



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

Reportable

Case number: 20127/23

In the matter between:

TECHNOSERVE MEDIUM VOLTAGE (PTY) LTD

Applicant

and

TECHNICAL RETICULATION SERVICES (PTY) LTD

First Respondent

JOHAN PETZER

Second Respondent

THOMAS LOUW DE WET

Third Respondent

DAVID EDWARD STOUT

Fourth Respondent

JOHANNES FREDERICK VISSER

Fifth Respondent

CARL BOTHA

Sixth Respondent

FISTON KONGOLO

Seventh Respondent

HERMANUS GROENEWALD

Eighth Respondent

JOHANNES VAN BRAKEL

Ninth Respondent

RANDALL WILLIAMS

Tenth Respondent

TREVOR DE BRUIN

Eleventh Respondent

Heard : 23, 30 August 2024 and 13 September 2024

Delivered : 15 April 2025

JUDGMENT

SIDAKI AJ

Introduction

[1] The applicant launched an urgent application on 10 November 2023 seeking the following relief:

'(1) That the applicant's non-compliance with the Rules relating to forms, time periods and service be condoned and permitting this application to be brought by way of urgency in terms of Rule 6(12)(a).

(2) That a rule nisi be issued calling upon the respondents to show cause on Wednesday the 6th of December 2023 why an order in the following terms should not be made final:

(2.1) That the respondents are interdicted and restrained for a period of eighteen months, from 16 October 2023 and ending on 16 April 2025, from:

(2.1.1) Soliciting any existing or previous client of the applicant for the purposes of conducting or providing any Medium Voltage installations, services or business operations;

- (2.1.2) *Soliciting or employing any existing employee of the applicant for the purposes of conducting or providing any Medium Voltage installations, services or business operations;*
- (2.1.3) *Utilising the applicant's confidential information (which includes the applicant's safety file accreditation, identity as a safety accredited entity, trade secrets, prices, pricing structures, customer lists and customer contact information) in any manner whatsoever;*
- (2.1.4) *Providing any Medium Voltage installation, service or maintenance services as an in-house service, utilising its own employees or those of its related subsidiary or holding company entities; and*
- (2.1.5) *Interfering with the applicant's business operations in any manner whatsoever.*
- (2.2) *That the respondents are ordered to pay, jointly and severally, the costs of this application including the costs of two counsel, the one paying the other to be absolved.*
- (2.3) *Further and/or alternative relief.*
- (3) *That pending the return date the rule nisi and Orders contained in paragraph 2 and its subparagraphs inclusive shall act as an interim interdict and order.*
- (4) *That the applicant shall institute an action ("the action") within thirty days of the granting of the rule nisi for orders against the respondents, which may include prayers extending the operation of the interim interdictory relief for an appropriate period of time, and/or for damages.*
- (5) *That the action shall proceed in accordance with an expedited timetable to be agreed between the parties at the hearing of this application, and failing such agreement in accordance with a directive from the court.*
- (6) *That the respondents shall pay the costs of this application, jointly and severally, the one paying the other to be absolved, and that such costs include the costs of two counsel.*
- (7) *Further and/or alternative relief.'*

[2] The application was set down for hearing on 21 November 2023, and the respondents were afforded until 17 November 2023 to file answering papers. The respondents opposed the application and filed answering affidavits in which, *inter alia*, they contested urgency. By agreement between the parties, the matter was postponed to 6 December 2023 for hearing. On that date, the parties agreed to an order postponing the hearing to 8 May 2024, and provided a timetable for the first and second respondents to produce WhatsApp messages referred to in the answering papers.

[3] On the hearing date, the parties again agreed to postpone the matter to 23 August 2024, and to permit the exchange of further pleadings:

- a) On 23 May 2024, the applicant filed a supplementary replying affidavit;
- b) On 14 June 2024, the respondents filed a response thereto.

[4] This swelled the pleadings bundle to some 947 pages.

[5] Oral argument was heard over a period of three days, on 23, 30 August and 13 September 2024.

Background

The parties

[6] The applicant, Technoserve Medium Voltage (PTY) LTD ("**Technoserve**") carries on business as an electrical engineering firm specialising in installation and maintenance services for medium voltage industrial electrical equipment and systems.

[7] The first respondent, Technical Reticulation Services (PTY) LTD ("**TRS**"), was previously known as Technosales Boland (Pty) Ltd (Technosales). In 2020, it and Technoserve changed the composition of their shareholders in the course of a division

of the Technoserve Group of companies, which had until then specialised in providing various services in the electrical engineering industry.

[8] The division of the Technoserve Group was underpinned by a share-swap agreement between three individuals: one Mr Veldhuizen, Mr R Botha and the second respondent, Mr Petzer. As a consequence of the division on 26 May 2023, Technosales changed its name to TRS and became a company specialising in sales of industrial electrical equipment and systems. Mr Petzer was its director and shareholder. On the other hand, Technoserve became a company providing installation and maintenance services for industrial electrical equipment and systems. It was controlled by Mr R Botha and Mr Veldhuizen.

[9] The third to eleventh respondents are persons who were previously associated with Technoserve either as its directors, shareholders or employees.

Factual matrix

[10] During September 2020, Messrs Petzer, Veldhuizen and R Botha concluded what they termed a 'gentlemen's agreement', including a so-called 'non-compete agreement', which was due to expire on 8 September 2023. This formed a part of the share swap agreement which divided the Technoserve Group. The non-compete agreement included the following clauses:

'f)

i). For a period of 3 years, the group Technoserve Electrical and Electronic Engineering and Technoserve MV will not establish new businesses that will compete with Technosales, Nedlog and Sallab.

ii) The reverse of (i) will also apply.

- g) *The respective businesses will not remove staff from each other for a period of 3 years. During this 3-year period if an employee resigns from one group, the other group will not employ him/her for 6 months.*¹

[11] In the founding affidavit, Mr R Botha stated that there was, generally, apparent compliance with the terms of the non-compete agreement, in that the companies worked independently, albeit that they subcontracted work between each other. Technoserve, however, first picked up signs of what it considered to be non-compliance only after the expiry of the non-compete agreement. This was when a number of Technoserve's employees, described as its 'entire operational team', suddenly resigned *en masse*:

- a) Mr Kongolo, Mr Groenewald and Mr De Bruin tendered their respective letters of resignation on 18 September 2023, stipulating 16 October 2023 to be their last working day;
- b) Mr Van Brakel gave notice of retirement on 18 September 2023;
- c) Mr Williams tendered his resignation letter on 15 September 2023, stipulating his last working day to be 31 October 2023; and
- d) Mr C Botha gave notice of his intention to retire on 12 September 2023, stipulating his last working day to be 31 October 2023, but left employment on 16 October 2023.

[12] Faced with this situation, Technoserve inspected these employees' company-issued cellular phones and recovered from the SIM cards a mass of data messages which it transcribed and provided as part of the record. An additional tranche of transcribed WhatsApp messages was introduced into the record during discovery, as indicated above. I deal with a synopsis of these messages.

¹ The written agreement was concluded in the Afrikaans language. This English translation is provided and accepted by the parties.

WhatsApp messages

[13] Mr Petzer stated that he created a WhatsApp group, named 'Technosales MV groupie', in about May 2022. Its members included employees of the applicant, 'due to the fact that the applicant did approximately 90% of Technosales subcontracting work'. Mr Petzer explained that, 'As Technosales are the responsible party to the client I needed to communicate efficiently with my subcontractor (especially the employees of the applicant doing the work), on jobs for obvious reasons. Before that we would just call and message each other individually' . . . 'The participants on the group were the team leaders of the applicant, Visser their manager and me' . . . 'During April 2023, I started a new WhatsApp group, with the same purpose in mind as explained above. Originally, only Carl Brakkies and Visser was on the group with me. Harry and Trevor joined in August 2023 and Fiston and Randall in September 2023'. (sic)

[14] On 14 April 2023, Mr Petzer posted a message which read as follows:

'No pressure, but we need to align (sic) and plan by the time I get back

We also need a name for the new venture

Start putting on the thinking caps.'

