

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

- | | |
|-----|--|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: |

Date: **5th September 2022** Signature: _____

A handwritten signature in black ink, appearing to read "Santhosh", is written over the signature line.

APPEAL CASE NO: A5038/2022

COURT A QUO CASE NO: 14760/2022

DATE: 5TH SEPTEMBER 2022

In the matter between:

VALUE LOGISTICS (PTY) LIMITED

First Appellant

**VALUE LOGISTICS PERSONNEL
SERVICE (PTY) LIMITED**

Second Appellant

and

OOSTHUIZEN, MARIUS

First Respondent

SAVINO DEL BENE (SOUTH AFRICA) (PTY) LIMITED

Second Respondent

Coram: Adams J, Mia J *et* Van Nieuwenhuizen AJ

Heard: 31 August 2022 – The 'virtual hearing' of the Full Court Appeal was conducted as a videoconference on *Microsoft Teams*.

Delivered: 05 September 2022 – This judgment was handed down electronically by circulation to the parties' representatives *via* email, by being uploaded to *CaseLines* and by release to SAFLII. The date

and time for hand-down is deemed to be 10:00 on 05 September 2022.

Summary: Contract – restraint of trade – enforcement of – against ex-employee – party who wishes to be absolved from his restraint of trade must allege and prove that enforcement would be contrary to public policy – it is for the restrained person to show why restraint of trade should not be enforced – onus on restrained person to prove unreasonableness – protectable interest – what constitutes – reasonableness of scope and time of restraint – order to be fashioned by court – appeal and cross-appeal dismissed.

ORDER

On appeal from: The Gauteng Division of the High Court, Johannesburg (Manoim J sitting as Court of first instance):

- (1) The appellant's appeal is dismissed.
 - (2) The respondent's counter-appeal is dismissed.
 - (3) Each party shall bear his own costs.
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JUDGMENT

Van Nieuwenhuizen AJ (Adams et Mia JJ concurring):

[1] For the sake of convenience, the parties will be referred to as per the naming conventions followed by the court *a quo* (Manoim J) in the judgment handed down on 20 May 2022. The first appellant is referred to as 'Logistics' and the second appellant as 'Personnel', whilst the first respondent shall be referred to as 'Oosthuizen' and the second respondent as 'Savino'.

[2] The matter and this appeal concern an alleged restraint of trade agreement ('the restraint') and the relief granted by the court *a quo* was in the following terms:

- '(1) The first respondent is interdicted from taking up employment with second respondent, or with any other tyre warehousing and distribution company (the "restrained employer"), within 75 kilometres of the first applicant's premises, for a period until the end of March 2023, or the final closing date for the submission of tenders for the 2023 Bridgestone tyre logistics contract, whichever is the earlier (the "restricted period").
- (2) Throughout the duration of the restricted period, the applicants must, from the date of this order, pay the first respondent his monthly salary (as it was at April 2022, less lawful deductions) every month, on the date he would normally be paid if he had continued to work for the first applicant. Provided, should the first respondent obtain new employment during this period, with a non-restrained employer, the obligation to pay him in terms of this clause will cease.
- (3) The second respondent is interdicted and restrained from employing the applicant during the restricted period.
- (4) The respondents, jointly and severally, the one paying the other to be absolved, are liable for half the costs of the applicants, including two counsel.'

[3] The court *a quo* subsequently granted the applicants and the respondents limited leave to appeal and cross-appeal against same, in the following terms:

- '(1) Leave to appeal is granted to the applicants in respect of the duration period set out in paragraph 1 of the order and in respect of the payment obligations set out in paragraph 2 of the order, but only insofar as the period of the restraint may be found to extend beyond the period for which the applicant had originally tendered payment for.

Leave to cross-appeal

- (2) Leave to cross-appeal is granted to the respondents in respect of paragraphs 1 and 2 of my order to contend that the restraint is no longer binding on the first respondent, insofar as it relates to the issue of the proper pleading and interpretation of clause 15.1.2 of the employment contract, between the first applicant and the first respondent.
- (3) Leave to appeal in respect of the joinder of the second respondent is refused.

