



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 43393/20

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED. YES
<u>8 January 2021</u> DATE SIGNATURE	

In the matter between:

MUTUAL SAFE AND SECURITY (PTY) LTD

First Applicant

MUTUAL SAFES JHB (PTY) LTD

Second Applicant

and

SIMPSON SAFES (PTY) LTD

First Respondent

ANDREW MURRAY SIMPSON

Second Respondent

KYLE BRADLEY PEARCE

Third Respondent

NEUKIRCHER J:

- 1] The relief sought by the applicants are a) an interdict in order to prevent certain allegedly unlawful conduct and competition by the respondents

specifically pending the institution of an action for final relief and damages and
b) an order to enforce a restraint of trade against the third respondent.

THE FACTS

- 2] The first applicant (MSS) was established in 1984 and it designs, manufactures, produces, sells and maintains a range of safes, security doors, vaults and security-related products (the product range) most of which are listed on its website¹.
- 3] The second applicant (Mutual Jhb) was one of several other affiliated companies under the MSS umbrella which exclusively marketed, distributed and sold the MSS product range. It also provided after-sales maintenance and services to the MSS clients, as do all the affiliated companies², throughout the entire South Africa³.
- 4] Although MSS has a production and manufacturing plant in Waltloo, Pretoria, certain of its parts and products have also been produced by 3 other companies, viz:
- 4.1 RAW Steel (Pty) Ltd (RAW);
 - 4.2 Mutual Hardened Doors (Pty) Ltd (MHD); and
 - 4.3 Mutual Safe & Security (Southern Cape) (Pty) Ltd (MSC): this company is also responsible for the sales process and warehousing of the produced MSS products.

¹ Together with pricing

² Of which there were several

³ Mutual Jhb closed its doors on 13 May 2020 which is why it is referred to in the past tense

- 5] Rhoderick George Murray Simpson (Rhod) is the sole director of MSC and MHD and one of 3 directors of RAW. He is also the father of the second respondent (Andrew).

THE AGREEMENTS

- 6] On 24 January 1998 a “Confidentiality and Restraint Agreement & Undertaking” (the 1998 Agreement) was entered into between *“Rhod Simpson and/or RAW Steel (Pty) Ltd and/or Mutual Southern Cape (Pty)Ltd (a company to be formed) – MSC “the licensees” and “The Mutual Security Group of Companies – MSG “the licensors” incorporating Mutual Security Cape (Pty) Ltd (MC) & Mutual Safe & Security (Pty)Ltd (MSS)”*.
- 7] For purposes of the issues arising out of this application, it is necessary to set out the relevant portions of the 1998 Agreement. Those state:
- “1. The licensors are the owners of the design patents, the technology and know how of all designs which are to be passed down to the licensees.*
 - 2. The licensors will suffer damage and/or financial loss should the licensees abuse or wrongfully use the designs, technology and know how about to be passed on.*
 - 3. The licensees will be obliged to compensate the licensors for any damages or financial loss that the licensors mat suffer as a result of abuse or wrongful use of the said designs.*

4. The designs, technology and know how (known as the package)⁴ may only be used by RAW Steel (Pty) Ltd (RAW) and Rhod Simpson (RS) within the RAW George factory premises.
5. The package may not be disclosed to any party or third party outside of the RAW business. Only specific RAW employees employed to manufacture for MSG may have access to the package on a “need to know” basis.
6. Should any misuse etc occur, the complete package must be returned to MSG on demand.
- 6 (sic) The package is for the manufacturing use of RAW in its production processes of safes, cabinets and doors made for MSG.
7. The directors, shareholders and their respective families bind themselves in solidum with the contents of this agreement.
8. It is further agreed that all directors, shareholders and their respective families may not use the package before an agreement is signed or after such agreement has expired. In addition all directors agree that they may not be indirectly involved in using the package with any other parties whilst the agreement is in place.
9. Whilst it is not envisaged to impose restraint of trade agreement on the directors, it is agreed that the package will not be used in any way whatsoever once the agreement has expired or cancelled....”

⁴ “The package” is described by MSS as including “the technical drawings, designs, trade marks and further know-how required for the manufacture and production of MSS’s product range. By necessary implication, certain client information forms part of the package as certain products are designed, manufactured and produced for individual clients of MSS.”

- 8] According to MSS, it then provided RAW, MSC and Rhod with the package and since 1998 the latter 3 manufactured and produced products, and parts of products, as and when requested to do so by MSS and/or its affiliated companies.
- 9] MSS is also the proprietor of the 'Mutual' trade mark, registered in its favour with the Companies and Intellectual Property Commission (CIPC) in terms of the Trade Marks Act 194 of 1993. According to MSS, the mark formed part of the package provided to RAW, MSC and Rhod for use under the 1998 Agreement, it is valid and in force, it is used extensively both locally and internationally in relation to MSS's product range and through extensive promotion and advertisement of the product range has a well-established reputation within the safety and security sector of the public.
- 10] Although the respondents have taken issue with whether or not the 'Mutual' mark is actually registered with the CIPC⁵, there is really no true issue on the papers surrounding MSS's allegations regarding the proprietorship of the 'Mutual' mark, and it appears from respondent's own answering affidavit that RAW/MSC produced products as instructed by MSS for on-sell with the 'Mutual' mark.
- 11] Over and above the mark, MSS states that it is the owner of the copyright⁶ in the technical drawings and design drawings provided as part of the package, supplemented from time to time. In argument Mr Woodrow submitted that it

⁵ The state that registration was only started in June 2020 and is presently pending

⁶ This in in that the copyrighted works fall within the definition of *inter alia* s2(1)(c) of the Copyright Act 98 of 1978

was irrelevant whether these works were statutorily protected as they were, in any event, protected via the common law.

