IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER: 16785/2023

In the matter between:

NEOVISION GROUP (PTY) LTD **Applicant**

And

NEOVISION WATERFRONT INCORPORATED **First Respondent**

WERNER NEFDT **Second Respondent**

REASONS FOR ORDER

DELIVERED ELECTRONICALLY ON 3 NOVEMBER 2023

MANGCU-LOCKWOOD, J

A. INTRODUCTION

[1] On 13 October 2023 I granted an order in this matter as follows:

> "1. The applicant's non-compliance with the time periods, forms and processes prescribed in the Uniform Rules of Court is condoned, and this application may be heard as one of urgency in terms of Uniform Rule 6(12);

2. The respondents are temporarily interdicted from directly or indirectly, performing any optometry related services within 2km radius of Dock Road Junction, V&A Waterfront, Cape Town pending the outcome of an arbitration to be initiated by the applicant, within 10 days of this Order, by referring the dispute to arbitration and requesting the Chairperson of the Arbitration Foundation of South Africa to appoint an arbitrator;

3. The costs of this application shall stand over for determination at the arbitration referred to above."

[2] I hereby provide the reasons for the order.

B. BACKGROUND & FACTS

[3] The applicant, duly represented by one of its directors, Ruediger Naumann (*"Nuamann"*) brought an urgent application for the said relief against the first and second respondents pursuant to the provisions of a franchise agreement entered into between the applicant and the first respondent, which is discussed further below.

[4] The first respondent is an optometry practice described in the papers as Neovision Waterfront Incorporated which, at the time of the application was situated at Unit 9 Dock Road Junction, V&A Waterfront. The second respondent is a director and business owner of the first respondent.

[5] It is common cause that on 20 September 2018, the applicant and first respondent concluded a franchise agreement (*"the agreement"*) for an initial period of five years, which allowed the first respondent, as franchisee, to establish a franchise to operate a Neovision Optometrist Practice – a defined term in the agreement. The parties to the agreement were described as Neovision Group Proprietary Limited (the applicant) and Neovision Woodstock Incorporated.

[6] It is common cause that, in terms of the agreement, the applicant has exclusive rights to establish, appoint and grant franchise rights for use of its Intellectual Property rights, trademarks and System for the development and operation of Neovision Optometrist Practices in South Africa.

[7] When the agreement came into place, the first respondent conducted its practice from a Woodstock address at Shop 2A, Ground Floor, Upper East Side, 31 Brookfield Road, Woodstock (*"the Woodstock address"*), and it is common cause that its practice commenced there in October 2017 under the auspices of the applicant.

[8] In January 2020 the first respondent opened an additional optometry practice at Unit 9, 8 Dock Road, Waterfront, Cape Town (*"the Waterfront address"*). Before entering into the Waterfront lease whose duration was to expire in September 2022, the first respondent obtained the consent of the applicant pursuant to clause 8.1 of the agreement. At the end of 2021 the first respondent ceased operating from the Woodstock address apparently due to declining performance brought to bear by COVID-19, and accordingly only practiced at the Waterfront address.

[9] On 9 September 2022, the parties amended the agreement to record, amongst other things, that the first respondent was not entitled to extend its lease without permission of the applicant. In terms of clause 38.2 no variation to any provision of the agreement or annexure thereto will be of any force or effect unless in writing and signed by the parties. In compliance with that provision, the amendment of 9 September 2022 was effected in terms of an addendum to the agreement, which recorded that the agreement was between the applicant and *"Neovision Woodstock Incorporated trading as Neovision Waterfront"*. By contrast, it is common cause that no amendments were effected to the agreement as a result of the opening of the Waterfront site. There was also no amendment effected to the agreement as a result of the closure of the Woodstock site.

