



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**  
**JUDGMENT**

**Not Reportable**

Case No: 989/2023

In the matter between:

**VAN DEN BERG WATER (PTY) LTD**

**FIRST APPELLANT**

**T/A OASIS WATER LYNNWOOD**

**CHARMAIN VAN DEN BERG**

**SECOND APPELLANT**

**ADRIAAN VAN DEN BERG**

**THIRD APPELLANT**

**DEON BRAAM VAN DEN BERG**

**FOURTH APPELLANT**

**DEWALD JOHANNES VAN DEN BERG**

**FIFTH APPELLANT**

and

**OASIS WATER (PTY) LTD**

**FIRST RESPONDENT**

**OASIS WATER ASSET COMPANY**

**SECOND RESPONDENT**

**(PTY) LTD**

AND

Case No: 988/2023

**VAN SCHALKWYK WATER CC T/A OASIS**

**FIRST APPELLANT**

**WATER KIMBERLEY**

**ALBERTUS BAREND VAN SCHALKWYK**

**SECOND APPELLANT**

and

**OASIS WATER (PTY) LTD**

**RESPONDENT**

AND

Case No: 1120/2023

**OASIS WATER (PTY) LTD**

**FIRST APPELLANT**

**OASIS WATER ASSET COMPANY (PTY) LTD SECOND APPELLANT**

and

**WYNAND ALBERTUS BESTER**

**FIRST RESPONDENT**

**JANET BESTER**

**SECOND RESPONDENT**

**Neutral citation:** *Van den Berg Water (Pty) Ltd t/a Oasis Water Lynnwood and Others v Oasis Water (Pty) Ltd and Another* (Case no 989/2023); *Van Schalkwyk Water CC t/a Oasis Water Kimberley and Another v Oasis Water (Pty) Ltd* (Case no 988/2023); *Oasis Water (Pty) Ltd and Another v Wynand Albertus Bester and Another* (Case no 1120/2023) [2025] ZASCA 98 (4 July 2025)

**Coram:** SCHIPPERS, NICHOLLS, MEYER and KGOELE JJA and PHATSHOANE AJA

**Heard:** 4 March 2025

**Delivered:** This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 4 July 2025.

**Summary:** Law of Contract – franchise agreement – whether post-termination provisions enforceable – whether terms unreasonable and unjust contrary to Consumer Protection Act 68 of 2008 – interdict – appellants ordered to return printed materials related to franchise, signage, and to cease using business system and intellectual property.

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## ORDER

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**On appeal from:** Gauteng Division of the High Court, Pretoria (Kooverjie J, sitting as court of first instance, case no 989/2023).

Northern Cape Division of the High Court, Kimberley (Lever J, sitting as court of first instance, case no 988/2023).

North-West Division of the High Court, Mahikeng (Petersen J, sitting as court of first instance, case no 1120/2023).

Case no: 989/2023

- 1 The application to adduce evidence on appeal is dismissed with costs, including the costs of two counsel, on the party-and-party scale.
- 2 The appeal succeeds in part.
- 3 The order of the Gauteng Division of the High Court, Pretoria, is set aside and replaced with the following:
  - ‘1. The first respondent is ordered to return to the first applicant all manuals and other printed matter relating to the first respondent’s franchise operation, including:
    - 1.1 manuals, labels or printed material containing the first applicant's names or trademarks;
    - 1.2 printed or electronic matter relating to the franchise operation, previously conducted by the first respondent under the name and style of Oasis Water; and
    - 1.3 client lists, or data lists.
  2. The first respondent is ordered to remove and return all ‘Oasis’ signage to the first applicant.

3. The first respondent is ordered to cease using or exploiting the first applicant's 'Oasis' business system and any intellectual property owned by the first applicant, more specifically, its know-how, trademarks, trade secrets, and confidential information.
  4. The respondents are ordered to pay 50% of the costs of this application, jointly and severally, on the contractually agreed scale as between attorney and client, including the costs of two counsel where so employed.'
- 4 Save as aforesaid, the appeal is dismissed. There is no order as to costs.

Case no: 988/2023

- 1 The application to adduce evidence on appeal is dismissed with costs, including the costs of two counsel, on the party-and-party scale.
- 2 The appeal succeeds in part.
- 3 The order of the Northern Cape Division of the High Court, Kimberley, is set aside and replaced with the following:
  - '1. The first respondent is ordered to return to the first applicant all manuals and other printed matter relating to the first respondent's franchise operation, including:
    - 1.1 manuals, labels or printed material containing the first applicant's names or trademarks;
    - 1.2 printed or electronic matter relating to the franchise operation previously conducted by the first respondent under the name and style of Oasis Water; and
    - 1.3 client lists, or data lists.
  2. The first respondent is ordered to remove and return all 'Oasis' signage to the first applicant.

3. The first respondent is ordered to cease using or exploiting the first applicant's 'Oasis' business system and any intellectual property owned by the first applicant, more specifically, its know-how, trademarks, trade secrets, and confidential information.
4. The respondents are ordered to pay 50% of the costs of this application, jointly and severally, on the contractually agreed scale as between attorney and client, including the costs of two counsel where so employed.'
- 4 Save as aforesaid, the appeal is dismissed. There is no order as to costs.

Case no: 1120/2023

- 1 The application to adduce evidence on appeal is dismissed with costs, including the costs of two counsel, on the party-and-party scale.
- 2 The appeal succeeds in part.
- 3 The cross-appeal succeeds in part.
- 4 The order of the North-West Division of the High Court, Mahikeng, is set aside and replaced with the following:
  - '1. The first respondent is ordered to return to the first applicant all manuals and other printed matter relating to the first respondent's franchise operation, including:
    - 1.1 manuals, labels or printed material containing the first applicant's names or trademarks;
    - 1.2 printed or electronic matter relating to the franchise operation previously conducted by the first respondent under the name and style of Oasis Water; and
    - 1.3 client lists, or data lists.
  2. The first respondent is ordered to remove and return all 'Oasis' signage to the first applicant.

