



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

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

DATE: 16 May 2023

SIGNATURE:

Case No. 026088/23

In the matter between:

OASIS WATER (PTY) LTD

First Applicant

OASIS WATER ASSET COMPANY (PTY) LTD

Second Applicant

V

VAN BERG WATER (PTY) LTD t/a OASIS WATER LYNNWOOD

First Respondent

CHARMAIN VAN DEN BERG

Second Respondent

ADRIAAN VAN DEN BERG

Third Respondent

DEON BRAAM VAN DEN BERG

Fourth Respondent

DEWALD JOHANNES VAN DEN BERG

Fifth Respondent

Coram: Kooverjie J

Heard on:

Delivered: 16 May 2023 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 14H00 on 16 May 2023.

SUMMARY:

- The post termination clauses apply upon the termination of the franchise agreements.
- In determining if the respondents were in unlawful competition with the applicants the true test is whether they obtained the information and know-how from the confidential relationship they had with the applicants in the form of franchise agreements.
- Restraints are unreasonable if they were against public policy, when the applicants' interests goes further than necessary to protect their interests.

ORDER

It is ordered: -

1. The forms, service and time periods provided for in the Uniform Rules are dispensed with and the matter is urgent in terms of rule 6(12);

2. An interim order, pending the final outcome of the relief sought in **PART B** of the notice of motion, in the alternate, pending the final outcome of the relief sought in part B of the notice of motion by arbitration proceedings:
 - 2.1 The first respondent is ordered to return to the first applicant any and all manuals and other printed matter relating to the first respondent's franchise operation, including:
 - 2.1.1 manuals, labels or printed material containing the first applicant's names and trademarks;
 - 2.1.2 printed or electronic matter relating to the franchise operation which was previously conducted by the first respondent under the name and style of Oasis Water;
 - 2.1.3 client lists, or data lists.
 - 2.2 The first respondent is ordered to remove and return all "Oasis" signage to the first applicant.
 - 2.3 The first respondent is ordered to remove and return the "Oasis" water purifying system to the first applicant consisting of:
 - 2.3.1 the reverse osmosis purification plant;
 - 2.3.2 the filling/dispensing tables;
 - 2.3.3 mobile ozonation unit or ozone units;
 - 2.3.4 any article bearing trademarks.
 - 2.4 The first respondent is ordered to cease using or exploiting the first applicant's "Oasis" business system and any intellectual property owned by the first applicant.

2.5 The first respondent is ordered to execute all documents and do all such things necessary to remove the name of the first respondent from any register relating to business names and trademarks belonging to the first applicant.

2.6 The first respondent is ordered to change the appearance of the first respondent's premises located at the following places to prevent the premises being mistaken in appearance or signage by members of the public for an "Oasis" franchised business:

2.6.1 Equestria;

2.6.2 Lynwood;

2.6.3 Gift Acres;

2.6.4 Glenfair Boulevard;

2.6.5 Lynwood Lane;

2.6.6 Willow Crossing;

2.6.7 Elardus Park;

2.6.8 Newlands;

2.6.9 Moreleta Square;

2.6.10 Moreleta Park Plaza;

2.6.11 Parkview; and

2.6.12 Pierre van Reyneveld.

2.7 The first respondent is ordered to forthwith hand control of the first respondent's franchised businesses to the first applicant.

2.8 The respondents are interdicted and restrained from using the first applicant's business system and intellectual property, including the first applicant's know-how, copyright, goodwill, trade dress, trademarks, trade secrets, as well as confidential information.

- 2.9 The respondents are interdicted and restrained from using or displaying the first applicant's water purification and bottling system and equipment directly or indirectly as part of any business enterprise.
- 2.10 The respondents are interdicted and restrained from:
- 2.10.1 using or divulging any of the first applicant's confidential information, trade secrets or business model;
- 2.10.2 passing off the respondents' products and business to be that of the applicants;
- 2.10.3 using or displaying the first applicant's trademarks or any printed material or poster which contains the first applicant's name, images of its products, copyright material or slogans;
- 2.10.4 making any representation or statement to any third party or a member of the public to the effect that:
- 2.10.4.1 the respondents have merely made a name change from that of the applicant;
- 2.10.4.2 the products sold by the respondents are the same or similar as those of the applicants;
- 2.10.4.3 the business and other practices used by the respondents are the same or similar as those used by the first applicant or any of its franchisees;
- 2.10.4.4 the respondents are entitled to sell, market and/or produce any of the applicants' products and business systems; and
- 2.10.4.5 the respondents are in any way connected to or entitled to act on behalf of the first applicant.

- 2.11 The respondents are interdicted and restrained from selling any of the applicants' products.
- 2.12 The respondents are interdicted and restrained from using and selling any bottled water using the same or similar bottle or bottle cap used by the first applicant for its products.
- 2.13 The respondents are interdicted and restrained from displaying any products together with any sign or label which creates the impression that the respondents' products are those of the first applicant or that the respondents are in any way associated with the first applicant.
- 2.14 The first respondent is interdicted and restrained from using the Oasis Water Exchange Programme.
3. Costs to be paid by the respondents jointly and severally the one paying the other to be absolved, on the scale as between attorney and client including the costs consequent on the employment of two counsel where so employed.

