



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

Case Number: 23149/2023

In the matter between:

TRUE NORTH HOLDINGS (PTY) LIMITED

First Applicant

**CASH CONVERTERS SOUTHERN AFRICA
(PTY) LIMITED**

Second Applicant

TRUE NORTH FRANCHISING (PTY) LIMITED

Third Applicant

and

SKY GECKO SOFTWARE LAB (PTY) LIMITED

First Respondent

GLYNN-ROBERT HENDRICKS

Second Respondent

JUDGMENT

JANISCH AJ:

INTRODUCTION

1. The Applicants seek final interdicts against the Respondents based on contractual rights of restraint of trade and for the protection of confidential information.
2. The Applicants are a group of companies with interests in the Cash Converters franchise business. The business encompasses the buying and selling of second-hand goods and new wholesale goods, and the provision of short-term credit (in the form of both unsecured short-term loans and pawn loans).
3. The First Applicant is the holding company of the Second and Third Applicants.
4. The Second Applicant holds the exclusive “*master franchise*” in relation to the use and operation of the Cash Converters business, brand and intellectual property in the territories of South Africa, Namibia, Lesotho and Eswatini. The master franchisor is an Australian company. The Second Applicant concludes agreements with individual franchisees to operate Cash Converters stores across the region. For this it receives a royalty based on retail turnover and pawn fees generated.
5. The Third Applicant plays an operational support role to each franchisee by licensing a bouquet of software applications to franchisees. These include a list of computer programs with unique names such as “CC-CORE”, “CC-POS” and “SMART”. These software applications facilitate the efficient conduct of the franchise businesses in various respects. The Third Applicant charges each franchisee a monthly software licence fee for the use of the bouquet of software applications.
6. The Second and Third Applicants enjoy independent contractual relationships with the franchisees. Each is directly remunerated for the particular benefits provided by it: the Second Applicant receives the royalty or franchise fee for *inter alia* branding, know-how, product development and marketing services, while the Third Applicant receives the software licence fee for the computer applications. In other words, the Second Applicant does not acquire the rights

to the computer software applications directly from the Third Respondent for on-supply these to franchisees. The Third Applicant licenses these rights directly to the franchisee.¹

7. The Second Respondent ("*Hendricks*") is a self-taught computer software engineer. He is a director and shareholder of the First Respondent, which is the vehicle through which he provides services to third parties. Hendricks is described in the Applicants' papers as the Second Respondent's *alter ego*. He does not take issue with this.
8. Prior to dealing with the Applicants, Hendricks had been involved for ten years in a joint venture with the Applicants' main competitor, Cash Crusaders, to develop a point of sale and enterprise franchise management system. It is unclear whether that was done in his personal capacity or through the First Respondent, although nothing turns on that. Hendricks thereby gained considerable exposure to the second-hand retail business in South Africa. His relationship with Crusaders had ended by the time he commenced engaging with the Applicants.

APPROACH TO THE EVIDENCE AND FACTUAL DISPUTES

9. The factual versions put up by the parties on various issues are not harmonious.
10. Although the notice of motion foreshadowed certain claims for interim relief, by the time the matter came before me the Applicants sought only final relief in the form of (i) an interdict restraining the Respondents from being involved with competitors of the Applicants for a particular time and (ii) an interdict restraining the Respondents from disclosing certain confidential information. Other parts of

¹ It is recorded in cause 2.1.27 of the standard-form franchise agreement between the Second Applicant and the franchisee that the Second Respondent provides "*Marketing and Operation Manuals*" in relation to the operation and management of the business. This includes manuals for "*the use of the required software, as set out in the Marketing and Operation Manuals, in respect of which the Franchisee is required to obtain a Licence*" (clause 2.1.27.15). The list of copyright items and intellectual property of which the franchisee acquires the use under the franchise agreement with the Second Applicant does not include computer software.

the final relief envisaged in the notice of motion (including an order to return or delete confidential information in the Respondents' possession, and interdicts against the infringement of copyright in the listed computer programs) were not persisted with.

11. In deciding to move for final relief on motion, the Applicants readily accepted that they would be bound by the approach towards the resolution of factual disputes on affidavit as set out in **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A). This is that an applicant can only obtain final relief on motion where the facts stated by the respondent, read together with the facts stated by the applicant and admitted by the respondent, justify such an order. An exception to this rule is that the Court will not be bound by the respondent's version where it can safely be rejected on the papers alone. The threshold in this regard is difficult to cross. As stated in **Media 24 Books (Pty) Limited v Oxford University Press Southern Africa (Pty) Limited** 2017 (2) SA 1 (SCA) in para [36]:

"[In an application for final relief] the case could not be determined simply on a weighing of the probabilities as they emerged from the affidavits. The facts deposed to by [the respondent's] witnesses had to be accepted, unless they constituted bald or uncreditworthy denials or were palpably implausible, far-fetched or so clearly untenable that they could safely be rejected on the papers. A finding to that effect occurs infrequently because courts are always alive to the potential for evidence and cross-examination to alter its view of the facts and the plausibility of evidence."