- 12] MSS is registered with the South African Bureau of Standards (SABS) and. Accordingly, *“the categorized safes and other items within its product range are SABS approved by virtue of the MSS’s SABS registration and the certifications obtained by MSS pursuant thereto.”* These products which MSS claims are SABS approved fall within the following categories for which MSS has SABS certification:

12.1 SANS 751

12.2 SANS 953-1; and

12.3 SANS 949.

- 13] The point of this is that any ‘Mutual’ SABS approved product which is not sold by MSS, or one of its affiliated companies, is not actually an SABS approved product and its irrelevant whether the product conforms to SABS standards or not. This then affects the validity of any warrantee that would accompany the product.

The second respondent (Andrew)

- 14] Andrew was employed by MSS on 1 February 2011 in terms of a written employment contract concluded on 18 February 2011. According to his employment contract his place of employment was Austin SAFES IN Linbro Park, Johannesburg.

- 15] Of particular importance are two specific clauses in the contract titled “*Trade Secrets/Confidentiality*” and “*Restraint of Trade*” and these state specifically the following:

15.1 “-19.1 *The employee undertakes, without prejudice to any general duty of confidentiality, not to disclose during the continuance of this contract or afterwards, any of the trade secrets of the employer or any information which is confidential to the employer’s business. Trade secrets include the following, which list will not be regarded as exhaustive man-hour tariffs, logistic techniques, proposal contents, client contacts, its systems, methods, processes, business finance, or other affairs of a confidential nature to a third party unless required to do so by law.*

-19.2 *The employee further undertakes immediately after the termination of his/her services to hand over to the employer all documentation and data in his/her possession belonging to the employer, whether in hard copy, contained on computer disc or any other recording medium, including cell photos and documents made by him/her in the course of his/her employment. The aforementioned implies that any copy, abstract, or any précis of any document belonging to the employee or any other person shall itself belong to the employer.*

-19.3 *The employee will not be liable to the employer for information divulged in terms of legislation or a court order compelling him to do so.*

15.2 “-17.1 *The employee may not for a period of twelve (12) months from the date of termination of this contract, whether on his/her own behalf or on behalf of any other person, close corporation, partnership or company solicit custom from, deal with or supply any person, close corporation, partnership or company with whom the employer dealt at any time during his/her employment.*

-17.2 *Paragraph 18.1⁷ also applies to potential clients in which the employer has shown interest or with whom the employer was negotiating at the time of the employee’s employment with the company.*

-17.3 *This limitation of trade is restricted to the nature of the employer’s business products and services. The employee acknowledges that this restraint is reasonable to protect the employer’s business.”*

16] It is common cause that Andrew was employed as a corporate sales executive at Austin Safes⁸ which later became Mutual Jhb, It is also common cause that at the time his employment came to an end, he was the branch manager of Mutual Jhb. On 27 August 2019, Andrew tendered his resignation with effect 29 August 2019, via an email to de Villiers⁹.

17] It is also common cause that at the time that this application was argued, Andrew’s 12 month restraint had lapsed. However, in issue was whether or not the confidentiality clauses survived period of the restraint. Mr Woodrow

⁷ Which deals with the exclusive service portion of the employment contract

⁸ Mutual Austin Safe and Security (Johannesburg) CC

⁹ The deponent to the founding affidavit and the CEO of MSS

submitted that it did. Ms De Kok's position was that any restrictions came to an end when Mutual Jhb closed its doors on 13 May 2020.

The third respondent – Kyle

- 18] According to MSS, Kyle commenced his employment with it on 22 August 2011. His employment contract was formally concluded on 24 April 2014¹⁰.
- 19] In terms of the 2014 contract, Kyle was employed as a sales executive with retrospective effect from 1 March 2013 at Mutual Jhb. The employment contract was entered into between “*Mutual Austin Johannesburg of Mutual Safe & Security Pty Ltd*” and Kyle.
- 20] The contract specifically notes that Kyle's employment commenced on 22 August 2011 but provides for his employment as Sales Executive from 1 March 2013.
- 21] Paragraph 22 of Kyle's employment contract provides for the “*confidentiality & restraint of trade*”. The clause, *inter alia*, provides for the following:
- “22.1 In accepting employment with the Mutual Safe and Security Group, it is acknowledged that during the course of his/her employment or other association with the Mutual Safe & Security Group, the employee will develop a close and personal relationship with the clients of the Mutual Safe & Security Group, and that the employee may, in the course of

¹⁰ It was noted in the preamble to the terms that the date on which Kyle's employment commenced was 22 August 2011

his/her duties, have access to all confidential information of the Mutual Safe & Security Group.

Such access may include, but is not limited to, information in relation to financial and marketing operations, customer data base, technical information and the employer's terms and conditions and methods of conducting its business, and/or any other information confidential or otherwise.

22.2 The employee is prohibited, both during the tenure of the existing employment contract, for a period of unlimited duration after termination of the existing employment contract, in any capacity whatsoever, from disclosing or discussing any information of whatsoever nature including but not limited to, trade secrets names of clients or other client information, methods of operation, information regarding systems, technical know-how, financial information, or any other information of whatsoever nature, to, by or with any person other than the employer.

