

IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

CASE NO: 6705/2008

In the matter between:

YUSUF MAHOMED RADEREE	First Applicant
RAP FAST FOOD TAKE AWAY CC	Second Applicant
JACKOJOE FRANCHISING CC	Third Applicant

and

BELREX 647 CC	First Respondent
ESSOP ABDOOL KADER PATEL	Second Respondent
RUSSEL WATSON	Third Respondent
REGISTRAR OF CLOSE CORPORATIONS	Fourth Respondent

J U D G E M E N T

Msimang AJP

[1] This Application involves a feud resulting from a fall out between the erstwhile business partners.

[2] As it is usually the case, in the feuds of this nature, accusations have come thick and fast, each partner accusing the other of bad faith, dishonesty and fraud. Needless to say, most of the allegations are not relevant to the issues to be determined in the present Application. It is, however,

essential for the Court to delve into the maze of these allegations with a view to identifying those that are relevant for the determination of the issues before it.

[3] During 1995 the First Applicant and the Second Respondent got together and formed a Close Corporation which would trade as a fast food restaurant, catering for the niche halaal market and which operated from Sparks Road in the Overport suburb of Durban. It would appear that the business proved to be a success and, on 13 January 1997, the Second Applicant became a holder of the trademark “Wrap It Up Caff’e” as well as the intellectual property of certain trademarks, logos and symbols.

[4] In time, it was decided that further business outlets be opened and that the trademark and the intellectual property be franchised to those outlets. For that purpose, another Close Corporation, to wit, the Third Applicant was set up during 1999 and it was endowed by the Second Applicant with the rights to franchise the trademark and the intellectual property.

[5] Indeed, a number of franchises were set up in various areas of KwaZulu-Natal and the Second Applicant ended up operating two fast food outlets, one situate in Sparks Road and the other in the Gateway shopping mall of Durban.

[6] Regrettably though, success in this business venture would be short-lived. Interpersonal clashes between the parties set in which lasted for several years. Correspondence which was subsequently exchanged between them as well as interventions between their respective legal advisors could not resolve the disputes.

[7] The First Applicant began to hold a view that the Second Respondent had excluded him from the running of and from the decision making relating to the business of the Second and Third Applicants. It was for this reason that, on 20 November 2006, he caused his Attorney to send a minute to the Second Respondent demanding to be informed of all the affairs and to be consulted on all decisions relating to the business, to be allowed to participate in the day to day running of the business without interference and for all interested parties to be informed that he would be exercising that right, to be provided with details of management staff and a schedule of wages they earned, for all cash on hand to be deposited immediately into the bank account of the business and the deposit slips to be faxed to him and for such deposits to be made in respect of all future takings and for all outstanding profits to be declared and distributed.

[8] On the same date another letter was addressed to the Second Respondent by First Applicant's Attorneys placing it on record that the First Applicant was an equal member of the Second and Third Applicants and requesting to be furnished with copies of the completed financial statements in respect of those Applicants for the year ending February 2006 and to be provided with a set of Management Accounts, including wages schedules from March 2006 to October 2006.

[9] On 23 May 2007 ATTORNEYS DENEYS REITZ, acting for the Second Respondent, dispatched a letter to the First Applicant suggesting that a meeting between the respective legal representatives be arranged on a mutually acceptable date.

[10] In the meantime, the First Applicant stumbled upon certain information which apparently triggered the launching of the present Application.

[11] According to the First Applicant, he had been approached by one VALENCIA MOODLEY who informed him that she had dealt with the Second and Third Respondents who had informed her that they represented an organization that held the rights to the "Wrap It Up Caff'e" business method and intellectual property rights. She had

accordingly concluded a franchise agreement with them which entitled her to use the business method and intellectual property rights of the Second Applicant as against payment of the amount of R130 000,00 (one hundred and thirty thousand rand). On 11 December 2007 she had, by electronic funds transfer, paid a sum of R50 000,00 (fifty thousand rand) into the First Respondent's account and had approached her bankers for further financial assistance.

