



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA**

CASE NO. CA 200/2021

In the matter between:

IMONTI CHEMICALS & HYGIENE SYSTEMS CC

t/a CHEMEX

First Appellant

LUKE LE MARQUAND

Second Appellant

MICHAEL-JOHN LE MARQUAND

Third Appellant

and

PETER MALCOM GUEST

First Respondent

RED ALERT TSS (PTY) LIMITED

Second Respondent

Coram: Van Zyl DJP; Malusi and Laing JJ.

Matter heard on : 05 August 2022

Judgment delivered on: 18 October 2022

FULL COURT APPEAL JUDGMENT

LAING J

[1] This is an appeal against the whole of the judgment of the court *a quo* (excluding certain paragraphs, as indicated). The matter pertains to the enforcement of a restraint of trade agreement.

[2] The first appellant ('Chemex') provides sanitary goods and services to customers across the length and breadth of the Eastern Cape. It loans various items of equipment at no charge, provided that the customer purchases the necessary consumables; a service and maintenance plan is also included. The second respondent ('Red Alert') provides the same goods and services, but in terms of a lease and service agreement. The question of the nature and extent of the differences between the two business models is central to the dispute.

Background facts*The appellants' case*

[3] It is common cause that the first respondent, Mr Peter Guest, was the founding member of Chemex, which commenced trading in 1994. Several years later, he sold 50% of his member's interest to the late Mr Christopher le Marquand. The former was responsible for setting up a manufacturing process for industrial chemicals and cleaning consumables, as well as being responsible for sales and procurement, which entailed the establishment and maintenance of customer relationships. The latter was responsible for managing Chemex's administration and finances, as well as the development of new business. When Mr le Marquand purchased an equal share of Mr Guest's member's interest, the parties entered into an association agreement that included a covenant in restraint of trade.

[4] In 2020, Mr le Marquand passed away, bequeathing his share of the member's interest to his two sons. They are cited as the second and third appellants respectively and are employed by Chemex. It is apparent that there had been some friction between the late Mr le Marquand's sons and Mr Guest, which culminated in the second and third appellants' purchasing Mr Guest's member's interest and settling of his loan account in terms of a so-called 'buy-back' arrangement.

[5] The parties entered into the buy-back agreement on 20 July 2020. This provided for the payment of R 14 million to Mr Guest for the value of his member's interest and the transfer of two luxury motor vehicles in settlement of his loan account. It also provided for his appointment as a consultant to Chemex for a period of five months, during which time he would advise on the development of recipes and formulae for the manufacturing of various products and advise on business operations in general. For this, he would earn a fee of R 50,000 per month. The appointment was important because it would facilitate Mr Guest's introduction and referral of Chemex's clients to the second and third appellants. The parties furthermore agreed to lengthy restraint of trade undertakings, in substantially the same terms as the undertakings previously concluded between Mr Guest and the late Mr le Marquand in terms of their association agreement.

[6] The appellants allege that the five-year period for the operation of the restraint of trade-clause is necessary for numerous reasons, *inter alia*: to protect the substantial purchase consideration paid to Mr Guest; to protect the goodwill and proprietary interests of the business; and to prevent Mr Guest from using confidential and proprietary information, thereby undermining Chemex's business.

[7] They state further that Chemex and the second respondent ('Red Alert') are separate commercial entities that compete for customers in the same sectors. Moreover, the appellants assert that the two entities supply the same products.

[8] During the first quarter of 2021, the second appellant received reports that Mr Guest had become involved with Red Alert in the manufacturing of chemicals and consumables for retail. The second appellant consequently met with a director of the Kempston Group, which is a major customer of Chemex, and was informed that Mr Guest had indicated that he was employed by Red Alert as a business development manager and was responsible for a new division thereof, known as Red Alert Chemtec. Mr Guest had allegedly requested the Kempston Group to transfer its business to Red Alert. Subsequently, the second appellant met with Red Alert's chief executive officer ('CEO'), Mr Peter Harvey, on 19 April 2021, and confronted him about Mr Guest's involvement. From the meeting, it became apparent to the second appellant that Mr Guest was actively engaged with Red Alert in establishing a business like that of Chemex. Consequently, argue the appellants, Mr Guest is in breach of the restraint of trade-clause.

[9] On 20 April 2021, the second appellant instructed attorneys to request a written undertaking to the effect that Mr Guest would cease to be employed by Red Alert and that he would no longer be involved in any business in breach of his contractual obligations. The respondents' attorneys responded by way of a letter on 21 April 2021, admitting that Red Alert had employed Mr Guest to develop the business of its hygiene division and that customers would be able to purchase products from the new entity (to be established) but pointing out that it would not employ Mr Guest; he would have nothing to do with it. They denied any breach of the covenant in restraint of trade.

[10] Not satisfied with the above response, the appellants launched their application for an interdict on 23 April 2021. This was done on an urgent basis.

The respondents' defence

[11] The respondents opposed the application. Their point of departure was that Red Alert was not a party to the agreement that the appellants sought to enforce. Accordingly, Chemex could not obtain contractual relief against Red Alert; its case ought to have been grounded in the principles of unlawful competition, but nothing to that effect had been advanced in its founding papers. There was no basis upon which the appellants could secure a final interdict against the entity.

