

**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, JOHANNESBURG**

- (1) REPORTABLE: **NO**  
(2) OF INTEREST TO OTHER JUDGES: **NO**  
(3) REVISED:

Date: **31<sup>st</sup> October 2023** Signature:

**CASE NO:** 2023-098452

**DATE:** 31<sup>ST</sup> OCTOBER 2023

In the matter between:

<b>ARCFYRE INTERNATIONAL (PTY) LIMITED</b>	First Applicant
<b>ARCFYRE SECURE DRIVE (PTY) LIMITED</b>	Second Applicant
<b>SECURE EXPRESS (PTY) LIMITED</b>	Third Applicant
<b>ALTOR INTERNATIONAL (PTY) LIMITED</b>	Fourth Applicant

and

<b><u>GOVENDER, VANESHREE</u></b>	First Respondent
<b>NSA SECURITY CONSULTANTS (PTY) LIMITED</b>	Second Respondent

**Neutral Citation:** *Arcfyre International and 3 Others v Govender and Another*  
(098500/2023) [2023] ZAGPJHC --- (31 October 2023)

**Coram:** Adams J

**Heard:** 24 October 2023

**Delivered:** 31 October 2023 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being

uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 10:30 on 31 October 2023.

**Summary:** Urgent application – Uniform Rule of Court 6 (12) – the applicant should set forth explicitly the reasons why the matter is urgent – why is it claimed that substantial redress would not be afforded at a hearing in due course – Rules of Court and Practice Directives can only be ignored at a litigant's peril – application struck from the roll for lack of urgency –

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## **ORDER**

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- (1) The applicants' urgent application be and is hereby struck from the roll for lack of urgency.
  - (2) The first to fourth applicants, jointly and severally, the one paying the other to be absolved, shall pay the first and the second respondents' costs of the urgent application, such costs to include the costs consequent upon the utilisation of two Counsel, where so employed.
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## **JUDGMENT**

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### **Adams J:**

[1]. This is an opposed urgent application by the first to the fourth applicants, who are all related companies, for interim interdictory relief against the first respondent (Ms Govender), an ex-employee of the first applicant, and the second respondent (NSA Security), her present employer. Pending the determination of final relief sought in part B of the notice of motion, the applicants seek an order, on an urgent basis, interdicting and restraining Ms Govender *inter alia* from being interested or engaged in any entity, which directly or indirectly competes with the business of applicants within a prescribed area. Ancillary relief is also applied for on an interim basis, such as for orders interdicting Ms Govender from rendering any of the services of the

applicants to any of the customers of the applicants and interdicting her from encouraging, enticing, inciting, persuading or inducing any employee or independent contractor of the applicants to terminate the contract of employment or independent contractor relationship with the applicants.

[2]. Further relief sought is for an order for the return to the applicants of all assets, records, documents, accounts, letters, notes, memoranda and papers of every description, including all copies of same, in her possession or under her control, relating to the affairs and the business of the applicants. So, in a nutshell, the applicants apply for interim interdictory relief based on a restraint of trade and a non-disclosure of confidential agreement. As regards NSA Security, the applicants apply for relief against it based on unlawful competition. So, for example, an order is applied for interdicting the second respondent from employing the first respondent for the duration of the restraint of trade agreement, which is set to expire during February 2024.

[3]. In part B, the applicants apply for relief similar to the relief claimed in part A, except that final relief would be sought during the hearing of part B.

[4]. The question to be considered in this application is whether a case has been made out on behalf of the applicants for the interim relief claimed. In particular, the issue to be decided is whether the applicant has demonstrated the existence of a *prima facie* right, worthy of protection by an interim interdict. The aforesaid issue can and should be decided on the basis of the case presented by the applicants.

[5]. The applicants base their application against the first respondent on her alleged breaches of a restraint of trade, a confidentiality agreement and a non-disclosure agreement, signed by Ms Govender on 20 December 2021 in favour of the first applicant. The applicants' case against NSA Security, as I have already indicated, is based alleged on unlawful competition. The unlawful competition complained of is the alleged use by the respondents of the applicants' confidential information and allegedly interfering with the applicants' contractual relationships.

