

SOUTH AFRICA / JUDGMENT

Charioteer Trading CC v Fontis Holdings (Pty) Ltd and Another (1500/2012) [2014] ZANWHC 38 (21 August 2014) [2014] ZANWHC 38

COURT

North West High Court, Mafikeng

BEFORE

N Gutta

CASE / FILE NUMBER

1500/2012

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“IN
THE HIGH COURT OF SOUTH AFRICA”
NORTH
WEST HIGH COURT, MAHIKENG
CASE
NO. 1500/2012
In

the matter between:

CHARIOTEER
TRADING
CC
PLAINTIFF
and
FONTIS
HOLDING (PTY) LTD
1ST
DEFENDANT
BOITEKONG
MALL (PTY)
LTD
2ND
DEFENDANT

JUDGMENT

GUTTA J.

A.

INTRODUCTION

[1] The plaintiff, Charioteer Trading 1018 CC, issued summons against the first defendant, Frontis Holdings (Pty) Ltd (“Fontis”), and the second defendant, Boitekong Mall (Pty) Ltd, for damages in the amount of R10 000 000.00 (Ten Million Rand) arising out of a breach of an agreement of lease.

B. RULE 36(9) & RULE 33(4)

[2] At a pre-trial conference held on 24 January 2014, the parties agreed that there were no issues to be determined separately, in terms of Rule 33(4).

[3] The first witness called by the plaintiff was its expert, Mr Norman Robert Preston.

[4] Counsel for the defendant, Mr Shepherd, raised an objection to Mr Preston’s evidence being led on the grounds that the expert notice filed does not comply with Rule 36(9)(b) because the facts on which the opinion is premised does not appear from the expert notice.

[5] This Court, after hearing submissions, ruled that the Court will not allow Mr Preston to testify until there is compliance in terms of Rule 36(9).

[6] Thereafter counsel for the plaintiff, Mr Lengane, applied for a separation, in terms of Rule 33(4), of merits and quantum. The application was not opposed.

[7] This Court accordingly granted the separation of the quantum and merits, and the matter proceeded on the merits only.

C. THE ISSUE

[8] The only issue for consideration is whether the parties concluded a lease agreement, that is whether the letter dated 28 July 2011, from Mr Fowler addressed to Mr Dolo constitutes an offer and the undated letter from the plaintiff addressed to Mr Fowler constitutes an acceptance of the offer.

D. THE PLAINTIFF’S CASE

[9] The first witness called by the plaintiff was Ms Kate Malahlela, who testified that she worked as a consultant for Old Fashion Fish and Chips (“Old Fashioned”) from 2007 to 2012. Her employer was one Emilia de Souza.

- [10] She testified that she is the author of an email sent to WKP Canteen on 01 September 2011, informing them that their application for the Old Fashioned franchise was in principle approved, subject to the WKP Canteen paying the initial deposit of R100 00.00 and signing the franchise agreement. She said that the deposit of R100 000.00 was not paid.
- [11] The next witness called was Mr Abram Dolo (“Mr Dolo”), who testified that the plaintiff is a close corporation and he is the sole director (member).
- [12] He testified that Mr Vernon Edwin Fowler (“Mr Fowler”) is a developer of the Boitekong Mall in Rustenburg. He obtained his name from the contractors whose name appeared on the board on the construction site, and he entered into negotiations with Mr Fowler in June 2011 about opening a fish and chips shop. He said after the first telephone conversation, Mr Fowler sent him a letter on 28 July 2011, which was an offer to let a space at the Boitekong Mall, where he would run his Old Fashion franchise.
- [13] He identified the correspondence dated 28 July 2011 on the first defendant’s letterhead, signed by Mr Vernon Fowler, which reads, inter alia, “We would therefore like to propose the following terms and conditions to you for your consideration”, as the offer. In the covering letter to the correspondence dated 28 July 2011, which was emailed, Mr Fowler stated, inter alia, that “It is imperative that you give an indication with regard to your participation in the scheme as soon as possible as the main contractor is on site and therefore your layout needs to be issued to the contract [sic]”.
- [14] Pursuant thereto he said he addressed a letter to Mr Fowler on the plaintiff’s letterhead, wherein he accepted the offer (A14). He testified that the words “I would like to confirm that my interest in your development in the Boitekong Mall with all the conditions”, is his acceptance of the offer. He agreed that the letter does not use the words ‘accept’ and ‘offer’ and explained that as a Setswana speaker, it was his intention to accept the offer.
- [15] He said on 08 August 2011 he received a letter from Mr Fowler, where he said “Kindly send me the FICA docs for the entity, the heads of agreement is to be drawn up as well as the name of the brand to be traded”. He sent Mr Fowler the CK documents and his identity document and Mr Fowler telephoned him and confirmed receipt and said that those were the documents he required.
- [16] On 01 September 2011, he sent an email to Mr Fowler, wherein he attached the email he received from Ms Malahlela as proof that his application for the franchise was approved. His email address is ‘wkpcanteen@exstrata.co.za’. He said he did not pay the R100 000.00 deposit for the franchise because on the same day, he received an email from Mr Fowler stating that he should not pay the R100 000.00 until his “letter has been received by the landlord”.
- [17] He said the agreement was repudiated on 28 September 2011 when he received an email from one Karen Smit, which was copied to Mr Fowler of the Fish and Chips Company, wherein she, inter alia, stated that “I regret to inform you that unfortunately the Boitekong Mall, Rustenburg is not available anymore and an operator has already been appointed”. He

said he was surprised when he received the email as he did not apply for the Fish and Chips Company franchise. He said presently there is a fish and chips business operating from the same shop which he was offered.

