



GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2015/41435

- (1) REPORTABLE: **YES**
 (2) OF INTEREST TO OTHER JUDGES: **YES**
 (3) REVISED.

9 March 2016

.....

DATE

SIGNATURE

In the matter between:

DE FREITAS, MARIO LINO SOUSA

Applicant

and

JONOPRO (PTY) LTD

First Respondent

BETTENCOURT, JARDIM ESVALDO

Second Respondent

PANDAZIS, CHRISTOS

Third Respondent

BLACK BALL FEVER

Fourth Respondent

JUDGMENT

SPILG, J:

9 March 2016

INTRODUCTION

1. The application seeks two forms of relief. Following the sequence in the notice of motion they are;
 - a. to declare that Messrs J Bettencourt and C Pandazis are in contempt of an order granted by Georgiadis AJ on 13 December 2015 (incorrectly stated as 2016 in the notice of motion) together with costs against them on the attorney and own client scale jointly and severally the one paying the other to be absolved
 - b. an interim interdict pending an action or application to be instituted within 21 days restraining all the respondents, being the previous mentioned parties to the suit and Jonopro (Pty) Ltd trading as Cheeky Tiger ('Jonopro') from conducting the business known as "SA's Hottest Action Bar" located at 29 Pretoria Rd Kempton Park. Costs are sought against anyone opposing.
2. The case has been before this court previously.

On 23 November the applicant brought an urgent application set down for 1 December. It is necessary to repeat verbatim the main orders sought;

- "1. Interdicting the first respondent (Jonopro) from opening its business under the name and style of Cheeky Tiger at 29 Pretoria Road, Kempton Park, Gauteng*
- 2. Interdicting the first, second and third respondents (ie; Jonopro, Bettencourt and Pandazis) from passing off the name Cheeky Tiger and the get up utilised by the applicant.*
- 3. Interdicting either the first, second or thirds respondents from using the name Cheeky Tiger without the consent of the applicant"*

3. Prior to the application all the respondents had been represented by attorneys Jack Hajibey Inc although at the time of the launch of the proceedings the firm had not yet agreed to accept service of the papers. The application in those proceedings claimed, as in the present one, that the applicant is the owner of the name Cheeky Tiger and which the applicant describes as a “*distinctive type of business pioneered by me which I would describe as an adult entertainment centre targeted at a niche market catering for the lower to middle income class*”
4. The applicant set out the history of when he opened his first business in January 2013 under the name Cheeky Tiger and how the name came to be distinctive of his business and why the name is associated in the minds of a particular section of the public with a particular and distinctive type of entertainment having regard to the facilities and nature of entertainment provided.
5. The applicant also mentioned the close personal relationship he had with Bettencourt spanning some 20 years. It was stated in the founding papers that in May 2011 they had thought of the name and discussed in broad terms the concept of adult entertainment targeting the lower to middle income groups. The applicant however contended that nothing further transpired and Bettencourt continued to run his own business which was a tavern in the Midrand trading under the name Ipi-Tombi.
6. The applicant contended that he had single-handedly implemented the concept and contracted Mr Figueiredo, an expert in the field to design, construct, install and set up businesses in the hospitality and retail industries. The unique colour scheme primarily consisting of red and green and a distinctive logo for Cheeky Tigers was created. He claimed that other distinctive features were established. The applicant also set out how he had invested money and time to create and build the reputation of Cheeky Tiger “*in the area*”.

7. The interdict was sought in order to prevent the respondents from opening their business at an address approximately 100 metres from that of the applicant. The respondent disputed the distance, contending that it was some 300 metres. In a letter dated 13 November 2015 the respondents' attorneys confirmed that the business would open under the name Cheeky Tiger.
8. The applicant contended that the sole purpose of opening so close to his business was to capitalise on and exploit the goodwill built up by the applicant's business and filch customers by misleading them into believing that the two businesses were associated. The applicant also sought to demonstrate that the interior layout would be substantially similar and added that Figueiredo's team had allegedly been poached. The applicant claimed that he expected to lose some 50% of turnover.
9. In the founding affidavit the applicant disclosed the contents of a letter received from the respondents' attorneys on 13 November 2015. The salient paragraphs read;

"It is correct that our clients have entered into an agreement of lease for premises in Kemsquare and our clients intend trading at these premises under the name Cheeky Tiger. Your client is well aware that our client , Mr Bettencourt , entered into an agreement with Jerson Ezequiel Christovao Figueiredo for the purchase of Mr Figueiredo's members interest in Taxiarnhis Investments CC and 4RCA Investments CC and our clients purchased the rights to the name , as well as the right to open businesses under the name , wherever our client wishes.

