IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Not reportable

Case no: 2026-081309

In the matter between:

GNS GRAIN TRADING CC	**APPLICANT**
and	
FRANCOIS PETRUS MOSTERT	**FIRST RESPONDENT**
RE GROUNDNUTS (PTY) LTD	**SECOND RESPONDENT**

Neutral citation: *GNS Grain Trading CC v FP Mostert and Another* (2026-081309) [2026] ZAFSHC 326 (5 June 2026)

Coram: DAFFUE J

Heard: 7 May 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand-down is deemed to be 15h30 on 5 June 2026.

Summary: Striking out application in terms of rule 6(15) of the Uniform Rules of Court – the applicant's replying affidavit contained new matter – the court declined to exercise its discretion to allow new matter as it was not an exceptional case – application to strike out granted with costs.

ORDER

All allegations in the replying affidavit referred to in paragraph 2 of the respondents' striking out application dated 24 April 2026, including the confirmatory affidavit of Mr Franjo Viljoen attached as annexure REP2 thereto, are struck out with costs.

JUDGMENT

Daffue J

[1] On 8 April 2026, GNS Grain Trading CC instituted motion procedure in this court on an urgent basis intending to obtain relief on 30 April 2026 based on a restraint of trade covenant. Francois Petrus Mostert, a former employee, was cited as first respondent and RE Groundnuts (Pty) Ltd, Mr Mostert's present employer, as second respondent. I shall refer to the applicant as GNS and to the respondents as such, unless I need to refer to them separately in which case I shall refer to them as Mostert and Groundnuts respectively.

[2] Truncated time-frames were provided in the notice of motion. The respondents, if they intended to oppose the application had to give notice to oppose on 10 April 2026 and file their answering affidavits on/or before 15 April 2026. There was a weekend between these two dates. GNS stated it would reply on 17 April 2026. The respondents duly opposed the application and filed their answering affidavits timeously. Although GNS filed its replying affidavit timeously, it filed a supplementary replying affidavit on 21 April 2026 without seeking leave from the court at any stage.

[3] The urgent application could not be heard on 30 April 2026 as GNS' counsel's flight from Durban to Bloemfontein was delayed because of inclement weather conditions. Consequently, the application was postponed for hearing on 7 May 2026 and eventually allocated to me for adjudication. It should be mentioned that heads of argument were

indeed filed by both parties in respect of the merits of the application.

[4] On 24 April 2026, the respondents filed a notice in terms of rule 6(15) of the Uniform Rules of Court, wherein they sought the striking out of several passages in the replying affidavit on the basis that this constituted new matter which ought to have been contained in the founding affidavit. Notwithstanding the wording of rule 6(15), this court's inherent common law power to strike out matter in the replying affidavit, including evidence which ought to have appeared in the founding affidavit, is uncontentious. As stated in *Gold Fields v Motley Rice LLC*,[1] the rationale behind striking out applications is sound insofar as it inter alia '*promotes orderly ventilation of the issues, promotes focus on the real issues* [and] *prevents proliferation of issues*'.

[5] The parties failed to file any heads of argument pertaining to the striking-out application and thus kept the court in the dark as to how this matter would be dealt with. When the matter was called on 7 May 2026, Mr S Grobler SC submitted on behalf of GNS that the striking-out application ought to be argued separately for me to make a finding in that regard, whereafter the merits could be argued. Mr MC Louw, on behalf of the respondents, did not object. After I heard oral argument from both sides without the benefit of written heads of argument, I reserved judgment.

[6] During oral argument, Mr Grobler made an open tender in court on behalf of his client to settle the main dispute, which tender was open for acceptance until the following Monday, 11 April 2026 at 10h00. He relied on the wording of clause 7 of the notice of motion, changing the restraint period from 24 months to 12 months, and indicated that an order in the following terms only would suffice:

'7. The First Respondent is interdicted and restrained from, within a period of 12 months calculated from 1 April 2026 in the geographical area of the Free State, Northern Cape and North West Province:

7.1 . . .

7.2 soliciting the custom of or deal with or in any way transact with, in competition with the Applicant, any business, company, firm, undertaking, association or person which during the period of 12 months preceding 1 April 2026 had been a customer or supplier of the Applicant.'