3. The first respondent is ordered to cease using or exploiting the first applicant's 'Oasis' business system and any intellectual property owned by the first applicant, more specifically, its know-how, trademarks, trade secrets, and confidential information.
4. Each party shall bear their own costs.'
- 5 Save as aforesaid, the appeal is dismissed. There is no order as to costs.
- 6 Save as aforesaid, the cross-appeal is dismissed. There is no order as to costs.

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## JUDGMENT

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**Schippers JA (Nicholls, Meyer and Kgoele JJA and Phatshoane AJA concurring)**

[1] The central issues in these three cases concern the meaning and effect of post-termination provisions in a franchise agreement; and whether the respondents, Oasis Water (Pty) Ltd (Oasis) and Oasis Water Asset Company (Pty) Ltd (Oasis Asset Company), are entitled to interdicts founded on those provisions. Van den Berg Water (Pty) Ltd t/a Oasis Water Lynwood (Van den Berg Water) and Van Schalkwyk Water CC t/a Oasis Water Kimberley (Van Schalkwyk Water), the first appellants in case numbers 989/2023 and 988/2023, respectively, are former franchisees of Oasis, the respondent in those cases. Oasis concluded written franchise agreements with Van den Berg Water in 2018 and with Van Schalkwyk Water in 2019, to operate retail outlets which sell and distribute water and related products under the name of Oasis or Oasis Water.

[2] In 2018 Oasis concluded franchise agreements with Mr Wynand Albertus Bester and Mrs Janet Bester (the Besters), also former franchisees, and the

respondents in case number 1120/2023. Where appropriate, Van den Berg Water, Van Schalkwyk Water and the Besters are collectively referred to as ‘the franchisees’.

### **Factual background**

[3] Oasis supplies bottled, filtered and purified water and other beverages. It has been in existence for some 20 years, was one of the first water purifying and processing companies, and is the fourth largest bottled water brand in South Africa, with an estimated 60% of the refilling market in the country. Oasis’ holding company, Oasis Water Holdings (Pty) Ltd, is the proprietor of various trademarks registered in terms of the Trade Marks Act 193 of 1994, consisting of or incorporating the word ‘Oasis’.

[4] Oasis produces its water products through a process of reverse osmosis and ozone treatment. It asserts that this process involves a confidential and secret combination of selected filters combined with ozone treatment of the water, which results in clear water that is refreshing and free from chlorine and odours. The Oasis water product is also used to produce ice, sparkling and flavoured water, fruit juices, iced teas and sports drinks.

[5] Oasis concludes a standardised franchise agreement with its franchisees. By letter dated 17 February 2023, the franchisees’ attorneys, acting for a larger group of franchisees operating some 54 Oasis outlets, informed Oasis’ attorneys that Oasis had repudiated the franchise agreements, which the franchisees had accepted; alternatively, that it had breached the agreements in material respects which entitled the franchisees to cancel them (the cancellation letter).

[6] A few days later, Oasis’ attorneys replied to the cancellation letter. They denied the alleged repudiation by Oasis and contended that the cancellation letter itself, was a repudiation of the franchise agreement. Oasis reserved its right to

either accept such repudiation and terminate the franchise agreement or enforce its terms. Thus, on the version of both the franchisees and Oasis, the franchise agreement came to an end.

[7] After termination of the franchise agreements, the franchisees continued to operate a filtered and purified water business out of the same premises, under the name of ‘Manzi Water’, serving the same customers. Oasis contends that they merely rebranded their stores from Oasis Water to Manzi Water.

[8] In March 2023 Oasis launched an urgent application against the franchisees in the Kimberley, Mahikeng and Pretoria High Courts. The notice of motion in each application is substantially the same. In Part A, Oasis sought the following relief:

- ‘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 First Respondent forthwith return to the First Applicant any and all manuals and other printed matter relating to the First Respondent’s 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 First Respondent forthwith remove and return all “**Oasis**” signage to the First Applicant.
  - 2.3 That the First Respondent 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 First Respondent 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 First Respondent forthwith execute all such documents and do all such things as are necessary to remove the name of the First Respondent from any register relating to business names and trademarks belonging to the First Applicant.

2.6 That the First Respondent forthwith change the appearance of the First Respondent's 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:

...

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

2.8 That the First Respondent 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 or 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 First Respondent has 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 First Respondent are the same or similar as those used by the First Applicant or any of its franchisees;
- (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.'

[9] In prayers 2.11 to 2.14 of the notice of motion, Oasis sought an order interdicting and restraining the franchisees from: selling its products (prayer 2.11); using Oasis bottles or bottle caps (2.12); displaying any products with a sign or label that create the impression that the franchisees' products are those of Oasis (2.13); and using the Manzi Water Exchange Programme (2.14). In prayer 3 of the notice of motion, Oasis sought an order enforcing the restraint of trade provisions of the franchise agreement.

[10] In Part B of the notice of motion, Oasis and Oasis Asset Company sought an order that if it is found that the arbitration provisions in clause 18 of the franchise agreement apply to the relief sought, that the arbitration clause would not affect the disputes forming the subject of the interdict applications. They also sought a final order interdicting and restraining the franchisees from: (i) using the Oasis business system, know-how, copyright, trade dress, trademarks, trade secrets and confidential information; (ii) competing unlawfully with Oasis; (iii) making injurious falsehoods against Oasis; (iv) making use of Oasis Asset Company's Water Exchange Programme (the Exchange Programme) and the copyright, confidential information and trademarks associated with the Programme; and (v) unlawfully competing with Oasis Asset Company.

