



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case Number: 17470/2014

In the matter between:

TECHNICAL SYSTEMS (PTY) LTD

First Applicant

LAVIRCO BELEGGINGS (PTY) LTD

Second Applicant

and

RTS INDUSTRIES

First Respondent

C QUIPTECH (PTY) LTD

Second Respondent

CGC INDUSTRIES (PTY) LTD

Third Respondent

CHRISTIAAN ARNOLDUS KURTZ

Fourth Respondent

CARL WILLIAM RICHTER

Fifth Respondent

Coram: Bishop, AJ

Heard: 6 November 2023

Delivered: 2 January 2024

JUDGMENT

BISHOP, AJ

[1] Augers are used to convey poultry feed. They are made from flat wire that is coiled to form a type of spiral. The process to turn steel into flat wire, and then convert flat wire into auger requires a production line with multiple machines and steps. The steel must be de-coiled, flattened by a flattening mill, heat-treated through an austenitic and martensitic procedure, and then tempered. Each time it is heat treated, it must be quenched. The wire must properly tensioned by a tensioner, and at the end of the process, coiled again. This produces coiled flat wire which can then be fed through an auger coiling machine to make auger. If the process is not perfect, the product will be too brittle or defective, and will not convey the feed to the hungry poultry.

[2] The First Applicant (**Technical Systems**) manufactures flat wire and turns that flat wire into auger. Until 2015, so too did the Respondents. But in 2015, the parties agreed to an order which prohibited the Respondents from manufacturing either flat wire or auger until they could convince the Applicants' or this Court that they could do so without violating the Applicants' intellectual property in their manufacturing process.

[3] The Respondents built a new production facility to make flat wire and auger which the parties' experts evaluated. The Applicants and their expert believe that line still infringes their rights. The Respondents and their expert disagree. The Applicants want this Court to rule on that question. The Respondents say they have abandoned

that version of the facility and that there is therefore no point in a court ruling on whether it improperly employed the Applicants' drawings or confidential processes.

[4] I conclude that the Respondents' long history of dishonest dealing means their professed intent not to use the inspected production facility is not a sufficient basis to depart from the process this Court set in 2015.

[5] The matter has a long history and has troubled several judges in Cape Town and Bloemfontein. Let's start at the very beginning, a very good place to start.

The Original Dispute and the 2015 Order

[6] In 2014, the Applicants suspected that the Respondents were infringing their trade secrets for machinery to manufacture flat wire and auger. They brought an application to interdict them from doing so. The Respondents initially defended the application on the basis that Technical System's processes were not confidential, but were in the public domain.

[7] It subsequently emerged, through discovery and third party subpoenas, that Mr Kurtz (the Fourth Respondent) had taken a number of Technical Systems' technical drawings and given them to the First Applicant (**RTS**). Kurtz had been employed by Technical Systems, but had gone to work for RTS. RTS had supplied the Applicant's technical drawings to third parties to manufacture components for its production line; those were the drawings that the third parties supplied to Technical Systems in response to their subpoenas. In light of these revelations, the Applicants amended their notice of motion to also seek relief based on the infringement of their copyright in those technical drawings. The bottom line of these revelations was that Kurtz had

stolen the Applicants' copyrighted and confidential information and given it to his new employer, who had used it to make flat wire and auger in competition with the Applicants.

[8] Following this devastating discovery, the Respondents abandoned their defence. The parties agreed on an order that was made by Schippers J (as he then was) on 2 June 2015. In the 2015 Order, the Respondents recognised that the Applicants had a confidential production process to make augers from specially manufactured flat steel wire. The order included a range of interdicts against the Respondents. Three are relevant to this application:

[8.1] First, the order interdicted the Respondents from "employing any facet of the applicant's (sic) confidential process in the manufacture of flat wire or auger" for so long as the Applicants' process remained confidential. That interdict is effectively repeated in both paragraph 5 and paragraph 9.

[8.2] Second, paragraph 7 interdicted the Respondents from manufacturing, marketing or selling flat wire and auger at all for three years. The interdict applied to any process, even one that did not employ the Applicants' protected information.

[8.3] Third, if, after the three-year period ended, the Respondents wished to manufacture flat wire for the use in auger, they could only do so if they changed their process so it did not breach the Applicants' rights. This interdict is repeated twice in the 2015 Order:

[8.3.1] Paragraph 7 provides that the Respondents must "adapt/alter their production process so as to avoid using the First Applicant's

confidential information”.

[8.3.2] Paragraph 23 provides that, after the three year period “in the event that the Respondent or any of them, directly or indirectly, manufacture flat wire or auger, or equipment for the manufacture of flat wire or auger, such manufacture shall not infringe on the confidential information or copyright of the applicants.”

[9] The difficulty that has precipitated the current proceedings is how to determine whether any new production line the Respondents establish to manufacture flat wire and auger infringes the Applicants’ copyright or uses their confidential information. The parties envisaged this problem and the 2015 Order creates a process to make this determination. It seeks to balance two competing concerns: permitting the Respondents to manufacture flat wire and auger, but only if they can do so lawfully.