[6]. It is the case of the applicants that Ms Govender is in possession of confidential information comprising of information concerning the applicants' pricing, salary structures and client preferences and requirements. They also assert that she is in possession of information comprising the attachments to her resignation email allegedly being the applicants' documents. The applicants also aver that the respondents have acted unlawfully in attempting to interfere with the employment of the first and second applicants' senior associate, a Mr Mufamadi, that they have approached one of the applicants' largest clients and that they requested a quote from one of the applicants' vendors.

[7]. I am not persuaded that the applicants have made out a case that they have protectable interests that is worthy of protection and which necessitates the enforcement of the restraint of trade. Ms Govender's case is that she has not appropriated any confidential information of the applicants. In any event, so the case on behalf of the respondents continues, the applicants do not have an interest that is worthy or requiring of protection through the enforcement of the restraint of trade.

[8]. The evidence before confirms the case on behalf of the respondents.

[9]. *In casu*, Ms Govender admits to taking up employment with a competitor contrary to her restraint of trade undertakings in favour of the first applicant. She accordingly bears the onus to show that the restraint agreement is unenforceable because it is unreasonable.

[10]. In *Basson v Chilwan and Others*<sup>1</sup>, the Appellate Division held that in determining the reasonableness or otherwise of the restraint of trade provisions the Court must ask the following questions: (a) is there an interest of the one party, which is deserving of protection at the termination of the agreement? (b) Is such interest being prejudiced by the other party? (c) If so, does such interest so weigh up qualitatively and quantitatively against the interest of the latter party that the latter should not be economically inactive and unproductive? (d) Is there another facet of public policy having nothing to do with the relationship

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<sup>1</sup> *Basson v Chilwan and Others* 1993 (3) 742 (A);

between the parties but which requires that the restraint should either be maintained or rejected?

[11]. A restraint of trade will generally be considered unreasonable if it does not protect some legally recognisable interest of the party in whose favour it is granted, but merely seeks to eliminate competition. In that regard, it is well established that the proprietary interests that can be protected by a restraint agreement are essentially of two kinds, namely: (a) the relationships with customers, potential customers, suppliers and others that go to make up what is compendiously referred to as the 'trade connections' of the business, being an important aspect of its incorporeal property known as goodwill; and (b) all confidential matter which is useful for the carrying on of the business and which could therefore be used by a competitor, if disclosed to him, to gain a relative competitive advantage. Such confidential material is sometimes compendiously referred to as 'trade secrets'.

[12]. The applicants allege in this regard that the first applicant has a protectable interest in that it seeks to protect both its trade connections and its confidential information. Neither of these interests are worthy of protection and I say so for the reasons set out in the paragraphs which follow.

[13]. Apart from the allegation purportedly made by an unidentified individual that he was approached by the first respondent, who supposedly attempted to solicit his patronage, there is no other evidence that the first respondent interfered with the applicants' clients. Ms Govender denies this allegation in any event and it cannot be said, without more, that her denial should be rejected out of hand. She also explains that all the role-players in the industry share the same clients and if one or more of the role-players fails timeously to respond to a request for a security service, the client simply moves on to another competitor in the industry.

[14]. Furthermore, owing to her demotion as a team leader, Ms Govender explains, reasonably so, that she has not had any personal relationships with clients especially not after September 2022 and that she has been sterilised from the applicants' trade connections for a substantial period of time. She

therefore contends that there is no risk whatsoever that a client would move their business from the first applicant to the second respondent for the reason that the first respondent is now employed by the second respondent. She has no influence over any customer of the first applicant and none have followed her or will follow her to the second respondent.

[15]. I agree with this contention. The point is simply that customers in the security industry, not unlike vendors, often move from service provider to service provider. The applicants have, in my view, failed to show that Ms Govender is soliciting their clients who in all likelihood already are clients of the second respondent. The applicants also have not shown that the first respondent is soliciting its staff. Mr Mufamadi plainly approached the first and second respondents on his own accord because of his dissatisfaction with the applicants.

[16]. It is so, as submitted on behalf of the respondents, that the applicants have not demonstrated that the first respondent has any customer connections that will potentially harm them through her employment with the second respondent. The only purpose that the enforcement of the restraint would serve would be to stifle competition. This is impermissible.

[17]. As for the claim relating to confidential information which the applicants seek to protect, such information, as was held in *Alum-Phos (Pty) Ltd v Spatz and Another*<sup>2</sup>, to constitute confidential information, should: (a) involve and be capable of application in trade or industry; (b) must be useful; (c) must not be public knowledge and public property, that is objectively determined, it must be known only to a restricted number of people or to a closed circle of persons; and (d) objectively determined must be of economic value to the person seeking to protect it.