Costs

- (4) Leave to appeal and cross-appeal are granted in respect of the costs awards contained in paragraph 4 of my order.
- (5) Costs of these applications for leave to appeal and cross-appeal are to be costs in the respective appeal and cross-appeal.'

[4] On 4 July 2022 Manoim J granted a supplementary order in respect of the leave to appeal and cross-appeal, directing that same should be supplemented by an additional clause 6, reading as follows:

‘(6) Leave to appeal and the leave to cross appeal are granted to the Full Bench of the Gauteng Division.’

[5] The matter came before Manoim J as an urgent application to enforce the restraint between the appellant companies, their erstwhile employee (Oosthuizen) and his new employer (Savino).

[6] The Value Group of Companies and Savino both provide distribution and warehousing services (logistics) to major tyre manufacturers. It is common cause that the Value Group of Companies are competitors in the logistics market and Oosthuizen is an erstwhile employee of both the applicants and is now employed by Savino.

[7] The court *a quo* found the matter to be urgent and thereafter it followed the route of an urgent application and was dealt with in that way and also comes before this court as an urgent appeal to the judgment.

Condonation for the Late Filing of the Notice to Cross-Appeal

[8] Despite the fact that leave to cross-appeal was granted, the cross-appeal was not filed timeously. The reasons therefore are set out in an application for condonation of the respondents' non-compliance with Uniform Rule 49(3).

[9] The late filing of the cross-appeal appears to be due to the initial omission in the order of the court *a quo* for leave to appeal to indicate to which court the appeals lie and an initial decision to launch 'a petition' to the Supreme Court of Appeal.

[10] When the Honourable Deputy Judge President of this Court directed that the appeal and cross-appeal be enrolled for 31 August 2022, and that a notice of set-down and heads of argument should be served and uploaded to *CaseLines* before noon on 5 August 2022, notwithstanding the fact that no cross-appeal had been filed as yet, and did not direct the respondents to do so, the respondents

assumed that both the appeal and the cross-appeal had been properly noted as per the DJP's directions.

[11] There is no prejudice to the appellants and the heads on behalf of the respondents were filed timeously. Given the importance of the existence of the restraint to Oosthuizen and Savino, we are of the view that condonation should be granted. Such condonation is therefore granted.

[12] The remaining issues between the parties, for purposes of this appeal and cross-appeal are: (1) The duration of the restraint and the payment obligations imposed on Logistics and Personnel; (2) Whether the restraint is still binding insofar as it relates to the issue of proper pleading and interpretation of clause 15.1.2 of the employment contract between Logistics and Oosthuizen; and (3) The issue of costs.

[13] Having commenced employment with Personnel on 30 November 2008, Oosthuizen was required to enter into a written contract containing the restraint the applicants now seek to enforce. This contract also contains the extended definition of 'company' in clause 13. There was also annexed thereto an Annexure 'M' setting out the confidentiality policy of the Value Group and of Value Group Subsidiaries.

[14] It is common cause that Oosthuizen signed the aforesaid documents. His commencement salary included a monthly restraint payment of R1584.00.

[15] He was initially employed by Personnel as a sales administrative controller. Thereafter his career progressed to the point that he commenced working with Logistics' customer, Bridgestone, on 1 July 2013, when he was appointed an inventory controller in the Bridgestone Clayville Warehouse, which is a warehouse which houses only stock belonging to Bridgestone. Logistics alleges that Oosthuizen effectively throughout his career was employed by it. In addition, it relies on an acceptance of the benefits in terms of clause 13 of the employment agreement, alternatively accepts such benefits in its founding affidavit.

[16] Oosthuizen denies the aforesaid and further denies that he accepted the terms of clause 13 notwithstanding the fact that he signed the agreement.