[11] The franchisees opposed the applications. The grounds of their opposition can be summarised as follows:

- (a) The franchisees had lawfully terminated their franchise agreements, essentially for the following reasons. Oasis failed to comply with the Consumer Protection Act 68 of 2008 (CPA) and the regulations made under it, by failing to provide management accounts relating to a marketing fund. It implemented a 'land grab' strategy which required franchisees to acquire the stores of competitors. Oasis acquired a controlling interest in Go-Zone, a direct competitor in the water business, and competed with its own franchisees. Oasis indicated that it no longer considered the franchise model feasible and started terminating franchise agreements unlawfully.
- (b) By mid-February 2023, some 54 franchisees who collectively represented nearly 25% of Oasis Water stores, had also terminated their franchise agreements. The applications were launched against the franchisees because they were the instigators of this mass exodus of franchisees.
- (c) Apart from the Oasis trademark, Oasis and Oasis Asset Company do not have any trade secrets, confidential information or other intellectual property of commercial value.
- (d) The franchisees did not unlawfully interfere with the month-to-month contracts between Oasis Asset Company and customers of the Exchange Programme. In terms of this programme, customers lease a water dispenser from Oasis Asset Company. The lease amount includes 100 litres of water per month. The bottle used in the dispenser contains 10 litres of water and an empty bottle can be exchanged for a bottle of water at a participating Oasis store.
- (e) The sale of purified water by the franchisees to customers under the Manzi brand, does not constitute unlawful competition.

[12] The Pretoria High Court (Kooverjie J) granted the interim interdict sought in prayers 2.1 to 2.14 of the notice of motion in the Van den Berg Water application, pending the outcome of the relief sought in Part B. The court declined to grant an order enforcing the restraint of trade provisions. It granted Oasis costs on an attorney and client scale as specified in the agreement.

[13] In the application against Van Schalkwyk Water, the Kimberley High Court (Lever J) granted Oasis an interim interdict in terms of prayers 2.1 to 2.13, and 3 of the notice of motion, pending the outcome of the relief sought in Part B. The costs of the interim application were reserved for determination by the court dealing with Part B of the notice of motion.

[14] The Mahikeng High Court (Petersen J) in the Bester application, granted Oasis an interdict in terms of prayers 2.1, 2.2, 2.5 and 2.6 of the notice of motion. It dismissed the application for the remaining relief and directed the parties to pay their own costs.

[15] The Pretoria High Court granted Van Berg Water leave to appeal its order to this Court. The Kimberley High Court made a similar order in favour of Van Schalkwyk Water. In the Bester application, the Mahikeng High Court granted the franchisees leave to appeal to this Court. It also granted Oasis and Oasis Asset Company leave to cross-appeal against its orders refusing them relief.

### **The issues**

[16] Before us, counsel for Oasis fairly conceded that the relief sought in prayer 3 of the notice of motion – an interdict restraining the franchisees from engaging in a similar operation ‘as that of the First Applicant’s business system’, is aimed at restricting competition for a limited duration – a maximum period of 12 months. The franchisees have been trading as Manzi Water since February 2023. It was accordingly submitted that a decision on the order enforcing the

restraint of trade provisions contained in the franchise agreements, would have no practical effect or result, as envisaged in s 16(2) of the Superior Courts Act 10 of 2013.<sup>1</sup>

[17] The same applies to the interdicts granted in terms of prayers 2.7 and 2.11 to 2.14 of the notice of motion. In terms of prayer 2.7, the franchisees were ‘ordered to forthwith hand over control of the franchised businesses to [Oasis]’. These businesses no longer exist. The interdicts granted in terms of prayers 2.11 to 2.14 likewise will have no practical effect. In terms of these interdicts, the franchisees were restrained from: selling any Oasis products; selling bottled water in an Oasis bottle or using an Oasis bottle cap; displaying products with a sign or label that create the impression that the franchisees’ products are those of Oasis; and using the Manzi Water Exchange Programme.

[18] Counsel for Oasis however submitted that the orders granted in terms of prayers 2.1 to 2.4 of the notice of motion will have practical effect; and possibly also, the orders in terms of prayers 2.8 and 2.9. However, prayer 2.8 – for an interdict to restrain the franchisees from using Oasis’ business system and intellectual property – is a repetition of prayer 2.4, save that it is more descriptive. In prayer 2.9, Oasis sought an interdict restraining the franchisees from using its water purification and bottling systems and equipment. As regards the orders granted in terms of paragraph 2.10 relating to the use of confidential information, trade secrets and passing off, it was submitted that these orders may still be relevant.

[19] Thus, the remaining issues raised by the appeals are the following:

(a) The franchisees’ application to adduce evidence on appeal.

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<sup>1</sup> Section 16(2)(a)(i) of the Superior Courts Act 10 of 2013 provides:

‘When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.’

- (b) Whether a decision on the interdicts granted in terms of paragraphs 2.1, 2.2, and 2.4 of the notice of motion, will have any practical effect.
- (c) Whether the interdicts sought in terms of paragraphs 2.3, 2.9 and 2.10 of the notice of motion, were properly granted.
- (d) Costs.

### **The application to adduce evidence on appeal**

[20] The franchisees have applied to adduce substantially the same evidence on appeal in all three cases. This evidence essentially comprises a list of former Oasis franchisees conducting business under the Manzi brand as at April 2024; a copy of a document dated 6 November 2023, showing that Oasis, in an action instituted against the Besters in the Mahikeng High Court, claims R1 million as a penalty arising from a franchise agreement concluded in 2020; an affidavit by the franchisees' attorney confirming the institution of that action; and a termination letter dated 2 October 2015 sent by Oasis to Oasis Water Table View (the 2015 letter). In the application by the Besters to adduce evidence on appeal, they also seek an order that a supplementary affidavit which was considered in the Van den Berg and Van Schalkwyk applications, be admitted. This however is unnecessary, since that affidavit concerns issues that do not have to be decided on appeal.

