

MORGAN MUGONA
and
LOVEMORE MAKANYA
versus
CONSOLIDATED FARMING INVESTMENTS LTD

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 26 January 2017 & 15 November 2017

Opposed Matter

T Nyamucherera, for the applicants
T Tandi, for the respondent

FOROMA J: This is an application for the following declaratur in terms of s 14 of the High Court Rules Act [*Chapter 7:06*]

1. That the franchise agreement be and is hereby declared to have been terminated by notice given by the respondent on 31 March 2012.
2. That applicants resumed being employees of respondent upon the termination of the franchise agreement.
3. The respondent be and is hereby ordered to reinstate the applicants as its employees with full pay and benefits from the time the dispute arose if reinstatement is no longer tenable it pays damages in lieu thereof.

The respondent Consolidated Farming Investments Limited opposes the grant of the declaratur.

The following factual background is common cause between the parties.

1 – Respondent t/a Town and Country (hereinafter called respondent) and a company called Upridge Trading (Pvt) Ltd t/a

Afrofood (hereinafter called Upridge) entered into a franchise agreement the relevant provision of which is clause 7.2 reproduced below:-

“7.2.1 The grant of this franchise is conditional on the franchise taking over the employment of the employees currently serving the franchise within the franchise business and the franchise on the same terms and conditions of service and without loss of benefits. The franchisor shall provide a detailed list of the employees within the defined territory of the franchise.

7.2.2 At the end of the franchise, in accordance with clause 3 above, the franchise shall only re-engage the same number of employees that had been transferred to the franchise at the grant of the franchisee.

7.2.3 Any retrenchments redundancies or such like effected by the franchisee after the effective date of this agreement shall be for its own account and will not be paid by the franchisor.”

The applicants are some of the franchisor’s employees taken over by the franchisee in terms of clause 7.2.1 aforesaid. The relationship between respondent and Upridge developed cracks on account of certain breaches of the agreement resulting in respondent cancelling and withdrawing the use of Town & County Trademark and associated logos and synage. The parties appear to have disagreed on the termination and their dispute was referred to arbitration in terms of clause 11.1 of the franchise agreement.

According to the arbitral award by C H Lucas Upridge which had breached the franchise agreement in several respects was given notice to remedy its breaches of the agreement by respondent and it failed to do so.

The arbitration proceedings were determined in favour of the Respondent against Upridge. The arbitral award which was delivered on 30 September 2012 confirmed termination of the franchise agreement entered into on 15 April 2010. The arbitral award is extant.

It is also not disputed that the franchise agreement was for a given terms. In terms of clause 3.1 the franchise agreement was due to expire at the end of 3 years unless extended or renewed.

On 12 September 2012 Upridge was placed under provisional liquidation. The legal effect of provisional liquidation on the status of applicants’ employment is disputed. On 21 March 2012 and before the termination of the franchise agreement referred to above respondent officially wrote to Upridge highlighting its dissatisfaction with Upridge’s performance of its obligations in terms of the franchise agreement. Respondent then withdrew its Town and Country trademark and associated logos and signage as well as other associated intellectual property rights. Following upon this respondent cancelled the franchise agreement and terminated Upridge’s lease agreements

by virtue of which Upridge occupied respondent's Town and Country outlets – per Lucas arbitral award.

Issues for determination

1. Whether and when the franchise agreement was terminated.
2. The consequences of termination of the franchise agreement on the employment status of applicant's post termination.
3. What effect if any the provisional order of liquidation had on the applicants' employment.

