

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 079862/2023

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| (1) | REPORTABLE: Yes <input type="checkbox"/> / No <input checked="" type="checkbox"/> |
| (2) | OF INTEREST TO OTHER JUDGES: Yes <input type="checkbox"/> / No <input checked="" type="checkbox"/> |
| (3) | REVISED: Yes <input type="checkbox"/> / No <input checked="" type="checkbox"/> |

Date: 26 August 2023 WJ du

In the matter between:

HENNIES SPORTS BAR (PTY) LTD

FIRST APPLICANT

CONCRETE KEG AND CO (PTY) LTD

SECOND APPLICANT

and

WPRET ENTERPRISES (PTY) LTD

RESPONDENT

JUDGMENT

DU PLESSIS AJ

[1] Background

[1] This is an urgent application for the ejectment of the Respondent from commercial property. The First Applicant is the franchise owner of various restaurants. The Second Applicant is the purchaser of the franchise business owned by the Respondent.

- [2] The facts of the ejectment application can be summarised as follows: The First Applicant and the Respondent entered into a franchise agreement in August 2020. A dispute arose during or early 2021, which was referred to arbitration. In September 2021, the parties reached a settlement and signed a settlement agreement. The Applicant alleges that the Respondent breached the agreement in that the Respondent breached the restraint of trade clause, amongst others. The First Applicant states the business relationship between the franchisor and franchisee has been terminated either by lawful cancellation or by the conduct of the First Applicant and Respondent.
- [3] The Respondent denies the breaches and places specific clauses in dispute, specifically the restraint of trade clause, denying that they breached it. They also indicated that the First Applicant did not follow the processes as per the Operating Manual.
- [4] The Respondent also states that the parties have signed a sub-lease that has not been validly cancelled. Moreover, in terms of the settlement agreement that it disputed was cancelled, the parties agree that the Respondent's input would be sought before many a formal offer to potential franchisees.
- [5] In the Answering Affidavit, the Respondent states clearly that it does not want to continue with the business relationship but can also not walk away without financial security, and also not in the manner that the termination is to proceed.
- [6] On 10 August 2023, the sale of business agreement was concluded with the Second Applicant, effective from 18 August 2023. The First Applicant then sent a letter to the Respondent demanding an undertaking that it vacate the premises before the effective date of the sale agreement.
- [7] On 11 August 2023, the First Applicant sent a letter of demand stating that the Respondent does not have a valid right to occupy the premise and/or trade that a valid agreement was concluded between the First Applicant and the Second Applicant on 10 August 2023; that the date of sale is 18 August 2023, that the First Applicant must provide possession of the premises to the Second Applicant on the

effective date, and that the price is R5 000 000. They asked for an undertaking to vacate the premises by 00h00 on 18 August 2023. Failure to vacate will necessitate the First Applicant to launch an urgent application, where they would seek punitive costs.

- [8] The First Applicant states that the matter is urgent as there is a risk of financial loss and harm to the Hennie's brand and the employees of the Respondent if the relief is not granted. The steps for ejection were prompted by the business being sold. There is no relief in due course, as they can no longer implement the business agreement, which will lead to a loss in the purchase price and other commercial prejudice.
- [9] The Respondent filed a counter-application asking for an order to condone non-compliance with the Uniform Rules of Court, to terminate the agreement between the parties by order of the Court; to state that the First Applicant shall have no claim against the Respondent for royalties, franchise fees, rent or any other rights that would have accrued to the First Applicant by the Respondent's continued occupation of the business premises, that the Respondent shall vacate the premises on or before 17 August 2023 and matters related to that, that the Respondent be entitled to 40% of the proceeds paid into the Respondent's attorneys' trust account and that action proceedings be instituted in respect of the Franchise Agreement, Settlement Agreement and Interim Arrangement, and costs.
- [10] The Respondent applied to withdraw the counter-application on the day of the hearing, to which the Applicants did not consent.
- [11] The parties agree that they must go their separate ways. The dispute primarily hinges on the 40% of the sale of the business price, which rests on a contractual dispute. The Respondent also states that the monies should not be held in trust, as no action or arbitration is instituted to allow for the dispute to be adjudicated.
- [12] The Respondents agree that the premises should be vacated (for the Respondent on the condition of payment). The Respondent does not dispute the sale of the business as such but states its displeasure for not being consulted in the process.