[12] However, she later ran into financial problems which related to the costs of converting the premises she was leasing from Old Mutual and the Second Respondent's demands for more payments. She got wind of the fact that the First Applicant was, somehow, involved with the outlets utilizing the said trade name and intellectual property and accordingly approached the First Applicant for assistance. It was during this approach that the First Applicant came into possession of the following documents:-

- 12.1 A Memorandum of Agreement concluded by and between the First Respondent, as a franchisor, and Jazman's Cuisine CC, represented by VALENCIA MOODLEY;

- 12.2 A Profit and Loss Statement for the Sparks Road Branch of the First Applicant for the period between March and November 2007;
- 12.3 Third Applicant's annual financial statements for the year ended 28 February 2006;
- 12.4 Second Applicant's business plan prepared for VALENCIA ADDELAIDE MOODLEY and Jazman's Cuisine CC to trade as Wrap It Up Caff'e Bluff and
- 12.5 A document styled "disclosure document for "Wrap It UP";

[13] In his Founding Affidavit the First Applicant refers to the following clauses of the Memorandum of Agreement;

- "1. The Franchisor operates through its own and franchised outlets under the name and style of WRAP IT UP CAFÉ, a Halaal fast food outlet according to the business method;
 - 2. The Franchisor is the owner of certain intellectual property rights used in conjunction with the business method;
 - 3. The Franchisee wishes to operate the Franchised Business and for this purpose to use the Franchisor's business method and intellectual property rights;
 - 4. The Franchisor hereby licenses such use subject to the terms and conditions of this agreement.
- 1.2 "Business Method": the system in accordance with which the businesses franchised by the Franchisor shall be conducted as sometimes more fully set out in the operating manual using the intellectual property and any necessary know-how trade secrets, methods of operating, identifying materials, methods of advertising, style and character of equipment and insurance arrangements

specified in the operating manual and elsewhere as modified from time to time by the Franchisor;

1.10.1 “Franchise Products”: the products described in Schedule “A” or other products substituted in accordance with this agreement;

1.11 “Goodwill”: goodwill arising out of the use of the business method and the intellectual property by the Franchisor and its Franchisees;

1.14 “Intellectual Property”: all or any of the following:

1.14.1 copyrights held by the Franchisor in any written material, plans or other work relating to the franchise products or the business method;

1.14.2 designs whether or not registered, devised or acquired by the Franchisor and applied in the manufacture, assembly and sale of the franchise products and the business method;

1.14.3 patents of which the Franchisor is patentee in the territory and which relate to the franchise products of which are set out in Schedule “B” and applications for the grant of any such patents;

1.14.4 trade dress which will include the get-up of the Franchised Business as well as the interior and exterior decoration of the premises;

1.14.5 trade mark(s) see (Schedule “B”) of which the Franchisor is the owner as well as applications pending therefore, together with such future trade marks specified in an addendum to this agreement and signed by both parties;

1.14.6 trade name WRAP IT UP CAFFEE

1.15 “Know-how”: all confidential, technical and commercial information relating to the operation of the business method, including, without limitation, information contained in the operating manual or other documents as well as unrecorded information known to individuals who are office bearers or employees of the Franchisor;

1.267“Trade Marks”: the registered and unregistered trade marks listed in Schedule “B”.”

and points out that it is apparent from the terms of those clauses that the First Respondent is holding itself out as having the business method and intellectual property rights to the “Wrap It Up Caff’e”, a halaal fast food outlet.

[14] In schedule B of the Agreement, the First Applicant further deposes, is contained trademark, logos and symbols which had been registered in the name of the Second Applicant.