[10] The process the parties agreed to is set out in paragraph 24, which is at the centre of the current dispute, particularly paragraph 24.5. It is necessary to set out the paragraph in full:

24. The determination of the Respondents’ compliance with paragraph 23 shall be as follows:

24.1 Suitably qualified experts, one appointed by the Applicants and one appointed by the Respondents, are to be granted access to the proposed production facility in order to inspect the proposed production facility and to compile a joint report in respect of the extent to which such production facility complies with paragraph 23 above;

24.2 The said experts are to state in the report the aspects on which they agree and the aspects on which they disagree;

- 24.3 The said report is to be handed to the Applicants and Respondents within 5 (five) court days of it being compiled and the Applicants and Respondents are to submit their written comments and/or disagreements on the said report within 5 (five) court days of so receiving the report, to such experts.
- 24.4 The said experts are to file a final report within 5 (five) court days of the expiration of the said 5(five) day period referred to in subparagraph 24.3 hereinabove;
- 24.5 In the event that the Applicants and/or the Respondents do not agree with the final report of the experts they shall be entitled to bring a motivated application to Court within 5 (five) court days to have the said final report varied and/or corrected. The Court so hearing the application will be entitled to determine what procedures are necessary to determine the application. In the event that such application is not launched within the 5 (five) court days referred to above, the report shall for all intents and purposes be regarded as final.

[11] The purpose of paragraph 24 is vital to resolving the current dispute. The meaning of paragraph 24 has been considered previously by this Court, and the SCA (I explain why below). The SCA held that paragraph 24.5 “regulated the manner in which the [Respondents] would be free to resume competition with the [Applicants]”.¹

[12] That is obviously correct. It serves as an escape hatch from the interdicts in the rest of the 2015 Order. But it also serves to protect the Applicants. Ordinarily, the Applicants would not be entitled to prohibit the Respondents from manufacturing flat wire and auger unless they could establish the Respondents were infringing their rights. But the 2015 Order reverses that position. It prohibits the Respondents from

¹ *RTS Industries and Others v Technical Systems (Pty) Ltd and Another* [2022] ZASCA 64 at para 7.

manufacturing until the Respondents have established, through the paragraph 24 process, that they can do so lawfully. The parties agreed to that flip, presumably, because of the Respondents' prior dishonest and unlawful conduct.

[13] To complete the picture, paragraph 25 permits the Respondents to construct an auger production facility, solely for the purposes of the process in paragraph 24. It reads:

Notwithstanding paragraph 7.3 above,² the Respondents shall be entitled to construct an auger production facility, which is, as a whole or in any of its constituent parts, not be sold, leased or otherwise made available to any third party, solely for the purposes of commissioning same in terms of what follows below. The Respondents undertake not to commission the proposed auger production facility until such time as the Applicants and Respondents are in agreement as set out in sub paragraphs 24.1 - 24.4 above or a Court has made such determination in terms of subparagraph 24.5 above.

[14] 'Commissioning' in this context means putting the production facility into commercial operation.

[15] In sum, the 2015 Order means that the Respondents cannot manufacture flat wire or auger at all for three years. After three years, they can manufacture flat wire and auger only if they do so without infringing the Applicants' copyright or confidential information. They can build a new production facility for the sole purpose of proving their ability to manufacture flat wire and auger lawfully. Before they can put that new

² Paragraph 7.3 reads: "Notwithstanding the provisions of prayers 5 and 6 above, the Respondents, for a period of 3 (three) years from the date of the granting this order, are interdicted and restrained from: ... 7.3 Manufacturing and/or producing and/or being involved in the manufacturing and/or production, whether directly or indirectly and whether as proprietors, employees, consultants, agents, members, directors or in any other capacity whatsoever, of auger coiling machinery and/or parts or components thereof or any business doing same."

production facility into commercial operation, the Applicants must go through the process in paragraph 24. If the parties and their experts agree the new production facility is kosher, the Applicants can commission it. If not, either party can approach the Court for a ruling on whether the Respondents' new production facility infringes the Applicants' copyright and confidential. The bottom line, as the SCA explained, is that absent agreement, "[u]ntil such time that a court had made a determination, the appellants would not be entitled to commission the production facility."³

Contempt of the 2015 Order and the 2020 Order

[16] The parties initially seemed to share this understanding. The Respondents did not manufacture flat wire or auger for the three years after the 2015 Order. But they then indicated that they wished to begin production, so the parties began the paragraph 24 process to assess whether the Respondents were able to do so without breaching the Applicants' rights. However, from 13 December 2018, the Respondents took the view that the 2015 Order was unimplementable. They argued, for example, that the concession that the Applicants' process was confidential had been wrongly made in 2015. In 2019, they established a plant and proceeded to manufacture flat wire and auger even though the paragraph 24 process was incomplete.

[17] Despite the Respondents resuming commercial manufacturing, the parties continued with the paragraph 24 inspection process of the Respondents new production facility. Inspections were held in August 2019. But when the Applicants' expert – Mr Broekhuizen – requested further technical drawings, the Respondents

³ *RTS Industries* at para 8.

treated it as a delaying tactic, and refused to cooperate.

[18] In 2019, the Applicants became aware that the Respondents had begun to sell their auger. The Second Respondent issued an invoice to an Egyptian company which was one of the Applicants' existing clients. This prompted the Applicants to launch an urgent application to interdict the Respondents from breaching the 2015 Order until the paragraph 24 process was complete, and to hold them in contempt of court.

[19] On 17 September 2019, two days before their application was due to be heard, the Applicants became aware that the Respondents had also sold auger to a Thai company. The container of auger was still in Cape Town, but was due to be shipped to Bangkok. They filed a supplementary affidavit and sought additional relief to interdict the shipment.

[20] The shipment was temporarily interdicted by Myburgh AJ. But when the application came before Sievers AJ, he struck it from the roll. It eventually came before Mangcu-Lockwood AJ (as she then was), who delivered judgment in March 2020.⁴ She dismissed the Respondents' various challenges to the meaning and status of the 2015 Order.

