

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

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| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: Yes |

Date: **20th September 2022** Signature:

CASE NO: 47010/2021

DATE: 20th September 2022

In the matter between:

APPLEBITE ROADHOUSE (PTY) LIMITED

First Applicant

**GONBAR INVESTMENTS CC t/a
APPLEBITE ROADHOUSE & PIZZERIA**

Second Applicant

ALEX JAY CATERING CC t/a THE APPLEBITE EXPRESS

Third Applicant

and

APPLE BITE (PTY) LIMITED

First Respondent

SIMUL ENTERPRISES CC

Second Respondent

Heard: 20 April 2022 – The matter was disposed of without an oral hearing in terms of s 19(a) of the Superior Courts Act 10 of 2013.

Delivered: 20 September 2022 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 14:30 on 20 September 2022.

Summary: Unlawful competition – passing-off – restaurant and fast food outlet – whether goodwill and reputation of applicants’ business associated with trade name – whether use of name confusing members of the public – application granted.

ORDER

- (1) The first respondent be and is hereby interdicted and restrained from utilising the trading name ‘AppleBite Roadhouse & Pizzeria’, ‘The Apple Bite Roadhouse & Pizzeria’ and/or ‘Original Apple Bite Roadhouse & Pizzeria’ in respect to its roadhouse business located at 95 Van Riebeeck Avenue, Edenvale.
- (2) The first respondent be and is hereby ordered and directed to, within fourteen days from date of this order to:
 - (a) take all steps necessary to take down and remove its social media pages titled ‘The Apple Bite Roadhouse & Pizzeria’ hosted on its *Facebook* and *Instagram* platforms; and
 - (b) terminate, decommission and/or de-register its hosting package and to deregister its associated domain name (website) <http://www.theapplebite.co.za> under its domain IP Address 156.38.143.130;
 - (c) remove all references to the name and logo associated with ‘The Apple Bite Roadhouse & Pizzeria’ from all food delivery applications (‘apps’) including, but not limited to *Mr D Food* and *Uber Eats* delivery apps;
 - (d) refrain from registering or attempting to register any further internet domains containing the words and/or names ‘theapplebite’ or ‘The Apple Bite’, in the future;
 - (e) refrain from publishing on any webpage, website, or any social or printed media forum any false or misleading allegations regarding the second applicant and the third applicants’ business practices.
- (3) The First Respondent be and is hereby ordered and directed to:

- (a) Immediately refrain from directly or indirectly engaging in the use of applicants' identifying logo image, signs, menus, stationery, waiters and employees clothing bearing the insignia and other displays or advertising matter of any nature whatsoever indicative of a red apple with a bite taken out of it – containing the words in white lettering 'The Apple Bite';
- (4) The first respondent and the second respondent be and is hereby ordered and directed to remove the following parts of its neon signage depicting the logo of a red apple containing the words and lettering 'The Apple Bite' from its property located at 95 Van Riebeeck Avenue, Edenvale:
- (a) neon signage permanently affixed to a 4.5-meter metal pylon structure situate at the entrance to First Respondent's roadhouse business; and
- (b) neon signage affixed to First Respondent's roadhouse business at its rear entrance located on 10th Avenue, Edenvale.
- (5) The first and second respondents, jointly and severally, to one paying the other to be absolved, shall pay the second and third respondents' costs of this opposed application.

JUDGMENT

Adams J:

[1]. In issue in this opposed application is the use of a trade name, 'Applebite Roadhouse & Pizzeria' or 'The Apple Bite Roadhouse & Pizzeria' or any other name similar to or resembling those names and the related logos. The applicants claim that they have been using this trade name for a considerable period of time and their businesses are associated with that name, which comes with a good reputation and a substantial amount of goodwill, which the first respondent and the second respondent are now taking advantage of by using the said trade name. In other words, so the applicants claim, the defendants, by using the Applebite name, are passing-off their services and products as being that of the applicants, thus competing unlawfully with them.

[2]. The questions which need to be answered are the following: (1) Did the applicants establish a goodwill or reputation attached to the goods or services which they supply, in the mind of the purchasing public by association with the brand name (AppleBite)? (2) Does the public recognise the name, AppleBite, as distinctive specifically of the applicants' goods or services? (3) Does the use of the name, Applebite, and the related logo by the respondents have the potential for confusion between the services and goods of the respondents as being that of the applicants? (4) Should the respondents be interdicted from competing unlawfully with the applicants and directed to stop trading under the trade name 'Apple Bite Roadhouse and Pizzeria'? And whether or not, as a result of alleged passing-off by the respondents, any of the applicants have suffered a loss of monthly revenue, considering the various locations and distances between the various businesses?