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[1] *Gold Fields Limited and Others v Motley Rice LLC, In re: Nkala v Harmony Gold Mining Company Limited and Others* [2015] ZAGPJHC 62; 2015 (4) SA 299 (GJ); [2015] 2 All SA 686 (GJ) para 120.

[7] I was informed that the open tender had been rejected. Bearing in mind a busy schedule and time constraints, I could not prepare a judgment immediately. I shall refrain from dealing with the merits of the main application, but it is apposite to briefly deal with the authorities pertaining to restraint of trade disputes before adjudicating the interlocutory application. I shall do so soon.

[8] Mr Grobler made the following introductory remarks in his heads of argument, which as mentioned, dealt with the main application only:

'There is not much up for debate. The wheat, winnowed from the chaff, reveals the Applicant is entitled to exactly what it asks. It is common cause that the Applicant (***"GNS"***) had concluded an agreement in restraint of trade with the First Respondent (***"Mostert"***), and that he stands in breach of it. It should be considered as beyond reproach that the Applicant has confidential information, a protectable interest in that sense and existing clientele in all the Provinces covered by the restraint of trade covenant as another protectable interest, and that Mostert's involvement with the Second Respondent threatens these.'

[9] Mr Grobler submitted during his oral address that an applicant relying on a restraint of trade covenant needs to rely on two requirements in the founding affidavit and evidence to be led only in that regard, to wit:

(a) the restraint of trade covenant; and

(b) that the former employee is in breach thereof.

I beg to differ and shall explain soon.

[10] If Mr Grobler's submission is accepted as correct in law, it would mean that an applicant relying on a restraint of trade covenant in motion proceedings may depose to a two page founding affidavit, stating that a contract has been entered into which is attached to the founding affidavit and that the former employee is in breach of the contract. To use an extreme example: A firm of attorneys in Bloemfontein alleges that the attorney who was in their employ for six months should be prohibited to practise as an attorney at any place in South Africa for the next five years, the reason being that the parties agreed to such a restraint. Surely, any court considering such application, even if unopposed, will not grant such extraordinary relief. Such court will have to consider whether the contractual terms conflict with constitutional values even where the parties consented

thereto, as reiterated in *Barkhuizen v Napier*.[2]

[11] Although it is trite, as reiterated in *Digicor Fleet Management v Steyn*,[3] that the onus is on Mostert to show that GNS is not entitled to relief, GNS in electing to institute motion proceedings will only be entitled to succeed if the court eventually find in its favour in accordance with the well-known *Plascon-Evans* principles.

[12] In *Mangaung Building Materials & Hardware (Pty) Ltd t/a Mangaung Build It v Zulu and Another; Mangaung Building Materials & Hardware (Pty) Ltd t/a Mangaung Build It v Sekhoane and Another,*[4] I summarised some legal principles pertaining to restraint of trade disputes. I quote paragraphs 17 and 18 only:

'[17] Although the public interest requires parties to comply with their contractual undertakings, it is also in the public interest that all persons shall be granted an opportunity to remain economically productive to enable them to earn a living and to support their families. This was again reiterated in Reddy v Siemens Telecommunications (Pty) Ltd. The court continued in Reddy as follows:

"A restraint would be unenforceable if it prevents a party after termination of his or her employment from partaking in trade or commerce without a corresponding interest of the other party deserving of protection. Such a restraint is not in the public interest."

[18] In conclusion, and as Malan AJA did in Reddy, a court should follow the approach adopted in Basson v Chilwan and Others where four questions were identified that should be asked to consider the reasonableness of a restraint of trade:

(a) Does the one party have an interest that deserves protection after termination of the agreement?

(b) If so, is that interest threatened by the other party?

(c) In that case, does such interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive?

(d) Is there an aspect of public policy having nothing to do with the relationship between the parties that requires the restraint to be maintained or rejected?' (Footnotes omitted.)

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[2] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) para 30.

[3] *Digicore Fleet Management (Pty) Ltd v Steyn and Another* [2008] ZASCA 105; [2009] 1 All SA 442 (SCA) para 7.

[4] *Mangaung Building Materials & Hardware (Pty) Ltd t/a Mangaung Build It v Zulu and Another; Mangaung Building Materials & Hardware (Pty) Ltd t/a Mangaung Build It v Sekhoane and Another* (3387/2020; 3388/2020) [2020] ZAFSHC 188 (26 October 2020) paras 17 and 18; the references are to *Reddy v Siemens Telecommunications (Pty) Ltd* [2006] ZASCA 135; 2007 (2) SA 486 (SCA); (2007) 28 ILJ 317 (SCA) at paras 15 and 16; *Basson v Chilwan and Others* [1993] ZASCA 61; 1993 (3) SA 742 (AD) at 767 G-H. See also in general: Bradfield, *Christie's Law of Contract in South Africa* 7th ed, p 427 and further.

