REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2023-075201

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED: NO

Judge Dippenaar

In the matter between:

CLONARIS PANAYOTIS SALAMOUSAS **APPLICANT**

AND

SOUTH SIDE RESTAURANT (PTY) LTD
T/A OREXI GREEK STREET FOOD **RESPONDENT**

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 15th of AUGUST 2023.

DIPPENAAR J:

[1] The applicant by way of urgent application, sought the following substantive relief:

> *"Interdicting the respondent forthwith from-*
>
> *a) interfering with the applicant's management and operation of the business (including pursuing disciplinary proceedings under the guise that he is an employee of the respondent, and where those steps have been concluded at the time of the hearing of this application, from implementing any decision of such hearing,*
>
> *b) disposing, selling, transferring or dealing in any manner, with any of the assets of the business,*
>
> *pending the institution of an action within 14 days after granting of this order, seeking specific performance of the verbal agreement entered into by and between the applicant and Alex Stylianou and John Macrides, who at all times purported to have been duly authorised and acted on behalf of the respondent*;

[2] Costs were sought on the attorney and client scale in the event of the application being opposed. The respondent opposed the application on various grounds and sought the striking of the application due to a lack of urgency, alternatively its dismissal with a punitive costs order.

[3] The applicant's case is predicated on the existence of an oral joint venture agreement concluded between himself and the respondent, represented by its directors,

Messrs Stylianou and Macrides In terms thereof, the respondent would finance the rebranding of a restaurant venture, Orexi Aspen and the applicant was *inter alia*, entitled to manage the operations of a restaurant conducted in the name of the respondent and contributed a fully functional restaurant and equipment to the joint venture. The applicant *inter alia* contended that in terms of the said agreement, he would be the operator of the respondent's business who would oversee its management and operations and that the existing contents of the applicant's former restaurant business, Latelicious Aspen, would as far as possible be retained and used when the business commenced under the Orexi Greek Street Food umbrella. The agreement would be formalised and reduced to writing. According to the applicant, the joint venture agreement was implemented and in the process the applicant provided a fully equipped and functioning kitchen to the respondent's business. According to the applicant that agreement was implemented.

[4] The respondent denied the existence of such joint venture agreement as there was no consensus between the parties on various material matters. It argued that at best for the applicant, there was an unenforceable "agreement to agree" or a void agreement as its terms were unclear. The respondent did not dispute that it is in possession of and utilising the assets contributed by the applicant referred to in his founding affidavit.

[5] In sum, the respondent's case was that whilst the intention of the parties was to conclude various agreements with the applicant, to ultimately provide him with ownership of the shares of the respondent, none of the agreements were finalised and no consensus was reached on the terms pertaining thereto. It contended that the applicant from 1 June 2023 became employed by the respondent as a managerial employee. Pursuant to the applicant assaulting Mr Andreadis, an operational employee of the respondent on the opening day of the restaurant on 6 July 2023, disciplinary proceedings were instituted and the applicant dismissed on 2 August 2023, pursuant to a hearing held on 31 July 2023. It contended that the applicant had destroyed the trust relationship and the directors of the respondent decided not to pursue any further

commercial relationship with the applicant, resulting in them not being prepared to entrain any further negotiations or dealings with the applicant.

[6] It was undisputed that the relationship between the parties soured after the altercation between the applicant and Mr Andreadis. That altercation was not disputed. Pursuant thereto the applicant was furnished with a suspension letter. On 26 July 2023 this was followed by a notice of the disciplinary hearing to be held on 31 July 2023.

[7] It was undisputed that the present application was launched on 28 July 2023. That notwithstanding, the disciplinary enquiry proceeded on the stipulated date although the applicant's attorney of record advised that as the applicant was not an employee, he would not attend. Whilst the application was pending, the applicant was dismissed as employee on 2 August 2023.

[8] The respondent challenged urgency on the basis that the applicant failed to set out sufficient facts to illustrate why it would not obtain substantial redress at a hearing in due course[1]. Whilst I agree with the respondent that the issue is addressed in broad and laconic terms, considering the content and context of the founding affidavit and application papers as a whole, I am persuaded that the applicant has illustrated sufficient commercial urgency [2] to have the matter entertained on the urgent court roll and has illustrated that he will not obtain substantive redress at a hearing in due course.