[21] It is trite that the power to admit evidence on appeal is exercised sparingly and only in exceptional circumstances.<sup>2</sup> This is because of the need for finality; the undesirability of allowing a litigant who has been remiss in producing evidence, to do so late in the day; and the need to avoid prejudice.<sup>3</sup> The applicant must furnish a suitable explanation for its failure to adduce the evidence in the

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<sup>2</sup> *S v N* 1988 (3) SA 450 (A); *Ibex RSA Holdco Ltd and Another v Tiso Blackstar Group (Pty) Ltd and Others* [2024] ZASCA 166; 2025 (2) SA 408 (SCA) para 28.

<sup>3</sup> *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC), 2005 BCLR 301 (CC) (*Rail Commuters*) paras 41-43.

court below, and demonstrate that the evidence is reliable, weighty and material and presumably to be believed.<sup>4</sup>

[22] The franchisees have not met these requirements. The evidence sought to be adduced is neither weighty nor material. The updated list of Manzi businesses which were former Oasis franchisees, is irrelevant to the issues decided by the High Courts. So too, the action instituted against the Besters in which Oasis claims payment of R1 million, and the attorney's affidavit confirming this. The 2015 letter, containing Oasis' opinion as to what constitutes its intellectual property and protectable interests, and a statement that it has the right to buy equipment from a franchisee upon termination of a franchise agreement, is likewise irrelevant. These issues must be decided according to the terms of the franchise agreement.

[23] Aside from this, the evidence sought to be adduced is not substantial. Neither would it have any impact on the outcome of the cases. For these reasons, the application to adduce evidence on appeal is refused with costs.

### **The interdicts in paragraphs 2.1, 2.2 and 2.4 of the order**

[24] The relief sought in Part A of the notice of motion was for interim interdicts, pending the final outcome for the relief sought in Part B. A preliminary issue is whether the interdicts granted in terms of prayers 2.1 to 2.4 are interim or final. An interim interdict is a court order preserving the status quo pending the final determination of the rights of the parties. It does not finally determine those rights.<sup>5</sup> Whether an interdict is interim or final depends on its effect on the issue, not upon its form.<sup>6</sup>

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<sup>4</sup> *Coleman v Dunbar* 1933 AD 141 at 162 para 3, affirmed in *Rail Commuters* fn 3 para 43.

<sup>5</sup> See 11 *Lawsa* 2 ed at 418 para 401 and the authorities collected in fn 1.

<sup>6</sup> *Apleni v Minister of Law and Order and Others; Lamani v Minister of Law and Order and Others* [1989] 1 All SA 71 (A); 1989 (1) SA 195 (A), affirmed in *National Gambling Board v Premier, KwaZulu-Natal, and Others* 2002 (2) SA 715 (CC); 2002 (2) BCLR 156 (CC) para 50; *South African Motor Industry Employers' Association v South African Bank of Athens Ltd* 1980 (3) SA 91 (A) at 96H.

[25] The interdicts granted in terms of prayers 2.1 to 2.4 and 2.9 of the notice of motion, are final in effect. In terms of these interdicts the franchisees were ordered to return all printed matter relating to the franchise operation to Oasis; to return all Oasis signage and its water purifying system; to cease using the Oasis business system and intellectual property; and to cease using the Oasis water purification and bottling systems. None of these orders is directed at preserving the status quo, pending the determination of the relief sought in Part B of the notice of motion. Further, these interdicts will not be reconsidered in deciding whether Oasis is entitled to the relief in Part B.

[26] Since the orders granted in terms of prayers 2.1 to 2.4 and 2.9 are final in effect, Oasis was required to establish a clear right; and an issue such as the balance of convenience does not arise.<sup>7</sup> A further consequence of their status as final interdicts is that the *Plascon-Evans* rule applies,<sup>8</sup> and disputes of fact essentially fall to be determined on the respondents' version, unless it is far-fetched or untenable.

[27] Harms JA affirmed this rule in *Zuma*:<sup>9</sup>

'Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.'

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<sup>7</sup> *Lawsa* fn 5 para 401; *Masuku v Minister van Justisie en Andere* 1990 (1) SA 832 (A) at 840-841.

<sup>8</sup> *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 635B-C.

<sup>9</sup> *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA); 2009 (1) SACR 361 (SCA); 2009 (4) BCLR 393 (SCA); [2009] 2 All SA 243 (SCA) para 26.



[28] The founding affidavit states that the rights of Oasis to the interdicts are founded on the contractually agreed post-termination rights and its common law right to protection against unlawful competition. The post-termination rights are contained in clause 20 of the franchise agreement, which, inter alia, provides:

‘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 manual and other printed matter relating to the franchise operation, remove and return all signage to the franchisor, as well as return of the Oasis water purifying system, consisting of the following:

20.3.2.1 the reverse osmosis purification plant;

20.3.2.2 the filling/dispensing tables;

20.3.2.3 mobile ozonation unit or ozone units;

20.3.2.4 any article bearing **Trade marks**

and will immediately cease to use or exploit the **Business system** and any **Intellectual property** owned by the franchisor.’

[29] Oasis submits that its rights under the franchise agreement were infringed as follows. After cancellation of the agreement, the franchisees dishonestly misused the advantage they obtained as franchisees, inter alia, by passing off to springboard their competing business, Manzi Water. They unlawfully retained and used the Oasis business system, intellectual property and the Exchange Programme by dishonest means. They continue to provide an identical service and product to the same client base, from the same premises, in the same way they did when they were Oasis franchisees, by simply substituting the Oasis Brand with the Manzi Brand.