[15] Mr de Wet proposed 'RECTech' as the company name and Mr Visser sent a proposed logo for the company.

[16] It's common cause that the new WhatsApp group, formed in April 2023, was named 'TRS'.

[17] On 18 April 2023, Mr Visser wrote, 'Johan Venter se julle gaan hom nou direk kwoteer vir maintenance' and Technoserve's deponent (Mr R Botha) suggested that this meant that Mr C Botha was working on a direct TRS quotation for the mentioned maintenance work.

[18] In the period between 25 and 28 April 2023, the group held further discussions regarding a new company name, which included the following:

- a) Mr van Brakel proposed '*MV – Tech*' and Mr Petzer proposed '*Medium Voltage Technical Services*'.
- b) Mr Stout wrote, '*My feeling is that there should be no reference to TS or Tech in anyway. There must be no way that the customers can think that the new company is associated with technoserve*'.
- c) Mr van Brakel wrote, '*gebruik die naam Medium of High Voltage Technical Services voluit, MVTs of HVTs is maar net n afkorting*'.
- d) Mr Petzer wrote, '*Specialised technical services*' ... '*the reason is that we should not only focus on MV work and spread our wings*'.

[19] There were further discussions concerning a meeting which was to be held by those in the WhatsApp group. That meeting took place on 29 May 2023. Following the meeting, Mr Petzer sent several messages. One read, '*@ technical rs*'. Mr R Botha interpreted this to be a suggestion for a company e-mail domain name.

[20] On 26 June 2023, Mr Petzer shared what seemed to be a weekly itinerary for a job to be performed between 30 June and 8 September 2023. He wrote, '*Alles sal so week 12 klaar wees onhou altyd 1 week vir oplaai met jou beplaning na manufacturing ons het n tight schedule*'.

[21] On 27 June 2023, Mr Petzer wrote, '*Ordering the KIA 2500 now for us and we can discuss other vehicles and tools on Thursday*' ... '*pushing the buy button now*'. Mr C Botha responded, '*Mooi Mnr Petzer... die begin*', to which Mr Petzer responded, '*The beginning has just begun*'.

[22] On 13 July 2023, Mr Petzer wrote, '*Worcester SASKO bakery*'. Mr R Botha interpreted this as a request for a quotation. Elsewhere, there were other posts referencing companies such as '*Sea Harvest*', '*Aquila Safari*', '*PenBev*', '*Vendata*', '*KWV*', '*SASKO*', '*Cape Lime*', '*Betko*' and others.

[23] On 8 August 2023, Mr Petzer wrote, '*wat gaan aan manne*' and Mr Stout wrote thereafter:

'Hi all, so far we have paid the deposit for the premises and we have a vehicle that's been fully paid for. Is there anything else we need to do? As per Johan's question above what's happening? What are you all waiting for?'

Mr van Brakel followed up by writing, *'Ons wag vir Petzer en Visser wat om te doen en wanneer ek wil 1ste Sept bedank as hulle so se'*.

[24] On 21 August 2023, Mr C Botha posted something which is not discernible from the record, but which seemed to have sparked the following series of responses, interspersed by other posts:

- a) Mr Petzer: *'WTF'*;
- b) Mr de Wet: *'Maybe it's time to resign'*;
- c) Mr C Botha depicting *'thumbs up and clapping emojis'*;
- d) Mr Petzer: *'With immediate effect'*;
- e) Mr Stout: *'Agreed. Is there a restraint of trade on your existing contract?'* . . . Mr C Botha *'No restraint . . . just while working for TMV'*.

[25] On 17 September 2023, Mr Visser wrote, *'almal moet nie enige vrae of met Evans praat voor ons ne eers gesels het nie... Brakkies/Carl moet ook nie datums met hom praat nie'*.

[26] On 18 September 2023, Mr Petzer wrote, *'Well done guys!!! Welkom offisieel by TRS'*.

[27] On 19 September 2023, Mr van Brakel wrote, *'Baise k%k vandag hulle is op my spoor'* (sic).

[28] On 15 October 2023, Mr Petzer wrote, *'Lekker manne one more day'*.

[29] On 16 October 2023, the employee respondents served their last day of work with the applicant.

[30] On 17 and 19 October 2023, the employee respondents were removed from the WhatsApp group and then re-added with their new TRS telephone numbers.

Demand

[31] On 20 October 2023, Technoserve's attorneys dispatched letters with a similar content to each of the employee respondents, stating, *inter alia*, that:

- a) Technoserve did not view each termination of employment as being an isolated incident, but in a context in which they constituted the majority of the staff of the medium voltage division;
- b) The said employees acted with a common purpose, under the direction of Mr Petzer, to take up employment with TRS, a competitor;
- c) The said employees, acting together with TRS and Mr Petzer, intended to take away Technoserve's intellectual property and to use its confidential contact list to solicit its customers;
- d) While still employed by Technoserve, these employees had done work for TRS, including preparing quotations aimed at soliciting Technoserve's customers (as reported by certain of those customers);
- e) Technoserve considered this as unlawful competition and a breach of the employees' duties;
- f) Technoserve sought to protect its intellectual property. It accused the employees of '*stealing*' its customer base and taking over Technoserve's medium voltage work;
- g) Technoserve considered these actions as being aimed at crippling its business and, thus, unlawfully to '*transplant*' it to TRS; and

- h) Technoserve claimed prejudice both financially and in terms of its ability to provide service to its customers.

[32] The letter concluded by making a demand that the said employees should immediately make a written undertaking to not take up or continue employment with TRS for a period of at least 12 months. In the absence of compliance, Technoserve indicated it would bring legal proceedings. The undertaking sought was not forthcoming, and so this application was instituted, on the terms and in the manner as I have set out above.

[33] It is apparent in this demand, which was presented just before the launch of the application, that the applicant initially contemplated a springboard restraint period of 12 months, and not 18 months prayed for in the notice of motion.

Discussion

Evolution of the remedy sought

[34] In the notice of motion, the applicant sought a *rule nisi* calling upon the respondents to show cause, on 6 December 2023, why an order interdicting the respondents for a period of 18 months, from 16 October 2023 to 16 April 2025, should not be made final. Prayer 3 sought an order that, pending the return date, the *rule nisi* and interdicting orders would act as an interim interdict and orders.

[35] On 6 December 2023, and on subsequent occasions, the applicant agreed to a postponement of the hearing, without addressing the structure and content of its notice of motion. By the time of the hearing, some nine months after the application was instituted, urgency was no longer a live issue and the prayer for a *rule nisi* to be issued, returnable on 6 December 2023, had become obsolete.

[36] During argument, it was stated that Technoserve no longer sought interim relief '*pending the return day and/or outcome of an expedited action*', but instead sought a final interdict, which would '*prevent the respondents from enjoying the fruits of their unlawful*

conduct for a specific period'. The applicant's counsel handed up from the bar a draft order seeking relief in the following terms:

'(1) The first to sixth respondents, and the eighth respondent, ninth respondent and eleventh respondent, be interdicted and restrained for a period of 18 months from the date of this order (from):

(1.1) soliciting or employing any existing employee of the applicant for the purposes of conducting or providing Medium Voltage installations, services or business operations;

(1.2) providing any Medium Voltage installation, service or maintenance services as an in-house service, utilising its own employees or those of its related subsidiary or holding company entities.

(2) The aforesaid respondents are ordered to pay, jointly and severally, the costs of this application on a scale as between attorney and client.'

[37] The draft order effectively sought an amendment of the notice of motion without launching a formal application to amend. A key change effected by the draft order was that the 18-month springboard period was to have effect only from the date of the final order, thus deviating from the original notice of motion in which, despite a return day of 6 December 2023, the period of springboard restraint sought was to run from 16 October 2023 (presumably when the last of the employee respondents departed Technoserve) to 16 April 2025.