[13] I do not intend to quote the various paragraphs the respondents sought to be struck out but shall confine myself to general principles. Clearly, GNS tried to rely on new evidence in the replying affidavit pertaining to (a) Mostert's contact with GNS' customers; (b) Mostert being in possession of confidential information which may or will be used by Groundnuts as a springboard to increase its business activities; and (c) that a certain Mr Franjo Viljoen, who was previously employed by Groundnuts but now by GNS, was aware that Groundnuts' intended to employ Mostert to make use of his confidential information to compete unlawfully with GNS.

[14] Mr Viljoen's evidence was available to GNS at the stage when the application was issued. Notwithstanding such knowledge, GNS elected not to rely on this evidence in support of its application. No proper explanation was provided why this evidence did not form part of the founding affidavit. I am not appreciative of the apparent tactic of holding back evidence in the hope that the respondents might be caught off guard by presenting such evidence in reply, well-knowing that a fourth set of affidavits will only be allowed in exceptional circumstances. In my view GNS should have taken time to draft a proper founding affidavit, but either decided against it considering the alleged urgency, or sought to obtain a tactical advantage as mentioned.

[15] This is not a case such as in *Lagoon Beach Hotel v Lehane*[5] where the appellant was permitted to amplify its case in reply because of the urgency of the matter and the absence of the witness in possession of the primary evidence when the urgent application was launched. In that case the Court considered the appellant's practical difficulties in gathering evidence in a short space of time. Also, this is not a case such as in *Drift Supersand (Pty) Ltd v Mogale City Local Municipality and Another*[6] where the applicant merely clarified and elaborated on its original claims. In *Nkengana and Another v Schnetler and Another*[7] the Court held that 'if the new matter in the replying affidavit is in answer to a defence raised by the respondent and is not such that it should have been included in the founding affidavit in order to set out a cause of action, the court will refuse an application to strike out.' All three these judgments are distinguishable from the facts

[5] *Lagoon Beach Hotel v Lehane* [2015] ZASCA 210; [2016] 1 All SA 660 (SCA); 2016 (3) SA 143 (SCA) para 16.
[6] *Drift Supersand (Pty) Ltd v Mogale City Local Municipality and Another* [2017] ZASCA 118; [2017] 4 All SA 624 (SCA) para 10.
[7] *Nkengana and Another v Schnetler and Another* [2010] ZASCA 64; [2011] 1 All SA 272 (SCA) para 10.

in casu and do not support GNS' submissions.

[16] Clearly, the new evidence was presented to put Groundnuts in a bad light. It is litigation by ambush. We have heard in reply for the first time that Groundnuts intended to compete unlawfully by specifically targeting GNS' customers through Mostert's alleged connections. It is GNS' case in reply that upon termination of the business relationship between it and Groundnuts, the last-mentioned was in need to obtain new business and Mostert was a suitable candidate to assist them.

[17] To bolster his argument in seeking dismissal of the interlocutory application, Mr Grobler relied upon two dicta, one by Botha JA in *Basson v Chilwan and Others*[8] (*Basson*) and the other by Cloete JA in *Kwikspace Modular Buildings Ltd v Sabodala Mining Company SARL and Another*[9] (*Kwikspace*). I have already dealt with his argument pertaining to Cloete JA's *dictum* in *DIY Superstores (Pty) Ltd v Kruger and Another*[10] (*DIY*). Although expressed as the scribe in a unanimous judgment, it remains an obiter dictum and not part of the ratio decidendi of the judgment. In *Kwikspace* a totally different factual situation that might have arisen, but did not, was considered.

