REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No

19/4/2022
DATE

SIGNATURE

Case No.: 2021/10002

In the matter between:

C3 SHARED SERVICES (PTY) LIMITED Applicant

and

NICOLAS JOHN GRANGE First Respondent

XTRAVISION (PTY) LIMITED Second Respondent

JUDGMENT

This judgment was handed down electronically by circulation to the parties' legal representatives by email and is deemed to be handed down upon such circulation.

Gilbert AJ:

1. The applicant seeks wide-ranging relief against the first respondent, and in several instances against the first and second respondents, interdicting and restraining them in various forms from competing directly or indirectly with the applicant. Some eleven prayers are directed to this end in the amended notice of motion.

2. More particularly, an order is sought: [1]

"1. Interdicting the First Respondent from competing directly or indirectly, personally or through a nominee, with the Applicant until 31 May 2022;

2 Interdicting the First Respondent from carrying on business in competition with the Applicant in the field of electronic security and fire protection services and infrastructure related services up and to 31 May 2022;

3 Interdicting the First Respondent form using or disclosing any of the Applicant's confidential information or pricing structures to and third parties;

4 Interdicting the First and Second Respondent from contacting, soliciting or servicing, directly or indirectly any of the Applicant's Clients as set out in the Applicant's client list attached as Annexure "A" to the

[1] This is the relief as claimed as it appears in prayers 1 to 11 of the amended notice of motion, without any typographical and other errors corrected.

Sales of Shares agreement, attached as Annexure "B" to the founding affidavit, for the purposes of providing a competitive product or service similar to those provided by the Applicant;

5 *Interdicting the First and Second Respondent's from directly or indirectly requesting or advising any current, active or new customers, or suppliers or vendors of the Applicant to withdraw, curtail or cancel any of their business with the Applicant;*

6 *Interdicting the First and/or Second Respondents from disclosing or using or causing to be disclosed or used, directly or indirectly, in any capacity, in South Africa existing of potential business interest any propriety information, including but not limited to, the Applicant business model and pricing;*

7 *Interdicting the First and/or Second Respondent from using or disclosing the Applicant's trade secrets as long as they remain trade secrets;*

8 *Interdicting the First Respondent up and to 31 May 2022 from carrying on business or being concerned in any business carried on in South Africa which is competitive or likely to be competitive with any business of the Applicant;*

9 *Directing the First Respondent to protect the business and operations of the Applicant;*

10 Interdicting the First and Second Respondent's from doing anything which may disparage or damage the business operations and goodwill of the Applicant;

11 Directing the First and/or Second Respondents to keep confidential all the Applicants confidential information and to use their best endeavours to prevent the disclosure of confidential information to any person".

3. Given the wide-ranging, and in several instances vague, nature of the relief sought in the notice of motion, it is appropriate to consider what case the applicant seeks to make out in its founding affidavit.

4. The first respondent (who for ease of reference I shall refer to as Grange) had been a shareholder, director and employee of the applicant (who for ease of reference I will to as C3).

5. Brendon Cowley ("Cowley") deposed to the founding affidavit on behalf of C3. C3 describes in its founding affidavit, and it is common cause, that Grange sold his shares in C3 to Cowley for a purchase consideration of R3 million. This took place in terms of a written sale of shares agreement. Grange resigned as a director and employee.

6. The sale agreement contains what is styled a "Non-Compete" clause, and which is set out verbatim by C3 in its founding affidavit:

"7.1 The Seller to hereby warrant and undertake that for a period of 30 (thirty) months, recorded from the effective date of this agreement and within South Africa he will not, directly or indirectly, personally or through any nominee:

7.1.1 Carry on any business in competition to the business sold in terms of this agreement, for clarity business include electronic security and fire detection services and infrastructure related to the services;

7.1.2 Approached any of the clients as per annexure "A" with the purpose of selling services and/or products as defined in clause 8.1.1 above to them;

7.2 The Seller will be liable to pay a penalty of R500 000 (Five Hundred Thousand Rand) in each instance of breach of this clause 8. Instances of breach need to be determined via Arbitration or agreed between the Parties."[2]

7. This clause 7 would feature centrally in these proceedings.

8. During the course of argument Mr de Villiers for C3 pointed out that the period for which the interdict was sought in relation to certain of the relief was incorrectly reflected in the amended notice of motion, and that more

[2] This is the clause as it appears in the sale agreement, without any typographical and other errors corrected.The cross-referencing in clause 7.1.2. to clause 8.1.1 would appear to have been intended to be a cross-referencing to clause 7.1.1 and the cross-referencing in clause 7.2 to clause 8 appears to have been intended to be a reference to clause 7.

particularly the date 31 May 2022 in prayers 1, 2 and 8 of the notice of motion should be 3 June 2022. This, Mr de Villiers explains, is because the relevant period was a period of 30 months calculated from the effective date of the sale agreement, and that pursuant to various amendments to the agreement, the effective date was extended so that the 30-month period would expire not on 31 May 2022 but on 3 June 2022. Mr Grobler for the respondents had no objection to this amendment of the relief sought in the notice of motion as it accorded with the most recent addendum to the sale agreement.