[3]. These question should be decided against the factual backdrop set out in the paragraphs which follow, the facts in the matter being by and large common cause.

[4]. The first applicant, which was registered by Migel Goncalves ('Goncalves') on 11 April 2017, is at present not trading and is in fact dormant. According to Goncalves, who is the deponent to the founding affidavit of the applicants, he registered the first applicant under the name 'Applebite Roadhouse (Pty) Limited' in an effort to protect the trading names of the second and third applicants. I interpose here to note that from the founding papers it is not altogether clear on what basis the first applicant claims to have *locus standi* to claim the relief sought against the respondents. If the first applicant is at present not trading – and has evidently never done so – then the rhetorical question to be asked is how then can it be suggested that the respondents are using the 'trade name' of the first applicant. First applicant's cause is therefore, in my view, stillborn.

[5]. The second applicant is Gonbar Investments CC t/a Applebite Roadhouse & Pizzeria, which, as its trade name suggests, is a roadhouse and a pizza / fast food outlet, and which carries on business at the corner of Russel and

Chapman Streets, in Klippoortjie AH in Germiston. Goncalves is the managing member of the second applicant, which previously traded as 'Burger Land Roadhouse' at the same premises in Klippoortjie. This business, Gonbar Investments CC t/a Burger Land Roadhouse, had been opened during 2001 by Goncalves and his father. During late 2008, the second applicant relinquished its franchise agreement with Burger Land and started trading as 'The Applebite Roadhouse and Pizzeria' in Klippoortjie in Germiston. To this day, according to the applicants, that business is still flourishing.

[6]. During June 2008, Goncalves and his father, with a view to expanding their business interests, had purchased and acquired ownership of the business of an existing roadhouse establishment trading as 'The Applebite Roadhouse', which was trading at business premises situate at 95 Van Riebeeck Street, Edenvale. This is the business, or rather the trade name which is the subject of the dispute in this opposed application. This latter business was acquired by Goncalves and his father from the previous owner, one Mrs Xanthé Revelas, and soon after they had acquired the said business, the third applicant was registered – on 7 August 2008 – by Goncalves and his father and the business, The Applebite Roadhouse and Pizzeria, was taken over by it (the third applicant). And so, since August 2008 – for a period in excess of fourteen years - AlexJay Catering CC (the third applicant) traded as the Applebite Roadhouse & Pizzeria, with Goncalves and his father as the founding members. Prior to that, the said business had been carried on under the same trade name for at least another approximately twenty years by different owners.

[7]. On 10 April 2015 the third applicant was sold to one Raymond Daniels ('Daniels'), who acquired the business of 'The Applebite Roadhouse & Pizzeria' in Edenvale. Daniels, as the new sole member of the third applicant, entered into a lease agreement for the rental of the business premises with the owner, who was, as explained in more detail below, the second respondent. The aforesaid business, under Daniels, evidently ran into financial difficulties during October 2020 and was not able to meet its rental obligations to the second respondent, which compelled it to vacate the premises in Van Riebeeck Street, Edenvale, and to relocate. This downturn in the fortunes of the third applicant

coincided with and probably was attributable to the onset on the Covid-19 pandemic. During November 2020, Daniels relocated his business to 27D Central Avenue, Eastleigh, Edenvale, where he, or rather the third applicant commenced trading as 'Applebite Express'. These premises, so the applicants aver, are approximately 1.5 kilometres in distance from the Van Riebeeck Street premises.

[8]. As already indicated, the owner of the immovable property on which the aforementioned business premises in Van Riebeeck Street are situated, is the second respondent, and Goncalves and his father, as the owners of the business, The Applebite Roadhouse, let from the second respondent the said premises for as long as they owned – via the second applicant – the said business, as did Daniels after them and Revelas before that.

[9]. The first respondent, The Apple Bite (Pty) Limited, was registered by one Peter Christoforakis ('Christoforakis') on 21 July 2021 and it is presently trading as 'The Apple Bite Roadhouse & Pizzeria' at 95 Van Riebeeck Avenue, Edenvale. Christoforakis is the sole director of the first respondent.