In terms of the arbitral award by CH Lucas delivered on 30 September 2012 which is part of the papers filed by the applicants, the franchise agreement was terminated sometime in March 2012. This is also the position as submitted by the applicants which finds support from an arbitral award Annexure C. According to the arbitral award by C H Lucas Upridge was ordered to pay holding over damages of \$1 840.00 from 1 April 2012. The 1 April 2012 is significant as the effective date of the accrual of holding over damages as holding over damages fall due upon termination of a lease when despite termination of the lease / the lessee breaches the duty to vacate leased property - See Professor Chistie – *Business Law in Zimbabwe* 2 ed p 293. The 1st of April 2012 is the date which in all probability indicates when the franchise agreement was terminated. Respondent's contention is that the franchise agreement terminated when Upridge went into liquidation. This is not legally supportable. Provisional liquidation does not terminate the legal relationships between the creditors and the company under liquidation. All that happens on the grant of the order for provisional liquidation is that the enforcement of obligations against the distressed company under liquidation is stayed by operation of law unless with the leave of the court – Section 213 of the Companies Act [*Chapter 24:03*].

As a matter of fact if the agreements with the company in liquidation were cancelled by reason of liquidation then there would be no point in the process of liquidation. Respondent submits that “it is not in dispute that the contracts of employment were terminated (sic) when Upridge went into liquidation, and cancelled all agreements it had signed when it entered into a franchise agreement with the respondent.” This submission is erroneous.

Applicants are therefore legally on a sound footing in submitting that the effect of liquidation was not to automatically terminate the franchise agreement. It is clear therefore that the

franchise agreement was terminated in terms of a written notice as confirmed by the arbitral award of C H Lucas.

Effect of termination on applicant's employment

It is reiterated that Clause 7.2.2 provides as follows "At the end of the franchise term in accordance with clause 3 above the franchisor shall only re-engage the same number of employees that had been transferred to the franchisee at the grant of the franchise." On the other hand in terms of clause 3 the term of the franchise ends or expires after three (3) years from the effective date unless renewed or earlier terminated as provided in the agreement. Clause 9 provides the circumstances in which the franchise agreement shall be terminated by the franchisor. As found by the arbitrator C.H Lucas the franchise agreement was terminated in terms of clause 9:1:1. It is important to reiterate that in terms of clause 7.2.2 on termination of the franchise agreement the franchisor shall re-engage the employees that had been transferred to the franchisee at the grant of the franchise.

In its opposition to applicants' application respondent took three points *in limine* namely

- (1) that the matter was *res judicata*
- (2) that the matter was *lis pendens* and
- (3) that the matter was prescribed. I will deal with each in turn

Re: *Res Judicata*

The respondent argues that in an arbitration before T. Mlilwana the arbitrator made the following award:

1.
2. By claiming salaries and benefits from the liquidator, claimants acquiesced to their employ with Afro Foods
3. Claimants were never dismissed by the respondent but were still employees of Afro Foods (Under Liquidation).
4. Claimants' claims against respondent are therefore dismissed.

Claimants in the arbitration proceedings before Mlilwana were Morgan Mugona one of the applicants and 159 others. Of the 159 employees some were not former employees of the Franchisor (respondent).

The arbitral award (by Mlilwana) was unsuccessfully appealed against to the Labour Court. Dissatisfied with the judgment of the Labour Court it was denied to appeal and leave to appeal to the Supreme Court was sought and refused by the Labour Court. An appeal to the Supreme Court against refusal of leave to appeal was filed with the Supreme Court but eventually withdrawn. The effect of the withdrawal of the notice of appeal against refusal of leave to appeal by Labour Court made the judgment of the Labour Court final which in turn had the effect of making the arbitral award final. It was on the basis of this finality that the defence of *res judicata* was raised. I have gone through the details of the hearing of the arbitration proceedings before T Mlilwana (Designated Agent) and am unable to agree with it. There are serious errors of fact made. In part the errors are attributable to erroneous submissions by both counsels – I outline a few of the errors from the record of Arbitration proceedings below:

- “(i) Claimants submitted that on or about the 21 March 2012 respondent (Franchisor) officially cancelled the Franchise Agreement, letter of cancellation is marked Annexure E and a copy of the arbitral award is attached as Annexure “F” Claimants reverted back to CFI on 21 March 2012 when it cancelled the agreement. As indicated herein above the franchise agreement was cancelled at the end of March 2012.
- (ii) Respondent submitted that termination of the franchise agreement was not caused by respondent as Upridge was placed under liquidation. This is contrary to the Arbitral award by CH Lucas aforesaid which found that Upridge breached the franchise agreement resulting in respondent cancelling the franchise agreement on notice.
- (iii) Clause 7.2.2 of the franchise agreement would only take effect after the termination in April 2013(at end of 3 years duration of the franchise agreement). This is a misreading of clause 3.1 of the franchise agreement as the franchise agreement could be earlier terminated on breach see clause 9 of the franchise agreement (*supra*).
- (iv) That the liquidation of Upridge rendered claimants redundant hence clause 7.2.3 took effect.” This was totally misplaced a submission.

