REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 11/44852

DATE:07/03/2012

(1) REPORTABLE: / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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In the matter between:

BARTOLO, LINDY-ANN Applicant

And

DA CRUZ, MANUEL JORGE MAIA Respondent

J U D G M E N T

COPPIN J

[1] Applicant seeks an interim interdict restraining the respondent from operating, or being directly, or indirectly involved in La Grotta Restaurant pending the outcome of an action for a final interdict to be instituted by the applicant against the respondent, as well as attorney and client costs. The respondent is opposing the relief sought.

[2] It is common cause that the respondent's close corporation sold the applicant a restaurant business situated in Kensington, Johannesburg. In terms of the agreement of sale, which was concluded on the 28th September 2010, it was, *inter alia,* agreed that the respondent would not operate or have an interest, either directly, or indirectly, in a business of a similar nature (a Portuguese restaurant) for a period 2 (two) years within a five (5) kilometre radius of the applicant's business. The two year period, as per restraint, is to end on the 1st November 2012 (if the period starts from the effective date in the contract, namely 1 November 2010). The applicant avers that the respondent is in breach of the restraint.

[3] It is further not disputed that the respondent is presently involved in a business, La Grotta restaurant, which is situated within the 5 (five) kilometre radius of the applicant's business. What is disputed, mainly, is that the respondent is in breach of the restraint. In particular, in this regard it is in issue whether the respondent's involvement in La Grotta constitutes "*operating"* or "*having a direct or indirect interest"* in a similar business to that of the applicant, namely a Portuguese restaurant. The respondent also argues that the applicant has not made out a case for interim relief, because she has

an *alternatively* remedy, namely damages. It is further submitted that the applicant has delayed in bringing the application, i.e failed to act with the requisite expedition, as contemplated in *Juta and Company Ltd v Legal and Financial Publishing Co (Pty) Ltd*[1] and that this fact must count against her in the exercise of the court's discretion to grant an interdict.

[4] I should point out that the reasonableness of the restraint is not in issue.

[5] The requirements for the grant of an interim interdict are *trite.* However, there is merit in the respondent's contention that even though the applicant seeks interim relief in form, she actually seeks final relief in substance and effect, if one has regard for the remaining period of the restraint and the time it would take for the action, envisaged by the applicant, to be finalised. In such circumstances the correct approach to be followed is as set-out in *Stellenbosch Farmers' Winery Ltd V Stellenvale Winery (Pty) Ltd*[2]*.* In terms of this approach, where there is a dispute (i.e a genuine dispute) as to the facts, a final interdict should only be granted in motion proceedings if the facts stated by the respondent, together with the admitted facts in the applicant's affidavit, justify such an order. This approach is also commonly referred to as the application of the *"Plascon Evans rule"*[3]

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[1] 1969 (4) SA 443 (C) at 445 C - F, confirmed in *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw 2008 (*5) SA 339 (SCA) at 345 H - 346 C paras [16] and [17] where it was held that the standard is *"maximum expedition".*

[2] 1957 (4) SA 234 (C).See *also BHT Water Treatment (Pty) Ltd v Leslie and Another 1993* (1) SA 47 (W) at 55 A-E; referred to with approval in *Reddy v Siemens Telecommunications (Pty) Ltd 2007 (2)* SA 486 SCA at 491 par [4]

[3] After its application in *Plascon – Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3)* SA 623 (A) at 634 H- 635 B

[6] In *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*[4] Heher JA stated;

> "*recognising the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched clearly untenable that the court is justified in rejecting them merely on the papers; Plascon- Evans Paints Ltd v Van Riebeeck Paints (Pty)Ltd 1984* (3) SA 623 (A) at 634 that E – 635 C…".

[7] In *Wightman* it was also said that:[5]

> *"A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed"*

[8] Counsel for the applicant submitted that there are no real disputes of fact and that the respondent's version on the disputed facts should be rejected. Counsel submitted that this court should adopt the, so-called, "robust approach"; furthermore, that the applicant has made-out a case for the relief sought.

[9] The two main disputes are whether the respondent operates, or has a direct, or indirect, interest in La Grotta and whether La Grotta is a Restaurant similar to that of the applicant (a Portuguese restaurant).

