

**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 21/21349

REPORTABLE: ~~YES~~ / NO
OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
REVISED.

In the matter between:

ROYTEC GLOBAL (PTY) LTD

(Reg No: 2000/030090/07)

Applicant

and

MARTINSON, MICHAEL BRUCE

(ID No: [...])

First Respondent

PARAMATIC (PTY) LTD

(Reg No: 2017/408415/07)

Second Respondent

BTECH PROCESS (PTY) LTD

(Reg No: 2016/155861/07)

Third Respondent

(This judgment is handed down electronically by circulation to the parties' legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 12 October 2021.)

JUDGMENT

MALINDI J:

Introduction

[1] On 8 July 2021 this matter was certified as a Commercial Court dispute in terms of the Commercial Court Practice Directives. It was also declared to be heard on a semi-urgent basis.¹ It was allocated for hearing on 16 August 2021 and was postponed to 27 August 2021 by agreement between the parties in order for the applicant to file a supplementary affidavit and to allow for a reply thereto.

[2] The application was served upon the respondents on 29 April 2021 to be heard on 11 May 2021. The applicant seeks an order interdicting and restraining the respondents from breaching agreements that will be referred to later, for a period of 24 months.

[3] The parties are as follows:

3.1 The applicant is Roytec Global (Pty) Limited (previously Roymec Technologies (Pty) Ltd), a private company duly incorporated and registered according to the company laws of the Republic of South Africa.

3.2 The first respondent is Michael Bruce Martinson, currently in the employ and a Director of the second respondent.

3.3 The second respondent is Paramatic (Pty) Ltd, a private company duly incorporated and registered according to the company laws of the Republic of South Africa.

[4] The applicant will be referred to as such or as Roytec. The first respondent will be referred to as Mr Martinson and the first respondent interchangeably. The second and third respondents also as Paramatic and BTech, respectively.

Urgency

¹ CaseLines 000-1.

[5] The respondents challenge the hearing of this matter on an urgent basis. They contend that as the applicant became aware of the alleged breaches on 5 February 2021 and had threatened launching urgent proceedings if no undertakings were made by the respondents by 5 March 2021 and again by 19 April 2021, the launching of proceedings only on 29 April 2021 constitutes self-created urgency. The issue of urgency is intertwined with the merits and I will therefore pronounce on this after traversing the merits. It is more convenient to do so.

Background

[6] The Restraint sought against the first respondent is contained in clause 25 of the Shareholders Agreement entered into with him on 12 December 2017, and the Confidentiality, Copyright and Intellectual Property Agreement (“*Confidentiality Agreement*”) entered into on 25 May 2010.

[7] The interdict and restrain sought against the second respondent is contained in the Confidentiality Agreement entered into with it on 25 May 2010. Furthermore, an interdict is sought against the second respondent from breaching, *inter alia*, clause 9 of the Confidentiality and Non-Compete Agreement entered into on 30 April 2018 (“*the Non-Compete Agreement*”).

[8] The third respondent is to be interdicted together with the second respondent from conducting business together which amounts to a breach of the Non-Compete Agreement between the applicant and the second respondent.

[9] The applicant describes itself as follows:

“12. The Applicant is a privately owned and managed company which was established as Roymec Technologies in 2001 and rebranded to Roytec Global in 2015. The Applicant offers Proprietary Technology in, inter alia, thickeners as well as Partnered Technologies for Flotation, Vacuum Filtration (belt filters) and Pressure Filtration. The Applicant has approximately 20 years of application experience in filtration, clarification, thickening and other mineral separation technologies. Through this work the Applicant has established a prestigious reputation and significant goodwill in the marketplace which has taken a considerable amount of time, money and effort to establish.

13. *The Applicant specialises in, inter alia, the supply of Filtration and Separation Equipment for the Mining and Industry and in particular:*

13.1 *Vacuum Belt Filters (“Belt Filters”);*

13.2 *Thickeners (“Thickeners”).”*

[10] The applicant had initially learnt of the breaches during February 2021 and had caused its attorneys to write a letter of demand to the respondents with regard to the supply of Belt Filters on 3 March 2021.² The letter sets out that the applicant came into possession of an email of 5 February 2021 generated on 27 January 2021 by Bill Stevendale of the third respondent to Thomas Sun (“Sun”) of Toncin Group. Nuclear Industry Yan Tai Toncin Group Co Ltd is the applicant’s Chinese supplier of materials as set out. In this letter Stevendale is asking Sun whether Toncin can supply the third respondent with Belt Filters or whether it must be through the applicant. He states further that if Toncin cannot, the third respondent be provided with contacts of a person who can supply the third respondent directly.