[38] It is trite law that a court is vested with a discretion as to whether to grant or refuse an amendment.² In this case, there was no objection when the draft order was handed up. The essence of the relief sought in the draft order remains similar to that in the notice of motion. I can see no prejudice or procedural disadvantage to the respondents by allowing the amendment.

² *Devonia Shipping Limited v MV Luis (Yeoman Shipping Company Limited)* 1994 (2) SA 363 (C), at 369F – I.

[39] It is common cause that by the time this matter was heard, Technoserve had not instituted the action which is foreshadowed in its notice of motion. I could not get a clear explanation as to why the action had not been pursued.

Requirements of an Interdict

[40] An interdict requires someone to refrain from performing a particular act (prohibitory) or perform a particular act (mandatory). It affords an applicant protection against unlawful interference or threatened interference with their rights.³

[41] It is trite that a court should look at the substance rather than form of the relief sought, in classifying an interdict as final or interim.⁴ A final interdict finally determines the rights of the respective parties to a dispute or litigation.⁵ An interdict, even for a fixed period, may be final in effect.⁶

[42] It is settled that an applicant for a final interdict must show a clear right; an injury or infringement of a right, actually committed or reasonably apprehended; and the absence of similar or adequate protection by any other ordinary remedy.⁷

Ad a clear right

[43] Whether the applicant has a clear right is a matter of substantive law.⁸ The onus is on the applicant applying for a final interdict to establish, on a balance of probability, the facts and evidence which prove that they have a clear or definite right in terms of substantive law.⁹

³ *Godongwana v Mpisana* 1982 (4) SA 814 (TkSC) at 817C-D.

⁴ *BHT Water Treatment (Pty) Ltd v Leslie and Another* 1993 (1) SA 47 (W) at 55A-F; *Oasis Group Holdings (Pty) Ltd and Another v Bray* [2006] 4 All SA 183 (C) ("Oasis Group") para 13.

⁵ *Minister of Law and Order, Bophuthatswana and Another v Committee of the Church Summit of Bophuthatswana and Others* 1994 (3) SA 89 (BG) ("Committee of the Church Summit") at 97G.

⁶ *Zuurbekom Ltd v Union Corporation Ltd* [1947] 1 All SA 319 (A) at 341-342. *Oasis Group*, para 13.

⁷ *Setlogelo v Setlogelo* 1914 AD 221 at 227.

⁸ *Committee of the Church Summit* at 98D.

⁹ *Id.* See also: LAWSA Vol. 11, 2nd Ed. 397.

Ad an injury actually committed or reasonably apprehended

[44] For an interdict to be granted, it must be shown (taking into account the *Plascon-Evans* rule,¹⁰ where final relief is sought on motion) that unless restrained by an interdict, the respondent (i) will continue committing an injury against the applicant or (ii) that it is reasonably apprehended that the respondent will cause such an injury to applicant.¹¹ 'Injury' means an action which infringes, interferes with or is prejudicial to the right which has been shown or demonstrated.¹² Physical harm or pecuniary harm (damages) is not required to constitute an injury, although it might cause the rights breach or result from it.¹³

[45] In order to obtain a final interdict, in cases other than an ongoing injury, an applicant need not establish that injury will arise or ensue, but needs to prove a reasonable apprehension of injury of such a nature which a reasonable person might consider and conceive of, on being confronted by the relevant facts.¹⁴ This well-

¹⁰ *Plascon-Evans Paint Ltd v Van Riebeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) (*Plascon Evans*) at 634E-635C.

¹¹ *Commercial Stevedoring Agricultural and Allied Workers' Union and Others v Oak Valley Estates (Pty) Ltd and Another* (CCT 301/20) [2022] ZACC 7; [2022] 6 BLLR 487 (CC); 2022 (7) BCLR 787 (CC); 2022 (5) SA 18 (CC) (1 March 2022) para 19; *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* [2008] ZASCA 78; 2008 (5) SA 339 (SCA) at para 20.

¹² *V & A Waterfront Properties (Pty) Ltd and another v Helicopter & Marine Services (Pty) Ltd and Others* [2006] 3 All SA 523 (SCA) ("*V & A Waterfront*"), at para 21; *Exxaro Coal Mpumalanga (Pty) Ltd v TDS Projects Construction and Newrak Mining JV (Pty) Ltd and Another* [2022] JOL 53514 (SCA), at paras 13-14; *Reddy v Siemens Telecommunications (Pty) Ltd* [2006] JOL 18829 (SCA) ("*Reddy*"), para 22; *Masstores (Pty) Ltd v Pick n Pay Retailers (Pty) Ltd* 2017 (2) BCLR 152 (CC), para 8 and 101-103; *Oasis Group Holdings*, para 36 – 37; *National Commissioner Of The South African Police Services and Another v Forensic Data Analysts (Pty) Ltd and Another* (24570/2018) [2019] ZAGPPHC 6; 2019 BIP 215 (GP) (30 January 2019) ("*Forensic Data Analysts*"), paras 61 – 64; *Harmony Golf Mining (Pty) Ltd and Others v Lejweleputswa Community Engagement Structure and Others* (502/2023) [2023] ZAFSHC 193 (18 May 2023) ("*Harmony Golf Mining*"), para 19; *Khumalo v Master of High Court Johannesburg and Another* (2023/095270) [2023] ZAGPJHC 1158 (9 October 2023), paras 16 -19; *Boardwalk Trading 175 CC v City of Ekurhuleni Metropolitan Municipality and Another* (2023/101032) [2023] ZAGPJHC 1163 (16 October 2023), paras 25 – 26; *Eastern Produce Estates SA (Pty) Ltd v Wales Communal Property Association and Others* (LCC 201/2015) [2018] ZALCC 4; 2018 (4) SA 220 (LCC); [2018] 3 All SA 123 (LCC) (4 April 2018), para 71.

¹³ *V & A Waterfront*, paras 20 – 22; *Oasis Group Holdings*, paras 36 – 37; *Forensic Data Analysts*, paras 62 – 64; *Harmony Golf Mining*, paras 18-19.

¹⁴ *Free State Gold Areas Ltd v Merriespruit (Orange Free State) Gold Mining Co Ltd and Another* 1961 (2) SA 505 at 518; *Committee of the Church Summit*, at 99A; *Minister of Law and Order and Others v Nordien and Another* [1987] 2 All SA 164 (A) (Nordien), at page 165.

grounded apprehension of irreparable loss or infringement of rights must be proved as an objective fact, based on substantial grounds.¹⁵ The test is objective.¹⁶

[46] The court must decide, on the basis of the facts established, whether there are grounds for the entertainment of a reasonable apprehension of loss/injury by the applicant.¹⁷

Ad alternative remedy

[47] The courts have determined that an alternative remedy must be:

- a) adequate in the circumstances;
- b) ordinary;
- c) reasonable;
- d) be a legal remedy; and
- e) grant similar protection to a party.¹⁸

[48] Generally, an applicant will not obtain an interdict if they can be awarded adequate compensation or amends by way of damages.¹⁹ The enquiry on this leg is whether an interdict is the only relief or remedy which will assist the applicant, or whether there is a satisfactory alternative remedy.²⁰

[49] In sum, an interdict is meant to be a practical remedy, which a court will hesitate to grant if it appears that, in the form in which it is cast, it will not afford the applicant the protection sought.²¹

¹⁵ *Committee of the Church Summit*, at 99B.

¹⁶ *Id.*, at 99C; *Nordien*, at page 165.

¹⁷ *Id.*

¹⁸ *Committee of the Church Summit*, at 99F.

¹⁹ *Id.*, at 99G.

²⁰ *Id.*, at 99H.

²¹ *South Atlantic Islands Development Corporation Ltd v Buchan* 1971 (1) SA 234 (C) at 239G.

Springboard interdict

[50] Technoserve described its application in the founding affidavit as one for a 'springboard interdict', *'pending the return day and/or outcome of an expedited action, to put an end to a conspiracy by the respondents to damage the applicant's business whilst gaining an unfair and unlawful competitive advantage of their own at the expense of the applicant'*. I have mentioned above, that the application was also characterised as aimed at preventing the respondents from enjoying the fruits of their unlawful conduct, for a specific period.

