

SOUTH AFRICA / JUDGMENT

Moonstone Investments 97 (Pty) Ltd v Geffen International Realty Franchise (Pty) Ltd (22209/2011) [2011] ZAWCHC 462 (16 November 2011) [2011] ZAWCHC 462

COURT

Western Cape High Court, Cape Town

BEFORE

Davis

CASE / FILE NUMBER

22209/2011

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JUDGMENT

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: 22209/2011

DATE: 16 NOVEMBER 2011

In the matter between:

MOONSTONE INVESTMENTS 97 (PTY) LTDApplicant

and

GEFFEN INTERNATIONAL REALTY

FRANCHISE (PTY) LIMITEDRespondent

DAVIS, J:

Introduction:

The applicant seeks an order that the respondent be interdicted from, inter alia, enforcing its dispute of cancellation of a franchise agreement which had been concluded between the parties on 15 June 2007. The matter which was brought on the basis of urgency has been hotly contested, reflected in a record of almost 500 pages. The matter was argued on Friday on the basis of relatively skeletal heads, notwithstanding which, there are significant disputes which have made the compilation of this judgment rather more complicated than I would have wished.

Briefly the factual background can be summarised as follows, much of it based upon averments in the founding affidavit which have not been disputed in the opposing affidavits. On 15 June 2007, the applicant and respondent concluded an agreement in terms of which the applicant was appointed as a franchisee of the respondent, both in respect of the Geffen International Realty Franchise (GIF) and the Sotheby's International Realty brand (SIR) for a defined area in the Western Cape, in particular the Atlantic Seaboard from the Victoria and Albert Waterfront to Camps Bay.

From what can be gathered from the papers, respondent owned both brands and appointed the applicant as its franchisee in respect of them, albeit for different periods of time. In terms of the agreement, applicant was appointed as a franchisee in respect of the GIF licence for a period of 10 years as from 1 August 2007 and in respect of the SIR licence for a period of five years. The agreement then commenced on 1 August 2007. As I understand it, the SIR licence is due to expire on 31 July 2012 and the GIF licence on 31 July 2017, unless renewed by agreement between the parties, which, in view of this particular dispute, is hardly likely.

As from the effective date of the agreement, applicant avers that it has conducted itself as a franchisee of respondent and has complied with all of its obligations in terms of the agreement, to that I shall return later. In July 2008, applicant acquired Home News, an independent realty operator on the Atlantic Seaboard. In October 2009, it acquired Sanderman, an independent realty operator in Camps Bay. In August 2010 it acquired the Waterkant area from respondent, thereby allowing it to commence operations in the V&A and Waterkant areas and, having secured the largest development at that time, it avers that it grew its business considerably.

Applicant avers further that, from the conclusion of the agreement until the events which gave rise to the present dispute, it was able to conduct its franchise business without interference from the respondent or its CEO, Mr Lew Geffen. It appears, however, that the relationship soured significantly about a year ago. On 17 April 2010, Mr Jankowitz, who also appears to be the settlor of a trust which, together with the deponent to the affidavit, Mr Stefanutto, controls applicant, received a SMS message from Geffen, which averred that applicant did not employ enough Jewish agents, that it operated the Sipho franchise on a shoestring budget, which resulted "in a world famous brand to wallow in mediocrity" and that Jankowitz was the problem. On 19 April 2010 it appears that Mr Jankowitz responded by way of an e-mail to these allegations. I desist from engaging in the details thereof, because in my view they are not particularly relevant to the nature of the present dispute.

There is no question, however, that in terms of the averments which are contained in the founding affidavit, the relationship between the respondent and Jankowitz deteriorated, causing the termination of various franchises in which Jankowitz had a shareholding, allegedly for failing to meet its targeted market share. Then followed what can only be referred to as the 'Dogon' saga, in which it appeared that there was a dispute relating to a question of an agreement of the sale and the shares in the Dogon Estate Agency. Again, the details thereof are not strictly necessary for the resolution of the dispute.

