

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case No: 2023/098485

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED
DATE	SIGNATURE

In the matter between:

**DOLLAR RENT A CAR INCORPORATED
THRIFTY RENT-A-CAR SYSTEM LLC
HERTZ INTERNATIONAL LTD
CFAO MOBILITY (PTY) LTD**

**First Applicant
Second Applicant
Third Applicant
Fourth Applicant**

and

**YUNUS MOOLLA
(Identity number: [...])
IMRAAN MOOLLA
(Identity number: [...])
FOR THE TIME BEING THE TRUSTEES OF SAFY TRUST
SPRINGS CAR WHOLESALERS (PTY) LTD
HIRED BY BLACK WOMEN (PTY) LTD
T/A SANI CAR RENTAL**

**First Respondent
Second Respondent
Third respondent
Fourth respondent
Fifth respondent**

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 7 November 2023.

JUDGMENT

CARRIM AJ

- [1] On 7 November 2023 I granted interim relief against the respondents. The application was brought on an urgent basis on the urgent roll. The respondents have requested the reasons for my decision which I hereby provide.
- [2] The first (“Dollar”), second (“Thrifty”) and third applicants are American companies, incorporated in and trading from Tulsa, Oklahoma, USA. The fourth applicant is CFAO Mobility (Pty) Ltd (“CFAO”), a private company duly registered and incorporated in accordance with the company laws of the Republic of South Africa with registration number 1997/009861/07 and having its registered address at corner Gannet and Shearwater Roads, Little Falls, Roodepoort.¹
- [3] The first and second respondents are the trustees of the Safy Trust (“trust”), cited as the third respondent in this matter. The first and second respondents are directors of the fourth respondent.
- [4] The fifth respondent is Hired by Black Women (Pty) Ltd, a private company duly

¹ It appears that it is the prospective new South African licensee.

incorporated and registered in terms of the company laws of South Africa, with registration number 2021/1125051/07, trading as Sani Car Rental ("Sani"). The respondents are related companies.

- [5] In general, the applicants are involved in the motor vehicle rental industry, as owners and operators of the brands 'Dollar' and 'Thrifty' from corporate, licensee and franchisee locations, in various countries.
- [6] The contractual relationship between the parties arises from a written international Master Licence Agreement, concluded between the applicants and the trust, in terms of which the licence to operate the business of vehicle rental, and parking, and the use of the names, trade names, logos, trademarks in relation to 'Dollar' and 'Thrifty', was granted to the trust, in consideration of payment of a monthly royalty fee ("the IMLA").
- [7] There is a dispute about whether the IMLA expired on 31 December 2021 (the applicants' version) or extended to 31 December 2026 (the respondents' version). This dispute does not form part of the present application.
- [8] The matter has a long and complex history. On 31 January 2022, Dollar and Thrifty launched a substantive application for interim relief, by way of urgency, against the Sany respondents and SCW, arising from various instances of unlawful conduct by the respondents ("the first application"). The application for interim relief was granted on 23 February 2022 by the honourable Justice Vally with slight variations to the prayers in favour of Dollar and Thrifty ("the Vally J order"). The matter underwent some interlocutory skirmishes before the hearing of final relief took place before the honourable Justice Van Oosten

during May and July 2022. The matter ended with final relief being granted in favour of Dollar and Thrifty, together with punitive costs. (the “Van Oosten J order”).²

[9] The Van Oosten J order was taken on appeal by the respondents and is therefore suspended. However, the respondents raised a subsequent rule 7 dispute which has been referred to oral evidence by Van Oosten J. The leave to appeal hearing has not been dealt with and the applicants find themselves in a state of limbo. The respondents on the other hand have been left free to conduct themselves as they please in the marketplace in relation to the intellectual property of the applicants.