[11] If Stevendale was asking for Belt Filters that the applicant supplies, then two things are demonstrated. First, that the third respondent sought to compete with the applicant in the Belt Filters directly with the applicant’s supplier or through a third party.

[12] Secondly, in order to elicit a favourable response from Toncin, Stevendale wrote a further email on 29 January 2021 in which he evoked the first respondent’s name as the person with whom the third respondent has a business relationship by virtue of them working together for the second and third respondents. This demonstrates a prohibited relationship between and among the three respondents if the subject matter of these emails involve Roytec Vacuum Belt Filters. That an attempt was being made to solicit the acquisition of these Belt Filters is acknowledged in the respondents’ attorney’s letter of 5 March 2021 to the applicant’s attorneys.³ The applicant avers that the purported abandonment of the acquisition of

² CaseLines 001-24 to 001-27.

³ CaseLines 001-140.

the Belt Filters was fake as the respondents were doing it through Toncin's subsidiary, Sunny Rubber Company Ltd.⁴

[13] Regarding the Thickeners, the applicant alleges that on 22 April 2021 it uncovered that the second respondent was supplying equipment and prescribed services on the North Mara Project in Tanzania in breach of the Non-Compete agreement.⁵ The applicant alleges that the business between itself and Control Lines (Pty) Ltd ("CL") and Engineering & Hydraulic Services ("EHS") involves the supply of thickener components and spares which are defined as Prescribed Services in the Shareholders Agreement. On this day it uncovered that the first respondent had divulge relevant information in these regards to the third respondent. The telephone conversations that are reproduced in the founding affidavit evidence this.⁶

[14] In answer the first respondent denies that the third respondent operates in unlawful competition with the applicant. The essence of this denial is based on the assertion that although the third respondent may be construed as competing against the applicant "*in terms of a range of competing separation technologies*", including thickening and dewatering unit operations), it does so without access to the applicant's confidential information. This assertion is based on the fact that the third respondent has vacated the second respondent's premises as a display that it does not use the second respondent's knowledge of the applicant's business and confidential information, the first applicant being a director of both the applicant and second respondent. Furthermore, the third respondent is not a party to any agreement with the applicant which restricts it in any form from conducting its business.⁷

[15] As far as the second respondent's relationship with the applicant is concerned, the first respondent denies that Paramatic competes with the applicant or acts in collusion with BTech on the basis that the applicant delivers Original Equipment Manufacturer ("OEM") equipment whereas Paramatic is "*a services*

⁴ CaseLines 001, item 1, FA pp 001-65 to 001-66, para 90

CaseLines 001, item 2, FA, annexures "FA5.1" to "FA5.4", pp 001-100 to 001-108, specifically annexure "FA5.4", pp 001-108.

⁵ CaseLines 001-24, para 24.

⁶ CaseLines 001-55 to 001-59.

⁷ CaseLines 009-10 to 009-12.

company” that generates fabrication drawings for commercial, industrial, mining, tourism and metallurgical projects. A small part of its business is to generate fabrication drawings for solid liquid separation for suppliers, including the applicant.⁸

[16] As far as the first respondent’s link to the other respondents is concerned, he denies that Paramatic does any business that is in competition with the applicant and vaguely alludes to an assertion that the applicant cannot lawfully “*stifle the business of Paramatic and (his) ability to earn an income*” generally. He also argues that the knowledge he has about the applicant’s business was self-acquired in his employment before the applicant and is therefore not information or knowledge exclusive to the applicant.⁹

[17] Regarding BTech’s approaches to the applicant’s Chinese supply chain, the first respondent asserts that there is nothing that impedes BTech from doing business with Toncin.

