**REPORTABLE**

**IN THE HIGH COURT OF SOUTH AFRICA**

**(WESTERN CAPE HIGH COURT, CAPE TOWN)**

CASE NO: **3321/12**

In the matter between:

**T H RESTAURANTS (PTY) LTD** Applicant
**(formerly TH RESTAURANTS CC)**
(Registration no 2010/013014/23)

And

**RANA PAZZA (PTY) LTD t**/a **KAROO CATTLE & LAND** First Respondent
**EDEN ON THE BAY**

(Registration No 2007/021783/07)

**EDEN ON THE BAY (PTY) LTD** Second Respondent
(Registration no 2006/012636/07)

**NTSEBE FLORAH MATJILA** Third Respondent

**THE TRUSTEES FOR THE TIME BEING OF THE** Fourth Respondent
**NATIONAL EMPOWERMENT FUND TRUST**

Coram: Yekiso, J

Delivered: 8 June 2012

Summary:

Contract (franchise agreement) - whether obligations reciprocal or collateral Interpretation of contract - phrase in consideration of when contract containing a "without deduction or set-off' clause
Held - obligations reciprocal as opposed to being collateral

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**NTSEBE FLORAH MATJILA** Third Respondent

**THE TRUSTEES FOR THE TIME BEING OF THE N ATIONAL EMPOWERMENT FUND TRUST** Fourth Respondent

Coram: **NJ Yekiso, J**

Judgment by: **NJ Yekiso, J**

Counsel for Applicant: **Adv Kiki Bailey SC**
**Adv K loulianou**

Attorneys for Applicant: Steve loulianou Attorneys

Counsel for 1st Respondent: **Adv A G Sawma SC**
Attorneys for 1st Respondent: Rubensteins Attorneys

Date of Hearing: **16 & 17 April 2012**

Date of Judgment: **8 June 2012**

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**THE TRUSTEES FOR THE TIME BEING OF THE** Fourth Respondent
**NATIONAL EMPOWERMENT FUND TRUST**

**JUDGMENT DELIVERED ON 8 JUNE 2012**

**YEKISO, J**

[1] By way of a notice of motion issued out of this court, the applicant has instituted proceedings against the first, second and the third respondent for various forms of relief.

[1.1.] The first such relief is a declarator confirming that the franchise agreement concluded between the applicant and the first respondent has since been terminated.

[1.2.] The second such relief sought is an interdictory relief restraining the first respondent from continuing to conduct the franchise business at Shop no 56 in the development known as Eden on the Bay ("the premises") under the name and style Karoo Cattle & Land, including the use of the applicant's trademarks, signs, cards, notices, stationery and any other displays or advertising matter of any nature whatsoever indicative of the franchise granted in the franchise agreement.

[1.3.] The third such relief sought is an order declaring that the applicant is entitled to be substituted as the lessee of the premises where the first respondent is presently conducting the franchise business in terms of the lease agreement concluded between first and the second respondent, coupled with the order for the eviction of the first respondent from such business premises.

[1.4.] The last such relief sought is an order directing the first respondent to pay the applicant the sum of R207,180-06 together with interest thereon a *tempore morae* from 1 September 2011 to date of payment.

[2] The first respondent resists the relief sought on the basis that the applicant has failed to carry out multiple obligations resting upon it in terms of the franchise agreement and that,

arising from the applicant's failure to carry out such obligations, the first respondent, as the franchisee, is not required to perform. The first respondent goes further to say that since the conclusion of the franchise agreement it has effected payments totalling some R800,000-00 in respect of royalties and advertising fees against which it has received no counter-performance and is, accordingly, entitled to recover the monies so paid.