[12] Red Alert's CEO, Mr Harvey, deposed to the second respondent's answering affidavit. He contends that Red Alert has several business divisions that offer a variety of services, viz: electronic security and armed response; guarding; cleaning; hygiene; and emergency medical services. Its cleaning division, for example, supplies not only the necessary equipment (mops, brooms, etc) and consumables (dish-washing liquid, etc), but also the personnel who provide the service itself. Its hygiene division operates in accordance with the same business model; it leases and services equipment, supplies the consumables, and disposes of the waste that is generated.

[13] In contrast, Mr Harvey asserts that Chemex's business model is based on the manufacture and retail of cleaning and sanitizing products. He alleges that its hygiene division constitutes but a small fraction of its overall business. Whereas he admits that both Chemex and Red Alert supply hygiene equipment and consumables, what distinguishes the two entities is the provision or otherwise of an accompanying service. As evidence of the contention that the entities are not competitors, Mr Harvey states that they never provide competing quotations to potential customers.

[14] In relation to Red Alert's employment of Mr Guest, Mr Harvey explains that he met with him to discuss opportunities in late 2020. He indicated to Mr Guest that Red Alert was interested in establishing a manufacturing entity, Chemtec, so that it would not need to purchase consumables from third parties such as Chemex. To this, Mr Guest allegedly pointed out that he was prevented from doing so under his covenant in

restraint of trade but that his son, Vaughan, would be interested. The meeting ultimately led to Red Alert's employment of Mr Guest as a business development manager on 19 January 2021, to develop the business of its hygiene division. Mr Harvey contends that Mr Guest is merely a salary-earning employee with no shareholding or other financial interest in Red Alert.

[15] Consequently, Mr Harvey contacted Vaughan and together they established Chemtec on or about 5 February 2021. The purpose of the entity is to manufacture chemical products for supply to Red Alert. Once established, Chemtec will be a competitor to Chemex. Mr Harvey avers that Mr Guest is not involved at all in the establishment of Chemtec and has no shareholding or other interest therein. The new entity does not need his knowledge or expertise and will rely on Vaughan's capabilities, the assistance provided by an entity known as PE Chemicals, and the involvement of two further individuals who have the necessary manufacturing experience.

[16] Mr Harvey emphasizes that Red Alert and Chemtec are two separate entities, each with its own legal personality. The former does not possess any manufacturing capability; this is intended for the latter. The real issue, he says, is Chemex's need to prevent Chemtec from manufacturing competing hygiene products.

[17] In a separate affidavit, Mr Guest states that he has 35 years of experience in blending chemicals for use in the cleaning and hygiene markets. He estimates that he developed approximately 90% of Chemex's chemical products. The formulae involved are not particularly complicated and can be mastered relatively easily through a process of trial and error. After the appellants' purchase of his member's interest and the value of his loan account, Mr Guest's role as a consultant was limited; neither the second nor the third appellants ever sought his advice.

[18] Mr Guest asserts, like Mr Harvey, that Chemex and Red Alert are not competing entities. He provides the example of the Kat Leisure Hotel Group's need for hygiene services, where the Group's alleged dissatisfaction with the services provided by the existing supplier, Bidvest Steiner, prompted it to request quotations from competitors, including Red Alert. The Group never approached Chemex, despite its purchasing cleaning products from the entity in question.

[19] He is adamant that Chemex's sale of hygiene products constituted a 'minute portion' of its business. In any event, Chemex's customers preferred to purchase equipment and consumables, rather than enter into a rental and service agreement, which was Red Alert's approach. Mr Guest emphasizes that he has nothing whatsoever to do with Chemtec.

The appellants' reply

[20] In reply, the second appellant denies that the supply of hygiene equipment and consumables constitutes a small fraction of its business, indicating that it affects 24% of its customer base and translates into significant turnover for Chemex. To that effect, he indicates that the retail of hand soap and related cleaning consumables constitutes approximately 25% of Chemex's annual turnover; the retail of paper products contributes a further 20% thereto.

[21] Regarding the Kat Leisure Hotel Group, the second appellant points out that Mr Guest initially established and maintained a customer relationship on behalf of Chemex. After Red Alert's employment of Mr Guest, the Group switched suppliers with the result that Chemex lost a major customer.

[22] The second appellant draws attention to the timeline of events, indicating that Mr Guest's departure from Chemex and reports of his involvement with Red Alert in the manufacture of chemicals and consumables for retail coincided with the establishment of Chemtec, in relation to which Mr Guest's son has become a shareholder. Red Alert, argues the second appellant, needed Mr Guest for the new business development in question. Moreover, he points out that Mr Guest's knowledge of Chemex's prices and profit margins will most certainly be advantageous to Red Alert for purposes of any attempt to persuade customers to switch suppliers.

The findings of the court *a quo*

[23] In the court *a quo*, the issues were reduced to the following: whether Chemex and Red Alert conduct similar business; whether 'engaged', as used in the restraint of trade clause, can be interpreted to mean 'employed'; and whether a case had been made for the granting of a final interdict against the respondents.