[51] Mr R Botha elaborated on Technoserve's position in the founding affidavit, as follows:

'(Technoserve) require a period of 18 months of interdicted competition in order for us to recover our employee team and to protect our business from the unlawful acts of the respondents. The unlawful advantage achieved by the respondents is clearly one that allowed them to commence trading at the level that they have at least 18 months before they would otherwise have been able to do. The 'springboard' achieved provided them with an advantage of at least 18 months.'

[52] In argument, Mr Seale SC, appearing with Mr Fuller, referred largely to English law authorities, when explaining the concept of 'springboarding' and the 'springboard interdict' by which the applicant sought to restrain such springboarding. He argued that the respondents had garnered for themselves an unlawful competitive advantage over the applicant, referred to as a 'springboard'. This springboard, he contended, was an instance of unlawful competition and should, accordingly, be interdicted. He explained the concept, its rationale and, crucially, how he considered that it should be applied, in this particular matter, as follows:

'The period of the interdict in a springboard interdict application is calculated on the basis of the advantage derived by the respondents. The advantage consists of the saving of time and resources for the preparation phase of a new business, and this was conducted while preparations were prohibited. The principal advantage achieved by the respondents consists of the resources, time and effort saved in establishing an effective Medium Voltage services unit, which it achieved without having to follow the usual and lawful recruitment process.'

'Had the respondents conducted themselves lawfully, TRS would not have been able to commence trading in October with a fully formed and competent Medium Voltage services team. A period of at least 18 months after October 2023 would have been required for it to achieve, in a lawful and fair manner, what it was able to do by unlawful means through the respondents' conspiracy by October.' . . .

'In order to place the parties in a position of parity and to achieve the objects of a springboard interdict, the exclusionary time period should commence from the date upon which judgment is granted. Insofar as it may be argued that the term of the interdict should run from the termination of employment date, this would be wrong. The aim of a springboard interdict is not to prevent competition during a restraint period, as in a restraint of trade matter which concerns a finite contractual term, but to remove and to negate the unfair competitive advantage of a specific period of time gained as a consequence of the unlawful competition.'

[53] The applicant put significant stock in certain English case law and principles, which are evidently premised upon the specific English law tort of conspiracy.²² The applicant appears to maintain that the respondents engaged in an unlawful means form of conspiracy, which was described in *British Midland Tool Ltd v Midland International Tooling Ltd & Ors*,²³ as follows:

'[77] The claim is primarily put as an unlawful means conspiracy. The requirements of that tort are that the claimant proves that it has suffered loss or damage as a result of unlawful action taken pursuant to a combination or agreement between the defendant and another person or persons to injure him by unlawful means, whether or not it is the predominant intention of the defendant to do so'

see Kuwait Oil Tankers v Al Bader 2000 EWCA Civ 160, [2000]2 All ER Comm 271 at para 108 (Nourse Potter and Clarke LJJ). The three essential ingredients for present purposes are (1) unlawful means taken pursuant to an agreement, (2) loss suffered as a result of that, and (3) the intention to injure by the unlawful means.²⁴

²² *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1941] UKHL 2, [1942] AC 435. *Kuwait Oil Tanker Company SAK & Anor v Al Bader & Ors* [2000] EWCA Civ 160 (18 May 2000).

²³ *British Midland Tool Ltd v Midland International Tooling Ltd & Ors* [2003] EWHC 466 (Ch) (12 March 2003) (Midland).

²⁴ *Midland*, at para 77.

[54] On its own case, articulated in regard to the English tort of an 'unlawful means conspiracy'²⁵, it behoves the applicant, then, to establish the necessary elements: a) to indicate a combination or agreement between the relevant respondents; (b) to intentionally c) cause damage to the applicant's business; d) by unlawful means and (e) which is then executed, in such an unlawful fashion, and does, in fact, cause such unlawful damage.²⁶ *Inter alia*, the applicant would need to:²⁷

- a) Show that each respondent agreed to or acted in a concerted fashion to harm the applicant, intentionally, and, by unlawful means;
- b) Identify the unlawful acts inflicting damage to the applicant's goodwill and that they were carried out pursuant to the conspiracy; and
- c) establish that there was unlawfully inflicted (and in the case of an interdict, the ongoing or anticipated) damage to the goodwill of the applicant's business, with due reference to the springboard concept and period.

[55] This would involve a factual enquiry.

Common cause facts

[56] It is common cause that a WhatsApp group named 'TRS', was set up by Mr Petzer on 12 April 2023. The members of the group included Mr Petzer, Mr De Wet (third respondent), Mr Stout (fourth respondent), Mr Visser (fifth respondent), Mr Botha (sixth respondent), Mr Groenewald (eighth respondent) and Mr Van Brakel (ninth respondent). Furthermore, it is not disputed that upon resigning from their respective employment at Technoserve, some of the implicated employees took up employment with TRS, during October 2023.

²⁵ Rather than a conspiracy to injure by lawful means. See *Kuwait Oil Tanker Company SAK & Anor v Al Bader & Ors* [2000] EWCA Civ 160 (18 May 2000) (Kuwait), at paras 107-108, where the distinction is described.

²⁶ *Midland*, para 77; *Kuwait*, paras 108-110.

²⁷ Cf. *Kuwait*, para 132.

The non-compete agreement

[57] The non-compete agreement was described as part of a 'gentleman's agreement' between Mr Petzer, Mr Veldhuizen and Mr R Botha. It is unclear as to whether this was regarded as legally binding by the parties to it.

[58] It is however not immediately apparent to me whether TRS and Technoserve were party to the non-compete agreement. Neither Mr Veldhuizen nor Mr R Botha, as the parties entitled to enforce that agreement against Mr Petzer, are cited as parties to this litigation. Given this, Technoserve's entitlement to a cause of action against any of the respondents by reference to the non-compete relationship it has alleged with TRS is unclear. I however, do not decide the matter on this point.

Factual disputes

[59] Whilst there is no serious quibble as to the content of the WhatsApp messages found on the employees' SIM cards, the controversy concerns the full context in which the messages were posted and, therefore, the proper interpretation and meaning which is to be attached to those messages.

[60] The applicant contends that the respondent employees, acting together and in concert with its corporate competitor, conspired, unlawfully, to harm its business interests and goodwill by, *inter alia*, causing its specialised operational team to resign *en masse*, and to take up employment with the first respondent, taking with them the applicant's confidential information and clients.

[61] Mr R Botha, the director of Technoserve explained the situation, as he saw it, as follows in the founding affidavit:

'Not only did the first respondent steal our employees, but our clients too. The first respondent utilised the applicant's team to carry out work for it during the currency of their employment with the applicant. In a clandestine manner these employees provided services on behalf of the respondent to the applicant's clients and subsequently permitted the first respondent to take over those clients from the applicant, which it has done.' *'The existing working relationships between our employees and our clients were used to transfer those clients to the*

first respondent at the same time as the employees were being taken over by the first respondent. The first respondent has acquired our workforce which it needs to service our erstwhile clients and so has been able to take over the clients too. In so doing the first respondent has derived a significant although unlawful advantage, which could only have been achieved by our erstwhile employees acting in breach of their contractual and fiduciary obligations.'

[62] Technoserve drew the following conclusions from the facts available (consisting mainly of the recovered WhatsApp messages) and it is on this factual basis that it founded its application:

- a) The employees had been conspiring with each other to springboard TRS and compete unlawfully with Technoserve since at least March 2023;
- b) The employee respondents had encouraged one another to resign *en masse*, in violation of their service contracts and/or fiduciary duties to their employer, Technoserve;
- c) Mr Visser was doing work for TRS while still a director and in the employ of Technoserve;
- d) The resigning employees had already been working for TRS for some time before their formal resignations or retirement from Technoserve;
- e) TRS had, with the help of the resigning employees, poached and serviced Technoserve's clients during the TRS non-compete period;
- f) Accordingly, TRS together with the employees had intentionally inflicted harm on Technoserve's proprietary interests and client goodwill. Mr R Botha perceived these as acts of sabotage perpetrated by the resigning employees against Technoserve; and
- g) Finally, that the conduct of the resigning employees has deprived Technoserve of its immediate capacity to fulfil its contractual obligations. In this regard,

Technoserve alleges that TRS is rendering identical services to those that Technoserve had provided to those of its clients poached by TRS.