Suffice it to say that the applicant avers that respondent illegally and unlawfully acquired confidential information regarding the Dogon Agency. As a result applicant avers that on 16 March 2011, Mr Geffen attempted to take over the franchise. He generated two e-mails, the first of which was addressed to all franchisees, the respondent operating throughout South Africa and the second to all of the estate agents which were employed by applicant. The e-mail read thus:

"I am sure that by now you all know that the franchises bearing the Lew Geffen Sotheby's International Realty brand owned by Hugo Jankowitz, will be terminated forthwith for various reasons. We have been anticipating this move for a while and we are ready to launch plan B, the details of which will be made known to you shortly."

The second e-mail to which I have made reference, contained the following:

"You may have already heard that the Atlantic Seaboard under Hugo Jankowitz in Blouberg have been terminated. We have been anticipating this for some time and I am ready to launch plan B, the effect of which will be 'business as usual'"

As a result of these e-mails, on 18 March 2011, applicant's attorney addressed a letter to the respondent, in which the respondent was called upon to honour its obligations in terms of the franchise agreement and to cease unlawful interference in the contractual

relationship which applicant had established with its agents. On 24 March 2011, the respondent's then attorney furnished the following

undertakings on behalf of the respondent:

"2.1. Not to contact your client's agents and other franchisees and to hold out to them that the agreement between our respective clients has been lawfully terminated (or is about to be lawfully terminated).

2.2. Not to threaten to re-launch a new flagship in the Atlantic Seaboard franchise.

2.3. Not to entice your client's agents to cancel their independent contractors' agreements and to joint such newly re-launched

franchise."

On 25 March 2011, respondent placed an advertisement in The Cape Argus, which effectively offered the Blouberg franchise for free for the first five years. The applicant avers that this act undermined the true value of all the Sotheby's franchisees nationwide. On 29 March 2011, Mr Rohde, the CEO of respondent, contacted Mr Jankowitz, requesting a meeting in order to find an amicable settlement to the various disputes which had engulfed the parties and to which I already made reference. A meeting was arranged for 9 April

2011. That meeting was then postponed.

On 5 June 2011, Mr Rohde requested a further meeting on an urgent basis with Mr Jankowitz. This meeting indeed was held at the Cape Grace Hotel on 10 June 2011, the purpose of which was to explore whether there was a basis for a mutual parting of the ways. It appears that at that meeting Mr Rohde, Mr Jankowitz, Mr Geffen and Mr Bauwein and Mr Stefanutto were present. According to respondent:

"An agreement in principle was reached at that meeting in terms of which the franchise would terminate and the respondent would identify a purchaser for the franchise. Pursuant to this agreement, the respondent found a purchaser who met the financial business criteria, this potential purchaser, Mr Farouk Akoojee. In August 2011, I informed Jankowitz that a purchaser had been found. Jankowitz, far from being satisfied that a purchaser had been found, rejected Akoojee as a purchaser based on his ethnicity. This I found to be particularly strange, having regard to the fact that after the purchase of the franchise from the applicant, the applicant would have no further interest in the franchise."

Respondent contends that there had been a refusal by Mr Jankowitz to so sell to Mr Akoojee. A further issue was raised, namely that the dispute could be resolved by way of arbitration. According to the respondent:

"The respondent did not pursue the proposed arbitration suggested by applicant, because the relief sought by the applicant in terms of the arbitration, would have done little to resolve the issues between the parties. It is for this reason that I elected to meet Jankowitz and reach an accord which would allow for the amicable termination of the agreement between the applicant and the respondent. The sale of the franchise appeared to be the most suitable means of resolving the dispute. Hence the meeting at the Cape Grace Hotel during July 2011."

So much for the context of the meeting and that which was discussed there. It appears that the dispute between the continued. Thus on 4 October 2011, applicant addressed a letter to the respondent, reiterating its request to have the parties' dispute resolved by arbitration. According to applicant, it was "the spectre of arbitration" which precipitated two letters which were generated by respondent, alleging breaches of the franchise agreement, both dated 5 October 2011.