[21] Mangcu-Lockwood AJ concluded that the Applicants' production processes remained confidential and that the Respondents could only resume production after completing the paragraph 24 process. She rejected their attempts to downplay the Egyptian invoice as the Respondents admitted they had issued it. Mangcu-Lockwood AJ was "persuaded that the respondents have not only breached the terms of the Court Order, but continue to do so, and in fact harbour an intention to

⁴ *Technical Systems (Pty) Ltd and Another v RTS Industries and Others* [2020] ZAWCHC 69.

continue to do so.”⁵ And she held that “the facts surrounding the Bangkok shipment show, not only wilfulness to breach the Court Order, but also *mala fides* on the part of the respondents” and that “the respondents sought to mislead the court by concealing the factual circumstances surrounding the transporting and loading of the shipment.”⁶

[22] Mangcu-Lockwood AJ's order included the following relevant terms:

1) An interim interdict is granted in the following [terms]:

1.1 Pending the finalisation of the process provided for in paragraphs 23 to 25 of the [2015 Order], the respondents are interdicted and restrained from-

1.1.1 manufacturing and/or producing flat wire for purposes of manufacturing auger;

1.1.2 manufacturing and/or producing auger;

1.1.3 marketing for sale and/or selling any flat wire and/or auger produced by any of the respondents;

1.2 The respondents are restrained and interdicted from removing, causing or permitting the removal of any of the unlawfully produced products from the premises situated at 6 Distillery Way, BAT Building, Paarl, Western Cape, or from any other premises where same may be located.

1.3 Within 5 court days of the issue of this Order, the respondents are directed to furnish the applicants with the addresses of all premises where the respondents are storing the unlawfully produced products;

2) It is declared that the respondents are in contempt of the Court Order of 2

⁵ Ibid at para 32.

⁶ Ibid at para 52.

June 2015⁷

[23] Paragraph 1.1 of the 2020 Order was, technically, unnecessary. The Respondents were already interdicted from performing any of those acts by the 2015 Order. It was their refusal to accept that and their contempt of the earlier order that necessitated the 2020 Order.

[24] The Respondents appealed against the 2020 Order to the Supreme Court of Appeal. In a unanimous judgment of Molefe AJA, it dismissed the appeal on the basis that the 2020 Order was interim and therefore not appealable. It explained that the consequence of the 2020 Order was merely to enforce the 2015 Order “until the process ordained in paragraph 24 is completed”.⁸

[25] More importantly for present purposes, the SCA confirmed Mangcu-Lockwood AJ’s interpretation of the 2015 Order. In clear terms, it held: “Until such time that a court had made a determination [in terms of paragraph 24.5], the [Respondents] would not be entitled to commission the production facility. Evidently, and until such time that the process had been completed, the [Respondents’] proposed production facility would not be put into service for the commercial production of auger.”⁹

⁷ According to the SCA, the Applicants abandoned paragraph 2 of the 2020 Order. *RTS Industries* (n 1 above) at para 25. I am not sure what that means. A finding of contempt is made by the Court to assert its own authority. It cannot be abandoned by a party. It declares a state of affairs, without on its own affording any rights to another litigant. Fortunately, the consequence of this “abandonment” does not arise in this application, so I need make no decision about its competence or effect.

⁸ *RTS Industries* (n 1 above) at para 29.

⁹ *Ibid* at para 8.

The 2020 Action

[26] Before I can turn to the actual dispute in this application, there is a final piece of the puzzle. In 2020, Technical Systems launched an action against the Respondents under Case No. 5288/20. This 2020 Action is based on the Respondents' alleged use of the Applicants' confidential information and copyright drawings to manufacture, market and sell flat wire and auger after the 2015 Order. The 2020 Action seeks interdicts, damages and an order that the Respondents are in contempt.

[27] The Respondents have defended the 2020 Action on a range of grounds, including several preliminary objections. In 2021, Cloete J dismissed a *res judicata* exception by the Respondents.¹⁰ They claimed that the issue had already been determined by the 2015 Order. Cloete J held it was inappropriate to adjudicate the claim on exception as the pleadings indicated the 2020 Action went beyond the 2015 claim.

[28] A hearing of the 2020 Action is not yet trial ready. The parties could provide no clarity on when it would likely be heard. But it is likely still years from trial.

The Present Dispute

[29] While the litigation that led to the 2020 Order and the subsequent appeal were

¹⁰ *Technical Systems (Pty) Ltd v RTS Industries and Others* [2021] ZAWCHC 35.

ongoing, the parties continued with the inspection process of the Respondents' production facility as envisaged in paragraph 24. The two experts – Mr Broekhuizen for the Applicants, and Mr Bowles for the Respondents – produced their report on 9 November 2021. The parties then commented as provided for in paragraph 24.3 on 16 November 2021. The expert's final report, taking into account the commentary, was produced on 23 November 2021. It consists of some 988 pages. It was filed as an attachment to this application and was, with the agreement of the parties, made subject to a confidentiality order dated 13 November 2023.

[30] The experts did not agree on whether the production facility used the Applicants' confidential information and copyrighted drawings. Mr Bowles repeated the Respondents' consistent line – the Applicants' did not use a confidential manufacturing process worthy of protection. Mr Broekhuizen took the opposite view. Mr Broekhuizen identified multiple instances of copyright infringement; Mr Bowles found none.

[31] The two views were irreconcilable and could only be resolved by the process envisaged in paragraph 24.5 of the 2015 Order – an application to have the experts' report "varied or corrected". Paragraph 24.5 provided that the Court "hearing the application will be entitled to determine what procedures are necessary to determine the application." I understood this to mean that a party dissatisfied with the experts' report would apply immediately for its variation or correction. The Court seized with that application would decide how to determine it. There would be only one application, not two.

