

**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, JOHANNESBURG**

**CASE NO: 2023-008583**

**DELETE WHICHEVER IS NOT APPLICABLE**

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED NO

**Judge Dippenaar**

In the matter between:

**MARY ANTOINETTE SCHALEKAMP**

First Applicant

**HENICO SHALEKAMP**

Second Applicant

**BIANCA ROOS**

Third Applicant

**CARL MATTHEW VISSER**

Fourth Applicant

**FLORIS SCHALEKAMP**

Fifth Applicant

and

<b>PKF OCTAGON CHARTERED ACCOUNTANTS</b> Respondent	First
<b>WALDERMAR MAREK WASOWICS</b>	Second Respondent
<b>MELANI BROODRYK</b>	Third Respondent
<b>MUHAMMED ZIYAAD MOOSA</b>	Fourth Respondent
<b>STEPHEN LESLIE TUCKER</b>	Fifth Respondent
<b>NICOLE NOWAK THOMPSON</b>	Sixth Respondent
<b>MONIQUE VAN WYK</b>	Seventh Respondent
<b>CHARLES MAZHINDU</b>	Eighth Respondent
<b>MATTHEW BERGER</b>	Ninth Respondent
<b>OUEMAKOUA ALISTER CHABI</b>	Tenth Respondent
<b>CHRISTAL ANN PRETORIUS</b>	Eleventh Respondent
<b>DESHEN RABINARAIN</b>	Twelfth Respondent
<b>MOHAMMED MAYET</b>	Thirteenth Respondent
<b>ANTHONY FINEBERG</b>	Fourteenth Respondent
<b>SAVILLE PAIKEN</b>	Fifteenth Respondent

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**JUDGMENT**

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**Delivered:** This judgement was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 21st of February 2023.

**DIPPENAAR J:**

[1] The applicants seek by way of urgent application final interdictory relief aimed at restraining the respondents from directly or indirectly persuading, enticing or inducing any of the applicants' employees to terminate their employment with the applicant. They further seek an order restraining the respondents from enticing or inducing any of the applicant's clients to take their custom away from the applicants.

[2] The applicant's case is squarely predicated on an order for specific performance of the restraint of trade provisions in a partnership agreement concluded between the parties on 17 March 2016 and an undated addendum thereto, concluded during 2022. The relief sought is in the form of a final interdict, pursuant to alleged breaches of the restraint provisions by the respondents. In the founding affidavit it was contended that the applicants established a clear right, an injury actually committed and a threat of injury reasonably apprehended and the absence of an alternative satisfactory remedy and thus is entitled to a final interdict.

[3] In sum, the applicants' case is that their partnership with the first respondent was terminated by agreement with effect from 31 December 2022. The applicants exited the partnership during December 2022 together with some 78 employees and are in the process of implementing an agreement concluded with an international accounting firm, Moore Infinity ("Moore") to join that firm. The aforesaid employees have been employed by Moore since 1 January 2023 and the first, third, fourth and fifth applicants have been appointed as directors of Moore. The parties are still in negotiations relating to the unbundling of the applicants' interest in the first respondent partnership. The applicant's clients directly account for an annual turnover of some R55 million per annum.

[4] The urgency contended for is predicated on the contention that the applicants' client base constitutes the basis of the valuation currently being negotiated with Moore and that the respondents have approached various of their clients and employees seeking to induce them to remain with the first respondent partnership.

[5] In extensive answering papers, the respondents oppose the application on numerous grounds and seek the dismissal of the application with a punitive costs order. The second respondent is the deponent to the answering papers. No confirmatory affidavits were provided by the third to fifteenth respondents, despite the answering affidavit envisaging that such affidavits would be provided.

[6] The respondents challenge the urgency of the application and contend that no cognisable cause of action is made out, predicated on a particular interpretation of the restraint provisions in the partnership agreement. Their case in sum is that the applicants have not illustrated a clear right to relief and that the applicants lack the requisite right to claim enforcement of clause 20 of the partnership agreement. The respondents further contend that no partnership exists between the applicants and that the employees are not employed by the applicants, but by Moore. It is contended that the applicants have failed to illustrate any protectable interest. It is further argued that the restraint provision, which is to endure for a period of three years, is against public policy.

[7] The case for urgency made out by the applicant is that the risk of financial harm is imminent and ongoing. It is not disputed by the respondents that the second and fourth respondents have been in contact with certain clients of the applicants and various employees who left the employ of the first respondent together with the applicants.