[18] The first respondent’s denials are based only on the assertion that the equipment that BTech sought to or procured from Toncin or its subsidiary is not that the applicant uses in its thickening business as such acquired equipment is a clarifier for water treatment solutions or that the thickener that was acquired is different from the applicant’s thickener or that it is a standard thickener not of the applicant’s specifications. Toncin has confirmed that it has an exclusive agreement with the applicant for Sub-Saharan Africa. Therefore supplying any company in the Sub-Sahara would be competition with the applicant.

[19] The first respondent does not provide a convincing answer to the applicant’s allegations of the existence of a tri-partite relationship among the respondents, and that BTech’s acquisition of equipment from the applicant’s Chinese supply chain amounts to:

19.1 The use by the first respondent of Paramatic to help BTech in its acquisition of Prescribed Services, which according to the Non-Compete Agreement the first respondent is prohibited from doing.

⁸ CaseLines 009-12.

⁹ CaseLines 009-14.

19.2 The imparting of confidential information to help BTech to know the applicant's designs of Belt Filters and Thickeners which is prohibited in terms of the Confidentiality Agreement.

19.3 The facilitation of competition against the applicant by BTech which is prohibited by the Shareholders Agreement.

[20] The applicant argues that BTech is being utilised as a front in order for Paramatic, through the first respondent, to surreptitiously and clandestinely breach the Non-Compete Agreement.

[21] The transcripts of telephone discussions and emails referred to in the founding affidavit belie the earlier denials by the respondents when enquiries were being made by the applicant whether the respondents were engaged in unlawful business as defined in the various agreements referred to. This is so because the transcripts reveal that:

21.1 Paramatic placed an order for the supply of Thickeners with EHS, and Control Panels for Thickeners with CL.¹⁰ The probabilities are that the first respondent was personally involved.

21.2 Stevendale, a director and shareholder of BTech acquired Belt Filters through the applicant's Chinese supply chain, through the first respondent's facilitation.

[22] The first respondent offers no answer to paragraph 25 of the founding affidavit¹¹ save to deny that BTech and Paramatic acted in concert as alleged. That it is so is undeniable on the face of these emails.

[23] In its supplementary affidavit the applicant provides further evidence that there is a breach of clause 25.1 of the Shareholders Agreement and clause 9 of the Non-Compete Agreement. Fanton obtained 3 emails which show that:

23.1 Marhinus du Plessis is being thanked by one Drew Leibbrandt for the help he provided with 30m and 32m thickener general assembly ("GA")

¹⁰ CaseLines 001-57 to 001-58.

¹¹ CaseLines 011-24 to 001-27.

drawings. Du Plessis is a director and shareholder of Paramatic. The first respondent is copied herein.

23.2 On 7 May 2021 Du Plessis responded to Leibbrandt email of 30 April 2021 and the first respondent is a co-addressee together with Ernest Raats of Paramatic. Du Plessis confirms that the requested work is 98% complete.

23.3 On 8 March 2021 Raats sent an email to Du Plessis, with the first respondent being a co-addressee, attaching a GA of 32m Thickener in pdf as well as dwg format.

[24] The services being provided by Paramatic in this regard were to MechProTech, a direct competitor of the applicant in the manufacture of Thickeners.

[25] In response to the supplementary affidavit, the first respondent protests that the applicant is seeking to control all elements within a specific industry “*whilst prejudicing the respondents to the degree that such conduct impacts on our right to earn a living*”. He raises a defence of protectable interest. He protests that drafting services, as were provided to MechProTech, are not prohibited by the agreements with the applicant. Secondly, the first respondent avers that the design or drawing provided to MechProTech is a standard product used commonly in the industry and contains no features or attributes of the confidential information from the applicant.

[26] The first respondent attacks the supplementary affidavit on the basis that it constitutes hearsay as there is no confirmatory affidavit. He does not attack the contents of the emails referred to. This is the kind of hearsay evidence that a Court will admit in the context of an urgent application in particular where the evidence itself is not contested.¹² The general rule for the exclusion of hearsay evidence does not apply where unfairness to the other party is excluded in the proceedings. The context of the proceedings, and especially that the respondents can respond to the contents of the emails renders the admissibility thereof not unfair to them.¹³

¹² The Law of Evidence Amendment Act, 45 of 1988, section 3(1)(c).