[9] Prior to dealing with the merits of the application, it is apposite to deal with the striking application launched by the respondent pertaining to paragraphs 52 to 55 of the founding affidavit which pertained to without prejudice settlement discussions held between the parties.

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[1] East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite (Pty) Ltd 2011 JDR 1832 (GSJ)
[2] IL&B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd; Aroma Inn (Pty) Ltd v Hypermarkets (Pty) Ltd 1981 (4) SA 108 (C)

[10] The application was opposed by the applicant on the basis that the respondent did not illustrate prejudice and should not have brought a separate striking out application. Both of these arguments in my view lack merit.

[11] It is trite that discussions between parties undertaken with a view to settle the disputes between them are privileged from disclosure[3]. A disclosure of such privileged discussions are self-evidently prejudicial and such evidence inadmissible. The correspondence evidenced that the discussions were in fact held without prejudice. The respondent correctly followed the requisite procedural steps to launch a striking out application and it cannot be concluded, as the applicant argued, that it was improper for such procedure to have been adopted.

[12] It follows that the striking out application must succeed. There is no reason to deviate from the normal principle that costs follow the result.

[13] Turning to the merits, the applicant seeks interim interdictory relief, “pending the institution” of an action. Despite the paragraph being inelegantly worded, reading the founding papers in context, it is clear that what the applicant envisaged was to obtain interim interdictory relief pending the resolution of the factual disputes between the parties in the proposed action proceedings. I shall thus consider the application in this context.

[14] The applicant seeks interim interdictory relief. It is well established[4] that the principles in *Webster* [5] apply. It is not necessary to repeat them. The requirements for interim interdictory relief are trite[6]. They are: (i) a *prima facie* right, although open to some doubt; (ii) an injury actually committed or reasonably apprehended; (iii) a

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[3] Millward v Glaser 1950 (3) SA 547 (W) at 554E-555B
[4] Eskom Holdings SOC Ltd v Lekwa Ratepayers Association NPC and Others and a Similar Matter 2022 (4) SA 78 (SCA) para [21]
[5] Webster v Mitchell 1948 (1) SA 1186 (W) 1189 refined in Gool v Minister of Justice 1955 (2) SA 682 (C) at 688D-E
[6] Setlogelo v Setlogelo 1914 AD 221

favourable balance of convenience; and (iv) the absence of any other satisfactory remedy available to the applicant.

[15] The respondent disputed that any of the requirements for interdictory relief were met. Its principal attack was against the establishment of a *prima facie* right by the applicant. Applying the principles in *Webster*, it argued that the respondent convincingly and comprehensively illustrated that it's version cast serious doubt on the version of the applicant and that its *prima facie* right was in serious jeopardy and doubt.

[16] A distinction must be drawn between the two categories of interdictory relief sought by the applicant. The first; an interdict to prohibit the respondent from interfering with his management and operation of the respondent, and, if disciplinary steps had been taken, from implementing any decision taken at such hearing.

[17] The second; an interdict preventing the respondent from disposing, selling, transferring or dealing in any manner with the assets of the business pending the institution of an action for specific performance.

[18] The central factual disputes between the parties are first, whether a joint venture agreement was concluded on terms as alleged by the applicant and second, whether the applicant was a managerial employee of the respondent or a partner in the joint venture, entitled to manage the respondent's business activities.

[19] The applicant argued the joint venture agreement was concluded on the terms referred to in the founding affidavit, which afforded him the *prima facie* right to the relief sought. In support of those contentions, the applicant attached a batch of WhattsAp communications between the parties. No reference was made to any specific portion of the communications nor was it referred to in the applicant's affidavit as supporting his cause. Those communications do not assist the applicant. It is well established that a

party cannot merely attach documents and require a court to consider them without the relevant evidence being addressed in its affidavits [7].

[20] The respondent on the other hand contended that those "terms" were only discussion points and that there was no certainty as to the terms of the agreement between the parties. It argued that the alleged verbal agreement at best for the applicant was either an invalid agreement to agree or that the agreement would be void for vagueness.