9. C3 also goes on its founding affidavit to set out verbatim clause 10 of the sale agreement:

"10.1 All parties to the agreement shall stand in a fiduciary relationship to one another and shall consequently, but without prejudice to the generality of the aforegoing:

10.1.1. owe one another duty of utmost good faith, loyalty, integrity at all times;

10.1.2 exhibit to one another the same utmost good faith, loyalty, integrity and honesty and display the same standard of exemplary conduct as partners in partnership properly exhibit and displayed to one another, all as if the parties were partners in an unincorporated partnership;

10.1.3 it is further agreed that the parties shall at all times deal with each other openly, fairly and honestly and

10.1.4 in view of the aforementioned the parties agree that they will at all time ensure that the necessary procedures are in place and necessary precautions is taken to ensure that the intellectual property and other rights, privileges and interest of all the parties (nothing excluded) are at all times properly safeguarded, managed and protected by whatever appropriate needs, methods and procedures that may be necessary or appropriate at the relevant times."[3]

10. Although this clause is set out, no further reference is made to it in the founding affidavit.

11. C3 goes on to describe its business, which specialises in the design and implementation of intelligent video, fire and perimeter security services and includes technology and services. C3 also describes some of its clients, which are set out in annexure A to the sale agreement. This includes Southdowns Estate.

12. C3 describes how Grange, instead of immigrating to the United Kingdom as he said he would, became a director of the second respondent ("Xtravision"), and, through Xtravision, began competing with C3 in electronic security services and fire detection services as well as infrastructure related services.

[3] This is the clause as it is set out in the founding affidavit, without any typographical and other errors corrected.

13. C3 in its founding affidavit describes one (and only one) instance of this competitive conduct, namely the supply of imported Opgal cameras by Xtravision, at the instance of Grange, to Southdowns Estate.

14. C3 describes that it previously sold security cameras to Southdowns Estates, which is one of its listed customers, and which cameras it continued to maintain and service. It also describes that it sells imported Opgal cameras in the country. C3 therefore describes the supply of imported Opgal cameras by Xtravision to Southdowns Estate as an instance of Grange, through Xtravision, breaching clauses 7.1.1 and 7.1.2. of the non-compete clause in the sale agreement.

15. C3 also asserts in its founding affidavit that Grange deliberately approached Southdowns Estate to inform them that C3 was over-charging, and that this resulted in a fallout between C3 and Southdowns Estate.

16. C3 then describes how it discovered this, and which resulted in it approaching the court, initially on an urgent basis,[4] for what is final interdictory relief.

17. The basis asserted by C3 in its founding affidavit for its clear right to final interdictory relief is that it has *"a contractual right in that the First Respondent (Grange) may not compete with the Applicant (C3)"*, particularly as Cowley paid R3 million for the business, including its goodwill, and so can insist on specific performance of the agreement.[5] It is clear from the manner in which

[4] The application was struck from the urgent roll by Malungana AJ on 16 March 2021 for lack of urgency.

[5] See para 27 of the founding affidavit.

the case was conducted, including in argument before me, that specific reliance is being placed on the 'non-compete' clause 7.

18. C3 also relies on the proposition that when a seller sells its business including its goodwill to a purchaser, that seller cannot take back that which was sold, including its goodwill, by competing with the business it has sold, as otherwise the purchaser would not be getting what it contracted to buy.[6]

19. C3 relies upon Grange breaching the sale agreement by competing with it, particularly in relation to the Southdowns Estate incident, as demonstrative of reasonably apprehended injury.

20. C3 asserts in its founding affidavit that it has no adequate alternate remedy to protect that which it has purchased, particularly the goodwill of the business, and that it is entitled to the benefit of its bargain.

21. I have summarised what C3, though its deponent Cowley, has said in its founding affidavit at some length to demonstrate that, in my view, little or no case was made out by C3 as applicant for much of the wide-ranging relief sought in its amended notice of motion.

22. Although several prayers in the notice of motion are directed at restraining the first respondent, and in other instances, the first and second respondents from disclosing and/or using C3 confidential information, very little, if anything, is said in the founding affidavit about what that confidential information is and

[6] See paragraphs 28 and 29 of the founding affidavit.

why it is worthy of protection. Although C3 refers vaguely in its amended notice of motion to *"pricing structures"*, *"existing [or] potential business interest[s]"*, *"any proprietary information, including but not limited to, [its] business model and pricing", "confidential information"* and *"trade secrets",* it does not describe in its founding affidavit what that confidential or proprietary information is and why it is worthy of protection.[7]

23. Although C3 cited clause 10 of the sale agreement in its founding affidavit, it does not in its affidavit bring any of the relief it seeks within the parameters of that clause. C3's client list, which is an annexure to the sale agreement, is not in and of itself confidential information which, in the circumstances described in the founding affidavit, is worthy of protection, but rather is to be used by the parties to enforce clause 7.1.2. The relief aimed at protecting 'confidential information' and the like appears to be a tag on to the other relief that is sought in the application, rather than self-standing relief in its own right.