¹³ Compare *Savoi & Others v National Director of Public Prosecutions & Another* [2014] ZACC 5 at [46] – [49].

[27] The first respondent repeats the respondent's defence that as in the case of BTech, MechProTech is not the applicant's competitor and that Paramatic did not provide MechProTech with equipment, which is the applicant's business. He further distinguishes "*drawing*" from "*design*", the argument being that Paramatic produces drawings, not designs. MechProTech was provided with drawings, not designs. This is set out more fully in the confirmatory affidavit of Evan Bird, a managing director of MechProTech.

New defence: protectable interest

[28] The applicant has properly sought the striking out of the new defences in the respondents' supplementary answering affidavit at paragraphs 9.1 to 9.3, in particular the defence relating to the protectable interest defence. The defence is raised for the first time in supplementary heads of argument. A party is not ordinarily allowed to raise a new defence in a supplementary affidavit. Furthermore, the references to the applicant's conduct being tantamount to preventing fair competition and denying the respondents their right to earn a living has not been directly attacked in the answering affidavit. It is clear why this was not done. This is a defence that is mainly available if a defendant/respondent admits the breach of a restraint. This is a defence in which the defendant/respondent asks the Court to condone their breach. In this case the respondents deny any breach.

[29] Clause 9 of the Non-Compete Agreement prohibits Paramatic from "*enable(ing) a third party to enter the market with competing and similar equipment in the specified field in terms of this agreement*". The first and second respondents either enabled MecProTech to do so, or if MechProTech was in the same specified industry with the applicant twenty years earlier, the first and second respondents enabled it to produce a specific Thickener identical or similar to that of the applicant's competitor, Outotec.

Alleged Disputes of fact

[30] The respondents contend that the following constitutes disputes of fact which cannot be resolved in application proceedings:

“34. Apart from the aforesaid aspects raised, a clear dispute of fact has manifested. To highlight the most obvious disputes, the following are mentioned: -

34.1 The sphere of application of the provisions of the agreement: The supply of equipment and/or designs in the water filtration sphere. Roytec contends that this sphere of work falls under mining and metallurgical activities. This whilst the respondents contend that it does not and is separate from Roytec’s operations.

34.2 The Chinese supply chain: Roytec alleges that the respondents utilised the Chinese supply chain specifically earmarked for Roytec’s sole use. In this regard Roytec alleged use of its supplier Toncin. On a contextual reading, it has failed to establish in its founding affidavit that an exclusivity arrangement exists. The license is of no consequence as the order which is referred to was placed at Sunny Rubber company. There exists no exclusivity or licence agreement between Roytec and Sunny Rubber Company.

34.3 The EHS order: Roytec alleged that an order placed at EHS was in contravention of the terms of the agreements. Roytec relies on a redacted copy of a purchase order placed at EHS. Roytec failed to produce an order to show that this relates to an order from any of the respondents. Paramatic denies that it has ordered listed or competing equipment from EHS. Roytec persist with the view that “sufficient evidence” was placed before court to confirm that the order relates to the affected respondent. This whilst no documentary proof or even confirmatory affidavit of Mr Russel was placed before court.

34.4 The CL order: Roytec alleges that the order placed at CL was attended to by Mr Martinson in his personal capacity or Paramatic. This was denied.

34.5 The nature of the components: The EHS order and CL order are for components not related to Roytec thickener and clarifiers. This whilst Roytec contends that it ought to fall within the ambit of the operation of the agreements between the parties.

34.6 The 3 disclosures: Roytec relies on the notion that the 3 disclosures were untruthful. This is all disputed and shown out not to be correct.

34.7 The 4 denials: Roytec relies on the 4 alleged denials to show certain alleged conduct. The respondents persist with the qualified denials. This includes the denial of the use of the alleged confidential information, as alleged by Roytec. It is disputed that the information relied upon is in possession of Mr Martinson or Paramatic.

34.8 Use of BTech as a conduit: Roytec alleges that Mr Martinson has provided BTech with confidential information and consequently used BTech as a “vehicle” to compete with Roytec. A qualified denial of such arrangement was provided.