[63] Mr McClarty SC, appearing with Mr M Aggenbach, for the respondents, criticised the applicant for its generalised approach to the transcripts of the WhatsApp messages. The respondents did not, however, object to the authenticity and admissibility of those messages. A full transcript of the WhatsApp messages was attached to the affidavits and thereby incorporated into the evidence. The respondents, for their part, managed, in large measure, to deal with the accusations levelled against them.

[64] The respondents took issue with all of the material facts alleged by Mr R Botha. They:

- a) asserted that the terms of the non-compete agreement did not apply to TRS or to each of them as individuals, except for Mr Petzer;
- b) contested the applicant's understanding of the non-compete agreement;
- c) challenged the applicant's interpretation of the WhatsApp messages. They denied the accusation of carrying out work on behalf of TRS and in competition with their employer, Technoserve, in relation to various Technoserve clients (including Corobrick, Betko, Sea Harvest, Aquila, etc). They explained that the Whatsapp references to these entities related to legitimate ongoing Technoserve/Technosales subcontracting work in relation to those entities;
- d) denied that the employee respondents had been issued with TRS e-mail addresses while in the employ of Technoserve (except for Mr Visser who was issued one only after his suspension by Technoserve);
- e) denied approaching the various Technoserve clients named in the Whatsapp messages for the purpose of soliciting their business for TRS, while still employed by Technoserve. In that regard, it is noteworthy that Technoserve did not file any affidavits by clients confirming this solicitation;

- f) denied conspiring with one another or TRS or soliciting Technoserve employees; and
- g) denied that the employee respondents constituted the applicant's operational team or that all of them took up employment at TRS.

[65] The respondents maintained that the applicant did not have the proprietary interest and/or confidential information and/or skills which would attract legal protection. They contended that:

- a) The applicant had failed to specify from which companies the respondents were to be interdicted from soliciting business;
- b) Any price structure for services rendered by the applicant was publicly available;
- c) In this industry, competing companies often worked together on sites, such that there were no trade secrets and/or material confidential information. They pointed out that the applicant has failed to specify and describe these. Indeed, it should be noted that, legally, the applicant must set down the facts necessary to prove all the requirements to establish the confidentiality of any information (and has not done so)²⁸; and
- d) Applicant could not restrain the sixth to eleventh respondents from applying their respective skills, knowledge and experience, after departure from Technoserve, in the absence of any contractual restraint of trade agreement with them.

²⁸ *Strike Productions (Pty) Ltd v Bon View Trading 131 (Pty) Ltd & Others* [2011] JOL 26664 (GSJ) ("*Strike Productions*"), at paras 17, 22-24, 34-35. *Hirt & Carter (Pty) Ltd v Mansfield and another* [2007] 4 All SA 1423 (D), at paras 56-58; *Petre & Madco (Pty) Ltd t/a T-Chem v Sanderson-Kasner and Others* [1984] 4 All SA 171 (W), at page 178. In the English case of *QBE Management Services (UK) Ltd v Dymoke & Ors* [2012] EWHC 80 (QB) (27 January 2012), at paras 200-201, the court indicated that an applicant must particularize the confidential information in order to allow the court to determine that there is indeed a protectable interest.

[66] It was held in *Strike Productions* that:²⁹

'[22] For the applicant to succeed in this case it must establish that it has trade secrets, confidential information and intellectual property worthy of protection and which is "proprietary" to it, which Jacobs is allegedly using. The claim to confidentiality must be made on reliable facts. It is not sufficient for a party to merely state that it has "intellectual property", "know-how", "modus operandi" or that certain aspects of its business are secret or confidential.

[23] The mere fact that a party chooses to call something secret does not per se make it so. In Saltman Technicianing Co Ltd & others v Campbell Technicianing Co Ltd [[1948] 65RPC 203 (Ch), at 215], Lord Greene MR stated that, to be confidential, the information concerned must "have the necessary quality of confidence about it, namely it must not be something which is public property or public knowledge".'

[67] When expounding on the matters which he placed in dispute, Mr Petzer specifically averred that the non-compete agreement envisaged that the various companies could compete for installation and maintenance work and that this was consistently done. He gave various examples of this. I ploughed through the replying affidavit in search of a response to this particular point, without success. The deponent to the reply does say that there was no time to respond *ad seriatim* to the allegations in each of the respondents' affidavits, although he did address other specific allegations. Nevertheless, one would have expected that the deponent would have addressed any false allegation of this importance in its response, had it indeed been false.

[68] The situation is that all the material facts upon which the applicant seeks to rely, to establish a cause of action against the respondents, are soundly disputed and are incapable of resolution on the papers. Given the attendant disputes of fact, it is not feasible to come to a definitive factual finding on various crucial aspects, such as: whether any of the respondents unlawfully interfered in the contractual affairs of the applicant; breached any restrictive covenants or fiduciary duties binding them to the applicant; embarked on an intentional, concerted or agreed conspiracy to damage the

²⁹ *Strike Productions*, at paras 22 - 23.

applicant, by unlawful means; actually caused unlawful damage to the subjective right to goodwill belonging to Technoserve.

Factual link between an individual respondent and the actual or threatened unlawful conduct must be shown

[69] The employee respondents maintained that they, at all material times, were working on behalf of and for the benefit of Technoserve. In *Commercial Stevedoring*,³⁰ the Constitutional Court held that the law requires, for interdictory relief to be competently granted, that a factual link between an individual respondent and the actual or threatened unlawful conduct must be shown. In that case, which dealt with an application for interdictory relief in the context of a labour strike action, the court found that mere participation in a strike, protest, or assembly, in which there is unlawful conduct, is insufficient to link the impugned respondent to the unlawful conduct in the manner required for interdictory relief to be granted.³¹

[70] What would constitute the requisite direct link to the unlawful conduct (rights breach) would depend on the anterior question of what conduct is considered to be delictual or otherwise unlawful, and, therefore, can be interdicted.

[71] The English tort of 'conspiracy' appears to deviate from the South African law approach in regard to this enquiry, in that a person/ party to the relevant agreement/combination:

- a) may attract liability merely from being party to the agreement or combination with the object of intentionally and unlawfully damaging the defendant, without the need for any participation in the unlawful acts that implement that conspiracy;³² and

³⁰ *Commercial Stevedoring Agricultural and Allied Workers' Union and Others v Oak Valley Estates (Pty) Ltd and Another* (CCT 301/20) [2022] ZACC 7; [2022] 6 BLLR 487 (CC); 2022 (7) BCLR 787 (CC); 2022 (5) SA 18 (CC) (1 March 2022), at para 39.

³¹ *Id*, para 42.

³² *Barclay Pharmaceuticals Ltd & Ors v Waypharm LP & Ors* [2012] EWHC 306 (Comm) (28 February 2012), at para 222; *Kuwait*, at para 110 and 133; *Roche Diagnostics Ltd against Greater Glasgow Health Board and Another* [2024] ScotCS CSOH_55 (05 June 2024), at paras 95-97.

- b) is liable for all acts that are performed by other persons/ party to and implementing the conspiracy, even where the person does not participate in those acts, provided only they are party to the relevant agreement or combination.³³

[72] By contrast, in respect to interdicts grounded properly in South African law of delict, the applicant would, at minimum, need to link each respondent to the commission of each act of unlawful competition, even if only as a joint wrongdoer.³⁴ This link might entail no more than the instigating, aiding or abetting of any delict, but this would still require some measure of active involvement.³⁵

[73] Thus, mere participation in the relevant WhatsApp group would also not, without more, be enough to link the employee respondents into a delict against Technoserve, even if there may be suspicion of some unlawful activity by one or other of the participants.