[3] In so far as the relief based on the applicant being substituted as the lessee is concerned, it is contended on behalf of the first respondent that the lease agreement on which the applicant relies for the proposed substitution, does not create a benefit of substitution as a lessee capable of acceptance by the applicant. The benefit of substitution and the proposed substitution of the applicant as the tenant of the business premises in point is challenged on the basis that the entity, T H Hyde Park, which purportedly ceded its rights in terms of the lease agreement to the applicant, did not, in itself, acquire rights in terms of the lease capable of being ceded to the applicant. The further issue, on the basis of which the first respondent resists the relief sought, in as far as the lease agreement is concerned, is the question as to whether the applicant has indeed exercised an election to be substituted as a tenant whilst vested with a right to do so in terms of the lease agreement. It is thus contended on behalf of the first respondent that even if it were accepted that the applicant is vested with a right to be substituted as a tenant, the applicant has not exercised its right to be substituted as a tenant. Furthermore, the first respondent denies that the lease agreement, which constitutes the basis for this kind of the relief sought, is of force and effect, for want of fulfilment of a suspensive condition, thus placing the applicant's entitlement to rely on annexure "I" to the lease agreement which entitles the applicant to be substituted as a tenant in dispute.

**THE PARTIES**

[4] The applicant is T H Restuarants (Pty) Limited (formerly TH Restaurants CC, registration number 1989/013014/23), a limited liability company duly incorporated in terms of the laws of the Republic of South Africa, bearing registration number 2010/013014/23, and carrying on business as franchisors from its principal place of business situate at 53 Oak Road, Athol, Sandton, Johannesburg. The applicant was converted to a company during 2010 in terms of section 29C of the Companies Act, No 61 of 1973.

[5] The first respondent is Rana Pazza (Pty) Limited, trading as Karoo Cattle and Land, a limited liability company duly incorporated in terms of the laws of the Republic of South Africa, bearing registration number 2007/021783/07 and carrying on business as a restaurant at Shop No 57A, Eden on the Bay, Big Bay, Western Cape Province.

[6] The second respondent is Eden on the Bay (Pty) Ltd, a limited liability company duly incorporated in terms of the laws of the Republic of South Africa, bearing registration number 2006/012636/07 and having its principal place of business at Eden on the Bay, Big Bay, Western Cape Province.

[7] The Third Respondent is Ntsebe Florah Matjila, an adult female business person of 74 Riemland, Wapadrand Estate, Stangketting Street, Wapadrand, Tshwane, Gauteng Province. The third respondent is cited by reason of the interest she may have in this application and no relief is sought against her, save in the event of her opposing this application.

[8] The fourth respondent is the trustees for the time being of the National Empowerment Trust, a trust established in terms of section 2, read with section 4 of the National Empower Fund Trust Act, 105 of 1998, of West Block 187, Rivonia Road, Momingside, 2057.

**THE FRANCHISE AGREEMENT**

[9] On 24 August 2009, and at Rosebank, Johannesburg, in the Province of Gauteng, the applicant, represented by its director, Theodore Holiasmenos and the first respondent, represented by Ntsebe Flora Matjila, the third respondent in these proceedings, concluded a written franchise agreement in terms of which the applicant granted to the first respondent the non-exclusive right and licence to operate a restaurant business trading under the name and style of Karoo Cattle & Land.

[10] The franchise agreement, which invariably sets out the parties' rights and obligations, is a lengthy document consisting of somewhat 75 pages. The agreement deals with such terms as the termination and renewal of the agreement; the initial obligations of the parties; the franchisor's continuing rights and obligations; the franchisee's obligations; training of personnel; fees and charges, amongst other topics dealt with in the agreement.

[11] Annexed as schedule "B" to the franchise agreement is a deed of suretyship in terms of which Ntsebe Flora Matjila, the third respondent, binds herself as a surety and co-principal debtor in favour of T H Restaurants CC for all sums of money which might become owing by Rana Pazza (Pty) Ltd, the

latter entity being the franchisee in the franchise agreement.

[12] Paragraph 6 of the franchise agreement sets out the initial obligations of the parties. The franchisor's initial obligations are set out in paragraph 6.1 of the franchise agreement. These obligations, amongst others, involve the following, namely: advice on the initial opening, advertising and promotional campaign for the business and the supply of point of sale and promotional material; advice on initial staffing requirements and staff recruitment; advice and assistance on merchandising of products and general initial advice to enable the franchisee to operate the business efficiently.