[32] The Applicants took a different approach. They launched this application on 30 November 2021. It seeks only to deal with the prior, procedural issue of how the dispute between the experts should be resolved. The Applicants pray for an order that

the experts' dispute "be referred to trial to be heard *pari passu* with the" 2020 Action. The Applicants argue that the issues to be resolved in the 2020 Action, and the facts necessary to resolve the experts dispute under paragraph 24.5 will cover similar terrain. They have already filed an expert report by Mr Broekhuizen in the 2020 Action which they argue mirrors his findings in the Expert Report prepared under paragraph 24.5. It will be convenient and efficient, they argue, for the paragraph 24.5 dispute and the 2020 Action to be determined together.

[33] No point would now be served by refusing to decide this application because I am not the court deciding the actual dispute. Having taken one step forward, I would force the parties to take two steps back. The same dispute before me would arise before that Court. And it was not a point taken by the Respondents. I am willing to determine how the experts' disagreement must be resolved.

[34] The Respondents oppose the present application. Initially, their opposition was largely technical, or concerned with how the experts' dispute should be resolved, not whether it required resolution. They argued that the application should not have been brought under the same 2014 case number as the 2015 Order. They contended it was inappropriate to join the paragraph 24.5 proceedings to the 2020 Action. They argued that the application was premature because, at that time, the appeal against Mangcu-Lockwood AJ's 2020 Order was still pending. They contended that the Applicants had failed to state the core jurisdictional fact for invoking the judicial resolution process in paragraph 24.5 – that they disagreed with the experts' report. Finally, the Respondents argued that the affidavit supporting the application relied on irrelevant or inadmissible evidence.

[35] The Applicant filed a replying affidavit and heads of argument addressing these

grounds of opposition. The battle lines seemed drawn. But by the time of the hearing, save for the dispute about whether the paragraph 24.5 application should be joined to the 2020 Action, the Respondents' original bases of opposition fell by the wayside.

[36] On 23 October 2023, just 10 days before the hearing, the Respondents brought an interlocutory application to file an additional affidavit. The affidavit stated that "the respondents have abandoned their intention to use a production line consisting of the items of equipment which formed the subject of the joint technical report." Those elements of the production line that Mr Broekhuizen objected to would "be completely redesigned or ... replaced by other machines which were purchased on the open market." The Respondents would, moreover, only manufacture flat wire and then purchase a third party machine to convert that into auger. The Respondents argued that, as a result, there was no need to resolve the dispute between the experts about a production facility they did not intend commissioning.

[37] The Respondents explained that they had decided to redesign the inspected production facility for strategic reasons. There had been another, unrelated, trial between the parties concerning a different product – feed chain – which had run for 50 days and cost tens of millions of Rands. They preferred to avoid further, costly litigation against the Applicants and instead sought to develop a production facility they could use without having to go to court. The Respondents, instead, sought an order which would effectively restart the paragraph 24 process for their new flat wire "production line". The respective experts would exchange reports and, if they could not agree, the matter could be re-enrolled.

[38] The Respondents also contended that the Applicants knew there was no longer a live dispute and ought not to have persisted with their application. To unravel the

merits of that submission it is, unfortunately, necessary to consider the correspondence and interactions between the parties:

[38.1] On 16 May 2023, the Respondents' attorneys wrote to the Applicants' attorneys informing them that the Respondents had decided to "re-design" and "re-engineer" their production line. They invited Mr Broekhuizen to inspect the new components.

[38.2] After a follow-up letter, the Applicants' attorneys responded on 26 May 2023. They argued that the Respondents were unable to manufacture auger or flat wire without breaching the Applicants' rights. Nonetheless, they agreed to Mr Broekhuizen inspecting the machines and their components. They emphasised that this was "not an inspection as contemplated in the 2015 Order" and that the Respondents' intention did not affect the pending application set down for November.

[38.3] Further correspondence was exchanged between the parties. It is not necessary to detail each letter. Essentially, the Respondents insisted that, given their intention not to use the inspected production facility, the paragraph 24.5 application was moot. They also indicated that they no longer intended to manufacture auger using their own machines at all, but only flat wire. They would purchase a third party machine to convert the flat wire to auger. The Applicants persisted in their position – the Respondents' change of plan did not remove the need for the paragraph 24.5 application to be determined.

[38.4] Mr Broekhuizen eventually visited the Respondents' premises to look at their new machines on 2 August 2023. However, the Respondents did not hear from Mr Broekhuizen or the Applicants thereafter. Nor did they follow up to

request a response.

[39] The Respondents therefore took it on themselves to bring this new information to the Court's attention. They argued for a punitive costs order, or even costs *de bonis propriis* against the Applicants' legal representatives, for persisting with the application in the face of the Respondents indication they would not use the inspected production facility.

[40] The Applicants had a very different view of the Respondents' promise to abandon the inspected production facility. They claim that "there is no production facility other than" the one which was subject of the expert report. The "production line" Mr Broekhuizen considered on 2 August 2023 was "a shambolic collection consisting of 13 drawings of mostly bolts, nuts and spacers, as well as shells of machines missing virtually every essential component." It was not capable of producing anything, and could not be inspected as envisaged in paragraph 24. I note that the Respondents do not contest that the new production facility is incomplete and cannot, yet, produce flat wire.

[41] This conclusion was supported by an affidavit from Mr Broekhuizen who set out his observations in some detail. He explained that it was impossible to determine from the limited machines, and the limited drawings whether the Respondents had designed a functional production line. A great deal of "trial and error" was still required. Drawings often do not work as planned in practice, and adjustments often have to be made to a line before it works. According to Mr Broekhuizen, it was only "once a production line exists in three-dimensional format" that it can be assessed, because it is only then that all the components can be said to work together. Mr Broekhuizen was "not convinced that what [he] saw could be workable".

