

SOUTH AFRICA / JUDGMENT

Oasis Water (Pty) Ltd and Another v Bester and Another (UM70/2023) [2023] ZANWHC 53 (16 May 2023) [2023] ZANWHC 53

COURT

North West High Court, Mafikeng

BEFORE

Petersen

CASE / FILE NUMBER

UM70/2023

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Policy

IN THE HIGH COURT OF

SOUTH AFRICA

NORTH WEST DIVISION,

MAHIKENG

CASE NO: UM70/2023

Reportable: NO

Circulate to Judges:

NO

Circulate to

Magistrates: NO

Circulate to Regional

Magistrates: NO

In the matter between: OASIS
WATER (PTY) LTD
FIRST APPLICANT
OASIS
WATER ASSET COMPANY (PTY) LTD
SECOND APPLICANT
AND
WYNAND
ALBERTUS BESTER
FIRST
RESPONDENT
JANET
BESTER
SECOND RESPONDENT

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via e-mail. The date and time for hand-down is deemed to 14h00PM on 16 May 2023.

ORDER

(i)
Prayers 2.1,
2.2, 2.5 and 2.6 of the notice of motion are granted.

(ii)
The remaining
prayers are dismissed.

(iii)
Each party to
bear its own costs.

JUDGMENT

PETERSEN J

Introduction

[1] Water is a compound with the chemical formula H₂O. It is transparent, tasteless, odourless, almost colourless and the main constituent of Earth's hydrosphere and the fluids of all known living organisms (in which it acts as a solvent). Without water there can be no life. The chemical formula of H₂O, denotes that each of its molecules contains one oxygen and two hydrogen atoms, connected by covalent bonds. In this application predicated on a dispute over water it is the case of the applicants that the two parties acting as hydrogen atoms require oxygen to sustain a covalent or symbiotic bond in the franchise agreements they concluded. The applicants assert their claim, inter alia, on having perfected a unique, better and refreshing form of water, which distinguishes it from all other purified water.

[2] The applicants have launched this application in two parts. Part A is before this Court, brought on an urgent basis. In Part A, the applicants seek interim interdictory relief (which the respondents contend is in fact final interdictory relief) pending the final determination of Part B in the following terms:

“1. ...

2. An interim order, pending the final outcome of the relief sought in PART B of the notice of motion, in the alternative pending the final outcome of the relief sought in PART B of the notice of motion by arbitration proceedings:

2.1 That the respondents forthwith return to the First Applicant any and all manuals and other printed matter relating to the Respondents franchise operation, including:

2.1.1 manuals, labels or printed material containing the First Applicant’s names or trademarks;

2.1.2 printed or electronic matter relating to the franchise operation which was previously conducted by the First Respondents under the name and style of Oasis Water;

2.1.3 client lists, or data lists.

2.2 That the Respondents forthwith remove and return all “Oasis” signage to the First Applicant.

2.3 That the Respondents forthwith remove and return the “Oasis” water purifying system to the First Applicant, consisting of the following:

2.3.1 the reverse osmosis purification plant;

2.3.2 the filling/dispensing tables;

2.3.3 mobile ozonation unit or ozone units;

2.3.4 any article bearing trademarks.

2.4 That the Respondents forthwith cease to use or exploit the First Applicant’s “Oasis” business system and any intellectual property owned by the First Applicant.

2.5 That the Respondents forthwith execute all such documents and do all such things as are necessary to remove the name of the Respondents from any register relating to business names and trademarks belonging to the First Applicant.

2.6 That the Respondents forthwith change the appearance of the Respondents’ premises located at the following places to prevent the premises being mistaken in appearance or signage by members of the public for an “Oasis” franchised business:

2.6.1 Oasis Water Vryburg Industrial;

2.6.2 Oasis Water Hartswater;

2.6.3 Oasis Water Ganyesa;

2.6.4 Oasis Water Vryburg Taung;

2.6.5 Oasis Express Wierda Supermarket;

2.6.6 Oasis Express Wolmaransstad;

2.6.7 Oasis Express OK Foods Bloemhof;

2.6.8 Oasis Express Shell Garage Oase Motors.

2.7 That the Respondents forthwith hand control of the Respondents' franchised businesses to the First Applicant.

2.8 That the Respondents be interdicted and restrained from use of the First Applicant's business system and intellectual property, including the First Applicant's know-how, copyright, goodwill, trade dress, trademarks, trade secrets, as well as confidential information.

2.9 That the Respondents be interdicted and restrained from using or displaying the Applicant's water purification and bottling systems and equipment directly or indirectly as part of any business enterprise.

2.10 That the Respondents be interdicted and restrained from:

2.10.1 using and divulging any of the First Applicants confidential information, trade secrets or business model.

2.10.2 passing off the Respondents' products and business to be that of the Applicants;

2.10.3 using or displaying the First Applicant's trademarks or any printed material or poster which contains the First Applicant's name, images of its products, copyrighted material or slogans;

2.10.4 making any representation or statement to any third party or member of the public to the effect that:

- a) the Respondents have merely made a name change from that of the Applicant;
- b) the products sold by the Respondents are the same or similar as those of the Applicants;
- c) the business and other practices used by the Respondents is the same as those used by the First Applicant or any of its respondents;
- d) the Respondents are entitled to sell, market and/or produce any of the Applicants' products and business systems;
- e) the Respondents are in any way connected to or entitled to act on behalf of the First Applicant;

2.11 That the Respondents be interdicted and restrained from selling any of the Applicant's products.

2.12 That the Respondents be interdicted and restrained from using and selling any bottled water using the same or similar bottle or bottle cap used by the First Applicant for its products.

2.13 That the Respondents be interdicted and restrained from displaying any products together with any sign or label which creates the impressions that the Respondents' products are those of the First Applicant or that of the Respondents are in any way associated with the First Applicant.

2.14 The Respondents be interdicted and restrained from using the Manzi Water Exchange Programme.

3. An order that the Respondents may not without the First Applicant's prior written consent engage, operate, acquire, construct, or have any interest whatsoever in any similar operation as that of the First

Applicant's business system, directly or indirectly, actively or passively, at any time:

3.1 within 12(twelve) months after the date of the granting of this order within the marketing area specified in the franchise agreements, being:

3.1.1 Oasis Water Vryburg Industrial;

3.1.2 Oasis Water Hartswater;

3.1.3 Oasis Water Ganyesa;

3.1.4 Oasis Water Vryburg Taung;

3.1.5 Oasis Express Wierda Supermarket;

3.1.6 Oasis Express Wolmaransstad;

3.1.7 Oasis Express OK Foods Bloemhof; and

3.1.8 Oasis Express Shell Garage Oase Motors.

3.2 within 6(six) months after the date of the granting of this order within a radius of ten kilometres in which any of the First Respondent has been trading;

3.3 within 3(three) months after the date of the granting of this order anywhere within the Republic of South Africa as constituted on 24 April 1994.

4. Costs to be paid by the Respondents jointly and severally the one paying the other to be absolved, on the scale as between attorney and client including the costs consequent on the employment of two counsel where so employed.
5. Further and/or alternative relief."

The parties

- [3] The first applicant is a franchisor trading under the name Oasis Water (Pty) Ltd (“Oasis Water”). Oasis Water assert that it was established around December 2003, with its first water outlet having commenced business on 1 March 2004. It has been in business for just over 18 years. Oasis Water lays claim to being the pioneer of the formal refill water business in South Africa and on the African continent and one of the first (if not the first) water purifying processing companies in South Africa. The franchise model of Oasis Water commenced in 2006 and is recognised by the Franchise Association of South Africa (“FASA”). The second applicant is the developer and author of the Oasis Water Exchange Programme.
- [4] The first and second respondents (“the respondents”) are husband and wife businesspersons, who formerly traded as franchisees of Oasis Water under the names and styles alluded to in the notice of motion.