[13] The franchisee's initial obligations to be complied with in terms of the franchise agreements are set out in paragraph 6.2 of the franchise agreement. These involve, amongst other things, the securing of the right to occupy the premises by lease or otherwise; the purchase or otherwise acquisition and installation of all necessary equipment; obtain all statutory licenses required to conduct the relevant business and to obtain the necessary stationery, promotional literature and signage as stipulated by the franchisor.

[14] The franchisor's continuing rights and obligations are set out in clause 7 of the franchise agreement. Clause 7.2 of the franchise agreement, where appropriate, provides:

"7.2 The Franchisor shall at all times during the term of this agreement:

7.2.1 supply the Franchisee with sales and marketing literature, directives, updates to the operations manual, bulletins, product and pricing information (collectively 'the material'), which shall pertain specifically to the system and the products and provide the Franchisee

with details of any alterations or improvements in or to the system. Such material, together with updates thereof, shall at all times be supplied by the Franchisor at such times as the Franchisor may, in its sole discretion, consider appropriate. In the event of any dispute, the authentic text of such material shall be the copies kept by the Franchisor at its head office. The Franchisee hereby acknowledges that the copyright in the operations manual and the material is vested in the Franchisor;

7.2.4. provide the Franchisee with guidance on standards of operation and service;

7.2.6. conduct quality control inspections;

7.2.8. conduct advertising and marketing of the trademarks;

7.2.9. assist the Franchisee in developing a marketing plan for the franchise;

7.3. Notwithstanding anything to the contrary herein contained, it is recorded that the nature and extent of the advice and assistance to be furnished by the Franchisor will at all times be within the Franchisor's entire discretion.

[15] Clause 10 of the franchise agreement, under the heading "fees and charges", where appropriate, provides as follows:

"10.1. In consideration for rights awarded to the Franchisee in terms of clause 6.1 above, the Franchisee shall pay to the Franchisor the sum of R150, 000.00 (one hundred and fifty thousand rand) (excluding VAT) simultaneously with the Franchisee's signature of the agreement.

10.2. In consideration for the grant to it of the licence, and in consideration of the continuing services to be provided by the Franchisor, the Franchisee shall pay to the Franchisor a monthly royalty specified in S9 of Schedule 'A', on each and every month during the term of this agreement, which

monthly royalty is based on the previous month's gross turnover, commencing from the first month after the business commences trading. Payment of the monthly royalty shall be effected by debit order, or by such other method as the Franchisor may direct. All payments in terms hereof shall be made without deduction or set off and which amount shall be payable in arrears 5 (five) days after the end of each calendar month, together with VAT thereon"

[16] Clause 12 of the franchise agreement caters for advertising. In terms of clause 12.1 thereof, the parties agreed that the first respondent would be obliged to expend amounts on advertising and/or promotional activities, and that the first respondent would be obliged to contribute to that expenditure on a monthly basis as set out in clause 12.2 thereof.

[17] In terms of clause 12.2 the parties agreed that the advertising fee payable by the first respondent to the applicant, and which would be based upon the gross turnover percentage of the first respondent's gross turnover, would be payable in arrears, within five (5) days of the end of each and every month.

**THE LEASE AGREEMENT**

[18] On or about 28 October 2009 the third respondent, representing the first respondent, and the second respondent, concluded a lease agreement in respect of the business premises. The lease agreement is similarly a lengthy document consisting of somewhat 53 pages.

[19] Clause 16 of the lease agreement, under the heading "Suspensive Conditions", provides as

follows:

"16.1 In the event of the tenant being a franchisee, the tenant shall secure a T H Restaurant CC franchise entitling it to conduct a Karoo Cattle & Land business from the premises by no later than 19 August 2009 and the tenant shall furnish the landlord with written proof thereof by no later than 19 August 2009, failing which this offer and agreement shall lapse and be of no further force or effect."