[10] During September 2023 it came to the attention of the applicants that the respondents were engaged in a campaign to strategically devalue the 'Dollar' and 'Thrifty' brands. The applicants allege that the respondents incorrectly and unlawfully state in various forms of media that 'Dollar' and/or 'Thrifty' is rebranding to 'Sani', a new and unknown entrant to the South African car rental market.

[11] The applicants launched a further application (the “main application”) in the ordinary course³ due to what they alleged was the respondents ongoing infringement of their intellectual property.

[12] During early October 2023 the applicants allege that they became aware of conduct on the part of the respondents which involved (by way of summary) –

² CL 03-183 to 196

³ They had requested that this be placed on the Commercial Court roll and be given some urgent attention but the request was denied

- [12.1] unlawfully creating the impression and misrepresentation to the general public that their business of Sani Car Rental (which may be accessed at <https://sani.co.za>) is the "BROKER FOR THRIFTY ";
- [12.2] the respondents were knowingly and intentionally facilitating, enabling, endorsing and propagating the false and untrue claim that Sani was "PREVIOUSLY KNOWN AS THRIFTY";
- [12.3] fighting misleading advertisements, by representing that the Sani car rental business is, or is associated with the Thrifty car rental business, by catchphrases such as "BE THRIFTY, BOOK SANI" or "I'M NOT CHEAP I'M THRIFTY" in visual advertisements clearly advertising the Sani business;
- [12.4] purposefully acted to cause any user who accesses the Thrifty website (which may be accessed at <https://www.thrifty.co.za>) to be redirected away from the Thrifty website and to be taken to the Sani website; and
- [12.5] hardcopy/print of banners and verbal information to the general public reader that there is an association with the two brands and the publication of Thrift trademarks on the Sanu internet presence.
- [13] During mid-October 2023, the respondents were misleadingly engaged in a "rebranding" campaign by advertising the applicants' business and intellectual property by statements such as "THRIFTY CAR RENTAL" is being "REBRANDED" to "SANI Car Rental", "THRIFTY CAR RENTAL IS REBRANDING. We have stepped up our game! Thrifty Car Rental is now SANI

Car Rental” on the Sani website landing page.

[14] During the third week of October 2023, it came to the attention of the applicants’ attorneys of record that the respondents had indeed “stepped up” the rebranding campaign through new instances (“new conduct”) which included -

[14.1] Sani Instagram Reel — “*Thrifty is now Sani*”. On 17 October 2023, a candidate attorney at Bowmans, Ms Lexi Liedtke (“Liedtke”), saw a “reel” posted on Sani’s Instagram. This “reel”, which is a short video posted on social media, had almost 470 000 views at the time and repeats over and over again the catchphrase “THRIFTY is now SANI”;

[14.2] Sani Billboard – “*Thrifty rebranded as Sani*”. On 19 October 2023 Liedtke took a photograph of a billboard on the side of the M1 North Highway in Johannesburg. The billboard is clearly commissioned by Sani and advises the general public that Thrifty (being crossed out in thin red lines) is rebranding as Sani;

[14.3] On 20 October 2023 a Sani radio advertisement, “*Thrifty Car Rental is rebranding as Sani Car Rental*”.

[15] The applicants then launched this urgent application, on 25 October 2023, in an effort to advance the relief sought in the main application, and to interdict the respondents from engaging further in such conduct.

[16] The first to fourth respondents opposed the matter based on lack of urgency, *lis*

alibi pendens and an alternative remedy available in terms of section 18(3). The fifth respondent's opposition was focused on lack of urgency, and it requested a postponement of the application to permit it additional time to file further papers.

[17] The papers in the matter were shocking to say the least. The applicants pleadings were voluminous and referred by incorporation for context to the pleadings in the main matter, which were filed only on the Friday afternoon. The papers on all sides were filed in a haphazard manner, in continuous bundles which made it difficult to read and locate annexures easily. I was at first inclined to strike the matter from the roll due to this shoddiness but was ultimately constrained by my own view of the merits of the case, to which I now turn.

