

SOUTH AFRICA / JUDGMENT

Glenn Aquadro t/a Dodge City vs Salfay Trading CC and Others (16746/2009) [2011] ZAWCHC 234 (25 May 2011)

[2011] ZAWCHC 234**COURT**

Western Cape High Court, Cape Town

BEFORE

Cleaver

CASE / FILE NUMBER

16746/2009

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****(WESTERN****CAPE HIGH COURT, CAPE TOWN)****Case****no. 16746/2009****In****the matter between:**

GLENN

AQUADRO t/a DODGE CITY

.....Applicant

v

SALFAY

TRADING CC

.....First

Respondent

YASEEN

TAYOB

.....Second

Respondent

EBRAHIM

COOVADIA

.....Third

Respondent

SALMA

TAYOB

.....Fourth

Respondent

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(WESTERN
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.....Applicant
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.....First
Respondent
YASEEN
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.....Second
Respondent
EBRAHIM
COOVADIA
.....Third
Respondent
SALMA
TAYOB
.....Fourth
Respondent

JUDGMENT

HANDED DOWN THIS WEDNESDAY, 25 MAY 2011 CLEAVER J [1] This is an application in which the applicant seeks an order:- '2.1. That the Respondents cease to use, and shall remove from its premises, all trademarks, trade names, copyright photographs logos and images, signs, fonts of advertising, packaging, colour scheme, and any other material and indications that their outlet is a Dodge City Diner store, such being the following: 2.1.1. All illuminated and non-illuminated Dodge City signs; 2.1.2. All Dodge City copyright cartoon wall-art 2.1.3. Under-lit semi-circular ceiling features 2.1.4. The Black and White chequered dado rail 2.1.5. The cherry-wood cartoon frames and dado rail 2.1.6. All posters, menus, or any other material containing the words "Dodge City" or its copyright logo 2.1.7. All Black and frosted Vinyl chequered and trademarks attached to the glass shopfront 2.1.8. Removal or repainting of turquoise pillar tiles to a colour other than turquoise, blue or green (being the colours making turquoise) 2.1.9. All Dodge City copyright images 2.1.10. Black feature tiles on the ceiling bulkhead 2.2. That Respondents be interdicted and restrained from using the words "DODGE CITY" or any other words or device, forming part of any of my Dodge City Diner trademarks or copyright material in any manner whatsoever and at any location hereafter" Although the notice of motion provided for the grant of a provisional order and for interim relief pending final determination of the matter, it is clear

that final relief was sought and the matter was argued on that basis. The applicant appeared in person and the respondents were represented by counsel. [2] The application is founded on the terms of a franchise agreement in terms of which the applicant as franchisor granted to the first respondent as franchisee the franchise to operate the business known as Dodge City Canal Walk in Canal Walk, Cape Town for a period of five years effective from 22 November 2007. [3] The agreement reflects not only the first respondent as grantee of the franchise; it reflects the fourth respondent also as a grantee and 'first controlling person'. The second respondent is linked together with the fourth respondent to the agreement by virtue of the following clause in the agreement: 'UNDERTAKINGS BY CONTROLLING PERSONS The controlling person warrants and undertakes in favour of the FRANCHISOR that: 26.1. He is the beneficial owner of the interest in the franchise set out in the GRANTEE'S capital and equity structure 26.2. He will ensure that the GRANTEE at all times complies with each and every term and condition of this agreement fully, effectively and efficiently 26.3. He will not sell, alienate, transfer, pledge or otherwise encumber or dispose of the shares, members' partners' or other interest in the franchise beneficially owned by him as referred to in 26.1 without the written consent of the FRANCHISOR thereto first being obtained 26.4. He will be bound by the provisions of this agreement mutates mutandis in the same way as the GRANTEE 26.5 He will, so far as is possible, ensure that the beneficial owners of the remaining shares, partners' and members' interests in the GRANTEE are likewise bound by the provisions of this paragraph 26'. The papers include copies of documents signed by the second and fourth respondents recording them being in agreement with the terms and conditions of the franchise agreement and binding themselves with the first respondent for the obligations of the first respondent. Although the applicant contends that the third respondent is a member of the first respondent and attaches the result of a CIPRO search to confirm this, no document signed by the third respondent similar to the document signed by the second and fourth respondents recording their liability for the responsibilities of the first respondent has been placed before the court and in the circumstances no case has been made out against the third respondent. [4] The respondents contend that the franchise agreement was cancelled by them in 2009, but notwithstanding this alleged cancellation they have continued to operate the business in the premises in question contending, somewhat uniquely, that their cancellation was conditional upon them being refunded all royalties paid by them. The applicant denies that the respondents were entitled to cancel the agreement. For some time now the respondents have indicated that they had intended to "rebrand" the store, but have failed to take any concrete steps to do so. It would appear that they have encountered difficulties with the landlord for the premises whose input is necessary to enable them to change the trading style of the business. The applicant contends that he cancelled the agreement in writing because of various alleged breaches thereof by the respondents and required the respondents to cease trading in terms of the franchise by 1 April 2011. When the matter was argued it was common cause between the applicant and the respondents that the franchise agreement had been cancelled [5] The applicant does not seek payment of outstanding royalties, but as I have indicated, merely seeks that all reference to the franchise business be removed from the premises. [6] It is common cause that the signage outside the premises continues to display the name 'Dodge City' and the respondents continue to utilise the other elements of the franchise business including the system to which