It is for want of fulfilment of the suspensive condition that the first respondent contends the agreement between it and the applicant is not of force and effect. [20] The applicant's cause of complaint arises from the first respondent's alleged failure to pay franchise fees and advertising costs. According to the applicant's founding papers, the first respondent, since the conclusion of the franchise agreement and commencing trade, paid royalty fees and advertising costs only up and until the month of April 2010. The applicant alleges in its founding papers, for the period May 2010 to August 2011 the first respondent became indebted to it in the aggregate amount of R446,750.24 in respect of unpaid royalty/franchise fees and advertising costs.

[21] When the first respondent failed to remedy its default despite demand to do so, the applicant instituted an action out of the North Gauteng High Court under case number 52102/2011 for the recovery of the amount due. Once the summons was served on the first respondent in that action, and an entry of appearance to defend filed, the applicant brought an application for summary judgment which was opposed both by the first and the third respondent, the latter in her capacity as surety and co-principal debtor. That application for summary judgment was heard in the North Gauteng High Court on 13 December 2011, and following argument, the application for summary judgment was dismissed and the first respondent was granted leave to defend the action.

[22] In resisting the granting of summary judgment, the first respondent denied in its opposing affidavit that it is indebted or liable to the applicant in the sum of R446,750.24, whether wholly or in part, together with interest thereon as claimed or at all. The first respondent, in broad terms, states in its opposing affidavit that the rationale for withholding payment of royalty and advertising fees is expressed to be on the basis that the franchise agreement is a reciprocal contract containing reciprocal obligations, and that the applicant failed to fulfil its obligations, thus entitling the first respondent to withhold its counter-performance.

[23] The institution of an action in the North Gauteng High Court did not bring about any change. The first respondent persisted in failing to pay the applicant both franchise fees and advertising costs. For the period September 2011 up until 2 February 2012, so the applicant alleges in its founding papers, the arrears were in the further amount of R207,180.26.

[24] On 2 February 2012, the applicant's attorneys of record addressed a letter to the first respondent per registered post and had it hand delivered at the first respondent's chosen *domicilium citandi et executandi*, being 74 Riemband, Wapadrand Estate, Stangketting Street, Wapadrand, cancelling the franchise agreement in terms of clause 20 of the franchise agreement.

[25] Furthermore, on 2 February 2012 the applicant's attorneys of record addressed a letter to the second respondent's attorney notifying the latter of the termination of the franchise agreement, and of

the applicant's election to be substituted as the lessee at the premises in accordance with clause 21 of annexure "I" to the lease agreement.

[26] Once the franchise agreement was cancelled and the applicant elected to be substituted as the tenant at the business premises, and on 22 January 2012, the applicant proceeded to institute these proceedings out of this court for the relief set out in paragraphs 2 to 6 of the notice of motion.

**EVALUATION**

[27] It is common cause that the first respondent is in occupation of the premises and that it continues to carry on trade of the franchise restaurant at the business premises. It is further common cause that the first respondent is withholding payment of royalty and advertising fees as provided for in the franchise agreement. In paragraphs [2] and [3] of this judgment, I have set out the basis upon which the first respondent resists the relief sought, namely, on the basis that, so the first respondent alleges in its answering affidavit, the applicant has failed to carry out a series of obligations resting on it the counter-performance of which is the payment of royalty and advertising fees; that the suspensive condition contained in clause 16.1 of the lease agreement has not been fulfilled; that arising from the suspensive condition not having been fulfilled, the entire lease agreement has lapsed and is, accordingly, of no force and effect for want of fulfilment of the suspensive condition; and that, in any event, the applicant has not made an election to be substituted as a tenant timeously as provided in clause 21 of annexure "I" to the lease agreement. I shall then proceed to examine these defences in turn.

***EXCEPTIO NON ADEMPLETI CONTRACTUS***

[28] As has already been pointed out elsewhere in this judgment, the first respondent withholds payment in respect of royalty and advertising fees. This is because, so the first respondent alleges in its answering affidavit, the applicant has failed to fulfil its multiple obligations in terms of the franchise agreement. Contending that the parties' obligations arising from the franchise agreement are reciprocal, the first respondent invokes *exceptio non adempleti contractus* as a defence in resisting the applicant's claims.