The relationship between Oasis and the respondents

- [5] Oasis Water and the respondents concluded two (2) written franchise agreements on 2 August 2019 and 30 June 2022 in respect of Vryburg and surrounding areas and Wolmaransstad and surrounding areas, respectively.
- [6] Oasis Water according to the Preamble to the Franchise Agreement conducts business as a supplier of purified water and related products and water and related products. The business is organised as franchised business units under the name and style of ‘Oasis Water’. Oasis Water asserts a considerable presence in the market in which it has developed a strong brand of purified water and related products with specialist knowledge of water and related products and considerable know-how and expertise.
- [7] The parties entered into the franchise agreements to grant the respondents rights to use Oasis Water’s intellectual property to conduct a business on the model or business system developed by Oasis Water. As part of the franchise agreements the respondents acknowledged that Oasis Water had developed a proven business system in terms of which they were required to operate. Importantly, the respondents were advised to seek independent legal advice before signing the agreement for them to understand the contents of the agreement.
- [8] The definitions in the franchise agreements provide context to phrases employed in the agreement which impact on the present application. Central to the franchise agreements are the phrases business system, competing business, copyright, franchised business, goodwill, intellectual property, know-how, marketing area, operational procedures and training manual, premises, products, trade dress, trade marks and trade secrets.

The termination of the franchise agreements

[9] The franchise agreements were terminated in February 2023. Whilst a dispute exists on the exact date in February 2023, it is irrelevant to the consideration of this application. It being common cause that the franchise agreements were terminated, the post-termination rights of the parties and in particular those of Oasis Water comes to the fore. It is these rights and the alleged violation thereof by the respondents' that is central to the determination of Part A of

the application.

[10] Oasis Water relies on its post-termination rights as set out in clause 20 of the Oasis Water Vryburg Franchise Agreement and clause 30 of the Oasis Water Wolmaransstad Franchise Agreement. Clauses 20.3 to 20.5 of the Oasis Water Vryburg Franchise Agreement in particular provide as follows:

"20.3 Upon termination of this agreement for any reason whatsoever:

20.3.1 all rights which may have vested in the franchisee in terms of this agreement will immediately and automatically revert to the franchisor and/or the franchisor's nominee.

20.3.2 the franchisee will return immediately to the franchisor any and all manuals and other printed matter relating to the franchise operation, remove and return all signage to the franchisor, as well as return the Oasis water purifying system, consisting on the following:

20.3.2.1 the reverse osmosis purification plant;

20.3.2.2 the filling/dispensing tablets;

20.3.2.3 any article bearing Trade marks and will immediately cease to use or exploit the Business system and any Intellectual property owned by the franchisor;

20.3.3 the franchisee shall execute all such documents and do all such things as are necessary to remove the name of the franchisee from any register relating to business names and Trade marks belonging to the franchisor and for this purpose, the franchisee hereby appoints any authorised director or other authorised officer of the franchisor as the franchisee's lawful agent to execute in the name of the franchisee, all such documents and do all such things as are necessary to give effect to the foregoing;

20.3.4 to protect the Intellectual property the franchisee shall upon termination of this agreement, change the appearance of the Premises to the extent necessary to prevent the Premises being mistaken in appearance or signage by members of the public for an "Oasis" Franchised business.

20.3.5 the franchisee shall not be entitled to receive any rebate or refund of any money paid pursuant to this agreement;

20.3.6 the franchisee shall not be relieved of its obligations to pay any monies due to the franchisor pursuant to this agreement;

20.3.7 Immediately upon receipt of a notice of cancellation from the franchisor or termination by whatever other means, despite either party disputing termination for whatever reason, the franchisor shall be entitled to immediately take control of the Franchised business until a dispute (if any) is resolved by a competent authority in terms hereof on the same terms and conditions as would apply in terms of Clause

15. If the franchisee refuses access and handing over of control to the franchisor, both parties hereby consent to the fact that the franchisor can apply on an urgent basis to any competent court for such interim relief and both parties agree to the granting thereof;

20.3.8 in addition to those rights referred to or contained herein, the franchisor shall retain all such other legal remedies and rights as may be granted to it in law including the right to claim damages.

20.4 If due to the franchisee breaching this agreement or failing to comply with any lawful directive or instruction of the franchisor, the franchisor employs an attorney to bring about compliance or otherwise to protect its rights hereunder, then the franchisee shall be liable to refund the legal costs as between attorney and own client including cost of counsel incurred by the franchisor, whether litigation be commenced or not.

20.5 The franchisor will have the right, at its election and in addition to all other remedies, to obtain injunctive relief to enforce the foregoing provisions.”

- [11] Clauses 30.5 to 30.9 and 30.12 of the Oasis Water Wolmaransstad Franchise Agreement in addition provides that:

“30.5 In the event of termination of this agreement for whatever reason, the Franchisee will not dispose of any equipment, assets or item without prior written consent of the Franchisor and such consent may be given on such conditions as the Franchisor may deem fit.

30.6 Notwithstanding the provisions in clause 30.5 above, the Franchisor shall have the option, upon the termination of this agreement, for whatever reason, to acquire all or certain of the equipment, assets, items and accessories and products of the Franchisee on the written notice to the franchisee, at the market related price. The Auditor shall on request appoint an independent experienced valuator to determine a market related price with equipment, assets and other items, the Franchisor wishes to acquire. The Franchisor shall acquire the relevant equipment, items and assets and written notice setting out the specific equipment, items and assets it intends to acquire, at the price is determined by the appointed valuator, which shall then be binding on the Franchisee. The Franchisor shall be obliged to pay the Franchisee for such equipment, items and assets within 20 days thereof.

30.7 The franchisor shall be entitled to impose a fine not exceeding the amount reflected in Annexure A, Item 9, in the event of any breach of this agreement including noncompliance with the operational procedures and training manual.

30.8 The franchisor shall also be entitled, should it so wish, on written notice to the Franchisee, to procure from the Franchisee immediately with full details and HR files and records of any such employees of the Franchised business.

30.9 The franchisor shall also be entitled, should you so wish, to exercise its rights to take over the premises of the Franchised business, as set out in clause 12.14, treated so wish.

...

30.12 Upon termination of this agreement for whatever reason, the equipment, fittings and accessories of the Franchisee and any retail outlets, can only be sold to an existing Franchisee, and approved buyer of the Franchised business will be sold to the Franchisor, at its then fair market value, being the price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between independent market participants at the measurement date (provided it is in good working or placed in good working order at the cost of franchisee), or at the option and upon inspection from the Franchisor. In the event that an existing Franchisee of the Franchisor, and approved buyer of the Franchised business or the Franchisor not be interested to apply the equipment, footing and accessories, equipment, fittings and accessories may be sold to a third party after the Franchisor has given written permission thereto and only after de-branding of the equipment fittings and accessories to the satisfaction of the Franchisor has taken place. Consent will not be unreasonably withheld.”