24. In my view, no case has been made out for the relief in prayers 3, 6, 7 and 11 of the notice of motion.

---

[7] See the discussion in Van Heerden-Neethling *Unlawful Competition* LexisNexis 2nd ed. (2008) at pp 214 to 216 and the cases there cited for the requirements that need to be satisfied before the information can be considered a trade secret (or sufficiently 'confidential') to be worthy of protection. As stated in *Petre & Madco (Pty) Ltd t/a T-Chem v Sanderson-Kasner* 1984 (3) SA 850 (W) at 858, *"[i]t is trite law that one cannot make something secret by calling it secret. Facts must be proved from which it may be inferred that the matters alleged to be secret are indeed secret. In the nature of things it seems to me that it is unlikely that the applicant will operate in a way that is markedly different from the way in which its numerous competitors operate. There is nothing to show what is so unique about the product demonstrations or what is so special about the sales methods. Nor is there anything to show why the information said to be confidential can properly be regarded as confidential."*

25. The relief in prayer 9 of the notice of motion is too widely and vaguely stated, without in any concrete content, to be granted as a form of relief, whether interdictory, directory or otherwise.

26. That leaves prayers 1, 2, 4, 5, 8 and 10 of the notice of motion.

27. It is therefore not surprising that the focus of C3's case as the applicant was interdicting Grange as the first respondent from competing with it in the same business (which is the relief sought in prayers 1, 2 and 8, each of which appears to be a repetition of substantially the same relief) and interdicting Grange and Xtravision as the first and second respondents from soliciting the custom of C3's clients on the client list (which is the relief sought in prayer 4), relying in particular on the 'non-compete' clause 7 and the breach thereof demonstrated by the Southdowns Estate incident.

28. This matter was initially called before me in the opposed motion court on 16 August 2021. C3 as the applicant was, as it is now, represented by Mr de Villiers. Grange and Xtravision as the first and second respondents were, as is now, represented by Mr Grobler.

29. At the commencement of that hearing on 16 August 2021, the election arose whether C3 as the applicant would persist with seeking final relief by way of motion or whether to seek a referral to trial or to oral evidence where there may be material factual disputes that may be incapable of resolving on affidavit. This election is to be made upfront in the hearing and not only once

it becomes clear that the applicant is failing to persuade the court on the papers, unless there are exceptional circumstances.[8]

30. Both counsel for the applicant and respondents were alive to the election and the timing thereof.

31. The matter have been stood down to allow the parties to take instructions, upon the resumption of the hearing the parties were agreed that there was a need for a referral.

32. Although the parties agreed that there needed to be oral evidence, the parties could not agree whether that evidence should be adduced consequent upon a referral of the application to trial or upon a referral of the application to oral evidence in the customary *Metallurgical* manner.[9] The parties also could not agree on the costs arising from the hearing before me that day.

33. On 19 August 2021 I handed down a written judgment ordering a referral to oral evidence, and that the costs of 16 August 2021 were to be costs in the cause.[10]

34. The issue that was referred to oral evidence was whether there had been a breach of the sale of shares agreement, and which included the interpretation

---

[8] See the decision of the Full Court of this division in *ABSA Bank Limited v Molotsi* [2016] ZAGPJHC36 (8 March 2016) paras 25-27, applying *Law Society, Northern Province v Mogani* 2010 (1) SA 186 (SCA) para 23 and *De Reszke v Maras and others* 2006 (1) SA 401 (C) para 33.

[9] *Metallurgical and Commercial Consultants (Pty) Limited v Metal Sales Co (Pty) Limited* 1971 (2) SA 388 (W).

[10] [2021] ZAGPJHC 409 (19 August 2021).

of the agreement for that purpose. It was only that issue that was referred to oral evidence.

35. As matters then stood, oral evidence would be led on that issue only, whereafter the court having heard the oral evidence on the disputed issue would decide the matter in its totality having heard oral evidence on the disputed issue and based upon the affidavits already filed in the matter in relation to the undisputed evidence.[11]

36. But events overtook the further conduct of the application.

37. What would transpire is that subsequently, on 11 December 2021, an arbitration award would be handed down in the arbitration between, on the one hand, Cowley, C3 and an associated company C3 Intelligent Solutions (Pty) Limited, as the claimants, and on the other hand, Grange as the first defendant and Xtravision as the second defendant. The clause that featured centrally in the arbitration was the same clause 7.

38. In the arbitration, the claimants in the arbitration, as described above, sought of the defendants, who are the present respondents, payment of penalties of R500 000.00 in respect of each of nine asserted breaches of clause 7.

39. The parties appreciated that the arbitration award might have an effect on the further conduct of the application before me and for this reason various case management meetings that would otherwise have been held before me in

[11] *Lekup Prop Co No. 4 (Pty) Limited v Wright* 2012 (5) SA 246 (SCA) at 258I.

regulating the further conduct of the application were postponed to allow the arbitration award to be handed down.

40. For the sake of completeness, I mention that a first case management meeting was held on 8 November 2021 and minuted, and which dealt with certain aspects relating to the leading of oral evidence on the specified issue. The minute specifically records that an arbitration award was awaited and that it may be necessary to postpone a further case management meeting until after the award had been published.

41. The arbitration award, which would subsequently be placed before me by way of affidavit, commences with the arbitrator listing five essential findings, as follows:

> "*Essential Findings*
>
> *1. The first respondent [Grange] breached clause 7.1.1 of the Sale of Shares Agreement "(SSA") in that he indirectly carried on business in competition to the business of the second respondent [should read the second claimant, i.e. C3]. This is a single instance of breach.*
>
> *2. No other instance of breach of the SSA has been established.*
>
> *3. The penalty contained in clause 7.2 of the SSA is not out of proportion to the prejudice suffered by the First Claimant [Cowley].*

4. The First Respondent [Grange] is accordingly liable to pay the First Claimant [Cowley] the sum of R500 000.00 plus interest as well as costs of this arbitration.