[18] Four separate judgments were written in *Basson*. It must be emphasised that in *Basson* the covenantee presented detailed evidence in the founding affidavit why it should be afforded relief, although it changed tack to an extent in reply. In Eksteen JA's minority judgment, the learned justice, although referring thereto, did not have regard to the allegations raised for the first time in the replying affidavits.[11] Nienaber JA, writing for the majority in *Basson*, considered the replying affidavits but pointed out that the applicants in the court a quo presented a different version in reply to obtain relief.[12] Botha JA, in a separate judgment in *Basson,* agreed with the majority, but because of differences of opinion amongst the members of the bench, felt that he had to explain his views. He opined that an applicant in restraint of trade proceedings only need to invoke the provisions of the contract and prove the respondent's breach thereof.[13]

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[8] *Basson v Chilwan and Others* [1993] ZASCA 61; 1993 (3) SA 742 (AD) at 776H.
[9] *Kwikspace Modular Buildings Ltd v Sabodala Mining Company SARL and Another* [2010] ZASCA 15; [2010] 3 All SA 467 (SCA); 2010 (6) SA 477 (SCA) para 20.
[10] *DIY Superstores (Pty) Ltd v Kruger and Another* [2022] ZAFSHC 75; [2022] HIPR 193 (FB) para 30.
[11] *Basson loc cit* at 753E.
[12] *Ibid* at 765B-773A.
[13] Ibid at 776I-777B.

[19] Mr Grobler relied on Botha JA's aforesaid dictum in submitting that the application to strike out ought to be dismissed. However, the learned justice continued as follows insofar as Mr Basson would be restrained from carrying on his trade anywhere in South Africa if the appeal was to be dismissed: 'I am not aware that a restraint so oppressive in scope has ever been countenanced in our Courts.' Insofar as this last statement may have a bearing on the merits, I refrain from making further comments, save to say that the judgment must be read in context.

[20] It is trite that a party electing to make use of motion procedure must make out a case for relief in the founding affidavit. Applicants must stand or fall by their founding affidavit and the facts alleged therein as authoritatively stated in *Director of Hospital Services v Mistry*.[14] It is also trite that in motion proceedings, the affidavits constitute both the pleadings and the evidence. Respondents have the right to know what case they have to meet.[15] They are called upon to respond to the case which the applicant elected to bring to court and are afforded only one opportunity to present evidence in opposition to which the applicant may respond without raising new issues. The general rule is indeed: in motion proceedings there are three sets of affidavits. Upon filing of the founding, answering and replying affidavits (with supporting affidavits if applicable), the pleadings and evidence in motion proceedings are closed.

[21] I accept that, notwithstanding the aforementioned general rule, it is not absolute and that the court may in the exercise of its discretion and in exceptional cases allow new matter in the replying affidavit, as recently confirmed in *Mostert and Others v Firstrand Bank t/a RMB Private Bank*.[16] In exercising its discretion, a court:

(a) may consider various factors that could not be put right by orders of postponements and costs; and

(b) whether the new matter was known to the applicant when the application was launched.

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[14] *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 636A.

[15] See *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* [2008] ZASCA 78; [2008] 4 All SA 225 (SCA); 2008 (5) SA 339 (SCA) paras 29 and 30.

[16] *Mostert and Others v Firstrand Bank t/a RMB Private Bank* [2018] ZASCA 54; 2018 (4) SA 443 (SCA) para 13.

[22] In a more recent judgment of the Supreme Court of Appeal, the Court held in *IPA Foundation (NPC) v South African Pharmacy Council*[17] as follows:

'In the present case, the IPA aimed to bolster their grounds of review in its replying affidavit. By including affidavits from several associations that had not been mentioned in the founding papers, it sought to support its review application with new evidence and arguments that were not part of its initial case. The affidavits were introduced to strengthen the IPA's case. The supporting affidavits contained substantive arguments in favour of the primary relief claimed in the founding affidavit, rather than by way of rebuttal of the averments in the answering affidavit. They, therefore, constituted new material introduced for the first time in the replying affidavit. It is trite that an applicant must stand or fall by the averments made out in its founding affidavit. It was therefore impermissible for the IPA to make out a new case in the replying affidavit.'

[23] In *Porterstraat 69 Eiendomme (Pty) Ltd v P A Venter Worcester (Pty) Ltd*[18] (*Porterstraat*) the court allowed a further affidavit to be filed by the respondent in an opposed winding-up application after having considered the following factors which I quote:

'(i) The reason why the evidence was not led timeously.

(ii) The degree of materiality of the evidence.

(iii) The possibility that it may have been shaped to 'relieve the pinch of the shoe'.

(iv) The balance of prejudice, viz the prejudice to the plaintiff if the application is refused and the prejudice to the defendant if it is granted.