34.9 The performance of Roytec in terms of the agreement with Mr Martinson. Roytec specifically deny that they are in breach of the contract.

34.10 The locality of BTech: Roytec allege that BTech is sharing office space with Paramatic and consequently this enables BTech to act as an unlawful competitor against Roytec. This is denied and shown out that they have moved already in March 2021 rendering such allegation disputed.”

[31] These alleged disputes of fact do not raise real, genuine or *bona fide* disputes of fact. The terms of the agreements are not contentious. The only dispute of fact is whether Paramatic supplied equipment to third parties, which is prohibited by the agreements. On the reading of the emails in both the BTech and MechProTech situations Paramatic and the first respondent were engaged in providing or facilitation of the supply of equipment to third parties in contravention of the agreements.

[32] In respect of its attempt to distinguish its business or aspects thereof by stating that it is a service provider and not an equipment supplier, Paramatic seeks that the Court disregard the fact that despite the formal description of the scope of its work it went beyond that description when it helped MechProTech in its design of a Thickener and is recorded to have been paid for that.

[33] I conclude therefore that on the application of the *Plascon-Evans* principle¹⁴ the contrived disputes of fact are not genuine and are resolvable on paper.

Lack of authority to act

[34] The deponent to affidavit on behalf of the applicant, Mr Alan John Fanton, states that he derives authority to do so on the basis of resolutions of the Board of Directors for the applicant and of its shareholders which are annexed as “FA1” to “FA1.4”. The resolutions were adopted on 21 April 2021 and 29 April 2021. The first two authorise any of the named persons to institute legal proceedings against the respondents and the other two provide for each of the directors giving indemnity against the applicant in the event that any director votes against the resolution and the requisite majority is not attained but nevertheless legal action is proceeded with.

[35] The resolutions were taken consequent to a Special General Meeting of the shareholders on 23 April 2021 where it was resolved to bring legal action against a fellow director, being the first respondent. A shareholders’ resolution when legal action is proposed against a director is required by clause 12 of the Subscription and Shareholders Agreement which reads as follows:

“12.1 Save as expressly otherwise contemplated in this Agreement including, without limitation, clauses 4.13 and 4.14, the Shareholders undertake to procure that the Company shall not engage in, agree to, perform or undertake any of the following acts or matters, except as may be approved or agreed to in writing by Shareholders who at the relevant time hold at least 90% (NINETY PERCENTUM) of the entire issued share capital of the Company and the directors’ powers shall be limited accordingly:

...

12.1.8 the institution of any legal proceedings of any nature whatsoever other than those arising in the ordinary, normal and regular course of business;

...

¹⁴ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A); *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 325 (SCA)

2.2 *If any resolution of the Company is proposed that the Company institute any legal proceedings against any Shareholder or any member of a group of which the Shareholder forms part or Director of the Company, such resolution shall be deemed to be within the Shareholders' domain and not the directors' domain. If any Shareholder vetoes any such resolution, and as a result the requisite majority to pass the resolution cannot be obtained then, provided that the remaining Shareholders furnished an indemnity to the Company against all costs, losses or damages of whatsoever nature which the Company may sustain in bringing any such legal proceedings, such vetoing shareholder shall be deemed to have voted in favour of the resolution."*

[36] The respondents attack Fanton's authority on the basis that the resolution of 23/4/21 by the shareholders is not annexed and therefore the meeting cannot be presumed to have taken the resolution.

[37] Although the applicant does not attack the resolution it attaches a transcript of the shareholders meeting and points out that at the meeting 65.15% of the total 100% shareholders voted in favour of the resolution and the remaining 34.85% vetoed the resolution and were deemed to have voted in favour in terms of clause 12.2 of the Shareholders Agreement, and the 65.15% deemed to have given the indemnity.