5. The Second Respondent [Xtravision] is not a party to the SSA and I have no jurisdiction in respect of the Second Respondent [Xtravision]. In any event, the Statement of Claim does not make out a case against the Second Respondent [Xtravision]. As I have no jurisdiction in respect of the Second Respondent [Xtravision], I do not have the power to make any costs order in its favour. Had I had such power, I would in any event not have made a costs order in favour of the Second Respondent [Xtravision].”

42. A second case management meeting was held on 23 February 2022, the arbitration award having been handed down.

43. What had happened in the meanwhile is that on 22 February 2022, i.e. just before the second case management meeting, the present respondents delivered what the parties have described as an ‘interlocutory application’ with a supporting affidavit. The primary purpose of that interlocutory application by the respondents was to obtain leave to file a supplementary answering affidavit which sought to squarely raise three additional defences that did not appear, at least squarely, from the answering affidavit that had already been filed in the main application.

44. The three additional defences that the respondents sought to raise in the supplementary affidavit were:

44.1. that the applicant C3 does not have *locus standi* to bring the main application against either of the respondents;

44.2. that the second respondent Xtravision is not a party to the sale agreement and so C3 as applicant has no contractual remedy against Xtravision;

44.3. that the applicant C3 had not made out a case for interdictory relief against Xtravision, whether in contract or in delict.

45. At the second case management meeting on 23 February 2022, the issue arose of whether certain matters may have become *res judicata* and/or whether issue estoppel operates in relation to various issues that may have featured in the arbitration proceedings and in respect of which the arbitration award had been made. Accordingly, it was agreed between the parties and so directed at the second case management meeting that:

45.1. the respondents were granted leave to supplement their interlocutory application to delineate which issues in their view formed the subject matter of *res judicata* or issue estoppel as well as to include such further evidence as they sought leave to adduce that went beyond the issue that had been referred to oral evidence, i.e. beyond the issue of whether there had been a breach of the sale agreement, and which included the interpretation of the agreement for that purpose;

45.2. C3 as the applicant would deliver its affidavits in response to the interlocutory application and to counter-apply as to what issues it contended formed the subject matter of *res judicata* or issue estoppel. Further directions were made to facilitate the exchange of affidavits;

45.3. the respondents' interlocutory application and the applicant's counter application, if any, would be heard by me on 4 April 2022.

46. The respondents did supplement their interlocutory application on or about 3 March 2022, to which the applicant C3 responded on or about 11 March 2022 and to which the respondents then replied on or about 17 March 2022.

47. Both the applicant and the respondents filed heads of argument.

48. When the matter was called before me on 4 April 2022, the respondents moved in terms of their interlocutory application for leave to file their supplementary affidavit raising the three additional defences, both as discreet points of law and as issues that had already been determined in the arbitration proceedings and so were *res judicata* or issue estopped. C3 as the applicant indicated that it did not oppose the filing of the supplementary affidavit, particularly because it had already dealt with these three additional defences in its affidavits that it had filed during the course of the interlocutory application as well as in the heads of argument it had filed. It was accordingly common cause between the parties that the respondents should be granted leave to file the supplementary affidavit and so too the applicant's affidavits in response thereto. None of the parties expressed any prejudice at this as the parties were agreed that those issues were ripe for determination. I granted such leave.

49. Upon enquiry by me of both counsel, the parties agreed that the hearing before me proceed on the basis that I determine on the papers the three additional defences that had been raised by the respondents, whether as discreet points which if decided in favour of the respondents would be dispositive of the application (or at least part of it) and/or on the basis that those issues had already been decided and determined in the arbitration proceedings and so were *res judicata* or issue estopped. The parties were agreed that this was an appropriate way of approaching the matter as they had said whatever they would want to say about those points and should a decision on any of these additional defences be dispositive of the application and/or certain of the relief sought, then the court should make the appropriate order. This would also avoid the need for oral evidence on the disputed issue referred to oral evidence, with a resultant saving in costs and judicial resources as it was envisaged that such oral evidence may take several days even with the benefit of witness statements and the like.

50. This constructive and sensible approach is also informed by the limited duration of the contractual restraint in clause 7.1, which ends on 3 June 2022.

51. C3 as the applicant further contended that on the question that had been referred to oral evidence, i.e. whether there was a breach of the sale agreement, this had been rendered *res judicata* or issue estopped because of the finding that the arbitrator had already made that Grange had breached clause 7.1.1 of the agreement. Mr de Villiers for the applicant C3 therefore contended that should the matter not be disposed of in favour of the respondents based on one or other of their three additional defences, C3 as

the applicant was entitled to the relief sought in the amended notice of motion because the court would be in a position to decide the matter on the affidavits as the issue in respect of which oral evidence was required would no longer be a live issue because it had already been decided by the arbitrator in favour of the applicant C3.

52. Mr Grobler for the respondents countered that if the three additional defences raised by the respondents were not dispositive of the matter, it did not follow that C3 as applicant must succeed as there were other issues that needed to be determined.

