



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

In the matter between:

Case no: D10338/2023

ZENITH CAR RENTAL (PTY) LTD

APPLICANT

and

APEX VEHICLE RENTAL (PTY) LTD

FIRST RESPONDENT

JOHN PASCOE FAMILY TRUST (PTY) LTD

SECOND RESPONDENT

MAZORITE (PTY) LTD t/a AVIS VAN RENTAL

THIRD RESPONDENT

NELSPRUIT

CLASSIC NUMBER TRADING 217 t/a AVIS VAN

FOURTH RESPONDENT

RENTAL POLOKWANE

TEIESTAZONE (PTY) LTD t/a AVIS VAN RENTAL

FIFTH RESPONDENT

TZANEEN

LOUIS BEN DU TOIT

SIXTH RESPONDENT

This judgment was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date for hand down is deemed to be on 20 October 2023 at 10h00.

ORDER

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1. The application is dismissed.
 2. Each party to pay its own costs.

JUDGMENT

HARRISON AJ

[1] This is an urgent interdict brought on notice with expedited time periods for filing of affidavits being provided for in the Notice of Motion.

[2] The papers, as they presented, were complete, however, after the filing of the replying affidavit, the first and sixth respondents sought to file supplementary affidavits to which the applicant duly filed a reply.

[3] Whilst leave was not specifically sought for the filing of the supplementary papers, during the course of argument, the further affidavits were accepted by the parties as being before me and were not objected to. Those affidavits have been accepted as they are of assistance in clarifying certain issues regarding the identity of parties, which is highly relevant to the disputes in this matter. I am mindful that it has been repeated in numerous jurisdictions that litigation is not a game and, accordingly, I have had regard to the supplementary affidavits. This judgment is in no way to be constituted as authority that parties may simply further file affidavits at will. The practice is as it always was and with the leave of the court.

[4] The applicant describes itself as a sub-licensor of Avis International and conducts a vehicle rental business under the name, style and brand of Avis. It is in respect of this name, style and brand that the applicant seeks to interdict the respondents against what it contends is unlawful competition. Mr *Redman*, who appeared with Mr *Naidoo* (Mr *Redman* clearly not having been responsible for the drafting of the affidavits or the heads of argument), was of great assistance in identifying that the applicant's claim is not based on any trademarks or licensing agreement, but is confined to the realm of unlawful competition and one which he specifically identified in argument as being spring boarding.

[5] The interdict which is being sought is an interdict pending the outcome of an action to be instituted within 60 (sixty) days, however, during the course of argument Mr *Redman* sought to suggest that in interdicts of this nature and where the parties are seeking to prevent unlawful competition, particularly of the nature of spring boarding, then an interdict of some three months would be appropriate.

[6] The arguments relating to the unlawful competition are not simply confined to that area of law but included the corporate nature and structure of the various parties and the involvement of, what I was referred to as, the *dramatis personae*. I was also presented with arguments regarding the jurisdiction of the companies, the jurisdiction of this court, and the issue of whether there should be piercing of the corporate veil which would warrant the examination of the conduct of certain of the respondents and/or their controlling minds, in order to find that there were grounds to interdict pending an action for unlawful competition.

[7] That I have not dealt with all the arguments that were raised before me does not mean that for the purposes of this judgment I have not considered same and, in this regard, I believe that even if I dealt with them in this judgment, it will not change the conclusion which I have ultimately come to.

[8] At the outset, I look at the identities of the parties for it provides a relevant starting point for this judgment.

[9] The applicant, as I have already stated, is a company which has acquired from Barloworld SA (Pty) Ltd, what it contends are all the rights in and to the name, style and brand of Avis.

[10] The first respondent, Apex Vehicle Rental (Pty) Ltd, is identified in the founding papers as being a company with its registered office in Cape Town and which has its principal place of business, according to the applicant, at The Pearls, 6-8 Lagoon Drive, Umhlanga, Durban, KwaZulu-Natal (hereinafter referred to as "The Pearls"). This principal place of business is denied by the first respondent, it contending that its principal place of business is Unit 24, Milnerton Business Park, corner of Koeberg and Racecourse Roads, Milnerton, Cape Town, Western Cape.

[11] This issue, as to the principal place of business, is crucial to a fundamental aspect of this matter, namely who is trading at The Pearls.

[12] The return of service in respect of the first respondent reflects that service was effected by leaving a copy on the reception desk at the given address and then there is a specific notation—

'ENQUIRIES MADE WITH MR AKASH, GENERAL MANAGER FOR APEX CAR RENTAL KZN, AND PRESENT OCCUPIER WHO ADVISED THAT THE DEFENDANT IS UNKNOWN.' [Sic.]