JUDGMENT

KOOVERJIE J

RELIEF SOUGHT

[1] The applicants seek interim interdictory relief in terms of Part A pending the final determination of Part B whereby this court is requested:

1.1 to enforce the post-termination provisions contained in the franchise agreements concluded between the first applicant and the first respondent (prayers 2 to 2.7 of the notice of motion);

1.2 to enforce the restraint of trade provisions contained in the aforesaid franchise agreements (prayers 3 to 3.3 of the notice of motion);

1.3 to restrain the respondents from unlawfully competing with the applicants (prayers 2.8 to 2.14 of the notice of motion).

[2] In essence the issues to be determined is whether the relief sought is interim in effect and if so whether the applicant has made out a *prima facie* right to the relief sought. The applicants have contended that there is no alternative adequate remedy other than to bring this application for interdictory relief and to seek interim specific performance of the post-termination and restraint of trade provisions of the franchise agreements.

THE PARTIES

[3] The first applicant is the franchisor of the OASIS brand. The second applicant is the developer of the water exchange product and challenges the first respondent on the basis of unlawful competition.

[4] The first respondent is one of the franchisees who concluded four franchise agreements with the first applicant, namely the Oasis Water Lynnwood, Oasis Water Elardus Park, Oasis Water Moreleta Park and Oasis Water Pierre van Ryneveld.

[5] For the purposes of this judgment, I will refer to the first applicant as “the applicant” and the first respondent as “the respondent”. The second to the fifth respondents are all directors of the first respondent.

DISPUTE RESOLUTION

[6] Although none of the parties raised the issue as to whether this court has jurisdiction, I deemed it necessary to clarify same in light of the provisions set out in the franchise agreements. Upon close scrutiny of the franchise agreements, I note the context in which this dispute has been referred to the High Court.

[7] In generality, clause 18 of the franchise agreement makes provision for the manner in which disputes may be resolved. Clause 18.1 stipulates that:

“18.1 All disputes arising out of or relating to this agreement in respect of the meaning or interpretation of any word, provision or clause of this agreement, shall first be resolved or attempted to be resolved by the parties through bona fide discussion within 1 month of such dispute having been declared by any of the parties.”

[8] Failing the said process, the parties have an option to submit the matter to mediation or arbitration. Clause 18.7 specifically precludes either party from obtaining immediate relief on an urgent basis from any court of competent jurisdiction.

[9] Clause 18.8 further restricts the franchisee from conducting future business:

"If a dispute arises between the parties and such dispute cannot be resolved within 1 month allowed for bona fide discussion as set out in paragraph 18.1 above, the franchisee should refrain from conducting his business as franchisee until such time the dispute has been settled."

[10] In the case where there has been a termination of the franchise agreement, clause 20.3.7 becomes operable. Clause 20.3.7 stipulates that on termination, and upon the receipt of cancellation, if the franchisee refuses to hand over control over the business, the franchisor can apply on an urgent basis to court for interim relief, provided that both parties consent thereto and both parties agree to the granting of such interim relief.

[11] In having regard to paragraph [21] of Annexure 'FA9', from my understanding, the respondents, in informing the applicants that the dispute between the parties can be brought before court, amounted to consent on the respondents' part and which the applicants acceded to. It is on this basis that I proceed to consider the matter.

URGENCY

[12] Although this matter was previously enrolled for hearing in the urgent court, it was referred to me by way of special allocation.

[13] Counsel for the respondents persisted with his argument that a determination on urgency is paramount and has a bearing on this matter. The respondents argued that they were prejudiced as they were not given sufficient time to place their version before court. I do not find this explanation tenable. Surely the respondents could

have sought leave to file further supplementary papers, or even filed a postponement application motivating the reasons therefore.

[14] Parties are reminded that the rules of court make provision for various recourses to assist parties. In particular I take cognisance of the fact that even though the urgent application was issued on 22 March 2023, this matter was only heard on 19 April 2023.

THE FACTS

The Oasis brand

[15] It is not disputed that during August 2018 the applicant and the respondent concluded four franchise agreements in terms of which the respondent operated various Oasis outlets in Pretoria. In February 2023, five years later, these franchise agreements were terminated.

[16] It was also not disputed that:

16.1 the Oasis business involves the bottling and supply of filtered and purified water and other beverages under the Oasis brand;

16.2 the first applicant is the pioneer of all formal refill water business and has not only been in business for over 20 years but also is the fourth largest bottled water brand in South Africa and one of the first established water purifying processing companies;

16.3 it provides purified and ozonized water as well as a wide range of other products such as juices, iced teas and sports drinks. It was alleged by the

applicants that these products are made with a secret and confidential purification process;

16.4 it is the author and developer of the Oasis Water exchange programme (“exchange programme”). The aim of the exchange programme is to make water convenient and accessible to its customers in both homes and offices.