12. The Applicants' decision to ask for final relief on the papers must be viewed in the context of the history of this litigation.
13. The application was issued in December 2023, and on 31 January 2024 was postponed for hearing on a semi-urgent basis on 17 May 2024. The day before that hearing, the Applicants filed an application for the referral of an issue (namely whether the Applicants enjoy a protectable interest in relation to certain computer programs) to oral evidence. The stated basis for this was that, during

final preparation for the hearing, counsel had advised that “*the nature of the disputes which are the subject of this interlocutory application are such that they cannot properly be decided on affidavit*”.

14. The application for referral to oral evidence was dismissed by Katz AJ for reasons set out in a judgment dated 29 May 2024. In essence, his reasoning was that the hearing of oral evidence would result in the dispute only being finalised in 2025, when the Applicants had said that for any such relief to be effective it would have to be granted well before late 2024.² Katz AJ concluded that oral evidence would not result in the effective and speedy resolution of the application. He also had regard to the fact that the referral application was only launched “*at the last possible moment*”, three months after the answering affidavit that raised the dispute had been delivered.
15. The Appellants decided not to appeal the dismissal of their application for oral evidence. Instead, they pressed ahead with a claim for final relief on the papers, assuming the burden imposed by the **Plascon-Evans** approach. They contended before me that the referral to oral evidence had been brought out of an abundance of caution, and that despite its dismissal, a proper case for the relief sought could be extracted from the affidavits.
16. Against that background, I turn to deal with the relevant facts.

THE FACTS

17. The relationship between the Applicants and the Respondents commenced in 2018.
18. Prior to this, the Cash Converters entities had developed computer software systems which were used by franchisees in the operation of their business. Although the founding affidavit is not a model of clarity in this regard, it is

² This is a reference to an averment made in support of a claim for urgency. It was stated that if the matter were to be brought in the ordinary course the first date on the opposed motion roll would be in late 2024, “*which will largely render the relief academic if the application is only heard then*”.

apparent that the Third Applicant employed in-house software developers and was the repository of these systems within the group. The group's Chief Information Officer, Mr Bilbrough, was a director of the Third Applicant.

19. By 2017, it was recognised that the existing systems (including one called "*Cash Track*" co-developed with the master franchise licence holder) were not fit for purpose. A new information technology strategy referred to as "*Project 2000*" was adopted, which would involve the building of a new "*core*" software system. The strategic planning for this was done by Bilbrough and his team of software engineers. The Third Applicant however lacked sufficient in-house skills to commence the project.
20. It was at this point that the First Respondent entered the picture. Hendricks was in discussion with the group CEO, Mr Mukheibir, in July 2018 in relation to the potential provision of a client relationship management solution. In the course of this he learned of the difficulties with the "*Cash Track*" system. Bilbrough later contacted Hendricks to ask if the First Respondent could examine Cash Track and report on why it was not working. This was agreed.
21. Although Hendricks' version of these early events focuses on Cash Track, it is apparent that he was asked at that stage to make a preliminary assessment of the Applicants' core software systems more generally, and to propose steps to develop a new core system. This is consistent with the adoption of "*Project 2000*". It is also consistent with an "*executive summary*" prepared by the Third Applicant which formed part of the contractual matrix that followed. It records that Hendricks "*agreed to review our systems and was flown up ... to attend a workshop aimed at reviewing the existing application architectures; understanding their weaknesses; a proposing a new architecture based on the Core concept envisioned for Cash Converters*".
22. On 29 August 2018, prior to commencing the agreed review, the Respondents signed a "*Confidentiality Agreement*" with the Applicants. The terms of the agreement were provided by the Applicant and do not appear to have been the subject of negotiation. It contained both restraint of trade and confidentiality

protection clauses.³ The restraint applies “*during the subsistence of this Agreement and for three years thereafter*”. It is also recorded that the obligations of confidence “*shall survive the expiration or termination of this Agreement*”.

23. The confidentiality agreement records that “*the Company*”⁴ appoints “*the Consultant*”⁵ to “*perform certain services in Connection with Design, architect and develop (sic) core software systems for the company*”. Those “*certain services*” are not specified. However, despite the fact that the contract is reduced to writing, extraneous evidence “*of an identificatory nature*” is admissible to enable one to identify the persons or things which a contract mentions, so as to apply the contract to the facts (see e.g. **Delmas Milling Co Limited v Du Plessis** 1955 (3) SA 447 (A) at 454F; **Headermans (Vryburg) (Pty) Ltd v Ping Bai** 1997 (3) SA 1004 (SCA) at 1009H). On that basis, I accept the evidence of Hendricks (which is consistent with the objective facts) that the “*certain services*” for which the Respondents had been appointed under the confidentiality agreement were “*to examine and report on Cash Track, and what could be done to develop a new core system.*” In other words, they were not appointed at that stage to perform actual design, architecture and development work on a new system.
24. Hendricks (on behalf of the First Respondent) was duly given access to the existing computer systems. He performed his review. On 2 September 2018 he produced a report in the name of the First Respondent entitled “*Results of exploratory workshop and analysis of existing systems with the aim of developing a core from existing systems to become the central interface and database to all products of Cash Converters*”. The report listed a range of “*architectural / system issues*” that had been identified. It made a “*proposal to*

³ Hendricks says that he did not notice the restraint clause when he signed this document. However, he does not make anything of this for purposes of the present case.

