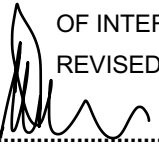


REPUBLIC OF SOUTH AFRICA



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

Case No: 2023/071667

(1)	REPORTABLE: YES/ NO
(2)	OF INTEREST TO OTHER JUDGES: YES/ NO
(3)	REVISED YES/NO
	
SIGNATURE	16/8/2023 DATE

In the matter between :

COREX (PTY) LTD
(Registration No. 2003/012178/07)

Applicant

and

SHENZHEN POWEROAK NEWENER CO LTD
(UNIFIED CODES OF SOCIAL CREDIT NO. 440301107472840) First Respondent

BLUETTI ENERGY SOUTH AFRICA (PTY) LTD
(REGISTRATION NO. 2022/626647/07)

Second Respondent

TAKEALOT ONLINE (RF) (PTY) LTD
(REGISTRATION NO. 2010/020248/07)

Third Respondent

JUDGMENT

ORDER

- (1) The forms and service provided for in the rules of this court are dispensed with and the matter is enrolled for urgent hearing in terms of rule 6(12)(a).
- (2) The application is struck from the roll.
- (3) Corex is directed to pay Poweroak's costs on the party and party scale.

DODSON AJ:

Introduction

- [1] This is an urgent application for interdictory and mandatory relief against the first respondent. The applicant is a company domiciled in South Africa. The first respondent is a company domiciled in Huizhou City, Guangdong Province in the Peoples' Republic of China. I will refer to them as "Corex" and "Poweroak" respectively.
- [2] Corex and Poweroak are parties to an agreement in terms of which the former is appointed as the latter's sole distributor of Poweroak's Bluetti renewable energy products on the Takealot platform for a period of 36 months. Corex asserts that Poweroak is acting in breach of the agreement. Poweroak disputes this and alleges that Corex is in breach.

- [3] The interdict seeks to prohibit the sale by Poweroak of Bluetti products to competitors of Corex who are (or ought reasonably to be) known by it to be selling those products on the Takealot platform. It also seeks to interdict the sale by Poweroak itself of Bluetti products on Takealot. A mandatory interdict is sought requiring Poweroak to disclose to buyers of its products, the existence of its exclusive distributorship agreement with Corex.
- [4] The second respondent is a company domiciled in South Africa. It was joined on the basis that it is a subsidiary of Poweroak. However it emerged in the course of proceedings that it is the subsidiary of a different company, based in Hong Kong.
- [5] The third respondent, Takealot, was joined on the basis of the interest it might have in the relief sought. However, no relief is sought against the second and third respondents, save in the event of their opposing the relief sought. In that event, costs are sought against them. The second and third respondents did not oppose the application.
- [6] In the affidavits, the application is pleaded as an application for interim relief. However, in the notice of motion there is no reference to any pending action or intended commencement of one. The relief is framed as final relief. The matter therefore stands to be decided on the basis that final relief is sought, although nothing ultimately turns on this.
- [7] I am satisfied that the application is urgent.

Factual background

- [8] Corex and Poweroak began discussions about a possible distribution arrangement during September 2022. These initial discussions appear to have taken place between a Mr Jacky Cheng, an agent of Corex based in China, and Mr Tiger Han, sales director of Poweroak. Mr Han describes himself as “currently based in Sydney Australia [and residing] in China”. No elaboration is provided.
- [9] These discussions resulted in the first order being placed by Corex on Poweroak on or about 28 September 2022. The email communications surrounding this order took place between Mr Tiger Han and Mr Andrew Mustard, a branch manager of Corex, in South Africa, with other parties copied in.
- [10] The business relationship developed. The parties decided to formalise their relationship through a distribution agreement. A written sole distributorship agreement was accordingly concluded on 9 February 2023. It was signed on behalf of Corex by its general manager, Mr Michael Hann. It was signed on behalf of Poweroak by its vice-president, Mr Huang Wei. This agreement provided for an exclusive distributorship in South Africa from 9 February 2023 to 1 June 2023. Thereafter, from 1 June 2023 to 9 February 2024, the position would change so that Poweroak appointed Corex as “its exclusive distributor on TAKEALOT along with the Company’s [i.e. first respondent’s] Online Shop, with plans to start operation June 2023”. There was also provision for negotiating a possible extension of the agreement.
- [11] Implementation of the agreement ran into some difficulty when an employee of Poweroak approached competitors of Corex with a view to supplying products to them. When this was discovered and raised by Corex, Mr Tiger Han

acknowledged the conduct, but indicated that the employee had acted without authorisation. An apology was given, along with an assurance of Poweroak's commitment to the contract.