[17] In terms of the respective franchise agreements, the respondents had the right to use and access the Oasis franchise business which included: the unique and novel business system; the Oasis trademark; the design of the kiosks and refilling tables; the intellectual property rights include the first applicant’s know-how, copyright, goodwill, trademarks, trade secrets which included the confidential information, as well as the exchange programme.

[18] The franchise agreements contained various confidentiality and restraint of trade undertakings in favour of the first applicant. The franchise agreements also conferred various post-termination rights on the first applicant.

The termination of the franchise agreements

[19] On 17 February 2023 the respondents cancelled the franchise agreements. The respondent at date of cancellation undertook to:

19.1 remove all Oasis trademarks, signage and other water-related brand elements from all its stores within a period of 7 days of the letter;

19.2 never in future to use the Oasis trademark as well as the applicant’s know-how and confidential information.

[20] The applicants regarded the respondents' cancellation as a repudiation of the franchise agreements. On 23 February 2023 the first applicant accepted the first respondents' repudiation and terminated the franchise agreements.

Cancellation of the agreement

[21] The applicants hold the view that the post-termination clauses find application. Clause 20.3 of the franchise agreements stipulate that upon termination of the agreement, for any reason whatsoever, all rights which may have vested in the first respondent in terms of the agreement would immediately and automatically revert to the first applicant.

[22] By virtue of the said clause the respondents were required to:

22.1 immediately return any manuals and printed matter relating to the franchise operation, remove and return all signage as well as return the Oasis water purifying system which constituted the following:

- reverse osmosis purification plant;
- filling or dispensing bottles;
- the mobile ozone units; and
- any article bearing the Oasis trademark;

22.2 to immediately cease to use or exploit the business system and any intellectual property of the first applicant;

22.3 to do all such things as are necessary to remove the name of the first respondent from the register relating to the business names and trademarks belonging to the first applicant;

22.4 further to change the appearance of the premises to the extent necessary to prevent the premises from being mistaken in appearance or signage by members of the public for an Oasis business.

REPUDIATION

[23] Notably in correspondence dated 17 February 2023 (Annexure FA9), the respondents indicated the basis on which they accepted the applicant's repudiation of the franchise agreements. In the alternative, it stated that the applicant breached the franchise agreements in material respects which caused the respondents to cancel their agreements.

[24] On its version, the respondents advanced five core reasons, which they proffered, that justified a repudiation on the applicant's part, namely that:

24.1 it failed to not only furnish financial information, but further failed to furnish the full records. It was argued that Regulation 2(3)(m) of the Consumer Protection Act required the applicant, *inter alia*, to furnish financial certificates (by an auditor). Same was not provided for the periods 2018 to 2022. In addition, the applicant further failed to provide management accounts for the period May to August 2022;

24.2 it implemented a "land-grab strategy" whereby the franchisees were expected to acquire competitive stores, alternatively open new stores. The objective was to expand the Oasis footprint in the country and abroad. The repudiation came about when the respondents were advised that if the franchisees do not buy into this strategy, their franchise agreements would not be renewed;

24.3 it acquired a controlling interest in the direct competitor in the water business - the GoZone Group. This resulted in competition with its own franchisees which was contrary to the mutual and beneficial relationship intended by the franchise. The repudiation was evident from the termination of the agreement with Mr Albert Challis and Mr Frank Stokel.

[25] It was argued that at the November 2022 meeting, Oasis declared its intention to break away from the current franchise model. This meant that the respective franchise agreements would be terminated. Oasis had, in fact, invited franchisees to approach the franchisor to defranchise. The new model would allow for the franchisor to own shares in the respective franchisee entities. The franchisees who exercised their rights to acquire a GoZone store and who further utilized the funding from the franchisor would do so through an entity in which the franchisor owned shares. This went against the very principle of a symbiotic relationship upon which the current franchise agreements were based on.

[26] The applicant, on the other hand, vehemently denied that it repudiated the respective franchise agreements. In summary it was explained that:

26.1 the pie charts gave a visual representation of the financial status. Information was extracted from audited financial statements. The pie chart included all the information as contemplated in terms of the Consumer Protection Act.

Furthermore the franchisees were invited to visit the Oasis head office together the auditor to inspect the financial information, as well as the details of the marketing fund;

26.2 the respondents were furnished with the applicant's audit certificates on an annual basis. It was argued that the marketing funds were justifiably utilized.

Oasis had an ongoing rebranding project and the funds were used for this reason;

26.3 the franchise agreements further did not prohibit the Oasis holding company from acquiring interests in GoZone. Hence there could never have been any conflict as it would not impact on the respondents' businesses. Moreover, it was pointed out that the Oasis purification system differs from that of GoZone.

26.4 The "land-grab strategy" was aimed to benefit the respondents. The strategy was developed to increase the Oasis footprint. The franchisees were encouraged to acquire competitor water stores with good locations. The intention was to assist franchisees to participate in the project and further provide them with financial assistance.

[27] Argument was proffered that the conduct of the respondents was not *bona fide*. Since the conference that was held in January 2023, with the franchisees, the respondents had undertaken to terminate their agreements with the applicant. The entire transition to "Manzi" was planned and orchestrated in a manner that at the date of cancellation they were ready to continue with the businesses under the "Manzi" name.

