IN THE HIGH COURT OF SOUTH AFRICA REPORTABLE

KWAZULU-NATAL, DURBAN

CASE NO: 10555/2008

In the matter between:

MULTISERV (PTY) LIMITED **Plaintiff**

and

NADINE ALICE PATHER **Defendant**

JUDGMENT

MSIMANG, J

1] This is an opposed application for summary judgment. Summons in the matter was issued on 20 August 2008 and the application for summary judgment was launched on 20 September 2008. The defendant's opposing affidavit was delivered on 31 October 2008. When the matter came before Court on 3 November 2008 it was, by consent of the parties, adjourned to the opposed roll for 26 February 2009.

2] When the matter came before Court on 26 February 2009 I was informed that the plaintiff no longer persisted with its application for summary judgment but that it would be content with an order refusing summary judgment, granting the defendant's leave to enter into its defence and reserving the question of costs for determination by the trial

Court. The defendant was, however, not satisfied with the part of the envisaged order relating to costs. In its opposing affidavit it had alleged that, prior to the issue of the summons, it had given allegations to the plaintiff which should have made it clear to the latter that those allegations would entitle the defendant to enter its defence in this matter. Mr. **Pillay,** who appeared for the defendant, referred to the following provisions of Rule 32(9)(a) of the Uniform Rules of Court :-

> "(a)…..where the plaintiff, in the opinion of the Court, knew that the defendant relied on a contention which would entitle him to leave to defend, the Court may order that the action be stayed until the plaintiff has paid the defendant's costs; and may further order that such costs be taxed as between attorney and client."

and submitted that the launching of the summary judgment application in the face of that knowledge constituted an abuse of the Rules of Court and therefore that, in terms of the provisions of the said rule, the Court should grant a punitive order for costs against the plaintiff.

3] A total of six claims are incorporated in plaintiff's Particulars of Claim and the first set of three of them is based on a franchise agreement and another set on the second franchise agreement concluded between the parties. The first franchise agreement had been concluded at Durban on 18 October 2005 the terms thereof were that the plaintiff, as franchiser, would allow the defendant to conduct the franchise business at the ShallCross Mall in accordance with the plaintiff's business system and using plaintiff's proprietary rights. The second franchise agreement was couched in the same terms as the first one, save that, in the case of that one, the franchised business would be conducted at the SouthCoast Mall.

4] It is significant to quote in full the following two clauses which form part of each of the

two franchise agreement, namely :-

> "3.4 The franchiser has made no warranty or representations, express or implied, as to the potential success of the franchise business;
>
> 29.7 The franchisee may not rely on any representations which allegedly induced it to enter into this agreement, unless the representation is recorded herein."

5] The plaintiff avers that on or about 4 June 2007 the defendant repudiated both agreements which repudiation was accepted by the plaintiff thereby effecting the cancellation or termination of the agreements. As a result of the cancellation or termination of each agreement, the plaintiff claims royalties as well as damages. The third claim relating to each agreement pertains to arrear rental allegedly payable by the defendant to the plaintiff as a result of a sub-lease concluded by the parties and in terms of which the plaintiff would sublet certain business premises to the defendant, obviously for purposes of conducting thereon the franchised business.

6] The allegations referred to in defendant's opposing affidavit and which, according to the defendant, should have alerted the plaintiff to the defendant's defence, are contained in a letter addressed by defendant's attorneys to the plaintiff dated 25 June 2007. Because of their obvious importance and relevance to the issue to be determined in this matter, I quote the relevant contents in full :-

> "3. Mrs. Pather entered into the agreements based on information relayed to her by a representative of Multiserv, which reflected the turnovers that the last five businesses had attained, as at the time our client had concluded her franchise agreements.
>
> 4. The turnovers presented to our client were remarkable and the business

plans seemed quite promising.

5. It is for this reason that Mrs. Pather verily believed that entering into this business venture would be a profitable and lucrative opportunity, as represented to her and thus concluded the agreements on this premise.

6. After actually conducting business, our client discovered that both the businesses were not meeting the required targets and turnovers, as illustrated and represented to her by Multiserv (Pty) Ltd, as per the turnovers presented by other businesses and the business plans.

7. Mrs. Pather communicated this problem to Multiserv verbally and in writing on numerous occasions, however she was not assisted in any manner whatsoever…….