[42] The Applicants point out that the Respondents never demanded a report from Mr Broekhuizen following the 2 August 2023 visit, and can therefore hardly complain now that they never received one. Mr Broekhuizen confirmed that he had never undertaken to provide a report.

[43] They argue that the Respondents' mere "intention" not to use the existing production line could never be a sufficient basis for the court to decline to make a determination under paragraph 24.5. In their view, the late submission of the supplementary affidavit and the "misrepresentations" in that affidavit were part of the same pattern of dishonest conduct. It was merely a last minute attempt to avoid or delay the paragraph 24.5 proceedings.

[44] The Respondents provided an email from their expert, Mr Bowles, to respond to Mr Broekhuizen.¹¹ He opined that it was not for Mr Broekhuizen to assess whether the new line was functional or not, but only to assess whether its components violated the Applicants' copyright or confidential information. As most of the components had been purchased or repurposed, they could not infringe those rights. He disagreed with Mr Broekhuizen's assessment of several of the components of the new line.

[45] Mr Bowles also alleged that, on 2 August 2023, Mr Broekhuizen had undertaken to review the joint report and share his comments based on what they had seen of the new line. Mr Broekhuizen filed a further affidavit denying this.

[46] Although they initially opposed the application to introduce the supplementary affidavit, at the hearing, the Applicants abided. But they persisted in arguing that its

¹¹ No affidavit was provided because Mr Broekhuizen was out of the country. I am willing to consider the contents of Mr Bowles' email.

contents were irrelevant, and that the Court should decide their initial application for this court to determine the procedure to resolve the experts' dispute about the inspected production facility. They argued that the Court had no power to vary paragraph 24 of the 2015 Order which was a final order. Even if the Court could do so, it should resolve the experts' disagreement because the Respondents mere "intent" not to use the inspected production facility was, in the context of their prior conduct, insufficient to adequately protect the Applicants' rights. They also complain that the Respondents have not agreed to an interdict to prevent them from using the inspected production facility, and refuse to even disclose where the components of that facility are now located (they were not at the facility Mr Broekhuizen visited in August 2023).

[47] The Respondents argue that this Court has the power to vary the process in the 2015 Order. They also contend there is no need for a further interdict because the Applicants are already protected by the 2015 Order which prevents them from manufacturing using any production facility, including the one inspected by the experts.

The Issues

[48] This application has become both far more complicated and far more simple than it was when it began. What should have been relatively straightforward debate about how to resolve the experts' disagreement became a heated debate with allegations of ulterior purpose and unreasonable behaviour flying back and forth. The history between the parties has engendered mutual hostility and suspicion. They are no longer able to find reasonable solutions to what are primarily procedural problems,

and so rely on the Court to resolve them.

[49] Mr Myburgh SC made clear in his oral address that the Respondents no longer persisted with the objections in their original answering affidavit. They limited their objections to the consequence of their intention to abandon the inspected production line. And the Applicants did not oppose the admission of the supplementary affidavits (provided the further affidavits were also admitted).

[50] To my mind, the case raises the following issues:

[50.1] Is it open to this Court to refuse to require a determination in terms of paragraph 24.5 of the 2015 Order?

[50.2] If it is, is it still necessary to resolve the clash between the experts about the existing production facility?

[50.3] If it is, what process should be followed to resolve that dispute?

[50.4] Who should bear the costs and at what scale?

[51] In short, I hold: This Court has the power to vary paragraph 24; but it should not exercise that power because the Respondents cannot be trusted; the experts quarrel should be resolved separately from the 2020 Action; there should be no costs in the interlocutory application; and the Respondents should pay 50% of the Applicants' costs on an ordinary scale.

The Power to Vary Orders

[52] The Applicants argued that the 2015 Order was a final order and that this Court

therefore had no power to depart from it. Its only role, Ms Robinson SC urged me, was to decide what process should be employed to resolve the experts' dispute. Even if the Court accepted that the Respondents did not intend to use the inspected production facility, it had no power to depart from the course already laid out for the resolution of a dispute about that facility.

[53] I do not agree that this Court lacks the necessary power. The general rule is that once a court makes an order, it cannot alter its order. This principle is vital to maintain the rule of law and certainty in legal proceedings.¹²

[54] But the general rule admits of certain exceptions. One of those is that courts have the power to alter interlocutory or procedural orders.¹³ A court can alter those orders on good cause shown. The rationale for permitting variation of interlocutory orders is that they "do not dispose of any issue or any portion of the issue in the main action."¹⁴ So, for example, in *Sandell* Hoexter J declined to give effect to an earlier order by a different judge referring a dispute to oral evidence.¹⁵ By the time the matter was argued before him, the referral was no longer appropriate as "voluminous" affidavits had been filed and it would "inevitably result in a trial within a trial, and a protracted and elaborate one to boot."¹⁶

[55] While courts have the power to vary these orders, "a Court will not lightly

¹² See, for example, *Zondi v Member of the Executive Council for Traditional and Local Government Affairs and Others* [2005] ZACC 18; 2006 (3) SA 1 (CC); 2006 (3) BCLR 423 (CC) at para 27.

¹³ See *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 551H-552A.

¹⁴ *Zondi* (n 12 above) at para 30.

¹⁵ *Sandell and Others v Jacobs and Another* 1970 (4) SA 630 (SWA).

¹⁶ *Ibid* at 634F.

exercise such a power.”¹⁷ An invitation to alter even an interlocutory order should be approached with “considerable diffidence.”¹⁸

[56] This seems right. Parties will regulate their affairs based even on interlocutory or procedural directions. That is certainly the case here. A court should only depart from procedural orders when the circumstances justifying those orders have fundamentally changed, where a party relies on the interlocutory order to abuse the court’s process, or where the interests of justice otherwise demand it.