- [18] Under cross-examination, it was put to him that the board from which he obtained the contractor's name was only put on the site in July 2011, hence his telephone call with Mr Fowler was in July 2011 and not June 2011. This, he denied. It was also put to him that the brand, Old Fashioned, was only disclosed later, which appears from documents. This, he denied and said that Mr Fowler called him and enquired about the brand and he told him it was the Old Fashioned.
- [19] It was further put to him that in the letter dated 28 July 2011, which was addressed to him in his personal capacity, the word 'proposal' was used and not 'offer', and in the letter where the site plan and tenant criteria was attached, he was requested to give an indication with regard to his participation in the scheme, not to accept any proposal. Also, the letter reads that they are proceeding with the discussions and negotiations. He replied that it refers to:
- "discussions and negotiations regarding the lease agreement because it is during our telephone discussion with Mr Fowler, he told me that as regards the site all was well, I will occupy the shop and promised to send me the documents."*
- [20] Under cross-examination, he was referred to the last paragraph, which reads "We trust that you find the attached proposal to your liking and look forward to finalizing your lease commitment in Boitekong". Mr Dolo admitted that the paragraph refers to a proposal and not an offer, and that lease commitment refers to a lease agreement.
- [21] When asked what other aspects had to be finalized pertaining to the lease commitment, Mr Dolo replied that there was a surety form which had to be signed, which he did not sign as Mr Fowler did not give to him. It was put to him that in all instances where lease agreements are concluded in respect of tenants for the mall, formal lease agreements are concluded and suretyships. Mr Dolo replied that he cannot dispute that, all he knows is that he was given an offer except for the surety form that was outstanding. He further testified that he knew that a franchise agreement was a prerequisite for the lease agreement.
- [22] He said the undated correspondence, A14, which is the letter of acceptance, was sent on 30 July 2011. When asked whether there was any correspondence before he sent this undated letter to Mr Fowler, he said he could not remember. He was then referred to an email he sent to Mr Fowler on 29 July 2011, wherein he thanked Mr Fowler for the speedy response and said that he will be meeting the franchisor on Tuesday and will be in a position to respond by Friday.

- [23] He was directed to the email dated 08 August 2011 from Mr Fowler, and it was put to him that he did not send the FICA documents with his email and he replied in the affirmative. He said Mr Fowler informed him that they did not appear with his email and that he should resend them to him. However, in his evidence in chief, he testified that he sent Mr Fowler the FICA documents and Mr Fowler telephoned him and confirmed receipt.
- [24] It was further put to Mr Dolo that what Mr Fowler said in the email is that he will provide him with an agreement and the deposit that is payable. He replied that this is not how he understood it. When asked why he did not respond to the email to say that he already has an agreement, he replied that he discussed it with Mr Fowler when he phoned him.
- [25] He said the plaintiff never entered into any franchise agreement/negotiations with Fish and Chips Company and was surprised to receive the letter from Ms Smit of Fish and Chips Company. He was then asked to explain the email dated 16 September 2011, wherein he asked Mr Fowler if he spoke to Ms Smit and what transpired. He explained that Mr Fowler explained that he

should talk to the people of Fish and Chips Company as Old Fashioned is not well managed, and he gave him Ms Smit's number. He said he phoned Ms Smit and she was confused and surprised that he called her as Mr Fowler had already referred somebody to her.

He admitted that Mr Fowler told him that Old Fashioned was not the preferred franchise.

E. APPLICATION FOR ABSOLUTION

- [26] After the plaintiff closed its case, the defendant applied for absolution from the instance. I heard submissions from both the plaintiff and the defendant, and refused the application with costs in the action, with reasons to be provided in this judgment.

- [27] In brief, Mr Shepherd submitted the following:

27.1 the first defendant was cited as an agent and it is not competent for an agent to either sue or be sued in its capacity. The only basis to sue the agent is if the agent was negligent or misrepresented and this is not the plaintiff's case;

27.2 the sole question is the proper interpretation of the document;

27.3 the alleged offer was addressed to Mr Dolo in his personal capacity, hence it was not an 'offer' to the plaintiff;

27.4 from the wording of the document and the circumstances surrounding the document and the negotiations, the letter was sent with the intent to proceed with discussions and negotiations. The word 'propose' does not mean offer. From the plain wording of the document, it cannot be said that it was a firm offer that you can, by mere acceptance without more, conclude a contract. There was no agreement of lease;

27.5 in the letter from the plaintiff, which the plaintiff alleges is the acceptance, he does not state that he accepts the offer;

27.6 after this document, is the email from Mr Fowler requesting the FICA documents for the entity that the HOA is to be drawn up from and the name of the brand to be traded and that the HOA will indicate the deposits done and the terms of the lease. Hence, it is clear that there was no agreement of lease conducted;

27.7 this is also apparent from the email of 01 September 2011 to Mr Dolo, that he should not pay any fees until the offer has been accepted by the landlord. There is no evidence that Mr Dolo questioned the issue that the offer must still be accepted by the landlord;

27.8 the plaintiff admitted that it was a prerequisite of the lease that a franchise agreement be entered into, hence a lease could not have been entered into a month before the franchise was approved;

27.9 Mr Dolo initially relied on a written agreement concluded on 30 July 2011, and in cross-examination he testified that he concluded an oral agreement with Mr Fowler during June 2011. It is not the plaintiff's case that they had a pactum de contrahendo.

[28] Mr Lengane submitted the following:

28.1 the offer was made by Mr Fowler, who is an agent of Fontis, and Fontis is a leasing agent for the second defendant. A person makes an offer when he puts forward a proposal;

28.2 Mr Fowler must be called as a witness to show that he did not have animus contrahendi, the intention to contract;

28.3 in any event, an offer, even made subjectively unintentionally, once accepted on a reasonable basis is an offer in law;

28.4 all the essentials for an agreement of lease are present in the letter dated 28 July 2011;

28.5 Mr Dolo was requested, in an email dated 28 July 2011, to give his layout needs to the contractor. Hence, he would not have been requested to supply the layout needs if he had not been approved as a tenant;

28.6 it is Mr Fowler who frustrated the fulfilment of the franchise agreement and he cannot rely on this to say there is no lease agreement.