It is in fact Mr Figueiredo who is restrained from opening businesses under the name Cheeky Tiger in competition to our client.

Furthermore, the only agreement entered into between our clients and your client was an agreement between our client, Mr Bettencourt and your client, when your client agreed to change the name Cheeky Tiger at his business in Kempton Park, to another name and our clients went

so far as to show their willingness to assist your client with the cost of changing the name.

In the circumstances, our clients being the owners of the name Cheeky Tiger, are entitled to use the name and it is in fact your client who must desist from using the name Cheeky Tiger and our clients reserve their rights to take such action as is necessary to protect their rights to the name, Cheeky Tiger.

In the circumstances, we are instructed to record that there is no basis whatsoever for your client to prevent our clients from trading under the name Cheeky Tiger at the leased premises and any action taken by your client will be vigorously opposed.”

The respondents' position was therefore that Figueiredo's member's interest was purchased by Bettencourt in 2 close corporations, Taxiarihis Investments CC and 4RCA Investments CC and that he had also purchased the rights to the name and to open businesses under that name wherever Bettencourt wished. It was also contended that after the fall out between them Bettencourt and the applicant concluded an oral agreement in terms of which the latter agreed to change the name of the business to Manhattan Nights and that Bettencourt would assist with the cost of changing the name.

10. The founding affidavit then set out to refute the respondents' version. Firstly the applicant contended that in April 2013 he had consented to Figueiredo and Bettencourt opening a Cheeky Tiger in Bree Street in order to develop the brand (para 30). Figueiredo created an almost identical Cheeky Tiger place of entertainment all with the applicant's consent. This business operated under 4RCA.

Another Cheeky Tiger establishment was opened during September 2013 in Park Street, Germiston by Figueiredo and Bettencourt. They operated the business under Taxiarihis.

The proposed Randburg operation in the name of Cheeky Tiger was to be operated by 4 RCA with the applicant, Bettencourt and Figueiredo having the members' interest.

11. Accordingly the sale of agreements in respect of the members' interests in Taxiarkhis and 4 RCA related only to the businesses operated at Bree Street and Park Street as well as the business to be opened in Randburg.
12. Moreover while there was a restraint agreement it was only in respect of Figueiredo being restrained from opening a business of Cheeky Tiger or a similar type of business in competition to Bettencourt. It is common cause that the applicant never signed a similar restraint. I consider this to be significant.

The applicant's averments were supported by Figueiredo

13. Bettencourt opposed the first application and contended that Jonosol was the proprietor and franchisor of the Cheeky Tiger trademark. Bettencourt effectively controls Jonosol. It was contended that Jonosol would seek an interdict restraining the applicant from utilising the mark in the course of trade either in Kempton Park or elsewhere. It is however evident that trademarks of the name and logo, being a stylised tiger's head, was only applied for electronically on 13 November 2015. This was while the applicant, to Bettencourt's knowledge, was utilising the same name and adopted a tiger print superimposed over a woman's form or face at his Cheeky Tiger establishment in Kempton Park.
14. Bettencourt furthermore disputed applicant's alleged ownership of the name and contended that the applicant was obliged to show that he had acquired a common law right in the mark and that the mark had become distinctive of the recreational services rendered by him under it. It was alleged that the applicant had failed to make out such a case in his founding papers.
15. Bettencourt also demonstrated that the first Cheeky Tiger type concern had in fact opened in about 2000 under the style Ipi Tombi and that he had changed

the name to Cheeky Tiger in 2011. However Cheeky Tiger in Midrand was completely destroyed in a fire in June 2014 and not rebuilt. It however appeared that the business did not trade as Cheeky Tiger although there were large mural sized pictures of women over whom a tiger print had been superimposed or painted. The words Cheeky Tiger appeared on the picture. .