[28] The respondents, on the other hand, pointed out that the applicants were malicious. The restraint of trade provisions remain unenforceable as there is no protectable interest that extends beyond the applicant's trademark and brand. The applicant's trademark and brand is not threatened. The post-termination clauses of the franchise agreement are unenforceable for the reasons that the respondents terminated the franchise agreements pursuant to the repudiation thereof by the

franchisor. The franchisor could not avail itself of the termination clauses under circumstances where it was unwilling to comply with the terms of the franchise agreements. The franchisor had not advanced any case on their papers that suggested that they complied or were ready to comply with its obligations in terms of the franchise agreements. Consequently, then the applicant cannot claim specific performance.

[29] I am aware that the test applied in determining whether conduct of a party amounts to a repudiation, is that there has to be a deliberate and unequivocal intention to no longer be bound to the contract. Simply put, the test is whether a reasonable person would conclude that proper performance will not be forthcoming in this instance for the applicant.¹

[30] The respondents identified the conduct of the applicant in Annexure 'FA9', which it alleged, in its view, constituted repudiation. I am however not satisfied that the evidence before me demonstrated repudiation on the applicants' part. There is no correspondence from the applicants declaring to the respondents herein that it had repudiated their agreement.

[31] Even if I were to accept the respondents' version, the reason for termination is not a determining factor if one has regard to the wording of the franchise agreements.

[32] The post termination clauses must be considered in the context of the franchise agreements. Clause 20.3 of the agreements explicitly states that the post termination provisions apply irrespective of the reason for termination.

¹ Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd 2001 (2) SA 284 (SCA)

[33] In this regard I draw an analogy from the **Scriven Bros**² matter where the court held that it is reasonable to infer that both parties, notwithstanding the fact that one of the parties repudiated the contract, intended that the post termination provisions become operable of the contract even if one party repudiated on the contract. The court at **401** stated:

"... It is time that a repudiation of a contract by one party may relieve the other party of the obligation to carry out the other terms of the contract after the date of repudiation, but the repudiation does not destroy the efficacy of the arbitration clause. The real object of that clause is to provide suitable machinery for the settlement of disputes arising out of or in relation to the contract and as that is its object, it is reasonable to infer that both parties to the contract intended that the clause should operate even after the performance of the contract is at an end."

[34] The post termination clauses in issue are the following:

34.1 clause 20.3 of the franchise agreement makes provision for the franchisor to terminate the agreement for any reason whatsoever;

34.2 upon termination of the agreement between the parties, the respondent was required to, *inter alia*, return all of the equipment and cease to utilize the applicant's business system and any intellectual property. Clause 20.3.2 identifies, *inter alia*, the documents and various equipment that should be returned by the franchisee upon termination. It reads:

"20.3.2 The franchisee will return immediately to the franchisor any and all manuals and other printable matter relating to the franchise operation, remove and return all signage to the

² Scriven Bros v Rhodesian Hides and Produce Co Ltd and Others 1943 AD 393 at 401

franchisor as well as return the Oasis water purifying system consisting of the following, namely:

- *the reverse osmosis purification plant;*
- *dispensing tables;*
- *mobile ozonation unit or ozone units;*
- *any article bearing trademarks and will immediately cease to use or exploit the business system and any intellectual property owned by the franchisor.”*

34.3 Clause 20.3.3 reads:

“The franchisee will execute all such documents and do all such things that are necessary to remove the name of the franchisor from any register relating to the business names and trademarks belonging to the franchisor ...”;

34.4 Clause 20.3.4 reads:

“The franchisee is required to change the appearance of the premises to the extent necessary to prevent the premises being mistaken in appearance or signage by members of the public or for an Oasis franchise business.”

34.5 Clause 20.3.5 reads:

“The franchisee shall not be entitled to receive any rebate or refund of any money paid pursuant to this agreement.”

34.6 Clause 20.3.6 reads:

“The franchisee will not be relieved of the obligation to pay any monies due to the franchisor pursuant to this agreement.”

34.7 Of importance is clause 20.3.7 which reads:

“Immediately upon receipt of the notice of cancellation or termination by whatever means, despite either party disputing termination for whatever

reason, the franchisor shall be entitled to immediately take control of the Franchise Business until the dispute is resolved by a competent authority.”

- [35] As alluded to above, on the respondents' own version they undertook to remove all Oasis Water trademarks, signage and other related Oasis Water brand elements from all their premises within a period of 7 days from the said cancellation letter (Annexure FA9). They further undertook to refrain from using the Oasis Water trademarks in future (subject to the grace period to remove the signage and the branding) and refrain from using any Oasis Water know-how confidential information.
- [36] The respondents argued that it had returned the items and the know-how of the Oasis product. However, on the papers, there is no evidence to substantiate same. It was further explained that the equipment was purchased by the respondents and remains their property. Furthermore the franchisor had not communicated its interest in the equipment.
- [37] I find such reasoning untenable. The respondents being parties to the franchise agreements were well versed with the provisions therein. On my understanding of the wording of the agreement, clause 7.3 requires of franchisees to purchase all its equipment, fittings and accessories detailed in the Operation Procedures and Training Manual from the franchisors' recommended suppliers and further that the franchisors' requirements and specifications must be adhered to. However, upon termination of such agreement for whatever reason, the equipment, fittings and accessories of all business systems and retail outlets can only be sold to an existing franchisee, an approved buyer of the franchised business to the franchisor at market value.