[24] The court *a quo* found that there was a dispute of fact in relation to the nature of the business conducted by the entities in question. It accepted the version presented by the respondents and held that, whereas the businesses may be similar, there were distinguishing features that permitted a finding that the entities did not operate in competition with each other. The court *a quo* held that 'engaged' could indeed be interpreted to mean 'employed'.¹ It found, too, that it was unnecessary for Red Alert to have been cited as a party to the proceedings inasmuch as it was not a party to the contract which included the covenant in restraint of trade. Finally, it held that the requirements for a final interdict had not been met and dismissed the application with costs.

¹ Importantly, this finding was not included within the ambit of the present appeal. The appellants indicated that they appealed against the whole of the judgment of the court *a quo*, excluding paragraphs 25-29 thereof, which dealt with the interpretation of 'engaged'. There was no cross-appeal.

[25] The applicants (who are the appellants in the present matter) applied for leave to appeal. In granting leave, the court *a quo* referred to its interpretation of *Kelly Group Ltd v Capazzoria*² for purposes of deciding whether the entities in question conducted similar business and mentioned the scarcity of authorities dealing with the same issue, indicating that it was persuaded that there was a reasonable prospect of success on appeal.

[26] The dispute is now the focus of the present court.

The issues to be decided

[27] From the pleaded facts and the arguments presented by counsel for the respective parties, it is apparent that the issues identified in the court *a quo* remain a useful guide to the way for the appeal court to embark upon a determination of the matter. A key feature that emerges is the extent to which the business of Chemex is like that of Red Alert. The other major feature is whether the appellants have made a case for the granting of a final interdict.

[28] I pause to mention that the respondents have not challenged the reasonableness of the covenant in restraint of trade nor its enforceability. They do not argue that it is contrary to public policy or the public interest.

[29] Mindful of the above, the issues can be refined and set out as follows: (a) what is the restraint of trade that operates and how must it be interpreted; (b) to what extent are the businesses of the entities in question similar; and (c) have the appellants satisfied the requirements for a final interdict against Mr Guest and Red Alert, respectively.

² (15484/2010) [2010] ZAGPHC JHC 139.

[30] The earlier dispute in relation to the meaning of 'engage' within the context of the covenant in restraint of trade has fallen away. The finding of the court *a quo* was to the effect that it can be interpreted widely to include, within the ambit of the restraint, the scenario where Mr Guest is employed by a competitor. This has not been challenged.

[31] A brief overview of the legal framework follows.

The broad legal principles relevant to covenants in restraint of trade

[32] The common law has long indicated that a contract is enforceable, in the absence of fraud or duress, even when its terms are unreasonable or unconscionable or restrict a person's freedom to participate in trade. The role of the court is not to remake the contract; consequently, the court will not relieve a party from any term that he or she finds onerous or unexpectedly harsh.³

[33] In the seminal case of *Magna Alloys & Research (SA) (Pty) Ltd v Ellis*⁴, Rabie CJ held, at 897-8, that a restraint on competition is, in principle, enforceable; it will only be unenforceable when it is contrary to public policy or the public interest. Furthermore, in deciding whether a covenant in restraint of trade is contrary to the public interest, regard should be had to two considerations: agreements freely concluded should be honoured, and everyone should be free to enter the business or professional world.⁵

[34] The common law approach is based on navigating a *via media* between the freedom of contract, on the one hand, and the twin principles of fairness and reasonableness, on the other. Whereas this approach has remained largely intact after the advent of South Africa's constitutional dispensation, it has inevitably been influenced

³ Van Eeden, 'Competition', *LAWSA* (Vol 7(1), 3ed, 2019), at 253.

⁴ 1984 (4) SA 874 (A).

⁵ *Ibid.*

by the application of constitutional values. This is illustrated in the decisions handed down by the Constitutional Court in at least the following cases.

[35] Ngcobo J emphasised, in *Barkhuizen v Napier*⁶, at paragraph [70], that while it was necessary to recognise the doctrine of *pacta sunt servanda* a court should be able to decline the enforcement of a clause that would result in unfairness or unreasonableness. This would ensure that a court could employ the Constitution and its values to achieve a balance that struck down the unacceptable excesses of freedom of contract while seeking to permit individuals the dignity and autonomy of regulating their own lives.

[36] More recently, in *Beadica 231 CC and others v Trustees, Oregon Trust and others*⁷, Theron J observed, at paragraph [80], that the common law has always recognized the role of equity, encompassing the notions of good faith, fairness and reasonableness, as a factor in assessing contractual terms and their enforcement. Nevertheless, a court may not refuse to enforce terms on the basis that this would, in its subjective view, be unfair, unreasonable or unduly harsh. It is only when a term or its enforcement is so unfair, unreasonable or unjust that it is contrary to public policy that a court may indeed refuse to enforce it.

[37] The above broad principles are relevant to a covenant in restraint of trade such as the one in the present matter. How it must be interpreted is the focus of the issue discussed in the paragraphs that follow.

The covenant in restraint of trade and its interpretation

⁶ 2007 (5) SA 323 (CC).

⁷ 2020 (5) SA 247 (CC).