[8] There is merit in the criticism levied by the respondents that the case for urgency in the founding papers were advanced in terse terms and in skeleton form, fleshed out in reply. Despite this, I was persuaded that the applicants have established commercial urgency<sup>1</sup> and that they will not obtain substantial redress at a hearing in due course<sup>2</sup>, considering the risk of ongoing harm in the face of the respondents' undisputed conduct.

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<sup>1</sup> Twentieth Century Fox Film Corporation and Another v Anthony Black Films (Pty) Ltd 1982 (3) SA 582 (W) at 586E-H

<sup>2</sup> East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others (11/33767) [2011] ZAGPJHC 196 (23 September 2011) paras [6]-[7]

In addition, I was persuaded on the facts that the undisputed conduct of the respondents in approaching clients and employees may jeopardise the merger with Moore, at least insofar as the monetary benefit to accrue to the applicants is concerned. The applicants are not compelled to wait for damages to be incurred and sue afterwards for compensation<sup>3</sup>.

[9] As the applicants seek final relief, the so called Plascon Evans test must be applied. It requires a consideration of whether the applicants are entitled to relief on the admitted facts in the applicant's affidavit together with the version of the respondents, unless the latter version is so palpably false or untenable that it can be rejected on the papers<sup>4</sup>. The respondents' version pertaining to the interaction between the second and fourth respondents and Mr Lindsay of Continental Group, a client of the applicant was controverted by the affidavit of Mr Lindsay in reply and can be rejected as untenable. It cannot however be concluded that the remainder of the respondents' version can be rejected on the papers.

[10] The requirements for final interdictory relief are trite.<sup>5</sup> They are: (i) a clear right on the part of the applicant; (ii) an injury actually committed or reasonably apprehended; and (iii) the absence of any other satisfactory remedy.

*Have the applicants established a clear right?*

[11] Central to this issue is the proper interpretation of the partnership agreement and the addendum thereto. The shared services agreement referred to in clause 5.2 of the partnership agreement was not placed before the court. The restraint provisions are contained in clause 20. If the applicants' interpretation is correct, it follows that they

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<sup>3</sup> Buthalezi v Poorter & Others 1974 (4) SA 831 (W)

<sup>4</sup> Plascon Evans Paints (Pty) Ltd v van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634E-635B; National Director Public Prosecutions v Zuma 2009 (2) SA 277 (SCA) para [26]; JW Wightman (Pty) Ltd v Headfour (Pty) Ltd 2008 (3) SA 371 (SCA) para

<sup>5</sup> Setlogelo v Setlogelo 1914 AD 221

have established a contractual basis for the relief claimed. The converse applies if the respondents' interpretation is correct.

[12] The interpretation of the words used in the agreement must be approached by considering 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. The triad of text, context and purpose should not be used in a mechanical fashion, but with consideration of 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 as a whole. The inevitable point of departure is the language of the provision itself<sup>6</sup>.

[13] As held in *Coral Lagoon*<sup>7</sup>, the meaning of a contested terms in a contract is properly understood not simply be selecting standard definitions of words, but by understanding the words and sentences that comprise the contested term as they fit into the larger scheme of the agreement, its context and purpose. In doing so, it must be considered what the design is of the partnership agreement and how its architects chose words and concepts to give effect to that design.

[14] In applying those principles to the partnership agreement, the exercise as to proper interpretation cannot be limited to a narrow interpretation of the text only. A consideration of the words used in clause 20.3 in isolation without considering context, is worthless<sup>8</sup>. However, the express wording of an agreement on the other hand also cannot simply be ignored in the interpretation exercise.

[15] The applicants' argue that the applicants' partnership, the so-called "Schalekamp Group" is afforded protection in relation to their clients and employees in terms of clause

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<sup>6</sup> Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others 2022 (1) SA 100 (SCA) ("Coral Lagoon") at para [25]; Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) paras [18]-[19] at 603E-605B

<sup>7</sup> Coral Lagoon supra paras [47], [50] and [51]

<sup>8</sup> Novartis v Maphil 2016 (1) SA 518 (SCA) para [28]

20 as the reference to “partnership” is a reference to the partnerships of the respective partner practices and not a reference to the first respondent partnership. Their interpretation is premised on the allegation that the first respondent does not have clients of its own and that the partnership has no clients separate from the partners. That allegation is however disputed by the respondents.

