



**In the High Court of South Africa
(Western Cape Division, Cape Town)**

Case No: 16887/2022

In the matter between:

RENEE SMITH

Applicant

And

DAWID MARTHINUS OBERHOLZER

Respondent

JUDGMENT DELIVERED ELECTRONICALLY ON 21 OCTOBER 2022

RALARALA AJ

INTRODUCTION

1. The Applicant instituted motion proceedings against the Respondent on an urgent basis in which he sought an interdictory relief restoring applicant's possession and control of a restaurant and to have the Respondent evicted from the premises.

2. The Applicant is Renee Smith, a pensioner and business owner of B Lounge Restaurant. The respondent is David Marthinus Oberholzer, a businessman conducting business from the restaurant known as B Lounge, located at 28 Village Plaza, Gordon's Bay.

3. For the sake of completeness, the Applicant seeks an order in the following terms:

[3.1] That the Applicant's failure to comply with the forms and notices prescribed by the court rules be condoned and the matter be heard as a matter of urgency.

[3.2] The Applicant be declared a 100% owner of business being run as B Lounge located at 28 Village Plaza, Gordon's Bay ('the premises').

[3.3] The Respondent be ordered to immediately vacate the premises and relinquish his possession of the premises;

[3.4] The Respondent be interdicted and restrained from removing any or all items from the premises;

[3.5] The Respondent immediately return all items that have been removed from the premises.

[3.6] The Respondent provide the Applicant with all records or statements of sales made from 18 September 2022 to present in the form of printouts from the points of sale;

[3.7] The Applicant be restored possession of the premises immediately, and that the Respondent hand over all keys or means of entry to the premises to the applicant.

[3.8] Should the Respondent fail to vacate the premises as directed that the sheriff be authorized to vacate the Respondent and return possession of the premises to the Applicant.

[3.9] The Respondent pay the costs of the application.

URGENCY

4. This application was brought on an urgent basis. This court was asked to dispense with all forms of service provided for in the rules and to treat this application in terms of Rule 6(12) of the Uniform rule of this court. In an urgent application such as this, the applicant must show that he will not otherwise be afforded substantial redress at a hearing in due course. In this application the applicant seeks to protect commercial interest. I must emphasise the fact that urgency does not relate only to some threat to life or liberty. The urgency of a commercial interest may justify the invocation of this sub rule no less than any other interests. See Bindler Investment (Pty) Ltd v The Registrar of Dees 2001 (2) SA 203 (SE).

5. Thus, this court has to determine whether urgency has been made out by the Applicant, allowing the court to condone the non-compliance with the rules regarding forms and service in terms of rule 6(12) of the Uniform rules of Court. Rule 6(12) provides that a court may dispose of urgent applications at such time and place and in such manner and according to such procedure as the particular circumstances enjoin. The Applicant is required to explicitly set forth in its affidavit the factors relied upon as rendering the matter urgent, and reasons for claiming that proper redress could not be afforded at a hearing in due course. Luna Meubel Vervaardigers (Edms)

Bpk v Makin and Another (t/a Makin's Furniture Manufactures 1977(4) SA (W) at 137 para f.

6. In *casu*, the Applicant averred in the founding affidavit that the respondent is running the restaurant business. The Applicant's goods, stock and equipment from the premises are being disposed of without the applicant's consent. The Applicant suspects that the Respondent's continued occupation and possession of the premises would cause the Applicant great financial harm. The Applicant further contended that she has no recourse to remedy the matter other than to approach this court. To my mind, the reasons advanced by the Applicant satisfies the requirement of urgency set out in rule 6(12). This court is satisfied that the Applicant made out a case for the relief it seeks.

APPLICANT'S CASE

7. The Applicant in her founding affidavit contends that in July 2022 Applicant with a partner purchased B Lounge restaurant, located at 28 Village Plaza Gorden's Bay for R150 000. Pursuant to the sale of the restaurant, the Applicant and Brian Kruger became 50% owners of the premises; the trade name; the goodwill of the business; trade and liquor licenses; the restaurant's fixed and movable assets; and stock in trade as at 15 July 2022. The Applicant and Brian Kruger also took over the lease agreement in Brian Kruger's name.