[74] To establish a link between an individual respondent and the actual or threatened unlawful conduct would involve a factual enquiry. I deal with the versions presented by each of the respondents below, which controvert the allegations made by the applicant.

[75] Mr Petzer acknowledged having a close relationship with Technoserve employees, because he was previously the chief executive officer and shareholder of the Technoserve Group before it split. He explained that a significant amount of work done by Technoserve was subcontracted to it by Technosales and that, as such, the Technoserve and Technosales/TRS teams often interacted with each other.

[76] The third respondent, Mr De Wet, was a director of TRS, serving alongside Mr Petzer, until his resignation on 29 September 2023. It was stated during argument that an interdict against him was no longer being pursued.

³³ *Kuwait*, at para 133.

³⁴ *Nedcor Bank Ltd t/a Nedbank v Lloyd-Gray Lithographers (Pty) Ltd* [2000] 4 All SA 393 (A), at para 10, where this concept was described as, in contrast with concurrent wrongdoers: 'Joint wrongdoers are persons who, acting in concert or in furtherance of a common design, jointly commit a delict.'

³⁵ *McKenzie v Van der Merwe* 1917 AD 41 (AD), at page 45 and 47.

[77] Mr Stout, the fourth respondent, was also a director of TRS serving alongside Mr De Wet and Mr Petzer, until his resignation on 29 September 2023. Both Mr De Wet and Mr Stout stated the following in their respective affidavits:

'As part of the board of directors, we agreed to rename Technosales Boland to TRS to split our projects that used to run through Technosales Western Cape (Pty) Ltd, in which I am a shareholder and a director. Technosales Boland was dormant and TRS only commenced trading in October 2023.'

[78] The fifth respondent, Mr Visser, was a director and 35% shareholder of Technoserve, and had served for a period as its managing director. He was due to retire from Technoserve in 2023 and had communicated his wish to the other directors to sell his shares later that year. He acknowledged having been a member of the WhatsApp group, but denied any involvement in the alleged conspiracy against Technoserve or ever working for TRS. It was stated during argument that an interdict was no longer sought against Mr Visser.

[79] The qualification, skill and experience of the sixth respondent (C Botha) is in dispute. In the papers, Technoserve portrayed Mr C Botha as *'a highly skilled MV electrical technician'* whose skills are in short supply in the industry. Mr C Botha denied being a qualified electrician or technician or having any specific qualification as an electrician, although he acknowledged having worked in the industry for some 40 years. He claimed to have been told by one Mr Coetzee, the new managing director of Technoserve, that he was not being considered as part of future plans for Technoserve. Having reached the age of 63 years, he opted to retire and refused a fixed term contract to continue working for Technoserve. He had approached Mr Petzer for a job at TRS, after his retirement from Technoserve, and commenced employment on 17 October 2023. He maintained that his departure from Technoserve and joining of TRS was not the result of a 'conspiracy' with his fellow employees or TRS. Whilst he admitted being part of the WhatsApp group, he denied that his activities on that group amounted to a conspiracy to harm the applicant.

[80] The founding affidavit described Messrs Kongolo (the seventh respondent) and Williams (the tenth respondent) as assistant technicians. It was accepted in argument

that they were in fact general workers. Both of them professed that they did not see any prospects of advancing their respective careers at Technoserve and decided to join TRS. The applicant indicated during argument that it no longer pursued an interdict against these gentlemen.

[81] The eighth respondent, Mr Groenewald, is a qualified electrician who was employed by Technoserve from April 2022. He tendered his resignation on 18 September 2023. He denied being a technician and also denied that he possessed rare skills, and, therefore, contended that it would be easy to find a replacement for him. He attributed his resignation to a workplace falling-out with Mr Coetzee. He commenced work for TRS on 17 October 2023. He denied knowing any trade secrets or confidential information of the applicant. He was part of the TRS WhatsApp group. He denied that the group conspired to harm the applicant and explained its purpose, which was to communicate and coordinate logistics on the projects that his team were performing for Technoserve, as a subcontractor for Technosales, and for social interaction. Mr Groenewald averred that an interdict in these circumstances would unduly interfere with his unrestrained right to ply his trade.³⁶

[82] Mr Van Brakel, the ninth respondent, is a qualified electrician. He was employed by Technoserve until his retirement at the mandatory retirement age of 60 years. He submitted his retirement by letter dated 18 September 2023. He claimed to have had poor workplace relations with Mr Coetzee. When he could not secure a work contract beyond his retirement, he approached Mr Petzer, who offered him employment with TRS, as from 17 October 2023. He stated that the discussions in the WhatsApp group were not a conspiracy against the applicant, but concerned subcontracting work between Technoserve and Technosales.

[83] Mr De Bruin, the eleventh respondent, was employed by Technoserve as a qualified technician. He tendered his resignation on 17 September 2023. He had had his own workplace conflict with Mr Coetzee, which he claimed was a major cause for seeking employment with TRS. He denied conspiring with his fellow employees and

³⁶ See: *Motion Transfer & Precision Roll Grinding CC v Carsten and Another* [1998] 4 All SA 168 (N) ("*Motion Transfer*"), at pages 176 – 178. *Aranda Textile Mills (Pty) Ltd v Hurn and Another* [2000] 4 All SA 183 (E), at paras 23 - 33. *Strike Productions* paras 25-31; *Knox D'Arcy Ltd and Others v Jamieson and Others* [1992] 4 All SA 275 (W) ("*Knox D'Arcy*"), at pages 279 – 282.

TRS to leave Technoserve and join TRS. He denied participation in a conspiracy against Technoserve and averred that his posts on the WhatsApp group were related to the work which he was carrying out on behalf of Technoserve.

[84] The versions presented by the respective respondents suggest that the factual disputes concerning the role of each respondent remain. At very least, an employee would need to be shown to have instigated or solicited his fellow employees either to resign, or, to commit any of the other unlawful acts (or aid and abet the relevant unlawful acts). Neither this nor the direct commission of the relevant delicts has been established, to the required legal standard, against each (or any) of the respondents.

Conclusions on conspiracy

[85] It does not appear as though the concept of 'conspiracy' has formed part of or been definitively adopted as such into the South African law of delict. Accordingly, in my assessment, applying the alien tort of 'conspiracy' from English case law, rather than the ordinary principles of delict, to the South African law of interdicts, will produce an erroneous result. Equally, reliance on English authorities and principles relating to injunctions, in a case such as this, will likely distort the proper application of South African law as it pertains to interdicts.

[86] During argument, I invited applicant's counsel to provide me with a note explaining the applicability, in South African law, of the springboard principle, in the context of the concept of 'conspiracy', in order to better understand the basis of the applicant's case. The note stated that South African courts have frequently applied the springboard doctrine in instances of the unlawful use of confidential information. The note further stated that:

'In casu, the respondents' unlawful springboard subsists in unlawfully conspiring with the applicant's then employees to establish a business that would compete with the respondent, which entailed procuring the applicant's operational team to resign en masse and take up employment with the first respondent. The procurement and the conspiracy breached contractual and fiduciary obligations.'

[87] I have considered these submissions with reference to some of the relevant South African authorities. Van Heerden & Neethling warn of the dangers of any importation of the principles of this English tort of conspiracy in regard to the South African delict of boycotts.³⁷ The Supreme Court of Appeal, when confronted with a case assessed under the English tort of conspiracy, by the judge *a quo* (who, like me, was unable to find South African authority for a delict of conspiracy),³⁸ declined to confirm the judge *a quo*'s view that this tort was consistent with South African delictual principles, and left the matter open.³⁹

Factual disputes were foreseeable

[88] There are clearly sharp disputes of fact which cannot be resolved on the papers. In *National Director of Public Prosecutions v Zuma*,⁴⁰ the Supreme Court of Appeal held that:

'[26] Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's... affidavits, which have been admitted by the respondent... , together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.'