[30] The franchisees submit that the post-termination provisions of the franchise agreement are unenforceable, having regard to the right of freedom of

trade and occupation in s 22 of the Constitution,<sup>10</sup> and the right to property in s 25.<sup>11</sup> They further submit that the post-termination provisions are unenforceable as contemplated in the CPA, because they constitute unconscionable conduct under s 40(1)(c);<sup>12</sup> unfair, unreasonable or unjust contract terms under s 48(1);<sup>13</sup> and prohibited transactions under s 51(1)(i).<sup>14</sup>

[31] The franchisees also submit that they do not have any trade secrets, confidential information or other intellectual property of Oasis, which has commercial value. They say that they did not unlawfully interfere with the month-

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<sup>10</sup> Section 22 of the Constitution provides:

**‘Freedom of trade, occupation and profession**

Every citizen has the right to choose their trade, occupation and profession freely. The practice of a trade, occupation or profession may be regulated by law.’

<sup>11</sup> Section 25 of the Constitution states, inter alia:

**‘Property**

(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

<sup>12</sup> Section 40(1)(c) of the CPA provides:

‘(1) A supplier or an agent of the supplier must not use physical force against a consumer, coercion, undue influence, pressure, duress or harassment, unfair tactics or any other similar conduct, in connection with any-

...

(c) negotiation, conclusion, execution or enforcement of an agreement to supply any goods or services to a consumer.’

<sup>13</sup> Section 48(1) of the CPA states:

‘(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.’

<sup>14</sup> Section 51(1)(i) of the CPA provides:

‘(1) A supplier must not make a transaction or agreement subject to any term or condition if-

...

(i) it expresses, on behalf of the consumer-

(i) an authorisation for any person acting on behalf of the supplier to enter any premises for the purposes of taking possession of goods to which the agreement relates;

(ii) an undertaking to sign in advance any documentation relating to enforcement of the agreement, irrespective of whether such documentation is complete or incomplete at the time it is signed; or

(iii) a consent to a predetermined value of costs relating to enforcement of the agreement, except to the extent that is consistent with this Act.’

to-month contracts between Oasis Asset Company and the Exchange Programme customers.

[32] Given that an order enforcing the restraint of trade provisions in the franchise agreements will have no practical effect, it is unnecessary to consider the defence that the restraint of trade clause is unenforceable because it infringes s 22 of the Constitution. The same applies to the defence based on s 25 of the Constitution, namely that the order granted in terms of prayer 2.7 of the notice of motion that the franchisees hand over control of their franchised businesses to Oasis, constitutes an arbitrary deprivation of property.

[33] In any event, the constitutional defences were impermissibly raised for the first time, on appeal. It is settled that a challenge based on a constitutional provision must be properly pleaded. A party must place before the court information relevant to that challenge to inform the opposing party of the case it is called upon to meet and enable it to present factual material and legal argument to meet that case. The opposing party must be left in no doubt as to the nature of the case it has to meet, and the relief sought.<sup>15</sup> So, the franchisees cannot rely on s 22 or s 25 of the Constitution to defeat a claim by Oasis that they return the water purifying system, as sought in prayer 2.3 of the notice of motion.

[34] I now turn to the orders granted in terms of prayers 2.1, 2.2 and 2.4 of the notice of motion. On either parties' version the franchise agreement came to an end in February 2023, albeit that this did not come about by mutual consent. What is clear, is that the parties expressly agreed that the termination of the agreement 'for any reason whatsoever', would trigger the rights in clause 20.3.

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<sup>15</sup> *Prince v President of the Law Society of the Cape of Good Hope and Others* 2002 (2) SA 794; 2002 (3) BCLR 231 (CC); 2002 (1) SACR 431 (CC).

[35] The franchisees undertook to immediately return all manuals and other printed material relating to the franchise operation, and to remove and return all signage to Oasis, on termination of the agreement. They failed to do so. The evidence shows that they continued to use the Oasis signage, stationery and marketing material in several of their outlets.

[36] The franchisees' submission that they do not have any trade secrets or confidential information relating to the franchised business, is unsustainable on the evidence. So too, their submission that Oasis does not have a business system, particular know-how or trade secrets. These are defined in the franchise agreement, with which the franchisees undertook to comply.

[37] Clause 3.11 of the agreement defines the 'franchised business'. It means, inter alia, the operation of retail outlets; the franchised business as described in the operational procedures and training manual; and know-how (which includes but is not limited to all confidential, technical, commercial or business information relating to the use of the business system or operation of the franchised business).

[38] The 'business system' is defined in the franchise agreement as meaning the system of operating the franchised business recorded in the agreement, and/or the operational procedures and training manual. The agreement defines 'intellectual property' as including know-how, goodwill, trade dress, trademarks and trade secrets.

[39] This is not a case where the franchisees received confidential information and trade secrets in circumstances where they ought to have appreciated that they were confidential. Rather, the franchisees not only expressly agreed that they would retain as confidential, the intellectual property and business system of Oasis, but also that they would obtain a written confidentiality document from

their employees or agents to whom the operational procedures and training manual were disclosed. Van den Berg Water concluded four franchise agreements in 2018. Van Schalkwyk Water concluded a renewal franchise agreement in 2019. The Besters concluded two franchise agreements in 2019 and 2022 respectively. All the franchisees conducted Oasis franchises until February 2023.

[40] What is more, the cancellation letter states:

‘Our clients hereby undertake as follows:

- a. To remove all OASIS WATER trademarks, signage and other related OASIS WATER brand elements from all its premises, within a period of 7 (seven) business days from date of this correspondence;
- b. To refrain from using the OASIS WATER trademarks in future (subject to the above grace period to remove all signage and branding); and
- c. To refrain from using any OASIS WATER know-how or confidential information.’

