



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)
REPUBLIC OF SOUTH AFRICA**

Case Number: **2023-087653**

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES
DATE: 10 October 2023
SIGNATURE: *JANSE VAN NIEUWENHUIZEN J*

In the matter between:

THE INDIAN BAY LEAF RESTAURANT & TAKE-AWAY CC

Applicant

and

KAMRUL HUSSAIN

First Respondent

HOSSAIN KAMRUL TRADING PROJECTS (PTY) LTD

Second Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J:

[1] The applicant prays for an interim interdict prohibiting the first *alternatively* second respondent from trading as a restaurant at the Lifestyle@55 Retail Centre under the name "Bay Leaf", pending an action to be instituted against

the first *alternatively* second respondent for specific performance of an agreement of sale entered into between the applicant and the first respondent.

Background

- [2] It is common cause between the parties that Mohammed Zillur Rahman ("Rahman"), the deponent to the affidavits filed on behalf of the applicant, opened a restaurant trading under the name "Bay Leaf" in Fordsburg in 2010.
- [3] It is, furthermore, common cause that two further restaurants trading under the name "Bay Leaf" were opened, respectively in Laudium in October 2012 and in Eldoraigne in November 2020.
- [4] The remainder of the facts are in dispute between the parties.
- [5] Rahman alleges that the applicant was registered on 24 January 2011 and has since its registration been trading as "Bay Leaf". As such, the applicant has, according to Rahman, been trading as a restaurant specialising in Indian cuisine in Fordsburg, Laudium and Eldoraigne.
- [6] The first respondent, Hossain Kamrul ("Kamrul") denies, firstly that the applicant is the entity that owns the restaurants and secondly, that the applicant was the sole owner of the restaurants in Laudium and Eldoraigne. According to Kamrul, Rahman has at all relevant times been the sole owner of the Fordsburg restaurant and had a 50% interest in the Laudium and Eldoraigne restaurants. Kamrul states that he initially, and from 2013, the second respondent, Hussain Kamrul Trading Projects (Pty) ("the company") had a 50% interest in the Laudium and Eldoraigne restaurants in terms of a joint venture agreement with Rahman.

- [7] Rahman, in turn, denies the aforesaid allegations and asserts that Kamrul was employed as a manager at the Laudium restaurant from 2012 until approximately August 2022. During the period September 2021 to approximately June 2022 and whilst Rahman was in Bangladesh, Kamrul, furthermore, managed the Eldoraigne restaurant.
- [8] According to Rahman, Kamrul during this period, without his knowledge and/or consent, used a credit card machine linked to Kamrul's bank account for most of the transactions, which resulted in the applicant not showing any profit for the relevant time. This led to numerous arguments between Rahman and Kamrul. The end result of the arguments was an offer from Kamrul to purchase the Laudium restaurant from the applicant.
- [9] The fact that the applicant was prepared to sell one of its restaurants to an employee who on all accounts stole from the applicant is somewhat of a mystery. One would expect that an employer in such circumstances would immediately dismiss the employee and proceed to lay criminal charges.
- [10] Be that as it may, according to Rahman, the terms of the verbal agreement of sale were as follows:

“10.1 the purchase price will be R1,1 million;

10.2 The purchase price is payable in three monthly instalments, to wit:

10.2.1 R 500 000, 00 payable in October 2022;

10.2.2 R 300 000, 00 payable in November 2022; and

10.2.3 R 300 000, 00 payable in December 2022;

- 10.3 the purchase price included the following assets:
 - 10.3.1 the fixed and movable assets;
 - 10.3.2 the listed staff together with their respective conditions of employment, if any;
- 10.4 the sale of the restaurant did not include the trade name, brand name and goodwill of the business;
- 10.5 the respondent will not be entitled to trade under the name and style of Bay Leaf Restaurant & Take-Aways or any similar name;
- 10.6 the applicant will vacate the premises on/or before 30 August 2023;
- 10.7 neither of the parties will open a similar restaurant within a radius of 15km of any of the existing restaurants;
- 10.8 Kamrul will enter into a new lease agreement with the current landlord in his personal name or the name of the restaurant after its name has changed."

[11] In breach of the aforesaid agreement, Kamrul has not changed the name of the restaurant after the six months agreed upon and is still trading under the name and style of "Bay Leaf". Kamrul, *alternatively* the company are, furthermore, in the process of opening a new restaurant at the Lifestyle@55 Retail Centre under the name and style of "Bay Leaf".

[12] Save to admit that the company intends opening a new restaurant under the name and style of "Bay Leaf". Kamrul denies Rahman's version.