⁴ In the heading to the agreement, the three Applicants are listed, with the term “*Company*” following the last of them (the Third Applicant). In the context of the agreement, it seems clear that “*Company*” was meant to refer to all three of the Applicants, and not only the Third Applicant. Otherwise there seems no reason for the other two to have been named parties.

⁵ The heading to the agreement likewise lists both the First and Second Respondents as parties subject to the defining term “*Consultant*”.

build core and resolve the above and other issues permanently”, which included a list of tasks and deliverables. The First Respondent proposed to charge a monthly retainer of R130 000, noting that it would take approximately 6 months to complete the project.

25. Hendricks states that the delivery of the report “*concluded [the First Respondent’s engagement, which was the subject of the confidentiality agreement]*”. The First Respondent was duly paid for its work.
26. The Applicants in their founding papers also reflect the review and evaluation of the existing software system (referred to by them as “CCPOS-V1”) as a distinct phase concluding with the delivery of the report.
27. The Respondents’ proposals for the development of a new core system were accepted and a new agreement (the “*software agreement*”) was concluded.
28. The parties to the software agreement were the Respondents and the Third Applicant (the group company that owned and licensed the software systems to franchisees). The First and Second Applicants were not parties.
29. The Respondents signed the agreement on 28 September 2018. There is no evidence as to when the Third Applicant signed it, but both parties proceeded before me on the basis that it is a written agreement.
30. In terms of the software agreement, the Respondents (referred to therein as “*the Performers*”) were appointed “*to develop the software programme in accordance with the deliverables*”. The “*software programme*” was defined as “*the system that the Performers shall develop for [the Third Applicant] in accordance with this agreement and as reflected in the deliverables*”. The “*deliverables*” were computer programs reflected in Annexure A, being a detailed “*Scope Statement*” drawn up by the Third Applicant.
31. The software agreement had a built-in time limit. It commenced on 1 October 2018 and would continue “*until the term of period*”, which was defined as the

period ending on 31 March 2019 *“or such extended period as agreed to between the parties as reflected at clause 3.2”*. Clause 3.2 provided that the parties *“may agree to extend the time period to a later date, in which event an addendum shall be prepared and signed by the parties”*.

32. The software agreement contained its own restraint of trade and confidentiality protection clauses. The restraint is addressed in clause 10. Its core provision (clause 10.1) is one restricting the Respondents from undertaking various types of involvement with entities operating in similar businesses to the Third Applicant *“within a period equivalent to the months contained in the term of period (the restricted period) to a maximum period of 3 (three) years after the termination of this agreement”*. The Respondents acknowledged a protectable interest for the Third Applicant in *“the software programme”* (clause 10.4). Clause 10.6, which is dealt with further below, purports to extend the restraint period, in the event of litigation, to the restricted period from the date of a final un-appealed judgment.
33. The Respondents commenced the core work contracted for. Monthly R130 000 payments were made as agreed. The core work was however not completed by 31 March 2019. Hendricks states that he then had a telephonic discussion with Bilbrough (which all the parties accept occurred on 2 April 2019). He says that they *“agreed that the date for delivery of the core work was extended”*. He also says that he and Bilbrough did not orally agree to extend the software agreement; that Bilbrough acknowledged that it had run its term; and that the parties needed to conclude a new written agreement.
34. Bilbrough’s version of this call is that it was agreed that *“the respondents continue rendering services to the third applicant on the terms set out in the software agreement to ensure the completion of the project while plans were made to arrange a workshop in May 2019 for a discussion regarding the design and development of a new CCPOS-V2 which the third applicant wanted the respondents to deliver”*.

35. It therefore seems clear that there was oral consensus that the contractual “*term of period*” would be extended so as to allow for the later completion of the agreed scope of work (or “*the project*” in Bilbrough’s language). While Bilbrough says that there was talk about a further project which the Third Applicant “*wanted the respondents to deliver*”, there is no suggestion of agreement on this at that stage. The envisaged CCPOS-V2 was not part of the deliverables under the written software agreement.
36. The Applicants however go on to aver that the “*result*” of the oral agreement on 2 April 2019 was that the software agreement “*was orally renewed ... on substantially the same terms as before with (i) the duration of the restraint directly linked to the duration of the contractual relationship between the parties, [and] (ii) the renewed software agreement not having a fixed term but terminable on reasonable notice by either party.*”
37. These are not averments of actual oral terms concluded on the call, but inferences or legal conclusions which the Applicants wish to draw from the express oral agreement as attested to by Bilbrough. I will return to this later. Unsurprisingly, the Respondents deny these allegations.
38. Continuing with the chronology, Hendricks states that in June 2019 he completed and delivered the core work for which the First Respondent had quoted (i.e. the agreed deliverables in the software agreement). This is not denied.
39. Following that milestone, Hendricks says that the Applicants still required the First Respondent to continue to provide services to them, and particularly to assist with the CCPOS-V2 program. He says that Bilbrough spoke to him, probably in June 2019, and conveyed “*that Converters wanted [the First Respondent] to stay on and provide services on a retainer basis, and that Converters would provide a new written agreement to cover this.*” This is consistent with Bilbrough’s version of the 2 April 2019 call, in which he says that at that stage plans were being made for a discussion about the design and development of a new CCPOS-V2.