[10]. By all accounts, *'The Applebite Roadhouse'* was first and officially opened in 1972 by brothers John and Jimmy Karantasis and by Chris Batitsas, who later sold the business, situated at 95 Van Riebeeck Avenue, Edenvale, to a John Bower. During 1978 a Pavlos Christoforakis ('Pavlos'), who is the father of Christoforakis, bought the business from John Bower as well as the premises from which the business operated. As owner of the property from which the business operated, Pavlos Christoforakis leased out the premises and allowed his lessees to carry on the business of the Applebite Pizzeria and Roadhouse from the leased premises. Therefore, from about 1978 the business was run from the said premises by various lessees who had bought the business from Pavlos, who also leased the premises to the business owners.

[11]. These various purchasers of the business had bought the business from Pavlos and subsequent owners, and they ran the business, which traded as 'The Apple Bite Roadhouse & Pizzeria', whilst leasing the premises from Pavlos. One such owner of the business / lessee was Xanthé Revelas, who at

some point effectively sold the said business to the third applicant, whose members at the time were Goncalves and his father, who later sold their members' interest to Daniels. He too rented the business premises from Pavlos Christoforakis.

[12]. It is instructive to note that the membership in the third applicant, which had as its main asset, the business trading as 'The Applebite Roadhouse and Pizzeria', was sold as a going concern by Goncalves and his father to Daniels for the purchase price of R1 500 000, which included an amount in respect of the goodwill of the business. The same applies to the purchase and sale agreement concluded between Goncalves and his father, as purchasers, and Revelas, as seller, during 2008, in respect of which the purchase price included an amount relating to the goodwill of the business. This, to my mind, is as clear an indication as one will ever get that there was goodwill in the business and that its reputation was closely related to its trade name.

[13]. There is a big 'The Applebite Roadhouse' sign at the entrance to the premises of the business and has been there since 1972. This sign was initially hired from Claude Neon Signs, however thereafter Pavlos purchased same outright. The sign has therefore been on the property for about forty-nine years and is effectively a permanent fixture on the property.

[14]. With that factual background in mind, I now turn to an analysis of the issues in the matter. And as a starting point, it may be apt to refer briefly to the legal principles applicable to unlawful competition and passing-off as a form of unlawful competition.

[15]. Nicholas AJA in *Schultz v Butt*¹ had this to say as regards unfair competition:

'In order to succeed in an action based on unfair competition, the plaintiff must establish all the requisites of aquilian liability, including proof that the defendant has committed a wrongful act. In such a case, the unlawfulness which is a requisite of aquilian liability may fall into a category of clearly recognised illegality, ... namely trading in contravention of an express statutory prohibition; the making of fraudulent misrepresentations by the rival trader as to his own business; the passing-off by a rival

¹ *Schultz v Butt* 1986 (3) SA 667 (A);

trader of his goods or business as being that of his competitor; the publication by the rival trader of injurious falsehoods concerning his competitor's business; and the employment of physical assaults and intimidation designed to prevent a competitor from pursuing his trade. But it is not limited to unlawfulness of that kind.' (My emphasis).

[16]. As regard passing-off, in *Hoechst Pharmaceuticals (Pty) Ltd v The Beauty Box (Pty) Ltd (in liquidation)*², the Appellate Division held as follows:

'Confusion *per se* does not give rise to an action for passing-off. It does so only where it is the result of a misrepresentation by the defendant that the goods which he offers are those of the plaintiff or are connected with the plaintiff. That has not been shown. The cause of any confusion is probably to be found elsewhere.'

[17]. And finally, in *Capital Estate and General Agencies (Pty) Ltd and Others v Holiday Inns Inc and Others*³, passing-off was defined by Rabie JA as follows: -

'The wrong known as passing-off consists in a representation by one person that his business (or merchandise, as the case may be) is that of another, or that it is associated with that of another, and, in order to determine whether a representation amounts to a passing off, one enquires whether there is a reasonable likelihood that members of the public may be confused into believing that the business of the one is, or is connected with, that of another.'

[18]. The very first enquiry relates to whether the second and third applicants can claim that they have established a reputation for themselves or the goods and services they supply in the market, which have been infringed by the respondents. This enquiry implicates the reputational element of the goodwill of that business of the applicants. In other words, proof of passing off requires proof of reputation, misrepresentation and damage.