[12] Following this, during May 2023, Corex and Poweroak concluded a second distributorship agreement which replaced the initial agreement. Under it, Corex was no longer the sole distributor of Bluetti products in South Africa. Instead, Poweroak appointed Corex "as its exclusive distributor on TAKEALOT.COM." It was to run for a period of 36 months.

[13] Significant terms of the agreement for present purposes included the following:

- "1. The Company [i.e. Poweroak] authorizes the Distributor [i.e. Corex] as its exclusive Distributor on TAKEALOT.COM.
2. The Company agrees to close its official online store on TAKEALOT.COM.
3. ...
6. The Company shall not authorise any other companies to sell BLUETTI products on TAKEALOT.COM . Should there [be] any companies trying to list BLUETTI products on TAKEALOT.COM, the Distributor shall endeavour to stop that from happening working with TAKEALOT. The company shall provide a formal EXCLUSIVE CHANNEL AUTHORISATION letter regarding this, but it is not the Company's responsibility to stop other companies from selling on TAKEALOT.
7. During the agreement period the Distributor shall not engage/present any other competitor brand ..."

[14] The second agreement was signed by Mr Michael Hann on behalf of Corex in his capacity as managing director on 11 May 2023. It was signed by Mr Ziangzhu Yin on behalf of Poweroak in his capacity as managing director. No date appears in the space provided for it below his signature. The agreement contains no

choice of law provision, no dispute resolution provision and no submission to the jurisdiction of the courts of any country.

- [15] Implementation of the new distributorship agreement has not been successful. Corex asserts that sales of the Bluetti products began to dwindle. They attribute this to a number of its competitors selling the Bluetti products on Takealot and other online platforms at lower prices. Corex also complains that the prices charged by Poweroak for its Bluetti products are excessive. Corex asserts that Poweroak's supply of the products to those competitors, knowing that they are competing with Corex on Takealot, is in breach of the second agreement.
- [16] This breach, says Corex, resulted in its sales of Bluetti products coming to a standstill. It has therefore suspended placing further orders on Poweroak. Attempts to resolve the matter with Poweroak have been to no avail.
- [17] The stance of Poweroak is that the second agreement is restricted to a sole distributorship on the Takealot platform. It is entitled to sell to other distributors. To the extent that some of these may place their offerings of Bluetti products on Takealot, clause 6 of the second agreement provides for this problem to be dealt with by Corex, not Poweroak. It alleges that Corex is not pricing the products at competitive levels.
- [18] A letter of demand addressed by Corex's attorneys to Poweroak did not resolve matters. It has therefore launched the present urgent application.
- [19] Poweroak opposes the application on the grounds, firstly, that this court lacks jurisdiction to grant the relief sought and, secondly, that Poweroak is in any event not in breach of the second agreement.

Jurisdiction

[20] The Constitutional Court¹ has approved the definition of the term “jurisdiction” given by Watermeyer CJ in *Graaf-Reinet Municipality*² as follows:

“Jurisdiction means the power or competence of a Court to hear and determine an issue between parties.”

[21] *Pollak The South African Law of Jurisdiction*³ refers to the following more comprehensive definition in *Wright*:⁴

“[A] lawful power to decide something in a case, or to adjudicate upon a case, and to give effect to the judgment, that is, to have the power to compel the person condemned to make satisfaction.”

[22] Voet’s definition is also helpful in the present context:

“The public power of deciding cases, both civil and criminal, and putting the decisions into execution.”⁵

[23] The consequence of wrongly assuming jurisdiction, Voet explains as follows:

“Obviously, if it is clear that a person is subject neither in regard of person nor of property, then one who exercises jurisdiction beyond his area is disobeyed with impunity.”⁶

[24] The onus of proving that a court has jurisdiction rests on the plaintiff or applicant as *dominus litis*.⁷

¹ *Gcaba v Minister for Safety and Security* 2010 (1) SA 238 (CC) at para 74.