40. It is common cause that no new written agreement covering any new deliverables was concluded. Hendricks says that both parties acknowledged that this was a necessary step, but “*back-ranked*” it because they were focusing on the “*real work*”. He says however that Bilbrough regularly mentioned the need for a new contract.
41. Hendricks goes on to state that in May 2022 the Third Applicant wanted to change how it paid the First Respondent from a monthly retainer to an hourly rate.⁶ This was a new trigger to both him and Bilbrough for the conclusion of a new written contract. On 3 May 2022, Bilbrough provided a draft written proposal for Hendricks to consider. That draft contained a restraint of trade clause. On 18 May 2022, Hendricks in an email told Bilbrough that he was concerned about signing a contract with a restraint of trade.
42. There is a dispute about what happened next. Hendricks contends that he was furnished with another copy of the proposed new contract (which is based on the software agreement) with the restraint clause having been struck out by the Applicants. He attaches what he says is that draft to his answering affidavit. The Applicants deny that they struck out the restraint clause. I do not need to resolve this dispute, because the Applicants do not deny that Hendricks had mentioned his difficulties with the restraint, and it is therefore clear at least that the restraint issue in respect of the proposed new contract was controversial.
43. The proposed new written agreement was never concluded. Hendricks lays the blame for this at the Applicants’ door, although he also does not seem to have pressed the matter further. The Applicants do not explain why they did not drive the matter to a conclusion. It also does not appear that the proposed new hourly-based payment method was implemented: the First Respondent continued to receive a fixed monthly payment (albeit at an increased amount per month).

⁶ The Applicants say that it was the Respondents that wanted more money, which gave rise to these discussions. Nothing turns on this.

44. On the Applicants' evidence, May 2022 was the date on which a new and final phase of work ("*Phase 5*") commenced. Phase 5 followed the completion of "*Phase 3*", which entailed the development of the new CCPOS-V2 system. Under Phase 5, the Respondents were given specific tasks such as adding a "*Domestic Reverse Charges*" function to CCPOS-V2, and developing a royalties calculation function and a "*Daily Settlement Engine*".
45. The Applicants also refer to a separate "*Phase 4*" commencing in March 2020. This involved an unsecured lending product that was being developed for the Second Applicant known as SMART. The Respondents' role was to ensure that the design and architecture of the new product "*would fit within the overall architecture of the third applicant's existing systems*". This is not disputed.
46. In October 2023, the relationship between the Applicants and the Respondents broke down. The catalyst was the Applicants learning that Hendricks had recently assisted a group of Cash Crusaders franchisees to back up data ahead of an anticipated contractual dispute with their franchisor. These franchisees had then broken away from Cash Crusaders and banded together as part of a new competitor business called "*Cash Xchange*."
47. Hendricks also revealed to the Applicants that he was in the process of developing a point-of-sale software system for a new company, Phoenix Pos (Pty) Limited, which would be licensed to third parties. His evidence (contested by the Applicants) is that the system is suitable for what he describes as a "*single 'mom-and-pop' shop operating without a centralised server or centralised management, which does not offer short term unsecured lending*". He offered the Applicants access to the system "*to show that it does not infringe any right of Converters,*" albeit subject to various "*rules of engagement*." Nothing came of this. But in an email to the Applicants, Hendricks acknowledged that Cash Xchange was one of the clients to which Phoenix Pos was providing the new point-of-sale system.
48. In the face of these disclosures, and following various meetings and correspondence, the Applicants terminated the relationship. They followed this

by demanding undertakings from the Respondents to comply with the terms of the confidentiality agreement, and not to render services to Cash Xchange or any other competitor for a period of three years from 17 October 2023.

49. The Respondents refused to give these undertakings.
50. This led to the launch of the present proceedings, to enforce the rights which the Applicants allege arise from the confidentiality and software agreements.

THE APPLICANTS' CAUSE OF ACTION

51. In motion proceedings, the affidavits serve the purpose both of pleadings and evidence. The parties thereby set out the nature of the dispute. It is for the parties to identify the dispute and for the court to determine that dispute, and that dispute alone (**Fischer v Ramahlele** 2014 (4) SA 614 (SCA) in para [13]).
52. It is therefore necessary to identify the pleaded cause of action in respect of which the Applicants seek relief.
53. The final relief which the Applicants seek in these proceedings has changed over time. They no longer pursue interim relief. They have also abandoned copyright relief in respect of the computer programs alleged to belong to the Third Applicant. As regards the final order, in oral argument a revised draft order was presented to me which pared down some of the prayers for interdictory relief. Instead of asking for the Respondents to be restrained for two years from the date of the Court's order (as per the notice of motion), they now seek the restraint to be enforced for three years from 23 October 2023, alternatively for six months from the date of the order.
54. The Applicants' causes of action lie in contract, and particularly in the enforcement of contractual rights that are alleged to exist based on the terms of the confidentiality agreement and the software agreement. The Applicants do not plead an independent case based on common law rights.