As against (i) above the respondent’s counsel correctly submitted that the letter of 21 March 2012 did not terminate the franchise agreement as the said letter only demanded withdrawal of use by Upridge of respondent’s trade mark logos and signage. Regrettably despite this correct submission the respondent’s counsel also fell into error by submitting that the Franchise Agreement was terminated by liquidation, this despite the arbitral award of Lucas in respondent’s favour to the contrary.

The arbitrator erroneously found that the claimants were never dismissed by the respondent and that they remained the employees of Upridge under liquidation. This finding was in direct

conflict with the arbitral award of CH Lucas which ruled that the franchise agreement was terminated on the 31 March 2012 by the respondent in terms of clause 9 of the franchise agreement.

The arbitrator (Mlilwana) made a gross error in finding as follows:-

“It is my finding that claimants were never dismissed by respondent as they were employed by Afro Foods which was placed under liquidation. At the time Afro Food was liquidated claimants were still employed by Afro Foods. The claim that the claimants were dismissed through a letter from Town and Country by P. Rambanapasi dated 28 January 2013 does not count as in the letter the respondent merely advised claimants and reiterated the position that ex Town and Country employees were still employed by Afro Foods (Under Liquidation).”

The error from this quoted passage arises from the fact that it ignores the finding in the arbitral award by CH Lucas that the franchise agreement was terminated at the end of March 2012. Once the franchise agreement was terminated the temporary employment of the respondent’s employees transferred temporarily (for the duration of the franchise agreement) to Upridge also terminated thus bringing into effect the requirement of re-engagement by the respondent of these employees. The arbitrator (Mlilwana) also made a serious error when he made the following finding

“The submission by claimants that respondent would take back employees upon effluxion of the franchise agreement cannot be considered as the Franchise Agreement never came to expiry. Instead, Afro Foods was placed under liquidation.”[my underlining for emphasis].

As indicated hereinabove the franchise agreement was competently and validly terminated at the end of March 2012 as found by CH Lucas (arbitrator) on account of breach of the agreement.

Mlilwana made yet another serious error when he found that

“the liquidation preceded the confirmation of the cancellation by the arbitrator (C H Lucas). The arbitration award was no longer binding between the parties. The institution of the Arbitral proceedings was over taken by events.”

In the absence of a setting aside of C H Lucas’ arbitral award by the High Court in terms of the Article 34 (2) of the Model Law under Arbitration Act [*Chapter 7:15*] the award remains extant and another arbitrator has no power to set it aside. See *Ropa v Reosmart Investments P/L and Anor* 2006 (2) ZLR 283 (S) at 286 B-C Once cancellation of the franchise agreement was confirmed through an arbitral award the provisions of clause 7.2.2 kicked in. Although the respondent’s obligation to re-engage the applicants may not have been implemented immediately but the applicants entitlement to re-engagement became irrevocably established The applicants’

right to be re-engaged could not have been compromised by any erroneous pursuit of unavailable remedies such as making demands to Upridge erroneously believing that it was their employer.

Prescription

The respondent also claimed that the applicants' claim had prescribed by the time the application was served on it i.e. on 15 September 2015. The argument is that the cause of action arose on 12 September 2012 when Upridge was placed under liquidation as it is then (so respondent argues) that applicants' contracts of employment were terminated. I have herein above indicated that the placing of Upridge under liquidation had no effect on the applicants' employment by Upridge as by then the franchise agreement had already terminated. By the same token such liquidation had no effect on the commencement of the running of prescription on applicants' claim. The respondent's argument is therefore without merit. Besides respondent has not settled on the date on which prescription commenced to run. The court cannot resolve that for respondent.

