REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: A 119/2013

8/8/2014

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

7 August 2014 EWMbuzi

DATE SIGNATURE

IN THE MATTER BETWEEN:

MIDAS PAINTS (PTY) LTD	**1ST APPELLANT**
EARTHCOTE FRANCHISING CO (PTY) LTD	**2ND APPELLANT**
and	
TKO PEST CONTROLLERS CC	**1st RESPONDENT**
K S MODZUKA	**2ND RESPONDENT**
K S MODZUKA N.O	**3RD RESPONDENT**
(as executor in the deceased estate of H D Modzuka)	
MUDI EARTHCOTE PAINTS CC	**4TH RESPONDENT**

J U D G M E N T

Heard on: 28 May 2014

Handed down on: 7 August 2014

KUBUSHI, J

INTRODUCTION

[1] This is an appeal against the whole of the judgment and order of Makgoka J granted on 30 July 2012, in which the second, third and fourth respondents' counterclaim was upheld with costs. The first and second appellants were as such found jointly and severally liable to the second to fourth respondents for contractual damages as they might prove in due course.

[2] At inception of proceedings the first appellant had claimed payment by the first to third respondents of a capital sum plus interest due and payable in respect of goods sold and delivered to the first respondent. The first to third respondents defended the claim and in addition filed a counterclaim. Subsequent to the said plea and counterclaim the first to third respondents applied for and were granted leave by the trial court to join the second appellant as the second plaintiff and the fourth respondent as the fourth defendant to the proceedings. Consequent to such joinder, the first to fourth respondents applied for and were granted leave to amend their counterclaim. Before the matter could be heard the first and second appellants withdrew their claim against the first to the fourth respondents due to the incorrect citation of the parties. As a result what was eventually heard by the trial court was the counterclaim only.

[3] No judgment was granted in favour of the first respondent and as such the first respondent is not party to this appeal. The third respondent has since died and her estate is represented in these proceedings by the second respondent in his capacity as the executor of her estate. For convenience I shall refer to the parties in this judgment by their respective names as follows: I shall refer to the first appellant as

Midas; the second appellant as Earthcote; the second and third respondents as the Modzukas; and the fourth respondent as Mudi. Where I refer to Midas and Earthcote together I shall refer to them as appellants and where I refer to the Mudzukas and Mudi jointly I shall refer to them as the respondents.

FACTS

[4] The factual background of this matter is that in June 2004 whilst purchasing paint for a house they were building, the Modzukas developed an interest to sell that paint. There were two types of paints, namely, the Midas paints and the Earthcote paints. They bought that paint from a paint shop in Brooklyn, Pretoria. In October 2004 the Modzukas started formal negotiations with the representatives of Earthcote, a franchisor of the said paints, for the purchase and opening of a franchised business to be known as Midas Earthcote Hartebeespoort. The said business was to be operated by Mudi a close corporation of which the Modzukas were its members, as franchisee. The negotiations culminated in a franchise agreement signed on 18 March 2005 between Earthcote, duly represented by Lin Castle and Mudi duly represented by the Mudzukas. With the assistance of Earthcote, a store was set up at the Sediba Plaza in Hartebeespoort and as such Mudi commenced business on 1 May 2005. Pursuant to the agreement, in March 2005, the Modzukas attended a week's training in Cape Town on how to operate the franchise. And as part of their training they were taken to the factory where the paints are manufactured as well as to other franchise stores around Cape Town.

[5] At the inception of the agreement the paints were stocked and sold by two distinct stores with two different signages, namely, the Midas paints store with a signage

that was red and white with a blue background with the word *'MIDAS Paint Lab'* in red and blue embolden very prominently in the middle of the board. Written beneath the word was a pay-off line *'Creators of Great South African Paints'*. The second shop was the Earthcote paints store with a signage that had a silver /chrome lettering against wood, with three brush strokes above the words *'Earthcote'*. There were other stores, like the Brooklyn store where the Modzukas purchased their paint, which stocked and sold both types of paints. These stores bore both signages for Midas paints and for Earthcote paints. These three store brandings are the ones the Modzukas allege to have seen and were aware of before Mudi bought into the franchise. The appellants' evidence confirms the signages as those in use at the time.