55. It is for the Applicants to establish both the existence of a contract and the terms thereof. A claim of this nature can be based on a written, oral or tacit agreement.
56. The Applicants' case as pleaded in the founding affidavit is that they have a clear right *"to require and enforce compliance by the respondents with their restraint and confidentiality obligations arising from the confidentiality agreement and the software agreement. The operative clauses are clauses 6.1 read with clause 6.3 as well as clause 5.1 to clause 5.5 and clause 11 of the confidentiality agreement. The relevant clause of the software agreement is clause 10."*
57. The Applicants' reliance on the software agreement as a source of contractual rights must be viewed against the common cause fact that the written agreement lapsed on its own terms on 31 March 2019. The Applicants claim however that on 2 April 2019 there was an oral *"renewal"* of the agreement on materially the same terms, save for the averred resultant changes as set out in paragraph 36 above. Hence the Applicants do not rely on the software agreement *per se*, but on an alleged oral agreement incorporating relevant provisions of the software agreement, but with amendments as pleaded.
58. The Applicants also confirmed in oral argument that they made no case for a tacit agreement. They stand and fall, as far as the software agreement is concerned, by their pleaded oral agreement of *"renewal"*.
59. I turn to consider whether the Applicants have established the contractual framework on which their cause of action is based. If not, the clear right on which they base their claim for interdictory relief cannot be established.

THE CONFIDENTIALITY AGREEMENT

60. There is no dispute about the conclusion of the confidentiality agreement or its written terms. For reasons set out above, I consider that all three Applicants are substantive parties to it and are therefore in principle entitled to enforce it.

61. The parties entered into the confidentiality agreement because it was necessary for the Respondents to be given access to the Applicants' existing computer systems to enable them to perform their review and to make recommendations to develop a new and improved core system. The Applicants sought protection for that information through *inter alia* the restraint in clause 6.1.
62. I concluded above that the "*certain services*" for which the Respondents were engaged under the confidentiality agreement constituted only the envisaged review and making of recommendations. Those services were completed at the latest by the end of September 2019.
63. In my view, the duration of the confidentiality agreement is limited to the period of the engagement for which it was concluded. That is the period of its "*subsistence*" (as envisaged in clause 6.1); and its "*expiration*" (as envisaged in clause 5.5) occurred once the services were complete.
64. It is true that the preamble to the confidentiality agreement states that the Respondents have agreed to perform the identified services and "*such other services as the Company may from time to time require on the conditions set out in this Agreement*". But the actual terms in the body of the agreement are limited to the identified services, and there was no evidence that the Respondents were ever requested to provide other services on the terms set out in the confidentiality agreement. When further substantive services were identified, a bespoke new software agreement was concluded with the Third Applicant only, carrying its own confidentiality and restraint provisions.
65. The fact that the subsistence of the confidentiality agreement expired at the end of September 2019 does not of course mean that it lost contractual relevance entirely on that date. On the contrary:

- 65.1. the obligation of confidence [as set out in clauses 5.1 to 5.4] “*shall survive the expiration or termination of this Agreement*” (clause 5.5); and
- 65.2. the Respondents undertook “*during the subsistence of this Agreement and for three years thereafter*” not to accept instructions from Cash Crusaders or any other competitor in the Applicants’ industry “*either directly or indirectly nor do any other act which might give rise to a conflict of interest*” (clause 6.1).
66. At best for the Applicants, the period of restraint under the confidentiality agreement thus began to run on 1 October 2019 and expired on 30 September 2022.
67. There is no equivalent contractual time-limit on the protection of confidentiality. However, in my view it follows from the limited scope of the services to which the agreement relates that the confidential information which it is designed to protect is that which came into the Respondents’ possession for purposes of enabling them to perform the agreed services.
68. Hence while the confidentiality agreement “*lives on*” for purposes of protecting confidential information, the scope of that protected information is limited to what was provided during the subsistence of the agreement.
69. The Applicants made out no case that any of the information to which the Respondents were exposed for purposes of performing the initial review (i.e. the old computer systems) is by itself still requiring of protection. Indeed, it is the essence of the Applicants’ case that the old core systems were not fit for purpose, which is precisely why the Respondents were required to rebuild them. It is the current suite of software products, which are the result of five years of development work, and the information provided that culminated in their development, that are now held out as being protectable. The Applicants state in the founding affidavit that “*[t]he extensive, intricate, and highly complex operation of the software application and technological platform forms the*

essence of, and encapsulates the protectable interest of the applicants...” This is a reference to the current systems, not those which were in place in 2018 and which have now been superseded.