These letters, both of that date, refer to breaches in the clause. In the first, Mr Rohde, writes:

"You are in breach of clause 14.12 of the agreement and that you have failed to deliver to us a copy of your audited annual financial statements, together with the required certificate, despite the lapse of the period in excess of 90 days after the end of your financial agreement. We hereby call upon you, i.e. in terms of clause 25.1(g) of the agreement, to remedy this breach within 14 days after you receive this notice."

On the same day a further letter by Mr Rohde was generated which read:

"You are in breach of clause 15.3.1 of the agreement, in that you have failed to purchase advertisements in SIR Proprietary Publications at a minimum agreement cost of R25 000,00 in the last year. We hereby call upon you (i.e. in terms of clause 25.1(g) of the agreement) to remedy this breach within 14 days after you receive this notice."

As appears from these letters, applicant was given a period of 14 days within which to remedy the alleged breaches. The letters having been only received on 6 October 2011, applicant contends that the 14 day period would have expired on 20 October 2011. However, on 12 October 2011, Mr Rohde deposed to an affidavit on behalf of respondent, in support of an ex parte application claiming cancellation of the franchise agreement and various other forms of relief. In his founding affidavit he alleged that respondent cancelled the franchise agreement in terms of a draft letter addressed to applicant by the respondent, which had been annexed thereto.

The application was then heard on 17 October 2011. Hennev, J granted the order sought on the basis of the ex parte application to which I have made reference. Applicant contends that following this order:

"Respondent did not allow the grass to grow under its feet. It acted with great haste to entrench itself in Moonstone's business premises, moving far beyond the remit of the court order."

By contrast, respondent avers in its opposing affidavit:

"The respondent did not act beyond of the remit of the rule nisi. The respondent, with the assistance of the sheriff, took possession of the Sotheby's premises and in terms of the order began to manage the premises pending the return date of the rule nisi. As part of the management of the Sotheby's franchise business, the respondent was required to familiarise itself with matters requiring

immediate attention, which included, inter alia, the payment of accounts. To this end attempts were made to remit funds from the bank account of the franchise business to settle amounts due to creditors. The applicant's bankers were approached with a copy of the order so that steps could be taken to permit interim use of the account pending the rule nisi. Standard Bank elected not to comply with the order, which, correctly stated, did not reflect it as the respondent therein and advised that until such time as an order had been granted against it, the account would be suspended... The applicant's computers were not seized, they remained on site with the premises and had there been co-operation from the administrative staff, it would not have been necessary for the respondent to have looked through the computers to establish what immediate steps were required in the general management of the business. It is correct that certain books and accounts

were removed. This was more of a convenience to allow the respondent's bookkeepers an opportunity to understand the business' financial needs. In addition the respondent was required to familiarise itself with the various transactions to ensure that the continued seamlessly and without any undue delay."

Applicant argues that, as a result of this situation, it suffered financial prejudice. It was effectively evicted from its business premises, Flat 16, Marine House and, therefore, was in the position where it could not continue running its business. It, therefore, proceeded to court by way of a notice on 19 October 2011 in which it sought to have the rule nisi set aside. On 21 October 2011, Hennev, J set aside the ex parte order and directed the respondent to restore the applicant to possession of its business premises and to return all items which it seized, together with an inventory of such items.

According to applicant, respondent failed to act in accordance with the order of 21 October 2011, save for restoring applicant to the premises situated at 3 Marine House and the further premises at Flat 16, Marine House, Sea Point. It avers that "merely dumped two plastic bags of unidentified items at the front door of the former premises" and it continued to act as if the order on 17 October 2011 was false. In short, applicant argues that respondent has conducted itself as if the franchise agreement has been cancelled and that it is entitled to manage the franchise as if it were its own.

On the basis of this factual matrix, Mr Solomon, who appeared together with Mr Howie on behalf of the applicant, submitted that in spite of the cancellation of the franchise agreement being hotly disputed, respondent had conducted itself as if the cancellation had already taken place. Mr Solomon submitted that the respondent acted by poaching applicant's estate agents, utilising its mandates from clients, as well as exploiting

confidential client information, instructing all conveyancing attorneys to pay to the respondent any commissions which had been

earned by the applicant which was still due to be paid.