[18]. None of these requirements have been proven by the applicants. As correctly contended by Ms Govender, the pricing in the industry is known by all service providers in that the costs are the same across the board, the differences being on the mark-up that is added. The mark-ups differ from

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<sup>2</sup> *Alum-Phos (Pty) Ltd v Spatz and Another* [1997] 1 All SA 616 (W) at 623A–624A;

service provider to service provider and are also known throughout the industry. Moreover, the documentation alleged to be confidential would not be useful to a competitor and has no economic value. They lack any degree of confidentiality and are of no use to competitors which use the same or similar methods in their businesses. In any event, no allegation is made that the first applicant was exposed to these documents or as to why they purport to be confidential in nature.

[19]. In my view, the applicants have not demonstrated that they have protectable proprietary interest that will be infringed by the respondents. The applicants have not presented any evidence of unlawful competition, and there is no evidence in the papers of any injury having been actually committed or reasonably apprehended.

[20]. For all of these reasons, the applicants' application should fail.

[21]. There is another reason why the applicant's Urgent Application should fail and that relates to urgency. Ms Govender and NSA Security oppose the urgent application *inter alia* on the grounds that the application is not urgent. In the event that it is determined that there is any urgency, then it is submitted, on behalf of the respondents, that the urgency is entirely self-created. The case on behalf of the respondents is that the applicants do not make out a case for urgency as envisaged by the Uniform Rules of Court and the case authorities.

[22]. In *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others*<sup>3</sup>, Notshe AJ commented on the rule regulating urgent applications and held as follows:

'[6] The import thereof is that the procedure set out in rule 6(12) is not there for the taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress.

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<sup>3</sup> *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* [2011] ZAGPJHC 196 (23 September 2011);

[7] It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of an interim relief. It is something less. He may still obtain redress in an application in due course but it may not be substantial. Whether an applicant will not be able obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his case in that regard.'

[23]. A party seeking to approach the Court on an urgent basis needs to justify why his matter is so urgent as to warrant other litigants being shifted further down the queue. As was held by Plaskett J in *Mlezana and Others v South African Civic Organisation*<sup>4</sup>:

'The judicial system, not unlike the private individual, does not take kindly to people who push to the front of the queue. The doctrine of urgency was developed and encapsulated in the rules of court in order to allow those for whom the wait in the queue would not be worth it unless they push in front, to do just that without attracting dirty looks from those behind them.'

[24]. Moreover, the applicant must justify the invasion of the respondent's rights to proper notice and an adequate opportunity to prepare. (*Luna Meubel Vervaardigers (Edms) Bpk v Makin & another t/a Makin Furniture Manufacturers*<sup>5</sup>). The applicant must fully set out the facts supporting the conclusion advanced; mere lip service will not do. If there is some delay in instituting the proceedings an applicant has to explain the reasons for the delay and must also explain why, despite the delay, it claims that it cannot be afforded substantial redress at a hearing in due course. This however does not mean that an applicant can create its own urgency by simply waiting until the normal rules of court can no longer be applied and a delay in bringing the application, or self-created urgency, is a basis for a court to refuse to hear a matter on an urgent basis.

[25]. In this matter, the applicants' attorneys alleged that information was deleted from the first respondent's work laptop and cell phone as far back as 3 March 2023, being two days after the first respondent resigned from her employment with the first respondent. On 10 March 2023 the said attorneys

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<sup>4</sup> *Mlezana and Others v South African Civic Organisation* (3208/18) [2018] ZAECGHC 114 (12 November 2018) at para [5], quoting from Norman Manoim 'Principles Regarding Urgent Applications' in Nicholas Haysom and Laura Mangan (Eds) *Emergency Law* at 79;

<sup>5</sup> *Luna Meubel Vervaardigers (Edms) Bpk v Makin & another (t/a Makin Furniture Manufacturers)* 1977 (4) SA 135 (W) at 114B;



even asserted that they had proof that the first respondent deleted work e-mails and *WhatsApp* messages.