[10] On 27 October 2022, the parties signed a further amendment to the agreement, recording that Neovision Woodstock Incorporated had changed its name to Neovision Waterfront Incorporated. The first respondent was described in that agreement as *"Neovision Waterfront Incorporated (previously Neovision Woodstock Incorporated trading as Neovision Waterfront), a company registered in accordance with the laws of South Africa under registration number 2017/412232/21, 8 Dock Road, Cape Town City Centre, Waterfront, 8001, Cape Town, South Africa (Neovision, Waterfront)".*

[11] By letter dated 28 October 2022 the applicant granted consent for the first respondent to enter into a further lease agreement with the V&A Waterfront (Pty) Ltd for Shop 9, Dock Road Junction (the Dock Road location) for a period to 30 September 2023. The respondents explain that this was an extension of the lease agreement which was due to expire in September 2022. The letter of 28 October 2022 expressly stated that the consent was granted in terms of clause 8.1 of the agreement.

[12] Clauses 8.1 and 8.2 of the agreement provide as follows:

> "8.1 The Franchisee shall not enter into any agreement of lease relating to the hire of a Location without the prior written approval of the Location by the Franchisor. Any lease shall be for an initial period of not less than the Initial Period and shall have a substantive, enforceable right of occupation or renewal for a period of not less than the Initial Term Capital.
>
> 8.2 The Franchisor will not grant the right to open another Neovision Optometry Practice to any third party within the Exclusive Area".

[13] It is common cause that there was no addendum effecting the amendment in respect of the extension of the lease to the end of September 2023.

[14] In addition to the agreement, the parties entered into an agreement in terms of which the second respondent in his personal capacity guaranteed as the primary obligation, all of

the first respondent's indebtedness and obligations of whatsoever nature to the applicant (*"the guarantee"*).

[15] The agreement was due to expire on 30 September 2023 and the first respondent opted not to renew it and the parties agree that it was terminated on that date.

[16] On 23 September 2023, shortly before expiry of the agreement, Naumann discovered a notice at the first respondent's Waterfront address informing the public that that the first respondent was moving to a new location which was two doors away from its premises at the time, at Spaces Office, Dock Road Junction, corner of Stanley and Dock Road, Cape Town. The notice was advertised in the window of the business of the first respondent, and was also circulated via e-mail to the first respondent's clients, and via an Instagram post. In addition, the applicant discovered an e-mail dated 29 September introducing the new business called Kaleidovision to Neovision clients.

[17] Thereafter, the parties engaged in correspondence, which in effect, forms the basis for this application and the opposition.

C. THE PARTIES' CASES

[18] The applicant states that the new location is within the area of restraint and therefore the relocation, under the new name of Kaleidovision, constitutes a breach of the agreement. It states that, during the term of the agreement between the parties, the respondents have come to know the confidential information of the applicant, including its know-how, costing and supplier arrangements, systems and standards, marketing strategies and pricing. Furthermore, the applicant points out that the respondents' marketing of its relocation to its client makes it seem like Neovision and its associated expert services will continue simply under a different name and will be moving in order to expand. The applicant states that this is a misrepresentation in an attempt to keep Neovision's clients.

[19] The respondents' primary argument is that it will no longer be trading and is to be wound up, although there is no indication in the papers when this will be. Consequently, it points out that it cannot be in breach of the restraint agreement if it is no longer in trade. Furthermore, the second respondent is not a party to the franchise agreement and accordingly cannot be held responsible for the restraint provisions. The applicant does not dispute that the first respondent is to be wound up, but it points out that even if the first respondent is to be wound up, the second respondent remains bound by the restraint undertakings and the guarantee.

[20] As regards the guarantee, the respondents point out that the Secured Obligations for which the second respondent stood as guarantor are those obligations which the first respondent as franchisee owed to the applicant. Since the first respondent is closing its business, the second respondent has complied with his obligations as guarantor.

[21] The next main issue between the parties relates to whether Kaleidovision is to provide services which are distinguishable from the practice of the applicant. The respondents state that the intention is for Kaleidovision to be the first vision therapy-only practice, which is also referred to as functional vision rehabilitation. In this regard, a distinction is drawn between, on the one hand optometry services, and on the other, functional vision rehabilitation services which include clinical eye care and developmental optometry services. On the basis of this distinction, it is stated that Kaleidovision will not be a competitor of the applicant.