² *Graaff-Reinet Municipality v Van Ryneveld’s Pass Irrigation Board* 1950 (2)SA 420 (A) at 424.

³ DE Van Loggerenberg *Pollak The South African Law of Jurisdiction* (Juta 3rd Ed) p 2 [service 7, 2022].

⁴ *Wright v Stuttford & Co* 1929 EDL 10 at 42, referring to the definition adopted in Vromans *De Foro Competenti* and approved in *Spendiff NO v Kolektor (Pty) Ltd* 1992 (2) SA 537 (A) at 551 C-D.

⁵ The Selective Voet being the Commentary on the Pandects translated by Percival Gane Butterworths 1955 Vol 1 p203.

⁶ *Ibid* at p243; Voet Book 2 title 1 section 46.

⁷ Van Loggerenberg above n3, at p 5 [service 7, 2022].

[25] Corex in seeking to satisfy the onus asserts that this court has jurisdiction over Poweroak, notwithstanding its domicile, on the basis that Poweroak has “been engaged in commercial activity within South Africa” and has cemented its commercial relationship with Corex through a contract which provides for the latter, as a South African entity, to distribute its products within South Africa. It states further that “Poweroak has developed a significant trade footprint within the South African region”.

[26] Poweroak disputes jurisdiction on the grounds that it is domiciled in China; it has no registered address or principal place of business in South Africa; everything done by it in fulfilment of the second agreement is executed from China; and the relief sought against Poweroak, if granted, cannot effectively be enforced in China. In its answering affidavit Poweroak says the following:

“64. I admit that Poweroak has engaged in commercial activity within South Africa, including contractually with Corex, to distribute its products within South Africa, but I deny that this founds the requisite jurisdiction of the above court for the relief sought. Poweroak trades internationally pursuant to the terms of the United Nations Convention on Contracts for the International Sale of Goods, with which it complies, and China and South Africa are both parties to this Convention. Poweroak’s distributor agreement with Corex is essentially still a sales contract. The delivery method of free on board Shenzhen is used. ...

65 Every aspect of Poweroak’s trading and selling in South Africa is actioned from and in China. I submit with respect that this cannot be interdicted.”⁸

⁸ Corex in its replying affidavit replies to this paragraph along with several other paragraphs of the answering affidavit by saying “[t]he contents hereof are denied insofar as they are inconsistent with the Founding Affidavit and what has been stated herein above in respect of jurisdiction”. It also denies that the distribution agreement amounts to a simple sale agreement. Nothing in the preceding paragraphs of the replying affidavit or in the founding affidavit has the effect of placing in issue the particular terms upon which products are shipped free on board Shenzhen, as alleged by Poweroak.

[27] Jurisdiction in respect of interdictory relief against a peregrine respondent has always been dealt with differently from jurisdiction in respect of claims sounding in money. Our courts will in appropriate circumstances grant an interdict against a *peregrinus*. What are those circumstances?

[28] In *Kibe*⁹ the Orange Free State provincial division of the Supreme Court was concerned with a dispute in which the applicant and the respondent were both *peregrini* domiciled in Lesotho. The relief sought, however, pertained to the freezing of a bank account opened by the respondent at the Zastron¹⁰ branch of a South African bank. De Wet AJ held that:

“Our Courts have held that, where the respondent is a *peregrinus*, the Court has jurisdiction if, in the case of a mandatory interdict, the act is to be carried out within such area, or, in the case of a prohibitory interdict, if the act against which an interdict is claimed is about to be done in such area.”¹¹

[29] On this basis, the court was willing to grant the interdict sought.

[30] In *South Atlantic Islands*¹² the applicant sought to interdict the respondent from setting sail from the port of Cape Town to conduct fishing operations in the territorial waters of Tristan de Cunha in the Atlantic Ocean, in respect of which the applicant held exclusive fishing rights. The court refused to grant the interdict saying –

“Where the relief asked for is such that it will not be enforceable, the judgment becomes illusory and the court should not undermine its authority by giving such a judgment. This no doubt is why it has been repeatedly

⁹ *Kibe v Mphoko and Ano* 1958 (1) SA 364 (N).