[15] Also, the profit and loss schedule of Sparks Road branch of “Wrap It Up Caff’e” had been supplied to VALENCIA MOODLEY by the Second Respondent in order to assist her in obtaining finance for the venture;

[16] Annexed to First Applicant’s Founding Affidavit and marked “YR12” is copy of an advertisement which appeared in the Mercury and the Daily News newspapers on 23 April 2008 which invited prospective franchisers to contact FAIZUL ALLIE, an employee of the First Respondent.

[17] It was for this reason that, on 28 May 2008, the Applicant launched the present Application seeking the following relief:-

- “1. That the First, Second and Third Respondents be and are hereby interdicted and restrained from:
 - 1.1 dealing with, representing, using, or in any way purporting to have the rights to use the name “Wrap-it-up” or “Wrap-it-up Caff’e” or “Wrap-it-up Caffè”;
 - 1.2 holding themselves out to be the intellectual property holder or holders of the intellectual property rights, trademarks, logos and symbol of “Wrap-it-up” or “Wrap-it-up caff’e” or “Wrap-it-up Caffè”;
2. That the First, Second and Third Respondents be and are hereby interdicted and restrained from trading under the name or the guise of “Wrap-it-up” or “Wrap-it-up caff’e” or “Wrap-it-up Caffè”, save through the Second and Third Applicants;
3. That the Second Respondent is directed to deliver to the Applicants’ attorneys of record, within seven (7) days of this Order:

- 3.1 all information and documents relating to any franchise that has been offered or afforded using the name trade, symbols and logos of “Wrap-it-up” or “Wrap-it-up caffè” or “Wrap-it-up Caffè”, whether such franchise has been offered through the First Applicant, the Second Applicant, the First Respondent, or the Second Respondent or any other entity, such information to include, but not be limited to:

3.1.1 the name of the franchisee;

3.1.2 the telephone number(s) of the franchisee and any other personal contact details of the franchisee;

3.1.3 the address of the franchise outlet;

- 3.2 a schedule of income and expenditure from 1 March 2003 to date for the:

3.3.1 First Applicant;

3.3.2 Second Applicant;

3.3.3 First Respondent.

3.4 a schedule setting out all purchases made for “Wrap-it-up” or “Wrap-it-up caffè” or “Wrap-it-up Caffè” for the period 1 May 2007 to date from:

3.4.1 Star Meats;

3.4.2 Any other supplier.

3.5 a list of all staff employed by the First and Second Applicants and the First Respondent, from 1 March 2003 to date including the:

3.5.1 name of the employee;

3.5.2 job description;

3.5.3 date of commencement of employment;

3.5.4 date of termination of employment (if any).

3.6 the financial statements for the First and Second Applicants for the financial years 2003 to 2008 inclusive.

4. That the Respondents pay the costs of the Application, jointly and severally, the one paying, the others to be absolved, such to include the costs of two (2) counsel.”

[18] In their Founding Affidavit, the Applicants having made an allegation that the Second Applicant is the holder of the trademark “Wrap It Up Caff’e” and having annexed thereto as “YR1” proof of registration of the said trademark and related logos and symbols, it must follow that the Applicant rely upon the provisions of subsection 34(3) of the Trade Marks Act (The Act)¹ for, at least, part of the relief they seek in these proceedings. The provisions of that subsection read as follows:-

“Where a trade mark registered in terms of this Act has been infringed, any High Court having jurisdiction may grant the proprietor the following relief, namely -

- (a) an interdict;
- (b) an order for removal of the infringing mark from all material and, where the infringing mark is inseparable or incapable of being removed from the material, an order that all such material be delivered up to the proprietor;
- (c) damages, including those arising from acts performed after advertisement of the acceptance of an application for registration which, if performed after registration, would amount to infringement of the rights acquired by registration;
- (d) in lieu of damages, at the option of the proprietor, a reasonable royalty which would have been payable by a licensee for the use of the trade mark concerned, including any use which took place after advertisement of the acceptance of an application for registration and which, if taking place after registration, would amount to infringement of the rights acquired by registration.”