22.3 This restriction is applicable during the tenure of the employment contract with the Mutual Safe & Security Group, and continues to be of full force and effect after the termination of the employment contract with the Mutual Safe & Security Group, for a period of unlimited duration.

22.4 The employee further undertakes not to be directly or indirectly interested in, or to carry on, or to be engaged in or concerned with, any business, or to be interested in or concerned with any company, firm, partnership, a close corporation, trust, undertaking or concern, either

as an employee or in any other capacity of whatsoever nature, which carries on any business which competes in any way, either directly or indirectly, with the business carried on by the Mutual Safe & Security Group.

- 22.5 The employee undertakes further not to persuade or attempt to persuade in any way, or to solicit, encourage or procure or attempt to solicit, encourage or procure the services of any employee of the Mutual Safe & Security Group, or approach in any manner whatsoever any employee of the Mutual Safe & Security Group to terminate that employee's employment contract with the Mutual Safe & Security Group.*

The area of the confidentiality and restraint terms and conditions shall be the geographical area of Gauteng, for a period of 24 months after termination, for any reason recognised in law as being sufficient, of the employee's employment contract with the Mutual Safe & Security Group.

- 22.6 The employee acknowledges that the restraints and restrictions placed upon him/her are reasonable as to subject matter, geographical area, and duration.*

- 22.7 The employee acknowledges further that his/her experience, qualifications, knowledge and capabilities are such that he/she will be able to obtain employment after termination of his/her employment contract with the Mutual Safe & Security Group, and that such employment will not impinge upon or contravene any of the conditions*

of Clause 22 to this agreement, and that enforcement of the restraint will not prevent him/her from earning a livelihood.”

- 22] On 11 May 2020 Mutual Jhb sent Kyle a letter in terms of s189(3) of the Labour Relations Act no 66 of 1995 informing him, *inter alia*, that the business had closed and “*therefore all employees working for the Mutual Safes Jhb branch will retrenched*” and that “*no other options which is financially viable for the company exists*” as it had not been profitable for the past few years.
- 23] On 13 May 2020 Mutual Jhb sent Kyle a letter informing him of the following:
“Thank you for our consultation held on 11 May 2020 where we discussed the close of the branch. Following this discussion, it is evident that the only option is to close the branch with immediate effect.” The letter informs Kyle that his last day of work would be 13 May 2020 and that he would receive a retrenchment package and his *pro rata* salary due to him by 28 May 2020.
- 24] Kyle then approached Andrew for a job and was employed by him with effect
 1
 June 2020.
- 25] It is common cause that were Kyle’s restraint to be effective, it would operate until 13 May 2022. My phrasing of the latter is deliberate as, in the answering affidavit, the response to the issue of Kyle’s employment contract is that:
- 25.1 he denies signing one;

25.2 if he did sign one, a restraint clause was not discussed with him and his contract did not contain a restraint clause;

25.3 the document put up as being his employment contract is “*an amalgamation of different contracts or documents*”.

The first respondent – Simpson Safes

26] In 2003 an entity was registered under the name of Austin Security Services (Southern Cape) (Pty) Ltd of which Rhod was one of 4 directors. He became the sole director in May 2005 and on 6 June 2019 he resigned and Andrew was appointed as sole director. On 29 July 2019 the company changed its name to Simpson Safes. A month later, Andrew resigned from MSS and Simpson Safes commenced trading with Andrew as its CEO and sole director.

The alleged breaches/infringements

27] During late August 2020, MSS began suspecting that Simpson Safes was trading in unlawful competition with it. This appeared to be confirmed upon receipt of an email from one of its clients¹¹ in respect of an order placed by it where MSS had been waiting on the production by MSC for “*an unusually long time*”.

28] The email originates from one Corné Bester of JDLV who states:

¹¹ JC van der Linde and Venter Projects (Pty) Ltd (JDLV)

“VDLV needs to know what the way forward will be regarding the order? It seems like Mutual cannot deliver because of your problems with Simpson Safes.

We cannot drag this out any longer, as you know the client is very specific and as I understand they have dealt with Simpson safes directly regarding the design etc. Leroy Merlin will not accept anything less than what was specified, and I know the units are lying ready at Simpson safes, and we need them on site.

VDLV needs confirmation by no later than COB today regarding the way forward. VDLV believes that the best way is to terminate between ourselves and Mutual safes on this project.”

29] Pursuant to the receipt of the email de Villiers¹² appears to have discussed the matter with Corn  of JDLV and the following is his take out from that conversation:

29.1 that MSC delayed the order on behalf of Simpson Safes to the detriment of MSS;

29.2 Andrew and Kyle had approached JDLV directly to inform it that they were trading as Simpson Safes in competition with MSS;

29.3 that MSS would be unable to deliver the order;

29.4 that the order was available for immediate delivery if purchased through Simpson Safes that MSS has been buying its products from them for years and thus the product quality is exactly the same;

29.5 the product in question was actually a MSS product.

