

SOUTH AFRICA / JUDGMENT

Apple Bite (Pty) Ltd and Another v Applebite Roadhouse (Pty) Ltd and Others (A2023/058069) [2024] ZAGPJHC 22 (12 January 2024)

[2024] ZAGPJHC 22**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Wright, Sutherland, R Strydom

CASE / FILE NUMBER

A2023/058069

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, JOHANNESBURG****CASE****NO: A2023-058069****REPORTABLE:**

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED:

YES

Date:12

JANUARY 2024

In

the matter between:

APPLE

BITE (PTY) LTD

FIRST

APPELLANT

SIMUL

ENTERPRISES CC

SECOND

APPELLANT

And

APPLEBITE

ROADHOUSE (PTY) LTD

FIRST

RESPONDENT

GONBAR

INVESTMENTS CC t/a
SECOND
RESPONDENT
APPLEBITE
ROADHOUSE and PIZZERIA
ALEX
JAY CATERING CC t/a THE
THIRD
RESPONDENT
APPLEBITE
EXPRESS

JUDGMENT

- FULL COURT APPEAL

Wright J, Sutherland DJP and R. Strydom J

Introduction

- [1] The first appellant is Apple Bite (Pty) Ltd. We shall refer to this party as Apple. The second appellant is Simul Enterprises CC. We shall refer to this party as Simul.
- [2] The first respondent is Applebite Roadhouse (Pty) Ltd. We shall refer to this party as Applebite. The second respondent is Gonbar Investments CC trading as “Applebite Roadhouse and Pizzeria “. We shall refer to this party as Gonbar. The third respondent is Alex Jay Catering CC trading as “The Applebite Express.” We shall refer to this party as Alex Jay.
- [3] The present respondents applied in the court below for an interdict against the present appellants. They alleged delictual interference in their business by the present appellants in the form of passing off and unlawful competitive trading. Adams J held that as Applebite is not trading and is dormant it had no case. The application was however, granted in favour of Gonbar and Alex Jay against Apple and Simul.
- [4] Apple and Simul sought leave to appeal. Adams J refused leave to appeal but the SCA granted leave to this Court. There is no cross-appeal by Applebite.

Chronology

- [5] The facts are largely common cause. This appeal turns essentially on the inferences to be drawn from the facts.
- [6] We set out below a chronology, from which the picture emerges.

- [7] 1972 – The Applebite Roadhouse is opened by the brothers, John and Jimmy Karantasis with Chris Bantasis at 95 Van Riebeeck Avenue, Edenvale. We shall refer to this piece of land as the property. Six months later, the business is sold to John Bower.
- [8] 1972 to the present – A large, 4.5-meter-high advertising sign is erected on the property advertising the name, Apple Bite. An apple with a bite taken out of it is the logo. It becomes well known and attracts customers.
- [9] 1978 – John Bower sells the business to Pavlos Christoforakis. Christoforakis buys the immovable property on which the business operates. Christoforakis trades as “The Applebite Roadhouse and Pizzeria.”
- [10] 1987 – Simul is registered as a Close Corporation. Its members are Pavlos Christoforakis and his wife, Catherine. Sometime thereafter, the property is registered in the name of Simul.
- [11] 31 October 2001 – Gonbar is registered as a Close Corporation. The members are Migel Goncalves, his father, Juvenal Goncalves and Luis Barreto.
- [12] Presumably, 17 March 2002 - Christoforakis sells the business to Ms Revelas.
- [13] 17 March 2002 – Simul leases the property to Revelas. Under clause 1.5, the leased premises mean “The Entire Property and Improvements Thereon. “Under clause 5.1 “The Lessee shall be entitled to carry on its business as a roadhouse on the leased premises. “Under clause 8.1, the lessee, Revelas is entitled to exhibit advertisements, signboards and the like. Under clause 8.3, the lessee shall, on termination of the lease be obliged to remove the advertisements and signboards and to leave the premises in the same good order and condition as “the same were in before anything was affixed by it thereto “. Our emphasis.
- [14] 16 March 2007 – Simul and Revelas extend the lease for four years and eleven months from 1 April 2007.
- [15] 19 June 2008 – Revelas sells the business “Apple Bite Road House “to Juvenal Goncalves and his son, Migel. We shall refer to these men together as Goncalves. The agreement records that the business is sold as a going concern. Under clause 12, in the event that the agreement is concluded by the Goncalves for a company to be formed, such company “will be registered within a period of thirty
- (30) days from the date of acceptance hereof and that upon incorporation it will ratify and adopt the agreement of sale. “
- [16] 29 June 2008 – Revelas cedes her rights as lessee to the property to Goncalves. The lessor, Simul consents to the cession.
- [17] 7 August 2008 – Alex Jay is registered as a Close Corporation. Its members are Migel Goncalves and Raymond Daniels.