[38] At the very heart of the matter is clause 9 of the buy-back agreement concluded by the appellants and Mr Guest. The contents are repeated below:

'Peter [Mr Guest] acknowledges and agrees that he is bound by a Restraint in terms of the Association Agreement, and further confirms and undertakes to comply with the Restraint set out hereunder having regard to the substantial repurchase consideration effected to Peter which includes consideration for goodwill and in order to protect the proprietary interests of the Corporation [Chemex] going forward. Peter confirms that he has no claim to the trade name / mark "Chemex", which is the trade name / trademark of the Corporation, and which proprietary rights in the aforesaid trade name / marks vests in the Corporation.

Peter undertakes that for a period of five (5) years from 31st July 2020 or the termination of employment with the Corporation he will not engage or be interested in, whether directly or indirectly, or have any financial interest in any business or undertaking carrying on a business similar to the business which is carried on by the Corporation. This restraint of trade shall encompass those municipal areas when the Corporation has carried on business in any manner for the immediately previous 24 (TWENTY-FOUR) month period.'

[sic]

[39] It is apparent from the above, on the face of it, that the potential effect of the covenant in restraint of trade is far-reaching. The clause in question prevents Mr Guest from having anything to do with a business or undertaking that carries on business 'similar to' that of Chemex. It covers virtually the entire Eastern Cape Province and endures for a period of five years.

[40] The *locus classicus* for the law pertaining to the interpretation of documents remains *Natal Joint Municipal Pension Fund v Endumeni Municipality*⁸, where Wallis JA held, at paragraph [18], that

'...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,

⁸ 2012 (4) SA 593.

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.’

[41] There are, furthermore, two recent cases that deal with the subject, decided by the Supreme Court of Appeal within a few months of each other. In *Capitec Bank Holdings Limited and another v Coral Lagoon Investments 194 (Pty) Ltd and others*⁹, Unterhalter AJA remarked, at paragraph [51], that interpretation begins with the text and its structure. To postulate that ‘context is everything’ is not a license to contend for meanings unmoored to the text and its structure. Rather, context and purpose may be used to elucidate the text. Similarly, in *Post Office Retirement Fund v South African Post Office SOC Ltd and others*¹⁰, Plasket JA observed, at paragraph [57], that the interpretation of a written document is an objective exercise and the starting point is the words of the document to be interpreted. These remain constant and cannot be made to mean different things to suit the perceived needs of the moment.

[42] In the present matter, the text of the clause in question is uncomplicated. The standard definition of ‘similar’, used here as an adjective, is ‘of the same kind in appearance, character, or quantity, without being identical’.¹¹

⁹ (470/2020) [2021] ZASCA 99 (09 July 2021).

¹⁰ (1134/2020) [2021] ZASCA 186 (30 December 2021).

¹¹ Pearsall (ed), *The Concise Oxford Dictionary* (10ed revised, 2001), at 1337.

[43] The context of the clause is the appellants' purchase of Mr Guest's member's interest for a considerable sum of money and the transfer of two luxury vehicles to settle his loan account.¹² Furthermore, the agreement was entered into upon the departure of Chemex's founding member, who had established the business, developed an extensive customer network throughout the province, and accumulated 35 years of experience in the manufacture of cleaning and hygiene products.

[44] The purpose of the clause was to protect Chemex's proprietary interests. To that effect, the parties expressly recorded that Mr Guest agreed to be bound by and to comply with the covenant in restraint of trade, having had regard to the 'substantial repurchase consideration' that was paid to him and the need for 'the proprietary interests of the Corporation [Chemex] going forward' to be protected.

[45] The most sensible and businesslike interpretation to accord to the clause, mindful of text, context and purpose, is that Mr Guest undertook, for a specified period and for a specified area, not to become involved or have any interest in any business that was similar to that of Chemex. Quite what 'similar' means for purposes of adjudicating the dispute, however, informs the next issue, which will be discussed below.

Extent to which the businesses are similar

[46] The appellants' primary ground of appeal is based on the reliance placed by the court *a quo* on *Kelly Group Ltd v Capazorio*¹³, where Kathree-Setiloane AJ held as follows, at paragraph [25]:

¹² The meaning to be ascribed to 'repurchase consideration', as used in clause 9, is set out in clause 2.1.17 of the buy-back agreement. The appellants would pay a gross amount of R 14 million, less dividends withholding tax in the amount of R 2,800,000, resulting in a net amount of R 11,200,000 to be paid for the purchase of Mr Guest's member's interest. In addition, Chemex would transfer to him, at book value, a 2014 Mercedes-Benz ML-Class motor vehicle and a 2007 Mercedes-Benz C-Class motor vehicle, in full and final settlement of his loan account.

¹³ 2011 JDR 0221 (GSJ).

'I am of the view that the phrase "any concern or entity which carries on the same business or similar business or alike the business of the COMPANY" postulates a comparison of the applicant's business to the respondent's, as a composite whole (*Capnorizas v Webber Road Mansions (Pty) Ltd* 1967 (2) SA 425 (A)). Accordingly, because the applicant provides some of the services which are provided by the third respondent does not mean that the respective businesses viewed in their entirety, are the same, similar or alike.'