reference will be made in due course. They seek to ameliorate the use of the trading style and system by attaching a sign at the entrance of the restaurant as well the inside of every menu which reads as follows: 'DEAR PATRONS PLEASE BE ADVISED THAT IN LINE WITH THE CONSUMER PROTECTION ACT (CPA), WE ARE NOT PART OF THE DODGE BRAND. WE HAVE BEEN TRADING INDEPENDENTLY FOR THE LAST TWO YEARS. HOWEVER. WE ARE CURRENTLY IN THE PROCESS OF A NAME CHANGE. THANKING YOU FOR YOUR LOYAL SUPPORT! ENJOY YOUR MEAL WITH US! REGARDS, MANAGEMENT In my view, this notification does not justify the retention of the name and other aspects of the franchise business [7] Ultimately the case turns on whether the items referred to in the notice of motion and listed in paragraph 1 have been sufficiently identified in the papers. In answering this question regard must be had to a number of clauses in the agreement. 7.1 In the interpretation clause the following definitions are given: '2.1.2. "franchised business" means the business of conducting a Dodge City (or any variation of the name Dodge City that may be necessary to meet market trends as determined by the FRANCHISOR in due course) retail food outlet. 2.1.3. "Dodge City products" means all the end products sold to the public by the GRANTEE pursuant to this agreement 2.1.4. "trade marks" means those trade marks, additional patent rights, names, menu items, trading styles, emblems, devices, and logos, whether registered or not and whether now existing or which will come, or be envisaged to come, into existence in future, which are or will be licensed, or used by the FRANCHISOR in the course of its business of franchising, or used by all or part of the general franchise, from time to time 2.1.5. "system" means the trade marks, trade secrets and know how relating to the design, development and management of a specialised restaurant in distinctive style, pursuant to uniform systems owned by the FRANCHISOR, which may be improved, further developed or otherwise modified from time to time. Included are all methods, or sources of supply, advertising procedures, confidential or invented methods, emblems, recipes, software, spreadsheets, and all other information not readily available to a competitor selling Dodge City products, including potential variations to the current system necessary to meet changing market trends, communicated by a FRANCHISOR to the GRANTEE from time to time, pursuant to this agreement 2.1.6. "copyright" means all copyright and design rights in or to any part of the trade marks, system, operations manual, and any other material which is or will be licensed or used by the FRANCHISOR in the course of its business of franchising from time to time. 2.1.10 "equipment" means all equipment and shopfittings at any time contained in the outlet' 7.2 Under the heading 'RECITAL AND ACKNOWLEDGMENTS' the following appears: '3.1 The FRANCHISOR: 3.1.1. owns valuable goodwill connected with the business of operating and franchising others to operate Dodge City stores. 3.1.2. is the sole owner of the trade marks or alternatively has the exclusive right to use same, including the franchising thereof. 3.1.3. has specialised experience, know-how and skill in the establishment and operation of its distinctive franchised business. 3.1.4. has developed a unique operating system incorporating distinctive architectural design and has, through extensive advertising and sales, built up a goodwill that has developed wide public recognition and confidence in connection with the sale of Dodge City products 3.1.5. is willing to grant a Franchise to the GRANTEE and allow it to utilise the system upon the terms and conditions recorded in this agreement. 3.2. The GRANTEE: 3.2.1. Desires to obtain a franchise to establish and operate a Dodge City outlet at the premises and, for this