[17] Oosthuizen regards his employment with Logistics as an entirely new contractual arrangement and further contends that every new position constituted a new contractual arrangement. These arrangements on his version were verbal. He further contends that Logistics was not a party to his original agreement with Personnel.

[18] On 1 September 2014 he was promoted to Inventory Manager and from 1 August 2015 he was promoted to Operations Manager. This is a very senior position in which Oosthuizen was responsible for the services rendered by Logistics to Bridgestone on an operational basis.

[19] Bridgestone is a major tyre manufacturer which has been a key customer of the Value Group since 1981. It conducts its business on the basis that it issues tenders every few years, the last one being awarded in 2019 to the Value Group of Companies. At the time, Savino competed with Logistics for that contract.

[20] The most recent contract provides for Logistics to be Bridgestone's exclusive supplier for logistical services until 31 March 2023, whereafter it is expected that Bridgestone will put out a tender for a new provider whose contract would be from 1 April 2023.

[21] In February 2022, Oosthuizen announced to his senior at Logistics that he was resigning and taking up employment with Savino. As a consequence, Logistics immediately requested an IT person to inspect Oosthuizen's work on a computer and found an offer of employment from Savino on same. This offer stated that he would be employed at Savino's Michelin warehouse. It is common cause that Savino will compete against Logistics for the Bridgestone tender when it comes up on 31 March 2023.

[22] Logistics' initial response to Oosthuizen's resignation was to offer him a salary increase whereafter he decided to stay on. On 5 April 2022, Oosthuizen nevertheless left Logistics as he was unhappy with the working hours he was obliged to keep. The appellants have a slightly different version, stating that since his re-employment he became the subject of disciplinary proceedings regarding some irregularities at the warehouse and that Oosthuizen had left to avoid the hearing. Notwithstanding the fact that much was made by both sides, on both the

papers and the hearing, the court *a quo* found that to be an ancillary issue and did not take it into account for purposes of its decision. We agree with that approach.

[23] After leaving Logistics, Oosthuizen took up employment with Savino and hence the fear arose that Oosthuizen would assist Savino on the expected tender for Bridgestone once its present agreement with Logistics terminates on 31 March 2023. The contract that will emanate from this tender is, as in the past, expected to be exclusive and to endure for several years.

[24] It is common cause that preparation for such a tender commences between three to six months prior to the expiry of the existing contract and, hence, that applicants sought to hold Oosthuizen to his restraints in the contract with Personnel which, according to them, is operative until end of April 2024. If the applicants are correct, this would mean that he is restrained from working for Savino for at least one year after the date on which the new Bridgestone contract is likely to be awarded.

[25] Although the relevant dates referred to are not in dispute, Logistics regard Oosthuizen's continued employment with Savino as an ongoing threat to their business interests and his continued unrestrained employment by Savino places him in a position to impart strategic information to Savino about the Logistics business. It is self-evident from the papers that Oosthuizen has information pertaining to the customer relationship with Logistics and that his continued employment by Savino poses a 'real threat of competitive harm'.

[26] Logistics was able to argue that, due to the extended interpretation of the above clause, it operates in favour of Logistics after Oosthuizen was employed there.

[27] The respondents conceded that Oosthuizen would be subject to a restraint in favour of the other Value Group companies while he was employed at Personnel and for two years after that, but, given that the transfer clause 15.1.2 does not apply and was not pleaded by the applicants, his restraint in favour of Logistics ended two years after he had left Personnel, i.e. somewhere in 2015, and he is therefore free from any restraint and same cannot be enforced.

[28] The court *a quo* concluded that a purely contextual reading of the transfer clause in the employment contract may well lead to such a conclusion but held that this would be the incorrect interpretation of the agreement between Oosthuizen and the applicants. In its view and based on the approach to contractual interpretation as set out in the language of the *Endumeni*¹ decision, it preferred a businesslike interpretation over an unbusinesslike one. And concluded that it meant that not only the text but also the purpose and context of the agreement should be considered.