¹² The deponent to the founding affidavit and the CEO of MSS

30] To compound this, on 22 August 2020 James Chapman (of MSS) intercepted a trail of emails between Kyle and one Saleem Malique (Malique) of “Fours Cash & Carry” which is an existing client of MSS. It appears that Kyle, on behalf of Simpson Safes, had solicited business from Fours. This is can be deduced from an email sent by Kyle to Malique on 20 August 2020 which states:

“So the ones you have taken in the past is the LD175CAT5¹³ drop safe, would you want that again or something different”

(emphasis provided)

31] On 25 August 2020 during a meeting with Woolworths (an existing MSS client), de Villiers was informed by the Woolworths head of security that there are “rumours in the industry” regarding a split between MSS and MSC/RAW, with Simpson Safes claiming to be the leaders in the industry. Woolworths apparently expressed concern about MSS’s production capacity in light of the “split” they had heard about and demanded certain assurances from MSS.

32] On 27 August 2020 MSS had a similar experience in a meeting that took place with Shoprite. The Shoprite Group Loss Provision Manager informed de Villiers that it had been provided with a proposal brochure from Simpson Safes through one of their suppliers, although Shoprite had not met with Simpson Safes directly. Shoprite had similar concerns regarding the state of MSS.

¹³ The LS175 is a MSS product and part of the MSS product range

33] The Simpson Safes brochure that was given to Shoprite contains a number of claims which MSS complains are fraudulent and *“which illustrate the unlawful conduct by the respondent”*. Amongst them is a claim that:

33.1 *“The Simpson family has been manufacturing safes and ballistic products in South Africa since 1976.*

After more than 40 years of supplying customers via intermediary companies, Simpson Safes was launched in 2019 in order to cut out the middleman and provide direct access between the manufacturer and the customer.”;

33.2 *“The Simpson family is also known for setting the benchmark for scientifically tested blast-resistant doors, after manufacturing blast-resistant doors for a large petroleum plant in South Africa in 2012.”;*

33.3 *“Not only does Simpson Safes conform to the minimum SABS guidelines but far exceeds these specifications with products ranging from Category 1 to Category 5”;*

33.4 there are also claims that:

33.4.1 Simpson Safes products are SABS rated;

33.4.2 the premises at 9 Foundry Road, George has *“state of the art infrastructure”*.

34] All of this, according to MSS is not only misleading but creates confusion in the minds of both the public and existing clients as:

- 34.1 Simpson Safes is not the driving force behind the products as those have been manufactured and produced the MSS product range since the 1998 Agreement was concluded;
- 34.2 MSS is also not the “middleman” but the licensor and owner of the intellectual property rights in its product range which is produced and manufactured by RAW and MSC;
- 34.3 the products are actually those of MSS and not of Simpson Safes;
- 34.4 the reference to the blast-resistant doors produced for a petroleum plant in 2012 is actually a reference to the project MSS undertook for Transnet. These doors were produced and manufactured by MSS at its Pretoria plant and were assembled by MSC/RAW as part of that project;
- 34.5 Simpson Safes is neither SABS registered, nor are its products SABS certified and approved; and
- 34.6 the Simpson Safes factory is situated at RAW’s premises where the MSS product range is manufactured and produced and MSS clients are aware of this.

35] Some examples given to found the relief sought regarding the infringement itself are:

- 35.1 the Simpson pamphlet incorporates a photograph of a product called the “Porta Vault”. According to MSS, this is an MSS product, designed by MSS for a client in Germiston in February 2018¹⁴. The vault

¹⁴

A transaction Andrew was involved in at that time

incorporated MSS's DS250 2-in-1 CAT5 door and was manufactured pursuant to MSS's technical drawings;

35.2 a company known as SA Bullet informed de Villiers on 31 August 2020 that Andrew was on their building site and that safes bearing the 'Mutual' mark were being installed – MSS had never processed or invoiced a transaction for these safes;

35.3 a meeting between de Villiers and Norman van Rooyen (van Rooyen) of SA Bullet¹⁵ on 11 September 2020 revealed that Andrew had informed the latter that although he had left MSS he was still able to provide van Rooyen with 'Mutual' safes an SABS certified 'Mutual' safes.

36] The submission is that these examples then demonstrate that Simpson Safes is attempting to pass off the 'Mutual' products as their own.

37] Thus, according to MSS:

37.1 Andrew/Kyle are approaching MSS existing clients to solicit their business;

37.2 they are holding out that Simpson Safes is capable of supplying to those client's products which actually form part of the MSS product range;

37.3 Andrew/Kyle are doing this by using the client connections they built up during their employment with Mutual Jhb in violation of their restraint and confidentiality agreements;

¹⁵ An existing MSS client

37.4 they are *“utilising and disclosing MSS trade secrets, including but not limited to product range information, logistic techniques, proposal contents, client contacts and other information obtained during [his] employment with MSS in order to compete with MSS in violation of the terms of [his] employment contract with MSS and the confidentiality and restraint contained therein.”*

38] As Kyle is still subject to a 24 month restraint, which only expires on 13 May 2022, and he is employed by Simpson Safes, he is in violation of his restraint.

THE RESPONDENT’S CASE

The application to strike out

39] As a first issue, the respondents all take issue with numerous paragraphs in the replying affidavit, as well as certain annexures that accompany the allegedly offending paragraphs. The complaint is that the facts set out therein are new matter impermissibly adduced in reply and/or were known to MSS at the time the application was launched and they cannot therefore be used to bolster an application in reply. The most notable of these are the sudden appearance of the designs, drawings and specifications of several of the MSS products which MSS alleges its intellectual property has been unlawfully appropriated by Simpson Safes. The second challenge is aimed at excluding the proof that the respondents are in fact unlawfully competing with MSS by contacting MSS’s existing clients and “poaching” them and that they are also unlawfully selling products with the Mutual brand.