THE CONCLUSION OF THE SOFTWARE AGREEMENT AND THE QUESTION OF NOVATION

70. Following the delivery of the review and recommendations envisaged in the confidentiality agreement, a decision was taken to engage the Respondents to perform substantive work on the computer systems. The result was the bespoke software agreement concluded with the Third Applicant.
71. The fact that only the Third Applicant was a party is consistent with the group commercial structure which housed the broader franchise rights in the Second Applicant and the information technology and computer systems in the Third Applicant, with each yielding different income streams. It was clearly not regarded as necessary for the other Applicants to be parties.
72. I concluded above that the primary operation of the confidentiality agreement expired once the envisaged services were complete, with only the restraint and confidentiality provisions “*living on*” subject to the restrictions identified. The expiration of the confidentiality agreement was the primary case put up by the Respondents as to why that agreement did not continue to operate during the period of the software agreement.
73. The Respondents argue in the alternative that if the conclusion of the initial services did not cause the confidentiality agreement to lapse, the subsequent software agreement novated it. Novation is a form of cancellation of a contract by agreement: “[w]hen parties novate they intend to replace a valid contract by another valid contract” (**Swadif (Pty) Limited v Dyke NO** 1978 (1) SA 928 (A) at 940G). The Applicants deny this and point to authority on the difficulty of establishing novation, given that a party typically waives rights under a novated agreement, and waiver is not easily inferred.

74. Given my view on the Respondent's primary case, the question of novation does not arise. There was no extant confidentiality agreement to cancel when the software agreement was concluded. The two agreements enjoy independent operation, pertaining to different periods and different scopes of work.

THE TERMS OF THE SOFTWARE AGREEMENT

75. There is no dispute as to the conclusion of the software agreement or its written terms.
76. As was accepted in oral argument, the software agreement is a contract for the performance of work (*locatio conductio operis*) as opposed to a contract of personal service (*locatio conductio operarum*) (see **Smit v Workman's Compensation Commissioner** 1979 (1) SA 52 (A) at 61). The Respondents were engaged to develop the software programs and to produce the specified deliverables – in other words, to provide a particular agreed result – rather than to place their productive capacity at the general disposal of the Third Applicant.
77. So viewed, it is perhaps counter-intuitive for the contract to have a specific period of operation ("*term of period*"), as would be more common for personal services or open-ended relationships such as franchise agreements. But in my view the inclusion of a termination date that may not coincide with the completion of the work does not convert the software agreement into a contract of service. It has the effect of limiting the total amount payable by the Third Applicant and reflects the agreed estimated date of completion of the work. At the same time, it recognises that the work may not be complete at the end of the term, and so provides for the extension of the period by way of a written addendum.
78. As it happened, the agreed work was not finished by the termination date. It is also common cause that the software agreement's term was not extended in writing. Instead, the parties agreed orally, on 2 April 2019, to extend the date for delivery of the core work.

79. The legal effect of what the parties agreed on 2 April 2019 is a matter of dispute. The Respondents say that because the software agreement imposes its own formalities for the extension of the period, which were not complied with, the agreement was not extended as a matter of law.
80. Against this, the Applicants relied on the decision in **Golden Fried Chicken (Pty) Limited v Sirad Fast Foods CC** [2002] 2 All SA 551 (SCA). That case involved a franchise agreement whose term had expired. The agreement set out a formal process which had to be followed to renew it after its initial period, which process was not followed. Both parties initially continued to operate as if the agreement had continued in force. However, after an apparent change of heart, the franchisor contended that there was no agreement at all because of the failure to follow the contractual formalities.
81. Harms JA dismissed this argument, finding that when the old contract expired, there was nothing to stop the parties from concluding a new contract, “*tacit or otherwise*”. He held (in para [7]) that “[t]he conditions for extending the initial agreement cannot govern the conclusion of a new and independent agreement”. On those facts, he held that there had been a tacit relocation of the franchise agreement.
82. I accept (as the parties do) that the software agreement terminated on 31 March 2019. It took with it the clause prohibiting the extension of the period save in writing. I see no reason why (applying the principle in **Golden Fried Chicken**) the parties could not have entered thereafter into an independent (oral) agreement for the delivery of the same work, albeit with a later targeted date for delivery, and on the same payment and associated contract terms. The Respondents’ argument that no new oral contract could be concluded at all carries an air of unreality, as it was common cause that they agreed to extend the delivery date and continued to make and receive payments. I very much doubt that if the parties had been asked on what basis they were then dealing with each other, they would have disclaimed any reliance on a contract.

83. Be that as it may, the above dispute is not determinative. This is because both parties aver that all that was actually agreed upon on 2 April 2019 was the extension of the date for the delivery of the core work (as Hendricks put it) or the continuation of services under the software agreement “*to ensure the completion of the project*” (as Bilbrough put it).
84. In other words, on both parties’ versions the discussion on 2 April 2019 was limited to giving the Respondents more time to provide the core deliverables envisaged in Annexure A to the software agreement. It did not relate to any other work to be performed, since none had yet been agreed – indeed, Bilbrough says that any further engagement would be the subject of a proposed workshop to be held at a later time.
85. Thus even if the 2 April 2019 oral agreement established binding contractual rights and obligations as the Applicants contend, the ambit of those rights was limited to the completion of the work (the core deliverables) that had been agreed upon originally.
86. The Applicants however seek in argument to stretch the oral agreement considerably further. They allege that the effect of the agreement was to “*renew*” the software agreement indefinitely, subject to termination on reasonable notice by either party, and with the duration of the restraint linked to the duration of the contractual relationship between the parties.
87. I have already pointed out that these consequences are not alleged to have been express oral terms, but the “*result*” (whether by necessary inference or by operation of law is not stated) of what was expressly agreed, namely the continuation of services “*to ensure completion of the project*”.
88. In contending that the agreement was “*renewed*” on the basis pleaded, the Applicants are really saying that the parties changed the nature of the agreement to an open-ended contract of services, not tethered to the agreed deliverables but incorporating whatever other projects the Third Applicant may require from time to time.