[47] The court *a quo* held that, on the strength of the version presented by the respondents,¹⁴ the two businesses were similar in nature but there were distinguishing features that indicated that they were not in competition with each other.

[48] The appellants assert that the court *a quo* was incorrect in requiring all the features of the two businesses to be the same or similar, pointing out that this was not the finding of the court in *Capnorizas*. They refer to several cases in support of the contention that what was required was for there to be competition in some material respect.

[49] In *Capnorizas*, the erstwhile Appellate Division dealt with a situation where the appellant carried on business as a general dealer; tea-room keeper; mineral-water dealer; patent-medicine dealer; restaurant keeper; and milk purveyor, in a building owned by the respondent. The appellant's lease included a term to the effect that the respondent undertook not to let any space in the building to a person who carried on substantially the same business as the appellant. Subsequently, the respondent let space to an entity, Hazeldene Dairy, that held a fresh-produce dealer's license and a milk purveyor's license. Steyn CJ held, at 430, that the term in question suggested a comparison; the issue for decision was whether the business of Hazeldene Dairy was to be compared with the corresponding business of the appellant or with the business

¹⁴ The court *a quo* applied the tried and tested principles of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) to accept the respondents' version of the facts (at paragraph [24] of the judgment of the court *a quo*).

conducted by him as a composite whole. The court held that the terms of the lease provided for the latter.

[50] The appellants also refer to *Poolquip Industries (Pty) Ltd v Griffin and another*¹⁵ 1978 (4) SA 353 (W), where the first respondent had been the managing director of the applicant, which had manufactured and distributed equipment and chemicals for the swimming pool industry. He had later obtained employment with the second respondent, whose business included the manufacture and sale of chemicals, veterinary products, anti-freeze solutions, fibre-glass products for agriculture and swimming pools, and swimming pool cleaning equipment. A term in the employment contract between the applicant and the first respondent had restrained the latter from having an interest in a business similar to that carried on by the former or in any business that competed or was likely to compete with the former. Cohen AJ held, at 361, that 'similar' (as used in the contract) meant a business that competed with the applicant's business and not a business that was the same in all respects. Furthermore, the court held that 'compete', here, meant competition in some material respect.

[51] In *PE Nightwatchman Patrol (Pty) Ltd v Blignaut*¹⁶, the applicant provided a service that entailed the guarding of premises, using dogs; the respondent did not guard anything, he simply provided a radio system that could be used by a guard. Stewart J held, at 304, that it was not necessary that the respondent's business was exactly like that of the applicant; it was sufficient if it was so like that of the applicant as seriously to compete with it. The test was not whether the respondent provided a security service but whether he carried on a business that was similar to or in competition with that of the applicant. The nature of the two businesses was decisive.¹⁷

¹⁵ 1978 (4) SA 353 (W).

¹⁶ 1979 (2) SA 302 (SE).

¹⁷ The court also referred to an Australian case, *Mays v Roberts* 1928 SASR 217, where the word, 'similar', with reference to houses, did not mean 'exactly alike'.

[52] The parties appear to agree that the above cases require a competitive overlap between the businesses being compared. A comparison must be made between Chemex's business and that of Red Alert, as a composite whole. To that effect, mere similarity is not sufficient; the businesses must compete in a material respect.

[53] The crucial distinction, argue the respondents, is that the entities in question operate according to different business models; Red Alert provides personnel to render the services related to the supply of the equipment and consumables, Chemex does not. A customer will prefer either one model or the other, depending on the circumstances. This meant that the models entailed different pricing structures. Consequently, argue the respondents, there is no competition. This was demonstrated by the fact that the entities have never been requested to submit quotations against each other.

[54] It is common cause that Chemex and Red Alert compete for customers in the same sectors, viz: food and beverages; hospitality; automotive; healthcare; commercial and retail; educational; manufacturing; and hygiene.¹⁸ It is common cause that they supply the same products, viz: foam-soap dispensers; hand-sanitizer dispensers; wall-mounted disposal bins; air-freshener units; toilet-seat sanitizers; toilet-roll holders; urinal-drip dispensers; hand-towel rolls; folded-towel rolls; tidy-wipe rolls; toilet-paper; hand-soap; antibacterial hand-soap; foam hand-soap refill sachets; hand sanitizer; and toilet-seat sanitizer sachets. It is also common cause that they supply the same products to customers in the same geographical areas, viz: within the boundaries of the Buffalo City Metropolitan Municipality and numerous other municipalities situated throughout the Eastern Cape Province.

[55] The respondents have built their defence on the platform that the business models used by the two entities are entirely different; the one provides personnel or a

¹⁸ The appellants distinguish between the 'contract cleaning and hygiene services' sector, in which they operate, and the 'hygiene' sector, in which they contend that Red Alert operates. The extent of the difference between the two sectors in question is not clear from the pleadings but nothing seems to turn on this.

workforce with the equipment and consumables, the other does not. The distinction, however, appears to be artificial. The following analogy can be considered: company X provides pre-packaged meals to customers, comprising an interesting variety of snacks, main courses, desserts, and drinks; company Y provides the same pre-packaged meals, but also offers staff who will heat or cook the meals where necessary and clean up afterwards. It would be difficult to contend that company X and company Y are not in direct competition with each other. The only real difference is the 'add-on' that company Y offers. Customers who require catering services would most certainly consider either company X or company Y and would be likely to make a decision based primarily on available budget and the contingencies of the occasion. The analogy is applicable to the situation that confronts the court in the present matter.