8. Applicant and Brian Kruger invested R50 000 into the business in order to buy stock and other business related necessities. Things did not happen quite in accord

with their business aspirations, causing the Applicant and Brian Kruger to part ways. Applicant bought Brian Kruger out from the restaurant business and paid Brian Kruger R 100 000, on 7 September 2022. Brian Kruger confirms the applicant's averments in this regard, in his confirmatory affidavit.

9. Subsequently, the Applicant and the Respondent discussed a joint venture with regards to the restaurant business. The Respondent agreed to the joint venture, and it was resolved that he would work with the Applicant and assist in the running of the restaurant. The Applicant avers that she was willing to sell 50% of the restaurant business to the Respondent when the Respondent had saved up, and was able to purchase same from the Applicant. In the interim, the Respondent would commence working for the Applicant at the restaurant and would be remunerated from the business profits. The Applicant refutes that there was a partnership in existence with the Respondent in the restaurant business. It is the Applicant's contention that the Respondent's conduct and expression is that the Applicant is not the owner of the restaurant.

10. It is further asserted by the Applicant that since the restaurant business' opening in September 2022, the Respondent has been running the restaurant and has excluded the Applicant entirely. On 19 September 2022 at a meeting, the Respondent refused to provide the Applicant with bank statements and or slips for any purchases the Respondent made with the additional R18 000 that the Applicant invested into the business. The Applicant avers that she had to buy stock for the opening of the restaurant, after realizing that the Respondent had not purchased

any, even after the R18 000 was made available to him for that purpose. This led to the restaurant opening event to be a failure.

11. Due to the complete failure of the restaurant' opening, and the Respondent's refusal to account for the R18 000, the Applicant advised the Respondent that the restaurant will be ceasing to trade. Despite the Applicant's decision, the Respondent continued to trade without consent of the Applicant .This prompted the Applicant to confront the Respondent on this issue ,whose reaction was a threat to have the Applicant removed from the premises .Pursuant to this ,the Applicant caused locks to the premises to be replaced, preventing the Respondent from accessing the premises .The Applicant's action in this regard was reciprocated by the Respondent's breaking into the premises and replacing the locks thereto .Thus the Respondent divest the applicant of access to the premises and the running of the business .Ultimately the Applicant sought legal advice on the matter.

RESPONDENT'S CASE

12. The Respondent in response to the averments made by the Applicant ,filed a detailed affidavit .In his answering affidavit, he confirms that he was approached by Applicant and Brian Kruger with an offer for employment as head chef at their restaurant, B Lounge and Café .Upon accepting the offer he started working for the Applicant and Brian Kruger .The Respondent contends that when the partnership between the Applicant and Brian Kruger was dissolved, the Applicant agreed to buy out Brian Kruger on the Respondent's behalf in order to make the Respondent co-owner of the restaurant. When presenting the Applicant with the proposal to make

him co-owner of the restaurant, the Respondent communicated his adequate experience and extensive achievements in the culinary industry as well as the required knowledge to start a restaurant. The Respondent proposed to give his full devotion and commitment to the restaurant in order to make it a success.

13. The Respondent asserts that the proposal included being responsible for all operations including hiring and appointing of staff members; creating of menus and menu prices; and any other tasks required to start the venture. The Respondent would then pay the Applicant the money spent buying 50% of B Lounge and Café with interest rates agreed upon, if the proposal were to be approved. The ultimate goal was that the Applicant would become a silent partner as the physical aspect of the work would be too much to handle for the Applicant. The Respondent avers that would then be a motivation for him to be at the premises for himself and on the applicant's behalf and this would boost productivity.

14. According to the Respondent, after the Applicant considered the proposal and raised certain concerns, the Applicant eventually agreed to the proposal.

15. It was as a result resolved that the Applicant would buy Brian Kruger's shares on the Respondent's behalf; the Respondent would be responsible for 50% monthly rental; 50% of the running costs and the contents of the restaurant. The proposal was also communicated to Brian Kruger who ultimately agreed thereto, and intimated via email a written agreement that upon reflection of the R100 000 payment in his bank account, he would relinquish the shares to the Respondent.