purpose, has or is about to enter into a lease/sub-lease of the premises upon terms and conditions approved or to be approved of by the FRANCHISOR. 3.2.2. Agrees, acknowledges and represents to the FRANCHISOR as an inducement to the FRANCHISOR to enter into this Agreement that: 3.2.2.1 It has read this Agreement and understands and accepts its terms and conditions as being reasonable and necessary to maintain the FRANCHISOR'S standards of quality and service and the uniformity of those standards at all Dodge City outlets in order to protect and preserve the goodwill of the name and reputation of Dodge City, or variations of the name Dodge City that may be necessary to meet changing market trends in due course, and the goodwill of its trade marks. 7.3 Under the heading BREACH AND TERMINATION the following appears: ' 20.3. If this Agreement is cancelled or terminates for any reason whatsoever: 20.3.1. The GRANTEE will immediately cease to use or permit the use of the MARKS, tradenames, signs, forms of advertising, packaging or any other indications of operation as a DODGE CITY store. The GRANTEE shall furthermore discontinue use of the FRANCHISOR'S colour scheme and remove from the PREMISES all material which may identify the PREMISES as having a connection with DODGE CITY systems. If the GRANTEE fails to comply with the provisions of this sub-clause within 14 (Fourteen) days after the written notice, then the FRANCHISOR, in addition to any other right or remedy which it may have, shall be entitled to enter upon the PREMISES and to remove such material or advertising at the GRANTEE'S expense. 20.3.2. The GRANTEE shall immediately deliver to the FRANCHISOR any operation manual and other information and documents pertaining to the MARKS which are in the GRANTEE'S possession. [8] While the items referred to in the notice of motion are not specifically mentioned in the founding affidavit, they are referred

to in general terms. In paragraph 10 the deponent states: Respondents' Franchise Agreement has been cancelled and it does not dispute this fact Respondents are obliged, and have undertaken under oath, to cease using my trademarks, copyright materials, colour scheme and all other indications that their business is a DCD outlet by 1 April 2011. And in paragraph 14.4 in referring to a second outlet opened by the applicant in Kenilworth Centre, the applicant furnishes the

following details of the decor for Dodge City Diners which he says is to be found in each of the diners. I opened a second DCD outlet in Kenilworth Centre in 2000 and in 2004. with a view to franchising the concept, I employed an architect and professional cartoonist at considerable cost to design a unique decor for DCD that would be easily identifiable by consumers. DCD outlets are recognisable by a combination of the following decor elements - eg black and white floor tiles, turquoise blue and white pillar tiles, a chequered black and white dado rail, cherry wood wall panels and cartoon wall-art. cherry wood fittings and tables, specified industrial light fittings, under-lit circular ceiling features and curved bulkheads, black tiles on the ceiling bulkheads, and red seating, (attached/marked "GA5").' The attachments referred to are coloured photographs of the standard decor and design elements of a Dodge City store In the answering In the answering affidavit, an attempt was made by the respondents to show that certain aspects of the decor are similar to restaurants