He further submitted that these factual submissions were supported by the further fact that the respondent had sought to dispose of the franchise business to an entity called Lew Geffen Estates CC, of which Mr Geffen was the sole member. Mr Solomon emphasised that in response to these various allegations in the present application, an answer in respondent's affidavit clearly indicated the nature of its conduct:

"On the issue of the cancellation, the draft letter of cancellation which was attached... in the ex parte application, has been deliberately misconstrued. The intention was not to cancel without first having taken control of the business for fear of the business being sabotaged by the applicant as explained above. Consequently in the ex parte application, a copy of the letter that the respondent intended delivering and which would cancel the franchise agreement, was attached as an annexure. A cancellation letter which was dated 18 October 2011 and delivered to the applicant on 18 October 2011, was virtually

identical... save for the date. This letter was delivered on the same date as the rule nisi was granted."

According to Mr Solomon, these paragraphs reflect the following:

1. The intention of the respondent was to take control of the business before cancellation. This was not only an action which was in direct conflict with clauses 25.3 and 26.6 of the franchise agreement, which provide for the way in which a dispute should be regulated, but it clearly reflected respondent's intention to dispose and, therefore, spoliage the applicant's business instead of pursuing the contractual avenues which were available to it.
 2. Further, the disposition prior to cancellation was also confirmed by the respondent, which not only intended to deliver the letter of cancellation subsequent to securing an ex parte order which was then later set aside.
 3. The letter of cancellation was not delivered on the same day that the rule nisi was granted. It is common cause that the order was granted on 17 October 2011, one day prior to delivery of the letter of 18 October
2011. The order was not a rule nisi, but was in fact an interim order of immediate force and effect, which represented confirmation of the cancellation which thus appears to be a final order.

Mr Vetten, who appeared on behalf of the respondent, raised a plethora of points in opposition to the relief so sought:

1. The application was not duly authorised.
2. The dispute concerned anti-competitive conduct with which this court does not have jurisdiction. 3. The applicant suffered from material ...(indistinct) joinder. 4. The applicant could not have a reasonable apprehension of harm to which the terms of the interdict against the respondent could speak. 5. The applicant did not establish either a prima facie or a clear right to relief in due course. 6. The applicant had an effective alternative remedy. Wisely, Mr Vetten did not proceed with the full encyclopaedia of objections, but concentrated on a few particular points to which I am thus required

to deal. 1. The question of authority. In his view, the application commenced without resolution, without the allegation that institution of the proceedings had been authorised. The applicant's authority to bring the proceedings had been challenged by the respondent. Although the deponent claim to be the sole director of the applicant, he was only a 20% member. The remaining 80% of the shareholding was owned by the Jankowitz Family Trust and, although Mr Jankowitz deposed to a confirmatory affidavit in respect of the founding affidavit, he could not speak for the family trust as he was only one of the trustees of the trust. The trustees had to act jointly. Whatever the merits of this argument, it was common cause that applicant was the sole director, ran the business on a day to day basis, which in my view, by implication, involves the authority to pursue litigation on behalf of the company and, accordingly, it did not appear to me

that this particular objection held much merit. The second point which was pressed by Mr Vetten concerned joinder The franchise business which the applicant had conducted, in his view is now being conducting by Lew Geffen Estates CC, to which entity I have already made reference. The respondent, therefore, was not Lew Geffen, but a corporate entity, Geffen International Realty Franchises (Pty) Limited. Respondent was involved in the marketing and sale of franchises to third parties. However, in correspondence of 28 October 2011, respondent's attorneys addressed a letter to applicant: "There has been a lawful cancellation of the franchise agreement pursuant to the breach of clause 8.1. The cancellation was accordingly effected in terms of clause 25.3 of the franchise agreement. As such, our client is entitled to conduct business for its own account as Lew Geffen & Sotheby's Agency, from the premises referred to in paragraph 12(b) of your letter." It does not appear, on the basis of this correspondence, that the applicant was required to do more than launch its proceedings

against respondent, which had clearly been responsible for the cancellation of the franchise agreement to which I have made copious