¹ 194 of 1993:

[19] The Application is strenuously opposed by the Respondents and they have filed their own Affidavits addressing the issues raised in the Applicant's Founding Affidavit. The Second Respondent, in particular, has made his own allegations of bad faith, dishonesty and fraud of and concerning the First Applicant. Most of those allegations are, however, not relevant to the issues to be determined in the present proceedings with the result that only those that are relevant will be dealt with in this judgment.

[20] One of the issues which was dealt with in the Respondents' Answering Affidavit is the issue involving the registration of the relevant trademark and the related logos and symbols. According to the First Respondent, at the time when the present Application was launched, the said trademark and related logos and symbols were no longer registered, such registration having lapsed on 15 February 2008.

[21] Reference was accordingly made to the provisions of section 33 of the Act which, in part, provides that:-

“No person shall be entitled to institute any proceedings under section 34 in relation to a trademark not registered under this Act...”

and doubt was expressed as follows regarding Applicants' *locus standi*:-

"The removal of the trademark calls into question the *locus standi* of the First, Second and Third Applicants to institute these proceedings"

[22] In response to this somewhat half-hearted challenge to the Applicants' *locus standi*, MS JULYAN, who appeared for the Applicants, referred to the proviso clause to section 33 of the Act which reads as follows:-

"Provided that nothing in this Act shall affect the rights of any person, at common law, to bring any action against any other person"

and submitted that, while it is true that the Second Applicant is precluded by the provisions of section 33 of the Act from instituting the proceedings in terms of section 34(3) of that Act, the Second Applicant has a protectable interest in the name "Wrap It Up Caff'e" and the goodwill associated with it which, under common law, it is entitled to protect against unlawful competition. It is this interest which the Second Applicant wishes to protect in the present proceedings, the argument concluded.

[23] Interpreting a section couched in similar terms in the now repealed Act, the Court in **Glenton & Mitchel v**

Ceylon Tea Company² emphasized the irrelevance of the proprietorship of a registered trademark to, for instance, a common law action based on passing-off.³ Interpreting the said provision BRISTOWE J remarked as follows:-

“Sec. 127 of the Statute expressly preserves passing-off actions ... I think that that section merely incorporates in the Statute what has always been in the law. I do not think that any Trade Mark Act has ever interfered with passing-off actions ... The policy has always been to preserve actions which depend on the fact that registered trade marks are calculated to deprive other persons of their trade rights... I think a passing-off action goes outside the register altogether.”⁴

[24] The provisions of the section have since been retained verbatim in two successive Statutes.⁵ I accordingly share MS JULYAN’s view that the Second Applicant is entitled, at Common Law, to protect its protectable interest in the name “Wrap It Up Caff’e” and the goodwill associated with it, notwithstanding the lapse in the registration of the said trademark.

[25] I did not understand MR PILLAY, who appeared for the first three Respondents, to take issue with this apparently trite proposition of the law. What he took issue with, as I understood him, is that the Applicants’ Founding Affidavit

² 1918 WLD 118;

³ See Also Solmike (Pty) Ltd v West Street Trading Co. (Pty) Ltd

⁴ Ceylon Tea (Supra) at 126-127;

⁵ Section 43 of the Trademarks Act 62 of 1963 and in section 33 of the present Act.

lacks averments sufficient to sustain a relief based on the Common Law cause of complaint of unlawful competition.

[26] Before considering the submissions with a view to ascertaining the cogency or otherwise of MR PILLAY's submission, it is necessary first to briefly give an exposition of the principles relating to the Common Law relief based on unlawful competition.

