

SOUTH AFRICA / JUDGMENT

MSA Devco Pty Ltd v Mmakola and Others (2024/032105) [2024] ZAGPJHC 1023 (11 October 2024) [2024] ZAGPJHC 1023

COURT

South Gauteng High Court, Johannesburg

BEFORE

Mudau

CASE / FILE NUMBER

2024/032105

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

Case

Number: 2024-032105

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: YES

11

October 2024

In

the matter between:

MSA
Devco Pty Ltd
First
Applicant
And
Qondiwa
Barbara Mmakola
First
Respondent
Mahlasedi
Mmakola
Second
Respondent
Funeka
Philda Mmakola
Third
Respondent
This

judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 11 October 2024.

Key
words: Enforcement of an arbitration award- section 31 of the Arbitration Act, 42 of 1965.

JUDGMENT

MUDAU, J

[1] This is an application to enforce an arbitration award by Maenetje SC pursuant to section 31 of the Arbitration Act[1], ("the Act"). In paragraph 1.2 of its notice of motion, the applicant seeks an order that it is entitled to operate and manage four McDonald's restaurants situated at Lephalale, Groblersdal, Thabazimbi and Kwaggafontein ("the restaurants")

without the involvement of the respondents in such operation and management in terms of the provisions of clause 16.1.3 of the

franchise agreement. The application arises out of an award made by the arbitrator on 1 February 2023, in arbitration proceedings between the parties.

The notice of motion seeks an order in further relevant parts which reads thus:

"1.3 Directing the respondents to hand over the operations and management of the restaurants to the applicant.

1.4 Directing the respondents to deliver the following to the applicant and to do so within two days from the date on which the order is granted:

1.4.1 the keys to the restaurants;

1.4.2 a list of the employees employed at the restaurants together with their positions and their contact telephone numbers;

1.4.3 full access to the point-of-sale system for the restaurants;

1.4.4 full access to the back-office system where all the documents relevant to the operation and management of the restaurants are kept;

1.4.5 full details of the restaurants' accountant;

1.4.6 the management accounts of the restaurants for the period ending one 'month before the date on which the order is granted;

1.4.7 the codes, if any, which are required and are necessary to enable the applicant to access and operate all electronic systems relevant to the operation and management of the restaurants."

[2] Section 31 of the Act, provides in relevant part:

"(1) An award may, on the application to a court of competent jurisdiction by any party to the reference after due notice to the other party or parties, be made an order of court".

[3] The award in relevant parts reads:

"68.1 McDonald's is entitled in terms of clause 16.1.3 to operate and manage the four McDonald's franchise restaurants at Lephalale,

Groblerdsdal, Thabazimbi and Kwaggafontein in issue in the arbitration in accordance with the terms of the franchise agreements concluded in respect of the restaurants until Mr Mmakola's interests in the aforesaid restaurants are transferred to another person or other persons acceptable to McDonald's in accordance with the terms and conditions of the franchise agreements concluded in respect of the restaurants".

[4] The parties have failed to reach an agreement on "the details" and the "arrangements" which the arbitrator and the arbitration award require them to agree on, hence this application.

[5] The applicant is MSA Devco (Pty) Ltd ("McDonald's"), a private company with limited liability duly incorporated as such in accordance with the laws of the Republic of South Africa.

[6] The first respondent, Qondisa Barbara Mmakola, is an adult female cited in this matter in her capacity as the executrix of the estate of the late Mr Frans Kgwadi Mmakola ("Mr Mmakola"). The first respondent is the late Mr Kgwadi Frans Mmakola's widow.

[7] The second respondent, Mahlasedi Avril Mmakola is an adult female with vested interests in the estate of the late Mr Frans Kgwadi Mmakola.

- [8] The third respondent, Funeka Philda Mmakola, is an adult female with vested interests in the estate of the late Mr Frans Kgwadi Mmakola. The second and third respondents are the children and the late Mr Mmakola's adult daughters.

Background facts

- [9] The facts are largely common cause. McDonald's and the late Mr. Frans Mmakola concluded 4 franchise agreements in respect of the restaurants. The conclusion of the franchise agreements and the terms stipulated therein are not in dispute. Mr Mmakola passed away in January 2021. A dispute arose between the parties about the identity of the person as to whom Mr Frans Mmakola's right in terms of the franchise agreements must be transferred. The respondents were of the view that's such right must be transferred to the second and third respondents, which was contrary to the views that are held by McDonald's.
- [10] The dispute was as a result referred to arbitration pursuant to clause 29.2.2 of the franchise agreement between the parties by the respondents. In terms of clause 29.4 of the franchise agreement, "the arbitration award shall be final and binding upon the parties and may be enforced in any court of competent jurisdiction". Clause 29.8.3 of the franchise agreements provides that the "parties waive to the fullest extent permitted by law any rights to appeal to, or to seek review of the award of the mediator or arbitrator by any Court." Also, clause 29.4 provides that, "the arbitration award shall be final and binding upon the parties and may be enforced in any court of competent jurisdiction. In the arbitration proceedings the respondents sought but failed to be awarded franchise rights previously held by the deceased, Mr Mmakola.
- [11] In the arbitration proceedings, relying on clause 16.1.3 of the franchise agreement, McDonald's applied for an order directing the respondents to hand over the operations and management of the four restaurants to it. In addition, to provide it with full and unrestricted access to the restaurants as well as the electronic systems necessary to effect operations and management thereof.
- [12] Clause 16 of the franchise agreement, which is materially relevant, deals with near or permanent incapacity of the franchisee. Clause 16.1.3 provides that:

"on death or Permanent Incapacity of the Franchisee, the Company has the option to operate and manage or designate a Person to operate and manage the Restaurant in accordance with this Agreement on an interim basis for the account of the Franchisee, the Franchisee's legal representative, or his/her estate, as the case may be, until the deceased or incapacitated Franchisee's interest therein is transferred to another Person acceptable to the Company in accordance with the terms and conditions of this Agreement. However, in no event will the Company's operation and management of the Restaurant continue for a period in excess of twelve (12) full calendar months without the consent of the Franchisee or of the legal representative of his/her estate. In the event of the Company operating and/or managing the Restaurant, the Company will make a complete account to and return the net income from such operation to the Franchisee, the Franchisee's legal

representative or to his/her estate, as the case may be, minus the reasonable management fees and expenses. During such time as the Company is operating and managing the Franchisee's Restaurant, the Franchisee (or administrator or executor of his/her estate) will continue to be liable for any debts, losses or obligations the Restaurant incurs and for the expenses associated with any products or services the Restaurant purchases or provides;...” My underlining.

[13] From a plain reading of clause 16.1.3 and as the arbitrator concluded, it entitles McDonald's to exercise the option to operate and manage or to designate a person to operate and manage the restaurants on an interim basis in accordance with the terms of the franchise agreement until the late Mr Mmakola's interest in the restaurants as franchisee is transferred to another person acceptable to McDonald's in accordance with the terms and conditions of the franchise agreement.

[14] There is no disputing that the relief sought by McDonald's is the same that it sought during the arbitration proceedings in its application to enforce its rights in terms of clause 16.1.3 of the Franchise Agreement, which relief the arbitrator declined to grant. The Arbitrator did so in the following terms:

'(65) However, clause 16.1.3 of the franchise agreement does not address or regulate the details addressed in the other orders that McDonald's seeks and which I described above in paragraphs 15.1 to 15.7. I cannot grant these orders pursuant to the provisions of clause 16.1.3 of the franchise agreement. McDonald's heads of argument and oral submissions do not justify the grant of these additional orders in the light of the express terms of clause 16.1.3 of the franchise agreement. In my view the details must be worked out by the parties to give effect to the rights and obligations in clause 16.1.3 of the franchise agreement....”

[15] The application is opposed on a very limited ground. In para 64 of their answering affidavit, the respondents ask:

“for an order in terms of which the award is made an order of Court in the same form directed by the Arbitrator” alternatively dismissing the application with the necessary costs order on a punitive scale”.

[15] In our law, the proper approach to the interpretation of written contracts has long been settled and followed in a long line of decided cases. In *Endumeni (Natal Joint Municipality Pension Fund v Endumeni Municipality*[2] para 18 and *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk*[3] para 10, the Court on appeal made it clear that when interpreting a contract consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. It is a unitary approach. However, a sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the contract. (See also *Amabhungane Centre for Investigative Journalism NPC v President of the Republic of South Africa*).[4]