89. This argument is irreconcilable with the evidence as to what was actually agreed. The Respondents were merely given more time (and funding) to complete the identified work. No further work or services were agreed upon, let alone the commencement of a new open-ended contractual relationship that would survive after the delivery of the core system.
90. On that basis, the software agreement terminated in June 2019 when the core work was delivered.

A FURTHER NEW AGREEMENT?

91. On Hendricks' evidence, once the core work was delivered in June 2019, the Third Applicant wanted the Respondents to continue to provide services. This is consistent with Bilbrough's evidence about the 2 April 2019 discussion. It appears that the parties still had in mind further specific items of work, rather than a general agreement of services. What is important is that Hendricks states that both he and Bilbrough acknowledged that a new written agreement would be needed for this. It is common cause that no such written agreement was concluded.
92. The Applicants' argument before me was not that a new oral or tacit agreement was concluded in June 2019, after the original work ended. The Applicants contented themselves with averring that what was agreed on 2 April 2019 created a contract governing everything that followed until October 2023.
93. Since the 2 April 2019 agreement does no more than extend the terms of the software agreement to June 2019, it follows that the Applicants lack a factual basis, even on their own version, for the existence of an oral agreement governing the period from June 2019 to October 2023. It might notionally be argued that the continuation of services in that period demonstrates a tacit agreement of work or services, but as I have set out above, the Applicants disavowed any reliance on a tacit contract, not having pleaded it.

94. It follows that there is also no basis to find that the restraint or confidentiality terms of the expired software agreement continued to bind the parties in the period after June 2019.
95. Moreover, on the **Plascon-Evans** approach I must accept that from June 2019 both parties accepted that a new written contract had to be concluded to regulate the new work (deliverables) which the Respondents were tasked to do. The inference is that the detailed terms of the agreement would be open to negotiation. I do not think that it can be taken for granted that just because the parties had agreed a restraint of trade in earlier contracts, the same would necessarily follow in a new contract, or that any restraint terms would be the same. The parties may have found themselves in very different positions of negotiating power in imposing or resisting such a provision. As it turned out, when eventually a draft proposal for an agreement was furnished by the Third Applicant, the Respondents resisted the inclusion of a restraint. The agreement was never finalised.
96. In the circumstances, I cannot find that the Applicants have established the existence of an oral restraint of trade term governing the work performed by the Respondents in the period from June 2019 to October 2023.
97. The fact that it may have been desirable, prudent or commercially sensible for the Third Applicant to have such a term is of no relevance. A party that seeks restraint protection, thereby eroding the counterparty's freedom of contract and ability to conduct a trade, should ensure that it has a proper written agreement in place. It should not leave such matters to chance or to the vagaries of establishing oral or tacit terms once a relationship sours.

THE IMPACT OF THE CONTRACTUAL POSITION ON THE RELIEF SOUGHT

98. I turn now to deal with the impact of my findings on the relief sought.

99. As already stated, the three Applicants were all parties to the confidentiality agreement. In principle they obtained rights of restraint and to protect certain confidential information.
100. The confidentiality agreement however lapsed at the end of September 2018. The three-year period in which the restraint under that agreement could be enforced has long since expired.
101. Moreover, I have already held that the Applicants have failed to make a case for the enforcement of the confidentiality provisions in that agreement in relation to any information that was originally disclosed to the Respondents in August 2018.
102. Accordingly, there is no basis now to enforce either the restraint or the confidentiality provisions of the confidentiality agreement.
103. As regards the software agreement, the Applicants in paragraph 187 of the founding affidavit – the pleading of their case for a clear right – limit the “*relevant*” clause of that agreement on which they rely for purposes of relief to clause 10 (i.e. the restraint provision). They do not invoke the confidentiality provisions in clause 6 thereof as a separate part of their cause of action.
104. The restraint of trade provision to which the Third Applicant was a party under clause 10.1 of the software agreement prohibits the Respondents from entering into prohibited arrangements with competitors for a period “*equivalent to the months contained in the term of period ... up to a maximum period of 3 (three) years after the termination of this agreement.*”
105. Even assuming (following **Golden Fried Chicken**) that the term of the software agreement was legitimately extended on 2 April 2019, the maximum period for which the Respondents could be restrained would be 9 months from June 2019 (this being the period from October 2018 to June 2019). That period has also long since expired.