Analysis

[29] The purpose of an application for absolution is that in circumstances where the plaintiff, after presenting all his evidence, it appears that the evidence does not have the potential for a finding in his favour and it would be senseless to allow the proceedings to continue.

[30] The standard is whether a reasonable person could or might decide in favour of the plaintiff, and the decision must be decided on objective grounds. (Own emphasis)

- [31] The requirement is that at this stage, the plaintiff must have established a prima facie case because on prima facie evidence, the Court could or might decide in the plaintiff's favour.
- [32] If the plaintiff's case is based on a document, and the interpretation of the document is in dispute, the interpretation on which the defendant relies must be virtually beyond doubt before his application for absolution can succeed. A decision on the meaning of a document is preferably reached only at the end of a case. See *HRH King Zwelithini of KwaZulu v Mervis* 1978 (2) SA 521 (W) at 526.
- [33] The difference between what a court can and should find tends to disappear when the point in issue is the interpretation of a document. See *Law of Evidence, Butterworths* 3–18, Service Issue 2004.
- [34] The facts in casu calls for an interpretation of a document, namely, whether the letter dated 28 July 2011 from the first defendant constitutes an offer, and whether the plaintiff accepted the 'offer'.
- [35] The interpretation relied on by the defendant was, in my view, not beyond doubt and the evidence of Mr Fowler was necessary to throw light on whether the proposal to Mr Dolo was made *animus contrahendi*. Although it is trite that only the person to whom the offer was made can accept the offer, the reason why I did not grant absolution is because, although an offer has been directed to a specific person this is not necessarily decisive of the offeror's intention. See *Hersch v Nel* 1948 (3) SA 686 (A) at 692; *Hill v Faiga* 1964 (4) SA 594 (W) at 596.
- [36] For the aforesaid reason, I dismissed the defendant's application for absolution from the instance.

F. THE DEFENDANT'S CASE

[37] The plaintiff called Mr Vernon Edwin Fowler, who testified as follows:

37.1 The first defendant, is a company whose main purpose is the management of developments. He was the leasing agent for Fontis. The owner of Boitekong Mall is the second defendant. The first defendant acted as an agent for the second defendant. He was involved in the procurement of tenants for the mall. This process entailed proposing the development to national tenants and franchise operators (franchisors), ascertaining the interest in the development and ultimately entering into agreements with these operators. He said anybody can apply to be a tenant of the development, but as the leasing agent, his responsibility is to have the best possible applicants for the tenants and to have the right tenant mix of anchor or national tenants. The final decision to approve the tenants lies with the second defendant;

37.2 Prior to this case, he had never met with Mr Dolo, and only spoke to him over the telephone. The first telephone call was in July 2011. He spoke to in excess of 100 people who were interested in taking up a lease at the Boitekong Mall;

37.3 Generally if a person calls to enquire about a lease for a shop, he would ask them what their interest in the mall is and what type of business they would like to operate. As people who telephone to enquire about leasing generally have many questions regarding the development, he prepared a rental proposal with basic details and information that covered the initial questions. The letter dated 28 July 2011 addressed to Mr Dolo was such a rental proposal and he did not consider this to be an offer to lease. He said it is “purely an information document which highlights the basic terms of development, should an agreement be concluded”. The covering letter to the letter dated 28 July 2011 reads “Attached kindly find the rental proposal for a Fish and Chips in Boitekong Mall”. He reiterated that the letter dated 28 July 2011 was not an offer, but a proposal;

37.4 He said in the letter dated 28 July 2011 when he said “we would therefore like to propose the following terms and conditions for your consideration” that it was purely the basic terms to lease the premises. He said it was not his intention to conclude a formal lease agreement, that it would be a firm offer;

37.5 He further explained that in the last paragraph where he wrote, “we trust that you find the attached proposal to your liking and look forward to finalizing your lease commitments in Boitekong Mall”, his intention was “purely that there was still negotiations and a finalizing of lease to follow this document”;

37.6 He said there was one phone call followed by this rental proposal, dated 28 July 2011. Following the initial rental proposal, there are follow up documents from which he starts to understand the feasibility of the tenant;

37.7 He said he did not discuss the name of the franchise with Mr Dolo, in their telephone discussion, and all that Mr Dolo mentioned was that it was a fish and chips franchise. It was important that Mr Dolo was associated with a particular franchise because their developments carry a high national component and it was always their intention to have a branded product in their premises. In respect of fish and chips, this is a specialized brand and product. Neither he nor the landlord would approve any agreement that was not associated with the national franchise. It was a requirement of the lease agreement that a franchise be obtained or a franchise agreement be entered into;

37.8 He said he knows Old Fashioned and they had made a joint decision early in the development not to do business with Old Fashioned because of their management style, the way they carry themselves as a company, what they propose and their brand;

37.9 He relied on the franchisor in their capacity to put together good operators and to propose good operators for development. When procuring tenants, they approved franchisors directly who would source operators in their best interest that can provide the best of their brand. In respect of the premises in question, the Fish and Chips Company (the franchisor) proposed Mr Kiri from Autum Skies Trading as the operator who is the tenant that the landlord ultimately approved. He said he sent a similar proposal to Autum Skies Trading on 13 September 2011, as he sent to Mr Dolo on 28 July 2011;

37.10 When asked to interpret the email sent by Mr Dolo the next day on 29 July 2011, wherein Mr Dolo says he will be meeting with the franchisor on Tuesday, he understood this to mean “he was still to meet with the franchisor and that he has not commenced or even concluded any negotiations with the franchisor”;

37.11 When asked how he interpreted the acceptance letter, A14, addressed to him by the plaintiff, he replied “purely that he was interested in the development”. He did not consider this letter to be an acceptance of the offer, as “there was no intent to enter into an agreement at that stage”;