[38] The question that requires an answer is whether the 65.15% voting in favour and invoking clause 12.2 against the other 34.85% did "*furnish an indemnity to the Company ...*" for the purposes set therein. The Notice of Special General Meeting¹⁵ contains an Explanatory Note as to the purpose of the proposed Special Resolution regarding legal action against a shareholder. Paragraph 2.2.1(b) thereof explains the requirement of providing the indemnity by those voting in favour in the event that the resolution is vetoed by other shareholders. By invoking clause 12.2 of the Shareholders Agreement the 65.15% bound themselves to furnishing the indemnity, or were deemed to have done so. I find therefore that in the context of all the

¹⁵ CaseLines 001-76.

documents relevant to the taking of a resolution by the shareholders in this regard the 65.15% of the shareholders furnished the requisite indemnity to the applicant.¹⁶

[39] The applicant submits that the challenge on clause 12 of the Shareholders Agreement is superfluous in any event because section 66 of the Companies Act, 71 of 2008 (*“the Act”*) now vests the management of a company with the directors as opposed to the regime before which vested this power in the hands of the shareholders. It submits that applying the provisions of clause 12 would be prohibited by section 15(7) of the Act which renders void any agreement by the shareholders which is inconsistent with the Act.

[40] In the circumstances the only question that remains is whether the Board resolutions of 21 and 29 April 2021 are valid, having been taken consequent to the shareholders’ direction.

[41] The management of the affairs of a company by a Board of Directors does not happen in a vacuum. The Board exercises its management powers as provided in the Shareholders Agreement read with the Act. Clause 12 of the Shareholders Agreement governs the relationship between the shareholders, in particular the circumstances under which legal action may be instituted against one another. I find this not to be inconsistent with Section 66 of the Act. When it comes to clause 12 of the Shareholders Agreement the Board has to pass requisite resolutions within the strictures thereof. In this instance the Board did so upon a valid resolution of the shareholders taken on 23 April 2021.

[42] The Act recognises this in Section 65. Part F of Chapter 2, in general and in particular Section 65(2), (4), (8), (9) and 10. In general the Memorandum of Incorporation may require any special resolution to be considered by shareholders¹⁷ other than any of those specified in subsection 11 of the Memorandum of Incorporation requires it.

[43] Section 65(9) imposes a minimum of 75% support for a special resolution by those who have the voting rights. The applicant’s Shareholders Agreement, an

¹⁶ Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SA) at [18].

¹⁷ Section 65(12).

equivalent of the Memorandum of Incorporation, demands more than the prescribed minimum and is entitled to do so.

[44] I find therefore that clause 12 of the Shareholders Agreement is valid and that the requirements of clause 12.2 were satisfied in both invoking the deeming of those who vetoed the resolution to have voted in support thereof as a result of the majority having furnished the requisite indemnity in favour of the applicant for the reasons stated therein.

[45] Upon the attack on the applicant's authority to act, and the applicant doubting that clause 12 of the Shareholders Agreement will withstand this attack, it filed a power of attorney on 10 May 2021, to authorise its attorneys to bring proceedings against the respondents.

[46] Rule 7 requirements have been decided in *Eskom v Soweto City Council*¹⁸ which has been approved by the Supreme Court of Appeal in *Unlawful Occupiers of the School Site v City of Johannesburg*.¹⁹ The authority of the attorney to act is sufficient and therefore the authority of the deponent is not necessary in terms of the Rule. The respondents' challenge to the Rule 7(1) Notice is that it does not address the 90% requirement of clause 12% of the Shareholders Agreement. I have dealt with that above with the result that the Rule 7 Notice authorises action against all the respondents to the extent that there is any challenge thereto. The applicant and the deponent's authority has been put beyond further scrutiny.

[47] I now come to the question of urgency.

[48] Although the applicant first became aware of the breaches by the respondents as early as February 2021 and directed its first letter of complaint on 5 March 2021, it could not act immediately in the face of the denials by the respondents. It required to conduct sufficient investigations in order to establish a *prima facie* case. Restraint of trade cases are inherently urgent because of their lifespan.

¹⁸ Eskom v Soweto City Council 1992 (2) SA 703 (W).

¹⁹ Unlawful Occupiers of the School Site v City of Johannesburg [2005] 2 All SA 108 (SCA) at [11] – [16].

