IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)

CASE NO: 7728/03

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED. ✓
DATE 6-11-03 SIGNATURE

In the matter between:

INYE AMUSEMENTS CC Plaintiff

and

MANY COLOURS RESTAURANT (PTY) LIMITED
trading as PRIMI PIATTI FRANCHISING COMPANY Defendant

JUDGMENT

GOLDBLATT J:

The plaintiff in this action entered into a written franchise agreement with the defendant in terms whereof it granted to him a franchise to operate a restaurant at certain premises in Cresta Johannesburg. The agreement was concluded on the 6th of June 2002.

In terms of the agreement the plaintiff paid to the defendant the sum of R250 000 plus R35 000 VAT. This was a franchise fee paid pursuant to clause 9.1 of

the agreement which read:

"An initial franchise fee and VAT thereon as recorded in clause 2.7 shall be payable by the franchisee to the franchisor in cash upon the execution of this agreement. The franchise fee shall be fully earned by the franchisor when paid and is strictly non-refundable."

Clause 7.1 of the agreement read:

"The Franchisor shall assist the Franchisee in the selection of a site for the Approved Location and if necessary, assist the Franchisee in the negotiation of a lease agreement in respect thereof. The selection of the Approved Location shall not be construed as an assurance that the Business will be successful. The Franchisee shall lease the Location for the Business."

Clause 7.5 of the agreement read:

"Notwithstanding anything to the contrary contained in this agreement, if the Franchisee has not concluded a lease fro the location within 6 (six) months of the date of signature of this agreement, the Franchisor may, by written notice to such effect, cancel this agreement and retain the Franchise Fee as pre-estimated damages."

A lease agreement was not concluded within six months of the signing of the agreement and the defendant cancelled the agreement on this basis on the 10th of December 2002.

The plaintiff for the reasons set out hereunder alleged that despite the terms of clause 7.5 of the agreement the defendant was obliged to refund all or some of the franchise fee paid to it.

The basis for plaintiff's claims are set out in paragraphs 6 to 16 of the particulars of claim which read:

"6. On a proper construction of the franchise agreement, the obligation imposed upon the plaintiff in clause 7.5 thereof was conditional upon the defendant, alternatively the plaintiff assisted by the defendant, negotiating a lease agreement with the proposed landlord at the approved location on terms acceptable to the parties, alternatively the defendant.

7. Alternatively to paragraph 6 above, the following constituted implied alternatively tacit terms alternatively conditions of the franchise agreement:

7.1 The approved location was to be suitable identified premises in a shopping centre in Cresta.

7.2 The defendant would attend to the negotiation of the terms of a lease agreement between the proposed landlord and the plaintiff on terms acceptable to the plaintiff and the defendant by having regard, in particular, to the criteria stipulated in clause 2.5 of the franchise agreement.

7.3 In the event that no premises were available in the Cresta Shopping Centre, alternatively in the event that the defendant was not able to negotiate the terms of a lease agreement with the landlord of the Cresta Shopping Centre in terms acceptable to the defendant as contemplated in clause 2.5 and to the plaintiff, the franchise agreement would thereby be rendered unenforceable and the parties would be obliged to make restitution of performance made by either party in terms thereof.

8. In the alternative to paragraph 7 above, the plaintiff pleads that it was the common intention of the parties to the franchise agreement that the terms pleaded in sub-paragraphs 7.1 to 7.3 above would constitute part of the contract concluded between them.

9. The terms pleaded above were omitted from the written franchise agreement by mistake and the parties accordingly signed the franchise agreement in the *bona fide* but mistaken belief that it recorded the true agreement between them.

10. In the premises, the franchise agreement falls to be rectified by inserting therein the terms pleaded in prayer (a) hereunder.

11. In breach of its obligations in terms of the franchise agreement, the defendant has failed to negotiate a lease agreement with the landlord of the approved premises. Alternatively failed to render assistance as provided for in clause 7.1 thereof and the plaintiff has not, at any material time, been in a position to comply with its obligations in terms of clause 7.5 of the franchise agreement.

12. Notwithstanding the facts pleaded in paragraph 11 above, the defendants, relying on the provisions of clause 7.5, purported to cancel the franchise agreement on the basis that the plaintiff did not conclude a lease for the approved location within six months of the date of signature thereof.

13. The plaintiff pleads that:

13.1 the obligation to conclude the lease agreement was dependant upon the defendant's prior compliance with its obligation to identify the approved premises and to negotiate a lease between the franchisee and the landlord in respect thereof as set out more fully hereinabove; and/or

13.2 performance by the plaintiff of the obligation imposed upon it has become objectively impossible, and the plaintiff is excused from compliance therewith.

14. As a result of the defendant's breach alternatively repudiation of the franchise agreement, the plaintiff has elected to cancel same.

15. Alternatively, and by virtue of the operation of the terms or conditions pleaded in paragraph 7 above, the franchise agreement has been rendered unenforceable.

16. In either event, the defendant is obliged to repay to the plaintiff the sum of R285 000,00 (including VAT) paid by the plaintiff to the defendant on or about 6 June

2002."

In the alternative the plaintiff pleaded that the provisions of clause 7.5 constituted a penalty stipulation in terms of section 3 of the Conventional Penalties Act no. 15 of 1962 and that it was out of proportion to the prejudice suffered by the defendant as a result of the plaintiff's default.