37.12 His comment regarding the email he sent to Mr Dolo, on 08 August 2011, wherein he requested the FICA documents for the entity (company or individual) that the HOA is to be drawn up in and the name of the brand to be franchised, is “I had no knowledge or not been informed of what company he was representing and therefore I asked him whether a company or an individual and it is information that would be required should this negotiations proceed and it was purely for information purposes that I would hold that information and have it on record”. He said the HOA refers to the future negotiations and a lease agreement which may be concluded;

37.13 In response to the email from Mr Dolo to Mr Fowler, dated 01 September 2011, wherein Mr Dolo informed Mr Fowler that his application for the Old Fashioned was approved, he sent Mr Dolo an email dated 01 September 2011, wherein he suggested that Mr Dolo does not pay any fees to the franchisor until his offer was accepted by the landlord. When asked why he wrote this email, he said:

“It was clear now following the mail previously that his intention was to pursue or apply for a franchise of Old Fashioned Fish & Chips and as stated earlier, I am opposed to dealing with Old Fashioned Fish and Chips.

It was purely a suggestion to avoid him entering into an agreement with a company that I certainly was not comfortable with.”

37.14 When asked whether he could recall referring Mr Dolo to Ms Smit at the Fish and Chips Company for the purpose of obtaining a franchise, he replied, “Yes, I think my intention at that stage was there are other operations. If he wishes he can make contact with Fish and Chips Company”. He said it is the franchisor’s prerogative to choose an operator, and Mr Dolo was aggrieved that he was not chosen;

37.15 When he sent the rental proposal to Mr Dolo, he had no information on Mr Dolo, neither his history nor his track record and after he received his FICA documents, he found him to be lacking in operational franchises and there was no history;

37.16 The value of the development was approximately R170 million. The mall opened on 01 May 2012. He secured tenants for all the shops in the mall and none of the tenants concluded oral lease agreements. He said it is paramount to the development that a tenant is of a high quality and can add value to the development.

[38] Mr Fowler identified a copy of the HOA which he said is the final negotiated terms between the landlord and the lessee. In the HOA concluded with Autum Skies Trading, he explained several clauses which were included in the HOA, namely:

38.1 clause 4.3 provides for turnover rental, which is 5% of the tenant's net annual turnover calculated on the tenant's annual financial statements;

38.2 clause 4.4 is the operating costs, which is the running cost of the mall and includes securing cleaning services, etc, which was R17.10 (excluding VAT) per square metre;

38.3 clause 5 is the deposit which was two times the sum of the final monthly gross rental;

38.4 clause 7 provides for a marketing fund, which is a fund used for marketing the mall, advertising, promotions, etc, and the tenant pays 4% of the monthly basic

38.5 clause 12 is the health insurance that tenants, especially food tenants, have to comply with certain health and safety regulations and the tenants contribute to this;

38.6 clause 17 is trading hours, which tenants have to adhere to, and includes minimum trading hours on Monday to Sunday for all tenants;

38.7 clause 20 is credit netting, which is at the discretion of the landlord who has the right to check a tenant's credit record;

38.8 clause 15 is headed 'Offer and Agreement', and provides that once signed by the tenant, the HOA shall constitute an offer made by the tenant to the landlord, which offer is irrevocable and remained open for the landlord's written acceptance for a period of 6 months, and once the landlord has accepted the offer in writing, the HOA shall constitute a binding agreement of lease;

38.9 clause 16, provides for a formal lease, that follows the HOA, which contains house rules which are not negotiable. In terms of clause 16.4, the tenant will have no action for damages if the landlord does not accept the offer.

[39] Mr Fowler also identified a suretyship agreement, which he said forms part of the lease agreement and is a standard requirement of the agreement that an individual or the member sign the surety on behalf of a company or a close corporation.

[40] Under cross-examination, he said to the best of his knowledge when he wrote the letter dated 28 July 2011, he was still a director of the first respondent. Even after he ceased to be a director, he was employed by the first defendant, he was an agent for the first defendant.

- [41] He was questioned about an email dated 13 September 2011 that he sent to one Sello from Fish and Chips Company wherein he attached the rental proposal and the information for Boitekong Mall and enquired whether they have an operator in place or whether they would enter into a corporate lease to secure the site. He said the rental proposal was similar to the one he sent to Mr Dolo on 28 July 2011. He was asked why he wrote to Sello who he identified as the owner of Fish and Chips Company. He replied that it is not uncommon as the franchisor appoints the franchisee. He said Old Fashioned were not his and the developers' first choice. It was put to him that on 01 September 2011 he wrote to Mr Dolo stating that he should not pay the deposit to Old Fashioned and on 13 September 2011, he wrote to a competitor attaching a rental proposal, and the letter to Mr Dolo was sent to frustrate the pre-condition to the lease. He replied that he did not have to engage with Mr Dolo, that he was engaging with many franchisees and he knew that Mr Dolo would lose the money once it was paid out if he did not secure the site and he sent the email as a professional courtesy to Mr Dolo.
- [42] It was also put to Mr Fowler that the engagements he had with Mr Dolo were not in good faith as he did not tell Mr Dolo that Old Fashioned was not the preferred franchise. Mr Fowler denied this. When asked why he did not tell Mr Dolo that he was not happy with Old Fashioned, he replied that there were not too many operators of fish and chips and they may have considered Old Fashioned as a last resort. He also said that this was the first time it came to his attention that Mr Dolo was interested in the Old Fashioned franchise. He said it was the prerogative of the landlord and Mr Dolo was not the only operator. They were negotiating with seven or nine franchises, and they wanted to secure the best operator and the best franchisor. Shops 26 and 27 were in the food court and were identified as a fish and chip shop, but it did not exclude other franchises. He conceded that he encouraged Mr Dolo to approach the Fish and Chips Company.