[16] Reliance is further placed on a contextual interpretation of the partnership agreement with emphasis on the structure of the partnership and the provisions of clauses 4.2, 5.1, 6.1, 8.2 and 8.3 of the partnership agreement in support of the argument on a contextual interpretation and the consideration of the purpose of the agreement. The applicants argued that the cumulative effect and import of the aforesaid clauses was to entrench the ownership of the individual partner’s clients in the partners’ practice, separate bank accounts and accounting, separate ownership of equipment and the excluding of sharing by the partners on the profits of another partner. Reliance was further placed on (i) clause 20.1 providing the context that it concerns the partner’s exposure to the other partners’ clients and access to the information of the other partners’ clients; (ii) clause 20.2 which provides for the partners’ acknowledgement of the restraints imposed on them and the reasonableness thereof; (iii) clause 4 of the addendum, which defined the partnership as the listed practices and only when referred to collectively would the practices be referred to as the partnership; (v) clause 4 of the addendum which included the applicants jointly as a single partner.

[17] It is conceded that if the text is viewed in isolation, the word used in clauses 20.3.1 and 20.3.1 carry the meaning that the partners undertook not to act in the prescribed manner in relation to the employees and clients of the first respondent partnership. They however criticise the respondents’ interpretation as being based on an isolated focus on the word “partnership” in clause 20.3.

[18] It is contended that such interpretation would however produce an absurd, unbusinesslike and meaningless outcome, given the express recordal in clause 4.2 of the agreement between the partners that “ownership” of the individual partners’ clients

would remain as such and would not vest in the partnership or any other partner. It is argued that on a plain linguistic interpretation of clause 4.2 the partnership has no clients separate from the partners but that it is only the partners who have clients. They argue that the rights of each partner in its own practice serves the purpose of inter alia protecting these rights from infringement thereon by the other partners.

[19] In respect of clause 20.3.1, the applicants rely on the contractual setting which includes subsequent conduct as a permissible interpretative tool, indicating how the parties understood the agreement. Reliance is placed on the employment contracts and the fact that the employees were on the payroll of the applicants. It is contended that the first respondent partnership has no employees of its own.

[20] On the applicants' interpretation in context of clauses 20.3.1 and 20.3 2 and the subsequent conduct in relation to clause 20.3.1 the word "partnership" does not refer to the first respondent in a collective sense but to the practices of each of the partners in an individual sense. It is argued that the purpose of clause 20 is to place a restraint on the partners in the partnership not to infringe on the other partners' clients and employees by encouraging enticing or persuading them to respectively take their custom away or terminate their employment, thus to protect the rights of each partner to their respective clients and employees by other partners that had exposure and access to all other partners' clients and their information.

[21] In sum, the applicants' arguments focus on what they contend the purpose of the agreement is and a contextual reading which elevates certain clauses above others, given that the wording of the relevant clauses do not support their cause.

[22] The respondents on the other hand argue that on a proper interpretation of clause 20.3 the word "partnership", is as is defined in the agreement and means the collective partnership of the first respondent only. It is argued that upon a proper construction of the partnership agreement, the restraint provisions in clause 20 afford protection to the first respondent partnership only and not to the respective partners'



practices. Emphasis is placed on the preamble of the partnership agreement, the provisions of clauses 2.3.1 (which defines clients) and 20.6 and the provisions of clause 1.2 .12 of the addendum in arguing that the interpretation advanced by the applicants is untenable.

[23] It is argued by the respondents that on a proper interpretation, the applicants are not able to enforce the restraint provisions of the partnership agreement with the result that the relief claimed is bad in law as the restraint is aimed at protecting the proprietary interests and goodwill of the first respondent partnership in respect of its clients and employees and not those of individual partnership groupings such as the applicants.

[24] I turn to consider the relevant provisions. Clause 20 is headed “restraint” and provides:

*20.1 The partners acknowledge that during the course of the Partnership, they will be exposed to and have access to information relating to the Clients of the other Partners.*

*20.2 the Partners acknowledge further that the restraints imposed on them in terms of this clause are reasonable and necessary.*

*20.3 The Partners hereby undertake that they will not, either alone or jointly or together with any other person-*

*20.3.1 directly or indirectly, encourage or entice or incite or persuade or induce any employee of the Partnership to terminate employment with the Partnership, or cause or assist in causing any of the foregoing to take place;*

*20.3.2 directly or indirectly, encourage or entice or incite or persuade or induce the Clients of the other Partners, to take its custom away from the Partnership, or cause or assist in causing any of the foregoing to take place; and*

*20.3.3 directly or indirectly, discourage or dissuade any of the clients of the other Partners from maintaining its custom with the partnership, or cause or assist in causing any of the foregoing to take place.*