Mr. Billis, the sole member of the plaintiff, gave evidence that he wished to acquire a franchise to operate a " Primi Piatti" restaurant. After various discussions with the defendant a site was identified for the restaurant in two shops to be erected at the entrance to the Cresta Shopping Centre. He then signed the franchise agreement. Before signing the agreement he had his attorney peruse it. He thereafter asked the defendant to make certain changes but the defendant, represented by Mr Castle, told him that he either took the agreement as it was or had to leave it. He then decided to sign the agreement.

At the time the agreement was signed Mr Castle showed Mr Billis an offer to lease from the Cresta management but he and Mr Castle felt that they should try and obtain better terms. Accordingly Mr Castle was mandated to enter into negotiations with the landlord to try and conclude a lease on more favourable terms than those initially offered.

Whilst the negotiations were taking place Mr Billis and his staff were obliged in

terms of the agreement to undergo certain training. Mr Billis found the training unpalatable and as a result of this and his refusal to undergo the full course and to allow his staff to be trained the relationship between him and Mr Castle deteriorated and a stage was reached when Mr Castle refused to speak to him.

By September 2002 the parties were dealing with each other through their then attorneys and on 29 October 2002 the defendant's attorney wrote a letter recording his clients version of events and in which the following statement appeared at paragraph 4.1.2 - "It is your client's responsibility to finalise the lease. He has been ably assisted in regard thereto by our client in terms of clause 7.1 of the franchise agreement."

According to Mr Billis he then tried to get into touch with the letting agents for the Cresta Shopping Centre namely a Mr Steenekamp and a Mrs Gerda Burger. Mr Steenekamp did not return his calls and Mrs Burger informed him that she was only prepared to deal with the franchisor. He, accordingly, was unable to negotiate a lease. He was in any event uncertain about whether the agreement was going to continue because of the dispute about the training and was therefore reluctant to commit the plaintiff to a lease unless there could be certainty about the restaurant opening.

Mrs Burger gave evidence and confirmed that she had told Mr Billis that she was

dealing with the franchisor. She however under cross-examination conceded that if she had been told that Mr Castle was no longer acting for the plaintiff she would have been prepared to negotiate with Mr Billis. She also said the landlord was anxious to conclude a lease and on the right terms would have concluded a lease.

Mr Castle gave evidence for the defendant. He said he dealt with Mr Steenekamp and Mrs Burger and that he was trying to get the landlord to make a substantial capital contribution in respect of improvements to the site. In the main his evidence accorded with the evidence of Mr Billis save that they differed about the dispute relating to the training and as to whether Mr Billis failed to keep an appointment with the letting agent. These disputes, however, are not material in regard to the issues to be decided by me. Mr Castle said that after he and Mr Billis started arguing he did not proceed further with the negotiations relating to the lease. He, however, did not do anything to prevent the plaintiff from continuing with the negotiations and concluding a lease. In this regard his evidence was substantiated by Mrs Burger who said that Mr Castle at no stage informed her that she was not to deal with Mr Billis.

In relation to the prejudice sustained by the defendant due to the cancellation of the agreement Mr Castle averred that the defendant had suffered serious financial loss and potential loss. He said that he had spent a considerable

amount of time and money in coming from Cape Town to Johannesburg to deal with the letting agent and the architect. Further he said that the defendant had expended money in providing the training facility for the plaintiff and its staff. Finally and most importantly the defendant would have earned, according to him, a minimum of R40 000 a month in royalties had the plaintiff started to operate a restaurant as contemplated in the agreement. Thus even if the defendant could find another franchisee it would have lost six months trading worth at least R240 00 0 to it.

I now turn to consider whether the plaintiff has succeeded in proving the facts necessary to support the allegations made by it in its particulars of claim. In regard to the allegation contained in paragraph 6 of the particulars of claim that the obligation contained in clause 7.5 was conditional on a lease being negotiated I cannot understand the basis for this construction of the clause. The very obligation contained in the clause is to conclude a lease and thus it cannot be said that this obligation is conditional upon the plaintiff concluding a lease. This argument is entirely circular and does not bear logical analysis.

In regard to the alleged implied or tacit terms of the agreement listed in paragraph 7 of the particulars of claim no reasons could be advanced why it was necessary to import these terms into the agreement especially in the light of the fact that the agreement in clause 2.3 specifically recorded that "This agreement

constitutes the entire agreement between the parties."

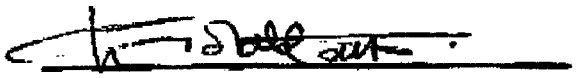
In regard to the allegation that the agreement fell to be rectified (vide paragraphs 8 9 and 10 of the particulars of claim) the plaintiff conceded that the facts alleged had not been proved.

In regard to the allegation that it became "objectively impossible" to conclude a lease. The evidence of Mrs Burger made it clear that in fact the owner of the premises was genuinely anxious to conclude a lease for the premises on reasonable terms. In any event it seems to me that the plaintiff in terms of clause 7.5 bore the risk of it becoming impossible to conclude a lease.

In regard to the question of whether the penalty stipulation was out of proportion to the prejudice suffered by the defendant as a result of plaintiff's default I am satisfied that the evidence of Mr Castle established that the defendant suffered considerable prejudice as a result of the default by the plaintiff. The loss of royalties alone would be proportionate to the penalties sustained by the plaintiff.

I accordingly make the following order:

Plaintiff's claims are dismissed with costs.



LI GOLDBLATT

JUDGE OF THE HIGH COURT

Counsel for Plaintiff:	S C Goddard
Instructing Attorneys:	EQM Hunter
Counsel for Defendant:	R G Goodman SC
Instructing Attorneys:	Gordon Holtman
Date of Hearing:	22 October 2003
Date of Judgment:	10 November 2003