[6] From the beginning, Mudi was set up to sell both types of paints, namely, the Midas paints and the Earthcote paints. Therefore, when Mudi was opened it was expected that it would bear both signages for the Midas paints and the Earthcote paints. However, it was fitted with a signage different from those already in use at the time. The signage provided to Mudi by Earthcote was inscribed with the words *'Midas Earthcote'* in white against a red background. An identical signage was fitted to the billboard of the shopping centre where the shop was situated. This signage, as can be perceived from paragraph [5] of this judgment, was different from the other signages that existed and which identified other Earthcote's franchised businesses that sold both types of paints. It was even different from the signage placed at stores that stocked and sold individual paints. According to the Modzukas the branding was different from the one displayed at the Brooklyn store where they bought paint and where they were first enticed to buy into the franchise; it was also different from the other signages they saw at all the stores where they were taken to during their training in Cape Town.

[7] The Modzukas raised their concern with Earthcote and persisted in their demand for a signage similar to all the other stores. The issue was raised again, aggressively so, at a franchise '*bosberaad*' where Earthcote discussed pertinent issues concerning the business with its franchisees. Emanating from this '*bosberaad*' a new signage was put up at the Modzukas' store in March 2006. The new signage was a fusion of the distinct logos of Midas and Earthcote, with red lettering on a red background, both names retaining their distinct nature, font and lettering and the Earthcote's three brush strokes were retained above its name; so was the Midas pay-off line *'Creators of Great South African Paints'*. This branding was still different and the Modzukas were not satisfied. It is however, common cause that this signage was eventually rolled out to other stores and that it was still the brand in use at the time of the hearing of this matter.

[8] At the time Mudi was set up, Midas and Earthcote had taken a decision that all franchisees should offer both Midas and Earthcote paints and that a new joint branding be designed for their stores. And as such, when the Modzukas took up the issue with Earthcote, they were informed that Earthcote was in the process of changing the signage to a new one which incorporated both paint businesses. The appellants contended that the Modzukas had been informed about these developments and knew that there were to be changes in the Midas Earthcote branding – this however is denied by the respondents. According to the evidence of the appellants the signage that was provided to Mudi was the result of Earthcote's engagement of its design teams and consultation with franchisees. In particular, the second new signage was designed at the behest of the Modzukas, after consultation with the franchisees at the '*bosberaad*'.

[9] The respondents' complaint in the counterclaim was that due to the signage provided to them by Earthcote which was different from the signages provided to other franchisees their store was the 'odd one out'. Members of the general public who were aware of the Midas Earthcote brand questioned Mudi's authenticity – they were not convinced that Mudi was a genuine Earthcote franchise, or that the paints sold were genuine Earthcote products and the potential customers could also not recognise the store. This state of affairs, according to the Modzukas, affected Mudi's sales negatively. This, according to the Modzukas, was compounded further by the fact that Mudi was not mentioned in the Earthcote's website as one of the franchised stores; nor was it shown in an advertisement by Earthcote in a lifestyle magazine, House and Leisure – the June 2006 issue – as one of the franchise stores. This situation led to Mudi not being able to meet its financial obligations to Earthcote. Consequently Earthcote sued Mudi together with the Modzukas' in their capacities as sureties, for payment of moneys due and owing hence these proceedings.

THE ISSUE

[10] There were two issues which the trial court had to consider which still remain issues before this court. The primary issue for determination was whether the appellants repudiated the franchise agreement. The trial court decided in favour of the respondents and made a finding that even though in terms of sub-clauses 3.1, 3.3 and 3.7 of the franchise agreement, Earthcote reserved the right to improve, develop and modify its trademarks and marketing program, however, Earthcote's conduct of furnishing only Mudi with the signage and promotional material dissimilar to all other franchisee stores was unreasonable. It, as a result, came to the

conclusion that by so doing Earthcote had repudiated the franchise agreement. The second issue decided by the trial court was in respect of the appellants' contention that Midas was not a party to the franchise agreement and can as a result not be contractually liable for damages due to breach of contract. In this regard the trial court found that Midas by its conduct closely associated itself with the agreement as franchisor, and was, as a result, party to the disputed signage being erected at Mudi's store. To that extent it held Midas liable to the respondents for breach of the franchise agreement.

THE GROUNDS OF APPEAL

[11] In their heads of argument the appellants submitted the following grounds for the appeal:

11.1 that the second appellant did not repudiate the agreement when it engaged in the branding and re-branding processes;

11.2 that the second appellant was not guilty of repudiation when it cancelled the agreement on account of the fourth respondent's overdue indebtedness;

11.3 that, even on the trial court's assumptions, the counterclaim was incapable of giving rise to any liability on the second appellant's part; and

11.4 that even on the trial court's further assumptions, the counterclaim was incapable of giving rise to any liability on the first appellant's part.

APPLICATION OF THE LAW

Repudiation

[12] Repudiation is said to consist of two parts: the act of repudiation by the guilty party, evincing a deliberate and unequivocal intention no longer to be bound by the agreement, and the act of his adversary accepting and thus completing the breach. See *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd*[1].

