

What entrepreneurs must know about franchising in SA

By [Hugh Melamdowitz](#)

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Despite volatility and uncertainty in South Africa's economy at present, franchising remains a viable option for South African entrepreneurs wanting to generate a good income and create job opportunities. In fact, franchising is considered to be a highly feasible area for potential growth in the South African economic sphere.



Source: www.pexels.com

The Franchising Association of South Africa (Fasa) loosely defines franchising as the granting of a right to operate a business or licence under certain specific conditions. At the moment, says Fasa, franchise businesses are found across 21 different business sectors in South Africa, including the following:

- Agricultural, mining, manufacturing and industrial services
- Building office and home services
- Fast food and restaurants
- Health, beauty and body culture
- The retail and direct marketing services sector

Entrepreneurs on both sides

The franchisee has the benefit of entering a business system with an established track record. They are in a position to trade under a well-known and reputable brand, using a business model that has been proven to work.

In turn, the franchisee is required to apply time, effort, and their own business acumen to develop the business – leveraging the brand and business systems. In this instance, the most obvious entrepreneur is the franchisee, who has the opportunity to create a profitable business and, in turn, generate employment for others. But the franchisor is also an entrepreneur.

The franchisor, by nature of the fact that they're licensing other businesses, will create jobs. The franchisor requires an infrastructure, and significant human capital, to ensure that the franchise operation is successful, there is proper oversight, and franchisees can access assistance (such as marketing and training) where required.



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South African legislation

The Consumer Protection Act 68 of 2008 (the CPA) attempts to balance the franchisor/franchisee relationship. It requires franchisors to provide prospective franchisees with a disclosure document that sets out specific information regarding the prospective franchise business – including, among other things:

- The financial requirements a prospective franchisee would have to meet to establish the franchise operation
- The expected ongoing running costs

In addition, the CPA provides that the franchise agreement must contain specific information and that the franchisee, after signing the agreement, is entitled to a 'cooling-off period' in which they can terminate the agreement.

The following must be included on the front of every franchise agreement:

"The Franchisee is advised that, in terms of Section 7(2) of the Consumer Protection Act No. 68 of 2008 ("the CPA"), the Franchisee may cancel a franchise agreement without cost or penalty within 10 (ten) Business Days after signing such Agreement, by giving written notice to the Franchisor."



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IP in franchise relationships

There are three main types of intellectual property (IP) that play a role in franchise relationships: copyright, trademarks, and possibly know-how. Therefore, when a franchisor licenses IP to a franchisee, all three should be included in the franchise agreement under the definition of "Intellectual Property".

1. Copyright

Copyright would normally subsist in the operations manual, computer programs forming part of the system, and fixation of the know-how (when the know-how is removed from one's head and recorded in a document), whether incorporated in the operations manual or in any other documentation or computer program.

The franchise agreement should make clear to the franchisee that copyright in the operations manual vests with the franchisor, and that any copying of it (other than specifically as permitted for business usage) would be an infringement of copyright.

2. Know-how

Know-how, which includes a business's trade secrets, is very difficult to protect. This is because it often exists only in the head of the individual employee. As a function of time, the individual will learn precisely how a particular business venture is conducted, including how to run their own business. In my opinion, this development of know-how should be encouraged, to drive job creation and business evolution.

What the individual employee should not be entitled to do is to remove any documentation containing know-how, confidential information, or trade secrets, including customer lists and supplier lists. Restrictions may even include a prohibition on contacting suppliers directly.

Know-how is generally controlled through a confidentiality agreement, which should stipulate the protection of confidential information that relates to:

- The finances (income and expenditure) and profitability of the business
- All confidential, technical, and commercial information relating to the operation of the business (including information contained in the operations manual, and commercial information including customer demographics, cost of product, where the product is sourced from, etc.)

As far as trade secrets are concerned, the information to be protected would be confidential information relating to the business of both the franchisor and the franchisee, and the rights granted in terms of the franchise agreement.

3. Trademarks

Registered and unregistered trademarks are protected in South Africa – the former in terms of the Trademarks Act 194 of 1993 and the latter in terms of the common law. The CIPC administers the Trademarks Register in South Africa. Applicants seeking trademark registration must submit separate applications for each trademark class of goods or services within which they would like their mark to be protected. Once registered, a trademark holder is issued a trademark registration certificate.

Trademarks are valid for a period of 10 years, during which period the trademark holder has exclusive rights to use the relevant mark, subject to any conditions that may be imposed by the CIPC.



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Trademark registrations may be renewed after every 10-year period, for a further period of 10 years, and a trademark

holder could protect their rights indefinitely. Trademarks generally include trade names, symbols, signs, trade dress, insignia, emblems, logos and slogans the franchisor may adopt and designate for use in connection with the business. Trademarks are usually recorded in an attachment to the franchise agreement.

It is critical for the franchisor to have a detailed knowledge of trademarks and the principles regarding the use of the trademarks in a particular class, who is licensing the use, and who is being licensed the use. It is the trademark that underpins all franchise businesses, because it is the trademark that the public is aware of and that attracts customers.

Tips for prospective franchisees

If you are considering becoming a franchisee, it is a good idea to verify and evaluate the IP rights that form part of the licence granted in the franchise arrangement.

You can also, more generally:

- Contact existing franchisees, suppliers, employees and customers
- Carefully study the disclosure documents and financial statements to check on financial health and forecasted profitability
- Check whether the franchisor is a member of industry bodies with enforceable codes of conduct
- Check for any court judgments or poor credit records against the franchise
- Visit franchised stores with a view to experiencing the services/goods from the perspective of a consumer

What's the bottom line?

Whether you're a would-be franchisor or a prospective franchisee, franchising is a highly viable economic methodology in South Africa. However, while a franchise is one of the easiest, safest businesses to start, it's important that you comprehensively safeguard prevailing IP (franchisors) and ask the right IP questions (franchisees) – to avoid ease and safety becoming complications and risk down the road.

ABOUT THE AUTHOR

Hugh Melandowitz, partner at Spoor & Fisher South Africa

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