REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: B3312/2023

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

Date: 10 August 2023 E van der Schyff

In the matter between:

KABELO SEEMS BOKABA	APPLICANT
and	
TAMMY TAILOR NAILS GLOBAL FRANCHISING (PTY) LTD	FIRST RESPONDENT
TAMMY TAILOR NAILS SA FRANCHISING (PTY) LTD	SECOND RESPONDENT
MALENY JUANITIA VILJOEN	THIRD RESPONDENT
ABSA BANK LTD	FOURTH RESPONDENT
CAPITEC BANK LTD	FIFTH RESPONDENT
NEDBANK LTD	SIXTH RESPONDENT
FIRST NATIONAL BANK LTD	SEVENTH RESPONDENT

STANDARD BANK LTD EIGHTH RESPONDENT

JUDGMENT

Van der Schyff J

Introduction and background

[1] The applicant obtained an order on 30 June 2023 on an *ex parte* basis in the urgent court to the effect that a *Rule Nisi* was issued calling on all interested parties to show cause on 22 September 2023 as to why an order in the following terms should not be made final:

i. An order interdicting the first, second, and third respondents from making defamatory statements about the applicant, and

ii. And order interdicting the fourth to eighth respondents from allowing the first [to third] respondents to withdraw any money from the accounts it holds with the said respondents.

The abovementioned orders operate as interim relief pending the final determination of the relief sought in part B of the application.

[2] In Part B of the application, the applicant seeks an order to the effect that the franchise agreement entered into between the applicant and the first and second respondents be declared void for non-compliance with the provisions of the Consumer Protection Act 68 of 2008, and alternative relief.

[3] The first and third respondents anticipated the return date and sought an order that the *rule nisi* be discharged and that the relief sought in Part B of the notice of motion be dismissed.

Anticipation of a return date

[4] The fact that an applicant obtained relief through an *ex parte* application does not create a procedural advantage and does not affect the incidence of onus. On reconsideration, the matter is treated as a rehearing of the original application. This principle is adequately explained in *Bradbury Gretorex CO (Colonial) Ltd v Standard Trading CO (PTY) Ltd*:[1]

> 'It is common cause that it is for the respondent to prove in these proceedings the matters it had to prove in the original petition, i.e. that it has a *prima facie* cause of action against the applicant, and that the goods attached are the property of the applicant. As pointed out in *Anderson and Coltman Ltd v Universal Trading Co.*, 1948 (1) SA 1277 at p. 1284 (W), the respondent, in a case such as this, cannot merely by obtaining *ex parte* an order in its favour secure a more advantageous position than it would have had if the applicant had had an opportunity of putting counter allegations before the Court.'

[5] This position was confirmed by the, then, Appellate Division, in *Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission:*[2]

> 'The objection that the issue of such a rule *nisi* places an unwarranted *onus* on the respondent is, in my view, unfounded. All that the rule does is to require the respondent to appear and oppose should he wish to do so. The overall *onus* of establishing his case remains with the applicant and the rule does not cast an *onus* upon a respondent which he would not otherwise bear.'

The nature of the relief sought by the applicant in Part A of the application.

[1] 1953 (3) SA 529 (W) 531A-D.

[2] 1982 (3) SA 654 (A) 676A.

[6] This court must rehear or reconsider the application heard on 30 June 2023 in the respondents' absence. The parties agreed that the issue of the first, second, and third respondents being ordered not to defame the applicant is a red herring. The freezing of the first to third respondents' bank accounts urged them to anticipate the return date.

[7] The applicant effectively seeks in Part A of the notice of motion that an anti-dissipation interdict be granted. The purpose of an anti-dissipation interdict is to prevent a respondent who can be shown to have assets and is about to defeat the applicant's claim, or to render it hollow, by dissipating assets before judgment can be obtained or executed, thereby defeating the ends of justice.

[8] Applicants often seek anti-dissipation interdicts because the time it can take for a matter to be finally determined by a court of law can have a detrimental impact on a successful litigant's ability to execute a judgment. Courts are generally reluctant to limit a party's ability to deal with its property freely. The court held in *RS v MS*:[3]

> 'It is perhaps apposite to point out that, as of the draconian nature, invasiveness and conceivable inequitable consequences of such anti-dissipation relief, the courts have been reluctant to grant it, except in clearest of cases.'

[9] In *Knox D'Arcy Limited and Others v Jamieson and Others*,[4] it was held that an anti-dissipation order is a claim to an interim interdict that requires a *prima facie* right (although open to some doubt), a well-grounded apprehension of irreparable harm and the absence of an ordinary remedy. To these requirements, the court added that it is essential for the person claiming an anti-dissipation interdict to show not only the existence of the debt giving rise to the claim against the respondent but also that the respondent has disposed of assets, or intends to

[3] 2014 (2) SA 511 (GJ) at par [18].