[56] The supply of cleaning and hygiene products constitutes Chemex's core business. Red Alert supplies cleaning and hygiene products (and services) but its business extends to security and emergency medical services, too. It is nevertheless clear from the pleadings that cleaning and hygiene are not insignificant parts of its business. For example, Red Alert lists its business divisions as follows: electronic security and armed response, guarding, cleaning, hygiene, and emergency medical. If Red Alert offered cleaning and hygiene products or services as something incidental to its security services, then the situation might be different, yet that is not the evidence.

[57] When viewing the businesses of Chemex and Red Alert as composite wholes, it cannot be denied that they are similar. When taking into consideration the fact that each supplies the same products to customers in the same sectors and geographical areas, it cannot be denied that they compete in material respects. The competitive overlap between the two businesses is substantial.

[58] At this stage, it is necessary, to consider the remaining issue and to ascertain whether the appellants satisfied the requirements for a final interdict against Mr Guest, on the one hand, and Red Alert, on the other.

Whether the requirements for a final interdict were met

[59] The requirements for a final interdict are well-known and hardly need restating: a clear right on the part of the applicant, an injury actually committed or reasonably apprehended, and the absence of any other satisfactory remedy available to the applicant.¹⁹ The extent to which the appellants have met the above is investigated below.

Mr Guest

[60] In launching the application, the appellants relied squarely on the covenant in restraint of trade contained in the buy-back agreement. The court *a quo* held that the term was wide enough to include the scenario where Mr Guest was employed by a competitor. This finding does not form part of the appeal; it has not been challenged by either the appellants or the respondents and this court sees no reason to interfere. Instead, the respondents argue that Mr Guest never breached his obligations by taking up employment with Chemex because the businesses of the entities are not similar, there is no competitive overlap. This court has found otherwise. Consequently, Mr Guest must be deemed to have breached the restraint in question; conversely, the appellants have a clear right to enforce the terms thereof.

[61] Mr Guest was a founding member of Chemex. It is not disputed that he used his technical knowledge of and experience in blending chemicals to establish and grow the business. He developed approximately 90% of the entity's products. It is also not disputed that, at the time of Mr Guest's departure, Chemex supplied cleaning and hygiene equipment and consumables to a wide range of customers in different sectors and across the length and breadth of the Eastern Cape Province. His technical and

¹⁹ See *Setlogelo v Setlogelo* 1914 AD 221; the principles have become settled law, as evident from the long line of cases that have followed, including the recent decision of the Supreme Court of Appeal in *Hotz and others v University of Cape Town* 2017 (2) SA 485 (SCA), at 496G-H.

business capabilities would clearly have been of significant interest to Red Alert, so much so that he and Mr Harvey explored opportunities in late 2020, after the appellants' purchase of his member's interest and the value of his loan account, which eventually led to his appointment, a few months later, as a business development manager to develop the business of Red Alert's hygiene division. To put it bluntly, Mr Guest knew Chemex's business inside and out. It would be difficult to ignore or deny the risks that the move posed to Chemex. If Mr Guest divulged his understanding of the workings of the business, the composition of its products, its customer base, the details of contractual arrangements, its pricing structures, and so forth, and exploited such knowledge to the advantage of his new employer, then considerable harm would be caused to Chemex's business.

[62] The alternative remedy of a damages claim is simply inadequate in the circumstances. By the time that any such claim was heard, the damage would have been inflicted and it would be exceedingly difficult for Chemex to recover its lost share of the market.²⁰ Moreover, it is clear from the correspondence exchanged between the attorneys for the respective entities that any attempt at negotiating a solution was bound to fail by reason of fundamental differences in the interpretation of the term in question.

Red Alert

[63] A determination of the extent to which the appellants have satisfied the requirements for a final interdict against Red Alert is not as straight-forward. There is no contractual right that the appellants can seek to enforce against Red Alert. The cornerstone of their argument, rather, is that Red Alert served as a 'vessel' to allow Mr Guest to breach his obligations. Importantly, the appellants emphasize that they do not seek an interdict based on unlawful competition, as alleged by the respondents. In

²⁰ See *Continuous Oxygen Suppliers (Pty) Ltd t/a Vital Aire v Meintjies and another* [2012] JOL 29152 (LC), at paragraphs [49] and [50].

support thereof, the appellants refer to a number of cases that were decided in the erstwhile Witwatersrand Division.

[64] In the unreported judgment of *Marcus Evans (South Africa) (Pty) Ltd V Mpungose and others* (Case no. 2002/2780), the applicant was a business intelligence organization that offered professional training by means of conferences and similar events. The first respondent had been in the applicant's employment and was bound by a covenant in restraint of trade. She was subsequently employed by the fifth respondent. Malan J indicated, at paragraph [12], that whether the applicant was entitled to relief against the fifth respondent depended on whether the former had proved that the latter had made use of confidential information. The court found, on the available evidence, that the fifth respondent had indeed done so and interdicted the fifth respondent accordingly.