¹⁰ Zastron was in the former Orange Free State province of South Africa.

¹¹ Here citing *Leyland v Chetwynd* 18 1901 S.C. 239; *Kramarski v Kramarski and others* 1906 T.S 937; *Brown v McDonald* 1911 E.D.L. 423; *Ex parte Kirsten*, 1921 C.P.D.608 and *Ex parte Winter* 1948 (3) SA 377 (W).

¹² *South Atlantic Islands Development Corporation Ltd v Buchan* 1971 (1) SA 234 (C).

stated that the principle of effectiveness is the basis of jurisdiction. ... *Dicey* stresses the point that it is power to give an effective judgment and not merely power over the defendant which is the test of jurisdiction. In other words the fact that the respondent in this case may be temporarily resident within the jurisdiction of this court is of no consequence – the question is whether this court can enforce an order against him if and when he starts fishing in the waters of Tristan de Cunha. Seen in that light it seems to me that there can be little doubt that this court will be powerless to enforce its judgment if Buchan chooses to ignore the interdict.”

[31] In *Hay Management*¹³ the court was concerned with interdictory relief sought pertaining to two claims by a South African *incola* against an English *peregrinus*. The first claim was based on a contract concluded between the parties. The second claim was based on delicts allegedly committed by the defendant. The judgment is not relevant insofar as it concerns the first claim. However, in respect of the second claim, the court held as follows:

“Nothing is said in the draft particulars of claim to establish that the court has any jurisdiction to grant an interdict to restrain the peregrine defendant from committing acts outside South Africa. The addresses of the email [by which the delict was said to have been committed] ... are all in foreign countries. It was sent from England. All the delicts complained of were committed outside the country. A South African court has no control over the defendant, nor over the cessation of the acts in question and cannot entertain an application for an interdict against it.”

[32] The judgment of the Supreme Court of Appeal in *Foize Africa*¹⁴ was relied on by both Corex and Poweroak. That matter concerned an interim interdict sought against nine respondents, two of whom were *incolae* and the remainder of whom were *peregrini*. The dispute concerned an exclusive right to sell, market and

¹³ *Ex parte Hay Management Consultants (Pty) Ltd* 2000 (3) SA 501 (W).

¹⁴ *Foize Africa (Pty) Ltd v Foize Beheer BV and others* 2013 (3) SA 91 (SCA).

distribute certain products pursuant to an agreement concluded between the appellant and two of the *peregrini* respondents. A dispute arose when the appellant was informed by certain of the *peregrini* respondents that the first and third respondents no longer considered themselves bound by the agreement, that the intellectual property and other rights forming the subject matter of the agreement in fact did not vest in the first respondent and that the two South African companies, the *incolae*, were to be appointed to market the product in South Africa. The interim interdict sought to hold the *peregrini* respondents that were parties to the contract to their bargain, to prevent the remaining *peregrini* respondents from unlawfully interfering with the contractual obligations of the contracting *peregrini* respondents and prohibiting the *incolae* respondents from concluding any agreements in conflict with the appellant's rights under its contract.

[33] The South African companies did not oppose the application and an interim interdict was duly granted against them. The *peregrini* respondents did not file answering affidavits but raised a point of law based on the appellant's papers, i.e. that the agreement included a governing law clause providing for the application of Dutch law; an irrevocable consent by both parties to the jurisdiction of the courts of Holland; and a dispute resolution clause requiring arbitration under the rules of the International Chamber of Commerce.