[27] The recognition of an action based on unlawful competition in our law resulted from the general development of the Common Law *Aquilian* liability and it was as early as in 1922 that the then Appellate Division pronounced itself as follows on this action:-

"In the absence of special legal restrictions a person is without doubt entitled to the free exercise of his trade, profession or calling, unless he has bound himself to the contrary. But he cannot claim an absolute right to do so without interference from another. Competition often brings about interference in one way or another about which rivals cannot legitimately complain. But the competition and indeed all activity must itself remain within lawful bounds. All a person can, therefore, claim is the right to exercise his calling without unlawful interference from others. Such an interference would constitute an *injuria* for which an action under the *Lex Aquilia* lies if it has directly resulted in loss." ⁶

[28] In the seminal judgment of CORBETT J (as he then was) in the case of **Dun & Bradstreet (Pty) Ltd v SA**

⁶ See: De Villiers AJ in *Mathew and Others v Young* 1922 AD 492 at 507

Merchants Combined Credit Bureau (Cape) (Pty) Ltd ⁷, the HONOURABLE CORBETT J, referred to, what he termed, a leading case in the United States on the subject of unfair competition where the Court had pronounced itself as follows on what constituted unfair competition in that case:-

“Stripped of all the disguises, the process amounts to an unauthorized interference with the normal operation of complainant’s legitimate business precisely at the point where the profit is to be reaped in order to divert a material portion of the profit from those who have earned it to those who have not ...” ⁸

[29] Transposing the same situation onto our law, CORBETT J had the following to say:-

“Reverting to the position in our law and without attempting to define generally the limits of lawful competition, it seems to me that where, as in this case, a trader has by the exercise of his skill and labour compiled information which he distributes to his clients upon a confidential basis (i.e. upon the basis that the information should not be disclosed to others), a rival trader who is not a client but in some manner obtains this information and, well knowing its nature and the basis upon which it was distributed, uses it in his competing business and thereby injures the first mentioned trader in his business, commits a wrongful act *vis-à-vis* the latter and will be liable to him in damages. In an appropriate case the plaintiff trader would also be entitled to claim an interdict against the continuation of such wrongful conduct. Although there is no precise precedent in our law for this proposition, I am of the opinion that it is a well-founded development of our law relating to unlawful competition in trade and is in accordance with trends of legal development elsewhere.” ⁹

⁷ 1968 (1) SA 209 (c);

⁸ Passage quoted from the Judgment of the US Supreme Court in *International News Service Associated Press*, 248 US 215 (1918);

⁹ *Ibid.* at 221 B-E;

[30] It is evident that the nature of MR PILLAY's objection to the averments made in the Founding Affidavit is such that, if it is sustained, it would lead to the dismissal of the present Application. The objection is similar to an exception which means that, to determine whether the contents of the Founding Affidavit lack the allegations that are sufficient to sustain a relief based on the Common Law cause of complainant of unlawful competition, this Court must look at the Founding Affidavit as it stands and only if the Court finds that on every interpretation that can reasonably be attached to it, the Founding Affidavit lacks those allegations, can this Court find in favour of MR PILLAY's objection.¹⁰

[31] MS JULYAN has referred to a number of passages in the Founding Affidavit and submitted that the allegations made therein are sufficient to sustain such a relief. The most important of these allegations appear as follows in paragraph 41 of the Founding Affidavit:-

“From the foregoing it is apparent that the First Respondent, together with the Second and/or Third Respondents are passing off and appropriating the logos, trademarks, symbols, intellectual property and goodwill of the First and Second Applicants.”

[32] As it was stated in **Moroka Swallows Football Club Ltd v The Birds Football Club and Others**,¹¹

¹⁰ Poisedon Ships Agencies v African Loading and Another 1980 (1) SA 313 (D) at 315 C; Minister of Safety and Security v Hamilton 2001 (3) SA 50 (SCA); Shell Auto Care (Pty) Ltd v Laggar 2005 (1) SA 162 (D);

¹¹ 1987 (2) SA 511 (W) at 520 F;

“Our law characterizes unlawful competition as a wide *genus* of delicts under the *lex Aquilia*, of which *genus* passing off is a species.”

[33] Clearly therefore the Founding Affidavit contains sufficient allegations to found an action based on the Common Law remedy based on unlawful competition of the passing off species. MR PILLAY’s objection can accordingly not stand.