[65] Similarly, in *South Africa BV (Incorporated in the Netherlands) t/a Institute for International Research v Tarita and others*²¹, the applicant's business was the planning, organising and managing of seminars, conferences, high-profile speaker events, and training courses. It had appointed the first and second respondents in terms of contracts of employment that included restraints of trade. Upon their departure, the applicant had sought to enforce the underlying restraints and to interdict their new employer, the third respondent, from competing unlawfully. Marais J held, at 171D-E/F, that, by employing a person acting in breach of her restraint of trade agreement to set up conferences, the third respondent was competing unlawfully with the applicant, in whose favour the restraint operated. This constituted unfair competition. The interdict was granted.

[66] Consequently, argue the appellants, the above cases are authority for the proposition that interdictory relief is available in circumstances where a competing entity

²¹ 2004 (4) SA 156 (W).

such as Red Alert provides an ex-employee with a vessel by means of which to breach restraint of trade obligations.

[67] The appellants also refer to *IIR South Africa BV (Incorporated in the Netherlands) t/a Institute for International Research v Hall (aka Baghas) and another*²², where the same applicant as in the previous case had employed the first respondent as a conference producer. Her contract of employment included a covenant in restraint of trade. She subsequently took up employment with the second respondent, only to be dismissed pursuant to disciplinary proceedings. The applicant brought an application to, *inter alia*, interdict the second respondent from holding a series of 14 conferences that had been organised while the first respondent had been in its employment. The application was dismissed. On appeal, a full bench found that it was necessary for the applicant to demonstrate that there was an existing or threatened use of confidential information by the second respondent. The court found that this had not been proved and the appeal was dismissed.

[68] The findings of the full bench are set out below.

[13.1] The claim against the first respondent was in contract. The legal principles applicable to this claim flow from the decision in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A).

[13.2] The appellant's claim against the second respondent is in delict. It is governed by the development of the *lex Aquilia* to cater for the misuse of confidential information and trade secrets to advance one's own business interests at the expense of a competitor.

[13.3] The fundamental differences between these two distinct causes of action have, on occasion, been blurred in judgments where the applicant has, in a single application, sought relief against the former employee who is bound by a restraint and the alleged "unfair competitor" who has employed the former employee.

[13.4] What these differences amount to is the following:

²²2004 (4) SA 174 (W)

- [13.4.1] Where the ex-employer seeks to enforce against his ex-employee a protectable interest recorded in a restraint, the ex-employer does not have to show that the ex-employee has in fact utilized information confidential to it- merely that the ex-employee could do so...
- [13.4.2] Where the ex-employer seeks to finally interdict a third party on the ground that it is competing unlawfully, by employing an ex-employee who has breached a restraint, the ex-employer must prove that:
- (a) It has confidential information or trade secrets.
 - (b) The third party is making use of, or is likely to make use of such information or trade secrets either knowingly or innocently...'
 - (c) It has a real right not to be faced with unfair competition. In deciding fairness, a court is entitled to look at the competing interests of the parties...
 - (d) It has no other remedy.
- [13.5] The fundamental difference between the two remedies is that in the delictual claim it does not suffice for the ex-employer to merely prove that the ex-employee who has protectable information has taken up employment with a rival, who is aware of the restraint. In addition, what must be proved is an existing use, or threatened use, of such information by the third party.'

[69] The respondents contend that the above case cannot be used as authority to assert that Red Alert's enabling of Mr Guest to breach his obligations was unlawful. They argue that it is not adequate to assert that Red Alert merely served as a vessel for Mr Guest's conduct. The appellants' cause of action was indeed grounded in delict and it required them to demonstrate that Red Alert made improper use of confidential information, knowingly or otherwise.

[70] This court is inclined to agree with the respondents. On the basis of the full bench decision in *Hall*, the appellants must present sufficient evidence of Red Alert's use or threatened use of confidential information. The decisions in both *Marcus Evans* and *Tarita* do not assist the appellants inasmuch as there is no clear indication that Red

Alert's employment of Mr Guest, *per se*, amounted to the improper use of the latter's knowledge of Chemex's business. The allegations made with regard to Mr Guest's interaction with the Kempston Group and his possible influence over the decision taken by the Kat Leisure Hotel Group are speculative at best. There are no confirmatory affidavits from representatives of either of the companies, there is also no documentary evidence to support the allegations. Significantly, there is no indication that Mr Guest's conduct was directed by or carried out upon the instruction of his new employer, Red Alert. At best, the allegations amount to conjecture. In relation to the establishment of Chemtec, the respondents deny, vehemently, that Mr Guest was involved or that he has any financial or other interest in the manufacturing entity. The appellants have not presented any compelling evidence to persuade the court that the usual principles must not be applied and that the respondents' averments must not be accepted.²³

[71] If a final interdict is granted in favour of the appellants against Mr Guest, then he will be prevented from engaging with, being employed by or having any interest in Red Alert until 30 June 2025. As the court *a quo* remarked, whether Mr Guest is interdicted from being employed by Red Alert or whether Red Alert is interdicted from employing Mr Guest, the result is the same. An alternative remedy exists, obviating the need for the appellants to obtain relief against Red Alert itself.