G. CLOSING ARGUMENTS

- [43] Mr Lengane, in his closing arguments, submitted inter alia the following:

43.1 this is a question of interpretation. The crux of the matter is that the letter dated 28 July 2011 is an offer and A14 is the acceptance of the offer and the agreement was repudiated;

43.2 there is no ambiguity in the letter dated 28 July 2011. The law states that if the addressee or recipient of a letter, which in the understanding of a reasonable person, constitutes an offer and that person accepts the offer, then in that instance the law recognises the party that accepts and the law creates a contract. Mr Dolo understood the letter dated 28 July 2011 to be an offer. Mr Fowler conceded that on a proper construction, it would not (objectively speaking) be unreasonable for Mr Dolo to understand the letter as a true offer. This Court should consider the objective approach to contracts, that the external appearance of the contract is given greater emphasis than the meeting of the minds;

43.3 the letter dated 28 July 2011 contains the essentialia of a lease and further negotiations were immaterial and irrelevant. The letter ends with the words “look forward to finalizing your lease”, which is the *animus contrahendi*. This is also found in Mr Fowler’s answering affidavit where he says “after considering a possible lease”;

43.4 two indicators that the letter dated 28 July 2011 was sent *animus contrahendi* is from Mr Fowler’s letter requesting Mr Dolo to give an indication with regards to his participation in the scheme and his layout needs and secondly, that Mr Dolo had to submit his FICA documents to Mr Fowler;

43.5 Mr Fowler’s evidence is irrelevant and inadmissible because he is merely an agent for the second respondent and his intention is irrelevant. The probative value depends on the principal’s intention and not the agent. The Court should draw a negative inference from the fact that a director of the second defendant did not testify;

43.6 Mr Fowler negotiated in bad faith. He frustrated the fulfilment of the franchise. This was fictional fulfilment of a condition and he cannot rely on the failure of Mr Dolo to secure the franchise;

43.7 if the Court finds that there was no agreement of lease, then there was an agreement to agree on an agreement of lease. There was a *pactum de contrahendo*;

43.8 Mr Fowler was not authorised by the defendants to testify on their behalf.

[44] Mr Shepherd’s submissions are, *inter alia*, the following:

44.1 the first defendant is an agent for the second defendant and an agent can only be held liable in its personal capacity as a result of its negligent conduct. No case is made out on the pleadings or otherwise that the first defendant is liable for negligent acts or misrepresentation;

44.2 in respect of the second defendant, the plaintiff’s claim is based on a written agreement concluded on 30 July 2011. The letter dated 28 July 2011 was not an offer made *animus contrahendi*, which would upon acceptance, give rise to an enforceable contract. It was merely a proposal made while the parties were in the process of negotiating and feeling their way towards more precise and comprehensive agreements;

44.3 the letter dated 28 July 2011 was sent to Mr Dolo in his personal capacity, which cannot be construed to be an offer to the plaintiff;

44.4 the letter dated 28 July 2011 cannot be construed as an offer from the plain meaning of the document;

44.5 the undated letter, A14, sent by the plaintiff does not purport to be an acceptance of any offer from the plain wording of the letter;

44.6 from the surrounding circumstances, specifically the email dated 28 July 2011, Mr Dolo's reply dated 29 July 2011, the email by Mr Fowler dated 08 August 2011, the email dated 01 September 2011, the email from Fish and Chips Company dated 29 September 2011, it does not support the plaintiff's case that there was a firm offer that was accepted on 30 July 2011;

44.7 Mr Dolo admitted that it was a requirement for the lease that a franchise agreement be entered into. Hence, no agreement could have been concluded if this requirement was not met;

44.8 in the letters of demand from the plaintiff's attorney dated 04 and 18 August 2011, plaintiff relies on an oral agreement and not a written agreement, and that a future lease was to be concluded. Mr Dolo did not dispute the correctness of the letter, and repeated this in his evidence. Hence, the plaintiff relies on a pactum de contrahendo and not a concluded lease. This is not the plaintiff's case in the pleadings;

44.9 Mr Fowler testified that no oral lease agreements were concluded as this is a R170 million development and the lease was for a 5 year period, with a monthly rental of approximately R20 000.00.

H.

ANALYSIS

[45] Before considering the main issue of whether the parties concluded a lease agreement, I will deal with the issue raised by Mr Lengane that Mr Fowler was not authorised to testify on behalf of the defendants and that Mr Fowler's evidence is irrelevant as it is only the principal's intention and not the agent's intention that carries any probative value.

[46] Unlike evidence in application proceedings where a resolution from a company authorising the institution of proceedings is a requirement, this is not required in action proceedings. Mr Fowler was competent to testify on behalf of the defendants. It is interesting to note that Mr Lengane challenged Mr Fowler's authority to testify on behalf of the defendants when he submitted when opposing the application for absolution that Mr Fowler should be called as a witness to show that he did not have animus contrahendi.

[47] Mr Lengane's submission that Mr Fowler's evidence is irrelevant and carries no probative value, is flawed. Mr Fowler represented the first defendant, who was the agent for the second defendant and had the authority to negotiate and procure tenants for the second defendant. Although the second defendant, as the owner of the Boitekong Mall had the final decision to approve the tenant, Mr Fowler was authorised to sign the lease agreements on behalf of the second defendant. This is apparent from the minutes of the second defendant's meeting on 05 June 2012, wherein they resolved "That Vernon Fowler be and is hereby authorised and empowered to sign the Agreement of Lease for and on behalf of Boitekong Mall". He acted as principal. It is Mr Fowler who negotiated with Mr Dolo on behalf of the defendant and addressed the letter dated 28 July 2011. All correspondence exchanged was between Mr Fowler and Mr Dolo. Accordingly, there is no merit in the argument that Mr

Fowler's evidence is irrelevant and carries no probative value. His intention is relevant when considering whether there was animus Contrahendi.