[26]. Thereafter on 20 July 2023 the attorneys asserted that the first respondent was competing unlawfully with the applicants by approaching an unidentified client of the applicants in contravention of her restraint of trade, the confidentiality and the non-disclosure agreements with the first applicant. At that time – on 20 July 2023 – an undertaking was demanded from the first respondent to refrain from breaching the restraint of trade agreement, failing which, so the first respondent was advised, an application would be launched against her to have her interdicted. Subsequently, further breaches were alleged and further demands for undertakings made, none of which were heeded by the respondents.

[27]. Strangely, despite the previous threats to institute urgent proceedings against the respondents, the applicants only proceeded to institute the present urgent application on 28 September 2023. This is at least four months after the applicants would have known about the alleged breaches of the restraint of trade covenant and the first respondent's employment with a competitor.

[28]. I am therefore of the view that the applicants' urgency is self-created. It waited many months from the time it was realised that it should institute proceedings against the first respondent, before it actually took action.

[29]. In my view, there has been non-compliance with the provisions of Uniform Rule of Court 6(12)(b), which reads as follows:

'(b) In every affidavit or petition filed in support of the application under para (a) of this sub-rule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he would not be afforded substantial redress at a hearing in due course.'

[30]. The salient facts in this matter are no different from those in *Afrisake NPC and Others v City of Tshwane Metropolitan Municipality and Others*<sup>6</sup>, where Fabricius J held as follows at para 12:

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<sup>6</sup> *Afrisake NPC and Others v City of Tshwane Metropolitan Municipality and Others* (74192/2013) [2014] ZAGPPHC 191 (14 March 2014);

[12] It is my view that Applicant could have launched a review application calling for documents, amongst others in terms of the Rules of Court, in February 2016. On its own version, it was also ready to launch an urgent application by then, even without the so-called critical documents. The threatened internal appeal also did not materialize.

[13] In the meantime, First Respondent has been in possession of the site since 28 January 2016. Third Respondent's Contract Manager made an affidavit stating that offices, toilets, septic tanks, electricity facilities, generators, storage facilities, bore-holes and access roads have all been established. By 16 May 2016, Third Respondent had done about 500 000 cubic metres of excavation, had surveyed the pipe-line and had procured about 70km of pipe at a cost of about R 188 million. Personnel have been employed.

[14] I do take into account that the whole project will take 24 months to complete. I do not however agree with Applicant's Counsel, who submitted in this context, that for those reasons the needs of the community played no significant role. Having regard to the whole history of the matter, which is set out in great detail in *Esorfranki Pipelines (Pty) Ltd and Another v Mopani District Municipality and Others ZASCA 21 (28103/2014)*, the interest of the particular community that requires the supply of water, remains a relevant consideration, both in the context of self-created urgency and the balance of convenience, which does not favour the Applicant at this stage at all.

[15] This Court has consistently refused urgent applications in cases when the urgency relied-upon was clearly self-created. Consistency is important in this context as it informs the public and legal practitioners that Rules of Court and Practice Directives can only be ignored at a litigant's peril. Legal certainty is one of the cornerstones of a legal system based on the Rule of Law.' (Emphasis added)

[31]. For all of these reasons, I am not convinced that the applicants have passed the threshold prescribed in Rule 6(12)(b) and I am of the view that the application ought to be struck from the roll for lack of urgency.

## **Costs**

[32]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*<sup>7</sup>.

[33]. I can think of no reason why I should deviate from this general rule.

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<sup>7</sup> *Myers v Abramson*, 1951(3) SA 438 (C) at 455.

[34]. Accordingly, I intend awarding costs in favour of the first and the second respondents against the applicants.

**Order**

[35]. Accordingly, I make the following order: -

- (1) The applicants' urgent application be and is hereby struck from the roll for lack of urgency.
- (2) The first to fourth applicants, jointly and severally, the one paying the other to be absolved, shall pay the first and the second respondents' costs of the urgent application, such costs to include the costs consequent upon the utilisation of two Counsel, where so employed.

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**L R ADAMS**

*Judge of the High Court  
Gauteng Division, Johannesburg*

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HEARD ON: 24<sup>th</sup> October 2023

JUDGMENT DATE: 31<sup>st</sup> October 2023 – judgment handed down electronically

FOR THE FIRST TO THE FOURTH APPLICANTS: Adv C Van der Merwe

INSTRUCTED BY: Mark-Anthony Beyl Attorneys, Cresta, Randburg

FOR THE FIRST AND THE SECOND RESPONDENTS: Adv I Miltz SC, together with Adv D Block

INSTRUCTED BY: Webber Wentzel, Sandton