[4] 1996 (4) SA 348 (A) 361C-G

dispose of assets, with the intention of defeating the claims of creditors.[5] An applicant must satisfy the court, through credible evidence, that the respondent is wasting or secreting assets with the intention of defeating its claim.

The applicant's case.

[10] The applicant avers that he entered into negotiations with the second respondent, represented by the third respondent, or Mr. P. Viljoen, regarding the conclusion of a franchise agreement. A written agreement was subsequently concluded in terms of which the applicant purchased the franchise rights to operate Tammy Taylor Menlyn Maine (TTMM). The purchase price was set at R 2 000 000.00. The amount of R1 500 000 was to be paid on or before 8 March 2023, and the remaining R500 000 in two installments, respectively, due by the end of April 2023 and May 2023. The handover of TTMM was to occur on 8 March 2023, and TTMM was to remain the property of the first respondent until final payment was made.

[11] The applicant claims that the second and third respondents failed to comply with the provisions of the Consumer Protection Act 68 of 2008 (the CPA). He further claims that the first to third respondents have been deceptive and dishonest in their dealings with him in that they provided false or incorrect information to induce him to enter into the agreement.

[12] The applicant terminated the agreement in May 2023 and demanded a refund from the second respondent.

[13] The applicant claims that the first to third respondents are inundated with lawsuits of similar nature for defrauding investors or franchisees. The applicant contends that it is the first to third respondents' *modus operandi* to 'defraud their victims' in the following manner:

[5] *Knox D'Arcy, supra*, at 372F-I.

> '…after the sale of the franchise, they start to employ all the tactics to fail the fail (*sic*) the franchise to exercise its rights in terms of the franchise agreement so as to cause the franchisee to default on its obligations. However, should they fail to default the franchisee, and/or meet with lawsuit by the franchisee, (*sic)* they then disempowered the company by stripping it of value e.g. is the company sold for R100.00 (HUNDRED RANDS).'

The first and third respondents' case

[14] The first and third respondents claim that they have no contractual liability pertaining to the applicant in terms of a franchise agreement, as the alleged franchise agreement was not concluded between the applicant and the first respondent. The applicant and the first respondent concluded a sale agreement in respect of a going concern.

[15] The first and third respondent take issue with the fact that the order granted on 30 June 2023 was never served on it or the third respondent. It was only on realising that it was precluded from transacting that the first respondent made efforts to obtain the reasons for this state of affairs.

[16] Despite denying that a franchise agreement was concluded between the parties, the first and third respondents deny that the franchise agreement does not comply with the CPA, and further deny that the franchise agreement can be declared void for want of compliance with the CPA.

[17] The first and third respondents claim that the applicant is in breach of paying the full purchase price and aver that the 'ailing financial position' of TTMM can only be attributed to the applicant. The first and third respondents deny having made any representations that were untrue or did not reflect the actual position.

[18] The first and third respondents deny having defamed the applicant.

Discussion

[19] A dispute of fact exists between the applicant and the first and third respondents that cannot be resolved on application. For this reason, the relief sought in Part B of the application cannot be dealt with at this time.

[20] As for the relief sought in part A of the notice of motion, the applicant did not make out a case that the first to third respondents are wasting away assets to defeat the ends of justice. The existence of court orders granted against the first respondent is not akin to the dissipation of assets. This, in itself, renders the relief granted on 30 June 2023 incompetent.

[21] The applicant, likewise, does not make out a case that the first to third respondents defamed him or 'might proceed to publish or make defamatory statements against him.

Miscellaneous

[22] The applicant's failure not to have served the order granted on 30 June 2023 on the first to third respondents after it was served on the bank-respondents is frowned upon. The explanation that the applicant awaited a response from the bank-respondents does not hold water.

[23] On 20 June 2023 the court was only called upon to determine the relief sought in Part A of the application. This court is not going to consider the relief sought in part B. It is not urgent. As stated, I am of the view that the factual dispute that exists renders motion court proceedings inappropriate.

Costs

[24] There is no reason not to apply the principle that costs follow success.

ORDER

In the result, the following order is granted:

1. **The *rule nisi* is discharged, and the costs order granted against the first, second and third respondents is set aside;**

2. **The applicant (Mr. K. Bokaba) is to pay the costs of the application.**

E van der Schyff

Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. It will be emailed to the parties/their legal representatives as a courtesy gesture.

For the applicant:	Mr. M.K. Lebea
Instructed by	MASHAO KELLY LEBEA INC.
For the first and third respondents:	Adv. D.A. de Kock
Instructed by:	MALAN MULLER ATTORNEYS
Date of the hearing:	8 August 2023
Date of judgment:	10 August 2023