[57] The next question is whether paragraph 24 generally, and paragraph 24.5 in particular, is an interlocutory order that can be varied. It plainly is. In 2015 the parties envisaged that the Respondents may, after the three years were up, seek to again manufacture flat wire and auger. They agreed that the Respondents would only be lawfully permitted to do so if they could demonstrate that they would do so without infringing the Applicants’ rights. Paragraph 24 determines the process for resolving that anticipated dispute. It does not finally determine (nor could it) whether any new production line infringes any of the Applicants’ rights.

[58] My view is fortified by the holding of the Supreme Court of Appeal. It concluded that paragraph 1.3 of the 2020 Order was interim in nature and therefore unappealable. That paragraph interdicted the Respondents from “marketing for sale and/or selling any flat wire and/or auger produced by any of the respondents” until “the finalisation of the process provided for in paragraphs 23 to 25 of the” 2015 Order. If that interdict is interim, then surely so is the order regulating the process for how it

¹⁷ Ibid at 634D.

¹⁸ Ibid.

might be lifted.

[59] That is not the case for all parts of the 2015 Order. The three-year interdict, and the interdict on using the Applicants' copyrighted or confidential information are all final in form and effect. But paragraph 24.5 is different. It sets a process to decide a process, it does not determine a substantive right. It is within this Court's power to determine that that process is no longer fit for purpose, is being abused, will have negative consequences unforeseen at the time it was made, and should be altered.

Paragraph 24.5 Should not be Varied

[60] This Court has the power to vary paragraph 24. But should it? There are two fundamental considerations.

[61] First, until a production line is approved through a paragraph 24 process, the Respondents may not commission a production facility to manufacture flat wire or auger *at all*, even if the facility made no use of the Applicants' intellectual property. That is the consequence of the interdict in paragraph 25 read with paragraph 24. From a strictly legal perspective, it is in the Respondents' interest to complete a paragraph 24 process because, until they do, they cannot legally commission a production line. Even if their production line does not infringe any of the Applicants' rights, until they convince the Applicants' expert or a court, they are prohibited from manufacturing.

[62] From this formal perspective, there is no need for the Applicants to insist on the completion of the paragraph 24 process. If the process is abandoned without a final determination – as the Respondents seek – they Applicants are no worse off. The Respondents will remain interdicted from commissioning a production facility. There is

no obvious legal advantage to the Applicants having a judicial determination on the legality of a production line that the Respondents will not use.

[63] But all this assumes the Respondents will be honest, comply with the 2015 Order, and not again infringe the Applicants' rights. That leads to the second fundamental consideration: The history of this matter demonstrates that the Respondents cannot be trusted. Their deceit began with the unlawful use of the Applicants' confidential information and copyrighted drawings. It continued with trying to conceal that illegality, which was discovered only by subpoenaing third parties. It was reproduced in 2019 when they produced and sold products in naked contempt of the 2015 Order, and "sought to mislead the court" about their activities.

[64] Even now, the Respondents have stated their intention not to use the inspected production line. But they have given no undertaking not to do so. They will not agree to an interdict prohibiting them from using that line. They will not reveal where the components of that line are located. They say they will only now manufacture flat wire, but intend to manufacture auger in the future, while remaining in possession of a production facility to convert flat wire into auger which the Applicants allege infringes their rights. As Mr Broekhuizen explains, even if the new production facility uses none of the elements he found objectionable previously, it may not work without re-introducing those offensive parts.

[65] This is not the conduct of a party can be trusted not to take advantage of any lingering uncertainty in the future. As Ms Robinson SC put it, the Respondents' case "hinges on a gossamer web of intention of proven liars". I agree.

[66] Absent the Respondents' history of dishonest and contemptuous conduct, I would likely have decided that no purpose would be served by allowing the Applicants

to pursue the paragraph 24.5 process for the inspected production facility. It would be an abuse of that process to achieve an end it never intended. But it seems to me there is a real risk that the Respondents will seek to take advantage of the continued dispute about whether they can lawfully use that line or not. How they might do so is unclear. But the Applicants' fear that they will do so is, to my mind, reasonable. And it would be allayed by this Court determining the legality of the facility under paragraph 24.5, as the parties agreed eight years ago.

[67] Resolving the disputes between Mr Broekhuizen and Mr Bowles will cause both sides considerable expense. But it lies in the Respondents' own hands to avoid that expense. They need merely grant an unequivocal undertaking not to use the inspected production line in that form, and agree to the Applicants having that undertaking made an order of court. In those very different circumstances, no purpose could possibly be served by resolving what would be a truly academic dispute. If they really have no intention to use that production facility, they lose nothing by agreeing to such an order. But until the Respondents are willing to assuage the reasonable risk that exists, there is no sufficient reason to depart from the protection paragraph 24.5 affords the Applicants.

[68] In sum: while the Applicants' primary legal interests are protected by paragraph 25, for so long as there is a risk the Respondents will use all or part of the inspected production facility, the Applicants have an interest in a judicial determination of whether that use would be lawful. To avoid that, the Respondents can agree to an interdict prohibiting the use of the inspected production facility. Once they have completed a new production facility that works, it can be inspected. If the parties and their experts cannot agree on whether it is lawful, one would hope they would agree

to referral to court along lines similar to what I order, without another application to define the process.

[69] Given that conclusion, it is not necessary to consider the alternative to the paragraph 24.5 process proposed by the Respondents. But it may aid the parties, and hopefully limit future disputes, to point out why it was inappropriate.