40] It is trite law that the general rule is that an applicant must stand or fall by its founding affidavit and the facts alleged in it and it is not permissible to make out new grounds in its replying affidavit.¹⁶

41] In **Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd**¹⁷ Viljoen J put it thus:

"In submitting that the applicant may in the replying affidavit supplement a case he has made out in the founding affidavit Mr van der Spuy has referred me to a decision in the matter of Reiter v Bierberg and others 1938 S.W.A. 13, in which the head note reads:

'A petitioner for an interdict is entitled in his petition only sufficient allegations to establish his right and in his replying affidavit he may supplement the information in the petition by anything further to enable him to refute the case put up by the respondent'

It lies, of course, in the discretion of the Court in each particular case to decide whether the applicant's founding affidavit contains sufficient allegations for the establishment of his case. Courts do not normally countenance a mere skeleton of a case in the founding affidavit, which skeleton is then sought to be covered in flesh in the replying affidavit..."

42] In this case, there is no "*skeleton of a case*" made out by MSS. However, MSS has indeed adduced evidence which was available when this application was launched, most notably paragraphs 25.2 (with Annexures "V5" and "V6"), 25.3, 28.5 (with Annexures "V7" and "V8"), 28.7 (with Annexures "V9.1 and

¹⁶ Director of Hospital Services v Mistry 1979 (1) SA 626 (A) at 635H – 636B; Mauberger v Mauberger 1948 (3) SA 731 (C) at 732

¹⁷ 1974 (4) SA 362 (T) at 368H-369B

“V9.2”), 28.8 (with Annexure “V10”), 28.9, 28.10 (and with it Annexures “V11” to “V13.2”)¹⁸, 37.3, 70.3, 73.3 (with Annexure “V27”) and 73.4 (with Annexures “V28”). This being so, these should be struck out as constituting new material in the replying affidavit that was available when the application was initiated.¹⁹

43] In my view, the only other paragraphs that may well come into consideration to be struck out are a) paragraph 56.2 and Annexure “V25”, and b) paragraphs 86.5 – 86.33 and Annexures “V38”, “V41” – “V46”. These paragraphs however pertain to information given to MSS after the application was launched and are a rebuttal to the evidence provided by the respondents in their answering affidavit to demonstrate the falsity of those allegations:

43.1 paragraph 56.2 pertains to information gleaned on 19 September 2020 regarding the fact that Andrew had intended to start a business in 2019 already in competition with MSS and he had intended to take employees with him including Kyle. The WhatsApp messages are Annexure “V25” and although they are dated February 2020, it is clear that they were obtained as a result of the conversation on 17 September 2020 between James (of MSS) and Armand Eksteen²⁰ and were not in MSS’s possession prior to that;

43.2 paragraphs 86.5 - 86.33 are a little more complex. They in actual fact relate to the conversation between Norman van Rooyen and de Villiers which took place on 11 September 2020 in respect of the SA Bullet

¹⁸ Which consist of the photographs and drawings of the offending items in respect of which MSS alleges its copyright is being infringed.

¹⁹ It bears mentioning that respondents also allege *“107 To make it clear, neither RAW nor MSC nor Simpson Safes are currently making any product with a technical design or drawing supplied by MSS.”* (my emphasis)

²⁰ A friend of Andrew’s and a former employee of an affiliated company of MSS

transaction set out in para 36.2 *supra*. All that paragraphs 86.5 – 86.25 do is provide context for the issue surrounding the fact that the Mutual safes were on a SA Bullet site, with Andrew seemingly overseeing the installation process. The main issue being taken with this is that MSS had neither invoiced nor processed this transaction, that SA Bullet was an existing MSS client, and Andrew had no business being on site and that it appeared that he was passing off ‘Mutual’ products as Simpson Safes products, especially given that he had left MSS in 2019.

- 44] Thus, save as set out in paragraph 42 *supra*, there is no merit in the remainder of the application to strike out and it is dismissed.

The respondents’ version

- 45] Andrew specifically states that when he resigned he informed Jason (the previous CEO of MSS) that he intended to sell safes and safety products for his own account and that he would do this from George (Simpson Safes) and from Pretoria via MSS. He states that Jason had no objection to this.
- 46] He states that he was employed by Austin Safes Johannesburg CC which underwent a name change in February 2017 to Mutual Jhb and that, as Mutual Jhb had closed its doors in May 2019, and no longer existed any restraint, or confidentiality restraint, had terminated with the company’s closure. He. In any event, does not recall signing any restraint agreement.
- 47] Similarly, Kyle was employed by Austin Safes and, he similarly does not recall any restraint being discussed with him, nor does he recall signing any

restraint agreement. He, however, goes one step further and calls the employment contract attached to the founding affidavit “*an amalgamation of different documents/contracts...*”.

48] What did appear from the documents is that where the signatories to Kyle’s employment contract appear at the end, Kyle actually signed where the “employer” was to have signed and Andrew (on behalf of MSS) signed where the word “employee” appears. This was conceded during the argument before me.

49] Thus it appears that Kyle did in fact sign his employment contract and was, by implication, aware of the restraint and confidentiality clauses. Both he and Andrew’s denials are simply opportunistic and this especially so as Kyle’s wife was employed with MSS and signed an agreement with exactly the same terms as he did.

50] It is common cause that Andrew’s restraint has already lapsed. The question is whether Kyle’s restraint is valid and enforceable.