16. On 24 August 2022, the Respondent received an email from Brian Kruger expressing that the Respondent could use the attached lease agreement and that the Respondent could change the name of the restaurant and make direct contact with the landlord for a new lease agreement which would run from 1 September 2022. The Applicant and the Respondent would be responsible for the September rental of the premises and the one-month deposit as required by the landlord.

17. The Respondent further asserts that the issue of the name change was discussed with Applicant and Abigail Smith and they then resolved that the name would be changed to Lounge Five .The Applicant then requested that the business be registered in the Respondent's name as a sole proprietor ,as the Applicant would not risk requesting authorization on her name for registration as she had been blacklisted .According to the Respondent, it was for the same reason that the lease agreement was on Brian Kruger's name and not in the Applicant's. The Respondent agreed to this proposal and went on to register the business in the Respondent's name, as Lounge Five Restaurant and Bar 2022/743547/07. Two directors were consequently appointed by the Respondent.

18. It is contented in the Respondent's answering affidavit that upon reflection of the R100 000 payment in Brian Kruger's bank account, Brian Kruger sent the Respondent a written and signed document, confirming such receipt of the funds and concluding the agreement between the Respondent and Brian Kruger. A bank account was opened in the Respondent's name , for the Applicant to deposit funds, R18000.00 was deposited to fund the preparations of the Restaurant opening .The

Applicant informed the Respondent that he will repay the Applicant 50% of the funds already deposited into the account .The Respondent states that the Applicant expressed that he will only commence with the repayment of R100 000 and the 50% of all the running costs of the restaurant up to the end of the three months of operations , only three months thereafter.

19. On 17 September 2022 the Applicant was at the restaurant drinking alcohol beverage, and started offering complimentary beverages to guests. The Respondent conveyed his disapproval of her behavior as this was defeating the purpose of the launch which was to raise additional funds to be used at the upcoming restaurant opening on 20 September 2022. According to him, the Applicant did not take kindly to the Respondent's reaction and became confrontational in the presence and in full view of staff members and guests, which caused discomfort amongst the guests. The Applicant displayed some rather rude behavior towards a staff member and threatened to dismiss her. After witnessing this commotion certain guests left the restaurant.

20. Later that evening, the Applicant communicated that the restaurant was closed until further notice, without discussing with the Respondent. According to the Respondent, he viewed this decision as unwise, as the large amount of stock they had just purchased would go to waste and they would miss a chance of making a success of the restaurant business. On 18 September 2022, the Applicant called a meeting to be held on 19 September 2022, which was attended by the Applicant, Abigail Smith and the Respondent. At the meeting the Respondent could not express

his views and the meeting was recorded. The Applicant requested bank statements of the bank account the Respondent opened in his name. The Respondent stated in response that he will not be furnishing the bank statement unless he is afforded an opportunity to express his views and concerns. The Respondent further informed the Applicant that the documents would be made available in the presence of a financial advisor, which was not yet appointed. At the hearing of this application the Respondent averred that the documents that he referred to as annexures to his answering affidavit, were in fact available as data stored in his smart phone (that he produced in court), but due to the truncated times that he had to adhere to in responding to the founding affidavit, he was unable to print same to annex to his answering affidavit.

21. The Respondent states that at 22h53 on 19 September he resolved to send the Applicant the documents that he refers to as addendum H and I in his answering affidavit, stating that he however still needed to gather all slips and prepare an excel spreadsheet with expenses. According to him the addenda contained amounts spent in starting the restaurant business. On 20 and 21 September 2022 the Applicant and Abigail Smith arrived at the restaurant and demanded keys to the cash register, a demand which the Respondent did not heed as the restaurant was still in operation and the guests were still present. He directed the Applicant and Abigail Smith leave the restaurant.

22. The Respondent states that on the morning of 22 September 2022, the Respondent learnt that the restaurant was broken into and the cash register was missing. He reported to the police and a criminal case was opened for investigation.