[22] This issue is vehemently denied by the applicant which states that all eye care-related services constitute optometry services, all of which are restrained in terms of the agreement. Furthermore, the applicant points out that on the respondents' own version they intend contravening the terms of the agreement because the services they intend providing are optometry services. Further, that the distinction created by the respondents is misleading, artificial and nonsensical because the very essence of optometry is the practice

by an optometrist of examining the eyes and testing visual acuity and prescribing corrective lenses for corrective measures. Moreover, the applicant points out that the respondents' own marketing language is that they will be relocating and expanding their eye care services, not closing down or only providing functional vision rehabilitation services, which is what the respondents now state.

[23] In any event, the applicant points out that its main business is not to sell spectacles or contact lenses but to also provide multiple other optometry services which include comprehensive eye tests, glaucoma screening and vision therapy, amongst others. The applicant refutes the respondents' allegations that it (the applicant) does not engage in vision therapy, adding that it actively markets and promotes vision therapy to attract existing and prospective clients, and this is what the respondent now refers to as developmental optometry.

[24] Next is a dispute regarding the area of restraint. In this regard, the respondents argue that the franchise agreement has not been varied in terms of clause 38.2 of the agreement, because no written addendum was ever concluded, effectively providing for the change of the location to the first Waterfront address. Accordingly, the argument goes, the 2km radius identified in clause 28.1.1 neither covers the Waterfront address, nor the new address of the Kaleidovision practice, and must be construed with reference to the Woodstock address and not from the V & A Waterfront address.

D. THE APPLICABLE LAW

[25] The requirements for an interim interdict are well-known. The applicants must establish (a) a *prima facie* right even if it is open to some doubt; (b) a reasonable apprehension of irreparable and imminent harm to the right if the interdict is not granted; (c) the balance of convenience must favour the grant of the interdict; and (d) the applicant must have no other available remedy.

[26] An interim interdict does not involve a final determination of the rights of the parties, and does not affect their final determination, but preserves or restores the *status quo* pending the final determination of those rights.[1]

[27] When weighing the evidence the applicable test is that which is set out in *Webster v Mitchell*[2], as qualified by *Gool v Minister of Justice and Another*[3], in terms of which the applicants must show that on their version, together with the allegations of the respondents that they cannot dispute, they should obtain relief at the trial. If, having regard to the respondents' contrary version and the inherent probabilities serious doubt is then cast on the applicants' case, the applicants cannot succeed. [4]It is not necessary for an urgent court to make a final determination on the legal issues.[5]

[28] In *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and Another*[6] *the court* explained the approach to be adopted in applying the requirements for an interim interdict in the following terms:

> *"In exercising its discretion the Court weighs, inter alia, the prejudice to the applicant, if the interdict is withheld, against the prejudice to the respondent if it is granted. This is sometimes called the balance of convenience. The foregoing considerations are not individually decisive, but are interrelated; for example, the stronger the applicant's prospects of success the less his need to rely on prejudice to himself. Conversely, the more the element of 'some doubt', the greater the need for the other factors to favour him. The Court considers the affidavits as a whole, and the interrelation of the foregoing considerations, according to the facts and probabilities…Viewed in that light, the reference to a right which, 'though prima facie established,*

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[1] *Apleni v Minister of Law and Order* 1989 (1) SA 195 (A) 201.
[2] *Webster v Mitchell* 1948 (1) SA 1186 (W) at 11189.

[3] *Gool v Minister of Justice and Another*, 1955 (2) SA 682 (C) at 688E.

[4] *Spur Steak Ranches Ltd and Others v Saddles Steak Ranch, Claremont and Another* 1996 (3) SA 706 (C) at 714E-H; See also *Gool v Minister of Justice and another* 1955 (2) SA 682 (C) at 688 (E).
[5] *Zulu v Minister of Defence and Others* 2005 (6) SA 446 (T) paras 41 - 42.
[6] *Eriksen Motors* (Welkom) Ltd *v Protea Motors & Others* 1973 (3) SA 685 (A) at 691E-G.

is open to some doubt' is apt, flexible and practical, and needs no further elaboration".