16. The answering affidavit averred that subsequently Figueiredo bought a minority interest in Bettencourt's Cheeky Tiger venture. The next Cheeky Tiger opened in Bree Street in March 2014 although Bettencourt alleges that preparatory work had commenced in November 2013. The Germiston operation opened in June 2014 and the Randburg one in January 2015.
17. An affidavit of a Mr More was used in support. He claimed to have been responsible for the design, printing and installation of the Cheeky Tiger logo and the images used. He also confirmed the dates on which the various operations under Bettencourt commenced in the name of Cheeky Tiger.
18. Perhaps the two most significant allegations were that the applicant could not demonstrate reputation in the Cheeky Tiger name, logo or get-up and that the applicant had agreed to no longer use the Cheeky Tiger name and change it to Manhattan Nights.
19. It is unnecessary to deal in further detail with the answering affidavit, save to state that the respondents claimed that there were irreconcilable disputes of fact raised on the papers.
20. The replying affidavit then attempted to demonstrate that the applicant's version was correct and that the respondents were untruthful.
21. The case came before Georgiadis AJ in the urgent court and on 4 December 2015 the following order was granted;

1. *The respondents are hereby interdicted from commencing and/or trading business under the name and style of Cheeky Tiger at 29 Pretorius Road Kempton Park*

2. *The order in prayer 1 operate as an interim interdict pending the outcome of an application for final order to be instituted by the applicant within 10 days of this order*
3. *Costs of this application are to be paid by the first, second and third respondents jointly and severally*

THE CONTEMPT OF COURT ORDERS

22. It is common cause that after the court order the respondents commenced trading near the applicant's business. It is also common cause that it does not use the name "*Cheeky Tiger*".
23. The applicant contends that every other significant element of the applicant's get-up and layout is similar and that the respondents have deliberately gone about to replicate the Cheeky Tiger brand in all but name. By way of illustration the respondents replicated at their Kempton Park establishment the identical front boarding which is at the Germiston premises save for deleting the words "*Cheeky Tiger*".
24. The court was concerned that Georgiadis AJ had decided to only grant prayer 1 of the notice of motion which was confined to an interdict preventing the respondents from trading under the name and style of Cheeky Tiger and enquired if it was permissible to have regard to the judge's findings on what had been passed off as the applicant's aside from the name. *Adv Mpofu* for the applicant contended that if one had regard to the judgment the court *a quo* had in fact found a passing off and that the judgment should be interpreted to give effect to that.
25. While the reasons for a decision between the same parties in respect of the same subject matter may create an issue estoppel it would still require the concept of contempt of court, or even a type of constructive contempt, to be stretched. One need not consider this further since no case is made out that

the respondents were not entitled to interpret the judgement in its terms particularly since the court did not grant the other two orders prayed for which would have covered the passing-off of the applicant's business or get-up even if the trading name was not utilised.

26. Accordingly the applicant is unable to demonstrate the essential requirement that the court order was breached deliberately and *male fide*. See *Fakie NO v CCII Systems(Pty) Ltd* 2006 (4) SA 326 (SCA) at para 9.

THE INTERDICT

27. *Adv Bester* for the respondents submitted that it is not competent for the applicant to apply for an interdict. It already did so and has an order to that effect. He also argued that the applicant was unable to demonstrate that it is the proprietor of the mark and get-up in the sense that it has become distinctive to him.
28. Since the applicant is not a statutory proprietor he is compelled to rely on the common law relief of passing off. In order to succeed the applicant must show that the mark or get-up is distinctive of its services and that the respondent is passing off its services as that of, or as associated in the conducting of its business with, the applicant. *Adv Bester* referred to the following well known passage in *Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd and Another* 1998 (3) SA 938 (SCA) at para 21;

'The nature of the reputation that a plaintiff has to establish was well stated by Lord Oliver in a judgment referred to at the outset of this judgment, namely Reckitt & Colman Products Ltd v Borden Inc and Others [1990] RPC 341 (HL) ([1990] 1 All ER 873) at 406 (RPC) and 880g --h (All ER):

'First, he must establish a goodwill or reputation attached to the goods or services which he supplies in the mind of the purchasing public by association with the identifying "get-up"

(whether it consists simply of a brand name or a trade description, or the individual features of labelling or packaging) under which his particular goods or services are offered to the public, such that the get-up is recognised by the public as distinctive specifically of the plaintiff's goods or services.'