[34] The relief which the Applicants seek herein is in the form of a Final Order and they must accordingly show that they have a clear right, that the Respondents have committed an act which interferes or threatens to interfere with that right and that no other satisfactory remedy is available to them.

[35] It is common cause between the parties that during 1995 the First Applicant and the Second Respondent got together to set up the Second Applicant for the purpose of operating a fast food restaurant, catering for the niche halaal market which was operated from Sparks Road, Overport, that, in its trade, the business used the trademarks, logos and symbols “Wrap It Up Caff’e”, “Halaal Fast Foods Halaal” and “Wrap It Up”, and that, after the business had been run successfully for four (4) years, a decision was taken to open more outlets and for the trademark and intellectual property

to be franchised to those outlets for which purpose the Third Applicant was set up.

[36] It is therefore evident that, in its business, the Second Applicant would, through the Third Applicant, derive income by franchising the said trademark and related intellectual property, which, over the years, were associated with the Second Applicant generating the necessary goodwill for the latter.

[37] The Second and Third Applicants accordingly have a right to the goodwill generated from that intellectual property and to the enjoyment of the same without unlawful interference by other persons or, in the words of CORBETT J, without anyone:-

“endeavoring to reap where it has not sown” ¹²

[38] The first requirement has therefore been satisfied and I find that the Applicants have demonstrated that they have a clear right.

[39] In his Answering Affidavit, the Second Respondent stated that the First Respondent was a shelf-company which, though he had given instructions for the finalization of its acquisition by himself, he was not, as of the date of the Affidavit, a registered member of. It was also not disputed

¹² Sun Cape (Supra) at 221E;

that, in the Agreement concluded by and between the First Respondent and JASMINE CUISINE CC referred to in subparagraph 12.1 and paragraph 14 hereof, it is recorded that the First Respondent trades as “Wrap It Up Caff’e” and that, in that agreement, the First Respondent is variously described as a “Franchise Company” and as “the Franchisor”. Furthermore, a number of clauses of this Agreement have been quoted in this judgment and it is evident from those clauses that the First Respondent did not only give out that he operated under the name and style of “Wrap It Up Caff’e”, a halaal fast food outlet, but that it also professed to be the owner of the above-mentioned intellectual property;

[40] Notwithstanding this overwhelming evidence of First Respondent’s interference with Second Applicant’s intellectual property, in his Answering Affidavit the Second Respondent deposed as follows:-

“At no stage did we represent that the First Respondent held the rights to the trademark nor did we represent that the First Respondent was the franchisor...”

and, as I understood him, MR PILLAY referred the Court to what appears to be a certificate of registration of the trademark which is annexed to the Memorandum of Agreement and marked Schedule B. In that certificate it is

recorded that the trademark is registered in the name of the Second Applicant.

[41] In answer to this futile attempt by the First and Second Respondents to obfuscate the true state of affairs, I can only say that, as set out in paragraph 39 hereof, the facts speak for themselves. A sentence hidden in a certificate annexed to the Agreement cannot serve to alter the clear language in the Agreement.

[42] It can therefore not admit to any doubt that the Respondents committed acts which interfered with Second and Third Applicants' right to the goodwill generated by their intellectual property. However, for those Applicants to succeed, they must show not only such interference but that the interference was unlawful. As it is aptly stated in the **Mathew** decision (**supra**):-

“All a person can, therefore, claim is the right to exercise his calling without unlawful interference from others.” ¹³ (my emphasis)

[43] “Unlawfulness” in the context of “unlawful competition” is often ‘a difficult horse to ride’. As once lamented as follows by VAN DIJKHORST J:-

¹³ See footnote 6 (*supra*);

“I am not the first nor will I be the last to lament upon the difficulty of determining the dividing line between lawful and unlawful interference with that of another” ¹⁴

I find myself among those faced with a similar predicament.