E. DISCUSSION

[29] The applicant relies on contractual rights and breach thereof as a *prima facie* right. The primary provisions relied upon are contained in clause 28, which provides as follows:

"28.1 The Franchisee to protect the proprietary interests of the Franchisor in the Neovision System, the Neovision IP Rights, the Neovision Trade Marks and the Neovision Franchise Group irrevocably agrees and undertakes in favour of the Franchisor that it will not

28.1.1 within a radius of 2km of the Neovision Optometry Practice; and

28.1.2 either as principal, agent, partner, representative, shareholder, member, director, employee, consultant, adviser, financier, demonstrator, or in any other like capacity, directly or indirectly, in any way be associated or concerned with, interested or engaged in any entity which provides optometry services and/or distributes, markets or sells products similar to or competing with any of the Approved Products; and

for a period of 1 year after the termination of this Franchise Agreement.

28.2 The Franchisee further undertakes to procure, and hereby warrants, that all of its officers, employees, shareholders and directors (whether current or resigned, during the Term and thereafter) shall be bound by similar restraint obligations as those contained in this clause 28, and that the Franchisee shall be responsible for any breach by any such persons of such restraint undertakings.

28.3 The Franchisee agrees that—

28.3.1 the restraints imposed upon it in terms of this clause are reasonable as to subject matter, area and duration and are reasonably necessary to preserve and to protect the legitimate and proprietary interests of the Franchisor and the goodwill of the Business; and

28.3.2 notwithstanding the manner in which the restraint and the area in clause 28.1 have been grouped together or linked geographically, each of them constitutes a separate and independent restraint, severable from each of the other restraints. In regard to each person giving the restraint and in regard to all aspects thereof including each area, each capacity and each activity referred to in clause 28.1."

[30] Clause 28.1.2 relates to the conduct of the first respondent directly as the franchisee. In terms of this clause, the first respondent is, in summary, prohibited from being associated in any manner in an entity which, effectively competes with the franchisor. To the extent that the first respondent is to be wound up, it is this clause that will possibly be satisfied because it will no longer be a primary role-player. But, until then, it is directly bound by the terms of the agreement for another year after the end of September 2023.

[31] Clause 28.2, however, binds other actors, namely officers, employees, shareholders and directors of the first respondent to similar restraints as the first respondent, including those contained in clauses 28.1 to 28.1.2. There is no doubt that the second respondent is one such person, being the sole director of the first respondent. As a result, amongst other things, the second respondent is required to not *"in any way be associated or concerned with, interested or engaged in any entity which provides optometry services and/or distributes, markets or sells products similar to or competing with any of the Approved Products; and for a period of 1 year after the termination of this Franchise Agreement."* Thus, although the first respondent may cease to exist as a result of the winding up, the second respondent remains bound by the same restraint obligations which the first respondent undertook to uphold.

[32] In terms of clause 28.1.2, the restraint obligations provided for in the agreement are to endure for a period of one year after its termination. This is reinforced by clause 38.6 which provides as follows:

> "The expiration or termination of this Franchise Agreement shall not affect such of the provisions of this Franchise Agreement as expressly provide that they will operate after any such expiration or termination or which of necessity must continue to have effect after such expiration or termination, notwithstanding that the clauses themselves do not expressly provide for this."

[33] Clause 38.6 therefore confirms that the termination of the agreement does not affect the provisions that operate after termination such as clause 28.1.2 and 28.2. As a result, the

restraint obligations which fall upon the second respondent as a result of clause 28.2, read with 28.1.2, did not come to an end at the end of September, but continue for another year. These are clear terms of the agreement.

[34] The undertaking to bind the second respondent, amongst other actors, is severable from the undertaking in clause 28.1.2 which binds the first respondent directly, and is not linked to whether or not the first respondent is in existence. The agreement does not create such a condition, and one would have expected it to be included if that was the intention. But the clearest indication of this view is clause 38.5 which provides that all provisions and clauses of the agreement are severable from each other notwithstanding the way they have been grouped together or linked grammatically.[7] Another indication of this view is clause 28.1.2, which binds the persons named there *"whether current or resigned, during the Term[8] and thereafter"*. In other words, even should the named role players change relations or status with the first respondent or no longer hold the positions they hold, they remain bound by the restraint obligations. It stands to reason that if the first respondent's status were to change, there is an argument to be made that the same would apply. But as I have already indicated, the strongest indicator that the obligations of the first respondent and those of the second respondent are severable and therefore continue to apply, is clause 38.5.

