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

**Case No:2025-047398**

- (1) REPORTABLE: ~~YES~~ / NO  
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO  
(3) REVISED: NO

**2 May 2025**

DATE

SIGNATURE

In the matter between:

**KALEX FLAVOURS & INGREDIENTS (PTY) LTD** 1<sup>st</sup> Applicant

**PROMIGEN (PTY) LTD** 2<sup>nd</sup> Applicant

And

**TRUDY KHUMALO** Respondent

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**JUDGMENT**

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**NOKO J**

*Introduction*

[1] The applicants instituted urgent proceedings for an order interdicting and restraining the respondent for a period of 24 months, commencing on April 2025 from taking up employment with a company rendering services similar to the services provided by the applicants. As at the time of instituting the proceedings the respondent had informed the applicants that she had accepted an offer of employment from a company which is a direct competitor of the applicants.

[2] The respondent is opposing the application. In opposing the application, the respondent, *inter alia*, disputes that the matter is urgent.

### *Parties*

[3] The first applicant is Kalex Flavours & Ingredients (Pty) Ltd, a private company duly incorporated in accordance with the Companies laws of the Republic of South Africa, with its principal place of business at 2[...] – 1[...] Road, R[...], Ext 1[...], M[...], Johannesburg.

[4] The second applicant is Promigen (Pty) Ltd, a private company duly incorporated in accordance with the laws of the Republic of South Africa, with is registered address at 2[...] – 1[...] Road, R[...], Ext 1[...], M[...], Johannesburg.

[5] In the applicants' founding affidavit, it is recorded that the first and second applicants are interrelated and each of them is to some degree engaged in the development and distribution of products to which the respondent was exposed

[6] The respondent is Trudy Khumalo, an adult female residing at 3[...] B[...] Street, P[...] P[...], M[...], Johannesburg.

### *Background*

[7] The first applicant is in the business of development, distribution and sale of flavours and ingredients used for cold drinks, ice creams, confectionary, bakery, pharmaceuticals and beverages. Its customers are in African states, most of them being in Southern Africa.

[8] The second applicant develops and creates sweeteners, colours and flavour blending for food beverages and pharmaceutical markets. The second applicant also serves as a research and development facility.

[9] The respondent was employed as a research and development technologist in terms of a contract of employment signed between herself and the applicants on 3 April 2023. On 18 November 2024 the applicants approached the respondent and presented her with a restraint of trade agreement ("restraint agreement") in terms of which the respondent would be restrained from divulging confidential information or from being employed by a competitor, in the event of termination of employment with the applicants. The motivation provided by the applicants was that the respondent has developed into a valued employee of the applicants and got to know more of the applicants' valued clients. The respondent agreed and signed the restraint agreement.

[10] On 5 March 2025 the respondent tendered her resignation which became effective at the end of April 2025 after service of her notice period. The applicants invited the respondent to an exit interview to establish the reasons for her resignation, and whether she had accepted an offer of employment from elsewhere. The respondent openly informed the applicants that she had received and accepted an offer from Firmenich, which is a direct competitor of the applicants.

[11] Soon thereafter the applicants placed the respondent on suspension and commenced a disciplinary process against her, on the basis that she had breached her contract of employment by accepting employment with a competitor. The disciplinary hearing was constituted on 27 March 2025 and the respondent was found guilty and dismissed on 1 April 2025. The respondent has referred the dismissal to the CCMA which was still pending at time of the hearing of this matter.

[12] The applicants then launched these proceedings, seemingly to enforce its rights in terms of the restraint of trade agreement.

*Parties' submissions and contentions*

### *Urgency*

[13] The applicants contended that the enforcements of restraint of trade agreements are ordinarily urgent as they are time-bound. The restraint agreement stipulated that it may only be enforced upon termination of the agreement. In this instance the applicants had to await the termination of the respondent's employment which was on 1 April 2025, being the date on which she was dismissed.

[14] If the applicants had proceeded on a normal basis, counsel argued, the applicants would not obtain substantial redress, more particularly because if one has regard to the congested roll in the Gauteng Division, the matter may be adjudicated after a period of 12 months. An order for damages may not assuage the injuries which may be occasioned by the exploitation of confidential information by the respondent and especially because the respondent has stated that she is not employed.

[15] The respondent's counsel submitted that the applicant did not treat the matter urgently as the respondent informed the applicants on 6 March 2025 that she would be joining a competitor and these proceedings were only launched a month later, on 7 April 2025. To this end, counsel argued, the application is not urgent alternatively, that urgency, if any, is self- created.