[29] *Endumeni* dealt purely with the interpretation of a clause where there was ambiguity. In the matter of *University of Johannesburg v Auckland Park Theological Seminary*², the Constitutional Court held that context and purpose must also be considered: '... as a matter of course, whether or not the words used in the contract are ambiguous'.

[30] Hence, the court *a quo* reasoned that, to allege that Oosthuizen ceased to be subject to the restraint in 2015, despite his uninterrupted employment and continuous employment with the Value Group of Companies and his elevation in seniority, it seems to be the 'epitome of an unbusinesslike interpretation of the clause'. This led the court *a quo* to conclude that, notwithstanding his redeployment in the Group, the previous restraint in favour of all the companies remained in place.

[31] It is trite that a restraint of trade is constitutionally valid³. This is in line with the fundamental principle that parties should be held to their contract. It is also by now trite law that the party who wishes to be absolved from his restraint of trade must allege and prove that the enforcement of the restraint of trade would be contrary to public policy⁴. It is for the respondents in this matter to set out why it should not be enforced⁵.

¹ See *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA), at para 26

² 2021 (6) SA 1 (CC), para 66

³ See *Den Braven SA (Pty) Ltd v Pillay* [2008] 3 All SA 518 (D); 2008 (6) SA 229 (D)

⁴ See *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A), p 893

⁵ See *Sibex Engineering Services (Pty) Ltd v Van Wyk* 1991 (2) SA 482 (T)

[32] It is fairly obvious that the foundational value that parties should perform their agreements is in conflict with the notion that a restraint of trade could be found to be unreasonable and hence unenforceable.

[33] At the heart of the conflict lies the foundational principle that parties should be free to seek fulfilment in business or profession and that the rights to freedom of trade should be protected. Hence, a restraint, when an attempt is made to enforce same, has to be reasonable and serve a legitimate purpose of protection of the former employer's protectable proprietary interests, whether same is goodwill or trade secrets⁶.

[34] In *Amler's Precedents of Pleadings*⁷, it is stated that a fourfold test applies before liability is established under a restraint of trade agreement, namely;

- '(a) is there an interest of the plaintiff which pursuant to the agreement, warrants protection?
- (b) is that interest threatened by the defendant?
- (c) if it is threatened, does that interest weigh qualitatively and quantitatively against the interest of the other so that he or she will be economically inactive and unproductive?
- (d) is there another aspect of public interest that does not affect the parties, but it requires that the restraint not be invoked?'⁸

[35] Our courts have, since the decision in *Magna Alloys*, held that the onus rests on the party who wishes to be relieved from the restraint on the basis that it is unreasonable. This remains so notwithstanding the fact that some concession may have been made as to whether or not it should be narrowed.

[36] Against the background of the aforesaid principles, the question now arises whether the restraint is reasonable. Oosthuizen has placed in issue whether he is in possession of any confidential information which he could impart to Savino and therefore he contends that in the circumstances enforcing the restraint against him would be unreasonable.

⁶ See *Value Logistics Ltd v Smit and Another* [2013] 4 All SA 215 (GSJ)

⁷ 9th Ed, *Harms* p317

⁸ See, for instance, *Digicore Fleet Management v Steyn* [2009] 1 All SA 442 (SCA)

[37] The court *a quo* relied on *Christie* as the starting point in evaluating the reasonableness of a restraint, i.e. comparing what it seeks to prevent with what it seeks to protect⁹. We cannot fault this approach. No evidence was proffered whatsoever that Oosthuizen has taken confidential information of the applicants or used any such information or had any customer contact with Bridgestone since he left. That notwithstanding the fact that he is working for Savino in a tyre warehouse for *Michelin*, another tyre manufacturer logistics company.

Genuine *bona fide* factual dispute

[38] On Oosthuizen's version, he was a manager of the Logistics Bridgestone Warehouse, but was not party to any sensitive financial information that might be useful to Savino or damaging to Logistics. He even attached a supporting affidavit from his immediate superior (when he was employed by Logistics) to bolster this claim. She no longer works for Logistics.