[34] The Supreme Court of Appeal overturned the decision of the High Court to decline jurisdiction, and substituted its own decision on the basis that it enjoyed jurisdiction. Insofar as the *peregrini* respondents who were parties to the agreement are concerned, the court held that, notwithstanding the clauses

referred to, it had a discretion whether or not to enforce them. It chose not to do so and granted the interim relief sought against them. More important for present purposes is the category of defendants who did not have the benefit of these clauses. In regard to this category, the court held as follows:

“[15]The first [contention] was that, as the respondents are *peregrini* who have no presence in this country, it would be futile to grant an interdict against them. The basis of this argument was that, as the respondents are in Holland, it would not be possible to ensure that they complied with an interdict granted by a court in this country, as contempt of court proceedings could not be brought against them. This is a somewhat surprising argument as, historically, the courts of this country have as a matter of course granted interdictory relief against *peregrini* and, presumably for this reason, the argument was somewhat tentatively advanced. Such diffidence was well founded. The issue is really one of effectiveness, and while I accept that a court of this country should not grant an interdict against a *peregrinus* where the act sought to be interdicted would take place outside its area of jurisdiction, this is not such a case. This is a matter involving a contract concluded in his country, which is to be performed in this country, which the respondents threaten to breach in this country, and which the appellant, an *incola*, seeks to enforce in this country. In these circumstances a court of this country will be able to enforce an interdict if granted, even if contempt proceedings are not available (about which I express no opinion).”

[35] *Pollak* does not treat *Foize* as stating the law on the grant of an interdict against a *peregrinus* any differently from how it was stated in *Kibe*.¹⁵ He summarises the legal position¹⁶ in precisely the same words as the court in *Kibe* that I have quoted above.

[36] After referring to *Hay Management*, *Pollak* then elaborates as follows:

¹⁵ *Kibe*, above fn 6

¹⁶ Van Loggerenberg, above at p 274 (service 7, 2022).

“If ... the respondent is a *peregrinus* ... of the Republic as a whole, and the act which is the subject of the interdict is to be performed or prohibited in a foreign country, the court has no control over the respondent nor over the execution or cessation of the act in question and manifestly it cannot entertain an application for an interdict against such respondent.”¹⁷

Application to the facts

[37] Applying these authorities to the facts of this matter, the first issue is where the contract was concluded. The agreement itself gives no express indication of this. The fact that a signature date was typed below the signature of Corex’s representative, but not below that of Poweroak’s representative, with the provision being left open for insertion of a date in manuscript, suggests that the parties were not together at the time of signature of the contract.

[38] Apart from the assertion by Corex that the contract was concluded in South Africa, no further information is provided. This bare assertion is met with an equally bare denial on the part of Poweroak. Given that Corex bears the onus to establish jurisdiction one would, in the face of this, have expected the necessary detail to be provided by Corex in the replying affidavit. However, the bare assertion is simply repeated in reply. In the circumstances, Corex has failed to establish that the contract was concluded in South Africa.

[39] Nevertheless, this does not appear to me to be the primary consideration. The next question to be considered is where the contract was to be performed. It is so that Corex’s obligations are almost exclusively to be performed in South Africa. However, the position is different for Poweroak. Although not expressly

¹⁷ Van Loggerenberg, above at p 276 (service 5, 2021), referring also to *Trustees Assigned Estate of Epstein v Manchester Assurance Co* 1903 24 NLR 41; *South Atlantic Islands Development*, above fn 9.

provided for in the agreement, Poweroak is tacitly obliged to supply Bluetti products to Corex for the purpose of carrying out its sole distributorship through Takealot. For the reasons given above, we must accept Poweroak's assertion that it manufactures the Bluetti products in China and delivers them to Corex "free on board Shenzhen" in accordance with the United Nations Convention on Contracts for the International Sale of Goods.

[40] "Free on board" or FOB is defined as follows –

"This is the basis of an export contract in which the seller pays for sending the goods to the port of shipment and loading them on to the ship or aircraft. The seller also pays for the insurance up to this point. Thereafter the transport and insurance charges have to be paid by the buyer."¹⁸

[41] The meaning of "free on board" can also be derived from article 67(1) of the United Nations Convention on Contracts for the International Sale of Goods. It provides:

"If the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale. If the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place." (my emphasis)

[42] Here we are concerned with shipment "free on board Shenzhen." The reference to Shenzhen must be a reference to the Port of Shenzhen.¹⁹ The latter part of article 67(1) applies. From this it is apparent that risk in the goods transfers to

¹⁸ *A Concise Dictionary of Business* Oxford University Press p150.

