

FRANCHISING LAW

In an era of global business expansion, franchising has seen a significant increase on the back of business convenience, the likelihood for success with a franchise, and the ease in training and financing the business. However, with an increase in franchising comes a dynamic legal field for this business model and its potential risks. Here, *Lawyer Monthly* talks to Graeme Wilson, the Founder and CEO of Whipping the Cat, a South Africa-based legal consultancy offering businesses of all sizes an alternative to traditional law firms.

As a professional operating within the franchising sector, what are the unique challenges involved in advising on franchise-related matters in South Africa, specifically in relation to the legal framework surrounding the sector?

The South African Government's Integrated Strategy on the Promotion of Entrepreneurial and Small Enterprises identified franchising as an opportunity to contribute to economic empowerment of historically disadvantaged entrepreneurs, create an entrepreneurial culture and stimulate the creation of new franchise enterprises.

The legal and regulatory framework for this strategy was created as a "bolt on" when enacting the Consumer Protection Act of 2008 ("CPA"). In terms of the CPA, a "consumer" is defined to include a franchisee. This means that a franchisee in South Africa is afforded the same rights as a consumer in terms of the Act.

For some franchisors the restrictive legislative and regulatory conditions and associated costs are constraints and an obstacle to growth. For others, the regulated environment provides certainty.

What are the main considerations that your clients need to be mindful of prior to signing a franchise agreement?

The regulations to the CPA provide a detailed list of "disclosures" that a franchisor needs to make to a franchisee before entering into a franchise agreement and relationship. The purpose of these disclosures is to make sure that prospective franchisees are fully aware of all their obligations and any potential pitfalls before entering into the relationship.

At the same time, franchisors need to make sure that they have valid franchisee selection criteria to ensure that the prospective franchisees have the necessary acumen and entrepreneurial flare to make a success of the business.

The parties need to be mindful that a franchise relationship is typically not about "box ticking" - so focusing on alignment of values and goals in what should be a mutually beneficial relationship is an important step before concluding any agreement.

What are the unfavourable terms that lead to disputes regarding franchise agreements and franchise licences? What specific tactics do you implement when assisting your clients with drafting franchise agreements in order to avoid potential disputes?

I find that disputes often arise in three areas: (i) the franchisee's compliance with applicable franchisor standards; (ii) rights to territory and cannibalisation/competition within the market; and (iii) termination/renewals.

To avoid disputes we work with our clients to develop an agreement, operating manuals and procedures that are clear and concise. We align the documents with the desired relationship - some franchisors permitting franchisee "freedom within a framework" and others requiring strict adherence to every detail. We include regular assessment measures and feedback mechanisms and make provision for independent third party assessment where needed. We try to draft in a way that is practical and fair, and use simple concepts like "three strikes and you are out" to avoid ambiguity.

How common is litigation as a means of resolving franchise-related disputes in South Africa?

Most franchise agreements make provision for internal dispute resolution with litigation as a last resort. As "time to trial" in South Africa can take several years, many clients favour private arbitration. The franchise industry has also established a voluntary trade association, the Franchise Association of South

Africa (FASA) that has adopted a code of ethics and business practices that members should adhere to. In terms of the code, complaints can be referred to FASA for adjudication and FASA can impose sanctions on members.

Your firm works closely with several big franchisors, assisting with both marketing and franchising-related issues - what are the challenges of representing such large corporations and what are the most common issues they face in terms of franchising?

Most big brands have big reputations. Protecting our client's reputation is one of the biggest challenges of the franchise relationship. By granting franchise rights, a franchisor allows a franchisee to use its brand and in so doing relinquishes an element of brand control.

When a franchisee acts outside of the franchisor's standards the whole brand suffers. It is thus critically important that we work with our corporate franchise clients to ensure not only that we have good agreements and franchise documents in place, but also that we assist them with adherence and enforcement.

Helping our clients with the legal compliance of their marketing material, promotional competitions and social media ensures that we have on-going insight into their brands and can advise and support them to protect and develop their brands, while mitigating risk. **LM**



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