[29] In authorities such as *Thompson v Scholtz* 1999 (1) SA 232 (SCA) at 238 C-D, the defence of *exception non adempleti contractus* is stated as a defence that is available to a party where the principle of reciprocity arises. It entitles the one party (the party from whom performance is demanded) to withhold such performance until the other party (the party demanding performance) has either rendered or tendered its own performance. It arises in circumstances where the performance and counter performance are so closely linked that the one was undertaken in return for the other. (See *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1971 (1) SA 391 (A) at 418). Whether or not obligations are reciprocal, in the sense required, involves an interpretation of the agreement in order to determine whether or not the obligations are sufficiently closely linked with one another, so that the finding can be made that the one was undertaken in return for the other. Obligations that arise in bilateral contracts are presumed to be reciprocal unless a contrary intention appears from the terms of the contract and/or the relevant circumstances.

[30] As stated in the preceding paragraph, in bilateral contracts, the *exceptio* is available as a defence in those circumstances where the parties' obligations are reciprocal. The issue to determine, therefore, in the determination of the question as to whether the first respondent can invoke the *exceptio* as a

defence is the question as to whether, based on a proper interpretation of the contract, the parties' obligations are closely linked with one another to justify a finding that the one obligation has to be undertaken in return for the other. In short, the question to be answered, based on a proper interpretation of the contract, is whether the parties' obligations are reciprocal to justify the invocation of the *exceptio* as a defence against the applicant's claims. This, invariably, will involve an analysis of the parties' obligations in terms of the contract.

**ARE THE PARTIES' OBLIGATIONS RECIPROCAL?**

[31] The parties' obligations are set out in clause 6 under the heading "Initial Obligations of the Parties"; clause 7 under the heading "The Franchisor's Continuing Rights and Obligations"; clause 9 under the heading "Training"; and clause 10 under the heading "Fees and Charges".

[32] Clause 6 of the franchise agreement, under the heading "Initial Obligations of the Parties", sets out the parties' respective duties and obligations prior to the opening of the franchise business. The franchisor's continuing rights and obligations are set out in clause 7 of the franchise agreement. The preamble to these obligations, which are set out in sub-clauses 7.2.1 to 7.2.12, is couched in peremptory terms: "(t)he franchisor shall at all times during the term of this agreement:". The whole of the multiple obligations are then set out in the sub-clauses which follow. Amongst others, these obligations involve supplying the franchisee with sales and marketing literature; providing the franchisee with guidance on standards of operations; conducting advertising and marketing of trademarks; assisting the franchisee in developing a marketing plan for the franchise and the whole other series of obligations set out in subclause 7.2

[33] Clause 10 of the franchise agreement makes provision for payment of an amount of money by the franchisee on signature of the franchise agreement as well as payment of royalty fees. Payment in consideration for the granting of rights awarded in terms of the franchise agreement is provided for in clause 10.1 which provides as follows:

"In consideration for rights awarded to the franchisee in terms of clause 6.1 above, the franchisee shall pay to the franchisor the sum of R150,000.00 (one hundred and fifty thousand rand) (excluding VAT) simultaneously with the franchisee's signature of this agreement".

Clause 6.1 referred to in clause 10.1 of the agreement relates to those multiple obligations which the franchisor undertakes to make available to the franchisee and these, amongst others, relate to advice as to location; advice to trading styles; advice on initial opening; advertising and promotional campaign and so on. The once-off payment of an amount of R150,000.00 is in consideration of these services.

[34] Paragraph 10.2, which provides for payment of royalty and advertising fees, reads as follows:

"In consideration for the grant to it of the license, and in consideration of the continuing services to be provided by the franchisor, the franchisee shall pay to the franchisor a monthly royalty specified in annexure "S9" of schedule A on each and every month during the term of this agreement, which monthly royalty is based on the previous month's gross turnover..."

The continuing services referred to in clause 10.2 invariably include those services which the franchisor, in terms of clause 7.2 of the agreement, undertakes to perform at all times.