[89] I have canvassed above what I consider to be real and wide-ranging factual issues which, in my view, cannot satisfactorily be resolved without the aid of oral evidence and cross-examination of witnesses. These disputes relate to facts which are central to the application and its determination. They were reasonably foreseeable.

³⁷ Van Heerden & Neethling *Unlawful Competition* 2nd ed (2008), pages 296 – 297.

³⁸ *Unilever Bestfoods Robertson's and Others v Soomar and Another* 2007 (2) SA 347 (SCA) para 7.

³⁹ *Id.*, para 11.

⁴⁰ *National Director of Public Prosecutions v Zuma* (573/08) [2009] ZASCA 1; 2009 (2) SA 277 (SCA); 2009 (1) SACR 361 (SCA); 2009 (4) BCLR 393 (SCA); [2009] 2 All SA 243 (SCA) (12 January 2009) para 26.

Nevertheless, the applicant was adamant that the application should proceed on the papers for final relief.

[90] The applicant has neither managed to establish the key unlawful acts alleged, nor, a conspiracy directed at the harming of the applicant by unlawful means. It is not feasible, therefore, to engage in a determinative legal analysis where the underlying factual basis of the application remains unresolved.

Interdict appropriate only when future injury is feared

[91] I nevertheless deal with the applicant's legal assertions. The applicant's changed stance, seeking a springboard interdict of 18 months from the date of the order as opposed to the dates stipulated in the notice of motion, reflected its argument that a springboard interdict exists to reverse an unfair competitive advantage, as opposed to addressing existing or ongoing rights violations (such as the ongoing abuse of confidential information or otherwise). The applicant specifically highlights that its case is, predominantly, focused on addressing the effects of alleged past wrongs, which might have occurred during the period that the employee respondents were employed and under contractual restraints or fiduciary duties to the applicant or during the period that they allege TRS was subject to the non-compete agreement. It is during this period that solicitation of and by employees and the diversion of project work are alleged to have taken place and it is largely on the WhatsApp records of this period that the applicant relies to prove its case.

[92] As I understand springboards, they are a measure of the transitory period for which the protected right (including confidential information) remains in existence and, therefore, can be protected from violation by interdict. I discuss, below, the basis upon which I hold that interdicts are not available for past and completed breaches of rights, even if an unfair competitive advantage continues to accrue or exist long after that breach. Interdicts are to prevent ongoing or reasonably apprehended future breaches of rights; they are not there to intrude on the domain of damages by addressing ongoing or long-term damages or advantages flowing from such past breaches of rights.

[93] The Supreme Court of Appeal held in *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw*,⁴¹ as follows:

'[20] An interdict is not a remedy for past invasion of rights but is concerned with present or future infringements.⁴² It is appropriate only when future injury is feared.⁴³ Where a wrongful act giving rise to the injury has already occurred, it must be of a continuing nature or there must be a reasonable apprehension that it will be repeated.'

[94] The past invasion of rights should be addressed by an action for damages.⁴⁴ Interdicts are not and should not be a substitute for a damages action.

[95] In *S v Baloyi*⁴⁵ (albeit in the context of domestic violence interdicts), the Constitutional Court held that the principal objective of granting an interdict is not to punish past misdeeds, but to prevent future misconduct.⁴⁶

[96] In the context of an unlawful competition case relating to springboarding, the above principle was reiterated in the case of *Africa Parts Group Holdings (Pty) Ltd and Others v Titan Auto Parts (Pty) Ltd and Others*,⁴⁷ where the court stated:

'There is a further reason the second applicant is not entitled to interdictory relief, final or interim. Interdictory relief is not aimed at addressing past wrongs; but to prevent future harm reasonably apprehended. Even if for the sake of argument I were to accept that the second applicant has established an actual injury committed in the past, which I am prepared to do, this does not entitle it to an interdict. The fact that the former employees in breach of their contractual obligations divulged confidential information, or any or all of the respondents misused the second applicant's confidential information giving rise to a claim in delict, is not

⁴¹ *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* (462/07) [2008] ZASCA 78; [2008] 4 All SA 225 (SCA); 2008 (5) SA 339 (SCA) (30 May 2008) at para 20.

⁴² See also: *Tau v Mashaba and Others* [2020] ZASCA 26; 2020 (5) SA 135 (SCA) at para 26; *Stauffer Chemicals Chemical Products Division of Chesebrough-Ponds (Pty) Ltd v Monsanto Company* [1988] 3 All SA 279 (T), at page 282.

⁴³ See also: *Phillip Morris Inc v Marlboro Trust Co* SA 1991 (2) SA 720 (A) at 735B.

⁴⁴ *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others* (CCT 39/21) [2022] ZACC 34; 2022 (12) BCLR 1521 (CC); 2023 (1) SA 353 (CC) (22 September 2022) ("*United Democratic Movement*"), at para 48.

⁴⁵ *S v Baloyi and Others* (CCT29/99) [1999] ZACC 19; 2000 (1) BCLR 86; 2000 (2) SA 425 (CC) (3 December 1999).

⁴⁶ *Id.*, at para 17. See also: *United Democratic Movement*, at para 48.

⁴⁷ *Africa Parts Group Holdings (Pty) Ltd and Others v Titan Auto Parts (Pty) Ltd and Others* (20/39009) [2022] ZAGPJHC 8; 2022 BIP 554 (GJ) ("*Africa Parts Group*").

*proof that they will do so in the future; it is merely evidence from which to imply an intention to continue doing so . . .*⁴⁸ (citations omitted)

[97] The court in *Knox D'Arcy*,⁴⁹ recognized that the effectiveness of information (and, therefore, the confidentiality) which provides a springboard '*diminishes with the passage of time and ultimately evaporates entirely*'. If the legal right (confidentiality) which the applicant seeks to protect has diminished or has evaporated, then an interdict, interim or final, is not the appropriate remedy. I consider the following:

- a) The fact that skill, time and effort are required to compile, assemble or coordinate otherwise public objects or information in useful systems, forms or to deduce information from public objects or information is the very characteristic which qualifies these forms, systems or deductions to be confidential information (provided they are also kept secret).⁵⁰ In such cases, any confidentiality is transitory - for the springboard period it would take for someone to deduce, compile, assemble or coordinate them independently.⁵¹ Accordingly, as I see it, the springboard is and defines the period of confidentiality for such information, as opposed to being merely the time period of unfair advantage imposed to penalise the person filching such information. Since it is not merely the latter, it cannot be imposed on the infringer at any time (even when the confidentiality has long gone) in order to level the competitive playing field;
- b) A number of South African cases confirm that a springboard disappears when the information protected by it is no longer confidential.⁵² When this happens,

⁴⁸ *Id.*, at para 68.

⁴⁹ *Knox D'Arcy*, pages 282-283; See also: *Africa Parts Group*), at paras 66-67.

⁵⁰ *Meter Systems Holdings Ltd v Venter and Another* [1993] 3 All SA 574 (W) ("*Meter Systems*"), at pages 590 – 593 (particularly paragraph 10.3); *Packaging & Stapling CC v Fromm System Africa and Others* (966/2010) [2010] ZACPEHC 80 (23 November 2010) ("*Packaging & Stapling*"), at paras 17-18; *Knox D'Arcy*, at pages 226 – 227; Cf. *Harvey Tiling Co (Pty) Ltd v Rodomac (Pty) Ltd and Another* [1977] 1 All SA 481 (T) ("*Harvey Tiling*"), at pages 486 – 492.

⁵¹ *Meter Systems* at pages 590 – 593 (particularly paragraph 10.3); *Packaging & Stapling*, paras 17 – 18, *Knox D'Arcy*, at pages 226 – 227; *Harvey Tiling*, at pages 486 – 492.