Offer

- [48] A common technique used to ascertain whether there is an agreement is to look for an offer and an acceptance of the offer. See *Reid Bros (SA) Ltd v Fischer Bearings Co. Ltd* 1943 AD 232 at 241.
- [49] A person is said to make an offer when he puts forward a proposal with the intention that by its mere acceptance, without more, a contract should be formed. The express or implied intention (*animus contrahendi*) to be bound by the offeree's acceptance is what distinguishes a true offer from any other proposal or statement. See *The Law of Contract in South Africa supra*, page 32 and 33.
- [50] An ambiguous proposal cannot be classified as an offer. The offer should be certain and definite in its terms. It must be firm, that is, made with the intention that when it is accepted it will bind the offeror. See *Wasmuth v Jacobs* 1987 (3) SA 629 (SWA) at 633D.

[51] In *CGEE Alstom Equipments et Enterprises. Electriques, South African Division v GKN Sankey (Pty) Ltd* 1987

(1) SA 81 (A) at 92E, Corbett JA stated that:

"Whether in a particular case the initial agreement acquires contractual force or not depends upon the intention of the parties, which is to be gathered from their initial conduct, the terms of the agreement and the surrounding circumstances."

See also *Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd* 1991 (1) SA 508 (A) at 516A–517B; *Lewis v Oneanate (Pty) Ltd & Another*

[1992] ZASCA 174; 1992 (4) SA 811 (A) at 820H–821C; *Titaco Projects (Pty) Ltd v AA Alloy Foundry (Pty) Ltd* 1996 (3) SA 320 (W) at 335A–337B.

[52] In *Kenilworth Palace Investments (Pty) Ltd & Another v Ingala & Another* 1948 (2) SA 1 (C), a company negotiated with trustees for a company in the course of formation of a 'management/lease agreement'. A HOA was drawn up and signed. Friedman J at 12H–13A held that:

"[T]he heads of agreement do not constitute an agreement standing on their own. They contemplated that certain other agreements, which were essential to the validity of the heads of agreement, would be in existence when that agreement was signed. . . ."

There is a fine distinction between the cases referred to above and those in which the offer mentions only the important terms and is accepted, the parties being content that the remaining terms, of which a general indication is given, shall be particularized later. In the last mentioned class of case there is a contract. The distinction appears to lie in the intention of the parties and this in turn means that all the circumstances have to be taken into account.”

Also see *The Principles of the Law of Contract*, 6th Ed. A J Kerr, Lexis Nexis.

[53] Corbett JA in *Pitout v North Cape Livestock Co-operative Ltd* 1977 (4) SA 842 (A) at 850D, said that the question to be asked is:

“Was the undertaking on offer made animo contrahendi, which upon acceptance would give rise to an enforceable contract, or was it merely a proposal made . . . while the parties were in the process of negotiating and were feeling their way towards a more precise and comprehensive agreement? This is essentially a question to be decided upon the facts of the particular case.”

Also see *Lambons (Edms) Bpk v BMW (Suid Afrika) (Edms) Bpk* [1997] ZASCA 51; 1997 (4) SA 141 (SCA) at 153E.

[54] Each case depends on its facts, so the nature of the offer, including the words in which it is expressed, the relationship between the parties and the circumstances surrounding the making of the offer must all be examined before it can be decided whether an offer was made with or without animus contrahendi.

[55] One should only examine circumstances which were present in the mind of the parties at the time the offer was made. See *Bird v Summerville* 1960 (4) SA 395 (N) at 408–9.

[56] In these situations, a step by step analysis of the negotiations and the surrounding circumstances is required to decide whether the letter dated 28 July 2011 constitutes a firm offer. See *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A).

[57] The most satisfactory analysis of such cases is to isolate the offer and ascertain whether the evidence shows that the offeree knew or ought to have known that it was intended to be accepted on a provisional basis only, and that the conclusion of a binding contract was to be dependent on agreement on further points. See *The Law of Contract in South Africa* supra, page 39.

[58] The letter dated 28 July 2011 starts with the following paragraph “I refer to our discussions for a Fish and Chips in Boitekong Mall near Rustenburg. It is with great pleasure that I am able to inform you that we are in a position to proceed with our discussions/negotiations with yourself to secure premises for Fish and Chips in Boitekong Mall” (Own emphasis). From the plain meaning, the word ‘proceed’ means to continue with the discussion and negotiations, and ‘to secure’ conveys that he has not yet secured the premises. Hence, reference is to discussions and further negotiations to secure the premises.