[13] Repudiation is in the main a question of the intention of the party alleged to have repudiated. The true question is whether the act or conduct of the party evinces an intention no longer to be bound by the contract. The test as to whether conduct amounts to repudiation is whether fairly interpreted it exhibits a deliberate and unequivocal intention no longer to be bound. See *Culverwell and Another v Brown*[2] and *BP Southern Africa v Mahmood Investments*[3]

The intention not to be bound

[14] It is common cause that the signages provided to Mudi at the commencement of business or the one provided after the '*bosberaad*" were different from the signages used by the other franchised stores. The question in this instance is whether Earthcote by its failure to provide Mudi with a signage similar to the other franchisees exhibited a deliberate and unequivocal intention no longer to be bound.

---

1 2001 (2) SA 284 (SCA) para [1] at 287G

2 1990 (1) SA 7 (A) at 14B – D

3 [2010] 2 All SA 295 (SCA)

[15] The trial court's conclusion is that this conduct on the part of Earthcote exhibited its intention not to proceed with the agreement, that is, it repudiated the agreement. The trial court based its reasoning on the principle of uniformity in franchise agreements. According to the trial court, uniformity is the substratum of the relationship between the franchisor and the franchisee absent which the relationship between the parties would be severely undermined.

[16] The appellants' argument is that at the time of the conclusion of the agreement there was no uniformity in respect of the brands. They contend that before concluding the agreement with the respondents, the respondents were, at the very least, aware of the three different signages that existed at the time. The respondents had also been informed of Earthcote's intention to engage in the branding and re-branding of the paint products and associated signage. In the main their argument is that Earthcote was entitled, in terms of the agreement, to act as they did because the agreement entitled them to do so. This argument by the appellants was based on Earthcote's alleged discretion to change its trademark and logos as provided for in sub-clauses 3.1, 3.3, 7.3 and 12.5 of the agreement.

[17] I am in agreement with the trial court's factual finding that Earthcote's conduct to embark on the re-branding of the signage was in good faith. I am also in agreement with its conclusion that Earthcote's exercise of its discretion in terms of the agreement to change and/or amend its trademarks was, in the circumstances of this case, unreasonable.

[18] The submission by the appellants' counsel that at the time of conclusion of the agreement there was no uniformity is not correct. There was uniformity in the sense that all the stores which sold the Midas paints had a Midas paints signage; all those which stocked and sold the Earthcote paint bore an Earthcote paints signage and those which stocked and sold both types of paints displayed both signages. In my understanding, the changes which were envisaged by Earthcote were meant to unify all the three so that all stores sold the two types of paints. It was therefore expected that Mudi would be provided with the two signages for Midas paints and Earthcote paints as it (Mudi) was set up to stock and sell both types of paints.

[19] Branding of the franchise business is normally the most visible feature of any franchise operation and can be described as the main force behind the attraction of customers. Branding is thus made exclusively available for the collective benefit of all involved in the franchise operation. It does not appear from the evidence that the branding provided to Mudi, by means of the signage, was meant to benefit it in the same manner in which the collective benefited. 'Collective' in this sense would mean the stores which sold both types of paints and which had both signages. It is common cause that because of the signage provided to Mudi, Mudi was the 'odd one out' of the other franchisees. This is further fortified by the unchallenged evidence of the respondents that members of the general public who were aware of the Midas Earthcote brand questioned Mudi's authenticity because they were not convinced that Mudi was a genuine Earthcote franchise, or that the paints sold were genuine Earthcote products and also that the potential customers could not recognise the store.

[20] In my opinion therefore, the trial court is correct to have found that Earthcote acted unreasonably by failing to provide Mudi with a signage similar to the other franchisees. Mudi was entitled in terms of the agreement to a signage that was similar to the other franchised stores; a signage that would have identified it as a member of the franchise. Sight should not be lost that the branding of a franchise forms its foundation and that franchisees pay for the right to use a recognised brand. The signage similar to the other franchisees, those who sold both types of paints for instance, would have distinguished the goods and services offered by Mudi, in this regard the paints branded by Earthcote and would have attracted potential customers. Even though the signage that was erected in March 2006 was eventually rolled out to the other franchisees, at the time it was erected at Mudi it still made Mudi the 'odd one out'. The appellants' evidence conceded that the signages provided to Mudi were neither recognised brands nor were they registered trademarks. The submission by the appellants' counsel that the changed signage could not be rolled out to all the franchisees at the same time because of the size of the business is to me of no substance. I also find the submission by the appellants' counsel that not all the stores were ready for the changes to be untenable.