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[4] 2008 (3) SA 371 at par [12]
[5] At 375 G par [13]

[10] It is not disputed that during about February 2011 the respondent approached the applicant and her husband with a proposal to open another restaurant. The respondent's idea being to re-open a Portuguese restaurant in the same premises from which he had formerly conducted a restaurant under the name and style of O'Braseiro at Lancaster Square, 141Roberts Avenue, Kensington, Johannesburg, which premises are situated at a distance of about 1.8 kilometres from the applicant's restaurant; Further, that the applicant and her husband did not accept the respondent's proposal. The respondent in response does not dispute the applicant's averments in that regard, but merely states that he came with the proposal because he was bored and when it was refused by the applicant and her husband, nothing came of it.

[11] The applicant avers that at the end of April 2011 she noticed the respondent's vehicle parked outside the former premises of O'Braseiro in Lancaster Square, Kensington. Thereafter she heard rumours that the respondent will be opening a restaurant in Kensington, down the road from her restaurant. She said she got a clear indication that this was indeed so when an advertisement appeared in a Portuguese newspaper which states that La Grotta would be opening soon. That copy of the advertisement is annexed to her founding papers. It appears from that advertisement *inter alia* that La Grotta is described as "*a Mediterranean restaurant*", "*Ex – O'Braseiro*". The advertisement is in Portuguese. The respondent denies none of this save for the fact that La Grotta is his restaurant. He avers in response that an associate of his, Ms Van Meir, offered him a position "*to assist in a new*

Mediterranean restaurant venture" and that she was the sole holder of the interest in La Grotta Restaurant CC which operated the restaurant; that he had no interest directly or indirectly in the restaurant and did not operate it, but was merely employed by it.

[12] However, the applicant also produced the evidence of a private investigator, Mr Jacobus Heyns, whose averments were not dealt with at all by the respondent in his answering affidavit. Mr Heyns states, *inter alia,* that on Friday, the 13th November 2011, he telephoned La Grotta restaurant and informed the lady who answered the telephone that he wanted to make a reservation for an engagement party for between one hundred to one hundred and twenty people. She told him that he would have to speak to the owner. The person who then came on to the line identified himself as Jorge Cruz. Mr Heyns said that he wanted prices and menus and also requested an e-mail address from Mr Cruz. The person gave Mr Heyns two e-mail addresses, one being his private e-mail address and one being that of La Grotta, but said that he preferred if Mr Heyns contacted him on his private e-mail address.

[13] The applicant also*, inter alia*, relies on a report dated the 7th November 2011, compiled by a private investigator, Mr Johan Nel and refers particularly to what is stated on page 3 of this report. Mr Nel states, *inter alia,* that the telephone numbers and cellular phone number which appear on the La Grotta advertisement, which I referred to earlier, are all registered in the respondent's name. In response, the respondent states that in February 2009 he opened O'Braseiro in the same premises as La Grotta; O'Braseiro was

sold as a going concern to one Da Silva during January 2010 and the telephone lines were transferred to him whereafter the respondent had no interest in O'Braseiro; Da Silva closed O'Braseiro in January 2011 and vacated the premises; when the owner of La Grotta decided to open a restaurant in the same premises application was made to Telkom for telephone lines and the numbers were allocated; they were the same numbers previously allocated to O'Braseiro. While the respondent expressly admits to the cellular phone number being his, he does not deny that the telephone numbers in the advertisement are all in his name. The respondent could have dealt with this issue simply by producing the accounts to show that it was not in his name but in that of La Grotta. The respondent denies that he operates, or manages, or has a direct, or indirect financial interest in La Grotta even though his name appears on the advertisement of La Grotta, in which he is described as an "assistant"; and even though the advertisement connects La Grotta to O'Braseiro.

[14] The respondent's answering affidavit lacks essential detail. He does not say exactly what he does at La Grotta. There is no confirmatory affidavit a by Van Meir. No other documentary proof to corroborate what he says is annexed to his affidavit, save for a copy of a single page of a bank statement. In my view the respondent's version regarding his involvement in La Grotta is spurious. He has not seriously and ambiguously addressed that issue.