[35] It is so that, in terms of clause 28.2 it is the franchisee that gave a warranty and undertook to procure that its role players are bound by the restraint obligations, and is to itself be held responsible for any breach by any such persons of those restraint undertakings. However, the second respondent personally bound himself as guarantor for the obligations of the first respondent in terms of clause 4, which provides as follows:

> "With effect from the Signature Date the Guarantor hereby irrevocably and unconditionally guarantees, as a primary obligation, in favour of the Franchisor the due and punctual

[7] Also compare clause 28.3.2.
[8] A Term is defined as the Initial Period and the Renewal Periods, as defined.

> performance by the Franchisee of the Secured Obligations and further undertakes to pay the Franchisor on first written demand all sums which are now, or at any time or times in the future shall become due, owing or incurred by the Franchisee to the Franchisor pursuant to the Secured Obligations."

[36] The subject-matter of the guarantee is due and punctual performance of secured obligations by the franchisee. Secured obligations[9] are defined to include all indebtedness and obligations of whatsoever nature of the franchisee, whether actual or contingent, present or future. And the guarantee continues to operate until the release date which is defined in the agreement as the date upon which the guarantor is released by the franchisor from the obligations of the guarantee. From the papers it is evident that the release date has not yet occurred.

[37] From the above, it is clear that the second respondent remains bound by the restraint obligations in terms of the agreement.

[38] As to whether the services to be provided at Kaleidovision are distinguishable from those provided, this issue was not pressed in the heads of argument and in oral argument on behalf of the respondents. Nevertheless, one observation that may be made is that in terms of clause to the 28.1.2, the restraint obligations include "optometry services", and the definition of "Services", is cast in wide terms and includes the *"advertising services, marketing services, product access services, training services, monitoring services and development services".* Given these wide definitions, I am satisfied that the applicant has established a *prima facie* right, though open to doubt, for purposes of granting the interim relief sought.

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[9] *"Secured Obligations"* are defined as "all indebtedness or obligations of any nature whatsoever of the Franchisee (whether actual or contingent, present or future) to the Franchisor from time to time in terms of the Main Agreement, including in respect of the principal amount, interest, costs, expenses, fees and the like".

[39] Next is the issue of the area of restraint, in terms of which the respondents argue that, since there was no written addendum amending the practice address, the restraint area is 2km from the Woodstock address. This issue, once again, resolved itself into one relating to the interpretation of the agreement. In interpreting contractual provisions, it is apposite to have regard to the current case law prism. In *Natal Joint Municipal Pension Fund v Endumeni Municipality*[10], it was stated as follows:

> "Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

[40] The SCA in *Endumeni* further clarified that, from the outset one considers the context and the language together, with neither predominating over the other.[11] This was expanded in *Capitec Bank Holdings Limited v Coral Lagoon Investments 194 (Pty) Ltd*[12] as follows: *"It is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. I would only add that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole*

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[10] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18.
[11] At para 19.
[12] *Capitec Bank Holdings Limited v Coral Lagoon Investments 194 (Pty) Ltd* 2022 (1) SA 100 (SCA) paras 25-26.

that constitutes the enterprise by recourse to which a coherent and salient interpretation is determined. As Endumeni emphasised, citing well-known cases, '[t]he inevitable point of departure is the language of the provision itself'."

[41] The SCA in *Coral Lagoon*[13] further cautioned that *"Endumeni is not a charter for judicial constructs premised upon what a contract should be taken to mean from a vantage point that is not located in the text of what the parties in fact agreed. Nor does Endumeni licence judicial interpretation that imports meanings into a contract so as to make it a better contract, or one that is ethically preferable"*.

[42] Turning to the contractual provisions, clause 28.1.1 proscribes the restrained obligations from *"within a radius of 2 km of the Neovision Optometry Practice"*. In turn, a *"Neovision Optometrist Practice"* is defined at clause 2.1.35 as *"the Neovision optometrist practice and the optometry business to be carried on by the Franchisee as a Neovision franchisee at the Location utilisting the Neovision IR rights, the Neovision System and the Neovision Trade Marks"*. (my emphasis)

[43] A *"Location"* is described in clause 2.1.30 as *"the premises from which the Neovision Optometrist Practice will be conducted in the Exclusive Area as specified in Annexure B pursuant to this provision of this Franchise Agreement."*(my emphasis) Annexure B is a page containing the full particulars of the franchisee, which include its registered office and business office addresses, as well as the street and postal addresses. All of the addresses contained in Annexure B are the Woodstock address.