- [16] Following the unitary approach as indicated above, the point of departure is the language used in clause 16.1.3, in 'light of the ordinary rules of grammar and syntax' referred to in Endumeni. As with any clause in a composite agreement, one cannot read clause 16.1.3 in isolation. It must be read in conjunction with other relevant clauses of the franchise agreement. In this instance, Clause 16.1 governs the position upon the death of Mr Mmakola. It binds Ms Q Mmakola as the executrix of the estate, which includes Ms Mahlasedi Mmakola as the appointed family representative. Both incur legal obligations towards McDonald's under the clause and in turn acquire the right to enforce compliance by McDonald's with the terms of the clause.
- [17] Also, Clause 1(D) provides that the franchise agreement will be interpreted giving effect to the intention of the parties so that the restaurant is operated in conformity to the McDonald's restaurant system through strict adherence to the company standards and policies as they exist and as may be modified. Additionally, under training and staff, clause 8.1 provides that: "The Company shall make available to the Franchisee initial and ongoing, basic and advanced training that complies with the Global Training Standards..."
- [18] Clause 5.2.2 of the franchise agreement provides that McDonald's (or such person as it designates from time to time) has the right, without prior notice to the franchisee, to inspect the restaurants from time to time at all reasonable times and to monitor and test the equipment and the computer system at the restaurants, observe, photograph and videotape or CCTV the restaurants' operations, interview the restaurants' personnel and customers and take samples of food, beverages, paper and other products used and sold therein to ensure that the franchisee's operation of the restaurants is policy and standard compliant.
- [19] Clause 16.1.3 of the franchise agreement makes plain that McDonald's is entitled in terms of the franchise agreement to exercise the option to operate and manage or to designate a person to operate and manage the restaurants on an interim basis until such time within the prescribed period of a year that Mr Mmakola's interest in the restaurants as franchisee is transferred to another person acceptable to McDonald's in accordance with the terms and conditions of the franchise agreement.
- [20] McDonald's contends that simply making "the arbitration award an order of Court" would perpetuate the deadlock which led to the institution of this application and would not serve the interests of justice. McDonald's contends that "a mechanical order which simply reproduces paragraph 68 of the arbitration award without more is not going to bring finality and will not be enforceable". Reference was made to what was stated in Court in Parsons[5], which the applicant contends is equally applicable here in the context of making a settlement agreement an order of court. In that case the court in Parsons emphasized that the order which a court makes "can only be one that is competent and proper" and that a Court "must thus not be mechanical in its adoption of the terms of a settlement agreement" with which I agree and that for "an order to be competent and proper, it must, in the first place, 'relate directly or indirectly to an issue or dispute between the parties'".

- [21] This court is urged to convert the arbitration award into its own order so that the arbitration award as converted into a Court order that is enforceable “just like a Court order”. McDonald’s contends that, the relief which it seeks in paragraphs 1.4.1 to 1.4.7 of its notice of motion is nothing more than a mechanism to give effect to and enforce its right to operate and manage the restaurants as contemplated in the arbitration award without being frustrated by the respondents. This court is urged to go further and grant relief consequential thereto which would make the arbitration award unconditionally enforceable.
- [23] I have no difficulty in also concluding that, McDonald's is entitled in terms of clause 16.1.3 to operate and manage the four McDonald's franchise restaurants at Lephalale, Groblersdal, Thabazimbi and Kwaggafontein in accordance with the terms of the franchise agreements.
- [24] I see no difficulty to read in that to manage and operate the four restaurants, requires granting the relief sought in the notice of motion in its entirety. For instance, the keys to the restaurants are key to managing a business entity. Also, by way of another example, there is no difficulty to read in that the relief sought in 1.4.7 of the notice of motion regarding “the codes, if any, which are required and are necessary to enable the applicant to access and operate all electronic systems relevant to the operation and management of the restaurants,” are necessary to give effect and meaning to the award given by the arbitrator.
- [25] In this matter, the legal submissions and contentions made on behalf of the applicant, and the affidavits amplify why there is justification and support of the writ of mandamus, which is essentially sought by McDonald’s. The rules of interpretation

and applicable laws governing contracts allow all the relief sought by the applicant to effectively manage the four restaurants.

[26] Order

1. The award by the arbitrator, Maenetje SC that MacDonald’s is entitled to operate and manage four McDonald's restaurants situated at Lephalale, Groblersdal, Thabazimbi and Kwaggafontein (“the restaurants”) is made an order of court;
2. The respondents to deliver to the applicant and to do so within two days from the date on which the order is granted in accordance with the Notice of Motion;
 - 2.1 The keys to the restaurants;
 - 2.2 A list of the employees employed at the restaurants together with their positions and their contact telephone numbers;
 - 2.3 Full access to the point-of-sale system for the restaurants;
 - 2.4 Full access to the back-office system where all the documents relevant to the operation and management of the restaurants are kept;
 - 2.5 Full details of the restaurants’ accountant;

2.6 The management accounts of the restaurants for the period ending one 'month before the date on which the order is granted;

2.7 The respondents are to provide the applicant with the codes, if any, that are required and are necessary to enable the applicant to access and operate all electronic systems relevant to the operation and management of the restaurants.; and

3. The respondents are to pay costs, each paying for the other to be absolved.

MUDAU J

JUDGE OF THE HIGH COURT

JOHANNESBURG

APPEARANCES

Counsel for the Applicant: Instructed by: Adv. Kennedy Tsatsawane SC ASHERSONS Attorneys

Counsel for the Respondent: Instructed by: Adv. Kota Ernest Masoga Reneilwe Mathekga

Attorney Date of Hearing: Date of Judgment: 22 July 2024 11 October 2024

[1] 42 of 1965.

[2] [2012] ZASCA 13; [2012] 2 All SA 262; 2012 (4) SA 593 (SCA).

[3] [2013] ZASCA 176; [2014] 1 All SA 517; 2014 (2) SA 494.

[4] [2022] ZACC 31; 2023 (2) SA 1 (CC); 2023 (5) BCLR 499 (CC) para 36.

[5] Eke v Parsons 2016 (3) SA 37 (CC).

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