¹⁹ The Port of Shenzhen is described on Wikipedia as "a collective name of a number of ports along parts of the coastline of Shenzhen, Guangdong Province, China. These ports as a whole form one of the busiest and fastest growing container ports in the world." See https://en.wikipedia.org/wiki/Port_of_Shenzen.

Corex upon their delivery by Poweroak to the carrier in the Port of Shenzhen. Accordingly, all components of the contractual obligations of Poweroak to manufacture and deliver Bluetti products to Corex are carried out in China outside of the territory of South Africa.

[43] Clause 1 of the second agreement provides that “the [first respondent] authorises the [applicant] as its exclusive distributor on Takealot.com.” Clearly that affords Corex rights that it exercises and imposes obligations that it performs in South Africa. To that extent the contract is carried out here in South Africa. But Poweroak gives the exclusive authorisation to distribute to a local South African company precisely because Poweroak is offshore.

[44] Clause 2 of the second agreement obliges Poweroak to “close its official online store on Takealot.com”. That appears on the face of it to be an obligation that Poweroak must perform in South Africa. But, in the absence of evidence to the contrary, and having regard to the nature of the Takealot platform, Poweroak would probably be able to comply with this obligation electronically from China.

[45] Clause 6 requires that Poweroak “shall not authorise any other companies to sell Bluetti products on Takealot.com”. That is a negative obligation. It requires Poweroak to refrain from actions or conduct. The nature of such a forbearance is that it rests on Poweroak primarily where it is based i.e. in China.

[46] On Corex’s interpretation of the agreement,²⁰ this clause goes further and casts an obligation on Poweroak not to supply Bluetti products to any competitor whom it knows, or ought to know, intends to distribute Bluetti products on Takealot.

²⁰ As appears from prayer 2 of its notice of motion. It is quoted in paragraph 50 below.

Poweroak avers (and Corex does not seriously dispute) that its supply to other distributors internationally is on the same terms as those described above in respect of Corex. On that basis, the forbearance imposed on Poweroak by this obligation is one that it must exercise in China by not delivering Bluetti products “free on board Shenzhen” to such distributors. That requires, in the main, a forbearance to be exercised in China.

[47] Clauses 8 and 9 impose obligations on Poweroak in relation to pricing. In the absence of evidence to the contrary, that is probably something that would be determined and applied in China prior to the shipping of the products.

[48] In terms of clause 11, Poweroak “shall set up a local service centre and provide after-sales service, warranty, repairing as per the Company’s warranty policy”. That is an obligation Poweroak must perform in South Africa.

[49] From the foregoing analysis, it is apparent that the contract is performed in both China and South Africa. Corex’s performance is almost exclusively in South Africa. Poweroak’s performance is predominantly in China.

[50] Having regard to the authorities on jurisdiction, the most important consideration, however, is the relief sought by Corex. In prayer 2 of the notice of motion, Corex seeks an order –

“Interdicting and restraining the First Respondent from either directly or indirectly selling, supplying, consigning or disposing of in any way any Bluetti products to any third party or entity who it knows, or ought reasonably to know, intends to sell, list, distribute or market the products on Takealot.com within the Republic of South Africa.”

[51] From the above analysis of the shipping arrangements, we know that “selling, supplying, consigning or disposing” of Bluetti products by Poweroak takes place exclusively in China. On the authorities referred to earlier, a prohibitory interdict will only be granted “if the act against which an interdict is claimed is about to be done in [South Africa].”²¹ That is not the case. Accordingly this court has no jurisdiction to grant the relief sought in prayer 2.

[52] In prayer 3, Corex seeks an order that –

“The First Respondent clearly, unambiguously, and conspicuously discloses to all current or prospective third party buyers, the existence and particulars of the exclusivity agreement with the Applicant, including the resultant prohibition against selling, listing, distributing or marketing Bluetti products on Takealot.com within the Republic of South Africa.”

[53] Having regard to the correspondence attached to the founding affidavit, compliance with an order in those terms would in all probability take the form of written electronic communications sent by Poweroak from its representatives in China (or, possibly, Australia in the case of Mr Tiger Han) to current and prospective third party buyers in South Africa.