The respondents alleged offensive conduct following termination of the franchise agreements

- [12] The respondents alleged offensive conduct post termination of the franchise agreement are essentially summarised by Oasis Water as constituting passing off of the Oasis brand in order to springboard a competing business under the name and style of “Manzi Water”.
- [13] The respondents are alleged to have unlawfully retained the use of the business system and intellectual property of Oasis Water, including the second applicant’s “Oasis Water Exchange Programme” and intellectual property by dishonest means for the purpose of using it to Oasis Water’s detriment and the unfair advantage of the respondents.
- [14] The respondents post termination of the franchise agreement, provide an identical service and product to the same client base from the same premises as it did as an Oasis Water franchisee, except for the fact that it now operates under the “Manzi” brand.
- [15] The respondents in allegedly refusing to comply with the post-termination rights of Oasis Waters are said to be in breach of the franchise agreement and are unlawfully competing with Oasis Water in that they in particular are alleged to be using:
 - (i) the exact same premises;
 - (ii) the exact same shoplifting and shop layout;
 - (iii) the exact same combination of filters;

- (iv) the exact same supplier of bottles;
- (v) the exact same shape of bottle, containing some of the registered trademarks of Oasis Water;
- (vi) the exact same business model and business strategies;
- (vii) the exact same client base;
- (viii) an almost identical copied version of the second applicant's Oasis Water Exchange concept;
- (ix) labelling on products;
- (x) labelling in shops;
- (xi) labelling on shop fronts;
- (xii) the continuous training that was provided the Besters' and its officials and/or employees.

Urgency

[16] Urgency in this application is predicated on the post-termination provisions of the franchise agreements and the restraint of trade provisions. Rule 6(12) requires of an applicant to "... set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course."

[17] The sentiments expressed in *Singh v Adam*

(2006) 27 ILJ 385 (LC) are apposite in the context of the present application:

"...cases involving restraint clauses are often by their very nature urgent. In the latter respect, were urgent and interim relief to be barred the benefit that the restart clause accords to the applicant, in view of its limited duration, would be diminished and possibly rendered nugatory. Even accepting that there may have been a measure of prevarication on the part of the applicant, such is outweighed by the applicant's legitimate need speedily to protect any interest she may have."

[18] The post franchise provisions and the restraint of trade are clauses that are to a great extent inextricably linked. It is common cause that the respondents have continued to conduct business in the supply of purified water, post-cancellation of the franchise agreements, albeit under a different trade name. If the consideration of what Oasis Water terms interim relief as were not considered against the backdrop of the post-cancellation clauses and restraint of trade clauses and the merits or demerits thereof, it may diminish and possibly render nugatory what the said provisions seek to prevent.

[19] I am accordingly satisfied that urgency has been demonstrated as envisaged by Rule 6(12).

The evidence

Oasis Water

- [20] According to Oasis Water, the genesis of the dispute between Oasis Water and the respondents who form part of a broader group of respondents under the Oasis Water banner, is a written letter directed by Smit & Van Wyk Attorneys to the Attorneys of Oasis Water in which they purported to cancel the franchise agreements with Oasis Water. Oasis Water regarded the respondents purported cancellation as a repudiation of the franchise agreements which it accepted and as a result terminated the franchise agreements on 23 February 2023.
- [21] On the version of Oasis Water, it got wind of rumours after receipt of the letter from Smit & Van Wyk of 17 February 2023, that the respondents together with certain other respondents were in the process of conducting a coup. The coup would include inter alia the removal of Oasis identifying signage from their stores, product and equipment and replacing same with the “Manzi Water” mark; utilising the same shop layout and business system approved for Oasis Water respondents, as well as the Oasis Water’s

confidential information, bottles and suppliers and launching a product called “Manzi X-Change product” which is a carbon copy of the idea behind Oasis Water’s X-change product.

- [22] Oasis Water further, on 24 February 2023, came to be in possession of WhatsApp messages exchanged between members of the Manzi group and existing clients of Oasis Water who utilised the X-change programme. The Manzi group in these messages sought to induce the said clients to cancel their agreements with Oasis Water. The content of such messages from a certain Muller (a member of the Manzi Group) portrays as introduction of the Manzi Group, that it provides the “finest quality, purified and ozonated drinking water” and that its dispenser machines have features in addition to current machines

(seemingly in reference to Oasis machines).

- [23] In reply to a certain Venter (an existing client of Oasis Water), Muller indicated that if he wanted to move his custom to Manzi, he was required to follow certain steps, which included completing the “Change your Manzi” contract, confirming the collection or delivery date of his new Midea machine; and ensuring his administration with his current service provider (which could only be Oasis) was dealt with. On a question by Venter what would happen to his existing contract with Oasis Water if he decided to move to Manzi Water, Muller replied that Manzi would not compel anyone to cancel their existing agreements, that the respondents had “broken away from Oasis water” to start a new brand (i.e. Manzi) with “the same quality service and quality to which their clients had become accustomed to being delivered”. And that if he did decide to move, he had to provide proof that he cancelled with Oasis.
- [24] During the period 1 to 10 March 2023 representatives of Oasis Water, with permission of the respondents, conducted inspections at eight of their outlets. These inspections revealed, inter alia, that the respondents were continuing to use the Oasis purification system; the same Oasis refilling tables that they used when they were a franchisee; had simply covered the Oasis logo with a Manzi logo; the respondents continued to display the Oasis trademark

either alone or in conjunction with the Manzi trademark and in some instances, were still selling Oasis products to the public as if they are still franchisees. It was further evident that the layout and fittings of the shops were exactly the same. Overall, the inspections revealed that the respondents were conducting the exact same business that they conducted when they were a franchisee.

- [25] According to Oasis Water, it further came to its attention that the respondents were approaching its suppliers of fruit juice concentrates to enquire whether the suppliers would supply them at the same prices they supply the first applicant; that the respondents were using the same employees employed when they were franchisees of Oasis Water, and who were trained by Oasis Water; and that the respondents employees were representing to clients that the business was the same as that of Oasis, save for the fact that they had undergone a name change.

The respondents

- [26] The respondents oppose the relief sought by Oasis Water on a number basis. The first basis being an alleged anti-competitive acquisition of a controlling interest in GoZone Water (Pty) Ltd, a direct competitor in the purified water business of Oasis Water in February
2022. GoZone is said to have approximately 114 GoZone stores in South Africa. GoZone also does business based on the franchise model.
- [27] Many franchisees, including the respondents, are said to have GoZone stores in the “territories” allocated to them in terms of the franchise agreements. The acquisition of GoZone effectively means that the Oasis Franchisor (through Oasis HoldCo) could (indirectly) get double the royalties. The Oasis Franchisor could also circumvent the terms of the franchise agreement and reduce the “territories” of franchisees by introducing one of their GoZone franchisees to the territory, as opposed to following the consultation process prescribed when a new Oasis store was opened.
- [28] This conflict in a franchise relationship opines the respondents, impacts on the symbiotic relationship it had with Oasis Water, where the health of the businesses of franchisees is important for the franchisor, whose royalties are directly affected thereby. And where franchisors, in symbiotic franchise systems, have a vested interest in the success of their franchisees. The respondents maintain that they entered into the franchise agreements with the expectation that it would be mutually beneficial and symbiotic.
- [29] The GoZone issue is said to have been discussed at various meetings and “Franchise Representative Meetings” (FRC meetings) around mid 2022, where the franchisees were assured by, amongst others, Alet di Polo (Oasis Franchisor’s COO at the time) that the GoZone and Oasis businesses would be separate and that information would not be shared.