[41] Thus, on their own showing the franchisees obtained know-how and confidential information as a result of the Oasis franchise. This is consistent with their contractual undertakings to conduct the franchise in accordance with its operational procedures and training manual, and to maintain the confidentiality of its business system and intellectual property. Oasis’ know-how, trade secrets and confidential information, such as its pricing structures and margins, marketing strategies, client base records and information, and sales strategies and marketing endeavours, obviously do not constitute information easily accessible from public sources, or information of a trivial character.

[42] Accordingly, the franchisees’ submission that they did not gain access to confidential information, such as Oasis’ know-how, business system and operational procedures, is far-fetched or clearly untenable; and may safely be rejected on the papers. And the evidence shows that they did not comply with the

undertaking in their cancellation letter. The Oasis trademark was still being used in various outlets of the franchisees. They retained the client base records and information relating to operational procedures, and used these to contact customers of Oasis, informing them that the Manzi brand offers the same service and quality. Indeed, this is common ground. They used the same marketing and pricing strategies as Oasis, in selling Manzi Water. One of the franchisees contacted a desktop publisher used by Oasis, to design custom labels for its brand, which was refused.

[43] It follows that the interdicts in paragraphs 2.1, 2.2 and 2.4 of the order will have practical effect. The Mahikeng High Court was correct in granting the interdicts in paragraphs 2.1 and 2.2 of its order. However, it erred in not granting the interdict sought in prayer 2.4 of the notice of motion, on the ground that this relief was inextricably linked to the restraint of trade order sought in prayer 3 of the notice of motion. That is not so, for the reasons advanced above.

[44] The franchisees' reliance on s 40(1)(c) of the CPA is misplaced. There is no evidence that Oasis used 'coercion, undue influence, pressure, duress or harassment, unfair tactics or any other similar conduct', in the conclusion or enforcement of any of the franchise agreements. Section 51(1)(i) of the CPA is no longer relevant, since Oasis concedes that an order authorising it to take control of the franchised business, will have no practical effect.

[45] For the above reasons, the relief sought in paragraphs 2.1, 2.2 and 2.4 of the notice of motion, was correctly granted by the Pretoria and Kimberley High Courts. Consequently, the franchisees' appeal against those orders, is dismissed. The appeal by Oasis against paragraph 2.4 of the order of the Mahikeng High Court succeeds. The cross-appeal by the franchisees against paragraphs 2.1 and 2.2 of the order of the Mahikeng High Court, is dismissed.

### **The interdicts sought in prayers 2.3 and 2.9 of the notice of motion**

[46] In prayer 2.3 of the notice of motion, Oasis sought the return of the water purification system consisting of purification plants, filling/dispensing tables, ozone units and articles bearing trademarks. Oasis rightly, does not allege ownership of this equipment. Instead, this relief is squarely based on clause 20.3.2 of the franchise agreement.

[47] Clause 7.3.2 of the franchise agreement requires a franchisee to ‘purchase all its equipment, fittings and accessories’ from suppliers recommended by Oasis. It provides that upon termination of the agreement for whatever reason, the equipment, fittings and accessories ‘can only be sold to an existing franchisee, an approved buyer of the franchised business or be sold to the franchisor at its then fair market value’. However, Oasis has not exercised the option to buy the equipment and consequently, has not tendered any payment for it.

[48] The definition of a ‘consumer’ in the CPA includes ‘a franchisee in terms of a franchise agreement’. Section 48(1) provides that a supplier must not conclude an agreement to supply goods or services on terms that are unfair, unreasonable or unjust;<sup>16</sup> or require a consumer to assume any obligation on such terms.<sup>17</sup> Clause 20.3.2 of the franchise agreement is a violation of these provisions. The agreement requires the franchisees to purchase the Oasis water purification system; and authorises its sale to another franchisee or to Oasis itself upon termination of the agreement. In either event, the franchisees would be entitled to the proceeds of the sale. But clause 20.3.2 also grants Oasis the right to obtain the water purifying system and its components, free of charge, on termination of the agreement for whatever reason. This plainly, is a term that is unreasonable and unjust. Apart from this, clause 20.3.2 is incurably ambiguous and falls to be construed against Oasis, in accordance with the *contra proferentem*

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<sup>16</sup> Section 48(1)(a)(ii) of the CPA.

<sup>17</sup> Section 48(1)(c)(ii) of the CPA.

rule (an ambiguous contract term should be construed against the drafter of the contract).<sup>18</sup> In short, Oasis did not make out a case for the relief sought in prayer 2.3 of the notice of motion.

[49] The interdict sought in prayer 2.9, restrains the franchisees from using or displaying the Oasis water purification system and equipment as part of any business enterprise. Oasis presented evidence of numerous instances where the same kiosks, refill tables, water purification and ozonation systems as those used by Oasis, were being used in the various outlets of the franchisees, after the cancellation letter had been sent. The franchisees' however adduced evidence showing that the water purification systems and equipment used by Oasis, are not unique; that they are widely used in the industry; that Oasis procures these products from third parties; and that some franchisees purchased their purification systems and refill tables directly from suppliers. It cannot be said that this evidence is plainly implausible, and any factual dispute on this aspect falls to be determined on the franchisees' version.

[50] There is nothing in the franchise agreement which suggests that Oasis supplies unique water purification and bottling systems and equipment to its franchisees. On the contrary, franchisees are responsible for carrying all necessary equipment and shopfitting, and are required to purchase all equipment, fittings and accessories detailed in the operational procedures and training manual, from suppliers recommended by Oasis. Franchisees may also acquire equipment and accessories from any other supplier, provided that 'franchisor requirements or specifications are fully adhered to'. Indeed, the answering affidavit states that there are about four main suppliers of water purification systems; that Oasis did not prescribe a particular system; and that franchisees

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<sup>18</sup> *Cairns (Pty) Ltd v Playdon & Co, Ltd* [1948] 3 All SA 107, 1948 (3) SA 99 (A) at 122-3; R H Christie and G B Bradfield *Christie's Law of Contract in South Africa* 8 ed (2022) at 277-278.



were free to choose both the system and the supplier to be used in running the franchise. This is the clearest indication that Oasis does not have unique or novel water purification and bottling systems or equipment, supplied to or required to be used by franchisees. What is more, equipment and accessories may be sold to a third party after removal of the Oasis brand, if Oasis or a franchisee is not interested in buying them.