[49] The applicant's right is based on the contract of employment and other agreements with the first and second respondents. This has not been disputed and the applicant's clear right for final relief has been established. The respondents have not attacked to any measure of credit the fairness of the agreements that they bound themselves to with the applicants.²⁰

[50] The applicant is entitled to the relief sought if it can show harm or the potential thereof if the respondents are not interdicted from perpetrating the wrongful and unlawful conduct complained of and that it has no other adequate remedy in damages. Damages are notoriously difficult to calculate in matters of this nature. As submitted by the applicant, the fact that the third respondent is not a party to any of the relevant agreements arbitration proceedings will not avail the applicant against the third respondent in addition to the fact that damages will be difficult to calculate.

[51] I concluded therefore that this matter was properly launched as an urgent matter and that this was recognised by certifying it as such and as a commercial case requiring a special allocation. The fact that it was only heard on 27 July 2021 does not detract from its urgent nature.

Costs

[52] Both parties pray for costs on the attorney and client scale, and that the costs of 14 May 2021 and 5 July 2021 be awarded.

[53] In regard to the 2 reserved costs orders:

53.1 The application was initially enrolled for hearing on the 11th of May 2021.

53.2 The respondents delivered a supplementary affidavit less than half an hour before Court was to commence. This necessitated the standing down of the matter, to enable the applicant to answer thereto.

²⁰ Waste Products Utilisation (Pty) Ltd v Wilkes and Another 2003 (2) SA 515 (W) at 571-573.

53.3 The parties agreed to stand the matter down for this purpose, and in the interim, discussed possible settlement. This resulted in the matter standing down further to the 14th of May 2021.

53.4 On the 14th of May 2021, the matter was removed from the roll and the parties were directed by Justice Dippenaar to jointly approach the office of the Deputy Judge President for the allocation of an expedited date, to have the application heard as a special motion.

53.5 This occurred pursuant to paragraph 26 of chapter 9.23 of the practice manual and due, in Justice Dippenaar's view, to the time required to argue the application.

53.6 The matter stood down due to the dilatory conduct of the respondents, who should be ordered to pay the costs of the 14th of May 2021 jointly and severally, the one paying, the other to be absolved.

53.7 The matter was allocated, by the DJP, for hearing as a special motion on the 5th of July 2021.

53.8 On the 5th of July 2021, Justice Siwendu ordered that the matter be heard as a semi-urgent application, and further certified the matter as a Commercial Court dispute in terms of the Commercial Court practice directives, referring the matter to Acting Deputy Judge President Victor for allocation to a Judge to finally determine the application.

53.9 The respondents opposed the application based on a purported lack of urgency. Insofar as the applicant was successful, in regard to a finding that the application be heard as a semi-urgent application, the respondents should similarly be ordered to pay the costs of the 14th of May 2021 jointly and severally, the one paying, the other to be absolved.

[54] The costs of the application will follow the result but not on a punitive scale. I do not agree that the respondents were unreasonable or *mala fide* in defending the application.

[55] Regarding the costs of 11 May 2021, the respondents will bear these costs as they were the cause of the matter standing down in order to enable the applicant to file an answer to their supplementary affidavit.

[56] On 14 May 2021 the matter was removed from the roll due to its nature and the time required to ventilate the issues fully. It was considered to warrant being set down as a special motion case and was eventually allocated for 5 July 2021. There is no reason to find that any party was responsible for this stand down. No order as to costs will be made.

[57] On 5 July 2021 the matter of urgency was argued and it was found to warrant being designated as semi-urgent and certified as a Commercial Court matter. As the applicant was successful on the issue of urgency it is entitled to the costs of the day.

[58] I therefore make the following order:

1. The provisions of the Rules of Court with regard to the forms and service of this application are dispensed with in terms of Rule 6(12) of the Rules of Court and that this application is heard as a matter of urgency.