(v) The stage which the particular litigation has reached. Where judgment has been reserved after all evidence has been heard and, before judgment is delivered, plaintiff asks for leave to lead further evidence, it may well be that he or she will have a greater burden because of factors such as the increased possibility of prejudice to the defendant, the greater need for finality, and the undesirability of a reconsideration of the whole case, and perhaps also the convenience of the Court.

(vi) The 'healing balm' of an appropriate order as to costs.

(vii) The general need for finality in judicial proceedings.

(viii) The appropriateness, or otherwise, in all the circumstances, of visiting the fault of the attorney upon the head of his client.'

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[17] *IPA Foundation (NPC) v South African Pharmacy Council* [2025] ZASCA 148; [2026] 1 All SA 41 (SCA); 2026 (2) SA 56 (SCA) para 28.

[18] *Porterstraat 69 Eiendomme (Pty) Ltd v P A Venter Worcester (Pty) Ltd* 2000 (4) SA 598 (C) at 617B-F.

[24] Although *Porterstraat* did not deal with new evidence to be presented in a replying affidavit, the principles enunciated may be applied in casu as well. Of course, an applicant relying on new evidence in reply will always submit that the respondent may be allowed an opportunity to file a fourth set of affidavits on request. It was suggested in casu as well. The finality of the matter is an important aspect to consider. GNS decided to embark on urgent litigation. It even afforded itself the right to file a supplementary replying affidavit for which leave was not even sought. If the respondents accepted the new evidence in reply, they might have asked leave to file a response thereto, also referred to as a rejoinder. The application would have to be postponed with a suitable costs order. Such an option might have caused the filing of affidavits to get out of hand. GNS may even decide to ask leave to file another affidavit in response, referred to as a surrejoinder. All this may transpire in a case that the applicant regarded as urgent from the onset.

[25] I have already dealt with GNS' failure to properly explain why the new evidence was not presented in the founding affidavit. Although the new evidence may be regarded as material in respect of the relief claimed, the court adjudicating the main application may yet deal with GNS' claims in accordance with the general principles applicable to restraint of trade disputes. I reiterate that it appears as if GNS either intentionally embarked on litigation by ambush or decided to rely on the new evidence to relieve the proverbial pinch of the shoe. Insofar as prejudice is concerned, GNS may continue to claim relief and any prejudice it may suffer is much less than the respondents may suffer, bearing in mind they have been brought to court to deal with the issues raised in the founding affidavit. It is not sufficient to say that an appropriate costs order in the respondents' favour will provide adequate relief. If leave should be granted to file a rejoinder in the event of dismissal of the striking-out application, the respondents will have to take time out of their daily schedules to consult with their legal team in Bloemfontein while they are from outside town. This matter must be finalised as soon as possible, and no further time shall be wasted on the filing of further affidavits which will obviously lead to the filing of supplementary heads of argument.

[26] Although I have some sympathy for GNS, it failed to persuade me that the striking-out application should be dismissed. Having considered the application papers, the parties' submissions and relevant authority, I am satisfied that all the offending passages in GNS' replying affidavit, with the inclusion of the confirmatory affidavit of Mr Viljoen,

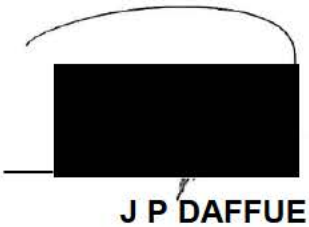
shall be struck out.

[27] I requested both counsel during the hearing to provide me with available dates to postpone the application to a specific date for hearing of the main application, but no date was agreed upon. Instead of postponing the application sine die, I shall make no order pertaining to postponement. This will allow GNS to enrol the main application as it deems fit, but obviously with proper and sufficient notice to the respondents.

Order

[28] In the result:

All allegations in the replying affidavit referred to in paragraph 2 of the respondents' striking out application dated 24 April 2026, including the confirmatory affidavit of Mr Franjo Viljoen attached as annexure REP2 thereto, are struck out with costs.



J P DAFFUE

JUDGE OF THE HIGH COURT

Appearances

For the Applicant:	S Grobler SC
Instructed by:	Kramer Weihmann Inc, Bloemfontein.
For the First and Second Respondents:	MC Louw
Instructed by:	MM Hattingh Attorneys Inc, Bloemfontein.