[21] It is indeed so that franchisors may from time to time make improvements to their business systems and branding. Such improvements should not, in my view, be to the detriment of the franchisees. Provisions should be made to ensure that the business operations of the franchisee are not jeopardised by such improvements. In this instance, it does not appear from the evidence that provision was made to safeguard Mudi's business operation against the risk of negative impact by such improvements, particularly as it was a new store. There is no evidence on record that the new signages were advertised to make the public aware of the changes

and/or to develop a general public recognition of the new signages, before they were installed even whilst they were already displayed. It is also common cause that Mudi was not mentioned in the Earthcote website as one of the franchised stores nor did Earthcote mention Mudi in an advertisement in the House and Leisure magazine. I therefore have to conclude that the failure by Earthcote to provide Mudi with the same branding as other franchisees and/or to provide safeguards against negative impact compromised its business operation and rendered Earthcote's discretion to improve or amend the signage unreasonable. That there was one other store in George that displayed the initial new signage or other two stores that displayed the new signage designed after the '*bosberaad*', does not take the appellants' argument any further. The fact remains that for the period of about eleven months, when the offending signages were displayed, Mudi was not treated the same as other franchisees, it remained the 'odd one out'.

[22] The appellants' other contention is that Earthcote did everything reasonably possible to assist the respondents in their business. In addressing the concerns of the respondents in regard to the signage, they went as far as to change the signage which was ready for rollout and had already been displayed at two stores one of the store being Mudi. They even removed the old signage displayed at Mudi and installed a new one free of charge. This, according to their counsel is not an indication of an intention not to proceed with the agreement. He is in my view wrong.

[23] In my opinion, the appellants' counsel lost sight of the fact that deliberate non-performance; an unequivocal tender to perform less than is due; or performance in a way not provided for in the agreement, for instance, may be such that a party to an agreement can properly be said to have repudiated without any positive statement or action. It is so that although repudiation classically involves a subjective intention to put an end to an agreement, a party may be held to have repudiated when he or she thought he or she was complying with his or her obligations under the agreement, provided of course that the term he or she has refused (or merely failed) to perform is of sufficient importance. See *Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou*[4] ; Christie: *The Law of Contract in South Africa*[5] and *Janowsky and Others v Payne*[6]

[24] Conceivably, it could happen that one party, in truth intending to perform may afterwards be held not to have done so; conversely, that his or her conduct may justify the inference that he or she did not propose to perform even though he or she can afterwards demonstrate his or her good faith and his or her best intentions at the time. However, it has been said that the emphasis is not on the repudiating party's state of mind, on what he or she subjectively intended, but on what someone in the position of the innocent party would think he or she intended to do; repudiation as it has been said is accordingly not a matter of intention, it is a matter of perception. The perception is that of a reasonable person placed in the position of the aggrieved party. Thus the test is whether such notional reasonable person would conclude that proper performance (in accordance with the true interpretation of the agreement) will not be forthcoming. The inferred intention

4 1978 (2) SA 835 (A) 845A – B and 846A

5 p527 -528

6 1989 (2) SA 562 (C) at 564I – J

accordingly serves as the criterion for determining the nature of the threatened actual breach. See *Datacolor, International (Pty) Ltd v Intamarket (Pty) Ltd* above [7].

[25] It is common cause that the term of the franchise agreement which the respondents allege the appellants to have not complied with is material. As I have already said branding of a franchise is the foundation of such a business. It is also not in dispute that from inception Earthcote provided Mudi with a signage that was different from the other franchisees. The uncontroverted evidence of the respondents is that a concern was raised immediately it became apparent to the respondents that the signage was prejudicial but nothing was done to remedy the situation. Earthcote only took action in August 2005, four months later when Modzuka raised the issue again at the '*bosberaad*'. It took another seven months, from August 2005 until March 2006 before the signage could be changed. As a result the offending signage was displayed for a period of eleven months, that is, from May 2005 until March 2006. I find the appellants' argument that the lead time required to design a signage is long, to have no bearing on this argument.

Acceptance of repudiation

[26] Where one party to an agreement, without lawful grounds, indicates to the other party in words or by conduct a deliberate and unequivocal intention no longer to be bound by the agreement, he or she is said to repudiate the agreement. Where this happens, the other party to the agreement may elect to accept the repudiation and rescind the agreement. If he or she does so the agreement comes to an end

7 at 294E – G

upon the communication of the acceptance of repudiation and rescission to the party who has repudiated the agreement. See *Nash v Golden Dumps (Pty) Ltd*[8].