[51] For the above reasons, the relief sought in paragraphs 2.3 and 2.9 of the notice of motion, should not have been granted by the Pretoria and Kimberley High Courts. Consequently, the franchisees' appeal against those orders is upheld.

#### **Prayer 2.10 of the notice of motion**

[52] This issue can be dealt with briefly. The relief sought in prayer 2.10 is essentially an interdict to restrain the franchisees from competing unlawfully with Oasis and Oasis Asset Company by using the Exchange Programme; and passing off their products and services as being those of Oasis. Given that Oasis accepts that the franchisees have been trading as Manzi Water since February 2023; that the order restraining the franchisees from engaging in a similar operation as the Oasis business system, has been overtaken by events; and that a decision on that order will have no practical effect, the relief sought in prayer 2.10 is no longer relevant.

[53] In any event, the assertions in the founding affidavit that Oasis developed a water purification process using a secret combination of specifically selected filters combined with Ozone treatment of the water, has not been established in evidence. These assertions were denied and rebutted by the franchisees, who presented evidence showing that Oasis does not prescribe a combination of filters; and purified water is produced by filtering municipal water through a process of

reverse osmosis and ozonation, comprising six steps widely used in the industry. And as stated, franchisees were free to choose their water purification system.

[54] The Exchange Programme, and specifically the allegation relating to the development of a 10-litre purpose-built bottle in collaboration with Polyoak and Plastic Innovations, constitutes inadmissible hearsay. Neither is the 10-litre bottle sold exclusively to Oasis. Further, the evidence shows that the Exchange Programme is neither unique nor innovative – it was copied from the website of Primo Water Exchange, a firm in the United States. In addition, the Programme cannot be regarded as a system – the dispenser is not unique and was bought from a third party; and several competitors of Oasis offer a water exchange programme. Again, the version of the franchisees on this score, is neither far-fetched nor untenable and must be accepted.

[55] The allegation that the franchisees are passing off their water shop and Change Your Manzi business as being that of Oasis, has likewise not been demonstrated in evidence. The name, get-up or trademark used by the franchisees is not reasonably likely to confuse or deceive the public into thinking that their goods and services emanate from Oasis, or that there is an association between those goods and the services and business conducted by Oasis.<sup>19</sup> On the contrary, Oasis demonstrated in annexes to the founding papers that the franchisees had informed consumers as follows: ‘We are no longer associated [with] or part of the Oasis Water Franchise Group. We are part of a new water Retail and Distribution Group called MANZI (short for water in Zulu)’.

[56] Finally on this issue, there are no facts in the founding papers that support a case of unlawful competition in relation to the ‘water shop business’. The high watermark of Oasis’ case in this regard is its assertion that it developed a unique

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<sup>19</sup> *Williams t/a Jenifer Williams & Associates and Another v Life Line Southern Transvaal* 1996 (3) SA 408 (A) at 418F-H.

purification process consisting of a secret combination of selected filters, combined with ozone treatment. As stated, this claim is unsustainable on the evidence.

[57] Further, in asserting that the franchisees are operating the same business, in the same way and servicing the same customers, Oasis overlooks two crucial facts. First, the franchisees have not copied nor appropriated an Oasis product or business values.<sup>20</sup> They are not selling Oasis water as if it were their own product. What is being sold is municipal water, which is filtered in a process used by all water shops and water purification businesses, utilising purification plants and equipment that are freely available in the market and sold by third parties. In addition, at a meeting in September 2021, Oasis' main deponent, Mr Ignatius du Preez, informed Mr Bester that there was nothing unique about Oasis franchises and the only thing that differentiates them is their brand. Mr du Preez admits attending that meeting, but says that he 'cannot recall' the discussion. Second, the business built up by a franchisee, even in a general sense, is not the business of the franchisor; and the customer connections built up by the franchisee whilst using the franchisor's name, must be regarded as the franchisee's 'property', subject to the rider that cross-referred customers cannot be regarded as trade connections built up by the franchisee.<sup>21</sup>

[58] For the above reasons, the relief sought in paragraph 2.10 of the notice of motion, should not have been granted by the Pretoria and Kimberley High Courts. Consequently, the franchisees' appeal against this order succeeds.

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<sup>20</sup> *Taylor & Horne (Pty) Ltd v Dentall (Pty) Ltd* 1991 (1) SA 412 (A) at 421F-G.

<sup>21</sup> *U-Drive Franchise Systems (Pty) Ltd v Drive Yourself (Pty) Ltd and Another* 1976 (1) SA 137 (D) at 142E-G. Although this was said in the context of a restraint of trade agreement, the position is in principle no different in relation to unlawful competition.

## **Costs**

[59] Oasis was successful in the Pretoria and Kimberley High Courts. Its reasons for not prosecuting the appeal in relation to the orders in its favour in those cases, are reasonable, and due to a change in circumstances beyond its control. Subject to what is stated below, there is no reason why it should be deprived of its costs in the High Courts, on the contractually agreed scale, in case numbers 989/2023 and 988/2023.