- [18] Late 2008 – Goncalves starts an “ Applebite Roadhouse and Pizzeria “ business in Germiston. This business is still operating. In effect, it is the business of Gonbar.
- [19] 2 March 2012 – Simul leases the property to Juvenal Goncalves for five years. Clause 1.4 defines the leased premises as “The Entire Property and Improvements Theron. “Under clause 5, “The Lessee shall be entitled to carry on his usual business as a roadhouse on the leased premises.” Under clause 8.3, Juvenal Goncalves shall be obliged to remove advertisements and signage “affixed by him “.
- [20] 1 October 2013 – Goncalves opens a third Applebite roadhouse in Benoni. This roadhouse closes down after a short time.
- [21] 10 April 2015 – Alex Jay sells the business “Applebite Roadhouse “to Daniels. The sale includes the goodwill. Clause 4.2 records that “the business is sold as a going concern “.
- [22] 27 February 2017 – Simul leases the property to Daniels. Under clause 5.1, Daniels “shall be entitled to carry on his usual business as a roadhouse on the Leased Premises. Under clause 8.3, Daniels is obliged, on termination, to remove advertisements and signboards “affixed by him”.
- [23] 11 April 2017- Applebite is registered as a company. The director is Migel Goncalves.
- [24] 27 March 2020 – Covid lockdown starts.
- [25] 27 March 2020 to 30 September 2020 – Gonbar and Alex Jay battle to survive. Their Germiston and Edenvale businesses suffer. Alex Jay, in the person of Daniels can’t pay the monthly rent to Simul. Simul issues a rent interdict summons. The summons is against Daniels as Simul insisted on leases with natural persons.
- [26] November 2020 – Alex Jay relocates its Apple Bite business from the property to a place about 1.5 kilometres away but still in Edenvale. The new business opens as “Applebite Express “
- [27] December 2020 to April 2021 – the property is vacant. To let signs are displayed by Simul.
- [28] 2 February 2021 – Simul’s attorney writes to Daniel’s attorney, alleging that Simul has the right to trade from the property and demanding that Daniels “remove its signage from our client’s premises at its own cost. “
- [29] 4 February 2021 – Simul’s attorney writes to Daniel’s attorney, alleging that the “large apple sign “is the property of Simul and is “not your client’s intellectual property. “The letter goes on to refer to small “The Apple Bite “signs which “can be removed “or, where they are painted on a wall, should be painted over by Daniels.
- [30] July 2021 – the large sign is refurbished by Simul.
- [31] 21 July 2021 – Apple is registered. Its director is Peter Christoforakis, the son of Pavlos and Catherine Christoforakis.

- [32] 30 August 2021 – Letter of demand from the respondents’ attorney to the appellants’ attorney.
- [33] 6 September 2021 – Letter from appellants’ attorney to respondents’ attorney, alleging that the respondents do not have the exclusive right to the Apple Bite name. The letter records that the respondents operate an “Apple Bite Express “. It is alleged that the appellants intend to name their business “The Apple Bite.”
- [34] 11 September 2021 – Apple opens “The Apple Bite “on the property.
- [35] October 2021 – Apple starts an extensive advertising campaign, including the setting up of a website www.theapplebite.co.za and advertising on Facebook and other social media platforms. Food delivery apps are used. The old Apple Bite sign features prominently on all advertising and on menus.
- [36] October 2021 – the respondents launch their application in the court below.

The allegations by the parties

- [37] The respondents claim that their customers are confused by the marketing by the appellants. The respondents allege that their turnover has dropped. They say that in modern times physical distance is not as important as it used to be, given that a large part of turnover is ordered through apps or by phone and then delivered to customers.
- [38] The appellants deny these allegations. They say too, that when the business was sold, it was sold as a going concern, including the right to use the name, but only at the property. They expressly deny that the respondents ever acquired the right to use the name at any other place.
- [39] The appellants say that they never objected to the respondents using the name in Germiston, from 2008 onwards, as that business was too far away to be relevant. They allege that the distance from the property to the Germiston site of the respondents is 20 kilometres and that there is no possibility of the appellants taking the respondents’ customers.
- [40] From November 2020, when Alex Jay opened its “Applebite Express “business 1.5 kilometers away from the property, the appellants never challenged Alex Jay. The appellants say that this is so because the name “Apple Bite Express “is markedly different to their own business of a roadhouse. They say that Alex Jay never acquired the exclusive right to the name “Applebite.”