not connected to the franchise stores and in response thereto the applicant has filed coloured photographs of his store in the V & A Waterfront, a Dodge City store in the Kenilworth Centre and the premises at Canal Walk occupied by the respondents. These photographs clearly reflect the same decor in each store. In my view these photographs constitute an amplification of the general description and do not introduce new material. They may therefore be relied upon to indicate with clarity the items of decor and design which the applicant contends to be part of the franchise. [9] Counsel for the respondents submitted that since it appeared that the registration of two trade marks previously registered in the name of the applicant had lapsed due to non-payment of fees and no proof had been tendered to support the applicant's claim to copyright in respect of photographs and logos which form part of the franchise, relief could not be granted in respect of these items. There is no merit in this submission. The applicant's claim to protection in respect of these items is based on his ownership thereof which is confirmed in the acknowledgements made by the first respondent in the franchise agreement. In fact, the agreement records specifically in clause 2.1.4 that "trade marks" means those trade marks, additional patent rights, names, menu items: trading styles, emblems, devices, and logos, whether registered or not./. The acknowledgement in clause 3.1.4 is to the effect that the applicant 'has developed a unique operating system incorporating distinctive architectural design...'. [10] I am satisfied that the items in respect of which the applicant seeks protection have been sufficiently described in the papers and that the applicant is entitled to the order which he seeks [11] The applicant requested, that in the event of me finding for him, I should make an order prohibiting the respondents from manufacturing scoop ice-cream, sorbet and Italian Gelato in the store. He submitted that the know-how to manufacture these items had been acquired by him and imparted to the franchisee as part of the franchise business. There is no specific reference in the papers to these activities, save for the reference to the system which is part of the franchise, and in my view an insufficient case has been made out for the grant of the order sought. In making this finding it must be understood that I have not found that the specific know-how to manufacture the ice-creams etc was not part of the franchise. All that I have found is that there were no allegations to support this submission. The applicant will therefore be entitled, if so advised, to apply afresh to obtain the relief which he seeks provided it is properly motivated and the respondents should bear this in mind. [12] In my view the applicant has met the requirements for a final interdict. He has a clear right to the ownership of the Dodge City franchisee in terms of the common law and his contractual rights to this are set out in the franchise agreement and the terms determining what is to occur on termination of the agreement. There is no doubt that an injury is being committed by the respondents continuing to trade under the name of the franchise business and to use all the elements of the business. As to any other satisfactory remedy, it seems clear that damages as a result of the loss of profits will be extremely difficult to establish. Respondents' counsel requested that in the event of me finding against the respondents, they be allowed a period of approximately one week to remove the offending signage. This is a reasonable request and as will appear from the order which follows, I will allow a longer time for the other changes in the store to be made [13] The first, second and fourth respondents are ordered to cease to use and to remove from the premises at Dodge City Canal Walk all trademarks, trade names, copyright photographs, logos and images, signs, forms

of advertising, packaging and other material and indications that the premises is a Dodge City diner store on the following basis: 13.1 The following items are to be removed within one (1) week within date of this order: 13.1.1. All illuminated and non-illuminated Dodge City signs; 13.1.2. All posters, menus, or any other material containing the words "Dodge City" or its copyright logo; 13.1.3. All Dodge City copyright images. 13.2 The following items are to be removed within one (1) month within the date of this order 13.2.1. All Dodge City cartoon wall-art; 13.2.2. Three (3) under-lit semi-circular ceiling features; 13.2.3. The black and white chequered dado rail; 13.2.4. The cherry-wood cartoon frames and dado rail; 13.2.5. All black and frosted vinyl chequered and trademarks attached to the glass shopfront; 13.2.6. Black feature tiles on the ceiling bulkhead; 13.2.7. The colour of the turquoise pillar tiles by removing or repainting the tiles to a colour other than turquoise. [14] There will be no order as to costs. R B CLEAVER

JUDGMENT

HANDED DOWN THIS WEDNESDAY, 25 MAY 2011

CLEAVER J

[1] This is an application in which the applicant seeks an order:-

'2.1. That the Respondents cease to use, and shall remove from its premises, all trademarks, trade names, copyright photographs logos and images, signs, fonts of advertising, packaging, colour scheme, and any other material and indications that their outlet is a Dodge City Diner store, such being the following:

2.1.1. All illuminated and non-illuminated Dodge City signs;

2.1.2. All Dodge City copyright cartoon wall-art

2.1.3. Under-lit semi-circular ceiling features

2.1.4. The Black and White chequered dado rail

2.1.5. The cherry-wood cartoon frames and dado rail

2.1.6. All posters, menus, or any other material containing the words "Dodge City" or its copyright logo

2.1.7. All Black and frosted Vinyl chequered and trademarks attached to the glass shopfront

2.1.8. Removal or repainting of turquoise pillar tiles to a colour other than turquoise, blue or green (being the colours making turquoise)

2.1.9. All Dodge City copyright images

2.1.10. Black feature tiles on the ceiling bulkhead

2.2. That Respondents be interdicted and restrained from using the words "DODGE CITY" or any other words or device, forming part of any of my Dodge City Diner trademarks or copyright material in any manner whatsoever and at any location hereafter"

Although the notice of motion provided for the grant of a provisional order and for interim relief pending final determination of the matter, it is clear that final relief was sought and the matter was argued on that basis. The applicant appeared in person and the respondents were represented by counsel.