- [38] It is only in the event where neither of the three (which includes the franchisor), are interested in purchasing the equipment, then such may be sold to a third party upon the franchisor giving written permission thereon and after debranding such equipment and fittings to the satisfaction of the franchisor.
- [39] Clause 20.3 of the franchise agreements requires the respondents to perform in terms of the said provisions. The further contention that clause 20.3.7 is unlawful, in terms of the Consumer Protection Act, is assailable. The said clause does not make provision for the franchisor to remove equipment and information from the franchisees' premises. The wording is clear. The franchisees are required to return same, failing which the franchisor has a remedy in law, to approach this court.

UNLAWFUL COMPETITION

- [40] The applicants' core argument was that notwithstanding the termination of the franchise agreements, the respondents continued to operate the very same business on the very same premises and serviced the very same customers. The only difference now is that the business is being conducted under the brand "Manzi Water". Apart from the change in brand the business is in all other respects identical to the Oasis brand. Such conduct is nothing more than copying the applicants' business.
- [41] The respondents argued that they did not springboard from the labours of the applicants. They, *inter alia*, contended that:

- 41.1 they use Midea dispensers for Exchange your Manzi, which dispensers are widely available;
- 41.2 they do not have access to the electronic systems neither do they have access to the source code;
- 41.3 their water exchange programme requires customers to visit the store and wait for their bottles to be refilled. They do not have prefilled bottles;
- 41.4 they had notified their customers that they had broken away to start a new brand with the same quality as the Oasis product;
- 41.5 the Manzi dispenser machines are more advanced in that provision is made for colder and warmer temperatures and that a child lock feature has been added.

[42] It was pointed out that the refill tables, kiosks and dispensers are widely used in the water industry by all of the competitors, one being Puritech.

[43] The Oasis trademark has been registered in terms of the Trade Marks Act 193 of 1994. The first applicant's holding company, Oasis Water Holdings (Pty) Ltd is the proprietor of various registered trademarks which incorporates the word "Oasis".

[44] Apart from admitting that Oasis had a registered trademark, it was contended that Oasis does not have a unique business system, particular know-how, trade secrets or copyright. It was further denied that Oasis had a unique water purification system. Franchisees were free to use any water purified system. Puritech's reverse osmosis system is used by other water businesses as well.

[45] The springboarding doctrine was defined in the **Waste Products Utilization (Pty) Ltd** matter³ where the court held:

“Springboard entails not starting at the beginning and developing a technique, process, piece of equipment or product but using, as the starting point, the fruits of someone else’s labour. Although the springboard concept applies in regard to confidential information, the misuse of the fruits of someone else’s labour may be regarded in a suitable case unlawful even where the information copied is not confidential.”

[46] An analogy can be drawn to the facts in the **Schultz** matter⁴ where it was illustrated that a certain hull that was designed by the plaintiff, Mr Butt, was copied by the defendant. The court found that although it was not confidential as it was in the public domain, the copying thereof constituted springboarding which is regarded as unlawful.

[47] The court in **Schultz** at page 682 to 683 stated:

“There can be no doubt that the community would condemn as unfair and unjust Schultz’s conduct in using one of Butts hulls ... to form a mould with which to make boats in competition with Butt... In South Africa the legislature has not limited the protection of the law in cases of copying to those who enjoy rights of intellectual property under statutes. The fact that in a particular case there is no protection by way of patent, copyright or registered design, does not license a trader to carry on its business in unfair competition with its rivals.”

³ Waste Products Utilization (Pty) Ltd v Williams 2003 (2) SA 575 and my emphasis

⁴ Schultz v Butt 1986 (3) SA 678

[48] More specifically with regard to the Oasis water exchange programme it was pointed out that the product is distinctive and unique in that:

- 48.1 a specific 10-liter water bottle was designed for the use of a dispenser;
- 48.2 the bottle design was ensued in collaboration with Plastic Innovation which led to a confidentiality agreement being concluded on the design;
- 48.3 the handling of the dispenser and the water bottle was improved. The design currently allows for it to be carried more easily as a standard dispenser has a volume of 18.9 liters;
- 48.4 the dispenser uses less power and keeps water at optimal temperatures making it much more environmental friendly; and
- 48.5 more importantly, the water exchange programme has a proprietary accounting system makes provision for the calculation of customers' monthly water exchanges.

[49] Argument was proffered that the development of the system, together with the algorithm, took 12 months to complete. In addition, there is a distribution network, website and a marketing business program.