- [30] At the National Franchise Congress on 24 January 2023, facilitated by Mr Johan Buys (“Buys”), a director of Oasis HoIdCo (and of GoZone Holdings (Pty) Limited) and the sole director of one of its shareholders (SLA Capital Proprietary Limited), SLA Capital Proprietary Limited and Fledge Capital jointly acquired 31.44% in Oasis HoIdCa in 2020 (“HoldCo Transactions”), and Buys is therefore one of the key drivers (if not the key driver) of Oasis Franchisor’s operations, strategy and vision post the HoldCo transaction.
- [31] At the said congress, Buys is alleged to have encouraged the franchisees to participate in the “landgrab” of GoZone stores (and other water stores) in their areas. This was explained by Buys’ to mean that franchisees were required to buy out the competition to become dominant in the market. Buys further allegedly made it clear that if franchisees could not afford to buy out the competition in their area, Oasis Franchisor or Oasis HoldCo would do so, resulting in competition between franchisees and Oasis Franchisor in the same territories. The respondents annexed a picture of the slides presented by Buys at the conference in confirmation of this allegation. Buys further specifically represented to franchisees that each franchisee with a GoZone in its area had the “option” to buy the GoZone. Post acquisition, the franchisee would be required to rebrand it to an Oasis. GoZone owners are said not to have consented to, nor were they aware of, this purported option afforded to Oasis franchisees. Franchisees interested in exercising the option were given three (3) days to approach the Oasis Franchisor in view of exercising it.
- [32] Franchisees were further told that they could obtain financial assistance from the Oasis Franchisor to assist it in its “landgrab”. In exchange, the Oasis Franchisor or Oasis HoldCo would obtain shares in the franchisee. The respondents acknowledge that there have always been “Oasis Franchisor-owned stores”, but these stores were in the minority. The proposed funding model to enable franchisees to comply with the instruction to partake in the “landgrabs” means the respondents would have resulted in an almost instantaneous shift to the opposite. The model says the respondents no longer represents a symbiotic franchise relationship at arm’s length with franchise business as stores, but a group structure whereby the Oasis Franchisor would obtain universal control over the majority of franchisees, reducing the business to “branches”
- as opposed to “franchises”.
- [33] According to the respondents, the unlawful dilution of their territory and disregard for the terms of the franchise agreements precipitated their decision to terminate the franchise agreements.
- [34] The second basis on which the respondents oppose the relief sought is that in terms of the agreements, franchisees contributed to a “marketing fund” on a monthly basis. At the time of termination, franchisees sold for 4c per litre of water, they were levied a marketing fund fee, which was a substantial amount of money, considering that the royalties (at the time of termination) was 12c per litre. The purpose of such marketing funds, was the funds that could be spent for and how franchisors should account to franchisees and are regulated by

the Consumer Protection Act 68 of 2008 (“CPA”) and its Regulations. The respondents contend that the spirit of a marketing fund is to fund marketing and not intended to supplement

royalties. Franchisors are further said to be restricted as to how they spend such funds.

- [35] Some of the franchisees have since October 2022, requested the management accounts, financial statements and other documents relating to the marketing fund to which they were statutorily entitled. Oasis Water is further said to have had several obligations which it failed to comply with, which included, amongst others, that it was obliged to provide franchisees with: (i) financial statements of marketing fund; (ii) a financial certificate by a registered auditor or accounting officer, confirming that the marketing funds account has been audited and that the statements, to the best of his or her knowledge, provide a true reflection of the marketing fund; (iii) three-monthly financial management accounts. No response was received to the request until 1 December 2022, when finally some documents, which were not adequate, were provided.
- [36] In terms of the CPA Regulations and clause 7.8.7.3 of the Vryburg Franchise Agreement, the Oasis Franchisor or associated businesses shall not enjoy any direct or indirect benefit from the marketing fund. From the pie chart, more than R274,000 was spent on email licences and software for franchisees. In clause 7.21 of the Vryburg Franchise Agreement, the Oasis Franchisor is obliged to provide franchisees with email addresses with the correct domain. The Oasis Franchisor spent approximately R1,400,000 on “rebranding”. Curiously, none of the shops were rebranded. Utilising marketing fund money to fund the above, resulted in Oasis Water obtaining an indirect benefit from the fund by diminishing its own financial burden in fulfilling its contractual obligations. At the franchise congress, Buys failed to come clean on the marketing fund and relegated it to the past, urging franchisees to look to the future.
- [37] After the termination of the franchise agreements, the respondent received correspondence from the attorneys of Oasis Water in terms of which the management accounts were provided. The documents indicated that the “Brand Ambassador” award was funded from the marketing fund. The award entailed a Mauritian holiday for the winner. This award was an incentive award rolled out by the Oasis Water for the franchisee that best performed. Ironically, the award went not to a “true franchisee”, but to Sean Collett, who now manages the Oasis Franchisor owned stores. The Oasis Franchisor owns 80% of Sean Collett’s businesses. “Laerskool Die Krans” was sponsored by the marketing fund in the amount of R5,946 in the 2017/2018 financial year. This is relevant as Oosthuizen (managing director of the Oasis Franchisor) had children in that school at the time. In both of these examples, the Oasis Franchisor or an associate of it derived a benefit.
- [38] To date, no management accounts have been provided for the period of May 2022 to August 2022 and no financial statements for the marketing fund have been provided, which the respondents suspect was used by Oasis Water to fund the business of Oasis Assets,

specifically the purchase of its water dispensers. No legally compliant certificate from an auditor was provided in respect of any of the past five (5) years, wherein the auditor confirmed that the marketing fund statements provide a true and accurate reflection of the marketing fund expenditure.

- [39] The third basis on which the respondents oppose the relief sought is that, after a group of franchisees organized themselves under the name ISAFA with the intention of negotiating with Oasis Water and meetings held pursuant thereto, the relationship between the said franchisees and Oasis Water proverbially soured. At a meeting on or about 25 November 2022, a group from ISAFA had a meeting with Buys to escalate their issues in relation to, amongst others, the marketing fund and GoZone. In attendance from ISAFA's side was van den Berg, Wynand Johannes Nel, Jacob Maree, Van Schalkwyk, Belinda and Pasquale Frese, Frank Stokell and Challis. The main representatives/spokesmen of ISAFA was Challis and Stokell.
- [40] At that meeting Buys informed the ISAFA delegation that the franchise model no longer suited the Oasis Water and that it would eliminate the franchise model like "Woolworths and BMW South Africa" had done. Within two (2) weeks of the said meeting the franchise agreements of Stokell and Challis' franchise agreements were terminated, seemingly to keep the rest of the ISAFA group in line. To ISAFA members, the message was clear that they should not question Oasis Water. At the national franchise congress, Buys indicated that "ISAFA" does not exist and further invited unhappy franchisees to defranchise by concluding an exit agreement.
- [41] Van den Berg was allegedly verbally advised by the Oasis Franchisor, through Oosthuizen, the managing director of the Oasis Franchisor on 27 January 2023, that the Oasis group intends to list on the JSE. Van den Berg was further informed that his business would "triple in value" upon the Oasis group being listed. The respondents contend that they fail to see how franchisees would benefit from such a listing as it would be the Oasis Franchisor or its shareholder,

Oasis HoldCo and its shareholders who would benefit from such a listing. According to the respondents this does explain why Oasis

Water was so eager to pursue "landgrabs" and unsustainable growth, as it would build a bulky prospectus in the hopes of its shareholders "cashing in".

The law applicable to franchises

- [42] In *PE Pack 4100 CC v Sanders and Others* (PA 08/10) [2013] ZALAC 1; [2013] 4 BLLR 348 (LAC); (2013) 34 ILJ 1477 (LAC) (22 January 2013), Davis J considered the nature of franchises as a business as follows:

"[16] In Longhorn Group (Pty) Ltd v The Fedics Group (Pty) Ltd and Another 1995

- (3) SA (WLD) 836 at 843B Zulman J (as he then was) cited with an approval the following

passage:

‘It is important for this honourable court to appreciate that in terms of the franchise agreement the first respondent is not in the position of an independent operator. It has to follow detailed instructions as laid down in the franchise agreement and to all intents and purposes operates as a servant or employee of the applicant in regard to the conduct of the franchise operation.’