[13] What is in dispute is whether the Respondent is entitled to 40% of the business sale proceeds. This dispute needs to be resolved. The Applicant has tendered to place 40% of the proceeds of the sale of business into their attorney's trust account pending the resolution of the dispute and agreed to refer the dispute to urgent arbitration.

[14] The court heard arguments on the day, and had to reserved judgement to consider the withdrawal of the counter-application.

[2] Ad notice of withdrawal of counter-application

[15] The Court must exercise its discretion on granting leave to withdraw an application. When exercising this discretion, two principles are important: the question of injustice to the other party,¹ and the fact that the Court must refrain from forcing a person to conduct their case in a certain way.² While the Court is loathe to force the Respondents to conduct their case in a certain way, especially in urgent court, the counter-application was withdrawn at the last minute, which is an injustice to the Applicants who prepared an argument based on the existence of the counter-application. Leave to withdraw the counter application is thus refused.

[3] Ad urgency

[16] Both parties seem to agree that the matter is urgent. Moreover, commercial urgency can establish urgency.³ Due to the sale of the business and the duty of the First Applicant to provide a vacant premise, I am satisfied that there will not be substantial redress in due course should the premise not be vacated. The matter is, therefore, sufficiently urgent to be enrolled as far as the ejectment is concerned.

[4] Ad merits

[17] The First Applicant is the leaseholder of the property, and the Respondent is the subleasee. Any sublease to the property has to be terminated by the Court for the ejectment to occur. Once that is ordered, the First Applicant is entitled to

¹ *Pearson and Hutton NN.O. v Hitzeroth and Others* 1967 (3) 591 (ECD).

² *Karoo Meat Exchange Ltd v Mtwazi* 1967 (3) SA 356 (CPD), referring to action proceedings, but the principle is arguably also applicable in motion proceedings.

³ *Twentieth Century Fox Film Corporation v Anthony Black Films (Pty) Ltd* 1982 (3) SA 582 (W) at 586.

possession.⁴ A date of 1 September 2023 would resolve the problem of pro-rata reimbursements for rental and payment to suppliers.

[5] Order

[18] I, therefore, make the following order:

1. The non-compliance with the rules of this honourable court is condoned, and the matter is heard on an urgent basis in terms of rule 6(12)(a) of the Uniform Rules of Court.
2. In terms of the urgent counter-application, the following orders are made:
 - 2.1. The Respondent's sub-lease agreement is hereby terminated.
 - 2.2. The First Applicant shall have no claim against the Respondent in respect of royalties, franchise fees, rent or any other right or interest which might have accrued to the First Applicant by virtue of the Respondent's continued occupation of the business premises from date of vacating Hennie's Moreleta situated at Moreleta Square Shopping Centre, 538 Githa Street, Moreleta Park, Pretoria ("the premises") until 31 October 2023.
 - 2.3. The Respondent shall vacate the business premises from which Hennie's Moreleta Park is operated on or before 1 September 2023.
 - 2.4. The Respondent shall be entitled to remove all personal belongings from the business property.
 - 2.5. The Respondent shall ensure a proper handover between the Respondent and the second Applicant.
 - 2.6. The Respondent's claim to payment of 40% of the sale proceeds shall be paid into the Respondent attorney's trust account, with proof of payment being made available to the Respondent before the Respondent vacates the business premises. Such amount shall be held in trust until the Respondent or First Applicant obtains a further order in a court, in arbitration proceedings, or by agreement between them.
 - 2.7. The parties' rights to institute action regarding the franchise agreement, settlement agreement and interim arrangement are reserved.
3. The costs, including the costs of two counsels, are reserved for further determination in further court or arbitration proceedings.

WJ DU PLESSIS

Acting Judge of the High Court

⁴ *Chetty v Naidoo* 1974 (3) SA 13 (A).

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

Counsel for the Applicant:	Mr H van Eeden SC Mr B Edwards
Instructed by:	Tli Attorneys Incorporated
Counsel for the Respondent:	(No Practice Note / Heads of Argument filed with the information)
Instructed by:	Alet Uys Attorneys
Date of the hearing:	22 August 2023
Date of judgment:	26 August 2023