[35] Thus, in very clear and unambiguous terms, the payment contemplated in clause 10.2 is payment in consideration for the granting to the franchise of a licence and those continuing obligations which the franchisor undertakes to perform at all times during the term of the agreement.

[36] In the absence of any clear indication to the contrary, the "consideration" referred to in clauses 10.1 and 10.2 of the agreement is the same consideration which the Cape Supreme Court in *Alexander v Perry* (1874) Buch 59 equated to the common law requirement of *redelijke oorzaak* and the English law notion of "valuable consideration" by which is meant some *quid pro quo* or recompense by both parties. (See Francois du Bois *et al:* Wille's *Principles of South African Law* 9th Edition at 753).

[37] Mr *Sawma* SC, for the applicant, makes a point in his submissions that what emerges from the reading of clause 10 of the franchise agreement is that, in the clearest possible terms, the franchise agreement proclaims that the payment of the royalty fee is a *quid pro quo* for the rendition, by the applicant, of its continuing services under and in terms of the agreement. Of significance, in as far as paragraph 10 is concerned, so the submission goes, is a reference in clauses 10.1 and 10.2 of the agreement to the phrase "in consideration for" which Mr *Sawma* submits connotes payment in consideration for services rendered. Mr *Sawma* then goes on to refer in his submissions to the meaning of the word "consideration" in the Concise Oxford English Dictionary, 10th Edition, Revised and edited by Judy Pearsall, which defines the word "consideration" as follows: "a payment or reward. Law: anything given or promised by one party in exchange for the promise or undertaking of another." In the same definition there is a specific reference to the phrase "in consideration of which connotes

payment in consideration for performance rendered.

[38] As regards the question whether the first respondent is entitled to raise the defence *exceptio non adempleti contractus,* in the circumstances of this matter, Ms *Bailey* SC, (with her Mr K loulianou) submits and argued strongly when the matter was heard before me that because the franchise agreement expressly provides that the first respondent is obliged to make payment of its advertising and franchise fees monthly

"without deduction or set off', that it could never have been contemplated by the parties that the parties' obligation would be reciprocal. The franchise agreement, although bilateral, so argued Ms *Bailey,* reflects that the applicant's obligation is collateral and that the first respondent's performance is not conditional upon performance by the applicant.

[39] In addition thereto, so the submission goes on behalf of the applicant, because the first respondent is in possession of the franchise; that the first respondent conducts business therefrom and continues to do so despite the alleged mal-performance by the applicant, the first respondent cannot, in the circumstances of this matter, be entitled to rely on the *exceptio.* The first respondent cannot continue with the franchise whilst withholding payment of royalty and advertising costs. The first respondent is not entitled to do both.

[40] The first respondent cannot approbate and reprobate, so argues Ms *Bailey:* if the first respondent is sufficiently satisfied to continue with the franchise, it must comply with its obligations, in particular, the payment of royalties and advertising costs. The *exceptio* does not permit it to continue trading,

remaining in breach and enjoying the fruits of the contract. In making these submissions, Ms *Bailey* relies on such authorities as *Altech Data (Pty) Ltd v M B Technologies* 1998 (3) SA 748 (W) at 762; *International Executive Communications v Turnley* 1996 (3) SA 1043 (W) at 1050; and an unreported judgment of Lopes J in *Hot Dog Cafe (Pty) Ltd v Daksesh Rowen's Sizzling Dogs cc & Another* (case number 2011/1783 [2011] ZAKZPHC 30).

[41] In *Altech Data*, supra, a matter of a claim for the balance of the purchase price, the respondent resisted the claim against it on the basis that the applicant failed to fully comply with the terms of the agreement and that, in view thereof, the proceedings instituted against it by the applicant had to be stayed pending the outcome of the adjudication of the respondent's claim by an arbitrator as the agreement contained an arbitration clause for referral of disputes of the nature complained about to arbitration. Thus, the respondent invoked the *exceptio* as a defence in a claim against it. Over and above the arbitration clause, the sales agreement also included a clause that the purchase price would be paid without deduction or set-off and a further mechanism in terms of which the purchase price could be adjusted under certain circumstances.