⁵² *Africa Parts Group* at paras 65 – 68; *Multi Tube Systems (Pty) Ltd v Ponting and Others* [1984] 3 All SA 578 (D) ("*Multi Tube Systems*"), at pages 584 – 586; *Valunet Solutions Inc dba Dinkum USA & another v eTel Communication Solutions (Pty) Ltd* [2005] JOL 13595 (W) ("*Valunet Solutions*") paras 15 – 17; *Big Catch Fishing Tackle proprietary Limited and Others v Kemp and Others* (17281/18) [2019] ZAWCHC 20 (5 March 2019) ("*Big Catch*") para 44; *Meter Systems*, at pgs 593 (para 10.3);

the right to an interdict also disappears.⁵³ That is in line with the principle that an interdict can only be granted for a continuing or reasonably apprehended future violation of rights (such as continued or future unlawful use of confidential information) and not for a past violation. In *Spieth and another v Nagel*,⁵⁴ the springboard principle was extended to an ex-director's ongoing exploitation of corporate opportunities filched from the company of which he was a director. The court emphasized that a springboard interdict could not be imposed as punishment for past misconduct, but only for the ongoing breach of the ex-director's continuing fiduciary duties to the company because of his ongoing exploitation of this corporate opportunity.⁵⁵

- c) I have canvassed above, the period of some nine months that it took from launching the application to the hearing. A survey of various cases suggests that a springboard may disappear in the course of a delay or lengthy legal proceedings, long before any corrective interdict is given.⁵⁶ This is because the confidentiality, being the springboard period, has expired, even though any lasting competitive advantage gained thereby may not have been redressed, although this may then be addressed by way of damages; and
- d) An interdict is permissible as a remedy for an ongoing or future breach of a right,⁵⁷ and not merely for the ongoing or future suffering of physical or

Knox D'Arcy, at pages 281-282; *SD Noorgat Trading Enterprise CC t/a Powertrade Cash and Carry (Focus Group) v Mahomed* (1179/21P) [2022] ZAKZPHC 2 (28 January 2022) ("*SD Noorgat*"), at paras 44-45, 56, 77 & 80.

⁵³ *Id.*

⁵⁴ *Spieth and another v Nagel* [1998] JOL 1320 (W) ("*Spieth*").

⁵⁵ Thus, at page 17, the court in *Spieth* states: '... I accordingly find that a director's fiduciary duty can survive the termination of his directorship and that there is no reason in principle why in an appropriate case a company should not, while such duty survives, be protected by way of an interdict from an irreparable loss it may otherwise suffer if the director, following his resignation, is allowed to continue to exploit a commercial opportunity created in breach of his fiduciary duty. To afford such protection must accord with public policy and the boni mores of the commercial community. To do so is not to punish the delinquent director for his past misconduct but to secure the cessation of an unlawful course of conduct which after all is the object of an interdict (see *Press The Law of Interdicts* page 42).'

⁵⁶ *Multi Tube Systems*, at pages 582 – 584; *Valunet Solutions* paras 9, 15 –17; *Taskflow (Pty) Ltd v Aluxium (Pty) Ltd and Others* (2021/41676) [2021] ZAGPPHC 604 (21 September 2021), at para 25; *SD Noorgat*, paras 9, 44-45, 56-57, 60, 65, 69, 77; *Big Catch*, para 46.

⁵⁷ See: *V & A Waterfront*, at paras 19 – 22; *Exxaro Coal Mpumalanga*, at para 13-14. *Reddy*, at para 22; *Masstores*, at paras 8 and 101-103; *Oasis Group Holdings*, paras 36 – 37; *Forensic Data Analysts*, paras 61 – 64; *Harmony Golf Mining*, para 19; *Khumalo v Master of High Court Johannesburg and Another* (2023/095270) [2023] ZAGPJHC 1158 (9 October 2023), paras 16 -19; *Boardwalk Trading*

pecuniary harm or damage.⁵⁸ Accordingly, no interdict is permissible where the breach of rights occurs in the past, even if damages from it continue to accrue into the future. In *Reddy v Siemens Telecommunications (Pty) Ltd*,⁵⁹ in the context of enforcing a restraint agreement, the court confirmed that breaching a contractual restraint by entering the employ of a competitor was sufficient for an interdict, quite independently of whether any damage would flow from this.⁶⁰ Even in cases where the breach of rights is founded in a delict of unlawful competition, a breach of that right occurs at the time the very first damage is manifested (not as the damage thereafter accrues or for the period it persists).⁶¹

[98] An applicant is required to prove, not merely allege, the following two integrally linked material facts:

- a) the confidentiality of any information claimed as such.⁶² The requisite confidentiality has very specific legal requirements.⁶³
- b) the length of its springboard.⁶⁴

[99] In this case, the applicant has not put up the specific facts and, where necessary, expert evidence to prove these material facts. It is not clear how the period sought for the springboard was calculated.

175 CC v *City Of Ekurhuleni Metropolitan Municipality and Another* (2023/101032) [2023] ZAGPJHC 1163 (16 October 2023), paras 25 – 26; *Eastern Produce Estates SA (Pty) Ltd v Wales Communal Property Association and Others* (LCC 201/2015) [2018] ZALCC 4; 2018 (4) SA 220 (LCC); [2018] 3 All SA 123 (LCC) (4 April 2018), para 71.

⁵⁸ *V & A Waterfront*, at paras 19 – 22; *Oasis Group Holdings*, para 36 – 37. *Forensic Data Analysts*, paras 62 – 64. *Harmony Golf Mining*, paras 18-19.

⁵⁹ *Reddy*, at para 22.

⁶⁰ Cf. *Oasis Group Holdings*, para 35 – 37.

⁶¹ *Oslo Land Co Ltd v The Union Government* 1938 A.D. 584 at 590 – 593.

⁶² *Strike Productions* paras 17, 22-24, 34-35; *Alum-Phos (Proprietary) Limited v Spatz and another* [1997] 1 All SA 616 (W) ("*Alum-Phos*") at page 623; *Hirt & Carter (Pty) Ltd v Mansfield and another* [2007] 4 All SA 1423 (D), at paras 56-58; *Petre & Madco (Pty) Ltd t/a T-Chem v Sanderson-Kasner and Others* [1984] 4 All SA 171 (W), at page 178.

⁶³ *Motion Transfer*, at page 175; *Alum-Phos* at page 623.

⁶⁴ *Triomed (Pty) Ltd v Beecham Group PLC and others* [2001] 2 All SA 126 (T), at page 159; *Valunet Solutions*, at para 17. In the English case of *QBE Management Services (UK) Ltd v Dymoke & Ors* [2012] EWHC 80 (QB) (27 January 2012), at para 247, the court indicated that an applicant bears the burden of spelling out the precise nature and period of its competitive advantage.

[100] In contrast to the South African position sketched above, an English court in *Vestergaard Frandsen A/S & Ors v Bestnet Europe Ltd & Ors*,⁶⁵ opined after a review of contradictory English authorities, that it was unclear whether an springboard injunction can be granted to prevent a defendant from benefiting from a past misuse of confidential information.⁶⁶

[101] The grant of an injunction to prevent a defendant from benefitting from a past (and not continuing) misuse of confidential information or some other past unlawful act is contrary to standard South African principles governing interdicts and renders any English authorities, on this point, an unreliable guide to South African law.

[102] Insofar as the applicant sought to base its cause of action on an alleged unlawful solicitation of employees (by one another or by TRS) occurring during the period of employment, any such breaches of rights would lie in the past. This could not be the subject of an interdict.

Order

[103] In the result the following orders are made:

- a) The application is dismissed with costs. Such costs to include the costs of 21 November 2023, 6 December 2023 and 8 May 2024 and to include the costs of two counsel on scales C and B of the High Court scale.



T.S. SIDAKI
Acting Judge of the High Court

⁶⁵ *Vestergaard Frandsen A/S & Ors v Bestnet Europe Ltd & Ors* [2009] EWHC 1456 (Ch) (26 June 2009).

⁶⁶ *Id.*, at para 93.

Appearances:

Applicant: Mr M Seale SC

Mr SG Fuller

Instructed by: Bernard Vukic Potash & Getz

Respondent: Mr R McClarty SC

Mr M Aggenbach

Instructed by: Heyns & Partners