(My emphasis.) See also Lord Jauncey at 417 (RPC). The words emphasised are pertinent and echo those of Nicholas J that

'the plaintiff must prove that the feature of his product on which he relies has acquired a meaning or significance, so that it indicates a single source for goods on which that feature is used'.

(Adcock-Ingram Products Ltd v Beecham SA (Pty) Ltd 1977 (4) SA 434 (W) at 437A--B.) Put differently, reputation is dependent upon distinctiveness (cf Van Heerden and Neethling at 169).'

29. Moreover the respondents contended that the applicant had agreed no longer to trade under the name Cheeky Tiger and that Bettencourt had agreed to assist him financially to effect a name change.

I proceed to deal with each in turn.

30. The applicant indicated that it was obliged to seek an interdict in the present case as an alternative to the contempt proceedings in case the order of Georgiadis AJ did not cover the respondents' passing-off of the applicant's get-up. In my view this does not offend the *res iudicata* principle. The decision of Georgiadis AJ purported to deal with both the mark and the get-up (as I will show later) but the order only dealt with the name. It is therefore evident that the court did not consider the possibility that the respondent would use the get-up without the name. However that situation has now materialised and if the applicant can make out a case of passing off of the get up then it must be able to obtain a remedy, provided the earlier court's pronouncement was not intended to refuse that relief.

31. In the present case Georgiadis AJ expressly stated that there had been a passing off of at least part of the applicant's get-up. Accordingly the issue of *res iudicata* does not arise.
32. But Adv Mpofu contends that the applicant is nonetheless entitled to rely on the judgment and the respondent cannot go behind it, even if the judgment is wrong. At the moment it stands and until set aside on appeal is binding between the parties. For this reason he submits that the respondents' argument that the applicant has not shown reputation is irrelevant; the decision by the Georgiadis AJ found that the applicant was the proprietor of the name and the get-up and that there was a passing off. These findings were binding unless and until a court on appeal said otherwise and it was urged that this court has no competency to revisit that decision.
33. In my view the issue is resolved on the basis of whether the requirements of issue estoppel have been satisfied. Issue estoppel is a species of *res iudicata*. See *Smith v Porritt and Others* 2008 (6) SA 303 (SCA) para 10 where Scott JA said;

'Following the decision in Boshoff v Union Government 1932 TPD 345 the ambit of the exceptio res iudicata has over the years been extended by the relaxation in appropriate cases of the common-law requirements that the relief claimed and the cause of action be the same (eadem res and eadem petendi causa) in both the case in question and the earlier judgment. Where the circumstances justify the relaxation of these requirements those that remain are that the parties must be the same (idem actor) and that the same issue (eadem quaestio) must arise. Broadly stated, the latter involves an inquiry whether an issue of fact or law was an essential element of the judgment on which reliance is placed. Where the plea of res iudicata is raised in the absence of a commonality of cause of action and relief claimed it has become commonplace to adopt the terminology of English law and to speak of issue estoppel. But, as was stressed by

Botha JA in Kommissaris van Binnelandse Inkomste v Absa Bank Bpk 1995 (1) SA 653 (A) at 669D, 667J – 671B, this is not to be construed as implying an abandonment of the principles of the common-law in favour of those of English law; the defence remains one of res iudicata. The recognition of the defence in such cases will however require careful scrutiny. Each case will depend on its own facts and any extension of the defence will be on a case-by-case basis (Kommissaris van Binnelandse Inkomste v Absa (supra) at 670E – F). Relevant considerations will include questions of equity and fairness, not only to the parties themselves but also to others. . . .'

34. It is therefore evident that where only the elements to support issue estoppel arise there is no hard and fast rule that a court is compelled to preclude a party from revisiting the issue. The question is not determined as a matter of principle but is dealt with casuistically. Factors such as equity and fairness may in a particular case militate against applying issue estoppel.