[42] Shakenovsky AJ (as he then was) concluded that the parties' obligations were collateral as a consequence of a detailed interpretation of the contract there at issue coupled with consideration of such other factors relating to exclusion of warranties as well as the adjustment mechanism provided for in the contract. Shakenovsky AJ reasoned as follows in arriving at the conclusion that the parties' obligations were collateral as opposed to being reciprocal:

"What is of particular significance, in my opinion, is the creation of *adjustment mechanisms* in terms whereof the parties agreed that, although the purchase price was to be paid without deduction or set-

off, nevertheless adjustments could be achieved by resorting to such adjustment mechanism. It needs to be stressed, as will appear from the agreement, that there was an exclusion of warranties with regard to these items bearing in mind that debits and credits were contemplated by the parties which would necessitate adjustments particularly after a six month period, i.e. from 1 November 1997 to 1 May 1998."

[43] Shakenovsky AJ, having regard to clause 4.2 of the agreement prohibiting deduction or set-off of the parties' respective claims and the various provisions relating to adjustment mechanisms, concluded that the respondent cannot rely on set-off to avoid payment of portion of the purchase price.

[44] *International Executive Communications,* supra, does not assist the applicant either. The issue in that matter related to the enforcement of an agreement in restraint of trade. The respondent resisted the enforcement of the restraint against him on the basis that there were still monies due to him by the former employer. The applicant, the former employer, contended that the respondent, a former employee, had been paid all that was due to him and had further tendered to pay any amount outstanding if the applicant's auditors, in terms of a clause contained in the employment contract, could determine that an amount is outstanding and, based on that determination, pay to the respondent (a former employee) the amount so outstanding, an option which the respondent had at any time never attempted to make use of. The defence of *exceptio* was not pertinently raised in papers, so that the court did not have to make any determination in regard to the merits of that defence.

[45] Ms *Bailey,* in seeking to persuade me that the parties' obligations are collateral, as opposed to

being reciprocal, relies heavily on the judgment of Lopes J in *Hot Dog Cafe*, supra, and urged me to follow the approach adopted by Lopes J in that matter. In arriving at the conclusion that the agreement between the parties precluded the respondents from withholding payments, Lopes J appears to have relied on *Altech Data,* supra. I have already made my observations with regards to factors Shakenovsky AJ took into account in arriving at the conclusion he did in paragraph [41] of this judgment.

[46] Lopes J, apart from relying on *Altech Data,* supra, in arriving at the conclusion he did, did so after an analysis of the parties' obligations based on the interpretation of the contract that served before him and came to the conclusion that the respondent's failure to comply with payment of the advertising levy is a breach of the franchise agreement entitling the applicant to cancel the contract.

[47] But not all "breaches" in the form of failure to pay, in circumstances where a contract contains a "without deduction or set-off clause will, of necessity, constitute a breach entitling the other party to resile. One can only have regard to authorities such as *Moreland v Dent* 1876, NLR 2 at 7 and *Poynton v Cran* 1910 AD 205 to appreciate that a "without deduction or set-off clause does not necessarily lead to a conclusion that the *exceptio* defence is absolutely precluded in contracts of a bilateral nature. In *Poynton v Cran,* Innes J, (as he then was) made the following observation at 209:

"It remains to consider whether the evidence discloses any circumstance which would deprive the tenant of the legal right which he exercised. I do not think that the clause in the lease providing for payment of rent on a certain day 'without any deduction whatsoever' has that result. That provision

cannot relieve the landlady of her obligation to place the leased premises in repair, or deprive the tenant of the remedy which the law gives him in respect of her initial default. That default afforded pro *tanto* a defence to the claim for rent. And I entirely agree with the learned judge when he says that 'It is only the rent due which can be stipulated to be paid without deduction'".