[50] It was further highlighted that other competitors in the market do not use and implement the same exchange programme as Oasis. Such competitors provide a dispenser rental program which is an entirely different concept. This means that a customer cannot walk into a competitor store and directly exchange a container. A customer would have to wait for it to be refilled or he/she has to purchase a new bottle. With the Oasis brand customers may walk in and exchange bottles immediately. With the devised accounting system, payment is not required with every visit.

[51] It was also explained that although Oasis purchases standard components from various approved suppliers, the setup thereof is specific and prescriptive. They are used in a specific manner to produce Oasis water.

[52] It was further motivated that the distinctiveness of the Oasis product is resultant from:

52.1 the unique process that the pressure vessel or housing for the sand filtration units which are filled with high grade filtration sand and activated carbon with a 50% ratio;

52.2 there is a water softness specific to the source water test results;

52.3 it is a reverse osmosis system which, *inter alia*, constitutes high pressure pump and that Oasis use specific melt-blown micron filters and not one that is ordinarily available, that is the 10 micron and 5 micron filter combination;

52.4 a specific UV globe is used;

52.5 the ozone generator has a minimum of 3.5g ozone;

52.6 furthermore the purification process is set out in the technical manuals and which are confidential;

52.7 the stored water is circulated for a specific confidential number of hours during a 24-hour period and calculated at a specific developed formula;

52.8 continuous training through the training manuals and videos are provided.

[53] More notably, it was pointed out that both Oasis and Manzi have the exact same substance, content or composition. The details thereof can be seen from the bottles. This fact has not been refuted on the papers.

[54] Ultimately the true determining factor is whether or not the respondents obtained their information and know-how within the context of a confidential relationship with the applicant. In this instance, it cannot be gainsaid that the respondents acquired the information and know-how emanating from the confidential relationship with the applicants, which was agreed to in writing, in the form of franchise agreements.

[55] On this point I find guidance from the **Multi Tube Systems** matter⁵ where the Appellate Division held that:

“... what the origin of it may be, is that a person who has obtained information in confidence is not allowed to use it as a springboard for activities detrimental to a person who made the confidential communication and springboard it remains even when all the features have been published or can be ascertained ... by any member of the public.”

[56] Between 1 to 4 March 2023 the applicant undertook inspections at the respective premises of the respondents, upon cancellation of the contract. The inspection findings, *inter alia*, revealed that the respondents continue utilizing the Oasis purifying system. Not only is the refilling still executed on the Oasis tables, but in one instance the Oasis logo was covered with the Manzi logo. Oasis kiosks are still used. Further the Oasis trademark is being displayed either on its own or in conjunction with the Manzi trademark.

[57] It was also pointed out that access to the filtration equipment was denied by the respondents at their premises. Photographs annexed to the papers depicted that the

⁵ *Multi Tube Systems v Ponting and Others* 1984 (3) SA 182A at 189 C-E quoted with approval the matter of *Terrapin Ltd v Builders' Supply Co (Hayes) Ltd* [1960] RPC 128

filtration process apparatus could not be inspected, post termination. Only photographs that illustrated the filtration system, apparatus and processes used prior to the cancellation of the contract were made available. It was therefore proffered that the only inference which can be drawn is that the Oasis equipment is still being used.

- [58] Once again, I have had regard to the provisions set out in the franchise agreements:
- 58.1 for instance, clause 12.2 of the franchise agreements stipulates that in terms of the Operational Procedures and Training Manual, the franchisee will obtain a written and signed confidentiality document for each of its employees, agents or persons to whom it makes a disclosure;
 - 58.2 by virtue of clause 13, the franchisee acknowledged that the franchisor's business system and intellectual property are of substantial importance to the entire franchise operation. The franchisee further acknowledges that the right, title and interest in the business system and intellectual property shall vest in the franchisor;
 - 58.3 clause 7.9 of the franchise agreement makes provision for training and the franchisee was requested to recognize there must be ongoing training of the franchisee employees;
 - 58.4 in addition, clause 7.10 stipulates that written approval must be established from the franchisor in respect of lease or purchasing of premises. Moreover Oasis products cannot be sold in stores if not approved by Oasis, the franchisor. The franchisor is entitled to terminate the agreement if the business is not on the same premises or if the lease expire.

[59] In light of the findings and evidence placed before me, the proposition that the Oasis product is not confidential and unique, in my view, is untenable. In applying the aforesaid principle, together with the respondent's continuation of its business under the Manzi brand constitutes unlawful competition.

PASSING OFF

[60] Passing off, in our law, is a form of unlawful competition. It is generally where one party uses a confusingly similar trademark, get-up or name of that of the other party.

*"Passing off occurs when there is a representation by on person that his business or merchandise ... 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 connected with, that of another."*⁶

[61] In every passing off case two propositions have to be established, namely that:

61.1 the mark, sign or get up has become distinctive in the eyes of the public in that it has acquired particular origin of the goods (known as *reputata*);

61.2 secondly, that the use of the feature concerned was likely to deceive and this cause confusion and injury to the goodwill of the business.