Subsequently, he learnt that after he closed the restaurant that evening, the Applicant, Abigail Smith, Brian Kruger and one Antonio were in the restaurant. Video footage showing them leaving the restaurant with the cash register was made available to the Respondent. On the strength of this information, the criminal charges were withdrawn. The Respondent approached the Applicant with the view to resolve the issue and the request was not welcomed by the Applicant. Instead, the Applicant communicated on 4 October 2022 that she was proceeding with this application.

ANALYSIS

23. In this matter, it is evident from the affidavits filed by the parties that there are material disputes of fact. Nevertheless, the Applicant seeks interdictory, declaratory reliefs on the papers without resort to oral evidence.

24. The general rule when dealing with disputes of fact in motion proceedings is set out in *Plascon Evans Paints Ltd and Van Riebeeck Paints (PTY) LTD [1984] ZASCA51; 1984(3) SA 623 (A)* where the court referred to *Stellenbosch Farmers' Winery (Pty) Ltd v Stellenbosch Winery (Pty) Ltd 1957 (4) SA 234 (C)* at p235 E –G where the court stated:

"... where there is a dispute as to facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order ... Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted In certain instances the denial by the Respondent of a fact alleged by the Applicant may not be such as to raise a real, genuine or bona fide dispute of fact. (Room Hire Co. (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd, 1949 (3) SA 1155 (T), at pp 1163 -5) If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross examination under Rule 65(g) of the Uniform Rules of Court and the court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact amongst those upon which it determines whether the applicant is entitled to the final relief which it seeks ... Moreover, there may be exceptions to this general rule, as for example the allegations or denials of the respondent are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers."

25. In *Wightman t/a JW Construction v Headfour(Pty) Ltd & another 2008 (3) SA 371 (SCA) para 13*

"[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him .But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment .When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so ,rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied ."

26. It is settled that where there is a genuine dispute of facts a court has a discretion to either dismiss the application or refer the matter to trial or to oral evidence .The court can refer disputed issues of fact which cannot be resolved on affidavit for hearing of oral evidence , without the parties' request .It is established that motion proceedings are not equipped to decide dispute of fact .*National Director of Public Prosecutions v Zuma 2009 (2) SA 277(SCA) ,the court remarked as follows:*

"Motion proceedings, unless concerned with interim relief, are all about resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities."

27. In this matter, I must point out that the Respondent did not merely deny the allegations against him in his answering affidavit. He distinctively argued the points averred by Applicant in her affidavit, thereby providing the court with a divergent and detailed outlook on the Applicant's version. At the same time, raising defences to the averments contained in Applicant's affidavit, although he was unable to provide substantial proof in the form of documentation referred to in his answering affidavit, as mentioned in paragraph 20 of this judgment. I must mention that the Respondent appeared in person in these proceedings. It also appears to this court that the

Respondent personally prepared the answering affidavit. I am mindful of what was stated succinctly in *Xinwa and Others v Volkswagen of South Africa (Pty)Ltd*(CCT3) [2003]ZACC 7;2003(6) BCLR 575;2003(4) SA 390 (CC);[2003]5 BLLR 409(CC) (4 April 2003) where the court stated: "*Pleadings prepared by laypersons must be construed generously and in the light most favorable to the litigant .Lay litigants should not be held to the same standard of accuracy, skill and precision in the presentation of their case required of lawyers .In construing such pleadings ,regard must be had to the purpose of the pleading as gathered not only from the content of the pleadings but also from the context in which the pleading is prepared. Form must give way to substance.*"

28. It is my view that a material dispute of fact exists in this matter that necessitates referral of the matter for oral evidence to particularly determine whether there was an agreement between the parties, as alleged by the Respondent in his answering affidavit; and if there exist such an agreement what were the terms thereof. In my view all the issues must be properly ventilated to enable this court to make an informed decision in the matter.

29. In the circumstances the following order is made.

1. The matter is referred for oral evidence for a determination whether there was an agreement between the parties as alleged by the Respondent.
2. If so, what were the terms thereof
3. Costs to stand over for later determination.

RALARALA AJ

**ACTING JUDGE OF THE WESTERN
CAPE HIGH COURT**

Counsel for the Applicant: Advocate Chris van Zyl

Counsel for the Respondent: In Person