[48] In the matter before me the point at issue is the franchisor's obligations which he undertook to perform at all times and the franchisee's obligation to pay royalty and advertising fees in consideration of those services which the franchisor undertook to perform at all times and, arising therefrom, whether the parties' obligations, in the circumstances of this matter, are reciprocal. In my view, the parties' obligations with regards to the issue of rendering services contemplated in the franchise agreement and payment for such services, based on the interpretation of the franchise agreement, are reciprocal despite there being a "without deduction or set-off clause contained in the franchise agreement.

**EVALUATION OF EVIDENCE**

[49] It can be accepted as common cause that at a certain point the first respondent withheld payment of royalty and advertising fees. In paragraph [21] of this judgment I referred to an action instituted by the applicant against the first respondent out of the North Gauteng High Court under case number 52102/2011 for the recovery of an amount allegedly due and payable in respect of royalty and advertising fees. In resisting an application for summary judgment in that matter, the first respondent alleged in its opposing affidavit that the parties' obligations, arising from the contract which constituted the basis of a claim against it, were reciprocal; that the applicant in those proceedings had failed to fulfil its obligations in terms of the agreement, in that, amongst other obligations that the applicant has failed to fulfil, the applicant, and contrary to clause 7.2.1 of the agreement, failed to supply the first

respondent with sales and marketing literature; directives; updates to the operations manual; bulletins; product and pricing information; details of any improvement in or to the system; no regular visits to the premises were ever conducted by the applicant and that the applicant failed to give the first respondent assistance in the development of a marketing plan for the franchise and took no steps to promote good relations between itself and the first respondent. The first respondent, in resisting the relief sought in this application, reiterates the basis on which it resisted the applicant's claim in the summary judgment proceedings instituted in the North Gauteng High Court.

[50] In its founding affidavit in these proceedings the applicant merely contented itself with the bald denial of the allegations advanced in the affidavit deposed to in resisting summary judgment. It is only in its replying affidavit that the applicant, for the first time, seeks to assert that it has carried out its obligations under the franchise agreement. Even in its attempt to seek to assert that it has carried out its obligations, the applicant does not produce the barest minimum of evidence in the form of either a balance sheet or a statement of source and application of funds in an attempt to demonstrate how funds paid in respect of advertising fees were received and applied or, with regards to the general body of the franchisees, how funds received in respect of advertising fees are generally applied.

[51] Based on the belated assertion by the applicant in its replying affidavit that it fully complied with its obligations in terms of the franchise agreement a dispute of fact obviously does arise. In my view, and based on those facts averred in the applicant's affidavit that have been admitted by the first respondent, together with those facts alleged by the first respondent, such dispute should be resolved in favour of the first respondent.

[52] In the light of the conclusion I reach in paragraph [48] of this judgment I, accordingly, cannot

confirm and declare that the franchise agreement concluded between the applicant and the first respondent has been validly terminated as prayed for in paragraph 2 of the notice of motion. It, therefore, follows that the remainder of the relief sought in paragraphs 3 to 5 of the notice of motion have to fall on the way side. I was informed by counsel for the applicant in the course of argument that the relief sought in terms of paragraph 6 of the notice of motion is no longer being pursued in these proceedings.

[53] I was similarly informed during the course of argument when the matter was argued before me, and indeed so it appears on basis of the papers, that the first respondent still conducts and carries on with the franchise restaurant at the leased premises. The conclusion I have reached with regards to the issues raised in this matter does not preclude the applicant in pursuing its remedies arising from such circumstances in the same manner it did by way of proceedings instituted out of the North Gauteng High Court. In short, therefore, the applicant is not left without a remedy.

[54] To re-iterate, I therefore find that the parties' obligations arising from the franchise agreement concluded between the applicant and the first respondent, based on the interpretation of that agreement, are reciprocal; that the first respondent, in these proceedings, is entitled to invoke the defence *exceptio non adempleti contractus;* that the franchise agreement concluded between the applicant and the first respondent has not been validly terminated; and that in the light of this finding, it is not necessary for me to determine those issues which otherwise would have constituted a basis for the relief sought in terms of paragraphs 3, 4 and 5 of the notice of motion.

[55] In the result, the following order is made:

[55.1.] The application is dismissed with costs.

**N J Yekiso, J**