- [59] The letter dated 28 July 2011 reads “We would therefore like to propose the following terms and conditions to you for your consideration”. This paragraph cannot be read in isolation, but the entire content of the letter and the surrounding circumstance should be considered and interpreted to be an offer. As stated supra, the preceding paragraph speaks of proceeding with the negotiations. I accept Mr Fowler’s evidence that these were the basic terms of the lease given to all prospective tenants and did not constitute a firm offer, especially when considering the surrounding circumstances hereinbelow.
- [60] One of the terms and conditions described in the letter dated 28 July 2011 reads “Balance of Terms & Conditions: The balance of the terms and conditions shall be as per the landlord’s standard lease”. Hence, it is clear that a standard lease agreement was envisaged and the letter dated 28 July 2011 cannot be construed to be an offer. Mr Dolo admitted that he did not receive the landlord’s standard lease.
- [61] The last paragraph of the letter dated 28 July 2011 reads “We trust you find the attached proposal to your liking and look forward to finalizing your lease commitment in the Boitekong Mall”. The letter again refers to a future lease agreement to be concluded. I agree with Mr Shepherd’s submission that the plain wording of the document is clear and cannot be construed as a firm offer that by its mere acceptance, without more, would result in the conclusion of a lease agreement.
- [62] The letter dated 28 July 2011 was sent to Mr Dolo as an attachment to an email dated 28 July 2011. This email by Mr Fowler clearly referred to a ‘rental proposal’ and no mention was made of a firm offer. In the email, Mr Fowler requested Mr Dolo to give ‘an indication’ with regards to his participation in the scheme as soon as possible and also requested him to keep him updated regarding his agreement with the franchisor. Mr Fowler gave a satisfactory explanation that when he requested an indication with regard to his participation in the scheme and layout needs, this was part of his preparation of assessing the potential tenant and how efficient information is made available to him.
- [63] Mr Dolo responded to the email dated 28 July 2011 on 29 July 2011, in an email to Mr Fowler wherein he indicated that he would be in a position to respond by the latest on Friday, and after a meeting with the franchisor. According to Mr Dolo, the plaintiff accepted the offer on 30 July 2011, in an undated letter addressed to Mr Fowler. This begs the question why Mr Dolo did not, in the email sent the next day, accept the offer if he understood the letter dated 28 July 2011 to be an offer. Mr Dolo’s credibility is dealt with hereinbelow.
- [64] Of importance is the email sent by Mr Fowler dated 08 August 2011, wherein Mr Fowler clearly requests Mr Dolo to provide FICA documents for the entity (company or individual) so that the HOA could be drawn up as well as the name of the brand to be traded. Mr Fowler specifically stated that the HOA would indicate the deposits due and the terms of the lease. It is clear that Mr Fowler intended a future lease to be drawn up. Very significantly, there is no further correspondence by the plaintiff to dispute the fact that a future lease still had to be concluded and that he had already concluded a lease agreement. Also, it is apparent that Mr

Fowler did not, at this stage, know whether the lessee was an individual or a company and did not know the name of the brand, whether it was Old Fashioned or Fish and Chips Company or any other franchise.

[65] I accept Mr Fowler's evidence that it was only when he received the email from Mr Dolo on 01 September 2011 that he became aware that the franchise was Old Fashioned and that is why in the email dated 01 September 2011, Mr Fowler advised Mr Dolo not to pay any fees to the franchisor until his offer has been accepted by the landlord. Mr Fowler, in the email also advised Mr Dolo not to pay the franchise fee until the offer has been accepted by the landlord. Hence, it is apparent that Mr Fowler did not consider any agreement to be concluded at the time.

[66] It was only on 29 September 2011 when Mr Dolo had been informed that he had not been approved by Fish and Chips Company that he addressed the email to Mr Fowler stating that he is unhappy and is going to seek legal advice. Once again, no mention was made in the email of the existence of an agreement and/or that he expects the defendants to honour the lease.

[67] Mr Dolo initially relied on a written lease agreement. However, in cross-examination, he relied on an oral agreement of lease concluded with Mr Fowler in July 2011. His testimony is as follows:

"Q: So based on the telephone conversation Mr Fowler had, the agreement was concluded?"

A: Yes, the way I understood him, yes everything was agreed upon.

Q: . . . I am asking you whether you perceived that after the discussion with Mr Fowler over the telephone, an agreement was concluded?

A: Yes, and he further promised to send me these documents and he told me that I would not encounter any problem as far as the shop is concerned.

Q: At the time you spoke to Mr Fowler telephonically . . . you said you reached an agreement with him, you were both in agreement on all terms?

A: That is true.

Q: And therefore there was no need to agree on any further terms because everything had been agreed upon at that time?

A: All he said then was that he will send me a document that explains about the money

issues.

Q: But your version is that it was agreed that there was a lease agreement for the specific shop?

A: That is how I understood it."

- [68] Mr Dolo testified that he consulted with his attorney when the facts were fresh in his mind. In the letter dated 04 October 2011 from the plaintiff's former attorney, there is no reference to an offer which was accepted or that an agreement of lease was concluded between the parties. On the contrary, the plaintiff relies on an oral agreement concluded during July 2011, wherein the parties agreed that the plaintiff is eligible to enter into a written lease agreement. Mr Dolo did not dispute the correctness of the letter. And in another letter from the plaintiff's attorney, dated 18 October 2011, the plaintiff's attorney again relies on an oral agreement towards future leasing. Hence, from the foregoing, it is apparent that the plaintiff initially did not rely on a written agreement of lease. It calls to question whether this was an after-thought.
- [69] Of further importance is the admission by Mr Dolo, during cross-examination, that it was a 'requirement' for the lease that a franchise agreement be entered into. This admission destroys the plaintiff's version that a lease agreement was concluded prior to his approval as a franchisee. No lease agreement could have been concluded if this requirement was not met.
- [70] Mr Fowler as the agent for the owner had a mandate to secure tenants for the development. At the time that he had discussions with Mr Dolo, he had similar discussions with various other interested service providers. His mandate was to find the most suitable tenant. I accept his evidence that under these circumstances, he supplied information about the terms of the lease without committing himself to a firm offer on these terms and the terms and conditions were to be embodied in the landlord's standard lease.
- [71] When considering that the development was valued at R170 million, and that the lease agreement for the particular premises was for a 5 year period with the rental and other expenses in the amount of R120 000.00 per month, then Mr Fowler's version that under no circumstances did the second defendant conclude a lease agreement without a written lease agreement signed by both parties, is more probable. The standard written lease agreement contains several clauses such as deposit, trading hours, operational costs and suretyship. In the circumstances, it is improbable that after one telephone conversation, without any further information, Mr Fowler would send the plaintiff an offer to rent a premises in the Boitekong Mall. The letter dated 28 July 2011 is a rental proposal given to all prospective tenants as an information pack and is the first step in the process of regulation, which would ultimately result in the HOA concluded between the plaintiff and the second defendant.
- [72] This, in my view, is a classic case of pre-negotiations which could or may result in an contract of lease. The telephone discussion that preceded the letter dated 28 July 2011 being sent to Mr Dolo, was the first step in the negotiations. This was followed by the letter dated 28 July 2011 with information pertaining to the lease, which was a continuation of the negotiations. The fact that the letter dated 28 July 2011 contains essential terms of a lease agreement, does not assist the plaintiff in circumstances where the animus contrahendi is absent. See *Biloden Properties (Pty) Ltd v Wilson* 1946 NPD 736 at 748.