[19]. The first issue is thus whether the second and third applicants established that their goods have acquired a particular reputation among the public. The test, simply put, is 'whether the plaintiff has, in a practical and business sense, a sufficient reputation amongst a substantial number of persons who are either

² *Hoechst Pharmaceuticals (Pty) Ltd v The Beauty Box (Pty) Ltd (in liquidation)* 1987 (2) SA 600 (A);

³ *Capital Estate and General Agencies (Pty) Ltd and Others v Holiday Inns Inc and Others* 1977 (2) SA 916 (A);

clients or potential clients of his business'. (*Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd and Another*⁴). The cases make it clear that such reputation may be inferred from extensive sales and marketing. (*Hollywood Curl (Pty) Ltd and Another v Twins Products (Pty) Ltd*⁵; *Adidas AG and Another v Pepkor Retail Limited*⁶).

[20]. In support of their claim, the second and third applicants aver in their founding papers that they have established a significant goodwill and a valued reputation over many years of trading under the name 'AppleBite'. They also aver that the trading name 'Applebite' has been developed into a distinguishable and reputable logo image. As already indicated, this claim by the applicants appears to be borne out by the fact the business was sold on more than one occasion for a purchase price, which includes a substantial sum in respect of the goodwill.

[21]. What is more is that the trade name, under which the business had been conducted over many years by different proprietors, had stood the test of time. It therefore stands to reason that the business has probably built up goodwill, which goes hand in hand with a good reputation. As testified to by the second and third applicants, the goodwill of the applicants has resulted in the growth of a large loyal group of customers who frequent the business establishment of the second and third applicants. This applies equally to the business in Edenvale and the one in Klippoortjie.

[22]. As averred by Goncalves in his founding affidavit, in relation to the goodwill associated with the 'Applebite' brand: -

'When the respective businesses were sold in 2008 and again in 2015 these sales implicitly included the goodwill built up over two decades and more including the name AppleBite Roadhouse and Pizzeria, its identifying logo image depicting its associated red apple image containing the words written within said apple in white lettering "The Apple Bite". One of the largest aforesaid

⁴ *Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd and Another* 1998 (3) SA 938 (A) para 20;

⁵ *Hollywood Curl (Pty) Ltd and Another v Twins Products (Pty) Ltd* 1989 (1) SA 236 (A) at 249J;

⁶ *Adidas AG and Another v Pepkor Retail Limited* [2013] ZASCA 3 para 29;

identifying signs consisted of a 4.5-meter metal electrical signage structure affixed to the entrance and a smaller electric sign affixed at the exit to the Property, located on Van Riebeeck Avenue and 1011 Street, respectively.

Further, said goodwill included the two telephone landlines intended for pickup and delivery orders, being 011-452-6225 and 011-452-2939. A copy of a photograph of the 4.5-meter electric sign affixed to the Property is attached hereto and marked "MG-16".'

[23]. In my view, therefore, the first and second applicants have clearly proven that their reputation and goodwill have been built up on their association of their businesses with the name 'Applebite'. This then takes care of the first enquiry.

[24]. The next issue relates to whether or not the use by the first respondent of the name 'Applebite Roadhouse & Pizzeria' is likely to cause confusion in the minds of members of the public that their services and food are that of the second and third applicants. The name used by the first respondent is the exact same name used by the second and third applicants. They are all involved in the business of fast food and fast food delivery. It therefore stands to reason that confusion is bound to follow. As correctly pointed out by the second and third applicants, there can be no doubt that customers using the latest ubiquitous restaurant apps to place orders will easily confuse first respondent's business with that of the second and third applicants. The logic in this conclusion cannot be faulted.

[25]. Additionally, the case of the second and third applicants is bolstered by confirmatory affidavits by a number of their customers, who all confirm that the use of the Applebite logo and the wording 'The Original Applebite' have lulled them into falsely believing that they were ordering from the second or third applicants, when in fact and in truth, they were ordering from the first respondent. In that regard, the applicants were able to procure affidavits from no less than six of the customers who confirmed actual confusion on their part.

[26]. Moreover, the business managers of the second and the third applicants both confirm under oath that after the first respondent commenced trading during September 2021, there has been a sudden increase in competition

emanating from first respondents' social media campaign in the past three months. So, for example, they relate how traditional customers mistakenly order on line or via the food delivery apps, believing that they were ordering from the second applicant and/or the third applicant, only to receive food deliveries from first respondent. The managers also testify to the fact that often customers attend at second or third applicants' outlets to collect take-out food orders, having mistakenly placed their orders via online or telephonic or WhatsApp numbers and/or on the website www.theapulebite.co.za and thereafter discovering that the food ordered was not being prepared or available from the applicants.