- [2] The application is founded on the terms of a franchise agreement in terms of which the applicant as franchisor granted to the first respondent as franchisee the franchise to operate the business known as Dodge City Canal Walk in Canal Walk, Cape Town for a period of five years effective from 22 November 2007.
- [3] The agreement reflects not only the first respondent as grantee of the franchise; it reflects the fourth respondent also as a grantee and 'first controlling person'. The second respondent is linked together with the fourth respondent to the agreement by virtue of the following clause in the agreement:

'UNDERTAKINGS BY CONTROLLING PERSONS

The controlling person warrants and undertakes in favour of the FRANCHISOR that:

26.1. He is the beneficial owner of the interest in the franchise set out in the GRANTEE'S capital and equity structure

26.2. He will ensure that the GRANTEE at all times complies with each and every term and condition of this agreement fully, effectively and efficiently

26.3. He will not sell, alienate, transfer, pledge or otherwise encumber or dispose of the shares, members' partners' or other interest in the franchise beneficially owned by him as referred to in 26.1 without the written consent of the FRANCHISOR thereto first being obtained

26.4. He will be bound by the provisions of this agreement mutates mutandis in the same way as the GRANTEE

26.5 He will, so far as is possible, ensure that the beneficial owners of the remaining shares, partners' and members' interests in the GRANTEE are likewise bound by the provisions of this paragraph 26',

The papers include copies of documents signed by the second and fourth respondents

recording them being in agreement with the terms and conditions of the franchise agreement and binding themselves with the first respondent for the obligations of the first respondent.

Although the applicant contends that the third respondent is a member of the first respondent and attaches the result of a CIPRO search to confirm this, no document signed by the third respondent similar to the document signed by the second and fourth respondents recording their liability for the responsibilities of the first respondent has been placed before the court and in

the circumstances no case has been made out against the third respondent.

- [4] The respondents contend that the franchise agreement was cancelled by them in 2009, but notwithstanding this alleged cancellation they have continued to operate the business in the premises in question contending, somewhat uniquely, that their cancellation was conditional upon them being refunded all royalties paid by them. The applicant denies that the respondents were entitled to cancel the agreement. For some time now the respondents have indicated that they had intended to "rebrand" the store, but have failed to take any concrete steps to do so. It would appear that they have encountered difficulties with the landlord for the premises whose input is necessary to enable them to change the trading style of the business.

The applicant contends that he cancelled the agreement in writing because of various alleged breaches thereof by the respondents and required the respondents to cease trading in terms of the franchise by 1 April 2011. When the matter was argued it was common cause between the applicant and the respondents that the franchise agreement had been cancelled

- [5] The applicant does not seek payment of outstanding royalties, but as I have indicated, merely seeks that all reference to the franchise business be removed from the premises.
- [6] It is common cause that the signage outside the premises continues to display the name 'Dodge City' and the respondents continue to utilise the other elements of the franchise business including the system to which reference will be made in due course. They seek to ameliorate the use of the trading style and system by attaching a sign at the entrance of the restaurant as well the inside of every menu which reads as follows:

'DEAR PATRONS

PLEASE BE ADVISED THAT IN LINE WITH THE CONSUMER PROTECTION ACT

(CPA), WE ARE NOT PART OF THE DODGE BRAND. WE HAVE BEEN TRADING

INDEPENDENTLY FOR THE LAST TWO YEARS. HOWEVER. WE ARE CURRENTLY

IN THE PROCESS OF A NAME CHANGE.

THANKING YOU FOR YOUR LOYAL SUPPORT!

ENJOY YOUR MEAL WITH US!

REGARDS,

MANAGEMENT

In my view, this notification does not justify the retention of the name and other aspects of the franchise business

- [7] Ultimately the case turns on whether the items referred to in the notice of motion

and listed in paragraph 1 have been sufficiently identified in the papers. In answering this question regard must be had to a number of clauses in the agreement.

7.1 In the interpretation clause the following definitions are given:

'2.1.2. "franchised business" means the business of conducting a Dodge City (or any variation of the name Dodge City that may be necessary to meet market trends as determined by the FRANCHISOR in due course) retail food outlet.