[17] This description is relevant to the present proceedings. When second respondent terminated the franchise agreements with third and fourth respondents, it did so in terms of contractual entitlements which flowed from the nature of the franchise agreement...

[21] Great care must be taken before applying the ‘outsourcing’ jurisprudence to a franchise operation. The argument presented to this Court did not take sufficient account of the specific relationships generated by a franchise agreement. Tanya Wokers ‘The franchise relationship and the problem of encroachment: *Silent Pond Investments CC v Woolworths (Pty) Ltd*’ (2008) 20 South African Mercantile Law Journal 402 at 404) captures the point thus:

‘Franchises are not free to develop their businesses as they see fit. Because they are buying into the franchisors’ business model, franchisors exercise a great deal of control over the way in which their franchisees do business. This is a very unusual business relationship because, although franchisees tend to own the assets of their businesses, someone else is entitled to tell them how to function. This leads to a relationship that is ‘highly intimate and interdependent’ (see Gillian K Hadfield “Problematic Relations: Franchising and the Law of Incomplete Contracts’

(1990) 42 Stanford LR 877 at 963). It is a primary role of franchisors to protect the interests of their networks and to develop their brands. Franchisors therefore have the right to ensure that they are able to protect those interests through the terms of their agreements with franchisees.

Franchisors usually dictate the location of respondents’ businesses, how the respondents are to advertise or what selling

methods they must adopt. The appearance of their premises, what products can be bought and sold, book-keeping methods, hours of business, qualification and appearance of staff, prices and so on.’

[43] The facts of the present application are to a great extent analogous to those presented in *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff and Another* 2009 (3) SA 78 (C). In that matter, the application, initially predicated on both the trademark and restraint of trade provisions in a franchise agreement was persisted in ultimately, only on the restraint of trade provisions. In drawing the analogy I employ the words of Davis J, albeit not by direct quotation.

- [44] In Mozart Ice Cream Franchises, it was submitted on behalf of the applicant that the protectable interest which necessitated the enforcement of the restraint of trade included; the applicant's reputation which had been built up over a period of 25 years during which it developed and perfected the creation by virtue of advanced methods, both in regards to ingredients and processing of unique ice-cream flavours and quality; its unique 'rand per kg' system in which the ice-cream is weighed and which, in turn, maximises the way the franchisee can control the quantity of ice-cream sold and therefore maximise profits and unique serving spoons which were designed by the applicant with the specific intention to ensure that the correct shape of ice-cream is presented to the customer in a cone.
- [45] It was further submitted on behalf of Mozart Ice-Cream, that the respondents in order to commence their own businesses relied upon the established Mozart customers, or walk-in customers, the familiar locality of the business, the fact that customers associate the business at the Bayside and Goodwood premises with the quality product provided by the applicant, and that customer loyalty and customer inertia were associated with purchasing ice-cream from a Mozart outlet at the premises in question.
- [46] The contention was then made on behalf of Mozart Ice-Cream that the respondents had failed to advance any evidence to establish a basis from which it could be found by the court that the enforcement of the restraint was unreasonable, and that it was not unenforceable and that there was a protectable interest in terms of the restraint of trade, which was reasonable and enforceable, and that the respondent, should be held to the bargain they had struck previously.
- [47] The Consumer Protection Act 68 of 2008 ("the CPA") which came into operation on 24 April 2011, has heralded a major change by regulating very strictly, the operation of franchises and in particular the franchisor-franchisee relationship. Respondents are now deemed in terms of the CPA to be consumers with a wide array of consumer rights. It is accordingly apposite to have regard to some of the relevant provisions of the CPA.
- [48] A franchise agreement is defined in the CPA as follows:
- "franchise agreement" means an agreement between two parties, being the franchisor and franchisee, respectively—
- (a) in which, for consideration paid, or to be paid, by the franchisee to the franchisor, the franchisor grants the franchisee the right to carry on business within all or a specific part of the Republic under a system or marketing plan substantially determined or controlled by the franchisor or an associate of the franchisor;
 - (b) under which the operation of the business of the franchisee will be substantially or materially associated with advertising schemes or programmes or one or more trade marks, commercial symbols or logos or any similar marketing, branding, labelling or devices, or any combination of such schemes, programmes or devices, that are conducted, owned, used or licensed by the franchisor or an associate of the franchisor; and

- (c) that governs the business relationship between the franchisor and the franchisee, including the relationship between them with respect to the goods or services to be supplied to the franchisee by or at the direction of the franchisor or an associate of the franchisor;...”

[49] One of the rights specifically emphasized in respect of respondents as consumers, is set out at section 13 of the CPA as follows:

“Consumer’s right to choose

Consumer’s right to select suppliers

13. (1) A supplier must not require, as a condition of offering to supply or supplying any goods or services, or as a condition of entering into an agreement or transaction, that the consumer must—
- (a) purchase any other particular goods or services from that supplier;
 - (b) enter into an additional agreement or transaction with the same supplier or a designated third party; or
 - (c) agree to purchase any particular goods or services from a designated third party, unless the supplier—
 - (i) can show that the convenience to the consumer in having those goods or services bundled outweighs the limitation of the consumer’s right to choice;
 - (ii) can show that the bundling of those goods or services results in economic benefit for consumers; or
 - (i) offers bundled goods or services separately and at individual prices.
- (2) Except to the extent that any other law provides otherwise, in any transaction between a franchisee and franchisor in terms of their franchise agreement, it is a defence to an allegation that the franchisor, as supplier to the franchisee, has contravened this section if any goods or services that the franchisee was required to purchase from or at the direction of the franchisor are reasonably related to the branded products or services that are the subject of the franchise agreement.”

[50] The CPA further provides that restraint of trade clauses forming part of franchise agreements shall be subject to the tenets of section 48(1)(a) of the CPA, which provides that:

“Unfair, unreasonable or unjust contract terms

48.

- (1) A supplier must not—
- (a) offer to supply, supply, or enter into an agreement to supply, any goods or services—
 - (i) at a price that is unfair, unreasonable or unjust; or

- (ii) on terms that are unfair, unreasonable or unjust;
- (b) market any goods or services, or negotiate, enter into or administer a transaction or an agreement for the supply of any goods or services, in a manner that is unfair, unreasonable or unjust; or
- (c) require a consumer, or other person to whom any goods or services are supplied at the direction of the consumer—
 - (i) to waive any rights;
 - (ii) assume any obligation; or
 - (iii) waive any liability of the supplier, on terms that are unfair, unreasonable or unjust, or impose any such terms as a condition of entering into a transaction.
- (2) Without limiting the generality of subsection (1), a transaction or agreement, a term or condition of a transaction or agreement, or a notice to which a term or condition is purportedly subject, is unfair, unreasonable or unjust if—
 - (a) it is excessively one-sided in favour of any person other than the consumer or other person to whom goods or services are to be supplied;
 - (b) the terms of the transaction or agreement are so adverse to the consumer as to be inequitable;
 - (c) the consumer relied upon a false, misleading or deceptive representation, as contemplated in section 41 or a statement of opinion provided by or on behalf of the supplier, to the detriment of the consumer; or
 - (d) the transaction or agreement was subject to a term or condition, or a notice to a consumer contemplated in section 49 (1), and—
 - (i) the term, condition or notice is unfair, unreasonable, unjust or unconscionable; or
 - (ii) the fact, nature and effect of that term, condition or notice was not drawn to the attention of the consumer in a manner that satisfied the applicable requirements of section 49.”