53. It is therefore necessary to determine the three additional defences as such determination would be determinative of the further conduct of the matter. I emphasise that the parties were agreeable to this approach to the matter and sought of me to decide these three additional defences albeit that the hearing of the "*interlocutory application*" as may initially have been envisaged for 4 April 2022 and minuted at the second case management meeting did not go so far as to require of the court to decide these issues.

54. The applicant C3 was content that these issues be decided on the affidavits and did not seek any referral to oral evidence on any of these issues. As stated, the referral to oral evidence was in relation to whether there had been a breach of the sale agreement and the interpretation of the agreement in relation to that issue only. That the three additional defences were not part of the disputed issue referred to oral evidence is clear from the fact that at the stage of the referral, in August 2021, the respondents had not yet raised these

additional defences in these proceedings as they would only be raised subsequently in their supplementary affidavit filed in February 2022.

55. In the circumstances, I am required to decide these three additional defences on the affidavits.

56. The respondents have described the first additional defence to be decided as whether C3 as the applicant has *locus standi* to bring the application against the first and second respondents. As I understand this challenge, the issue to be decided is whether C3 has a contractual right, in contrast to Cowley as the purchaser, to enforce the non-compete clause 7.

57. The parties have approached the issue, to a considerable extent, including during argument, from the perspective of whether C3 is a party to the sale agreement. C3 as applicant contends that it is and so can rely upon the "Non-Compete" clause while the respondents contend that, to the extent that C3 is a party to the sale agreement, it is only for the limited purpose of it agreeing to the transfer of its shares from Grange as seller to Cowley as purchaser pursuant to the sale, and that accordingly it is not the beneficiary of the non-compete undertakings in clause 7.

58. Axiomatically, for a party to enforce a contractual right against another party, those parties must be parties to the agreement. Although it is common cause that Grange as seller was a signatory and a party to the sale agreement and that Cowley as the purchaser was a signatory and a party to the sale agreement, there is a dispute as to whether C3 itself is a party to the agreement and so whether it, in contrast to Cowley, is entitled to any relief

pursuant thereto. No case is made out by the applicant that clause 7 was a *stipulatio alteri* for the benefit of C3 and which benefit was accepted by C3.

59. To at least some extent C3 is a party to the sale agreement, even if on the limited basis accepted by the respondents. Further, the parties' conduct is strongly indicative of them being in agreement that C3 is a party to the sale of shares agreement. As pointed out by Mr de Villiers for C3, C3 as the applicant stated in paragraph 27 of its founding affidavit that it (C3) has a contractual right in relation to the 'non-compete' clause and so it can insist on specific performance in terms of the agreement. The response in the respondents' answering affidavit was that the contents of the agreement are not denied but the respondents deny that they did business in competition with the applicant. This would have been an appropriate place for the respondents to dispute that C3 is a party to the agreement, but they did not do so. Similarly, there were various other opportunities during the course of the answering affidavit for the respondents to contest that C3 is a party to the agreement. The challenge to C3 being able to enforce the 'non-compete' clause only arose in these proceedings by the introduction of that challenge in the supplementary affidavit.

60. I therefore approach this additional defence on the basis that, and in favour of C3, C3 is a party to the agreement to at least some extent but to more closely consider whether it is the beneficiary of the warranties and undertakings given by Grange in the non-compete clause.

61. Clause 7.1 does not expressly provide for who is the beneficiary of the undertaking not to compete. There are two contenders, namely, Cowley as the purchaser and C3 as the company whose business is sought to be protected by the clause.

62. The issue then for decision, as refined, is whether C3 is the beneficiary of the undertaking not to compete in clause 7.1, rather than whether C3 is a party to the sale agreement.

63. But, Mr Grobler argues for the respondents, this issue had already been decided between the parties in the preceding arbitration and the arbitrator has made an award, and which award, Mr Grobler continues, could only have been made if the arbitrator had decided this issue, with specific reference to the minority judgment of Wille J in *Democratic Alliance v Brummer* 2021 (6) SA 144 (WCC).

64. *Res judicata* means 'a matter judged'. It is in the public interest that once a matter has been judged, it cannot be judged again. For the defence of *res judicata* to succeed i.e. to find that a matter has already been adjudged, and so cannot be adjudged again, the matter must be *"between the same parties, in regard to the same thing, and for the same cause of action"*.[12]

[12] *Bertram v Wood* (1883) 10 SC 177 at 181, referred to with approval in *in S v Molaudzi* 2015 JDR 1315 (CC), para 14. (Also cited as 2015 (8) BCLR 904 (CC), 2015 (2) SACR 341 (CC).

65. The courts recognise that application of *res judicata* has the potential to cause injustice. In order to avoid injustice, in certain instances the court stresses that the three requirements must be strictly satisfied.[13] In other instances, in order to avoid injustice, the requirements are relaxed, and an absolute identity of relief and the cause of action is not required, in what is known as issue estoppel.[14] But in turn the relaxation of the three requirements too can cause hardship, and so *"[e]ach case will depend on its own facts and any extension of the defence will be on a case-by-case basis … Relevant considerations will include questions of equity and fairness not only to the party themselves but also to others…"* [15]

66. In the circumstances, the three requirements for *res judicata* must not be read overly literally or applied dogmatically. For example, in *Fidelity Guards Holdings (Pty) Ltd v PTWU & others*[16], in relation to the requirement of *"the same cause of action"*, Myburgh JP for the Labour Appeal Court held that:

> *"The cause of action is the same whenever the same matter is in issue: Wolfaardt v Colonial Government (1899) 16 SC 250 at 253. The same issue must have been adjudicated*

---

[13] For example, *Bertram v Wood* referred to with approval in *Molaudzi*, para 15.

