

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 039074/2022

DATE: 11-09-2024

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO.

(3) REVISED.

DATE 11 September 2024

SIGNATURE

10 In the matter between

A ASMALJEE AND ANOTHER

Applicants

and

TORGA OPTICAL (PTY) LTD AND OTHERS

Respondents

J U D G M E N T *EX TEMPORE*

20 **WILSON, J:** The applicants are former franchisees of the first respondent, Torga Optical. They initially approached the court seeking wide-ranging relief impugning the legality of the franchise agreement between them and Torga. All of that relief save for one paragraph has now fallen by the wayside and it is not necessary for me to make any determination as to the complaints advanced in the founding affidavit regarding the legality of various provisions of the

franchise agreement, or the legality of the conduct of Torga or its agents. This is because save for an order for the return of patient records which I shall presently make, the other relief in the notice of motion no longer raises a live issue between the parties.

The applicants came to court on essentially two complaints. The first related to a right to continue in occupation of the property from which the franchise was operated, and the second related to the right to return of
10 various patient cards held by Torga. The applicants no longer operate from the property and have vacated it. It is accordingly not necessary for me to consider the legality of the franchise agreement as it relates to the applicants' rights to remain in occupation of the property.

Before me today the parties are agreed on an order that will see the applicants' patients' records returned to them and the first and second respondents restrained from retaining utilising, sharing or selling them. Accordingly, whether or not the franchise agreement permits that, and
20 whether or not the first and second respondents have sought to do that notwithstanding the provisions of the agreement, is again no longer a live issue. In other words, given the order by consent that I shall presently make, the application is moot.

The order I shall make by agreement provides for the

first and second respondent to deliver patient cards, pre-test forms, patient personal information, patient accounts and email databases presently held by the first and second respondents to the applicants. It also again, by agreement, interdicts and restrains the first and second respondents from using or disseminating that information.

The only live question that remains between the parties is who should pay the costs of the application. This has excited a great deal of argument.

10 Mr Ally, who appeared for the applicants, submitted that the applicants are entitled to their costs merely on the basis that this order is now being granted by agreement, and that the agreement to grant the order was only reached today. It was accordingly necessary for the applicants to come to court to get their relief.

 Mr Dobe, for the first and second respondents, says that this is not so. He submitted that the relief that I shall presently grant was always available to the applicants and was embodied in various tenders made throughout the
20 papers.

Purely as a matter of textual accuracy that submission cannot be sustained. There is no tender along the lines of the order that is now agreed to anywhere in the papers. To be fair to him, Mr Dobe did not say that there was. He said that it is clear from the papers that the first

and second respondents were always willing to return the information, and that the willingness to return the information was indicative of an undertaking not to use the information in any other way and to delete it from the first and second respondents' systems.

Try as I might, I cannot see those implications on the papers. What I see is an undertaking to return the information. There is no undertaking to delete it and no undertaking not to further disseminate the information. It
10 seems to me that the applicants had to come to court to get that. It is not at all clear to me on the papers why the first and second respondents did not make a tender substantially in the terms that they have now agreed to, before today. But the fact remains that they did not.

It follows that the applicants must have their costs. Mr Ally submitted initially that those costs should be on the attorney and client scale, but I do not think that a foundation has been laid on the papers for a punitive costs order in favour of either party.

20 For all those reasons I make the following order –

1 The first and second respondents are directed to deliver up the applicants' patient cards, pre-test forms, patient personal information, patient accounts and email database ("the information") and, for that purpose, to take all steps necessary to ensure that

the information can be transferred electronically to the applicant's Eminance optometry management software system.

2 The first and second respondents are to discard and/or delete any record of the information.

3 The first and second respondents are interdicted and restrained from –

3.1 retaining, utilising, sharing or selling the information;

10 3.2 contacting or soliciting any of the patients of the Applicants; and/or

3.3 selling the information.

4 The first and second respondents are directed, jointly and severally, the one paying the other to be absolved, to pay the costs of this application, on the party and party scale, with counsel's costs to be taxed on scale "B".