reference throughout this judgment. Turning to the question of the substance of the relief, Mr Vetten submitted that the applicant's breaches of the agreement could be summarised thus: 1. The applicant's directors had not devoted their full time and attention to the franchise. To the contrary, they are involved in competing businesses without the respondent's consent. 3. The applicant had failed during the subsistence of the franchise agreement to be in possession of a valid Fidelity Fund certificate. 3. The applicant had failed to prepare and deliver audited financial statements during the years 2007 to present, such financial

statements to be delivered within 90 days at the end of the financial year (these two latter complaints being echoed in the two

letters of 5 October 2011 to which I have already made reference). 4. The applicant has not purchased advertising annually to the value of R25 000,00. 5. The applicant had breached clauses of the franchise agreement, particularly clauses 5.3 and 5.4 by "dual branding with Dogon". There is a ferocious dispute between the parties about whether there had been breaches of the franchise agreement. All of the points, which had been set out by Mr Vetten, are disputed in the papers. There is also no doubt that the franchise agreement does state in clause 25.3: "Notwithstanding anything to the contrary herein contained, should the franchisor have given notice to the franchisee on two or more occasions in any 24 month period to remedy any breaches of this agreement, and notwithstanding that the franchisee may have rectified such breaches, the franchisor may, in the event of any further breach thereof during the said 24 month period, immediately cancel this agreement without notice." Thus Mr Vetten submits that the clause made it clear that the notice of breach was sufficient to activate the rights under the clause. Two notices of breach were delivered on 5 October 2011, which identified breaches of the franchise agreement. Whatever the merits of these breaches, both were triggered, simultaneously it appears, by way of a letter of 5 October 2011. Within seven days thereof, that is far short of the period by which to remedy the breach, respondent launched an ex parte hearing. I cannot but agree with Mr Solomon that these letters appear to have been generated merely to

bolster the ex parte application. If the respondent had acted in good faith, it surely would have waited the full 14 day period before it rushed to court in what can only be called a rather unusual application, that is proceeding to court ex parte in order to cancel a contractual agreement. Despite Mr Vetten's best efforts at interpretation, the second order of Hennev, J, clearly was intended to restore the status quo ante, which had, even on respondent's version, been significantly disrupted by respondent's action following the granting ex parte of the first order. I have already emphasised, on respondent's own version, the steps that it took following the granting of the ex parte order particularly that respondent, in effect, took control of the business. So much is clear from respondent's own version. Mr Vetten appeared aware of this difficulty; hence he was constrained to argue that the second order did not restore the status quo ante, but merely restored possession of property to the applicant. This is an exercise in jurisprudential gymnastics and has no merit. It is obvious what occurred. Respondent improperly sought to gain an advantage by an ex parte application, gaining a judicial imprimatur for its version that the contract had been cancelled. When it was caught with a contrary version, it was forced to accept an order reversing that position, that is the second order restored the position to that which had prevailed prior to the granting of the first order. On these papers, there is a clear dispute about whether respondent was entitled to cancel the contract. Clause 28 of the franchise

agreement expressly provides that: "Any dispute, question or difference arising at any time between the parties to this agreement, out of or in regard to: any matters arising out of or; the rights and duties of any party hereto or; the interpretation of or; the termination of or;

any matter arising out of the termination of or; the rectification of this agreement, Shall be submitted to and decided by arbitration on notice given by either party to the other parties on the terms that is provided for hereunder." The clause is clear: it employs simple language and it was intended to ensure that any dispute, any difference arising between the parties with regard to the contract or the termination thereof, is resolved by arbitration, that is not to court, not to be terminated by an ex parte application, not by way of litigation, but by way of arbitration. The agreement, therefore, was designed to provide for a resolution of the present impasse between the warring parties. Until resolved, respondent cannot simply cancel the contract unilaterally, take over the business, ignore the purpose of clause 28 and act in the manner which it has, even as set out in its own version. Until resolved, the applicant has a clear basis by which to protect its interests and its rights, which are still enshrined in the agreement and, therefore, demand that the status quo be preserved, pending the resolution of the dispute by way of arbitration. In the result thereof, the following order is made: 1. Pending the final determination of arbitration to be instituted against the respondent by the applicant within 21 days of this order and in which the issue of the dispute of cancellation of the franchise agreement concluded between the parties on 15 June 2007 is to be determined, the respondent is: (i) Interdicted and restrained from enforcing its dispute of cancellation of the agreement, and (ii) Contacting any of the conveyancing attorneys associated with the sale immovable properties for which the applicant has to be paid commission, and (iii) Advising any of the applicant's estate agents, clients, staff members and/or conveyancing attorneys that the agreement has been terminated, and (iv) Instructing the conveyancing attorneys to pay the commissions due to the applicant, to the respondent. (v) The