- [73] Having considered the conduct of the parties and the surrounding circumstances expressed supra, I am not persuaded on a preponderance of probabilities in the plaintiff's favour. From the evidence adduced and the correspondence exchanged between Mr Dolo and Mr Fowler, the only interpretation that lends itself to these circumstances is that the proposal in the letter dated 28 July 2001 was not an offer with the intention of concluding a final contract. It was merely a proposal in the course of negotiations which, if successful, would lead to a written contract between the plaintiff and the second defendant. I am of the view that Mr Fowler never intended to conclude a lease agreement on behalf of the second defendant with Mr Dolo or the plaintiff.
- [74] Of further importance is the fact that the letter dated 28 July 2011 was addressed to Mr Dolo in his personal capacity. From Mr Fowler's evidence and the correspondence exchanged, it is apparent that as at 28 July 2011, the plaintiff was not known to him. Hence, the letter dated 28 July 2011 is neither an offer nor proposal made to the plaintiff, Charioteer Trading CC.
- [75] As Krause J in *Blew v Snoxell* 1931 TPD 226, Krause J at 229–230, held that:
- “Now it is trite law that an offer made by one person to another cannot be accepted by a third . . . for the simple reason that there was no intention on the part of the one person to contract with the other person --- the subject matter of the contract maybe.”*
- See also *Levin v Drieprok Properties (Pty) Ltd* 1975 (2) SA 397 (A) at 407C.
- [76] As Corbett JA in *Levin v Drieprok Properties (Pty) Ltd* supra, at 407F, said:
- “Everyone has the right to select and determine with whom he will contract and another cannot be thrust upon him without consent regardless of whether the offeree had special reasons for contracting with the offeree rather than with someone else.”*
- [77] The first defendant, as correctly submitted by Mr Shepherd, is the agent for the second defendant and does not become the party in the principal obligation and can only be liable in its personal capacity as a result of negligent conduct. There is no basis for this Court, in the circumstances, to find in respect of the first defendant.
- [78] An unenforceable preliminary agreement is also distinguishable from an enforceable pactum de contrahendo, which Corbett JA in *Hirschowitz v Moolman & Others* 1985 (3) SA 739 (A) at 765I, described as, “A pactum de contrahendo is simply an agreement to make a contract in the future”. I mention the pactum de contrahendo only because Mr Lengane relied on this in his closing arguments. However, as correctly pointed out by Mr Shepherd, this was not pleaded by the plaintiff and is not the case for the plaintiff, hence it is not necessary for me to traverse this type of agreement.

The Court cannot, on the strength of the further and/or alternative relief allow the plaintiff to rely on a new cause of action.

The parties' case is limited to the pleadings.

Acceptance

- [79] One only considers whether there was an acceptance if an offer has been made. Hence, if an offer is made without *animus contrahendi*, without the intention to be bound by mere acceptance, then the acceptance of such an offer cannot give rise to a contract if the offeree knew or ought to have known that *animus contrahendi* was lacking. As I have found *supra*, that there was no offer, it is not necessary in the circumstances to consider whether there was acceptance.
- [80] Furthermore, as stated *supra*, the letter dated 28 July 2011 is addressed to Mr Dolo and not the plaintiff, and the purported acceptance is on the plaintiff's letterhead. Hence, the acceptance by the plaintiff is ineffective and does not bring about the conclusion of a contract between the plaintiff and the second defendant.

Credibility

- [81] In many respects and on various important aspects, Mr Dolo's evidence was seriously unconvincing, he was evasive and did not make a good impression on the Court. His attempt to explain why his initial attorneys did not rely on a written agreement of lease, but on an oral agreement concluded in June 2001, was unsatisfactory. Mr Dolo also could not explain the statement he made in his earlier affidavit wherein he referred to the correspondence relating to protracted negotiations between the parties when it is now clear that no such correspondence exists. Furthermore, Mr Dolo stated under oath that he had concluded a franchise agreement, when no such agreement had been concluded. Mr Dolo was also not able to deal with discrepancies in his early affidavit. Often when confronted with questions, in cross-examination, why there was no written proof to support his assertions, he would then rely on telephone conversations with Mr Fowler, which conversations Mr Fowler denied.
- [82] Mr Fowler, on the other hand, was a credible witness who answered the questions put to him and did not contradict himself. He informed the Court of instances when he could not recall events and for the most part his evidence was unblemished. He did however on occasion, in cross-examination become emotive when questions were put to him. This in my view was because of the nature of the cross-examination. I am not persuaded that Mr Fowler, by his conduct, acted in bad faith.

I. ORDER

- [83] In the circumstances, the plaintiff failed to discharge the onus and the order that I make is the following:
- a) The plaintiff's claim against the first and second defendants is dismissed with costs.

N. GUTTA

JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING

: 17 JUNE 2014

DATE OF JUDGMENT

: 21 AUGUST 2014

COUNSEL FOR PLAINTIFF

: ADV K. LENGANE

COUNSEL FOR DEFENDANTS

: ADV M.T. SHEPHERD

ATTORNEYS FOR PLAINTIFF

: MOKALE MOSHIDI ATTORNEYS

(Instructed by LELETHU MBANGI INC.)

ATTORNEYS FOR DEFENDANTS

: VAN ROOYEN TLHAPI WESSELS INC.

(Instructed by STRYDOM BRITZ MOHULATSI INC.)

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