The nature of the relief sought

[51] The relief sought by Oasis Water for what it submits is an interim interdict must be considered carefully against the evidence adduced in support thereof, the applicable law and the formulation of the relief in the notice of motion.

Discussion

[52] The respondents’ case is that Oasis Water repudiated the franchise agreements and is therefore not entitled to invoke the restraint of trade provisions or claim specific performance. Aligned thereto, the respondents take issue with the relief sought at paragraphs 2.3 and 2.7 of the notice of motion as being contrary to section 51(1)(i)(i) of the

CPA in respect of prohibited transactions, agreements, terms or conditions and the remaining relief as being anti-competitive with the restraint of trade provisions essentially being contrary to public policy.

- [53] In dealing with the main opposition relied on by the respondents, it cannot be denied that the parties agreed that the post franchise provisions would apply upon termination of the agreements for any reason whatsoever. The repudiation argument on behalf of the respondents, which Oasis Water disputes, need therefore not detain this Court.
- [54] In respect of the relief sought at prayers 2.1, 2.2, 2.5 and 2.6 of the notice of motion, the relief is similar to that which was sought in *U-Drive Franchise Systems (Pty) Ltd v Drive Yourself (Pty) Ltd and Another 1976 (1) SA 137 (D)*, where a similar clause related to termination of the agreement for any reason appears. In *U-Drive* the following appears from the judgment at page 138E-139C:

“Clause 6 (u) of the agreement provides that

‘the franchisee shall upon termination of this agreement for any reason

- (i) deliver at the franchisee’s sole cost, all records, manuals, drawings, advertising matter, logos and all other material furnished by the franchisor to the franchisee;*
- (ii) take such steps as soon as may be reasonably possible to delete all reference which indicates that the franchisee is a franchise holder of, or is associated with, U Drive Rent-A-Car Company in the telephone directory or any other form of advertising journal or other media;*
- (iii) take steps to remove the name U Drive Rent-A-Car Company from its offices, windows, sign-writing or any other place on the business premises or property of the franchisee;*
- (iv) give up its telephone number and in this connection hereby irrevocably and ill rem suam nominates and appoints the franchisor as its agent and attorney in its name, place and stead, to apply for the transfer of the telephone number from the premises of the franchisee to any other premises in the franchise district as may be selected by the franchisor or to apply for the cancellation of the number;’*

It was common cause before me that the applicant was entitled to confirmation of that part of the rule which sought the enforcement of the provisions of clause 6 (u) and that this should carry with it an order that the first respondent pay the costs of the application on an unopposed basis. It was submitted on behalf of the respondents that the rule should otherwise be discharged with costs.”

- [55] In my view, the position in respect of prayers 2.1, 2.2, 2.5 and 2.6 of the notice of motion, being similar to the relief in *U-Drive*, in the absence of any cogent reasons demonstrating otherwise, entitles Oasis Water to such relief. That leaves the relief sought at prayers 2.3, 2.4, 2.7 to 2.14 and 3 for consideration.

Return of the purification system

[56] The relief sought at prayer 2.3, can be disposed of expeditiously. Whilst the relief at prayer 2.3 follows the wording of clause 20.3.2.1 and 20.3.2.2 of the franchise agreement that the franchisee will return immediately to the franchisor ... the Oasis water purifying system, consisting of the reverse osmosis

purification plant; the filling/dispensing tablets; ...”, sight cannot be lost of the fact that the purifying system as described with the filling/dispensing tablets were not purchased by Oasis Water, but by the respondents. The said clause cannot be read in isolation. The purifying system remains the property of the respondents, only subject to what is contained, for example in clauses 30.5 and 30.6 and 30.12 of the second franchise agreement

(with a similar clause at clause 7 of the first franchise agreement), that:

30.12 Upon termination of this agreement for whatever reason, the equipment, fittings and accessories of the Franchisee and any retail outlets, can only be sold to an existing Franchisee, and approved buyer of the Franchised business will be sold to the Franchisor, at its then fair market value, being the price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between independent market participants at the measurement date (provided it is in good working or placed in good working order at the cost of franchisee), or at the option and upon inspection from the Franchisor. In the event that an existing Franchisee of the Franchisor, and approved buyer of the Franchised business or the Franchisor not be interested to apply the equipment, footing and accessories, equipment, fittings and accessories may be sold to a third party after the Franchisor has given written permission thereto and only after de-branding of the equipment fittings and accessories to the satisfaction of the Franchisor has taken place. Consent will not be unreasonably withheld. ”

[57] The relief sought at prayer 2.3 of the notice of motion, accordingly cannot be sustained.

Restraint of trade: Use or exploitation of Oasis Water’s business system

and intellectual Property including Oasis Water’s know-how, copyright,

goodwill, trade dress, trademarks, trade secrets and confidential

information

[58] Prayers 2.4 and 2.8 to 2.14 and 3 are inextricably linked. These prayers engage questions surrounding protectable interests, customer connections and trade secrets which are embraced under the restraint of trade provisions.

[59] I align myself with the following discussion by Davis J in Mozart Ice-Cream Franchises and the reasoning by Milne J in U-Drive in so far as it deals very succinctly with the remaining issues. In Mozart Ice-Cream Franchises, Davis J stated:

“Enforcement of restraint clauses

It is trite that a restraint clause designed solely to stifle competition is, generally speaking, not enforceable because it is contrary to public policy. See *Humphrys v Laser Transport Holdings Ltd and Another* 1994

(4) SA 388 (C), and *Basson v Chilwan and Others* [1993] ZASCA 61; 1993

(3) SA 742 (A) at

771. In crisp terms, a restraint of trade raises significant questions regarding its enforceability when examined through the prism of public policy. In deciding whether a restraint of trade is contrary to public policy, regard must be had to two principal considerations: firstly, agreements freely concluded should be honoured; secondly, each person should be free to enter

into business, a profession or trade in the manner they deem fit. For this reason unreasonable restraint of trade clauses are contrary to public policy. In *Sunshine Records (Pty) Ltd v Frohling and Others* 1990

(4) SA 782 (A) at 794C - E EM Grosskopf JA summarised the position thus:

In determining whether a restriction on the freedom to trade or to practise a profession is enforceable, a court should have regard to two main considerations. The first is that the public interest requires, in general, that parties should comply with their contractual obligations even if these are unreasonable or unfair. The second consideration is that all persons should, in the interests of society, be permitted as far as possible to engage in commerce or the professions or, expressing this differently, that it is detrimental to society if an unreasonable fetter is placed on a person's freedom of trade or to pursue a profession. In applying these two main considerations a court will obviously have regard to the circumstances of the case before it.

An important guideline in the evaluation process is that a restraint should, as far as activities, area and duration are concerned, be necessary to protect the infringed or threatened interest. Furthermore, it is trite that goodwill such as trade connections, trade secrets and confidential information are recognised as protectible interests. As to the meaning of these concepts see *Neethling Unlawful Competition* 2 ed at 20.

...*Barkhuizen v Napier* [2007] ZACC 5; 2007

(5) SA 323 (CC) (2007)

(7) BCLR 691) at para 57 in support of the enforceability of restraint provisions. See paras 28 - 32...In dealing with the relationship of public policy to contractual terms Ngcobo J said the following:

Ordinarily constitutional challenges to contractual terms will give rise to the question of whether the disputed provision is contrary to public policy. Public policy represents the legal convictions for the community; it represents those values that are held most dear by the society. Determining the content of public policy was once fraught with difficulties. That is no longer the case. Since

the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values that underlie it. Indeed, the founding provisions of our Constitution make it plain: our Constitutional democracy is founded on, among other values, the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, and the rule of law. And the Bill of Rights, as the Constitution proclaims, 'is the cornerstone' of that democracy; 'it enshrines the rights of all people in our country and affirms the democratic [founding] values of human dignity, equality and freedom.