[44] After grappling with the subject, VAN DIJKHORST J concluded as follows:-

“I have come to the conclusion that the norm to be applied is the objective one of public policy. This is the general sense of justice of the community, the *boni mores*, manifested in public opinion. In determining and applying this norm in a particular case, the interests of the competing parties have to be weighed, bearing in mind also the interests of society, the public weal. As this norm cannot exist, *in vacuo*, the morals of the market place, the business ethics of that section of the community where the norm is to be applied, are of major importance in its determination. ¹⁵

[45] However, in the view I take of the Applicants’ allegations upon which their claim for unlawful competition is based, I have considered it unnecessary to engage in the determination of the norm *in casu*.

[46] In his Founding Affidavit the First Applicant makes the following allegations of and concerning the wrongful conduct of the respondents:-

¹⁴ Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd & Others 1981 (2) SA 173 (T)

¹⁵ Ibid. at 188H-189A;

“... the First Respondent is holding itself out as having the business method and intellectual property rights for the “Wrap It Up Caff’e”, a halaal fast food outlet.”

“From the foregoing it is apparent that the First Respondent together with the Second and/or, Third Respondents are passing off and appropriating the logos, trademarks, symbols, intellectual property and goodwill of the First and Second Applicants”

“Had it not been for the difficulties that VALENCIA MOODLEY found herself in, and the dispute that came about between herself and the Second Respondent, I would never have become aware of this subterfuge on the part of the First Respondent, and the Second and/or Third Respondents.”

[47] Applicants’ case is therefore that the Respondents intentionally misrepresented that they had a right to deal with Second Applicant’s intellectual property for their benefit, the allegation which is denied by the Respondents.

[48] Explaining the role played by the Third Respondent in the conclusion of the said Agreement, the Second Respondent deposed that the Third Respondent was an employee of a company called Franchise Synergies (Pty) Ltd, a business which offered services within the franchising industry and which attended to the administration, certification, drawing up of contracts and the collection of franchising fees and royalties for trading entities which offer franchise opportunities and that, in that capacity, the Third Respondent was a duly authorized representative of the Second and Third Applicants. It was Franchise Synergies (Pty) Ltd who, on behalf of the Second and Third Applicants,

entered into negotiations with JASMINE CUISINE CC, which negotiations led to the conclusion of the said Memorandum of Agreement.

[49] The Second Respondent alluded to incidents of First Applicant's unlawful dealings with funds belonging to the Second and Third Applicants. It then became necessary to form the First Respondent so as to provide a vehicle to safeguard the finances of those Applicants by transferring all the monies from the Third Applicant's bank account to the First Respondent's bank account, the fact which was mentioned to the Third Respondent. The latter, however, laboured under a misapprehension that the Second Respondent wished to transact all the business of the Third Applicant in the name of the First Respondent. That is how it came about that the name of the First Respondent appeared on the Memorandum of Agreement, which appearance was in error.

[50] The Second Respondent accordingly gave an assurance that no other Agreement existed in the name of the First Respondent and gave an undertaking never again to transact in the name of the First Respondent when dealing in the affairs of the Second and Third Applicants. In any event, the Second Respondent concluded, the Agreement with JASMINE CUISINE CC had since been cancelled.

[51] However, in a Replying Affidavit subsequently filed by the First Applicant, the latter annexed a document which is marked "YR13". It purports to be a Memorandum of Agreement couched in the same terms as the one already alluded to in this judgment, save that the franchisee therein is TROPICAL EDEN CC and the date of commencement is 15 December 2007. No doubt, the purpose was to make a mockery of the Second Respondent's earlier assurance.

[52] Responding to the First Applicant's latest revelations, the Second Respondent, in his Supplementary Affidavit, denied that the document constituted a valid agreement. He averred that when he noticed that the name of the First Respondent had been incorrectly inserted in the Agreement as the franchisor, he had refused to conclude the Agreement.