106. The Applicants however referred me to clause 10.6 of the software agreement which provides as follows:

“In the event that the Performers are involved in any litigation in respect of this clause, and in the event that this clause 10 is upheld, then the Performers agree to be restrained for the restricted period from the date of such un-appealed final judgment of the highest court, which includes but is not limited to any interim order obtained against the performers.”

107. I have some doubts as to whether such this provision is necessarily enforceable, given how it materially extends the effective period of the restraint. Just as a court has the power not to enforce a restraint for an excessive period, or for a period that does not bear a proper relationship to the interests to be protected (see e.g. Sunshine Records (Pty) Ltd v Fröhling 1990 (4) SA 782 (A) at 794G-H, Technor (Pty) Ltd v Rishworth 1995 (4) SA 1034 (T) at 1038C-D), such a provision may conceivably not be enforced where it is not apparent that imposing the restraint at a time which may be many years after the end of the relationship will still be reasonably necessary to protect the interests for which the restraint was included.

108. On the facts of this case, it is however not necessary for me to decide this issue. Clause 10.6 presupposes the upholding of the restraint *per se* under clause 10. For that to happen, it must be established that the Third Applicant has a protectable interest that warrants enforcing the restraint.

109. I reiterate that the contractual restraint which is under consideration is located in the written (or extended oral) software agreement. Since that agreement expired no later than June 2019, any protectable interest which warrants the enforcement of the restraint must be found in the work done or services rendered under that agreement.

110. In this regard, clause 10.4 of the software agreement contains a specific acknowledgement that the Third Applicant has a protectable interest “*in respect*

of the software programme” – which is a reference to the core system that was the deliverable under that agreement.

111. The Applicants have brought their case on the basis that the current software system is protectable. Presumably because of their reliance on a “*renewed*” software agreement that applies up until October 2023, they have not attempted to make an independent case for restraining the Respondents to protect the original core work that was completed more than four years ago. It follows that I cannot make an assessment as to whether it would serve a legitimate purpose to restrain the Respondents at this stage in relation to what may be old or superseded work.
112. Moreover, the Applicants elected to move for final relief on the papers, in the knowledge that the Respondents had denied the existence of a protectable interest in the computer software *per se*. It was averred in the answering papers that the work done was not unique, and entailed the application of standard systems used by many businesses. It was because of this evidence that the Applicants applied unsuccessfully to have the issue of a protectable interest referred to oral evidence on the basis that the dispute could not properly be decided on affidavit.
113. In moving the application before me, the Applicants sought to overcome this difficulty by pointing to a letter from the Respondents’ attorneys, sent before the litigation commenced, that denied that the software programs were confidential “*except for SMART*”. The Applicants argued that this was an admission as to the protectable nature of SMART, which by itself would justify the enforcement of the restraint.
114. Whether or not the Applicants are correct in this averment, it is common cause that SMART was conceptualised in 2020 and that development commenced in 2021. Therefore it is not part of the “*software programme*” envisaged in the software agreement, and cannot possibly constitute information that enjoys protectability under the software agreement that terminated in 2019.

115. As far as the Applicants' case for protectability extends beyond SMART and incorporates parts of the core software developed up to June 2019, I do not believe that I can summarily reject the Respondents' averments as to the standard nature of those systems on the papers alone, by applying the high threshold for exceptions to the **Plascon-Evans** rule as set out in **Media 24 Books** (*supra*).

116. In summary, even if I were inclined in principle to rule that a restraint sourced in an agreement that expired in 2019 should run from the date of judgment in October 2024, on the present facts I could not do so in the absence of the Applicants having established a relevant protectable interest over material developed up to 2019.

117. Finally, I have found that the Applicants have not established any restraint of trade agreement binding the Respondents in relation to the period after the termination of the software agreement in June 2019. No restraint relief can therefore be granted in respect of that period.

CONCLUSION ON THE MERITS

118. The first requirement for a final interdict is the establishment of a clear right to the relief sought.

119. For the reasons given above, I am of the view that the Applicants have not established an entitlement to enforce the contractual restraints and confidentiality provisions on which they have pleaded reliance. No clear right has been shown to exist.

120. It is therefore unnecessary to deal with the other requirements for a final interdict, namely the infringement of the right and the absence of an alternative remedy.

COSTS

121. The matter is plainly of considerable importance to both set of parties, and raises factual and legal issues of some complexity.

122. Both parties regarded it as a reasonable precaution to engage the services of two counsel, and both agreed that it would be appropriate for any costs order to include the costs of two counsel on Scale C.

123. I do not consider that this is a matter where the conduct of the unsuccessful parties warrants a special or punitive costs order.

ORDER

124. In the circumstances, I make the following order:

124.1. The application is dismissed.

124.2. The Applicants shall pay the costs of the Respondents jointly and severally, the one paying the other(s) to be absolved, including the costs of two counsel taxed on Scale C.

M W JANISCH
Acting Judge of the High Court
Western Cape Division

APPEARANCES:

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For the Respondents:

R Patrick SC

(the heads of argument having been
drawn by A Sholto-Douglas SC and
R Patrick SC)

Instructed by:

Cluver Markotter Inc

Date of hearing: 18 October 2024

Date of judgment: 28 October 2024 (electronically)