35. This very situation arose in *Prinsloo NO v Goldex 15 (Pty) Ltd 2014 (5) SA 297 (SCA)*. Brand JA stated at paras 16 and 17 that;

'[16] The appellants' argument that the application of issue estoppel in these proceedings would result in unfairness and inequity derives from two hypotheses. First, that it was not necessary for Webster J to arrive at any final decision as to whether or not Prinsloo committed fraud in order to dismiss the trust's application to compel specific performance. Secondly, that Webster J could not and should not have decided the disputed issue of whether fraud was committed on motion proceedings without the benefits inherent in the hearing of oral evidence, including discovery of documents, cross-examination of witnesses, and so forth.

[17] I think both these propositions are well supported by authority....'

36. Adv Bester argues that the decision of Georgiadis AJ regarding whether the applicant could show reputation and could prove a passing-off were conclusions and that there were no findings in that regard.

37. I disagree. The judgment must be considered as a whole and it is evident that the learned judge found that;

- a. The applicant had claimed that the following features were distinctive of his business; the colour schemes (predominantly red and green) , the lay out, the logo and the turnstile;
- b. The respondents had raised the issue of no protectable right and relied on *Caterham*;
- c. The respondents had also contended that factual evidence was lacking to establish the nature and extent of use and evidence of a representative selection of a relevant section of the public dealing with whether they associated the two businesses as being owned by the same person;
- d. The respondent had argued that only unsubstantiated allegations had been made that the applicant had acquired distinctiveness and reputation on the mark and brand; in other words the applicant had made submissions only, unsupported by facts;
- e. The applicant only has to demonstrate a prima facie right though open to some doubt for interim relief;
- f. The applicant stated that it has operates in the Kempton Park area for some time and that it has built up a reputation and goodwill;
- g. There is no doubt in the court's mind that if the respondents were allowed to open a similar business with the same and identical name and set up (this is assumed from the overall context as the word is left blank in the judgment) some 300 metres away then that that will cause

confusion, be detrimental to, and irreparably harm, the applicants business.

38. It must be recalled that the case was heard as a matter of urgency and the judgment appears to have been *ex tempore*. It therefore cannot be scrutinised with a fine toothcomb.

39. I am satisfied that having regard to the summary of the judgment the court had regard to the allegations made by the applicant and because the test is a *prima facie* one, accepted the applicant's version.

40. The present case is also one for interim relief. Accordingly the considerations that weighed in *Prinsloo* are not present. Nor did Adv Bester argue that the considerations in that case applied. I believe he was correct not to.

41. Accordingly the respondents' argument that the applicant has failed to demonstrate reputation, that there will be confusion and that there are irresolvable disputes of fact are met by issue estoppel.

42. Issue estoppel also operates to counter the allegation that the applicant cannot show a *prima facie* right because there was a subsequent agreement not to trade. Independent of issue estoppel the papers do establish a *prima facie* right in favour of the applicant because of the following facts stated, or admitted, by Bettencourt ;

- a. Bettencourt and the applicant were close friends for some 20 years;
- b. Bettencourt allowed the applicant to implement the concept in Kempton Park without paying anyone a royalty or other amount for the mark or the lay-out;
- c. While the applicant owned the Cheeky Tiger establishment in Kempton Park, the two companies or Bettencourt personally operated the other

establishments in Randburg and Germiston as well as Midrand (on Bettencourt's version);

- d. At no stage did Bettencourt require the applicant to desist, despite the identical mark and similar if not identical branding;
- e. After they fell out Bettencourt and the applicant agreed to part ways. They finalised an oral agreement towards the end of January 2015 in terms of which the applicant would inter alia change the name and convert the Kempton Park operation from Cheeky Tiger to Manhattan Nights. Bettencourt contended that the applicant already operated a number of "Manhattan" bars;
- f. The applicant could not immediately change the Kempton Park operation because he was finding his Vereeniging operation that had already opened as Manhattan Nights costly and nothing further occurred until the urgent application was launched by the applicant;

43. Accepting Bettencourt's version, he had allowed the applicant to conduct a Cheeky Tiger establishment in Kempton Park and all other Cheeky Tiger ventures did not enter the physical perimeter of the other but were widely separated.