[27]. Also, some time phone-in food orders would be placed by customers of the second applicant or the third applicant, who would then proceed to prepare the orders, only for those orders never to be collected. When this is enquired about, the applicants would establish that the customers would have attended on the business of the first respondent to collect the orders they had placed with the second applicant or the third applicant.

[28]. The foregoing therefore satisfies me that the second and third applicants have, as against the first and second respondents, proven a case of unlawful competition in the form of passing-off, which has resulted in them encountering a slowdown in business as a direct result of first respondent's aggressive internet marketing drive.

[29]. One of the main grounds of the respondents' opposition to the application is to the effect that the applicants, when they acquired the business of 'Apple Bite Roadhouse and Pizzeria', did not acquire the right to use the name and the logo. This, so the respondents contend, was retained by the owner of the property, that being the second respondent. This claim is belied by the provisions of the sale agreements, including the one concluded between Revelas and Pavlos, which sold the business as a going concern. There is therefore no merit in that defence, which, to me, seems like an afterthought.

[30]. For all of these reasons, the application by the second applicant and the third applicant should succeed. I have, at the outset, indicated my view that the

first applicant lacks the necessary *locus standi* to claim the relief claimed from the respondents. No costs order should therefore be made in its favour. Otherwise, costs should follow the suit and the first and second respondents should pay the costs of the second and third applicants.

Order

[31]. Accordingly, I make the following order: -

- (1) The first respondent be and is hereby interdicted and restrained from utilising the trading name 'AppleBite Roadhouse & Pizzeria', 'The Apple Bite Roadhouse & Pizzeria' and/or 'Original Apple Bite Roadhouse & Pizzeria' in respect to its roadhouse business located at 95 Van Riebeeck Avenue, Edenvale.
- (2) The first respondent be and is hereby ordered and directed to, within fourteen days from date of this order to:
 - (a) take all steps necessary to take down and remove its social media pages titled 'The Apple Bite Roadhouse & Pizzeria' hosted on its *Facebook* and *Instagram* platforms; and
 - (b) terminate, decommission and/or de-register its hosting package and to deregister its associated domain name (website) <http://www.theapplebite.co.za> under its domain IP Address 156.38.143.130;
 - (c) remove all references to the name and logo associated with 'The Apple Bite Roadhouse & Pizzeria' from all food delivery applications ('apps') including, but not limited to *Mr D Food* and *Uber Eats* delivery apps;
 - (d) refrain from registering or attempting to register any further internet domains containing the words and/or names 'theapplebite' or 'The Apple Bite', in the future;
 - (e) refrain from publishing on any webpage, website, or any social or printed media forum any false or misleading allegations regarding the second applicant and the third applicants' business practices.
- (3) The First Respondent be and is hereby ordered and directed to:

- (a) Immediately refrain from directly or indirectly engaging in the use of applicants' identifying logo image, signs, menus, stationery, waiters and employees clothing bearing the insignia and other displays or advertising matter of any nature whatsoever indicative of a red apple with a bite taken out of it – containing the words in white lettering 'The Apple Bite';
- (4) The first respondent and the second respondent be and is hereby ordered and directed to remove the following parts of its neon signage depicting the logo of a red apple containing the words and lettering 'The Apple Bite' from its property located at 95 Van Riebeeck Avenue, Edenvale:
 - (a) neon signage permanently affixed to a 4.5-meter metal pylon structure situate at the entrance to First Respondent's roadhouse business; and
 - (b) neon signage affixed to First Respondent's roadhouse business at its rear entrance located on 10th Avenue, Edenvale.
- (5) The first and second respondents, jointly and severally, to one paying the other to be absolved, shall pay the second and third respondents' costs of this opposed application.

L R ADAMS
Judge of the High Court of South Africa
Gauteng Division, Johannesburg

HEARD ON: 20th April 2022 – the matter was disposed of without an oral hearing in terms of s 19(a) of the Superior Courts Act 10 of 2013.

JUDGMENT DATE: 20th September 2022

FOR THE FIRST, SECOND AND THIRD APPLICANTS: Advocate A P Allison

INSTRUCTED BY: Tshepo Mohapi Attorneys, Norwood, Johannesburg

FOR THE FIRST AND SECOND RESPONDENTS: Advocate B D Stevens

INSTRUCTED BY: Thompson Attorneys, Pretoria