[27] This aspect was never an issue before the trial court. There is nothing on record that indicates that the aspect was ever traversed either in the pleadings or in argument before the trial court. The trial court did not deal with it in its judgment as well. In reply to a question put to the appellants' counsel during the hearing of the appeal, both counsel were not agreed whether the issue was common cause or not. The pre-trial conference minutes to which the respondents' counsel referred us to, do not form part of the record. However, from the reading of a letter dated 7 June 2006 addressed to the Modzukas by Midas Earthcote, it seems that the respondents did furnish Earthcote with 'notification of cancellation of the franchise agreement' which would have meant the acceptance of the repudiation. The letter forms part of one of the Bundle of documents, Bundle "A", which were handed in court during the trial and forms part of the record. I therefore have to infer that it was common cause between the parties that the respondents accepted the repudiation.

[28] I am thus in agreement with the trial court's conclusion that since it was Earthcote who repudiated the agreement first, it (Earthcote) could not retroactively nullify the repudiation by taking Mudi's later breach and cancelling the contract before Mudi thought of doing so. Repudiation does not only entitle the innocent party to cancel but while it endures, it relieves him or her from the obligation to perform or to tender performance. See *GNH Office Automation CC & Another v Provincial*

8 1985 (3) SA 1 (A) at 22D – F

Tender Board, Eastern Cape, & Another [9] and Christie: *The Law of Contract in South Africa* [10].

Contractual Liability of Midas

[29] The respondents' evidence on this point is that they were informed that Midas and Earthcote have merged and will trade under one name, Midas Earthcote. According to Modzuka the impression created was that the two companies are the same hence Mudi sold the Midas as well as the Earthcote paints.

[30] The trial court found in favour of the respondents on this point based on the close association between Midas and Earthcote. I, however, do not agree with this finding.

[31] Mudi as the franchisee entered into the franchise agreement with Earthcote as the franchisor. Earthcote was duly represented by one Lin Castle. In terms of the agreement, Earthcote granted to Mudi the right to operate a Midas Earthcote franchised business. The franchised business is the business known as Midas Earthcote Hartebeespoort, incorporating both Midas paints and Earthcote paints.

9 1998 (3) SA 45 (SCA) at 51F

10 1998 (3) SA 45 (SCA) at 51F

[32] To my mind, the trial court failed to take into account that there were two companies involved in this operation. One company was in regard to the paint business, namely, Midas Paint Lab (Midas Paint (Pty) Ltd) and the other was to market and franchise the paints, namely Earthcote. The merger that Modzuka allege to have happened is in respect of the paint businesses, that is, the Midas paints business and the Earthcote paints business. As a result of the merger Midas Paint Lab, incorporating Earthcote paints and Midas paints was born. Midas, as a paint business trades in the name Midas Earthcote. This information is available in the Disclosure Document of Earthcote which forms part of the Bundle of documents, Bundle "A", which were handed in court during the trial.

[33] The confusion might have been brought about by the fact that the same persons are involved in both companies. Some of the shareholders in the paint business are also shareholders in the franchise business. The shareholders are also directors in the respective companies and operate the businesses as well. For example, Linda "Lin" Jean Castle is a shareholder and director of Earthcote, she is also the legal advisor of Midas Earthcote; Michael "Mike" Vadas is the director and chairman of Midas Earthcote and also a shareholder and director of Earthcote. This is all evident from the Disclosure Document stated in paragraph [32] of this judgment and the letters on record contained in Bundle "A" which were written by Midas Earthcote to Mudi and/or the Modzukas.

[34] On the facts before me, I could not come to the same conclusion as the trial court that because of the merger Midas was also liable to the respondents for breach of the franchise agreement.

[35] Consequently I make the following order:

35.1 The appellants appeal succeeds in part.

35.2 The trial court's order is amended to read as follows:

'1. The defendants' counterclaim is upheld with costs;

2. The second plaintiff is liable to the second, third and fourth defendants for whatever damages the above defendants may prove;

3. The determination of quantum of those defendants' damages is postponed *sine die*.'

E.M. KUBUSHI

JUDGE OF THE HIGH COURT

I concur

S STRAUSS

ACTING JUDGE OF THE HIGH COURT

I concur and it is so ordered

M. W. MSIMEKI

JUDGE OF THE HIGH COURT

On behalf of the appellant: **Adv. M. Du P VAN DER WEST, SC**

Adv. R. M. PEARSE

Instructed by:

MARK W NIXON

2nd Floor, Hatfield Mall

424 Hilda Street Hatfield

PRETORIA

On behalf of the respondent: **Adv. N. DAVIS, SC**

Instructed by:

MODZUKA ATTORNEYS

Suite 202 Nedbank Building

190 Andries Street

PRETORIA