. The arbitrator's view that he had jurisdiction to determine the disputes was a preliminary finding. The applicability of the arbitration agreement to the second applicant is a serious issue that should be considered by the court. The arbitrator did not apply his mind to whether the defence raised in terms of section 52 are justiciable in the arbitration proceedings.

25. A factual basis has been laid in the applicants' founding papers that engages section 52 of the CPA. If the claims against the applicants were to be adjudicated in a court of law, the factors set out in this section would have to be considered and evaluated. In light of the findings of the arbitrator and the legal issues referred to above, the question as to whether the arbitrator is empowered to adjudicate the disputes, and particularly to apply the provisions of section 52, is a matter that requires consideration by the court. The applicants would be seriously prejudiced and an injustice would result if the arbitration is not stayed pending Part B of the application.

26. At the commencement of the proceedings, counsel for the first respondent raised a number of points *in limine*. These, briefly summarised, are:

26.1. The applicant acquiesced in the arbitration by filing a notice challenging the jurisdiction of the arbitrator.

26.2. It should have appealed the adverse order made by Bham SC in terms of the rules.

26.3. They were dissatisfied with the outcome of the appeal, so they would then have to institute review proceedings.

26.4. The applicants are bound by the AFSA rules.

26.5. Section 3 of the Arbitration Act is no longer available to them.

26.6. There was no prejudice in following the AFSA rules.

27. I dismiss these points and my reasons are briefly:

27.1. The applicants' Rule 6.1.4 notice made it clear that the applicants objected to the arbitration proceedings. I do not consider that by filing the notice they can be said to have acquiesced in the proceedings.

27.2. I do not agree that the applicants should have appealed the arbitrator's ruling. He considered his ruling to be preliminary in nature. He did not consider section 52 of the *Takealot* judgment and he acknowledge that if the applicants were dissatisfied with his ruling on jurisdiction, they had recourse to a court of law. Little purpose would be served by appealing or reviewing his ruling. In my view, the applicants were not obliged to continue the arbitration proceedings and were correct in approaching the court for relief.

28. The first respondent's argument in relation to section 3 of the Arbitration Act, overlooks the fact that subsection (2) empowers the court to grant relief *inter alia* setting aside an arbitration agreement:

> At any time on the application of any party to an arbitration agreement on good cause shown.

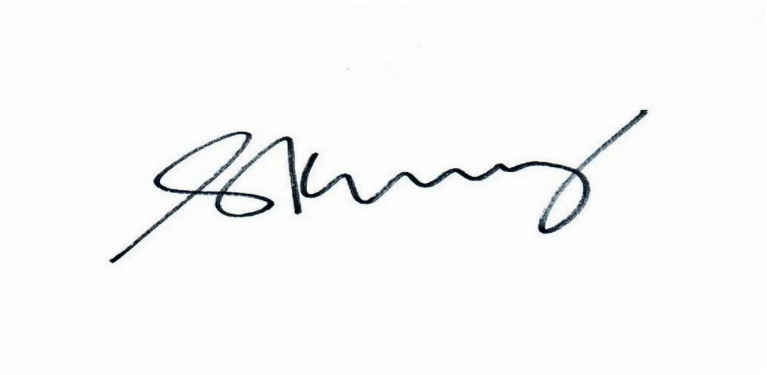
29. In all the circumstances, I am satisfied that the requirements for the granting of the relief sought in Part A of the notice of motion, have been met. Cost were only sought in the event of opposition by the respondents to part A. Strenuous opposition was offered. The first respondent was intent on enforcing the ruling of the third respondent and it has applied to make such ruling an order of court. This necessitated the urgent bringing of this application. In the circumstances, in my view, the applicants are entitled to their costs in seeking relief in terms of Part A.

30. I accordingly make the following order:

1 The arbitration proceedings between the first respondent and the applicants, commenced on or about 28 February 2022, is stayed pending the determination and finalising of the relief sought by the applicants in Part B of this application.

2. The first respondent is ordered to pay the costs in respect of the relief sought in Part A of this application.

That concludes my judgment in the matter.



……

KUNY, J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

DATE: 7 FEBRUARY 2023