[18] I do not deal with the historical disputes between the parties any further because these are a matter of record. The conduct of the respondents has been well recorded in the rulings of Vally J and Van Oosten J. Furthermore, I do not regurgitate all the contents of the various affidavits and the myriad of disputes between the parties because in my view the issue in the matter is a crisp one.

[19] The relief sought by the applicants in the Notice of Motion was in two parts, part A and part B. Part A seeks to interdict the respondents from conducting themselves in the manner contained therein were pending the finalisation of Part B.

[20] The requirements for an interim interdict are well established. An applicant

must establish a *prima facie* right, a well-grounded apprehension of irreparable harm if the relief is not granted, the balance of convenience favours the granting of an interim interdict and the absence of another satisfactory remedy.⁴

Prima-facie right

[21] As discussed above the respondents did not deny that they were engaged in any of the alleged conduct.⁵ Nor have they challenged the applicants' intellectual property rights. Thus, there is no dispute of fact in relation to the merits of the matter and the applicants' clear right has been shown.

Lis alibi pendens

[22] The first to fourth respondents have alleged that the conduct complained of is the same as the conduct that is the subject of the main application or the conduct that is the subject of the Van Oosten J appeal.

[23] The conduct that was the subject of the Van Oosten J order is clearly described in that judgment and the Vally J rule *nisi*. It related to trademark infringements by the respondents advertising the 'Sani Car Rental' brand or any other brand with the intellectual property of the applicants and operating the Sani car rental business or any similar business in competition with the applicants' business during the operation of the agreement between the parties.

[24] In the main application, the complaint was that the respondents were, inter alia, creating the *impression* (through unlawful and unauthorised infringement of

⁴ Harms *Civil Procedure in the Superior Courts* A-44

⁵ I myself have seen two of the billboards on which it is announced that Thrifty is rebranding to Sani with Thrifty crossed out in red lines. One while driving on the M1N and the other on the M1S

trademarks and passing off) that the business of Thrifty was associated with the respondents' Sani car rental business. After the main application was served on the respondents one change which the respondents did was to remove the visual associations and connections on the websites, thereby addressing some of the complaints against them in the main application. This was confirmed in the filing of a supplementary founding affidavit by Ms Jacklin-Levin to highlight the changes for the Court's benefit.

[25] Since then, the respondents have been engaged in the new conduct which involves new radio marketing campaigns, new social media releases and new publications via printed media/billboards.

[26] While all three species of conduct may fall within the broad heading of trademark infringement, this new conduct is especially egregious. This is a species of unlawful passing off that has been elevated from a devaluing campaign into a funeral service for the Thrifty brand. This conduct is not merely placing brands and advertising on physical premises or on the Sani website passively but consists of pro-actively going into the market and proclaiming a *fait accompli* namely that Thrifty is now Sani. In this intensified rebranding campaign, the respondents are mispresenting to the broad public out there that Thrifty no longer exists, it is now Sani. In this manner they are engaging in a “killing off” of the Thrifty brand. In other words, they are devaluing the brand to such an extent as to take it out of the market.

[27] Hence the *lis alibi pendens* defence holds no merit.

Alternative remedy

[28] The first to fourth respondents have argued that the applicants have an alternative remedy in terms of section 18(3). They could seek to enforce the Van Oosten J order pending the finalisation of the appeal. However, this argument assumes that the conduct complained of is the same as what was considered by Vally J and Van Oosten J, which I have found is not the case. But it also assumes that the applicants could find s18(3) relief on an urgent basis, which begs the question. Given the nature of the respondents' new conduct, it cannot on any construction be argued that the applicants will have substantial redress at a hearing in the ordinary course when their brands are being killed off or taken out of the market.

Urgency, apprehension of harm & balance of convenience

[29] I am satisfied that the applicants' apprehension of harm is both reasonable and justified (**Setlogelo v Setlogelo** 1914 AD 221) and the matter is urgent.