[54] On the authority of *Kibe*,²² “where the applicant is a *peregrinus*, the Court has jurisdiction if, in the case of a mandatory interdict, the act is to be carried out [in South Africa]”. Here the acts are to be carried out in China. Again, prayer 3 seeks relief which this court does not have the jurisdiction to grant.

[55] Prayer 4 of the notice of motion seeks an order that has the effect of –

²¹ *Kibe* above fn 6 at 367A.

²² *Kibe* above n10.

“interdicting and restraining Poweroak from either directly or indirectly trading on Takealot.com.”

[56] Given that Takealot.com is an electronic platform, and although no technical information was provided in this regard, it seems to me that it would probably be technologically possible (and more likely) for Poweroak to trade directly on Takealot.com through electronic means from China. To the extent that it would have to supply goods that it traded on Takealot, it would be on the terms referred to above, which contemplate Poweroak complying with its shipping obligations in China. Indirect trading would presumably contemplate doing so through the agency of another party. Again, on the available evidence, this seems entirely possible without a physical presence in South Africa. On this basis, the act against which an interdict is claimed is about to be done in China, not South Africa. This court therefore lacks jurisdiction also in respect of prayer 4 of the notice of motion.

[57] In any event, in relation to this aspect no adequate case has been made out by Corex for its assertion that Poweroak is trading directly or indirectly on Takealot.com. No reference to such conduct was made in the letter of demand from Corex’s attorneys to Poweroak on 21 June 2023. On the contrary, Corex’s complaint expressed there was that Poweroak “*opted rather disingenuously to empower the competition and take a back seat*”.

[58] In its founding affidavit, Corex averred that –

“Insofar as our competitors are concerned, I have included ... screenshots evidencing marketing of the Bluetti products on Takealot by the first and second respondents, Pangolin, Elite Shopper, Banquo Power, MyCybercare, Blushing and the third respondent itself.”

[59] When regard is had to the relevant annexure, however, there are no screenshots evidencing marketing of the Bluetti products on Takealot by Poweroak.

[60] Poweroak deals in its answering affidavit with this complaint as follows:

“Takealot was not happy with Poweroak’s application as Takealot was not prepared to be purchasing from Corex while Poweroak sold Bluetti products on our online shop via or on Takealot. Corex in fact sells to Takealot as opposed to selling with an online shop on or via Takealot. All of this was communicated in a virtual meeting between Takealot, Corex and Poweroak in April 21th 2023 [sic]. So Poweroak had to accept it had to change its business plan and agreed not to continue with its plans and efforts to sell Bluetti products on its own online platform through Takealot.” (emphasis in the original)

[61] In its replying affidavit, Corex responds to this paragraph as follows:

“The contents of paragraph 125 are specifically noted in that it is evident that Takealot would not be prepared to essentially compete with the First Respondent by purchasing of the Bluetti products from the Applicant and having the First Respondent have a store on the Takealot marketplace.”

[62] Accordingly, on Corex’s own version in the replying affidavit, Poweroak is not guilty of the conduct sought to be interdicted in prayer 4 of the notice of motion.

Conclusion

[63] Applying the authorities referred to earlier, this court lacks jurisdiction to entertain Corex’s application.

[64] This matter is distinguishable from *Foize inter alia* because –

64.1 it has not been established that the contract in question was concluded in South Africa;

64.2 Poweroak's primary obligations under the second agreement are required to be performed in China; and

64.3 the matter falls squarely within the exception identified by the Supreme Court of Appeal when it said that "*a court of this country should not grant an interdict against a peregrinus where the act sought to be interdicted would take place outside its area of jurisdiction*".

[65] I accordingly make the following order:

(1) The forms and service provided for in the rules of this court are dispensed with and the matter is enrolled for hearing urgently in terms of rule 6(12)(a).

(2) The application is struck from the roll.

(3) Corex is directed to pay Poweroak's costs on the party and party scale.



AC DODSON AJ
Acting Judge of the High Court
Gauteng Division, Johannesburg

Counsel for the Applicant : S Mushet

Instructed by: Gittins Attorneys Inc

Counsel for the Respondent : R Willis

Instructed by: Marshall Attorneys

Date of hearing: 7 August 2023

Date of Judgment: 16 August 2023

Judgment handed down electronically through uploading onto Caselines.