[13] I shall return to this issue as I deem it more convenient to deal with the other respondents first.

[14] The second respondent is identified as John Pascoe Family Trust (Pty) Ltd and, in this regard, the existence of this entity is defined by the applicant through the annexing of a document referred to as "AGENT AGREEMENT" with the entity identified as "John Pascoe Family Trust (Pty) Ltd" with registration number 1993/003957/07.

[15] Mr *Anderton* purported to put himself on record for the second as well as the third to fifth respondents.

[16] I say that the representation was purported as a company search for the entity with that registration number was put up in the answering affidavit of the second to fifth respondents, which identifies the company with registration number 1993/003957/07 as being Padix Investments 1 (Pty) Ltd. It is in final deregistration. During the course of argument before me, it was accepted by all parties that the second respondent was in deregistration. Being in deregistration, that entity is *moribund* and it is an impossibility for either Mr Pascoe, who deposed to the affidavit, to do so on behalf of that entity, or for Mr *Anderton* to appear on its behalf.

[17] There was never any suggestion that the application was going to be adjourned for the reregistration of this entity, and it having been accepted that this entity was in deregistration, there is no possibility of any relief being sought or granted against it.

[18] The third, fourth and fifth respondents, all being represented by Mr *Anderton* (with Mr A W *Pullinger* having drafted the heads of argument), specifically raised the issue of jurisdiction on the basis that all three of those companies have registered offices outside the jurisdiction of this court and whilst it was suggested that all three of those entities are no longer trading, what is clear is that their businesses were in Mpumalanga and Limpopo.

[19] At the fundamental level, common law dictates *actor sequitur forum rei* and that a defendant or respondent is entitled to be sued in its local forum.

[20] What is clear is that the Local Division of the High Court, Durban, does not have jurisdiction over the third to fifth respondents by virtue either of their place of business or their registered office.¹

[21] The main complaint regarding the third and fourth respondents (who are identified as being “controlled” by Mr John Pascoe (“Pascoe”) through the holding company Navsiva (Pty) Ltd (“Navsiva”)), arises out of a letter addressed by a Regional Sales Manager, Julie Truman (“Truman”), which is dated 17 August 2023, which is annexure “ZC8” to the founding affidavit. That is an email from Truman in respect of Avis Van Rental in Polokwane (the entity which trades as Avis Van Rental in Polokwane is the fourth respondent).

[22] That email is addressed to Mixo Shivambu of the Land and Agricultural Development Bank of South Africa in Centurion, Gauteng. There is nothing therein which confers jurisdiction on this court.

[23] When I raised this specifically with Mr *Redman*, he sought to rely on the provisions of s 21 of the Superior Courts Act 10 of 2013, and, more specifically, s 21(2) which provides—

‘A Division also has jurisdiction over any person residing or being outside its area of jurisdiction who is joined as a party to any cause in relation to which such court has

¹ See: *Sibakhulu Construction (Pty) Ltd v Wedgewood Village Golf Country Estate (Pty) Ltd (Nedbank Ltd Intervening)* 2013 (1) SA 191 (WCC).

jurisdiction or who in terms of a third party notice becomes a party to such cause, if the said person resides or is within the area of jurisdiction of any other Division.'

[24] Simply citing a party does not make them a party to a cause of action and on a conspectus of all the allegations in the papers, the link to the third, fourth and fifth respondents is through the connection of Pascoe.

[25] Pascoe is not joined or made a party to this application, nor is the holding company of the third, fourth and fifth respondents, Navsiva, joined.

[26] The only apparent connection is through the manner in which the second respondent has been cited (or should I rather say miscited as "The John Pascoe Family Trust (Pty) Ltd".

[27] It being common cause that the second respondent is in final deregistration, the link which the applicant seeks to make as between the third, fourth and fifth respondents being within this jurisdiction is not just tenuous, but non-existent. I accordingly find that this court has no jurisdiction in respect of the third, fourth and fifth respondents and, accordingly, no interdict can be sought against them.

[28] Even if I am wrong on this issue, there is the issue of the non-joinder of the holding company Navsiva and Pascoe, which issue of non-joinder I have dealt with in regard to the discussion on the first respondent hereunder.

[29] The sixth respondent is Louis Ben Du Toit, who is identified as the controlling mind of the first respondent although on the papers before me, the only connection between the sixth respondent and the first respondent is that he was a director of that entity from February until May 2023.

[30] As I have mentioned above, the parties filed supplementary affidavits and during the course of both the filing of those affidavits and argument it became clear that the entity which is trading at The Pearls is Apex Vehicle Rental KZN (Pty) Ltd. It is a separate company registered on 17 July 2023 which had as its original director, the sixth

respondent, who resigned on 6 September 2023, to be replaced by a Steve Dennis Meyer.