*20.4 The restraints imposed in this clause 20 are imposed for a period of 3 (Three) years from the termination date (the “Restraint Period”).*

*20.5 Each of the undertakings and restrictions in this clause 20 shall be regarded as a distinct and severable covenant, in respect of each magisterial district falling within the Republic of South Africa and each country within which the Partnership conducts business falling within the definition of Territory.*

*20.6 The Partners acknowledge and agree that the restraints imposed upon them in terms of this Agreement are reasonable in all respects as to subject matter, period and territorial limitation and are no more than are reasonably and necessarily required by the Partnership to protect its proprietary interests and goodwill.*

[25] On a linguistic level and considering the words used, the clause affords protection to the first respondent partnership and not to the individual partners. On a contextual reading and considering the agreement and clause 20 as a whole, its provisions impose restraints on the partners during the existence of the partnership in order to protect the collective partnership, the first respondent. The clause does not make provision for any arrangements between the parties after the partnership is terminated but rather affords protection to the first respondent partnership whilst the partnership is in existence. Clauses 14, 15, 16 and 17 of the partnership agreement expressly regulate the termination of the partnership.

[26] The provisions of clause 20.6 further militate against the interpretation proposed by the applicants. The clause expressly refers to the protection of the proprietary interests and goodwill of the partnership, rather than the individual partners. Such interpretation is also in accordance with the purpose of the agreement, which is to regulate the affairs of the partnership and the partners *inter se*.

[27] The only clause in the partnership agreement which refers to employees is clause 20.3.1. In its text protection is afforded to employees of the partnership. Moreover, the applicants' reliance on subsequent conduct to support its interpretation does not avail it. The 78 employees listed in FA5 by the applicants as its employees have been employed by Moore with effect from 1 January 2023. According to the employment contracts and letters of transfer they were previously employed by the first respondent and not by the applicants. This was not disclosed in the applicants' founding papers. Not only does the interpretation of the clause not favour the applicants, they

further cannot enforce rights in respect of persons that are already in the employ of Moore, more so absent any explanation of what interest in these employees can be recognised.

[28] It is necessary to also consider the context of the other clauses relied on by the applicants. The applicants rely heavily on clause 4.2, which provides:

*“It is specifically recorded and agreed that the ownership of clients and debtors, whether prior or subsequent to this Agreement, of each individual partner shall remain as such and under no circumstances, vest in the Partnership or any other partner”.*

[29] The clause entrenches a proprietary interest of each of the partners to its clients. The clause cannot however, as argued by the applicants, be interpreted as confirmation that the first respondent partnership has no clients. On a factual level, it is disputed by the respondents that the first respondent partnership has no clients. The applicants’ interpretation further disregards the provisions of clause 1.2.3 in which “clients” are defined as all persons for whom the first respondent partnership has carried on work, will carry on work and for whom they have carried on work during the period of 30 years preceding the signature date.

[30] In terms of clauses 5.1, 6.1 and 8.2, each partner holds separate bank accounts, separate books of account and separate ownership of equipment. In terms of clause 8.3, each practice’s share of the profit of the partnership would be calculated by subtracting the proportionate costs from the turnover of each partner. In terms of clause 2, the partners would share all profits in the first respondent partnership and bear its equal losses in proportion to their respective declared turnover. These clauses essentially regulate how the business of the first respondent would be conducted and do not in my view avail the applicants.

[31] The practices in their collective form constitutes the partnership conducted under the name of the first respondent. Although the applicants comprise five of the six individuals listed in clause 1.2.12.5, they do not on their own make up the partnership of

the first respondent. The preamble to the partnership agreement expressly refers to the establishment of a partnership under the name and style of Octagon Chartered Accountants for the purpose of carrying on an accounting and auditing practice and ancillary activities associated therewith.

[32] In terms of clause 3 of the addendum, clause 1.2.1 was deleted. The word "business" was defined as: *"inter alia financial accounting.....carrying on business under the name and style of PKF Octagon"*.

[33] In clause 4 of the addendum, clause 1.2. 12 of the partnership agreement was deleted and replaced. In relevant part it provides: *"Partnership" means the following practices, which shall collectively be referred to as the Partnership on the Effective Date*". The clause then lists the respective practices. The applicants, together with a Mr Riaan Dalton Kok is listed as a practice in paragraph 1.2.12.5.

[34] In the original partnership agreement, the same definition was included. After the list of practices, the clause provided: *"jointly and severally, which shall carry on Business as an accounting and audit practice under the name and style of Octagon Chartered Accountants"*. That provision was expressly excluded from the addendum by its architects.

