

DAIRIBORD ZIMBABWE LTD

Versus

LITGHTON TRADING (PRIVATE) LIMITED

IN THE HIGH COURT OF ZIMBABWE
CHIWESHE J
BULAWAYO 2 OCTOBER 2003

J Tshuma for applicant
Ms P Dube for respondent

Opposed Matter

CHIWESHE J: The applicant company seeks an order couched as

follows:

- “A. The franchise agreement entered into between applicant and respondent in or around December 1999 be and is hereby declared lawfully cancelled;
- B. Respondent and all those claiming through it be and are hereby ordered to vacate forthwith:-
 - (i) The depot premises at number 9 Wilcania Street, Kwekwe;
 - (ii) The depot premises at number 11 Wilcania Street, Kwekwe; and
 - (iii) The house at number 9 Norfolk Drive, Fitchlea, Kwekwe.
- C. In the event of respondent failing to comply with paragraph (B) above it is ordered that the Deputy Sheriff be and is hereby authorised to evict the respondent from the said premises mentioned in paragraph (B) above.
- D. Respondent pay applicant’s costs of suit.”

The background facts to this matter are as follows. In or around December 1999 the parties entered into a franchise agreement in terms of which the respondent was appointed applicant’s sole franchisee for the district of Kwekwe for the purposes of selling and distributing the applicant’s dairy products. In order to facilitate the respondent’s operations in that regard, the applicant leased to the respondent its depot premises situate at stands 506 and 507 Que Que Township (also known as numbers 9

and 11 Wilcania Street Kwekwe) and the house at number 9 Norfolk Drive, Fitchlea, Kwekwe.

The applicant has terminated the franchise agreement on the grounds firstly that the respondent has breached clause 2(b)(ii) of the contract which obliges the respondent to bank all the daily takings from the proceeds of the sales of the applicant's products into the applicant's bank account. By letter dated 23 January 2002 the applicant advised the respondent that because of that breach the agreement would be terminated with effect from 28 February 2002. The respondent deny any conduct in breach of the said provision.

The franchise agreement was one of fixed duration. It was envisaged that it would run from 1 April 1999 to 30 December 2004. Clause 8 of the agreement deals with termination. It reads:

“8. Termination of Agreement

- (1) Non sales performance (less than 95% of budget) for three consecutive months or for three months in six months shall prompt Dairibord to cancel the contract. Sales budgets shall be agreed on by Dairibord and the franchisee at the beginning of each planning period (currently in December and June annually).
- (2) Without prejudice to any other remedies that Dairibord may have against the franchisee, it shall have the right at any time by giving notice in writing to the franchisee to terminate the agreement forthwith and Dairibord shall immediately take over in any of the following event:
 - (a) On Breach
If the franchisee commits a breach of any of the terms or conditions of this agreement.
 - (b) On liquidation or insolvency
If the franchisee ...
 - (c) On prevention of performance of duties
If from any cause ...
 - (d) On prejudicial conduct
If the franchisee is guilty of any conduct which in the opinion of Dairibord is prejudicial to its interest
 - (e) If franchisee commits an act of insolvency

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- (3) Either party may terminate the agreement at any time after the expiration of one year from the date of this agreement by giving to the other party two months notice in writing sent by registered post to the address of the other party as given in this agreement.”

It is clear from the above that initially it was intended by the applicants to rely on the provisions of clause 8(2)(a) of the agreement in terminating the franchise. However by letter of its legal practitioners of record dated 26 February 2002 the applicant sought instead termination in terms of clause 8(3). Clause 8(3) does not require the party giving notice of termination to provide reasons for that course of action. It is clear that the applicant has abandoned termination of the agreement on alleged breach of the agreement, preferring to rely instead on the provisions of clause 8(3).

In my view clause 8(3) of the agreement runs against the grain of the relationship between the parties. The gist of the agreement is that the parties intended a five-year arrangement, renewable if both parties agree. Premature termination of the agreement is contemplated in the main under well defined and momentous circumstances such as breach, insolvency, liquidation, prejudicial conduct and prevention of performance of duties. Clause 8(3) seeks to empower either party to cancel the agreement any time after its first anniversary for no reason.

I agree with respondent in the argument that the effect of clause 8(3) is to provide for wrongful breach of the contract. To the extent that clause 8(3) provides for unlawful termination of the agreement the applicant should not expect this court to hold that provision binding on the parties.

Accordingly the applicant has not in my view established the grounds upon which the agreement may be cancelled.

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The applicant has abandoned reliance on clause 8(2)(a) for obvious reasons. The prospects of success would be remote. The respondent has denied any breach of the agreement as alleged. The result is a serious dispute of fact which cannot be resolved on the papers. The application would have been dismissed for that reason.

It follows therefore that if the agreement stands the applicant cannot evict the respondent from its premises. Even if the agreement were to be deemed lawfully terminated there would be another hurdle to contend with. Firstly, the respondent alleges that it bought the dwelling house from which the applicant seeks to evict it. Another dispute of fact would arise which could not be resolved on the papers. Further the franchise agreement envisages a situation where there would be a separate lease agreement covering the house and the cold rooms. No such agreement has been furnished to the court. In the absence of such agreement it would not be prudent to order that the respondent be evicted as prayed by the applicant.

Accordingly it is ordered that the application be and is hereby dismissed with costs.

Webb, Low & Barry applicant's legal practitioners
Messrs Coghlan & Welsh respondent's legal practitioners