- [13] According to Kamrul, he has known Rahman since 2004 when they both worked at Bismillah restaurant. After Rahman left the restaurant, they started an eatery and a supermarket / convenience store at the China Shopping Mall. They were 50/50 partners. The two businesses were sold, and the profit was used to start the Bay leaf Laudium restaurant. The restaurant was conducted as a joint venture between Kamrul and Rahman with Kamrul putting up 50% of the capital. Kamrul conducted the business operations of the Laudium restaurant. The joint venture also opened the Eldoraigue restaurant during 2020.
- [14] I pause to mention, that Kamrul's version totally disregards the common cause fact that Rahman had been trading since 2010 as Bay Leaf restaurant in Fordsburg.
- [15] Be that as it may, according to Kamrul, he registered the company in 2013 and transferred his 50% interest in the joint venture to the company. Kamrul was employed and paid by the company.
- [16] At a stage Rahman introduced a credit card machine and diverted funds from the business into his personal account. Rahman's aforesaid conduct gave rise to part of the dispute leading up to the termination of the joint venture. In the end result, Rahman and Kamrul agreed to part ways in terms of which Rahman will keep the Eldoraigue restaurant and Kamrul the Laudium Restaurant. The Laudium restaurant had a larger turnover than the Eldoraigue restaurant and it was agreed that the company will pay R 1,1 million to Rahman to make up for the difference in value.

- [17] This amount was duly paid by the company in the monthly instalments referred to *supra*. In the result, the company is entitled to trade under the name and style of "Bay Leaf" restaurant in Laudium and may open a new restaurant under the name Bay Leaf.
- [18] The applicant, Kamrul and the company attached various documents to their affidavits in support of their different versions.
- [19] The applicant attached the following relevant documents:
- 19.1 proof of registration of the applicant on 24 January 2011;
 - 19.2 an application dated 25 August 2023 to register Bay Leaf Restaurant as a trademark;
 - 19.3 FNB cheque accounts for the period 1 September 2022 to 28 February 2023 in the name of Mohammed Z Rahman t/a Bay Leaf restaurant;
 - 19.4 invoices in confirmation of the allegation that the applicant paid for advertisements in respect of the Laudium restaurant;
 - 19.5 a certificate of acceptability issued by the City of Tshwane on 11 February 2014, in respect of the Laudium restaurant , which certificate indicates that Rahman is the person in charge;
 - 19.6 a statement from the South African National Halaal Authority in respect of the Eldoraigue restaurant in support of the allegation that the applicant traded at the restaurant;

- 19.7 proof of registration by Bay Leaf Restaurant and Take Away on 3 April 2020 as a taxpayer;
- 19.8 various certificates issued by SARS to Bay Leaf Restaurant and Take Away confirming that the restaurant is tax compliant;
- 19.9 a Telkom account dated 9 January 2020, in respect of the Laudium restaurant in the name of the applicant;
- 19.10 proof that the company was registered on 10 July 2013;
- 19.11 a letter from Prospectus Accounting & Business Advisory CC confirming that the firm is the accounting officer of the company and that the company conducts business at the address of the Laudium restaurant.

[20] In turn, Kamrul and the company presented the following documents in support of their version:

- 20.1 a lease agreement dated 21 September 2020, entered into between the company t/a Bay Leaf Restaurant & Take Away, represented by Kamrul, and Eldo Office Park CC in respect of the Eldoraigue restaurant. Rahman signed as surety for the due and punctual payments of all amounts owing by the company in respect of the leased premises. I pause to mention, that the date of the lease agreement coincides with the date on which the Eldoraigue restaurant was opened;
- 20.2 proof that the company t/a Bay Leaf Restaurant and Take Away registered for VAT on 20 April 2020;

- 20.3 proof of yearly tax returns submitted by the company t/a Bay Leaf Restaurant and Take Away for the period 2016 to 2022;
- 20.4 2022 financial statements of the company t/a Bay Leaf Restaurant, Laudium;
- 20.5 a City of Tshwane acceptability of food certificate dated 24 May 2018, which records Kamrul as the person in charge;
- 20.6 proof of payments in the amount of R 50 000, 00 made by the company to Rahman as part of his alleged profit sharing for the period January to August 2022. I pause to mention, that the "reference on beneficiary statement" on the proof of payment is inexplicably indicated as "salary increase".

[21] The applicant initially sought an order that the respondents be interdicted from trading under the name and style of "Bay Leaf" Restaurant. The matter was set down in the urgent court on 12 September 2023 and by agreement between the parties, an order in *inter alia* the following terms were granted:

- "5. *It is recorded that the Respondent and/or Hossain Kamrul Trading and Projects (Pty) Ltd will not erect signage or trade using the word "Bayleaf" at the new restaurant at the Lifestyle@55 Retail Centre until the 3rd of October 2023.*
- 6. *It is further noted that the Applicant has no objection to the opening of the new restaurant as long as the trading name does not include the word "Bay Leaf".*

7. *It is noted that the Respondent, alternatively Hossain Kamrul Trading and Projects (Pty) Ltd can continue trading using the word "Bayleaf" at the Laudium restaurant, (the status quo remains) until the finalization of the action to be instituted by the Applicant."*

- [22] In the result, the application only proceeded in respect of the new restaurant and any further restaurants that the respondents might wish to open pending the finalisation of the action to be instituted by the applicant.