[15] The respondent relied on what was held in *Raimonde Steel Construction Ltd and Others v Manique*[6] concerning the meaning of the

[6] 1972 SA 422 (P)

words to "operate" and "direct or indirect interest in". There the court considered the meaning of the words "*any interest in any business of a similar nature"*. In the context of the facts of that case, it was held there that a mere employee did not have the "*interest"* contemplated there because that "*interest"* meant a pecuniary interest, or to have a proprietary right and did not mean a social, or ethical interest. The employee's interest in his salary did not amount to such a pecuniary or propriety interest. The court in *Raimonde* was not dealing with the same wording, as the clause is in the present case. In any event, in the present case one cannot conclude that the respondent merely "*interested himself*" in La Grotta. The respondent says nothing about a salary and gives no detail of his employment, or the nature of his duties, other than relying on the vague description of "*assistant"* that appears next to his name in the La Grotta advertisement. It is clear from the facts that he was involved with La Grotta from its inception. His link with O'Braseiro is exploited in favour of La Grotta. He is the contact person for La Grotta. Taken with the uncontested evidence of Mr Heyns, it is reasonable to conclude that the respondent is not a mere employee of La Grotta, but that he operates it and has a direct, or indirect, pecuniary interest in it. In my view the applicant has made out a case in that regard.

[16] I am also of the view that the respondent's version regarding whether La Grotta is a similar restaurant to that of the applicant's is spurious. He does not dispute that La Grotta is serving the same fare as the applicant's restaurant. He is clearly in a position to know what fare the applicant's restaurant was serving that his restaurant did not serve. The linking of

O'Braseiro, which was a Portuguese restaurant, to La Grotta, is not just because of the location. A combination of that link; La Grotta's advertisement to the Portuguese community and the publication of the respondent's involvement in La Grotta was clearly intended to induce in the minds of those at whom the advertisement was aimed and directed at, that this was a continuation of the old business – O'Braseiro.

[17] The requirements for the grant of a final interdict are trite. The applicant must show a clear right, an injury actually committed, or reasonably apprehended and the absence of another, available and satisfactory remedy[7].

[18] The applicant's rights, in terms of the restraint, are not in issue. The respondent's conduct constitutes a breach of the restraint. The applicant has made out a case of an injury committed, or reasonably apprehended. The respondent's submission that damages are a satisfactory alternative remedy, because the applicant has already stated that she has had a twenty per cent loss, cannot be upheld. Damages in cases of breach of restraint are often notoriously difficult, if not impossible to prove, therefore a restraint is agreed upon in the first place. The respondent's continued involvement in La Grotta is a continuing violation of the restraint.

[19] Regarding the exercise of my discretion: My discretion in the grant of a final interdict is linked to the question whether the applicant's rights can be adequately protected by any another remedy. In my view it cannot be. The

[7] *Setlogelo v Setlogelo 1914 AD 221; V&A Waterfront Properties (Pty) Ltd v Helicopter and Marine Services (Pty) Ltd 2006* (1) SA 252 (SCA)

delay in bringing the application was explained by the applicant. I am of the view that the grant of the interdict at this stage will not cause any inequity and the exercise of the restraint at this stage will not amount to unconscionable conduct on part of the applicant. The respondent was aware of the restraint throughout. The applicant has not acquiesced in the conduct of the respondent. The respondent, on the other hand, has not been frank and forthcoming with clear and unambigious facts regarding the true nature and extent of his involvement in La Grotta. La Grotta is clearly in competition with the applicant's restaurant. A mindful of the fact that an interdict would have implications for the applicant, if he has a pecuniary interest in La Grotta, but that he has brought upon himself by his failure to comply with the restraint that he has voluntarily agreed to. *Pacta servanda sunt*.

[20] The applicant has asked for costs on an attorney and client scale. Taking all the facts and circumstance into account, I am of the view that an ordinary costs order is justified.

[21] In the circumstances I grant an order;

21.1 Interdicting and restraining the respondent until 1 November 2012 from operating and/or from being interested, directly or indirectly, in the La Grotta restaurant, since it is situated within a radius of five kilometres from the applicant's restaurant premises;

21.2 Directing the respondent to pay the costs of this application.

P COPPIN
JUDGE OF THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

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