9. Multiserv has unilaterally taken occupation and installed a new franchisee at the Shallcross branch, which our client has not agreed to and which she considers a repudiation of the agreements.

10. Mrs. Pather verily believes that she was enticed into concluding the agreements, based on the misrepresentations of the turnovers presented to her and the business plan……"

7] In her opposing affidavit the defendant accordingly contended that the said misrepresentations made by the plaintiff were fraudulent or negligent and that they had induced her to conclude the various agreements upon which the plaintiff relied for its claims. Having been apprised of this defence in defendant's letter of 25 June 2007, the plaintiff must have appreciated that it could not succeed in any summary judgment application. It would therefore be appropriate for the Court to grant a special order in terms of Rule 32(9)(a) against the plaintiff, the defendant concluded.

8] Clearly, the rule grants the Court a discretion to grant a punitive order for costs even if

the jurisdictional facts contained in that section are found to be present. The perusal of the Court decisions relating to the exercise of that discretion has revealed that, while the Courts in other Divisions, particularly the Transvaal and the Cape Divisions, readily exercise their discretion in favour of granting such order once it is found that those jurisdictional facts exist, [1] the Courts of this Division are slow in doing so. In **Flamingo General Centre v Rossburgh Food Market** [2] **James JP** pronounced himself as follows on the issue :-

> "On the other hand, it seems to me that the Court must, of necessity, be slow to make a special order for costs between attorney and client in such cases because, if the defence is ultimately held to be unfounded or dishonest, it might mean that the defendant has obtained a special penal order for costs when its own conduct is subject to serious criticism – an order which cannot be corrected at the trial. The risk of such an injustice being perpetrated is increased because the plaintiff is denied the right of reply to the defendant's allegations in summary judgment proceedings." [3]

9] However, in the view I take on the matter, it is not necessary to enter this debate.

10] As already indicated, each franchise agreement contain a clause pursuant to which the defendant acknowledges that no representations were made to her regarding the potential success of the franchised business and another clause preventing the defendant from relying on any representations which had allegedly induced her to enter into the said agreement. The effect of these clauses is to exclude plaintiff's liability based on a misrepresentation. Dealing with the clause couched in the similar manner **Innes CJ** had the following to say in **Wells v South African Alumenite Co.** [4]

> "No doubt the condition is hard and onerous; but if people sign such conditions they must, in the absence of fraud, be held to them."

It therefore accordingly follows that such exclusionary clauses cannot exclude remedies for fraudulent misrepresentations.

11] In her letter of 25 June 2007 the defendant alleges that she had been enticed by plaintiff's misrepresentations to conclude the agreement, without characterizing those misrepresentations. It was only when she filed her affidavit in opposition to the summary judgment that she, for the first time, declared that :-

> "I believe that the plaintiff fraudulently or negligently misrepresented turnovers for the business as contained in the plaintiff's business plan ….."(My emphasis).

12] It would then follow that prior to the delivery of the defendant's affidavit in opposition to plaintiff's summary judgment application all the plaintiff knew was that the defendant's defence would be anchored on a misrepresentation and that, prior to such delivery, it was entitled to conclude that such a defence could be met with the provisions of the above-quoted clauses of the agreements and that the defendant did not have a *bona fide* defence. The defendant's contention that, at the time when it launched the summary judgment application, the plaintiff had been aware that the defendant would rely on the defence which would entitle her to leave to defend, is therefore without foundation.

13] An appropriate order for costs in the circumstances of the present case would accordingly be the one reserving those costs for determination by the trial Court.

The order I then make is as follows :-

(a) Summary Judgment is refused and leave is granted to the defendant to defend the action;

(b) The costs of the application are reserved for consideration at the trial of the matter.

For the Applicant: Adv. J F Nicholson (instructed by Bouwer Cardona Inc c/o Legator, McKenna Inc)

For the Respondent: Adv. I Pillay (instructed by Siven Samuel & Associates)

Matter argued: 26 February 2009

Judgment delivered: 16 March 2009

---

[1] See, for instance, ABSA Bank Ltd v S J du Toit & Sons Earthmovers (Pty) Ltd 1995(3) SA 265 (C; South African Bureau of Standards v GGS/AU (Pty) Ltd 2003(6) SA 588 (T);

[2] 1978(1) SA 586;

[3] Ibid. at 588 C;

[4] 1927 AD 69 at 73;