What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values

that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus a term in a contract that is inimical to the values enshrined by the Constitution is contrary to public policy and is, therefore, unenforceable.

In my view the proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged

is contrary to public policy as evidenced by the constitutional values, in particular those found in the Bill of Rights. This approach leaves space for the doctrine of *pacta sunt servanda* to operate, but at the same time allows our courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have consented to them.

The debate is not about the importance of *pacta sunt servanda*. Manifestly, without this principle, the law of contract would be subject to gross uncertainty, judicial whim and an absence of integrity between the contracting parties. The fundamental dispute concerns the balance between the bargain, as it is phrased in the contract, and the demands of public policy that give content to the idea of a constitutional community.

In our country there should be no need to remind the legal community of the importance of power and its abuse, even when sourced in private hands. Private power in South Africa is also accountable to the principles of the Constitution. Madala J reminds us of this important point in our history when he wrote in *Du Plessis and Others v De Klerk and Another* 1996

(3) SA 850 (CC) [1996] ZACC 10; (1996

(5) BCLR 658) at para 163:

Ours is a multi-racial, multi-cultural, multi-lingual society in which the ravages of apartheid, disadvantage and inequality are just immeasurable. The extent of the oppressive measures in South Africa was not confined to government/individual relations, but equally to individual/individual relations. In its effort to create a new order, our Constitution must have been intended to address these oppressive and undemocratic practices at all levels. In my view our Constitution starts at the lowest level and attempts to reach the furthest in its endeavours to restructure the dynamics in a previously racist society.

The challenge of our Constitution is therefore not to reproduce uncritically the shibboleths of the past, but to transform (as opposed to abolish or ignore) legal concepts in the image of the Constitution. Contract law cannot be reduced to a museum of a past jurisprudence. Expressed differently, the methodology mandated by s 39(2) of the Constitution needs to be implemented whenever a dispute such as the present is placed before a court.”

[60] In *U-Drive*, Milne J said the following in respect of restraints of trade:

“...It was also common cause that, on the limited basis indicated in Diner v. Carpet Manufacturing Co. of SA Ltd., 1969

(2) SA 101 (D) at

- p. 104A - B, the onus was upon the applicant to show that the restraint went no further than was reasonably necessary for the protection of the applicant’s interests. There do not appear to be any South African or English cases directly in point, though the position in America appears to be in accordance with the concessions set out above, viz., that a business franchisor may have a ‘protectable interest in his goodwill’ and accordingly a covenant in the franchise agreement that the franchisee will not engage in a similar business within a specified area for a certain time will be lawful provided that it goes no further than is reasonably necessary to protect the franchisor’s interests. See para. 518 of vol. 54 of *American Jurisprudence*, 2nd ed...”

[61] In *Mozart Ice-Cream Franchise*, Davis J, identified the key issues to be interrogated in the matter, which resonates with the facts of the present matter, as follows:

“(1) Is there an interest on the part of the applicant that is deserving of protection after the termination of a business relationship?

- (2) Is that interest prejudiced by the conduct of respondents?
- (3) If the interest is so prejudiced, how does that prejudice get weighed both qualitatively and quantitatively against the interest of the respondents to be gainfully employed and to pursue the right of the dignity of work if the order sought is so granted?
- (4) Is there any other aspect of public policy as mediated by the values of the Constitution and which is unrelated to the relation between the parties that, nonetheless, requires the restraint either to be upheld or to be struck down?
- (5) Does the restraint go further than absolutely necessary to protect the legitimate interest of the applicant that it is deserving of legal protection in terms of the balancing exercise which I have outlined?”

[62] In *Basson v Chilwan and Others* [1993] ZASCA 61; 1993 (3) SA 742 (A) at 767G-H, the test for determining the reasonableness or otherwise of the restraint of trade provision, was formulated as follows:

“1. Is there an interest of the one party, which is deserving of protection at the determination of the agreement?”

2. Is such interest being prejudiced by the other party?
3. If so, does such interest so weigh up qualitatively and quantitatively against the interest of the latter party that the latter should not be economically inactive and unproductive?
4. Is there another facet of public policy having nothing to do with the relationship between the parties but which requires that the restraint should either be maintained or rejected?”

[63] Oasis Water essentially sets out what its protectable interest is under the heading “The Business system and IP” in the founding affidavit as follows:

“The Business System and IP

The product

39. The First Applicant perfected the reverse osmosis and the ozone combined system by application of the First Applicant’s know-how and extended efforts to develop the water product and the business system.
40. The First Applicant has developed “Oasis” through extended effort to provide a unique and novel quality water product that is pure, safe for use and uncontaminated.
41. The water purification process developed exclusively by the First Applicant employs a confidential and secret combination of specifically selected filters, including reverse osmosis filters, combined with ozone treatment of the water.
42. The ozone treatment is effectively an oxygen enriching process which increases the oxygen contained in the water. It results in the safe removal of chlorine from all water supplied and adding a touch of ozone to ensure that proper hygiene is maintained. By removing harmful chemicals and using natural disinfectants, the Oasis recipe produces water with absolute clarity; free of odours.
43. The First Applicant utilises a very specifically confidential and secret combination of purification and filtration. This system was developed by the First Applicant to offer a uniquely refreshing taste to the product.
44. In the entirety of this unique process, Oasis places stringent requirements with regards to hygiene and the regular testing of the product. In this regard, the quality of Oasis’s product is always beyond reproach and only of the highest quality.
45. The “Oasis” purified and ozonated water is also used to produce a wide range of juice, iced teas, sports drinks and ice. The development of these additional products also employs the First Applicant’s secret and confidential information. In this regard, “Oasis” also offers:
 - 45.1 “Oasis” ice;

45.2 “Oasis” fruit juices;

45.3 “Oasis” sparkling and flavoured water;

45.4 “Oasis” Fruit Juice Concentrate;

45.5 “Oasis” sports drinks; and

45.6 “Oasis” iced teas.

46. Since December 2003, the first applicant authored a carefully designed business system surrounding the product. This system includes the following:

46.1 the establishment of a large network of franchisee-based businesses;

46.2 the design of shopfronts and a shop layout that provides a distinct and uniform look and feel to all “Oasis” outlets, shops and franchisee businesses;

46.3 the development of secret and confidential business processes that are viable, successful and effective;

46.4 the unique use of the “Oasis” trademark and brand on shopfronts, in the shop layout and on products and equipment;

46.5 the marketing, promotion and advertising of the product in an effective manner;

46.6 the managing of client expectations and the delivery of a unique and novel service to clients;

46.7 the incorporation of the Second Applicant’s developed unique and novel “Oasis Water Exchange Programme”, i.e., “WATER X-CHANGE” in the business system;

46.8 the training of franchisees and employees in the entirety of the business system and the IP;

46.9 the authoring of an Operations Manual, which contains the First Applicant’s business system and IP;

46.10 the on-going training of employees, franchisees and franchisees’ employees;

46.11 the on-going providing of access and use of franchisees to the first applicant’s business system and IP;

46.12 the on-going expending of substantial resources in the marketing, promotion and advertisement of Oasis and its products. This occurred by the employing of local - and national radio media and television media; and

46.13 the on-going expending of labour, knowledge and know-how to ensure that the “Oasis” brand and trademarks are easily recognized and associated with its distinct attributes.