[44] An "Exclusive Area" is described in clause 2.1.18 as *"the exclusive business area within which the Location is situated and within which the Franchisor will not grant any person the right to establish another Neovision Optometry Practice, as indicated on the*

[13] At para 26.

attached map as depicted on Annexure F." (my emphasis) Annexure F demarcates parts of Woodstock University Estate, Salt River and Observatory as the Exclusive Area.

[45] Although these definitions are circuitous and not elegantly drafted, what is clear is that their context is to delineate the area(s) in which the franchisee is permitted to operate its business. And that is done by reference to the map in Annexure F. It is common cause that there has been no addendum amending the map to the Waterfront address. The sum of all these provisions, when read together, is that the first respondent must be reckoned to be operating from the Woodstock address.

[46] But factually, that has not been the position since end of 2021 until 30 September 2023, according to the papers. This is why the applicant argues for a contextual interpretation with specific emphasis on the parties' conduct. As the case law discussed above, a unitary exercise of interpretation of the agreement is appropriate.

[47] The starting point must be clause 28.1.1, where the 2km radius requirement is contained. The function and purpose of that clause was for the parties to agree to the area for the operation of the restraint. And in clause 28.1.1, the restraint is defined with reference to where the respondent was located at the time of the agreement. It would serve no purpose to agree to a restraint with reference to an address that had no connection or relation to the practice of the first respondent. That was the function of annexures B and F.

[48] However, it is common cause that the respondents relocated to the Waterfront address, and did so pursuant to clause 8.1, to which specific reference was made in the correspondence between the parties in October 2022. Clause 8.1 provides that *"the franchisee shall not enter into any agreement of lease relating to the hire of a Location without the prior written approval of the Location by the franchisor"*. (my emphasis)

[49] Thus, in order for a franchisee to enter into a lease, the Location, as defined in the agreement, must be approved by the applicant. This is instructive for the facts of this case. A

Location is defined in the agreement by reference to Annexure B, which, at the time of the relocation, contained the Woodstock address as the respondents' particulars. But at the time that the approval was granted in October 2022, the first respondent had long-since ceased to operate from its Woodstock address, from end of 2021. If the respondents' interpretation were to be adopted, it would mean that the approval itself was invalid, or that there was no valid relocation by the respondents.

[50] But that cannot be so because it clear from the conduct of the parties, and especially the conduct of the respondents that the intention was to move away from the Woodstock address. First, it is common cause that the first respondent had been operating a Neovision Practice at the V & A Waterfront since January 2020, while it was still also operating in Woodstock. The respondents state in their papers that consent for that relocation and entry into lease was granted by the applicant.

[51] Then, when the initial term of lease was due to expire, the applicant granted its consent by means of the letter dated 28 October 2022, and as I have stated, the letter expressly made reference to clause 8.1.

[52] The next significant issue pertaining to the context was the first respondent's name change from Neovision Woodstock Incorporated to Neovision Waterfront Incorporated, which was effected on 27 October 2022 at about the same time as the applicant's approval was granted for it to enter into a lease renewal.

[53] What is clear from the papers is that, at no point since 2021 did the parties interpret the 2km radius with reference to the Woodstock premises. As the applicant points out, the respondents traded as Neovision Waterfront for more than 3 and a half years, with all the benefits of the agreement in place. The name change from Woodstock to Waterfront is also reflected in their Companies and Intellectual Property Commission Information.