[39] He worked on the previous tender for Bridgestone in 2019, which Logistics won. Hence, the applicants describe him as a 'significant' member of the team which determined what rates to put in the tender. This required knowledge of what would appear to be three vital matters, namely the number of people required, their seniority and equipment¹⁰.

[40] What was required of him is, in the face of final relief, to put up a *bona fide* factual dispute. Although the principles pertaining to the establishment of such dispute are trite the Appellate Division revisited *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*¹¹ in *Wightman t/a JW Construction v Headfour (Pty) Ltd*¹², in which it was held as follows:

'[13] A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the

⁹ *Christie's Law of Contract in South Africa*, 7th ed, p 427

¹⁰ See paragraph 3 of the judgment *a quo*

¹¹ 1984(3) SA 623 (A) at 634E - 635C

¹² 2008(3) SA 371 (SCA)

disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.¹³

[41] Oosthuizen's attempts to deny that which he must have had knowledge about simply does not bear scrutiny. The notion that Logistics did not accept the benefits of the restraint are suspect.

[42] Similarly, we are asked to believe that Logistics entered into a series of verbal agreements with Oosthuizen. This is commercially naïve and untenable. Personnel had a restraint and so had every company in the Value group of companies based on the extended definition of 'company' in the restraint clause.

[43] Oosthuizen's approach to the restraint, i.e. that he did not accept same despite the fact that he signed the agreement undermines the denials in his answering affidavit. The fact that his denials are bolstered by Ms Duvenhage is of no assistance.

[44] It is of some importance that Oosthuizen admits the facts in paragraph 23.2 to 23.5 of the founding affidavit when he deals with same *ad seriatim*. The earlier denials in paragraph 36 (and its sub-numbers) cannot be reconciled with

¹³ See p 375-376

these. The following paragraphs and its contents are admitted by Oosthuizen without qualification:

'23.2 Details of the Applicant's profits and losses on a monthly basis.

23.3 Details of strengths and weaknesses in Applicant's operational systems and how such strengths and weaknesses can be applied and improved upon.

23.4 The particular requirements of Bridgestone's various major customers. In this regard Bridgestone know very well that Oosthuizen knows how to deal with their customers. When there were problems, Oosthuizen would visit the customers to remedy same.

23.5 The Applicant's strategy sessions pertaining to the retention of customers with new warehouse layout proposals.'

[45] The fears of Logistics are real and understandable given that Savino had competed for the 2019 round of tenders to become the Bridgestone logistics supplier. In particular, Oosthuizen's response pertaining to the issue of whether or not he worked on the Bridgestone tender does not pass muster. On a proper reading of his affidavit, it is not clear whether he denies working on the tender or whether, if he had worked on the tender, he was not exposed to more commercially sensitive information. Given that he has to show why he should be relieved from his restraint, one would have expected a proper and detailed response to those parts of the founding affidavit setting out precisely what knowledge he was exposed to.

[46] His failure to deal properly with same caused the court *a quo* to conclude that not only was his answer evasive, but it was also so unsatisfactory that it could not but find that Logistics' allegation that he had worked on the tender and had access to some of its strategic information, was to be treated as uncontradicted.

[47] Applying the tests set out above and taking a robust approach, it follows ineluctably that absent any other acceptable *causa* Oosthuizen must have been transferred under clause 15.1.2 even if it was not pleaded specifically.

[48] On the basis that he had worked on the tender, this would place Savino in a position in the upcoming tender on 31 March 2023 where Oosthuizen's could assist Savino and might be able to utilise commercially sensitive and reasonably

current information about the Logistics competitors in relation to the Bridgestone tender to their disadvantage and to the advantage of Savino.