[70] In a draft order attached to their supplementary affidavit, the Respondents sought an order that generally mirrored the process in paragraph 24.5, starting with requiring Mr Broekhuizen to file a supplementary report based on his evaluation of the new production line. At the hearing, Mr Myburgh SC handed up a revised draft order. This began by treating Mr Broekhuizen's affidavit filed in response to the Respondents' supplementary affidavit as a "supplementary report" which he could then further supplement. The experts would then meet and produce a joint report identifying areas of agreement and disagreement. What would follow is an iterative process where the experts would examine each element of the production facility in turn to seek agreement that it does not violate the Applicants' rights. If the experts could not reach agreement, either party could refer the matter to the Court for hearing.

[71] There are three problems with the proposal.

[72] First, it is inconsistent with paragraph 24. Paragraph 24.1 requires the parties to appoint experts to "inspect the proposed production facility". I agree with the Applicants that the Respondents must identify a complete production facility, and then make it available for inspection. Paragraph 24 does not envisage piecemeal inspection of each element of a production facility. As Mr Broekhuizen explained, it is only when the facility is complete that it is worthwhile inspecting it. Until then, there is no guarantee that each piece in the puzzle will fit, and that the line as a whole will work.

Parts that work in isolation may need to be modified to work together. They will need to be re-inspected after alteration to again ensure they do not violate the Applicants' rights. This would be an inefficient and tedious process.

[73] Second, the Respondents' proposed order rests on treating Mr Broekhuizen's affidavit as a report following an inspection in terms of paragraph 24.1. But it was not an inspection. Not only did the Applicants' attorneys repeatedly make clear that they were not agreeing to an inspection, there was no "production facility" to inspect. Unless there is a complete production facility that produces flat wire and/or auger, there can be no inspection under paragraph 24.

[74] Third, it is not the Applicants' task to advise the Respondents on how not to violate their rights. Ms Robinson SC referred me to a passing-off case: *Weber-Stephen Products*.¹⁹ EM Grosskopf JA endorsed the finding of an English court in a decision concerning lemon juice containers: "[I]t is not for the Court to tell the defendant how to solve the difficulty, or indeed in my judgment even to consider whether the difficulty can be solved."²⁰ By analogy, it was argued that it is not for the Applicants' expert to tell the Respondents how to avoid infringing their rights; it is for the Respondents to present a production line and for the experts – or ultimately the Court – to determine whether it violates the Applicants' rights.

[75] I agree. The violation originally conceded in the 2015 Order was not limited to any particular machine, but to the process of manufacturing flat wire and auger. The Respondents must devise a "production facility" that they will use to manufacture flat

¹⁹ *Weber-Stephen Products Co v Alrite Engineering (Pty) Ltd And Others* 1992 (2) SA 489 (A).

²⁰ *Reckitt & Colman Products Ltd v Borden Inc and Others (No 3)* [1987] FSR 505 at 515, quoted in *Weber-Stephen* at 501B.

wire and auger that does not infringe any of the Applicants' rights. They can either do that or they cannot. But it is not for the Applicants to assist them to achieve that goal by checking their process at each step along the way.

[76] Accordingly, the only way for the Respondents to lawfully manufacture flat wire or auger is to design and build a "production facility" that can in fact do that, and then to subject that production facility to the paragraph 24 process. That is what it agreed to. It may now seem onerous. But that is no reason to depart from the 2015 Order.

A Separate Process is Appropriate

[77] There were two options for how to resolve the experts' dispute about the inspected production facility: join it to the 2020 Action; or refer it for separate resolution through oral evidence.

[78] There are pros and cons to both options.

[79] In favour of separate referral, the dispute between the experts is largely ready for hearing, and the issues will be confined. There is unlikely to be a need for discovery beyond what is already in the lengthy joint report. By contrast, I was informed that the 2020 Action is not ready for hearing, and it is unclear when it will be. Even after the determination of the exception, there are a range of preliminary disputes that may need to be resolved before the merits of the action can be determined. Linking the one to the other will mean that the paragraph 24 dispute can only be resolved when the 2020 Action is ready for determination. It may be that the 2020 Action is never determined on the merits, because one of the Respondents' preliminary defences succeeds. What then would happen to the paragraph 24.5 issue that had been

conjoined to the 2020 Action?

[80] The Respondents have, for strategic reasons, indicated they do not wish to use the inspected production facility. That assessment may change in light of this judgment. If it does, the dispute should be resolved as quickly as possible. If Mr Bowles is right and the existing production line is lawful, the Respondents should be allowed to commission it as soon as possible, without also needing to resolve the 2020 Action. Linking the two would unfairly disadvantage the Respondents.

[81] On the other hand, there are factors that favour conjoining. There is likely to be a fair degree of overlap between the issues. It is not clear to me whether the production facility that the Applicants allege the Respondents used to produce flat wire and auger was identical to the one the experts inspected. Even if it was not, there will likely be significant similarities. The testimony of Mr Broekhuizen and Mr Bowles would be substantially similar in both cases.

[82] But, while there would undoubtedly be an overlap, there may also be differences. The testimony in the paragraph 24.5 dispute will be limited to the joint report, whereas the 2020 Action is more wide-ranging. The Respondents may or may not choose to call Mr Bowles in the 2020 Action, but joining the two would effectively force them to do so.

[83] There is also a risk that referring the paragraph 24 dispute to separate adjudication would result in two courts considering the same issues of fact and law, and possibly reach conflicting results. That may occur. Or it may not. If it does, the latter court (probably the one deciding the 2020 Action) will need to determine how to deal with the earlier findings. It is only a possibility and, even if it occurs, it is not an insuperable problem.