[14] *Hyprop Investments Ltd and Others v NSC Carriers and Forwarding CC and Others* 2014 (5) SA 406 (SCA), para 14, citing with approval *Prinsloo NO and Others v Goldex 15 (Pty) Ltd and another* 2014 (5) SA 297 (SCA).

[15] *Smith v Porritt* 2008 (6) SA 303 (SCA), para 10, cited with approval in *Hyprop*, para 14.

[16] [1998] 10 BLLR 995 (LAC)

upon. An issue is a matter of fact or question of law in dispute between two or more parties which a court is called upon by the parties to determine and pronounce upon in its judgment and is relevant to the relief sought: Horowitz v Brock and others 1988 (2) SA 160 (A) at 179F–H."

67. All three parties in the present proceedings before me (being C3, Grange and Xtravision) were parties in the arbitration. Although Cowley was a party in the arbitration proceedings (in fact, he was the successful party) but is not a party in these proceedings, that does not detract from the arbitrator's finding having been made in respect to the parties before me. The requirement that the issue must have been decided between the same parties has been satisfied.

68. What is clear from the arbitration award is that both Cowley and C3 sought as claimants to enforce the same non-compete clause as is the subject matter of these proceedings before me. The difference is that in the arbitration proceedings, Cowley and C3 sought to enforce the monetary penalty payable following upon a breach of the non-compete clause, as provided for in clause 7.2 of the Sale of Shares Agreement. In the present matter, C3 seeks to enforce the non-compete clause by way of specific performance in the form of interdict proceedings. But whether the remedy is payment of a penalty or specific performance, both are dependent upon the same clause, namely clause 7.1, and which includes a finding of who the beneficiary is of the undertaking in that clause. That the issue was decided in the context of different causes of action does not, in the circumstances of this case, prevent issue estoppel from operating.

69. It is not clear how in the arbitration the issue arose whether C3 is the beneficiary of the undertaking not to compete in clause 7.1, but it did, as appears from paragraphs 16 and 17 of the arbitration award:

> *"16. No differentiation is made in the statement of claim between the three Claimants. However, I agree with Mr Grobler, who appeared for the Respondents, that the Second and Third Claimants were not true parties to the SSA. Indeed, the Claimants pleaded that the SSA was concluded between Mr Cowley and Mr Grange. This was admitted in the statement of defence and is accordingly a common cause fact. Moreover, the variations to the SSA make it clear that only Mr Cowley and Mr Grange were parties to the SSA.*
>
> *17. Accordingly, the claim is in fact a claim by Mr Cowley against [Grange]".*[17]

70. The arbitrator in his award specifically points out that no differentiation was made in the statement of claim by Cowley and C3 as to which of them was enforcing the non-compete clause. The arbitrator continues that he agreed with the respondents that C3 was not a "*true party*" to the agreement, and particularly because Cowley and C3 had themselves pleaded that the agreement was concluded between Cowley and Grange, rather than with C3. The arbitrator accordingly concluded that the claim in the arbitration

[17] Paragraph 17 of the arbitration award refers to the claim as being against C3 but counsel agreed in argument before me that this was a typographical error as the reference to C3 should be to Grange. C3 was a claimant in the arbitration proceedings and so the claim could not be against itself.

proceedings in terms of clause 7 to enforce the penalty provision "*is in fact a claim by Mr Cowley against [Grange]".*

71. The arbitrator proceeded in accordance with this finding to make an order against Grange in favour of Cowley (and not in favour of C3) for payment of the contractually stipulated penalty of R500 000.00 in respect of the established breach of the non-compete clause, in the form of the Southdowns Estate incident.

72. But for the arbitrator finding that the beneficiary of the non-compete clause was Cowley and not C3, the arbitrator would not have made the award that he did. Accordingly, the arbitrator has determined who the beneficiary is of the undertaking given in the non-compete clause, namely Cowley and not C3.

73. The same issue serves before me, namely whether C3 is the beneficiary of the undertaking given in the non-compete clause, and that issue has already been decided by the arbitrator, being that C3 is not the beneficiary of the undertaking.

74. Does it make a difference that the arbitrator may not have defined, and then decided, the issue in precisely those terms, but rather by necessary inference? I agree with Mr Grobler for the respondents that it does not, on the authority of the minority judgment of Wille J in the Full Court decision of *Democratic Alliance*,[18] particularly paragraph 31: *"In my view for issue estoppel to apply it*

[18] Above.

is not necessary that the previous court <u>expressly</u> determines the issue before the latter court".[19]

75. Although the judgment of Wille J in *Democratic Alliance* is a dissenting judgment, I do not read the judgment of the majority as detracting from the acceptance of the proposition that issue estoppel can arise where the issue is decided by necessary inference. Rather the majority departed from the dissenting judgment on the basis that the interests of justice and equity in the particular circumstances of that matter required that the respondent be permitted to raise the issue before the court as he had not been given an adequate opportunity in the earlier proceedings to advance his case on any of the available causes of action, and so he should not be issue estopped.[20]

76. No argument was made before me as to whether the application of issue estoppel should be relaxed in the interests of fairness or equity such as, for example, the application the doctrine would otherwise operate overly harshly upon C3.