[49] Logistics is entitled to tender again for the Bridgestone contract without any interference or the risk of Oosthuizen compromising its confidential information. It thus follows that Logistics is entitled to some form of protection when tendering for the upcoming Bridgestone tender.

Is the period and scope of the restraint reasonable?

[50] The restraint ends in April 2024 and is against Oosthuizen being employed by any company that competes with any company in the Value Group within 75 kilometres of its outlets. Oosthuizen himself points out that the Group has a footprint in numerous locations in South Africa and that its logistics operations are not limited to tyres.

[51] Given the wide footprint of Logistics and the fact that his restraint is not limited to Logistics in the context of tyres, we are of the view that the restraint is overly broad and not required for the protection of the legitimate interests of Logistics.

[52] The applicants proposed certain relaxations of the restraint, i.e. limiting same to tyre warehousing and distribution in the logistics industry. With that came a tender to provide for payment to Oosthuizen for a period of six months, provided he does not take up another job with a non-competing firm in the interim.

[53] This proposal of Logistics should be weighed against a proposal emanating from the respondents, allowing Oosthuizen to continue his employment with Savino but confining him, in terms of an undertaking given mutually by the respondents, to working with *Michelin* as his customer and not Bridgestone (if they won the tender) for the period of the restraint. The applicants have rejected the aforesaid on the basis that it is unpoliceable. A mere undertaking that he would in future only work with Michelin as a customer and not with Bridgestone clearly does not protect the valid interests of Logistics in the upcoming tender.

[54] In the matter of *Experian South Africa (Pty) Ltd v Haynes and Another*¹⁴, it was held that when an employer has endeavoured to safeguard itself against the unpoliceable danger of the respondent communicating its trade risks or utilising its customer connections, it should not have to run the risk that the respondent will do so, nor is it incumbent upon the applicant to enquire into the *bona fides* of the respondent and to demonstrate his *mala fides* before being allowed to enforce its contractually agreed restraint.

[55] Although these remarks or observations were made in the context of one company purchasing the business of another and involved section 197 of the Labour Relations Act¹⁵, the aforesaid remains valid, even for purposes of the present matter.

[56] Another proposal by the respondents was that the restraint on Oosthuizen working for Savino could be imposed but that it should be limited to 30 November 2022. This proposal entailed that he be paid by the applicants at his previous salary for this period. This hardly assists, given the fact that at the heart of this matter is the issue and apprehension that Logistics intend to tender for the Bridgestone contract and that tender will only take place on 1 April 2023.

[57] The court *a quo* found in para [46] of its judgment that:

‘Thus, the nub of the dispute between the parties is that the applicants want to restrain Oosthuizen from working for Savino for the full two-year period. Put differently, regardless of who wins the Bridgestone tender in April 2023, Oosthuizen on their version, cannot be employed by Savino or any other tyre logistics rival, for approximately one year after the new contract with Bridgestone commences in April 2023. On the respondents’ version he can start employment on 1 December 2022 regardless of when the tender may be put out for consideration. Since this date is presently unclear it could well happen after that date. Comparing the two versions of the time period of the restraint proposed: it is 1 December 2022 versus 5 April 2024 – a difference of about 16 months.’

[58] The proposal does not protect Logistics for purposes of the Bridgestone tender and is not really of any assistance.

¹⁴ 2013 (1) SA 135 (GSJ), para 21

¹⁵ Act 66 of 1995, s197

[59] Applicants submitted that Oosthuizen should be restrained beyond the period when its interests for at least one year after the tender and the new contract commences. The rationale for this, so it was argued, was that the promise of Oosthuizen joining them in the near future would strengthen the hand of Savino in the Bridgestone tender process.

[60] This approach completely ignores the real protectable interests of Logistics and there is no evidence to make this case. The applicants' protectable interests are limited to the contract remaining with Logistics until April 2023.