44. On Bettencourt's own version he had obtained the applicant's agreement to converting his operation from Cheeky Tiger to Manhattan Nights without disclosing that he intended opening a similar entertainment operation (irrespective of name) that would draw on the applicant's customer base. I would consider this a material and actionable non-disclosure. On the papers before me it is reasonable to conclude having regard to the timing that Bettencourt intended to capture the customers who frequented the applicant's Cheeky Tiger Kempton Park establishment and take the applicant's goodwill in that business, including its customer base, without compensation. This would have been financial suicide for the applicant and Bettencourt confirms that he did not offer to pay for the goodwill of the

customer base. On these facts it therefore *prima facie* appears that if there was an agreement to stop trading as Cheeky Tiger then Bettencourt deliberately concealed from the applicant his own plans to open up a Cheeky Tiger operation close to the applicant's establishment .

There would be a legal duty to disclose because Bettencourt knew that if he informed the applicant of his plan to open a Cheeky Tiger establishment immediately after the applicant removed the last vestige of his Cheeky Tiger operation and renamed and reconfigured it for a Manhattan Nights bar his customers would go to what was familiar to them.

45. In effect the applicant would unwittingly destroy the goodwill he had built up under Cheeky Tiger and its familiar branding. But instead of the goodwill disappearing its familiar logo and ambiance would simply transfer to Bettencourt's bigger operation and the applicant would then have to compete under a new brand unfamiliar to the customer base in the area.
46. In my view the evidence of Bettencourt is clear: Under the extant agreement there would be no physical proximity competition as each Cheeky Tiger establishment (irrespective of membership composition) would be a significant distance from the other. Even if the agreement relied on by Bettencourt had been concluded I would consider it an actionable non-disclosure not to have disclosed that the moment the applicant abandoned the trading name and get up of Cheeky Tiger Bettencourt would take them up in an establishment that would be effectively alongside the applicant's re-branded one.

One does not need affidavits from patrons to draw the reasonable conclusion that they would go to what was familiar to them and believe that it is simply a continuation of the applicant's business, or one associated with it, save that it was now operating in larger premises.

47. The applicant in reply denied the alleged agreement. He also stated elsewhere that during a conversation in the first week of November 2015 Bettencourt "*vehemently denied he was opening a Cheeky Tiger*". I however

accept that the point of material non-disclosure was not raised in the alternative. I did however raise the issue with Adv Bester during his argument. The respondents pleaded the agreement as one of several defences to the applicant's case. It is the respondents who relied on the agreement and there can be no prejudice to them in considering whether the agreement can stand having regard to what was claimed to have been discussed and what was divulged in the affidavit. The issue is one of law and the respondents were given an opportunity to deal with it in argument and the respondents did not seek to lead oral evidence but continued to deal with the matter on paper.

48. If the judgment of Georgiadis AJ does not constitute issue estoppel then I would have been satisfied for the reasons given that *prima facie* there was a duty to make the disclosure, if only based on the requirements of good faith in the circumstances of the relationship and the consequences of the alleged bargain struck. The applicant in the simplest terms would have been duped to give up at no cost the goodwill he had built up, in the area, of the name and brand in circumstances where he would have believed that his customer base would remain intact and would not be under threat from Bettencourt.
49. Adv Bester said in arguing the case under passing off that the result offends one's sense of fairness. It does. And the reason it does is because of the business relationship that existed between the parties. The actionable non-disclosure would render the alleged January 2015 oral agreement null and void *ab initio*. See generally the majority judgment of Galgut AJA (at the time) in *Glaston House (Pty) Ltd v Inag (Pty) Ltd* 1977 (2) SA 846 (A) and more recently *Spenmac (Pty) Ltd v Tattrim CC* 2015 (3) SA 46 (SCA) ; see an application of the principles in *Refco Ltd v Amicor Investments* 1964 (3) SA 184 (FC).
50. This does not leave a void because, in the circumstances of the case, the pre-existing relationship is resurrected as it requires a superseding valid agreement to amend its terms. The terms of the pre-existing relationship are readily established by the conduct of the parties.