Kyle’s restraint of trade

51] As has been set out supra, the restraint clause would endure for a period of 24 months and be enforceable in respect of the geographical area of Gauteng.

52] Kyle’s argument is the following:

- 52.1 he specialised in servicing the construction industry and had about 30 regular clients. The LockDown that was implemented as a result of COVID-19 in South Africa severely affected his customer base and by the time that LockDown had eased, more than half of those had gone out of business;
- 52.2 as Mutual Jhb no longer exists, any restraint clause has lapsed;
- 52.3 he is 35 years old, has a matric qualification and was employed with Mutual Jhb since 2013. The skill set he has was acquired as a result of his hard work and experience in the products of the security industry and are his only "*valuable stock in trade*";
- 52.4 in the present economic climate, he would find it difficult to find employment elsewhere were the restraint to be enforced;
- 52.5 he financially supports his parents, his fiancé and his fiancé's parents.
- 53] What was also pointed out, over and above the fact that many of MSS's products are imported, is the MSS is not the only company of its kind in South Africa. There are, in fact, many competitors in the market which all sell essentially the same products i.e. a standard range of safes, ballistic products and vaults in accordance with a standard range of sizes and dimensions and graded accordingly.
- 54] In enforcing restraints of trade, our courts have done so on the basis that *"If there is one thing that more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and*

voluntarily shall be held sacred and shall be enforced by courts of justice.

*Therefore you have this para-mount public policy to consider - that you are not lightly to interfere with this freedom of contract."*²¹

55] In **Magna Alloys and Research (S A) (Pty) Ltd v Ellis**²² it was stated that the mere fact that the clause may be unreasonable inter partes is not normally a ground for attacking its validity, since the public interest demands that parties to a contract be held to the terms of their agreement.²³

56] Quoting these principles, the court in **Basson v Chilwan and others**²⁴ went on to distil the principles to be applied to issues regarding restraints as the following:

56.1 does the one party have an interest that deserved protection after the termination of the agreement?

56.2 if so, is that interest threatened by the other party?

56.3 in that case, does the interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive?

56.4 is there an aspect of public policy having nothing to do with the relationship between the parties that requires that the restraint be maintained or rejected?

²¹ Per Didcott J in Roffey v Catterall, Edwards and Goudre (Pty) Ltd 1977 (4) SA 494 (N) quoting the dictum of Jessel M R in Printing and Numerical Registering Co v Sampson (1875) L R 19 Eq 462

²² 1984 (4) SA 874 (A)

²³ At 893 H-I

²⁴ (332/1991) [1993] ZASCA 61; 1993 (3) SA 742 (AD) at 767G-H; [1993] 2 All SA 373 (A) (17 May 1993)

56.5 does the restraint go further than necessary to protect the relevant interest?²⁵

57] In **Ball v Bambalela Bolts (Pty) Ltd and Another**²⁶ the manner in which these principles are assessed was put thus:

“In Reddy v Sieman Telecommunications (Pty)Ltd, it was held that the reasonableness of a restraint could be determined without becoming embroiled in the issue of onus. This could be done if the facts regarding reasonableness have been adequately explored in the evidence and if any dispute of fact are resolved in favour of the party sought to be restrained. If the facts, assessed as aforementioned, disclose that the restraint is reasonable then the party, seeking the restraint order, must succeed, but if those facts show that the restraint is unreasonable, then the party, sought to be restrained must succeed. Resolving the disputes of fact in favour of the party sought to be restrained involves an application of the Plascon-Evans rule...”

58] As to the question of why restraints are generally either necessary or enforced by our courts, the following is relevant:

58.1 there are generally two types of proprietary interests worthy of the protection of a restraint of trade - trade secrets and trade connections;

58.2 as regards the trade connections, the need for an employer to protect its trade connections arises where the employee has access to customers and is in a position to build up a particular relationship with

²⁵ Also Reddy v Siemans Telecommunications (Pty) Ltd 2007 (2) SA 486 (SCA); Odifin Life (Pty) Ltd v Jacobs and Another [2016] ZALCJHB 378 (22 September 2016)

²⁶ (2013) 34 ILJ 2821 (LAC) at par [14]

the customer so that when he leaves that employment, he could easily induce the customer to follow him to a new business.²⁷ Once the employer has established the customer contact exists and that it can be exploited by the employee, it is then up to the employee to show that he *“never acquired any significant personal knowledge of, or influence over, the applicant’s customers.”*²⁸;

58.3 *“The court must avoid the subconscious temptation in cases such as these to think that the former employee is ‘just a salesman’ and to treat the attempt to enforce the restraint as a case of the employer taking a sledgehammer to crack a nut. Obviously each case depends on its own facts. A highly successful telemarketer selling to the public at large on a ‘cold calling’ basis will probably not establish a distinctive customer connection. However, in any business dependant for its profits on the sale of its products, the sales function is of fundamental importance and the salesperson’s ability to damage the business of the employer may be very considerable or even fatal, notwithstanding the fact that the salesperson may seem to stand fairly low in the staff hierarchy.”*²⁹

58.4 And in **Poolquip Industries (Pty) Ltd v Griffin and Another**³⁰ the court stated

“The first respondent, as the applicant’s managing director, was in overall and complete control of its business...As managing director the

²⁷ Medrontic (Africa)(Pty) Ltd v Kleynhans and Another (2016) 37 ILJ 1154 (LC); New Justfin Group (Pty) Ltd v Turners and Others (J786/14) [2014] ZALCJHB 177, (2018) 38 ILJ (LC) (14 May 2014)