respondent is directed to pay the applicant the commissions which caused the conveyancing attorneys to pay it to the respondent. The costs of this application are reserved for determination by the arbitrator and the application, therefore, and the counter-application are postponed sine die. DAVIS J

2. The dispute concerned anti-competitive conduct with which this court does not have jurisdiction.
3. The applicant suffered from material ...(indistinct) joinder.
4. The applicant could not have a reasonable apprehension of harm to which the terms of the interdict against the respondent could speak.
5. The applicant did not establish either a prima facie or a clear right to relief in due course.
6. The applicant had an effective alternative remedy.

Wisely, Mr Vetten did not proceed with the full encyclopaedia of objections, but concentrated on a few particular points to which I am thus required to deal.

1. The question of authority. In his view, the application commenced without resolution, without the allegation that institution of the proceedings had been authorised. The applicant's authority to bring the proceedings had been challenged by the respondent. Although the deponent claim to be the sole director of the applicant, he was only a 20% member. The remaining 80% of the shareholding was owned by the Jankowitz Family Trust and, although Mr Jankowitz deposed to a confirmatory affidavit in respect of the founding affidavit, he could not speak for the family trust as he was only one of the trustees of the trust. The trustees had to act jointly. Whatever the merits of this argument, it was common cause that applicant was the sole director, ran the business on a day to day basis, which in my view, by implication, involves the authority to pursue litigation on behalf of the company and, accordingly, it did not appear to me that this particular objection held much merit.

The second point which was pressed by Mr Vetten concerned joinder The franchise business which the applicant had conducted, in his view is now being conducting by Lew Geffen Estates CC, to which entity I have already made reference. The respondent, therefore, was not Lew Geffen, but a corporate entity, Geffen International Realty Franchises (Pty) Limited. Respondent was involved in the marketing and sale of franchises to third parties. However, in correspondence of 28 October 2011, respondent's attorneys addressed a letter to applicant:

"There has been a lawful cancellation of the franchise agreement pursuant to the breach of clause 8.1. The cancellation was accordingly effected in terms of clause 25.3 of the franchise agreement. As such, our client is entitled to conduct business for its own account as Lew Geffen & Sotheby's Agency, from the premises referred to in paragraph 12(b) of your letter."

It does not appear, on the basis of this correspondence, that the applicant was required to do more than launch its proceedings

against respondent, which had clearly been responsible for the cancellation of the franchise agreement to which I have made copious

reference throughout this judgment.

Turning to the question of the substance of the relief, Mr Vetten submitted that the applicant's breaches of the agreement could be summarised thus:

1. The applicant's directors had not devoted their full time and attention to the franchise. To the contrary, they are involved in competing businesses without the respondent's consent.
3. The applicant had failed during the subsistence of the franchise agreement to be in possession of a valid Fidelity Fund certificate.
3. The applicant had failed to prepare and deliver audited financial statements during the years 2007 to present, such financial

statements to be delivered within 90 days at the end of the financial year (these two latter complaints being echoed in the two

letters of 5 October 2011 to which I have already made reference).

4. The applicant has not purchased advertising annually to the value of R25 000,00.
5. The applicant had breached clauses of the franchise agreement, particularly clauses 5.3 and 5.4 by "dual branding with Dogon".