51. It appears therefore that the alleged agreement to change the name of the applicant's establishment from Cheeky Tiger might be rendered void because *prima facie* the factual and legal requirements of actionable non-disclosure are present. This makes it unnecessary to consider Adv Bester's argument that there was a spill-over of reputation between the Cheeky Tiger businesses operated by Bettencourt and that operated by the applicant. I also believe that in the context of passing-off the effect of spill-over is a factual enquiry not determined simply because each exploiter of the same mark has a website that is accessible throughout the country. Nor is the analogy of a distributorship helpful since in the present case there is not the payment for the right of use to a single controlling distributor or central franchise holder.
52. Adv Bester referred to *Horseshoe Caterers (Green Point) (Pty) Ltd v Burnkloof Caterers (Pty) Ltd* 1975 (2) SA 189 (C) at 195 E which stated that one trader cannot restrain the use of a mark and get up by another trader. This is because the reputation generated by such use and which attached to that mark and get up would vest in each of the traders.
53. My difficulty is that the case was not concerned with the situation of where a geographic or other limitation is imposed on each trader limiting his ability to attract customers to purchase goods or services at a specific locality only however wide the advertising is disseminated. That goes to relationships inter se that may not be governed exclusively by the delictual laws of passing-off but may also be impacted by contractual relationships whether express or implied.
54. This leaves the question of what mark or get-up has now been passed off as that of the applicant or associated with his business.
55. It is evident from the judgment of Georgiadis AJ that aside from the name Cheeky Tiger (which it is common cause is not being used in the respondents' establishment) the applicant's distinctive get-up at Cheeky Tiger in Kempton Park comprises the predominantly red and green colour scheme ,

the lay out and the turnstile. The difficulty is that the court seemed to consider them in totality with the logo.

56. I bear in mind that the respondents can eliminate a feature of the get up which may colour the entire situation. It is therefore necessary to return to basic principles and ask what name, logo or get up of the respondents' business is likely to lead the client base from where the applicant's business is drawn to believe that that respondent's business is that of, or associated with, applicant's business and is likely to divert custom from applicant's business to that of the respondents.

57. In my view aside from the name and style of Cheeky Tiger which is the subject of the current interim interdict, there is the predominant colour combination of red and green as well as the depiction of the woman face or body whether in part or whole having superimposed on it or superimposing on, whether selectively or otherwise, the colouring or features of a tiger. There is also the logo. Moreover I believe that there would be the same confusion with any other feline, canine or any other living species of whatever nature or form. The reason being that the distinctive feature of the establishment is the superimposing of an animal's or other species colouring or features on to a woman's form or face would lead the ordinary clientele to believe that it is part of the branding of the same business or one associated with it.

58. While part of the lay-out and turnstile may be identical and distinctive, the applicant accepted that there were points of departure or of a non-exclusive nature making it impossible to single out. The only distinctive element of the lay-out was the jungle theme.

ORDER

59. I accordingly grant an order that;

1. Pending the outcome of the application instituted by the applicant against the respondents under the above case number and in addition to the interim interdict granted by Georgiadis AJ on 4 December 2015. The first second and third respondents are forthwith interdicted and restrained from utilising the following logos and get ups at the business located at 29 Pretoria Road and currently known as SA's Hottest Action Bar;
 - a. a woman's face with tiger features or colouring on any part of it;
 - b. the *Cheeky Tiger* logo;
 - c. the depiction of a woman's face or body whether in part or whole having superimposed on it or superimposing on, whether selectively or otherwise, the colouring or features of any feline, canine or any other living species of whatever nature or form;
 - d. the use of red and green as the predominant colour combination anywhere at the establishment, whether interior or exterior and whether on permanent or movable fixtures or fittings;
 - e. the adoption of a jungle theme anywhere at the establishment, whether interior or exterior and whether on permanent or movable fixtures or fittings.
2. The applicant is awarded two thirds of the total costs on the attorney and client scale, such costs to include the engagement of two counsel, to be paid by the second and third respondents jointly and severally, the one paying the other to be absolved.

Date of Hearing; 8 March 2016

Date of judgment; 9 March 2016

Legal representatives:

For applicant: Adv. D Mpofu SC;

Adv. S Cohen

De Jager Du Plessis attorneys

For Respondents: Adv A Bester SC

Jack Hajibey Inc