²⁸ New Justfin (supra)

²⁹ Den Braven SA (Pty) Ltd v Pillay 2008 (6) SA 229 (D) at par [11]

³⁰ 1978 (4) SA 353 (W) at 362B-E

first respondent would have in fact had an intimate knowledge of applicant's pricing policy and its costs structure, its customers, with some of whom he had built up a close relationship ...its existing markets and its plans to penetrate further markets and introduce new products. The first respondent has not denied his knowledge of its pricing policy and cost structure nor its plans to develop new markets. This can all be classed as the applicant's confidential information and proprietary interest which it is entitled to protect, It seems to me that the applicant had a legitimate interest to ensure that this information, and the information and knowledge which a managing director would have of his company and its customers, and particularly those with whom the first respondent had developed a relationship, should not be carried off by the first respondent to a rival."

59] There is thus, on a proper reading of the above cases, no doubt that restraints still form a valid part of South African law and that a party will be held to their contractual obligations³¹. It is also trite that a party who challenges the enforceability of the agreement has the burden of alleging and proving that it is unreasonable.³²

60] In deciding this issue, the question I raised with Mr Woodrow and Ms de Kok was the following: it is clear that the intent of the restraint is to protect MSS clients in Gauteng. Thus, would Kyle be in breach of his restraint if he was

³¹ Also Bedford Square Properties (Pty) Ltd v Liberty Group Ltd 2010 (4) SA 99 (GSJ) at par [6]
³² Magna Alloys supra at 893C-G and 897H – 898D

based in Gauteng but solicited clients for Simpson Safes from elsewhere in South Africa? Both counsel conceded that there could be no such objection.

61] Ms de Kok submits that the restraint and confidentiality clauses cannot survive the demise of Mutual Jhb as, where an employment contract is wrongfully terminated by an employer (i.e. where the employer repudiates its obligations under the contract), it cannot at the same time enforce the restraint clause. This she submits is so because proper retrenchment procedures were not followed by Mutual Jhb who, in the letter of 11 May 2020, solicited suggestions from the employees to keep Mutual Jhb running and two days later severed the employment by giving the employees the s189 letters. She therefore submits that the restraint clause ceased to operate. In support of her submissions she cited the following authorities: **Reeves & Another v Marfield Insurance Brokers CC & Another**³³ (Reeves), **Drewtons (Pty) Ltd v Carlie**³⁴ and **Info DB Computers v Newby & Another**³⁵. But the principle cited in these cases do not support an argument regarding a wrongful or unfair dismissal – it supports an argument regarding a fraudulent or bad faith termination of employment.

62] As examples of these authorities, the following *dicta* are relevant:

62.1 In **Reeves** the question was whether the words “*cease to be employed...for any reason whatsoever*”³⁶ included a wrongful dismissal, and whether the words “*for any reason whatsoever*” in a

³³ 1996 (3) SA 766 (A) at 775B-H

³⁴ 1981 (4) SA 305 (C) at 308E

³⁵ 1996 (1) SA 105 (W) at 108H-I

³⁶ In Kyle’s contract the words “...for any reason recognized in law as being sufficient” appear

restraint clause should be given a restricted meaning so as to exclude any wrongful termination of the contract of employment by the employer. Scott JA found that the meaning of these phrases is wide enough to include the wrongful termination of an employment contract by an employer and

“The words ‘ceases to be employed’ indicate an intention that the restraint is to operate once there is no longer an employment relationship between the employer and employee.

The words that follows, ie ‘for any reason whatsoever’ make it clear that the circumstances in which the employment relationship comes to an end or the underlying cause of its termination are irrelevant to the operation of the restraint provision...”

62.2 at 772D-773A Scott JA continues as follows:

*“An employee who by virtue of his employment would be in a position to exploit on his own behalf his employer's customer connections is free on leaving his employment, subject to certain limitations, to compete with his erstwhile employer for the business of the latter's customers unless restrained by contract from doing so. See Freight Bureau (Pty) Ltd v Kruger and Another **1979 (4) SA 337** (W) at 341 E - H; Cambridge Plan AG and Another v Moore and Others 1987(4) SA 821 (D) at 846 13 - 847 A; Meter Systems Holdings Ltd v Venter and Another **1993 (1) SA 409** (W) at 430 I - 432 B. The legitimate object of a restraint is to protect the employer's goodwill and customer connections (or trade secrets) and the restraint accordingly remains effective for a specified period (which must be reasonable) after the employment relationship has*

come to an end. The need for the protection exists therefore independently of the manner in which the contract of employment is terminated and even if this occurs in consequence of a breach by the employer. Such a breach may, of course, take many forms. It may be committed by the employer in good faith and be of a technical nature only. There may be fault on both sides. It is difficult to imagine that in such circumstances it would be against good morals to recognise the restraint and that the employer should have to forfeit the protection which the parties have agreed he should have regardless of how the employment relationship is ended. Even where the breach on the part of the employer is less innocent, it must be remembered that the employee is always free to pursue his contractual or statutory remedies against the employer. Where there is provision for the giving of notice the damage suffered by the employee may not amount to much. On the other hand, the loss to an employer in consequence of holding the restraint to be invalid may be considerable. In appropriate circumstances, as pointed out by Georges JA in Commercial and Industrial Holdings (Pvt) Ltd and Another v Leigh-Smith and Others, supra, at 238 I, an employee may be entitled to have his damages assessed on the basis of the existence of the restraint. I can accordingly see no justification for regarding a provision such as the one in issue as contra bonos mores. Whether such a provision should be enforced in the light of all the circumstances prevailing when it is sought to invoke the restraint is a different question and one to which I shall revert later.”