There is a ferocious dispute between the parties about whether there had been breaches of the franchise agreement. All of the points, which had been set out by Mr Vetten, are disputed in the papers. There is also no doubt that the franchise agreement does state in clause 25.3:

"Notwithstanding anything to the contrary herein contained, should the franchisor have given notice to the franchisee on two or more occasions in any 24 month period to remedy any breaches of this agreement, and notwithstanding that the franchisee may have rectified such breaches, the franchisor may, in the event of any further breach thereof during the said 24 month period, immediately cancel this agreement without notice."

Thus Mr Vetten submits that the clause made it clear that the notice of breach was sufficient to activate the rights under the clause. Two notices of breach were delivered on 5 October 2011, which identified breaches of the franchise agreement.

Whatever the merits of these breaches, both were triggered, simultaneously it appears, by way of a letter of 5 October 2011. Within seven days thereof, that is far short of the period by which to remedy the breach, respondent launched an ex parte hearing. I cannot but agree with Mr Solomon that these letters appear to have been generated merely to bolster the ex parte application. If the respondent had acted in good faith, it surely would have waited the full 14 day

period before it rushed to court in what can only be called a rather unusual application, that is proceeding to court *ex parte* in order to cancel a contractual agreement. Despite Mr Vetten's best efforts at interpretation, the second order of Hennev, J, clearly was intended to restore the status quo ante, which had, even on respondent's version, been significantly disrupted by respondent's action following the granting *ex parte* of the first order.

I have already emphasised, on respondent's own version, the steps that it took following the granting of the *ex parte* order particularly that respondent, in effect, took control of the business. So much is clear from respondent's own version. Mr Vetten appeared aware of this difficulty; hence he was constrained to argue that the second order did not restore the status quo ante, but merely restored possession of property to the applicant. This is an exercise in jurisprudential gymnastics and has no merit. It is obvious what occurred. Respondent improperly sought to gain an advantage by an *ex parte* application, gaining a judicial imprimatur for its version that the contract had been cancelled. When it was caught with a contrary version, it was forced to accept an order reversing that position, that is the second order restored the position to that which had prevailed prior to the granting of the first order.

On these papers, there is a clear dispute about whether respondent was entitled to cancel the contract. Clause 28 of the franchise

agreement expressly provides that:

"Any dispute, question or difference arising at any time between the parties to this agreement, out of or in regard to:

any matters arising out of or;

the rights and duties of any party hereto or;

the interpretation of or;

the termination of or;

any matter arising out of the termination of or;

the rectification of this agreement,

Shall be submitted to and decided by arbitration on notice given by either party to the other parties on the terms that is provided for hereunder."

The clause is clear: it employs simple language and it was intended to ensure that any dispute, any difference arising between the parties with regard to the contract or the termination thereof, is resolved by arbitration, that is not to court, not to be terminated by an *ex parte* application, not by way of litigation, but by way of arbitration. The agreement, therefore, was designed to provide for a resolution of the present impasse between the warring parties. Until resolved, respondent cannot simply cancel the contract unilaterally, take over the business, ignore the purpose of clause 28 and act in the manner which it has, even as set out in its own version. Until resolved, the applicant has a clear basis by which to protect its interests and its rights, which are still

enshrined in the agreement and, therefore, demand that the status quo be preserved, pending the resolution of the dispute by way of arbitration.

In the result thereof, the following order is made:

1. Pending the final determination of arbitration to be instituted against the respondent by the applicant within 21 days of this order and in which the issue of the dispute of cancellation of the franchise agreement concluded between the parties on 15 June 2007 is to be determined, the respondent is:
 - (i) Interdicted and restrained from enforcing its dispute of cancellation of the agreement, and
 - (ii) Contacting any of the conveyancing attorneys associated with the sale immovable properties for which the applicant has to be paid commission, and
 - (iii) Advising any of the applicant's estate agents, clients, staff members and/or conveyancing attorneys that the agreement has been terminated, and
 - (iv) Instructing the conveyancing attorneys to pay the commissions due to the applicant, to the respondent.
 - (v) The respondent is directed to pay the applicant the commissions which caused the conveyancing attorneys to pay it to the respondent.

The costs of this application are reserved for determination by the arbitrator and the application, therefore, and the counter-application are postponed sine die.

DAVIS J

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