[62] The test as adopted from ***Plascon Evans***⁷:

"... It is sufficient if the probabilities establish that a substantial number of such persons will be deceived or confused. The concept of deception or confusion is not

⁶ Bress Designs (Pty) Ltd v G Y Lounge Suite Manufacturers (Pty) Ltd and Another 1991 (2) SA 455 W at 471

⁷ Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 A at 640 G – 641 E

limited to inducing in the minds of interested persons the erroneous belief or impression that the goods in relation to which the defendant's mark is used are the goods of the proprietor of the registered mark ... it is enough for the plaintiff to show that a substantial number of persons will probably be confused as to the origin of the goods or the existence or non-existence of such a connection."

[63] The Whatsapp correspondence and various communication that the representatives of the respondents had with their customers, in my view, demonstrated that the public could be confused into believing that the Oasis brand was related to the Manzi brand. There was a reasonable likelihood that customers believed that the Oasis brand has connection with the Manzi brand.

RESTRAINT OF TRADE

[64] The restraint of trade clause is crafted in clause 16 of the respective franchise agreements and set out that:

64.1 the restraint of trade clause is enforceable during the existence of the agreement and after termination thereof for whatever reason (clause 16.1);

64.2 the franchisee is not permitted to use the franchisor's business system, style and intellectual property (clause 16.2);

64.3 the franchisee acknowledges that the franchisor's business and business of other franchisees will suffer irreparable damage should the franchisee conduct a competing business in the area of any of the franchisor's retail outlets (clause 16.4);

64.4 the franchisee may not operate or acquire or have any interest in another similar operation of the franchisor's business system directly, indirectly,

actively or passively at any time during the term of the agreement and specifically:

- within 12 months of the termination of the agreement within the marketing area specified;
- within 6 months of the termination of the agreement anywhere within the radius of 10 km in which the respondent had been trading; and
- within 3 months of the cancellation of the agreement anywhere in the Republic of South Africa.

[65] It is understood that the rationale behind the restraint of trade provisions is to protect the first applicant from a franchise leveraging of its goodwill and exploiting its business systems, trade secrets, intellectual property and confidential information. It was argued that the respondents were acting in breach of the restraint provisions as they have been conducting a similar operation of that of the applicant's business system.

[66] It is well established that proprietary interests can be protected by a restraint agreement, more particularly in respect of one's relationship with customers and secondly in respect of confidential information.

[67] The position in our law is that an agreement in restraint of trade is enforceable unless it is unreasonable.⁸ The applicants merely bear the onus to show that there is a binding restraint clause and that there has been a breach. The respondent then bears the onus to rebut that the enforcement of the restraint is unreasonable.

⁸ J Louw & Co (Pty) Ltd v Richter and Others 1987 (2) SA 237 (N) at 243 B-D

[68] Ultimately, the true test is for this court, in exercising its discretion, to weigh up the notion whether the parties should comply with their contractual obligations or whether the parties should not be excluded from engaging in their business and earn an income.

[69] The respondents, in their answering papers, opposed the restraint provisions mainly on two grounds. Firstly, that the applicant has not established protectable interests in its customer relationships nor in respect of confidential information and trade secrets. Secondly, that their freedom of trade is unreasonably restricted (as envisaged in Section 22 of the Constitution)⁹. In other words, their right to trade and property have been unconstitutionally restricted.

[70] I have taken cognisance of the submissions proffered by the respondents namely that the applicant cannot claim a protectable interest in its customer relationships as most are walk-ins and no special relationship with them has been forged nor do they form part of the franchisor's property.

[71] However by applying the test as set out in ***Basson v Chilwan 1993 (3) SA 742 (A) at 767 F-H***, I am of the view that the applicant demonstrated that it has a protectable interest in respect of its confidential information and trade secrets, and secondly, it is prejudiced by the respondents' conduct.

[72] On the second ground, it is accepted that public interest is the touchstone for deciding whether the courts will enforce the restraint or not. The party seeking to

⁹ S 22 of the Constitution provides that every citizen has the right to choose their trade, occupation or profession freely.

avoid the contractual obligation to which it had agreed to, should be able to prove that the public interest would be detrimentally affected by such restraint.

[73] The respondents argued that even if the restraint is enforced on an interim basis, the effect thereof is final. The effect thereof would be, *inter alia*, that the respondents would have to shut their doors and their employees would lose their jobs. Moreover the restraint extends to not only the respondents' four businesses but all of its other eleven businesses. Such restraint in itself was unreasonable.

[74] I am mindful that it is of paramount importance to uphold the sanctity of contracts and declaring contracts contrary to public policy should only be done in the clearest of cases.¹⁰ However, it must be reiterated that it is against public policy if parties conclude agreements where the commercial intercourse is unreasonably shackled.

[75] Ultimately the court's determination is based on a value judgment. It entails a factual enquiry. In so doing, I am required to weigh the respondents' right to trade, where ordinarily they are free to engage in useful economic activity and contribute to society against the sanctity of the agreements entered into between the parties.

[76] At this juncture, I wish to emphasize that the mere elimination of competition is not the kind of interest which can be protected by a restriction of freedom of trade after the termination of a contract. The interest which the restraint attempts to protect must not outweigh the interests of parties not to trade in their environment. If it does, then it has been considered to be unreasonable by our authorities.