LEGAL REQUIREMENTS

- [23] In order to succeed with its application, the applicant needs to allege and proof:

23.1 a *prima facie* right;

23.2 a well- grounded apprehension or irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;

23.3 that the balance of convenience favours the granting of the interim relief;
and

23.4 the absence of any other satisfactory remedy.

[See: *Setlogelo v Setlogelo* 1914 AD 221 at 227]

***Prima facie* right**

- [24] The facts underlying this requirement are in dispute between the parties.

- [25] The test to resolve the dispute has been set out in *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189 as follows:

"The proper manner of approach I consider is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at a trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown on the case of the applicant he could not succeed in obtaining temporary relief, for his right, prima facie established, may only be open to 'some doubt'. But if there is mere contradiction, or unconvincing explanation, the matter should be left to trial and the right be protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief."

- [26] Mr Coertze, counsel for the respondents, submitted that the facts set out by the respondents throw *"serious doubt"* on the version of the applicant. Ms De Lange, counsel for the applicant, did not agree. Ms de Lange submitted that the inherent probabilities favour the applicant's version although open to *"some doubt"*.
- [27] From the common cause facts it is clear that Rahman created the trading name *"Bay Leaf"* when he opened the Fordsburg restaurant. The facts set out by the respondents in respect of the opening of the Laudium and Eldoraigue restaurants, however, do throw doubt on the relationship between the various role players thereafter.
- [28] The first issue to be considered, is the fact that the company registered for both VAT and income tax under the trading name *"Bay Leaf"* restaurant. Businesses are, in general, rather apprehensive to draw the attention of SARS to its financial matters. If the company did not conduct the business of a restaurant under the name and style of *"Bay Leaf"*, albeit in a joint venture with Rahman *alternatively* the applicant, it is highly improbable that it would have registered for the payment of VAT and income tax.

- [29] Secondly, the fact that the company entered into a lease agreement for the Eldoraigue restaurant is inexplicable. Rahman's response to the aforesaid allegation leaves more questions than answers. Rahman responded by saying that he remembers the document but was informed that it was Kamrul's personal lease agreement. Only the last two pages were given to him to sign and he was never afforded the opportunity to read through the whole document.
- [30] It is difficult to contemplate that an experienced businessman such as Rahman will not carefully read a document in terms of which he signs as a surety. More telling is the fact that Rahman does not deny the authenticity of the lease agreement, but only states that he signed it under false pretences without reading the document.
- [31] If the applicant was the owner of the Eldoraigue restaurant, one would have expected Rahman to, without delay, present the lease agreement between the applicant and the lessor. This the applicant failed to do.
- [32] As a result, this court must accept the authenticity of the lease agreement between the company and the lessor of the premises where the Eldoraigue business is situated.
- [33] Thirdly and more alarming, is the payments made by the company, of which Kamrul is the sole director, to Rahman. Rahman responds to these allegations with a bold denial. Rahman offers no explanation why payments by a company, of which an employee of the applicant is the 100% shareholder, would pay R 50 000, 00 over a period of eight months into his personal bank account.
- [34] In view of Rahman's failure to deal with these payments, the version of the respondents should be accepted.

[35] Considering the inherent probabilities emanating from the disputed facts, I agree with Mr Coertze that the applicant failed to establish a *prima facie* entitling it to an interim interdict in the terms prayed for.

[36] I wish to emphasize that this court's finding is based on the facts before court and is not binding in any further litigation the parties may choose to engage in.

COSTS

[37] Mr Coertze informed the court that two counsel were at different stages employed by the respondents. In the result, Mr Coertze requested for an order including the costs of two counsels who were so employed. When questioned whether the matter justified the employment of two counsels, Mr Coertze submitted that the matter involved the complex legal principles applicable to passing off.

[38] Ms de Lange confirmed during her address that the relief claimed by the applicant is premised on the verbal agreement between the applicant and the first *alternatively* second respondent. I agree. The facts set out by the applicant in its founding papers and the legal principles applicable to the facts do not, in my view, justify the employment of two counsels.

[39] In the result, I am not prepared to grant the cost order prayed for by the respondents.

[40] The parties, furthermore, informed the court that the wasted costs occasioned by the postponement of the matter on 12 September 2023 was reserved and should be included in the cost order made herein.

ORDER

The following order is granted:

The applicant's application is dismissed with costs, which costs include the wasted costs occasioned by the postponement of the matter on 12 September 2023.



N. JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE HEARD:

06 October 2023

DATE DELIVERED:

10 October 2023

APPEARANCES

For the Applicant:	Advocate E de Lange
Instructed by:	Muthray & Associates Incorporated
For the Respondent:	Advocate A Coertze
Instructed by:	Jaffer Inc Attorneys