2.1.3. "Dodge City products" means all the end products sold to the public by the GRANTEE pursuant to this agreement

2.1.4. "trade marks" means those trade marks, additional patent rights, names, menu items, trading styles, emblems, devices, and logos, whether registered or not and whether now existing or which will come, or be envisaged to come, into existence in future, which are or will be licensed, or used by the FRANCHISOR in the course of its business of franchising, or used by all or part of the general franchise, from time to time

2.1.5. "system" means the trade marks, trade secrets and know how relating to the design, development and management of a specialised restaurant in distinctive style, pursuant to uniform systems owned by the FRANCHISOR, which may be improved, further developed or otherwise modified from time to time. Included are all methods, or sources of supply, advertising procedures, confidential or invented methods, emblems, recipes, software, spreadsheets, and all other information not readily available to a competitor selling Dodge City products, including potential variations to the current system necessary to meet changing market trends, communicated by a FRANCHISOR to the GRANTEE from time to time, pursuant to this agreement

2.1.6. "copyright" means all copyright and design rights in or to any part of the trade marks, system, operations manual, and any other material which is or will be licensed or used by the FRANCHISOR in the course of its business of franchising from time to time.

.....

2.1.10 "equipment" means all equipment and shopfittings at any time contained in the outlet'

7.2 Under the heading 'RECITAL AND ACKNOWLEDGMENTS' the following appears:

'3.1 The FRANCHISOR:

3.1.1. owns valuable goodwill connected with the business of operating and franchising others to operate Dodge City stores.

3.1.2. is the sole owner of the trade marks or alternatively has the exclusive right to use same, including the franchising thereof.

3.1.3. has specialised experience, know-how and skill in the establishment and operation of its distinctive franchised business.

3.1.4. has developed a unique operating system incorporating distinctive architectural design and has, through extensive advertising and sales, built up a goodwill that has developed wide public recognition and confidence in connection with the sale of Dodge City products

3.1.5. is willing to grant a Franchise to the GRANTEE and allow it to utilise the system upon the terms and conditions recorded in this agreement.

3.2. The GRANTEE:

3.2.1. Desires to obtain a franchise to establish and operate a Dodge City outlet at the premises and, for this purpose, has or is about to enter into a lease/sub-lease of the premises upon terms and conditions approved or to be approved of by the FRANCHISOR.

3.2.2. Agrees, acknowledges and represents to the FRANCHISOR as an inducement to the FRANCHISOR to enter into this Agreement that:

3.2.2.1 It has read this Agreement and understands and accepts its terms and conditions as being reasonable and necessary to maintain the FRANCHISOR'S standards of quality and service and the uniformity of those standards at all Dodge City outlets in order to protect and preserve the goodwill of the name and reputation of Dodge City, or variations of the name Dodge City that may be necessary to meet changing market trends in due course, and the goodwill of its trade marks.

.....

7.3 Under the heading BREACH AND TERMINATION' the following appears: '

20.3. If this Agreement is cancelled or terminates for any reason whatsoever:

20.3.1. The GRANTEE will immediately cease to use or permit the use of the MARKS, tradenames, signs, forms of advertising, packaging or any other indications of operation as a DODGE CITY store. The GRANTEE shall furthermore discontinue use of the FRANCHISOR'S colour scheme and remove from the PREMISES all material which may identify the PREMISES as having a connection with DODGE CITY systems. If the GRANTEE fails to comply with the provisions of this sub-clause within 14 (Fourteen) days after the written notice, then the FRANCHISOR, in addition to any other right or remedy which it may have, shall be entitled to enter upon the PREMISES and to remove such material or advertising at the GRANTEE'S expense.

20.3.2. The GRANTEE shall immediately deliver to the FRANCHISOR any operation manual and other information and documents pertaining to the MARKS which are in the GRANTEE'S possession.

[8] While the items referred to in the notice of motion are not specifically mentioned in the founding affidavit, they are referred

to in general terms. In paragraph 10 the deponent states:

Respondents' Franchise Agreement has been cancelled and it does not dispute this fact Respondents are obliged, and have undertaken under oath, to cease using my trademarks, copyright materials, colour scheme and all other indications that their business is a DCD outlet by 1 April 2011.

And in paragraph 14.4 in referring to a second outlet opened by the applicant in Kenilworth Centre, the applicant furnishes the

following details of the decor for Dodge City Diners which he says is to be found in each of the diners.

I opened a second DCD outlet in Kenilworth Centre in 2000 and in 2004. with a view to franchising the concept, I employed an architect and professional cartoonist at considerable cost to design a unique decor for DCD that would be easily identifiable by consumers. DCD outlets are recognisable by a combination of the following decor elements - eg black and white floor tiles, turquoise blue and white pillar tiles, a chequered black and white dado rail, cherry wood wall panels and cartoon wall-art. cherry wood fittings and tables, specified industrial light fittings, under-lit circular ceiling features and curved bulkheads, black tiles on the ceiling bulkheads, and red seating, (attached/marked "GA5").'