[30] The applicants are unlikely to be able to protect their brands from being devalued or killed off in the ordinary course. There is a commonly held view that in cases of trademark infringement, applicants may find substantial redress in the form of damages in the ordinary course. But that view assumes that damages are easily proven. Nothing could be further from the truth. Damages are notoriously difficult to prove especially so in instances of what I term 'structural harm' which relates to the structure of the market and the number of brands competing in that market. The applicants' brand is being killed off in the market. When a brand or trademark is being "killed off" or taken "out of the market" it is being taken out as a viable competitive brand and the harm to the

brand owner is likely to be immeasurable or permanent.

[31] Moreover, once a brand has been taken out or devalued to such an extent it could have disastrous knock-on consequences in the form of mistrust in the mind of the public for a new licensee of the brand when it eventually tries to enter the market.

[32] I am also satisfied that the applicants did not unduly delay in bringing this application given that their executives were based in the USA which might have caused delays in obtaining instructions.

[33] The respondents have not shown they would suffer any prejudice should the relief be granted. The applicants, on the other hand, stand to suffer irreparable harm should the relief not be granted. The balance of convenience thus favours the granting of the relief.

[34] Accordingly, the following order was made:

1. The forms and service provided for in these Rules are dispensed with and the matter is disposed of as a matter of urgency in accordance with Uniform Rule 6(12).
2. Pending determination of **PART B** of this application, the first to fifth respondents are:
 - 2.1. ordered and directed to remove, within THREE DAYS of the date of this order the first, second and/or third applicants' trademarks from:
 - 2.1.1. all radio adverts;

2.1.2. all billboards;

2.1.3. the Internet website <https://sani.co.za>;

2.1.4. all invoices, statements, communications or other business documentation, in which the aforesaid trademarks appear;

2.1.5. all of the Internet social media platforms utilised and operated by any of the respondents, including Instagram; and

2.1.6. all advertising, signage, banners and promotional material, in which the aforesaid trademarks appear.

3. Pending the determination of **PART B** of this application, the first, second, third, fourth and fifth respondents are:

3.1. interdicted and restrained from directly or indirectly in any form or manner representing that *Thrifty* car rental is rebranding to Sani car rental or that **THRIFTY IS NOW SANI** or that *Thrifty* is crossed out to be rebranded as Sani;

3.2. interdicted and restrained from directly or indirectly representing or holding themselves out to be a broker or agent (or any affiliation) of first and/or second applicants, or of the third and/or fourth applicants;

3.3. interdicted and restrained from directly or indirectly representing that the second respondent, or any of the first, third and/or fourth respondents are connected and/or linked and/or associated and/or related to any one or more or all of the applicants;

- 3.4. interdicted and restrained from directly or indirectly unlawfully interfering in one or more or all of the first to fourth applicants' businesses in South Africa;
 - 3.5. interdicted and restrained from passing off the businesses of any of the respondents, including the fifth respondent's Sani Car Rental business, as that of any of the applicants' businesses, or as being connected in the course of trade with any of the applicants' businesses, by using the applicants' trademarks or well-known marks, or any getup which is identical to, or confusingly or deceptively similar to, any of the applicants' distinctive getup;
 - 3.6. interdicted and restrained from operating any businesses under the name and style of Dollar and/or Thrifty and from using the first and/or second applicants' trademarks, brands and/or intellectual property in any business; and
 - 3.7. ordered and directed to return all of the first and second applicants' intellectual property, including the registered ownership of the domain names www.dollar.co.za and www.thrifty.co.za.
4. The first, second, third, fourth and fifth respondents are ordered and directed to pay the applicants' costs of this application jointly and severally, the one paying the other to be absolved, on the scale as between attorney and client.
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Y CARRIM
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

APPEARANCES

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RESPONDENT: Shaheed Dollie Inc

DATES OF HEARING: 7 November 2023
DATE OF REASONS 7 December 2023