[53] During argument MS JULYAN recalled the allegations made in the Second Respondent's answering affidavit, namely, that the use of the First Respondent's name in the Agreement had been an error which had resulted from a misunderstanding between that Respondent and the Third Respondent and that this was the only agreement where the First Respondent had been held out to be the franchisor of "Wrap It Up Caff'e", and pointed out that, in rebuttal, the

Applicants had shown that yet another franchise Agreement had been concluded wherein the First Respondent had been held out to be a franchisor. It was for this reason that she relied on the decision in **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd**¹⁶ and urged this Court to reject the Respondents' allegations of a *bona fide* error as being far fetched or clearly untenable.

[54] MS JULYAN'S submissions lose sight of an important allegation made in the First, Second and Third Respondents' Supplementary Affidavit, namely, that the later Agreement had never been signed on behalf of the First Respondent or, on behalf of the Second and Third Applicants and that the Second Respondent deposed that when it was brought to him for signature, he recognized that the name of the First Respondent had been incorrectly inserted where it should have reflected the name of the Third Applicant and accordingly refused to append his signature.

[55] Indeed, the perusal of a copy of the later Agreement annexed to the Applicants' Replying Affidavit and marked "YR13" reveals that, though the Agreement had been signed by the franchisee, it was never signed by or on behalf of the franchisor. Far from the Second Respondent's allegations of *bona fide* error being far-fetched or being clearly untenable, they appear to me to be convincing. Besides, the type of

¹⁶ 1984 (3) SA 623 (A)

relief sought by the Applicants herein, being in the form of final order, such a relief can only be granted:-

“...if ...facts averred in the Applicant’s Affidavits which have been admitted by the Respondent, together with the facts alleged by the Respondent, justify such an order.” ¹⁷

[56] In the circumstances I have been driven to the conclusion that the Applicants have failed to show that the Respondents’ conduct herein resulted from an intentional misrepresentation and therefore that that portion of the relief based on unlawful competition should fail.

[57] Regarding the second portion of the relief, namely, the furnishing of information and documents relating to the franchise transactions undertaken by the Respondents, it seems to be common cause that, in the past, a letter had been addressed by the First Applicant to the Second and Third Applicants’ accounting officer requesting copies of some of the documents and that not all the requested documents had been provided to the First Applicant. Also, in a number of paragraphs in the Respondents’ Answering Affidavit, the Second Respondent expressed willingness to furnish the First Applicants with the relevant information and

¹⁷ Ibid. at 634 H;

documents. There is accordingly no dispute between the parties on this issue.

[58] What is now remaining is the exercise of my discretion relating to the awarding of costs. Looking at the substance of the judgment, it is evident that, though the Applicants have achieved success on the issue of the furnishing of documents and information, no such success was achieved on the rest of the issues. Besides, as early as in their Opposing Affidavit, the Second Respondent conceded that the First Applicant was entitled to the relevant information and documentation and that he was willing to provide the First Applicant with the same. It would appear to me that the fair order would be to grant the First Applicant costs incurred for the purpose of procuring that information and those documents but only those costs incurred by the First Applicant for that purpose until the delivery of Respondents' Opposing Affidavit.

The order I make is accordingly as follows:-

- 1. The Application for an interdict is dismissed with costs;**
- 2. I grant an order in terms of paragraph 3 of the Notice of Motion;**

3. **The Second Respondent is ordered to pay First Applicant's costs relating to procurement by that Applicant of the information and documents in terms of paragraph 3 of the Notice of Motion, those costs to be limited to costs incurred until the delivery of the Respondents' Opposing Affidavit.**

Date of Hearing : 25 February 2010

Date of Judgment : 14 April 2010

Counsel for Applicant : Adv. J Julyan SC

Instructed by : Pather & Pather
Attorneys

Counsel for First Three Respondents : Adv. I Pillay
Instructed by : Deneys Reitz Inc.