The attachments referred to are coloured photographs of the standard decor and design elements of a Dodge City store In the answering In the answering affidavit, an attempt was made by the respondents to show that certain aspects of the decor are similar to restaurants

not connected to the franchise stores and in response thereto the applicant has filed coloured photographs of his store in the V & A Waterfront, a Dodge City store in the Kenilworth Centre and the premises at Canal Walk occupied by the respondents. These photographs clearly reflect the same decor in each store. In my view these photographs constitute an amplification of the general description and do not introduce new material. They may therefore be relied upon to indicate with clarity the items of decor and design which the applicant contends to be part of the franchise.

[9] Counsel for the respondents submitted that since it appeared that the registration of two trade marks previously registered in the name of the applicant had lapsed due to non-payment of fees and no proof had been tendered to support the applicant's claim to copyright in respect of photographs and logos which form part of the franchise, relief could not be granted in respect of these items. There is no merit in this submission. The applicant's claim to protection in respect of these items is based on his ownership thereof which is confirmed in the acknowledgements made by the first respondent in the franchise agreement. In fact, the agreement records specifically in clause 2.1.4 that "trade marks" means those trade marks, additional patent rights, names, menu items: trading styles, emblems, devices, and logos, whether registered or not../. The acknowledgement in clause 3.1.4 is to the effect that the applicant 'has developed a unique operating system incorporating distinctive architectural design...',

- [10] I am satisfied that the items in respect of which the applicant seeks protection have been sufficiently described in the papers and that the applicant is entitled to the order which he seeks
- [11] The applicant requested, that in the event of me finding for him, I should make an order prohibiting the respondents from manufacturing scoop ice-cream, sorbet and Italian Gelato in the store. He submitted that the know-how to manufacture these items had been acquired by him and imparted to the franchisee as part of the franchise business. There is no specific reference in the papers to these activities, save for the reference to the system which is part of the franchise, and in my view an insufficient case has been made out for the grant of the order sought. In making this finding it must be understood that I have not found that the specific know-how to manufacture the ice-creams etc was not part of the franchise. All that I have found is that there were no allegations to support this submission. The applicant will therefore be entitled, if so advised, to apply afresh to obtain the relief which he seeks provided it is properly motivated and the respondents should bear this in mind.

[12] In my view the applicant has met the requirements for a final interdict. He has a clear right to the ownership of the Dodge City franchisee in terms of the common law and his contractual rights to this are set out in the franchise agreement and the terms determining what is to occur on termination of the agreement. There is no doubt that an injury is being committed by the respondents continuing to trade under the name of the franchise business and to use all the elements of the business. As to any other satisfactory remedy, it seems clear that damages as a result of the loss of profits will be extremely difficult to establish.

Respondents' counsel requested that in the event of me finding against the respondents, they be allowed a period of approximately one week to remove the offending signage. This is a reasonable request and as will appear from the order which follows, I will allow a longer time for the other changes in the store to be made

- [13] The first, second and fourth respondents are ordered to cease to use and to remove from the premises at Dodge City Canal Walk all trademarks, trade names, copyright photographs, logos and images, signs, forms of advertising, packaging and other material and indications that the premises is a Dodge City diner store on the following basis:

13.1 The following items are to be removed within one (1) week within date of this order:

13.1.1. All illuminated and non-illuminated Dodge City signs;

13.1.2. All posters, menus, or any other material containing the words "Dodge City" or its copyright logo;

13.1.3. All Dodge City copyright images.

13.2 The following items are to be removed within one (1) month within the date of this order

13.2.1. All Dodge City cartoon wall-art;

13.2.2. Three (3) under-lit semi-circular ceiling features;

13.2.3. The black and white chequered dado rail;

13.2.4. The cherry-wood cartoon frames and dado rail;

13.2.5. All black and frosted vinyl chequered and trademarks attached to the glass shopfront;

13.2.6. Black feature tiles on the ceiling bulkhead;

13.2.7. The colour of the turquoise pillar tiles by removing or repainting the tiles to a colour other than turquoise.

[14] There will be no order as to costs.

R B CLEAVER

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ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAWCHC/2011/234.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/glenn-aquadro-ta-dodge-city-v-salfay-trading-cc-and-others-unknown-topic-awchc-2011>

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