In the alternative the respondent argued that the applicants' claim is prescribed in terms of s 94 of the Labour Act [Chapter 28:01]. This argument is also premised on the erroneous view that the applicant's employment was terminated as a consequence of Upridge being placed under liquidation. It is for the same reason that this argument in support of the claim of prescription is found to be bereft of any merit.

Lis pendens

This special plea has been raised without placing adequate facts on which the court can properly assess the validity of the contentions. The court is accordingly unable to come to the respondent's assistance given the paucity of the facts on which to base the proper exercise of its discretion. I accordingly cannot find against the applicants on the special plea.

The applicants in their heads of argument argue that when they approached the respondent seeking re engagement after termination of the franchise agreement the respondent promised that it was creating an opening for the applicants and their colleagues entitled to re engagement. It was however on 28 January 2013 that the respondent categorically refused to take the applicants back.

The parties were requested to furnish a copy of the letter dated 28 January 2013 for the court's perusal in its consideration of judgment as it did not form part of the documents filed in this application. A copy was delivered under cover of letter dated 10 November 2017 by Messrs Kantor and Immerman. The first sentence of the letter reads: –

“This letter serves to confirm that you are no longer employees of Town and Country.” The letter goes on to say- “this is as a result of a franchise agreement entered into by and between Town and Country and Upridge Trading wherein the former transferred the undertaking to the latter. As a result of the liquidation of Upridge Trading certain conditions were not met. As a result certain clauses of the franchise agreement take effect and it entails the ex-Town and Country employees are still employed by Upridge Trading.” The letter is signed Rambanapasi Managing Director.

This letter is not disputed by the respondent and the respondent argues that the applicants and their co-workers were permanently transferred to Upridge in terms of s 16 of the Labour Act. In its heads of argument the respondent submits as follows- “10.5 it is submitted that once the undertaking was transferred applicants were thereafter employed by Upridge without limit of time. Further since May 2010 applicants were rendering services to Upridge’s AfroFoods Supermarkets and, they were being remunerated by Upridge on terms and conditions that they agreed with Upridge.....

This submission erroneously disregards the clear fact that contractually there was never any agreement or intention to permanently transfer the respondent’s employees to Upridge as the franchise agreement was a temporary arrangement of 3 years duration subject to possible extension by renewal in terms of clause 3.1 of the said franchise agreement. By reason of the temporary nature of the franchise agreement and by express and specific agreement between the franchisor and franchisee the agreement was conditional upon clauses 7.2.1 and 7.2.2 (supra). It is worth reiterating by quoting this part of the clause 7.2.2. – “At the end of the Franchise term in accordance with clause 3 above the franchisor shall only re-engage the same number of employees that had been transferred to the franchisee at the grant of the franchise.

It is clear from the provisions of the franchise agreement that the transfer of employees was for the duration of the franchise term. As a matter of fact the franchise went with the work force in order to ensure compliance with the provisions of s 16 of the Labour Act designed to protect labour whenever a business is disposed of as a going concern.

In the circumstances the applicants have successfully established their entitlement to a declaratur. I accordingly make the following order- It is ordered that-

1. The franchise agreement between Consolidated Farming Investments Ltd t/a Town and Country and Upridge Trading (Pvt) Ltd t/a Afrofood is declared to have been terminated on 31 March 2012 by notice as determined by the arbitral award of CH Lucas handed down on 30 September 2012.
2. Applicants' employment with Upridge Trading P/L terminated on the day the franchise agreement was terminated and as a result of the termination of the franchise agreement the respondent became obliged to re-engage the applicants into its employment without breaking their period of service.
3. The respondent is to pay the cost of suit.

Lawman Chimuriwo Attorneys, 1st & 2nd applicants' legal practitioners
Messrs Kantor & Immerman, respondent's legal practitioners