[60] However, the same cannot be said of Oasis Asset Company. Although its Exchange Programme was made available to the franchisees, it has no contract with them and consequently, no entitlement to attorney-client costs. The application by both Oasis and Oasis Asset Company for an order in terms of prayers 2.3, 2.7, 2.9, 2.10 and 2.14 of the notice of motion, ought not to have been granted by the relevant High Courts. Moreover, Oasis Asset Company failed to establish passing off or unlawful competition in respect of its Exchange Programme. However, a separate costs order against it on a party-and-party scale would be impractical and create confusion. Therefore, an order that the applicants in case numbers 989/2023 and 988/2023 are entitled to 50% of their costs, is in my view, appropriate and fair.

[61] The Mahikeng High Court in case number 1120/2023, granted Oasis an order only in terms of prayers 2.1, 2.2, 2.5 and 2.6 of the notice of motion. Although the court failed to make an order of attorney and client costs in terms of the franchise agreement, Oasis was not substantially successful in those proceedings. Consequently, there is no basis to interfere with the costs order of the Mahikeng High Court.

[62] Oasis has not achieved substantial success on appeal in case number 1120/2023. Equally, the franchisees were largely unsuccessful in their cross-

appeal. In these circumstances, fairness dictates that there should be no order regarding the costs of appeal in case number 1120/2023.

[63] That leaves the costs of appeal in case numbers 989/2023 and 988/2023. The franchisees lodged an appeal in these cases. It is true that Oasis was compelled to oppose it to preserve the orders granted in its favour. However, this factor is not decisive. On the other hand, the franchisees were successful in that the order in paragraph 2.3 was overturned; and several orders which Oasis had obtained in the High Court, such as the handing over of their businesses, passing off, unfair competition and that they be restrained from using the Manzi Water Exchange Programme, was not proceeded with. In the circumstances, the appropriate order is that each party be liable for their own costs.

## **Order**

[64] The following order is made:

Case no: 989/2023

- 1 The application to adduce evidence on appeal is dismissed with costs, including the costs of two counsel, on the party-and-party scale.
- 2 The appeal succeeds in part.
- 3 The order of the Gauteng Division of the High Court, Pretoria, is set aside and replaced with the following:
  - ‘1. The first respondent is ordered to return to the first applicant all manuals and other printed matter relating to the first respondent’s franchise operation, including:
    - 1.1 manuals, labels or printed material containing the first applicant's names or trademarks;
    - 1.2 printed or electronic matter relating to the franchise operation, previously conducted by the first respondent under the name and style of Oasis Water; and

- 1.3 client lists, or data lists.
2. The first respondent is ordered to remove and return all 'Oasis' signage to the first applicant.
3. The first respondent is ordered to cease using or exploiting the first applicant's 'Oasis' business system and any intellectual property owned by the first applicant, more specifically, its know-how, trademarks, trade secrets, and confidential information.
4. The respondents are ordered to pay 50% of the costs of this application, jointly and severally, on the contractually agreed scale as between attorney and client, including the costs of two counsel where so employed.'
- 4 Save as aforesaid, the appeal is dismissed. There is no order as to costs.

Case no: 988/2023

- 1 The application to adduce evidence on appeal is dismissed with costs, including the costs of two counsel, on the party-and-party scale.
- 2 The appeal succeeds in part.
- 3 The order of the Northern Cape Division of the High Court, Kimberley, is set aside and replaced with the following:
  - '1. The first respondent is ordered to return to the first applicant all manuals and other printed matter relating to the first respondent's franchise operation, including:
    - 1.1 manuals, labels or printed material containing the first applicant's names or trademarks;
    - 1.2 printed or electronic matter relating to the franchise operation previously conducted by the first respondent under the name and style of Oasis Water; and
    - 1.3 client lists, or data lists.

2. The first respondent is ordered to remove and return all 'Oasis' signage to the first applicant.
  3. The first respondent is ordered to cease using or exploiting the first applicant's 'Oasis' business system and any intellectual property owned by the first applicant, more specifically, its know-how, trademarks, trade secrets, and confidential information.
  4. The respondents are ordered to pay 50% of the costs of this application, jointly and severally, on the contractually agreed scale as between attorney and client, including the costs of two counsel where so employed.'
- 4 Save as aforesaid, the appeal is dismissed. There is no order as to costs.

Case no: 1120/2023

- 1 The application to adduce evidence on appeal is dismissed with costs, including the costs of two counsel, on the party-and-party scale.
- 2 The appeal succeeds in part.
- 3 The cross-appeal succeeds in part.
- 4 The order of the North-West Division of the High Court, Mahikeng, is set aside and replaced with the following:
  - '1. The first respondent is ordered to return to the first applicant all manuals and other printed matter relating to the first respondent's franchise operation, including:
    - 1.1 manuals, labels or printed material containing the first applicant's names or trademarks;
    - 1.2 printed or electronic matter relating to the franchise operation previously conducted by the first respondent under the name and style of Oasis Water; and
    - 1.3 client lists, or data lists.

2. The first respondent is ordered to remove and return all ‘Oasis’ signage to the first applicant.
3. The first respondent is ordered to cease using or exploiting the first applicant’s ‘Oasis’ business system and any intellectual property owned by the first applicant, more specifically, its know-how, trademarks, trade secrets, and confidential information.
4. Each party shall bear their own costs.’
- 5 Save as aforesaid, the appeal is dismissed. There is no order as to costs.
- 6 Save as aforesaid, the cross-appeal is dismissed. There is no order as to costs.

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A SCHIPPERS  
JUDGE OF APPEAL



Appearances:

For appellants: G Kairinos SC with J Butler

Instructed by: Smith & Van Wyk, Pretoria

Honey & Partners Incorporated, Bloemfontein

For first and second

respondents: P G Cilliers SC with R J Groenewald and R Modua

Instructed by: Adams & Adams Attorneys, Pretoria

Phatshoane Henney Incorporated, Bloemfontein