[54] Another indication of the parties' intention is depicted by the description of the first respondent in the agreements mentioned in the factual background of the matter. Whereas the addendum to the agreement of 9 September 2022 described the first respondent as *"Neovision Woodstock Incorporated trading as Neovision Waterfront",* clause 1.2 of the addendum dated 27 October 2022 states as follows: *"The parties to this addendum agree that all references to Neovision Woodstock or Neovision Woodstock Incorporated in any existing agreement shall hereafter be a reference to Neovision Waterfront".* This was consistent with the accompanying name-change effected on 27 October 2022, in which the first respondent was described as *"Neovision Waterfront Incorporated (previously Neovision Woodstock Incorporated trading as Neovision Waterfront), a company registered in accordance with the laws of South Africa under registration number 2017/412232/21, 8 Dock Road, Cape Town City Centre, Waterfront, 8001, Cape Town, South Africa (Neovision, Waterfront)".*

[55] There is no doubt that these descriptions show a decisive and intentional move away from the Woodstock address to the Waterfront address as the first respondent's area of practice. In that context, the contention of the respondents is an unbusinesslike interpretation of the agreement which leads to insensible results.[14] It does not accord with the commercial reality which has existed for the past few years. If the respondents' interpretation were to be upheld, that would mean the agreement and the arrangements between the parties have not been enforceable during that period. That is quite clearly not the intention that the parties have had in that time. In fact, it is undisputed that the parties held a meeting in July 2023 at which the operation of the agreement was confirmed, at least until end of September 2023. There was no mention there of the agreement not being operational as a result of failure to effect the relocation amendment from Woodstock in writing.

[56] I am therefore persuaded that the applicant has established a *prima facie* case, based on the terms of the agreement.

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[14] *Endumeni* at para 18.

[57] As for irreparable harm, I am in agreement with the applicant that if the restraint undertakings are not immediately enforced, at least on an interim basis, the respondents will be able to establish their competing business in clear breach of the restrained undertakings which are contained in the agreement, and will be able to use the information and clients gained from trading under the applicant's name with clear prejudice to the applicant.

[58] I am furthermore of the view that the balance of convenience favours the granting of the interim interdict because the applicant's contractual rights to protect its interests will be rendered nugatory if the interim interdict is not granted. Concomitantly, the respondents will be entitled to act in flagrant disregard of the clear contractual terms to which they have agreed.

[59] As regards the availability of an alternative relief, the respondents point out that their attorneys extended an invitation to the applicant's attorneys to deliver an *"appropriately worded undertaking"* for the respondents' consideration, or to formulate such undertaking for the applicant's consideration. That offer was made on 29 September 2023 when the parties were engaging in correspondence before the launching of these proceedings. However, as the applicant points out, if the existing restraint undertaking was extant, there was no need for a further undertaking to be agreed between the parties. All that was required was for the respondents to comply with their existing legal obligations in terms of the agreement. Furthermore, the applicant points out that an offer not to breach contractual obligations which are already breached cannot affect the applicant's right to obtain interdictory relief.

[60] The respondents argue that the applicant could still claim for damages. However, that is not a remedy that is immediately available to avert the immediate harm to be caused by the respondents' unlawful conduct of competing contrary to the terms of the agreement. The same applies in respect of the applicant's right to refer a dispute arising out of the franchise agreement for dispute resolution before an arbitrator in terms of clause 33. Although the applicant does have such a right, there is no suggestion that that would have provided interim remedy of the kind that is required by the clear urgency of the matter.

[61] In the circumstances, the following order was granted:

1. The applicant's non-compliance with the time periods, forms and processes prescribed in the Uniform Rules of Court is condoned, and this application may be heard as one of urgency in terms of Uniform Rule 6(12);

2. The respondents are temporarily interdicted from directly or indirectly, performing any optometry related services within 2km radius of Dock Road Junction, V&A Waterfront, Cape Town pending the outcome of an arbitration to be initiated by the applicant, within 10 days of this Order, by referring the dispute to arbitration and requesting the Chairperson of the Arbitration Foundation of South Africa to appoint an arbitrator;

3. The costs of this application shall stand over for determination at the arbitration referred to above.

N. MANGCU-LOCKWOOD
Judge of the High Court

APPEARANCES

For the applicant	:	Adv C. Fehr
Instructed by	:	M. Burger Slabbert Venter Yanoutsos Inc
For the respondents	:	Adv R. Howie
Instructed by	:	A. van Rensburg Fairbridges Wertheim Beckker