¹⁰ Sasfin (Pty) Ltd v Beukes 1989 (1) SA at 9B-C

- [77] I again refer to the matter of **Basson**¹¹ where the court remarked that it is necessary to find the middle ground. Therein the court expressed that an employee's interest must be protected to the extent that it does not outweigh his right to participate economically. It was suggested that it would be more appropriate to employ such person for a stipulated limited term where such employee would receive his agreed remuneration and not be unproductive.
- [78] The reasonableness of the restraint is judged on the basis of the broad interests of the community, on the one hand, and the interests of the contracting parties, on the other hand.
- [79] The inevitable result would be that all of the respondents' businesses, including the eleven other businesses, would have to close their doors. The stance taken by either party are not decisive factors. At most, they are factors to be considered in determining what is deserving of protection and what is reasonable.¹²
- [80] The restraint goes further than protecting the applicants' interest. Even though the applicant has a protectable interest in respect of its confidential information, in weighing the contractual obligations set out in the agreement against the economic viability of the respondents, if the answer is that it would restrict the respondents from being economically active, it is unreasonable.
- [81] In **Reddy**¹³ the SCA added a further enquiry, namely whether the interest goes further than necessary to protect the employer's protectable interests. Our courts

¹¹ Basson at 742

¹² Basson at 744

¹³ Reddy v Siemens 2006 SCA 164 at paragraph 17

have held that it would be contrary to public policy to unreasonably restrict a person's freedom of trade.¹⁴

[82] Consequently, in my view, the restraint would prevent the respondents from conducting themselves economically. I am mindful that it is not only the four businesses that would be affected but the other businesses (as set out in the restraint relief) that would be affected. They are all franchisees of the Oasis brand. Furthermore the restraint extends separately to the second, third, fourth and fifth respondents as well (directors of the first respondent). In my view, the applicants' interest goes further than necessary to protect their interest.

ALTERNATIVE REMEDY

[83] The respondents explained that the appropriate redress for the applicants was to institute a damages claim as they held the view that the alleged loss is capable of quantification.

[84] The applicants contended that a damages claim could not be quantified on the basis that the applicants were not privy to the full extent to which the respondents springboarded off the applicant's business system and know-how.

[85] I have noted the allegations regarding the quantification of the claim as set out in paragraphs 102 to 104 of the founding affidavit. I am in agreement with the applicants. I have noted that the contents of these paragraphs relate to the overall

¹⁴ Magna Alloys and Research SA (Pty) Ltd v Ellis 1984 (4) SA 874A at 894C

figures of the first applicant's sales of their water exchange programme, as well as their five yearly sales figure and their royalties. Hence the respondents' damages have not been quantified on the papers.

[86] Having regard further to the provisions of the franchise agreements, namely clause 20.3.8, it is noted that the franchisor may, in addition to the relief sought in this application, institute a claim for damages. Hence my understanding of the said provision is that the franchisor is therefore not barred from the current relief it seeks. The applicants may, in addition, further institute a claim for damages.

CONCLUSION

[88] As first prize, the applicants seek interim interdictory relief. It argued that it has shown that it has a *prima facie* right in that, in essence, it was in law entitled to protect its trademark, business system, goodwill and confidential information. Their rights are found in the franchise agreements as well as the common law.

[89] No doubt the applicants have been prejudiced by the respondents' conduct in failing to comply with the terms of the franchise agreements and unlawfully competing with the applicants. I find that the balance of convenience is in the applicants' favour. They would in the interim be protected from irreparable harm they have alleged they would suffer.

[90] I therefore find the applicants are entitled to interim relief as set out in Part A of their order.

COSTS

[91] The applicants sought punitive costs against the respondents. Such costs are premised upon clause 20.3.8 of the franchise agreements. As alluded to above, this matter has been referred to court in terms of clause 20.3.7.

[92] Clause 20.4 makes provision for attorney and client costs. It reads:

“If due to the franchisee breaching this agreement or failing to comply with any lawful directive or instruction of the franchisor, the franchisor employs an attorney to bring about compliance or otherwise to protect its rights hereunder, then the franchisee shall be liable to refund the legal costs as between attorney and own client costs of counsel incurred by the franchisor, whether litigation be commenced or not.”

[93] In this instance, the applicants have been substantially successful and would become entitled to the costs of litigation in their favour. The franchise agreement makes provision for punitive costs.

[94] Accordingly, the respondents are ordered to pay the costs of this application on an attorney and client scale, consequent upon the appointment of senior and junior counsel.

H KOOVERJIE
JUDGE OF THE HIGH COURT

*Appearances:**Counsel for the applicants:**Adv PG Cilliers SC**Adv RJ Groenewald**Instructed by:**Adams & Adams**Counsel for the respondents:**Adv HM Viljoen**Adv JM Butler**Instructed by:**Smit & Van Wyk Attorneys**Date heard:**19 April 2023**Date of Judgment:**16 May 2023*