Findings

- [41] The agreements referred to above clearly have the sensible and business meaning that the business sold included the name in the goodwill. The only real issue is whether or not the name was to remain at the property or could be moved to different trading premises.

- [42] Ultimately, the right of the appellants, as recorded in the lease agreements, to retain the large sign at 95 Van Riebeeck Avenue cannot be read so as to render hollow the right to the name as included in the goodwill, ultimately sold by the appellants to the respondents.
- [43] The critical issue derives not from ownership but from action calculated to deceive.
- [44] The respondent came by the right to use the name 'apple bite' by purchase of a business as a going concern, which merx included the goodwill. That the goodwill included the right to the use of the name of the business, is a conclusion which is axiomatic. It exercised that right not only at the location where the acquired business was situated but also elsewhere without demur. What are the rights inter se between the appellants and the respondents, as inherited from their predecessors? This case implicates no persons other than these.
- [45] To test this inter-relationship, we offer the following scenario. Suppose that at the conclusion of the lease over the property at 95 van Riebeeck Avenue, the respondents instead of renewing the lease, concluded a fresh lease next door or across the street? Is it conceivable that the appellants could have started up a business in the same trade, which is what it has done, styled 'applebite'? Moreover, could the appellants have legitimately marketed its 'applebite' business as the original 'applebite'? The answer is unequivocally no. The fact that the respondents are, in fact, trading 1.5 kms away does not upset this

analysis.

- [46] In our view, the conscious and deliberate effort to piggy-back on the reputation of the business which had been sold by the appellants to the respondents is well established. The appellants have passed off their business as being that with which an existing customer base was already acquainted by using an established brand and did so intentionally to solicit that body of customers.
- [47] Lastly, it was argued, at least in written heads of argument, for Apple and Simul that because the 19 June 2008 agreement of sale from Revelas to Goncalves contained the suspensive condition that the relevant company had to be formed within 30 days, namely by 18 July 2008 whereas in fact the close corporation was formed on 7 August 2008, the sale never took effect and that no rights to the business transferred from Revelas to Goncalves. In our view, there is nothing to this argument. All concerned acted as if the relevant party, Alex Jay had been incorporated within thirty days. The extra three weeks is not relevant to the matter. The clause is for the benefit of Goncalves who by their conduct clearly waived the right to rely on non-fulfilment of the suspensive condition.

[48] It was Goncalves, not Alex Jay who bought the business from Revelas on 19 June 2008. There is an allegation by Goncalves in the founding affidavit that from 7 August 2008, when Alex Jay was incorporated “all trading and business related activities including the opening of bank accounts now took place under the auspices of AlexJay Catering CC t/a AppleBite Roadhouse and Pizzeria.” In our view, what tacitly occurred was that the rights of Goncalves were ceded to Alex Jay, the bare denial by the appellants

notwithstanding. What bolsters this finding is that in the 10 April 2015 agreement of the sale of business it is Alex Jay, not Goncalves which sells the business to Daniels.

[49] The import of this is that on 10 April 2015 Alex Jay divested itself of the right to goodwill in the business including the name and logo. Daniels acquired the right sought to be enforced in the application.

[50] According to the founding affidavit, when Daniels paid off the purchase price of the business which he had bought on 10 April 2015 from Alex Jay, Daniels acquired sole membership in Alex Jay. In a confirmatory affidavit to the founding affidavit Daniels says that he is the sole member of Alex Jay. A Windeed Company search document, or part thereof and dated 2 September 2021 and annexed to the founding affidavit indicates that Daniels is currently the sole member of Alex Jay. Daniels clearly supported the application from inception and was of the view, understandably, that the right to claim vested in Alex Jay, rather than in himself personally. We draw no inference against Alex Jay that it has no case on the ground that Daniels had the enforceable right when the application was launched. Daniels is not a lawyer. From a common sense and business like perspective, Daniels, possibly as late as the launching of the application, tacitly ceded his claim to Alex Jay.

ORDER

1. The appeal is dismissed with costs.

R SUTHERLAND

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

I agree

GC WRIGHT

JUDGE OF THE HIGH COURT

R STRYDOM J

Heard on: 15 November 2023 Delivered on: 12 January 2024 Appearances: For the Appellants: Adv David Watson 071 260 2390 watson@group621.co.za Instructed by: TWB – Tugendhaft Wapnick Banchetti and Partners zoe@twb.co.za / johncarlos@twb.co.za 011 291 5110 For the Respondents: Adv A P Allison abeallison@gmail.com 083 879 2288 Instructed by: Tshepo Mohapi Attorneys tshepo@tshepomohapilaw.co.za 011 483 1527/8

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