[21] Those disputes are irresoluble on the papers and require oral evidence, before they can be determined. The applicant did not seek the referral of those issues to oral evidence or to trial.

[22] The first category of interdictory relief can be disposed of succinctly.

[23] Considering the material irresoluble disputes of fact regarding whether (i) any joint venture was concluded and (ii) the applicant was an employee of the respondent or a partner in the joint venture business, it cannot in my view be concluded that the applicant has illustrated any *prima facie* right, although open to some doubt, to the relief sought.

[24] The respondent's version is set out in significant detail and in my view casts serious doubt on the version of the applicant as envisaged in *Webster*. The applicant's argument that the "terms" averred in the founding affidavit are sufficient to constitute an enforceable joint venture agreement, albeit an oral once, is not convincing, specifically considering that these are motion proceedings. Considering the evidence of the respective parties, it appears that no consensus was ultimately reached between them on vital issues which were to regulate their relationship.

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[7] Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa 1999 (2) SA 279 (T) 324B-E; Genesis Medical Aid Scheme v Registrar, Medical Schemes and Another 2017 (6) SA 1 (CC) par [171]; Minister of Land Affairs and Agriculture v D&F Wevell Trust 2008 (2) SA 184 (SCA) par [17]

[25] Moreover, what is also fatal to the applicant's case is that the harm sought to be prevented by the interdict has already transpired. It is trite that the risk of harm must be ongoing and is concerned with present or future infringements [8]. An interim interdict is not a remedy for the past invasion of rights [9].

[26] The relief as phrased in the notice of motion pertains to events which had already transpired at the time the application was argued on 8 August 2023. There has been interference with the managerial functions of the applicant and the decision to terminate his relationship with the respondent has both been taken and implemented.

[27] Whilst the stance adopted by the respondent smacks of opportunism by taking the decision to terminate its relationship with the respondent and to implement that decision after the application was launched, the applicant did not amend the relief sought after the launching of the application nor seek to interdict the implementation of his exclusion from the management and operation of the respondent's business.

[28] It follows that the first category of interdictory relief is doomed to failure. Having reached this conclusion, it is not necessary to consider the remaining requirement in any detail.

[29] Suffice it to state that it cannot be concluded that the applicant has illustrated a favourable balance of convenience in his favour, given the undisputed breakdown of the trust relationship between the parties (albeit that the respective individuals blame each other for the breakdown). It can further not be concluded that the applicant has illustrated that he has no alternative legal remedies at his disposal.

[30] The interdictory relief pertaining to the assets contributed by the applicant to the respondent's business, however stands on a different footing.

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[8] Tshwane City v Afriforum 2016 (6) SA 279 (CC) para [55; NCSPCA v Openshaw 2008 (5) SA 339 (SCA) par [20]

[9] United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others 2023 (1) SA 353 (CC) par [48]

[31] It was not disputed by the respondent that the applicant contributed the assets referred to in paragraph 46 of his founding affidavit to the respondent's business and that those assets are being utilised therein. According to the respondent, a sale agreement of those assets was still to be concluded between the parties.

[32] Having expressly disavowed the existence of any agreement between the parties, the respondent has no entitlement to those assets, nor any basis to dispute the applicant's right to protect those assets. On its own version, any equipment which belonged to the applicant's Latelicious franchise would be used by and purchased by the respondent, but this agreement was also never finalised and its terms agreed to. The respondent did not expressly deal with the assets and equipment referred to by the applicant in its answering affidavit. It in bald terms denied that all the equipment was fully functional and that the restaurant was a fully equipped and functioning restaurant.

[33] Considering the undisputed facts, I am persuaded that the applicant has established a *prima facie* right to have those assets protected on an interim basis.

[34] Turning to the requirement of an injury actually committed or reasonably apprehended, a well-grounded apprehension of irreparable harm if the interim relief is not granted and if the assets were to be used or disposed of is self-evident and of an ongoing nature.