77. In any event, it would not, in my view, be unjust or inequitable to find that the issue has already been determined against C3 and so that it is not the beneficiary under clause 7. C3 and Cowley chose to initiate arbitration proceedings seeking payment of a penalties under clause 7.2 arising from a breach of clause 7.1. Cowley succeeded in those arbitration in recovering a penalty from Grange as the seller, having established a breach of clause 7.1.1.

---

[19] The emphasis is that of the court.

[20] See para 85 of the majority judgment.

arising from the Southdowns Estate incident. For the court now to find that C3 cannot also obtain relief against Grange as the seller (who has already paid the price for his transgression) arising from the same breach of the same clause 7.1.1 does not appear unjust or inequitable.

78. Further, the arbitrator's finding that it is Grange rather than C3 who is the beneficiary of the non-compete clause does not offend a business-like interpretation of clause 7, and makes commercial sense. Cowley is the purchaser of the shares from Grange. Cowley did not purchase the business itself. Accordingly, Cowley's interest in the business, at least in the context of the sale of shares agreement, is as a shareholder. A shareholder cannot generally recover, in his own right, damages arising from a harm done unto the company, as such harm as he may suffer as a shareholder is merely reflective of the loss suffered by the company and as such is not recoverable by him but should be recovered by the company as the 'proper plaintiff'.[21] So it does make commercial sense in a sale of shares agreement for a seller such as Cowley as a shareholder who wishes to directly recover for a harm done unto the company, in this instance C3, which he ordinarily would not be able to recover because of the 'no reflective loss' or 'proper plaintiff' rules, to contract for himself a penalty that he can recover if such harm is done unto the company.

79. The arbitrator's finding that that it is Cowley, and by implication not C3, that is the beneficiary of the undertaking in clause 7.1, and my finding that this issue

[21] *Hlumisa Investments Holdings RF Ltd and another v Kirkinis and others* 2020 (5) SA 419 (SCA), para 37.

cannot now be revisited by C3, is dispositive of C3's claims in the present proceedings insofar as they are based upon the non-compete clause.

80. In any event, and to the extent that I may have erred in finding that issue estoppel operates, I would not have granted interdictory relief. A requirement for a final interdict is that there must be an absence of an alternative remedy that is adequate in the circumstances. It is not uncommon for the person enforcing a restraint of trade to bemoan that an award of damages does not constitute an adequate alternative remedy for a breach of restraint for a variety of reasons, including the difficulties in quantifying the damages. One manner in which to overcome this difficulty is to provide for a pre-estimate of damages or penalty in the agreement containing the restraint. This is what the parties have done in clause 7.2 in providing for a penalty of R500 000.00 to be paid by Grange as a seller in each instance of breach. Not only have the parties provided for such a penalty, contractually, the preceding arbitration proceedings have demonstrated that such penalty provision is capable of enforcement.

81. The restraint period is nearly over, ending on 3 June 2022, and to the extent that there are any further breaches of the non-compete clause (i.e. other than in relation to the Southdowns Estate incident), C3 (assuming that I am incorrect and that it is a beneficiary of the non-compete clause and this issue has not been already been decided against it in the arbitration), has the remedies available to it under clause 7.2 in the form of penalties.

82. I proceed to consider the two further additional defences raised by the respondents insofar as I may be incorrect in relation to my decision in respect of the first additional defence and/or to the extent that the relief sought by C3 goes beyond relying on clause 7 (on the assumption that C3 has made out any case for such further relief beyond clause 7, which I have already found against C3 in relation to certain of the relief that it prays for in its amended notice of motion).

83. The second additional defence raised by the respondents is that C3, even if it is a party to the sale agreement that can rely upon clause 7 of the agreement and such other clauses in the agreement, does not have any contractual claim against the second respondent, Xtravision because Xtravision is not a party to the agreement.

84. I agree that Xtravision is not a party to the sale agreement. No mention is made of Xtravision in the sale agreement. The respondents correctly make the point that the sale agreement was concluded before Grange became involved in Xtravision and therefore it cannot have been intended that Xtravision is a party to the sale agreement.

85. In any event, the arbitrator did find, as one of his essential findings, that Xtravision was not a party to the sale agreement, more particularly for purposes of finding that he as arbitrator had no jurisdiction over Xtravision as it was not party to the arbitration agreement that forms part of the sale agreement. In my view, it does not matter that that the arbitrator's finding that Xtravision was not a party to the sale agreement was made for purposes of

deciding his jurisdiction. Accordingly, there is much to be said for the respondents' argument that this issue has already been decided by the arbitration and cannot now be revisited by C3.

86. But it is unnecessary to make a final determination on whether issue estoppel operates in respect of this issue as it is clear to me that Xtravision is not a party to the sale agreement. Although Mr de Villiers sought to argue that the claim by C3 is good also as against Xtravision as Xtravision is the vehicle through which Grange breaches the sale agreement, that does not make Xtravision a party to the sale agreement or permit for a contractual claim against Xtravision.

87. I accordingly find that there is no basis upon which C3 as the applicant can advance a contractual claim against Xtravision based on the sale agreement.