[31] Mr *Byleveld* (who appeared with Ms *Morris*) correctly identified, in my view, that the crucial issue as regards the interdict against the first respondent is whether the first respondent was trading in KwaZulu-Natal or whether it was the separate entity.

[32] This is a fundamental dispute of fact and as the matter was not asked to be referred to oral evidence on this matter, I find myself having to apply the *Plascon-Evans* rule.

[33] As Mr *Byleveld* correctly identified in my view, any interdict granted against the first respondent would ultimately result in a contempt application being vigorously opposed as the dispute as to whether the first respondent was trading at The Pearls or whether it was the separate entity, Apex Vehicle Rental KZN (Pty) Ltd was a dispute which remained between the parties.

[34] There has been no application before me to adjourn the matter for the joinder of Apex Vehicle Rental KZN (Pty) Ltd and in light of the disclosures as to its identity, I am of the view that it ought to have been joined as a party in this matter as it had a direct and substantial interest in this litigation. It is a company which is not before me.

[35] The issue of the non-joinder of Apex Vehicle Rental KZN (Pty) Ltd was specifically raised by Mr *Redman* and whilst his response that as it is a party which is not before the court, and no relief is sought against it. This does not detract from the very issue that Apex Vehicle Rental KZN (Pty) Ltd is the company which is trading at The Pearls, the address which the applicant identifies as being the first respondent's principal place of business.

[36] With this entity having a direct and substantial interest in the matter, an interdict cannot simply be granted against the first respondent on the basis that it is the franchisor in respect of Apex Vehicle Rental KZN (Pty) Ltd. The non-joinder of a party,

in my view, prevents the granting of the interdict at this time and in this regard, I specifically refer to the decision in *Wilkins v Khumalo*²

[37] With this in mind, I must comment that there is also the non-joinder of Pascoe as regards the third, fourth and fifth respondents. If the applicant deemed it necessary to join the sixth respondent because of his control over the first respondent, then, it would have been incumbent upon the applicant to have joined Pascoe as a party to these proceedings.

[38] In light of the non-joinder of interested parties, I decline to grant any interdict in this matter.

[39] In declining the interdict, I do so on the basis of the lack of jurisdiction and the non-joinder of parties, and highlight this specifically in order that this judgment in no way is to be seen as a comment on any unlawful competition action which might follow.

[40] I turn now to the issue of costs, an issue in terms of which I have a discretion³ and, in this regard, I decline to award any form of costs orders in favour of the respondents in this matter.

[41] The costs order which I intend to make is that each party will bear their own costs and I do so in the exercise of my discretion but mention that I take a very dim view of the manner in which the first, third, fourth, fifth, sixth respondents and Pascoe have

² *Khumalo v Wilkins and Another* 1972 (4) SA 470 (N) at 477. where the failure to join a party prevents a court from granting any relief in the matter. Also see: *Philippi Horticultural Area Food and Farming Campaign and Another v MEC for Local Government, Western Cape and Others* 2020 (3) SA 486 (WCC) para 29.

[29] Our courts have also cautioned that an order ought not ordinarily to be granted where any other person's interests may be directly affected without formal judicial notice of the proceedings having first been given to such other party. The reason for this, as was stated in *Economic Freedom Fighters and Others v Speaker of the National Assembly and Others*, is so that as a matter of fairness all substantially and directly interested parties may be heard before any order is made. Where an order may be binding on all parties whose interests its terms affect, and not just some of them, it may be mandatory for a party that institutes proceedings to join every other party that has a direct and substantial interest in the relief sought...

³ *Norwich Union Fire Insurance Society Ltd v Tutt* 1960 (4) SA 851 (AD) at 854D.

sought to litigate and have failed to take the court into their confidence as regards the shareholding and cross-holdings of the various entities.

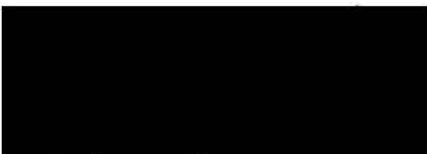
[42] Again I do not believe that it is appropriate to engage in arguments regarding piercing of the corporate veil through application proceedings, but having concluded that there are other grounds for refusing the granting of the interdict, it is unnecessary for me to go further in this regard.

[43] As was correctly identified and argued by Mr *Redman*, the respondents in this matter have been less than forthright with the court and it is, *inter alia*, for that reason each party is to pay its own costs.

ORDER

[45] In the circumstances I make the following order:

1. The application is dismissed.
2. Each party to pay its own costs.

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G M HARRISON AJ

Appearances

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