[35] The prospect of defining the partnership jointly and severally as the practices was thus expressly removed from the partnership agreement by the amendment. The intention is clearly expressed to refer to the practices collectively as the partnership.

[36] The deletion in the addendum of the words "jointly and severally" is significant and does not support an interpretation that for purposes of clause 20.3 a reference to the "partnership" would include a reference to the individual partnership practices.

[37] Had the parties not concluded the addendum in terms of which the applicants and Mr Kok became a practice of the partnership, it would be arguable that the term “partnership” in clause 20.3 could have included the individual practices as contended for by the applicants. Thus, whilst the applicants’ interpretation may have been viable before the conclusion of the addendum, the express choice of words and the changed intention evidenced by the different wording used in the addendum puts pay to such interpretation, which cannot be ignored in the interpretation exercise.

[38] The existence of clause 4.2 and the other provisions relied on by the applicants does not mean that it can be read into the provisions of clause 20.3 that the partnership agreement affords protection to each individual partner and that for purposes of the restraint clause, partnership would include the practices of the individual partners.

[39] The applicants’ interpretation further disregards that the first respondent partnership of which they were partners dissolved<sup>9</sup> when they left the partnership on 31 December 2022. It cannot be read into the provisions of clause 20 that protection is afforded to former partners. That does not render the provisions unbusinesslike, as the applicants contend, given that the provisions afford protection as long as the individual partner practices remain partners of the first respondent partnership.

[40] I conclude that the provisions of clause 20.3, seen in context and considering the purpose of the agreement, do not support the interpretation contended for by the applicants. The broad context interpretation contended for by the applicants is not supported by the text of the agreement or its structure.

[41] As held by Unterhalter AJA in *Coral Lagoon*<sup>10</sup>:

*“The proposition that context is everything is not a licence to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text”.*

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<sup>9</sup> Berco Sameday Express v McNeil and Others 1996 4 All SA 100 (W)

<sup>10</sup> Para [51]

[42] There may have been omissions in the drafting of the agreement to protect the position of the applicants as departing partners. The present case does not however concern a rectification of the partnership agreement, but rather the enforcement of the provisions thereof.

[43] In contending for a broad contextual and purposive interpretation outside the express wording of the contested clauses, the applicants effectively seek from the court to licence an interpretation that imports meanings into the agreement so as to make it a better contract or one that is ethically preferable<sup>11</sup>. That is not permissible.

[44] Contracts freely concluded between parties, here highly qualified professionals and chartered accountants, should be enforced in accordance with the *pacta sunt servanda* principle, as confirmed by the Constitutional Court in *Baedica*<sup>12</sup>.

[45] I conclude that on a grammatical, purposive and contextual interpretation of the partnership agreement and addendum, it does not confer on the applicants a contractual right to the relief sought. The clause does not purport to create rights in favour of departing former partners. Rather, it extends rights in favour of the partnership of the first respondent. Although that is not the only hurdle facing the applicants, it is not necessary to delve into those issues in light of the conclusion reached.

[46] Having failed at the first hurdle, the applicants have not made out a proper case for interdictory relief. The absence of a clear contractual right is dispositive of the application and the application must fail. It is thus not necessary to consider the other issues raised in the application papers.

[47] There is no reason to deviate from the normal principle that costs follow the result. The respondents sought a punitive costs order. Despite there being merit in the

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<sup>11</sup> Coral Lagoon supra para [26]

<sup>12</sup> Baedica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others 2020 (5) SA 247 (CC) para

criticisms levied by the respondents against the applicants, upon a consideration of all the facts, I am not persuaded that it is in interests of justice to grant a punitive costs order.

[48] I grant the following order:

[49] The application is dismissed with costs.

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**EF DIPPENAAR  
JUDGE OF THE HIGH COURT  
JOHANNESBURG**

**APPEARANCES**

<b>DATE OF HEARING</b>	: 15 February 2023
<b>DATE OF JUDGMENT</b>	: 21 February 2023
<b>APPLICANTS' COUNSEL</b>	: Adv. P.G. Cilliers SC Adv. J.C. Viljoen
<b>APPLICANTS' ATTORNEYS</b>	: Stupel & Berman Inc. Mr S Jacobs
<b>RESPONDENTS' COUNSEL</b>	: Adv. C.C. Bester
<b>RESPONDENTS' ATTORNEYS</b>	: Fluxmans Inc. Attorneys Mr C Shapiro