88. This leaves the third additional defence raised by the respondents, namely that C3, as applicant, has not made out a case for final interdictory relief against Xtravision, either in contract or in delict.

89. I have already found that no case in contract can be sustained against Xtravision as it is not a party to the sale agreement. As no other contract is advanced in the founding affidavit as a basis to sustain contractual relief, no contractual claim is made out against Xtravision.

90. I also agree with the respondents that no delictual cause of action is made out in the founding affidavit. This appears from my summary at the beginning of this judgment of the case made out by C3 in its founding affidavit. A delictual

cause of action is distinct from a contractual cause of action based upon unlawful competition, and the distinct requirements for each must be established.[22] That Grange breached the sale agreement, as found by the arbitrator, does not translate into Grange having acted wrongfully for purposes of establishing a delictual claim.

91. I have therefore found in favour of the respondents on their three additional defences.

92. Whether or not I am correct in relation to the first additional defence, C3 has made out no case against Xtravision, as found by me in relation to the second and third additional defence. Thus none of the relief sought by C3 as applicant in the notice of motion directed as against Xtravision as the second respondent can be granted.

93. I have already decided that no case has been made out for the relief in prayers 3, 6, 7 and 11 of the notice of motion.

94. In deciding the first additional defence against C3 on the basis that it is not a beneficiary of the non-compete undertaking in clause 7.1 of the agreement, the relief sought by it in prayers 1, 2, 4 and 8 cannot be granted.

95. To the extent that C3 relies upon an implied restraint at common law (as distinct from clause 7.1 of the sale agreement) that when a seller sells its business including its goodwill to a purchaser, the seller cannot take back that

[22] See the cautionary note sounded in *IRR South Africa BV (incorporated in The Netherlands) t/a Institute for International Research v Hall (aka Baghas) and another* 2004 (4) SA 174 (W) at para 13.3 and 13.4.

which was sold, including its goodwill, by competing with the business it has sold, here too C3 has not made out a case. This is because the implied restraint only prevents a purchaser from taking back the business as sold, including its customers, by directly soliciting or appealing to them to move their custom to him, such as by invitation. The customers are not prevented from shifting their custom to the seller of their own accord, and the seller from accepting their custom[23] absent a contractual restraint by him not to do so.[24]

96. Cowley for C3 in the founding affidavit avers that Grange did contact Southdowns Estate, effectively to persuade it to do business with Xtravision, rather than C3.[25] Grange denies this in his answering affidavit. This is not a factual dispute that can be resolved on the papers. C3 as the applicant did not seek a referral to oral evidence on this issue, but was content that the matter be determined on the papers.

97. Further, the arbitrator found that although Grange had engaged in competing with C3 in selling Opgal cameras to Southdowns Estate, albeit through a third-party Falcon, Grange did not do so knowingly and did not contact Southdowns Estate.[26]

---

[23] *A Becker & Co (Pty) Ltd v Becker and others* 1981 (3) SA 406 (A) at 417H – 419A, citing with approval with the House of Lords decision of *Trego v Hunt* 1896 AC (HL) 7 at 21 and 24-15.

[24] And I have found that the contractual restraint as is to be found in clause 7.1 does not operate in favour of C3.

[25] See, for example, paragraphs 25 and 28 of the founding affidavit.

[26] Arbitration award, paragraphs 79, 85, 102, 105, 136, 137, 141.2 and 141.3.

98. It follows that C3 has not established that Grange directly solicited or sought to solicit the custom of Southdowns Estate or any other customer. I am therefore unable to find on the papers in favour of C3 as the applicant that Grange has breached the 'common law' implied restraint.

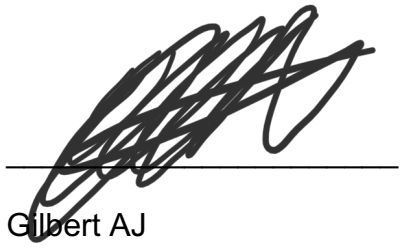
99. This also disposes of the relief sought in prayer 5 of the notice of motion, assuming that such prayer is intended to constitute self-standing relief separate from the other relief as claimed. C3 has not established that Grange conducted himself as described in prayer 5.

100. No case had been made out for the widely and vaguely framed relief in prayer 10 beyond that which is already sought in the other prayers in the notice of motion.

101. The applicant C3 has therefore failed to sustain any of the relief sought in its notice of motion and so its application is to be dismissed.

102. Although the three additional defences upon which the respondent has succeeded were only raised in February 2022, after the referral to oral evidence in August 2021, this is understandable as the arbitration award that features centrally in at least two of these defences was only handed down in December 2021. The three additional defences were raised in a manner and sufficiently timeously to avoid the need to hear oral evidence, which would otherwise have significantly increased the costs. I therefore do not find, in my discretion in relation to costs, that the timing of the raising of the three additional defences should disqualify the respondents from the usual order that costs follow the result.

103. The application is dismissed, the applicant to pay the costs of the first and second respondents.



Gilbert AJ

Date of hearing:	4 April 2022
Date of judgment:	19 April 2022
Counsel for the Applicant:	R F de Villiers
Instructed by:	Deneys Zeederberg Attorneys
Counsel for the First and Second Respondents:	C J Grobler
Instructed by:	Salant Attorneys