2. The first respondent is interdicted and restrained for a period of 24 months from:

- 2.1. Breaching the provisions of the restraint contained in clause 25 of the shareholders' agreement concluded between the applicant and the first respondent;

- 2.2. Rendering any prescribed services (including but not limited to the supply of equipment and services relative to belt filters and thickeners) to or for the benefit of any prescribed customer in the territory, or attempt to do so;

- 2.3. Soliciting, interfering with, enticing, or attempting to entice away from the applicant, any prescribed customer in the territory, including but not limited to:

- 2.3.1. Engineering and Hydraulic Services; and

2.3.2. Control Lines (Pty) Ltd; and

2.3.3. The applicant's Chinese supply chain (which includes Nuclear Industry Yan Tai Tongxing Group Co Ltd ("*Toncin*") and any of its subsidiaries);

2.4. Being interested, engaged, concerned, associated with or employed by whether as proprietor, partner, director, shareholder, employee, consultant, contractor, financier, principal, agent, representative, assistant, adviser, administrator or otherwise and whether for reward or not, any company, firm, business undertaking, trust, concern, or other association of any nature which carries on, directly or indirectly, any business similar to or in competition with the business of the applicant (including but not limited to the supply of equipment and services relative to belt filters and thickeners) anywhere in the territory; and

2.5. Either alone or together with, or as agent(s) for any person, firm, company, close corporation, trust or association whatsoever, directly or indirectly, carry on or be involved in, in any way, as shareholders, directors, proprietors, partners, trustees, beneficiaries, financiers, advisers, consultants or otherwise, or be employed in, or be engaged in or concerned with, or grant financial assistance or loans of money, to any business carried on in competition with the applicant.

3. The first respondent is interdicted from:

3.1. Breaching the provisions of the confidentiality, copyright and intellectual property agreement concluded between the applicant and the first respondent ("*the confidentiality agreement*"), by utilising, communicating or publicising any of the applicant's:

3.1.1. Confidential information;

3.1.2. Customer and/or supplier contact details of persons with whom the applicant deals;

3.1.3. Confidential information regarding the internal operations of its business including its business and financial relationships with any of its suppliers or sub-contractors, including but not limited to the companies, mentioned in paragraph 2.3.1 and its sub-paragraphs above.

4. The second respondent is interdicted and restrained until 4 March 2023:

4.1. From breaching the provisions of the confidentiality and non-compete agreement concluded between the applicant and the second respondent (*“the non-compete agreement”*);

4.2. Competing with the applicant by designing, marketing or selling equipment with comprises thickeners and clarifies, pin bed clarifiers, solvent extraction filters (carbon, dual media and CoMatrix types), horizontal linear screens, vacuum/pressure disc and drum filters, vacuum belt filters, flocculent and reagent plants and Ion Exchange and Resin Elution systems, including but not limited to belt filter components and thickener components (*“equipment”*);

4.3. Entering the market or enabling a third party to enter the market with competing and similar equipment;

4.4. Providing any design service using the applicant’s confidential information to the applicant’s competitors;

4.5. Conducting soliciting interfering with, enticing or attempting to entice away from the applicant any prescribed customer in the territory, including but not limited to, the companies mentioned in paragraph 2.3.1 and its sub-paragraphs above.

5. The second and third respondents are interdicted from completing the CL Order, EHS Order and Belt Filter Order (as detailed in paragraph 25, 67 and 69 of the founding affidavit) as well as any orders ancillary thereto, that amount to a breach of the non-compete agreement.

6. The first to third respondents are compelled to:
- 6.1. Disclose with sufficient particularity the details of any person, close corporation, partnership or company to whom they have disclosed any of the applicant's confidential information;
- 6.2. Disclose with whom they have conducted business or with whom they have attempted to conduct business utilising the applicant's confidential information;
- 6.3. Disclose with whom they have conducted business in contravention of the non-compete agreement;
- 6.4. Dispose/delete/destroy the applicant's confidential information and allow the applicant's nominated IT professional access to inspect their telephones, computers, devices, tablets, memory sticks and/or hard drives to ensure that they have done so; and
- 6.5. Deliver to the applicant, within seven days of the date of the granting of this order, all purchase orders, invoices and proofs of payment, relative to the CL Order, EHS Order, and Belt Filter Order (as detailed in paragraph 25, 67 and 69 of the founding affidavit).
7. The first to first respondents are to pay:
- 7.1. The costs of this application on a party and party scale jointly and severally, the one paying, the other to be absolved;
- 7.2. The costs of 11 May 2021 on a party-and-party scale;
- 7.3. The costs of 5 July 2021 on a party-and-party scale.

G MALINDI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

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I L Posthumus

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DATE OF THE HEARING:

27 August 2021

DATE OF JUDGMENT:

12 October 2021