[16] In addition, counsel submitted that the respondent was warned by the applicants of legal actions to be pursued against her during the meeting with the applicants' representative on 6 March 2025. The applicants took a supine posture and did not act on the applicants' threat to take legal action. The application should have been launched at the earliest available opportunity. In any event, the argument continued, the offer which was made to the respondent has subsequently been withdrawn, and confirmation thereof was annexed to the respondent's answering affidavit, and as such the applicants' basis for urgency that the respondent would be joining a competitor no longer exists.

[17] Counsel for the respondent contended further that there was no need for the applicants to await termination of the employment, as the restraint agreement clearly provides that the employee should not breach the agreement 24 months from the termination date or before then. In this instance the alleged breach was made known to the applicants on 6 March 2025 and the urgent proceedings should have commenced soon thereafter and not after a month.

[18] In retort the applicants' counsel stated that the veracity of the withdrawal of the said offer of employment could not be confirmed with Firmenich as the latter has not replied to a letter inquiring about that issue, and also refused to confirm that they will not employ the respondent, and , in any event, there is nothing stopping the applicant from applying again.

[19] I had regard to clause 5.2 of the restraint agreement which provides, *inter alia*, that "Without derogating from the Employee's obligations set out in his contract of employment, the Employee shall not for 24 (twenty-four) months from the Termination Date (and prior thereto)" (underlining added). Therefore, the applicants had an option to institute the proceedings before termination and need not first await termination.

[20] The applicants have only accounted for the period after the dismissal, and further persisted with the argument that the rights flowing from the restraint agreement could only be exercised after the employment had terminated, and not before. The respondent's counsel referred to *Mogalakwena Local Municipality*<sup>1</sup> where the court held in respect of any delay by the applicant in asserting his rights ... it is often called, usually by counsel acting for respondents, self-created urgency".<sup>2</sup> This was also echoed in *Roets N.O*<sup>3</sup> where the court stated that

"... urgency which is self-created is a sense that an applicant sits on its laurels or takes its time to bring an urgent application can on its own lead to a decision that a matter is struck off the roll. It would depend on the explanation

<sup>1</sup> *Mogalakwena Local Municipality v Provincial Executive Council, Limpopo and Others* [2014] ZAGPPHC 400.

<sup>2</sup> *Id* at para 64.

<sup>3</sup> *Roets N.O and Another v SB Gurantee Company (RF) (Pty) Ltd and Others* [2022] JOL55628 (GJ) at [26].

provided but if the explanation is lacking and does not cover the full period from when it was realised or should have been realised, that urgent relief should be obtained. If this criteria to strike a matter from the roll is not available that the delay in itself is not a basis to a court, a court would be compelled to deal with an urgent application where for instance nothing is forthcoming for weeks or months and a day or two before an event was going to take place a party who wanted to stay that event can approach a court and argue that if an order is not immediately granted such party would not obtain substantial redress in due course. If this is the approach to be adopted by a court, there exist no reason why an explanation for the delay should be provided at all. An applicant only have to show that should interim relief not be granted it will suffer irreparable harm”<sup>4</sup>

[21] I am enjoined to assess the explanation proffered by the applicants for the period between 6 March and 7 April 2025. The applicants refused to proffer any explanation for that period and persisted that the only time to launch the proceedings was after termination. As set out above, the restraint agreement states that it is either before or after termination. In the absence of an explanation there is no basis for me to consider whether the matter is urgent and condonation for non-compliance with the rules is warranted and ergo *cadit questio*. It is also not necessary for me to deal with the merits<sup>5</sup> of the matter.

### *Conclusion*

[22] I therefore find that the applicants failed to satisfy the threshold for urgency and the application is bound to fail.

### *Costs*

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<sup>4</sup> *Id* at at para 26.

<sup>5</sup> As it is generally unavoidable that the parties would refer to the merits during arguments on urgency. The parties were requested to submit supplementary heads regarding the retrospective application of the restraint of trade agreement and whether the inconsistent application of the enforcement of the restraint as alleged by the respondent did not amount to unfair discrimination as Mr Du Plessis (applicants’ senior employee) who accepted employment from Firmenich was not interdicted.

[23] There is no reason why the costs should not follow the results.

*Order*

[24] I make the following order:

*The application is struck from the roll with costs, including costs of counsel on scale B.*

**M V Noko**

Judge of the High Court,  
Gauteng Division, Johannesburg.

This judgement was prepared and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 2 May 2025 at 12:00.

Date of hearing: 16 April 2025

Date of judgment: 2 May 2025

**Appearances**

For the Applicants: A Bishop

Attorneys for the Applicants: Dewey McLean Levy Inc.

For the Respondent: TN Mlambo

Attorneys for the Respondent Langa Desmond Inc.