47. In the ultimate result, the entirety of the business system and IP that was developed over nineteen

- (19) years by the First Applicant, ensured that “Oasis” is a household name and that the unique nature of the “Oasis” product remains popular with the public. Oasis successfully established and maintained its reputation as the supplier of high-quality water since 2004.
48. The mentioned attributes are essential to the public image and the marketing of the “Oasis” products, as well as the successful conduct of its business.
49. Any perception created in the public view that inflicts negatively on these aspects would be disastrous to both the “Oasis” brand and the body of franchisees – individually and collectively.
50. Therefore, the business system and IP must be zealously guarded and protected.

The registered “Oasis” trademark

51. The First Applicant and its holding company, Oasis Water Holdings (Pty) Ltd, Registration Number 2[...] is the owner of several trademarks, including the word “Oasis.”

[64] In *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another* 1991

- (2) SA 482 (T) at 502D–F, Harms J (as he then was) identified the proprietary interests capable of protection by a restraint of trade agreement as follows:

“It seems to me that the subject-matter of the last-quoted passage was the previously supposed rule to the effect that a contractual

restraint imposed by an employer on an employee to operate after termination of the contract of employment would be invalid if it was merely to protect the former employer against competition from his ex-employee, and that it would be enforced by the Courts only if the employer proved that such restraint was necessary for the protection of the employer's proprietary interests. The proprietary interests that could be protected by such a restraint were essentially of two kinds. The first kind consisted of the relationships with customers, potential customers, suppliers and others that go to make up what is compendiously referred to as the “trade connection” of the business, being an important aspect of its incorporeal property known as goodwill. The second kind consisted of all confidential matter which is useful for the carrying on of the business and which could therefore be used by a competitor, if disclosed to him, to gain a relative competitive advantage. Such confidential material is sometimes compendiously referred to as “trade secrets”.

[65] As Davis J noted in *Mozart Ice-Cream Franchise*:

“It is clear, however, given the nature of the Plascon-Evans rule, that the mere ipse dixit of the applicant cannot suffice on its own to establish these proprietary interests. As Olivier AJ noted in Viamedia (Pty) Ltd v Sessa (unreported,

CPD case No 8679/2008):

Information does not become confidential and a process or practice does not become secret merely because Viamedia contends that they do

- or, perhaps, even if Mr Sessa subjectively believed them to be so. It does not suffice for Viamedia to say that it has confidential information or trade secrets. It must set out what they are and when and how Mr Sessa was exposed to them. It must set up the facts from which the conclusion could be drawn that something is indeed confidential or secret.

See also *Automotive Tooling System (Pty) Ltd v Wilkens and Others* 2007

- (2) SA 271 (SCA) ([2007] 4 All SA 1073) at 281B - D. The key to the resolution of this dispute turns on an examination of these two components, customer connections and trade secrets.”

[66] In *Experian SA (Pty) Ltd v Haynes and Another* 2013 (1) SA 135 (GSJ) at paragraph 19 Mbha J (as he then was) said:

“[19] It is trite that the law enjoins confidential information with protection. Whether information constitutes a trade secret is a factual question. For information to be confidential it must be capable of application in the trade or industry, that is, it must be useful and not be public knowledge and property; known only to a restricted number of people or a close circle; and be of economic value to the person seeking to protect it.”

Trade connection (customer connections, potential customers and suppliers)

[67] The customers of the franchise are ‘walk-in’ customers. There is nothing in the evidence to suggest a different relationship. There is further no evidence as to how such customers became customers of the franchise. The respondents also do not purport to have any relationship of a specified kind with the customers and nowhere in the evidence has Oasis Water suggested that the customers form part of its franchise property.

[68] Oasis Water alleged in its founding affidavit that “The water purification process developed exclusively by the First Applicant employs a confidential and secret combination of specifically selected filters, including reverse osmosis filters, combined with ozone treatment of the water...The First Applicant utilises a very specifically confidential and secret combination of purification and filtration. This system was developed by the First Applicant to offer a uniquely refreshing taste to the product.”

[69] In *Walter McNaughtan (Pty) Ltd v Schwartz and Others* 2004

- (3) SA 381 (C) [2003] 1 All SA 770 at 388J - 389B Van Reenen J pointed out that:

“Whether the information constitutes a trade secret is a factual question . . . For information to be confidential it must (a) be capable of application in trade or industry, that is, it must be useful; not be public knowledge or property; (b) it must be known only to a restricted number of people or a closed circle; and (c) be of economic value to the person seeking to protect it ...” See too *Townsend Productions (Pty) Ltd v Leech and Others* 2001

- (4) SA 33 (C) at 53J-54B, *Mossgas (Pty) Ltd v Sasol Technology (Pty) Ltd* [1999] 3 All SA 321 (W) at 333F).
- [70] On the evidence it is clear that the water purification system is not supplied by Oasis Water. Franchisees have *carte blanche* in sourcing different systems and different components of the system. The *ipse dixit* of Oasis Water that it “... utilises a very specifically confidential and secret combination of purification and filtration. This system was developed by the First Applicant to offer a uniquely refreshing taste to the product.” does not suffice. Oasis Water as distinct from certain franchise models where a specific product is delivered by the franchisor through specifically identified suppliers, does not deliver prepared or purified water. Same is prepared in store. Nothing in the evidence suggests that Oasis Water as claimed by it, is an elixir distinguishable from purified water sold by many of the other water stores trading under various trade names.
- [71] Oasis Water further lays claim to a unique layout of its stores and unique filling tables without elaborating on why such layout and filling tables are unique. The respondents have demonstrated that the filling tables are not as unique as Oasis Water would have the Court believe. The filling tables as demonstrated through photographic images are in fact readily available for purchase from third-party suppliers and clearly in use by certain competitors. At most what distinguishes the layout and filling tables are the trade mark of Oasis Water. Admittedly, most if not all the ever-springing water purification shops in South Africa present with a similar layout of filling tables, juice dispensing machines and counter tops, save for the various unique trade or identifying marks attached thereto. This echoes what has been said earlier in this judgment, that the water

purification system is not the property of Oasis Water and I may hasten to add neither are the tables and other fixtures employed in the layout of the stores which are clearly readily available for purchase from third party suppliers. There is nothing pertinent to prove that the bottles used by Oasis Water are unique or peculiar only to Oasis Water.

Conclusion

- [72] Oasis Water has failed to make out a case on the remaining prayers for an interim interdict.

Costs

- [73] Oasis Water has been partially successful in the relief sought. The success is on aspects of the relief sought by the applicants which in my view the respondents should have left unopposed. The respondents would have done well as in *U-Drive* to concede the relief on the non-contentious issues, which would have left it open for this court to consider an order as to costs on an unopposed basis.
- [74] The respondents have been successful in opposing the remainder of the relief sought by the applicants for an interim interdict. That begs the question how the issue of costs should be dealt with.

[75] In exercising my discretion on costs, mindful of Part B of the relief sought by the applicants, the partial success of the applicants and the success of the respondents, fairness in respect of Part A of the application, dictates that each party should bear its own costs.

Order

[76] I, accordingly make the following order:

A H PETERSEN

JUDGE OF THE HIGH COURT

APPEARANCES

COUNSEL FOR APPLICANTS: ADV P G CILLIERS SC ADV R J GROENEWALD ADV C W PRETORIUS

Instructed by: Adams & Adams Attorneys c/o Smit Neethling Inc. 29 Warren Street Golf View

MAHIKENG COUNSEL FOR RESPONDENTS: ADV H M VILJOEN ADV J M BUTLER Instructed by:

Smit & Van Wyk Attorneys c/o Van Rooyen Tlhapi Wessels Inc. 9 Proctor Avenue Golf View

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