[61] Given that it is Oosthuizen, and by employing Oosthuizen, Savino, that is posing a threat to the legitimate business activities of Logistics, it is obvious that some form of relaxation of the restraint is necessary. There is authority for upholding the restraint in part and declaring it unenforceable in part.¹⁶

[62] The court *a quo* balanced the competing interests, taking into account that Oosthuizen has a right to work in his current profession as a specialist in logistics for tyre manufacturers and that any restraint longer than required to protect Logistics' legitimate interests would be unfairly prejudicial to him. Thus, he found that the interests of all the parties can be accommodated if Oosthuizen is paid out for the period in which he is unable to take up employment with Savino for a rival tyre logistical provider. If, however, he takes up other non-conflicting employment during this period, he will cease to have a right to be paid by the applicants.

Competency of Court to Order Payment to Oosthuizen for the Restricted Period

[63] Mr Kaplan urged this court to hold that the order for payment during the restricted period is incompetent, notwithstanding that the applicants themselves were not entirely against the notion that any loss of income should be compensated. The court *a quo*'s order does not deviate in any substantial way from this proposal.

¹⁶ See *McNaughton and Coin Sekerheidsgroep (Edms) Bpk v Kruger en 'n Ander* 1993 (3) SA 564 (T) at 569E-H

[64] Notwithstanding the aforesaid, the question still remains whether the court has the power to make such an order. This court is the successor of the Supreme Court and is a court of inherent jurisdiction. Hence it possesses certain inherent discretions. This much is trite and has often been upheld in numerous cases. Some of these inherent discretions are at times justified by the role played by the courts of Holland in the context where the discretion has to do with land (bearing in mind that, in the Dutch law the Registrar of Deeds was a judge). At other times, the various discretions have been justified as procedurally of origin and based on the court's inherent power to make its order effective¹⁷.

[65] Some of these discretions are classified as narrow and others as wide. For present purposes we need not embark on these distinctions. It serves the interests of the administration of justice to make such an order for payment in the restricted period and it is also just and equitable to do so.

[66] In the circumstances, the appeal stands to be dismissed as does the cross-appeal. As regards costs, we are of the view that no order as to costs would be just and fair to all concerned.

[67] Accordingly, the Appeal and Cross-Appeal are to be dismissed with costs.

Order

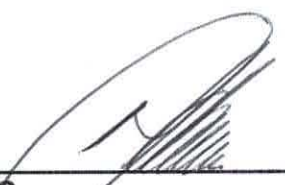
[68] In the result, the following order is made: -

- (1) The appellant's appeal is dismissed.
- (2) The respondent's counter-appeal is dismissed.
- (3) Each party shall bear his own costs.

¹⁷ See, for instance, the judgment in *Universal City Studios Inc and others v Network Video (Pty) Ltd* 1986(2) SA 734 (A) p 754G – 755A, where Corbett JA refers to the inherent reservoir of powers the Supreme Court possesses to regulate its procedures in the interests of the proper administration of justice. He distinguishes between substantive law and adjectival law – these concepts being defined as follows: 'Substantive law is concerned with the ends which the administration of justice seeks; **procedural law deals with the means and instruments by which those ends are to be attained.**' (Our emphasis)


S VAN NIEUWENHUIZEN
Acting Judge of the High Court
Gauteng Division, Johannesburg

I agree


L R ADAMS
Judge of the High Court
Gauteng Division, Johannesburg

I agree,


S C MIA
Judge of the High Court
Gauteng Division, Johannesburg

HEARD ON:

31st August 2022 – in a ‘virtual hearing’ during a videoconference on the *Microsoft Teams*.

JUDGMENT DATE:

5th September 2022 – judgment handed down electronically

FOR THE FIRST AND SECOND APPELLANTS:

Adv J L Kaplan, together with Advocate Leigh Franck

INSTRUCTED BY:

Ian Levitt Attorneys, Sandton.

FOR THE FIRST AND SECOND RESPONDENTS:

Adv J M Barnard, with Advocate A A R Marques.

INSTRUCTED BY:

Ryan Attorneys, Brooklyn, Pretoria