[84] It is impossible to look into the future and determine exactly how each option will play out. Ultimately, I take the view that separate adjudication is more appropriate. It seems almost certain that linking the two matters will delay the resolution of the paragraph 24.5 dispute. The downsides of linking the two involve predictions that may or may not play out. I prefer to dodge the definite downside, rather than avoid anticipated obstacles.

[85] At the hearing Ms Robinson SC, undertook to prepare a draft order reflecting the terms of a referral for separate adjudication if I determined that was appropriate. The Applicants submitted such a draft order. The Respondents made no specific objections. The order I make tracks that draft.

[86] I emphasise two elements of my order that I have amended from the draft:

[86.1] It endorses a semi-urgent hearing of the matter. The urgency arises from the need to give the Respondents the “green light” to re-commence their operations. I accept that they may not wish to have a final determination on the inspected production facility. But then they need just agree to an interdict prohibiting its use, complete the new production facility, and subject it to inspection.

[86.2] It permits the parties by agreement, or the Court that is seized with the merits of the experts’ dispute, to alter the procedure. It may become necessary to introduce other elements of the ordinary rules for trials in order to resolve the dispute. This procedural order is intended to enable, not straightjacket the parties or the future Court.

Conclusion and Costs

[87] That leaves costs. Both sides sought punitive costs against the other. The Respondents argued the Applicants were at fault for not informing the Court of their intent not to use the inspected production facility, and for persisting with the application. The Applicants argued the Respondents' last-minute attempt to derail their application warranted a special costs award.

[88] As my judgment explains, the Applicants were entirely entitled to persist with the application, notwithstanding the Respondents' approach. At the same time, while it was late, it was not inappropriate for the Respondents to introduce the new evidence which was admitted and was necessary to properly adjudicate the dispute.

[89] I do not accept the Respondents' criticism that it was incumbent on the Applicants to inform the Court about the Respondents' supposed change of heart. There was no correspondence between the parties after August 2023. There was no demand for a report from Mr Broekhuizen, nor any demand that the Applicants abandon the application. There is no reason the Applicants, rather than the Respondents, were obliged to notify the Court of the developments.

[90] The Applicants have been partly successful – they have secured a process for the determination of their dispute. But the Respondents were successful in resisting tying it to the 2020 Action.

[91] I considered that costs should stand over for determination when the merits of the paragraph 24.5 dispute are decided. But that may not occur. In my view, the Applicants have achieved greater success than the Respondents. My order requires the Respondents to pay 50% of the Applicants' costs on the ordinary scale. That

should not include the application to introduce further evidence. I granted that application. Although the Applicants opposed the application, and then consented, their opposition was never primarily directed at admission of the new evidence, but the consequences of the new evidence. They have been successful in resisting what the Respondents sought to achieve in introducing that evidence. And they would have been entitled to file an answer to the new affidavit, even if they had not opposed its admission.

[92] Accordingly, I make the following order:

1. All the supplementary affidavits filed by the parties are admitted. There is no order as to costs in the Respondents' application to introduce further evidence.
2. The determination of the disputes and difference of opinion evident from the report of Messrs Nicolaas Theodorus Broekhuizen and Helmut Bowles (**the Report**) prepared pursuant to paragraphs 24.1 to 24.4 of this Court's order of 2 June 2014, is referred to oral evidence as envisaged in paragraph 24.5 of that order, on a semi-urgent date to be determined in consultation with the Acting Judge President and the Registrar of this Court.
3. Subject to paragraph 4, the following procedures shall apply to the determination by oral evidence:
 - 3.1. To the extent that any party intends to rely on a document which does not form part of the Report, such party is required to make discovery on oath of those documents within one month of this

Order.

- 3.2. Such discovery shall be made in accordance with Rule 35 and the provisions of that Rule with regard to the inspection and production of documents discovered shall apply.
- 3.3. Subject to what is stated below, the oral evidence shall be that of Messrs Broekhuizen and Bowles.
- 3.4. A party shall not be entitled to call any witness other than Messrs Broekhuizen or Bowles unless a witness statement, setting out the evidence in question, has been filed by the parties in respect of such witness at least eight weeks before the hearing of the oral evidence. In response to any witness statement, each party may file a witness statement of further evidence to be led at least four weeks before the hearing of oral evidence.
- 3.5. A party shall not be entitled to call any expert witness other than Messrs Broekhuizen or Bowles, unless such party has filed:
 - 3.5.1. A notice as contemplated in Uniform Rule 36(9)(a), not later than 30 days from the date of this Order; and
 - 3.5.2. A summary of the expert's opinion and reasons as contemplated in Uniform Rule 36(9)(b) not later than forty-five days from the date of this Order.
- 3.6. Notwithstanding paragraph 3.4 above, the Court may, at the hearing, on good cause shown permit a person to be called

despite the fact that no statement has been served in respect of his or her evidence.

- 3.7. Either party may subpoena a person to give evidence at the hearing whether or not such person has consented to furnish a statement.
- 3.8. The fact that a party has served a witness statement or subpoenaed a witness shall not oblige such a party to call the witness concerned.
- 3.9. If a deponent or witness is not called to testify, the affidavit or statement of such deponent or witness shall be disregarded in the determination of the issues referred to oral evidence.
- 3.10. Witnesses called by the parties may be examined and cross-examined with a view to resolving any factual differences.
4. The parties may agree to any departure or addition to the above procedures. The Court hearing oral evidence shall not be limited to the procedures in this order, and will be entitled to amend them if it considers it necessary to resolve the dispute.
5. The Respondents shall pay 50% of the Applicants' costs.

M J BISHOP
Acting Judge of the High Court

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