Relief and order to be granted

[72] The provisions of clause 9 of the buy-back agreement constitute a covenant in restraint of trade. Mindful of the text, context and purpose thereof, the restraint must be interpreted to mean that Mr Guest undertook, for a specified period and for a specified area, not to become involved or have an interest in any business that was similar to that

²³ The principles are those laid down in *Plascon-Evans* (n 14, *supra*).

of Chemex.²⁴ Such a restraint is, in principle, enforceable.²⁵ The respondents did not argue or demonstrate that the enforcement of the restraint would be unfair, unreasonable or unduly harsh,²⁶ but focused, instead, on the assertion that it was incumbent on the appellants to provide evidence of a competitive overlap. To that effect, the respondents argued that the business models of Chemex and Red Alert, respectively, were different, such that the entities were not in competition with each other. As already indicated, the court disagrees. Upon the basis of the case law to which the parties referred, the court is satisfied that the competitive overlap between the entities is substantial. The court respectfully differs from the findings of the court *a quo* in relation to the nature and extent of any distinguishing features.

[73] Consequently, the court finds that the appellants have indeed met the requirements for a final interdict against Mr Guest. The court does not find, however, that there is a basis upon which to grant the same relief against Red Alert. There is, firstly, no contractual right that the appellants can enforce; there is, secondly, merit in the contention that a cause of action grounded in delict requires the appellants to demonstrate that Red Alert made or is likely to make improper use of confidential information, knowingly or otherwise. No evidence of either actual or likely use was presented. It is, furthermore, not sufficient for the appellants merely to allege that Red Alert served as a vessel for Mr Guest's conduct.

[74] Regarding costs, the appellants are successful in relation to the relief sought against Mr Guest but not against Red Alert. There is no reason why costs should not follow the result in both instances. These should include the costs of two counsel, given the complexity of the matter.

²⁴ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13 (SCA), at paragraph [18]; *Capitec Bank Holdings Limited and another v Coral Lagoon Investments 194 (Pty) Ltd and others* 2022 (1) SA 100 (SCA), at paragraph [51]; and *Post Office Retirement Fund v South African Post Office SOC Ltd and others*, [2021] ZASCA 186 (SCA) at paragraph [57].

²⁵ *Magna Alloys & Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A), at 897-8.

²⁶ A restraint of trade clause is unenforceable in such circumstances. See *Barkhuizen v Napier* 2007 (5) SA 323 (CC), at paragraph [70], and *Beadica 231 CC and others v Trustees, Oregon Trust and others*, *Supra* at paragraph [80].

[75] The following order is made:

- (a) the appeal with regard to the relief sought against the first respondent is upheld;
- (b) the appeal with regard to the relief sought against the second respondent is dismissed;
- (c) the order of the court *a quo* is set aside and replaced with the following:
 - (i) until (and including) 30 June 2025, the first respondent is interdicted and restrained from being engaged or employed by or having an interest in the second respondent or any business or undertaking that carries on a business similar to that carried on by the first appellant within those municipal boundaries where the first appellant carried on business in any manner for the 24-month period immediately prior to 31 July 2020, viz.
 - Amahlathi Local Municipality;
 - Blue Crane Route Local Municipality;
 - Buffalo City Metropolitan Municipality;
 - Dr Beyers Naude Local Municipality;
 - Elundini Local Municipality;
 - Emalahleni Local Municipality;

- Engcobo Local Municipality;
- Enoch Mgijima Local Municipality;
- Great Kei Local Municipality;
- Intsika Yethu Local Municipality;
- Inxuba Yethemba Local Municipality;
- King Sabata Dalindyebo Local Municipality;
- Kouga Local Municipality;
- Koukamma Local Municipality;
- Makana Local Municipality;
- Matatiele Local Municipality;
- Mbhashe Local Municipality;
- Mhlontlo Local Municipality;
- Mnquma Local Municipality;
- Ndlambe Local Municipality;
- Nelson Mandela Metropolitan Municipality;
- Ngqushwa Local Municipality;
- Ntabankulu Local Municipality;
- Nyandeni Local Municipality;
- Port St Johns Local Municipality;
- Raymond Mhlaba Local Municipality;
- Sakhisizwe Local Municipality;
- Senqu Local Municipality;
- Sundays River Local Municipality;

- Umzimvubu Local Municipality;
- Walter Sisulu Local Municipality; and
- Winnie Madikizela-Mandela Local Municipality;

(ii) the first respondent is liable for and is directed to pay the appellants' costs, including those of two counsel; and

(iii) the appellants are liable for and are directed to pay the second respondent's costs, including those of two counsel.

JGA LAING
JUDGE OF THE HIGH COURT

I agree:

D VAN ZYL
DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

I agree:

T MALUSI
JUDGE OF THE HIGH COURT

APPEARANCE:

For the appellants: Adv Pienaar SC with Adv Mostert, instructed by
Cooper Conroy Bell & Richards Inc, East London.

For the respondents: Adv Whitcutt SC with Adv De Witt, instructed by
Kirchmanns Inc, East London.

Date of hearing: 05 August 2022

Date of delivery of judgment: 18 October 2022