[35] It was contended that the respondent and its directors had no intention of selling, transferring or dealing in any manner with any of the assets of the respondent in such a way that would be detrimental to its interests and, by implication, detrimental to its directors' own financial interests as the sole shareholders of the respondent. In the answering affidavit it was further stated:

> *"Mr Macrides and I and the respondent, have no difficulty in providing an undertaking that none of the assets of the respondent will be disposed of, transferred or dealt with in any manner which would cause any detriment to the respondent except insofar as any such disposal or similar conduct is required for the operation of the respondent in a commercially sensible manner"*

[36] That undertaking in my view falls far short of the mark of offering any protection for the applicant's assets. On the respondent's own version, the undertaking provided applies only to the assets of the respondent and does not pertain to the assets referred to by the applicant. For present purposes, it matters not whether the assets are owned by the applicant personally or by the company of which he is the sole director, Latelicious Aspen (Pty) Ltd. For these reasons, I am persuaded that the applicant has met this requirement.

[37] In considering the balance of convenience, the prejudice to the applicant if relief is refused must be weighed against the prejudice to the respondent if it is granted. In considering such balance, the principles enunciated in *Olympic Passenger Services*[10] must be applied. [11]It is not necessary to repeat them. In an application for an interim interdict, the balance of convenience is often the decisive factor, given that it is a discretionary remedy[12].

[38] The respondent adopted the emphatic stance that it would have no further commercial dealings or relationship with the applicant. Having pinned its colours to the mast, any prejudice or inconvenience to the respondent in being deprived of the use of the assets is outweighed by the prejudice to the applicant.

[39] I am satisfied that the applicant has illustrated that the balance of convenience is in its favour. The respondent did not strenuously contend that the applicant has an alternative suitable remedy at its disposal other than an approach to the CCMA, which is not relevant to the present enquiry.

[40] It follows that the applicant is entitled to interdictory relief in relation to the assets. The applicant's papers are unclear as to what "business" it was referring to. Insofar as it referred to the assets contributed by the applicant, he is entitled to the relief sought. As

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[10] Olympic Passenger Services v Ramlagan 1957 (2) SA 382 (D) 383F; Cipla Nedpro (Pty) Ltd v Aventis Pharma SA 2013 (4) SA 579 (SCA) para [40].
[11] LF Bosshoff Investments (Pty) Ltd v Cape Town Municipality 1969 (2) SA 256 (C) at 267A-F
[12] Erikson Motors (Welkom) Ltd v Protea Motors, Warrenton & Another 1973 (3) SA 685 (A)

the applicant did not provide a separate list of the relevant assets, I am constrained to refer to them as listed in paragraph 46, specifically paragraphs 46.1 to 46.29 of the applicant's founding affidavit. Those items were not disputed by the respondent.

[41] However, insofar as the applicant sought to obtain interdictory relief pertaining to all the assets of the respondent, no relief can be granted, given that no *prima facie* right has been established in relation thereto and it cannot be concluded that the applicant has established the joint venture agreement on a *prima facie* basis. I have already dealt with that issue in relation to the first category of interdictory relief sought by the applicant.

[42] Turning to the issue of costs, the applicant, although not successful in obtaining all the relief sought, has achieved substantial success in the application. It would be appropriate to apply the normal principle that costs follow the result. I am not however persuaded that a punitive costs order is warranted as sought by the applicant.

[43] I grant the following order:

> [1] The forms, service and time periods prescribed in terms of the Uniform rules of court are dispensed with and the application is heard as one of urgency in terms of rule 6(12).
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> [2] The respondent's striking out application is granted with costs and paragraphs 52 to 55 of the founding affidavit are struck out.
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> [3] The respondent is forthwith interdicted from disposing, selling, transferring, utilising or dealing in any manner with any of the assets of the business contributed by the applicant or his business referred to in paragraph 46 of the founding affidavit, pending an action for specific performance to be instituted within 14 days after granting of this order, relating to the verbal agreement entered into between the

applicant and Messrs Stylianou and Macrides, purporting to have been duly authorised and acting on behalf of the respondent.

[4] The respondent is directed to pay the costs of the application.

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EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

DATE OF HEARING	: 08 August 2023
DATE OF JUDGMENT	: 15 August 2023
APPLICANT'S COUNSEL	: Adv N. Jagga
APPLICANT'S ATTORNEYS	: Vardakos Attorneys
RESPONDENT'S COUNSEL	: Adv R. Pottas
RESPONDENT'S ATTORNEYS	: Christodolou Mavrikis Alex Protulis