62.3 It was only *“Where the wrongful termination by an employer is fraudulent, eg the employee is hired and fired with the sole object of imposing a restraint upon him, or otherwise amounts to a wrongdoing on the part of the employer which is wilful, ie it involves bad faith on his part, a court would on that ground alone decline to enforce the restraint. Indeed, an express provision in terms of which one contracting party undertakes to condone or submit to the fraudulent conduct of the other will be regarded as contra bonos mores and so offensive to the interests of society as to render it illegal and hence void. See Wells v South African Alumenite Co 1927 AD”*
(my emphasis)

62.4 In the **Drewtons** case the court also had to answer the issue of whether a restraint was lawful and stated
“With regard to the submission that the restraint went too far because the contract could be terminated “for any reason whatsoever”, in so far as it is suggested that this is unreasonable because the appellant could unlawfully have dismissed respondent and then claimed compliance with the restraint clause, that of course is not so. An employer cannot repudiate his obligation under the contract of employment and at the same time claim to enforce the restraint clause.”

62.5 The appropriate word in the above quote is the word “*unlawful*” – this is not something which is relevant in the context of the present facts and therefore, in my view, the conclusion drawn in **Drewtons** cannot be drawn here. This is especially so given that MSS states:

“James Chapman met with Kyle on Thursday 28 May 20020 in the Mutual Jhb offices where James advised Kyle that there was an alternative offer of employment within the Mutual Group that was immediately available. Kyle immediately rejected this offer. James was informed that Kyle and his fiancé...were going to involve themselves in a company known as “CK” which allegedly would deal with face masks and sanitizers.”

- 63] In my view it is clear from the authorities cited by Ms de Kok that, in the absence of fraud or bad faith, Kyle remains bound by the terms of his restraint.
- 64] One must also bear in mind that the version of both Simpson Safes and Andrew is that Simpson Safes operates from George as that is where the factory is. There can therefore be no argument that the restraint is unreasonable because Kyle (if he has to bearing in mind the concession made in paragraph 60 *supra* cannot work anywhere other than Gauteng as he clearly can.
- 65] I also find it implausible and improbable that Kyle had no knowledge that he was signing a contract that included a restraint clause especially given that his signature is to be found at the bottom of the restraint provision itself. If he failed to read the contract properly, then the principles of **George v Fairmead (Pty) Ltd**³⁷ apply where it was held that if a person signed a document which

³⁷ 1958 (2) SA 465 (A)

contained the terms of his contract and he chose not to read those terms, then he did so with his eyes wide open and could not plead ignorance of that which he signed or that he signed it in *justus error*.

66] As to whether both Andrew and Kyle's restraint and confidentiality clauses came to an end when Mutual Jhb closed, I find that they did not:

66.1 Andrew's contract clearly stipulates that his employer is MSS and that his place of employment is Mutual Jhb;

66.2 Kyle's contract states that it was entered into between him and "*Mutual Austin Johannesburg of Mutual Safe and Security (Pty)Ltd*";

66.3 all the clauses in the restraint provisions refer specifically to "*the Mutual Safe and Security Group*".

67] I also cannot find that the decision to retrench Kyle because Mutual Jhb was closing down as it had not been profitable, was either fraudulent or in bad faith. Therefore, these clauses in my view survive the closure of Mutual Jhb and the fact that Kyle was offered other work within the Mutual Group cements the lack of any bad faith on MSS's part.

68] The respondents do however, attack both the geographical area of the restraint and the period of the restraint which they state is entirely unreasonable.

68.1 Insofar as the latter is concerned the following is said:

‘The applicants make out no case that the information to which Kyle had access will still have economic value in two years’ time. No customer connection will endure for such a long period of time.’

68.2 But this is not correct. The entire point of building up a relationship with a customer is that the relationship forms the basis of recurring trade and will lead to multiple orders over time with any new project being taken on by that client. Just one example of this is to be found in the fact that van Rooyen had been a client of MSS since 1998.

69] What in my view is unreasonable however is the length of Kyle’s restraint. Bearing in mind that restraints severely impact on the ability to trade and earn an income, and also bearing in mind that Andrew was a branch manager and his restraint was only for a period of 12 months, I cannot see how Kyle’s restraint of 24 months could be reasonable. I am of the view that a 10 month restraint is reasonable in the present circumstances³⁸ given that he had been a sales consultant only since 2013.

Re the interdict

70] It is trite that in order to succeed in obtaining the interdict sought, which is framed as interim relief, MSS needs to demonstrate:

70.1 a *prima facie* right although open to some doubt;

70.2 a reasonable apprehension of imminent and irreparable harm;

70.3 that the balance of convenience favours the grant of the interdict; and

³⁸ Den Braven SA (Pty) Ltd v Pillay and Another 2008 (6) SA 229 (D) at 236D-E

70.4 the absence of any other adequate remedy.³⁹

- 71] The respondents have, save for the relief sought against Kyle which they say is final in effect, accepted that the remainder of the relief sought is interim in nature and effect.
- 72] It is MSS's contention that it has established, at the very least, a *prima facie* right to protect its reputation, product range, confidential information and client connections and that it is entitled to carry on its business without the unlawful interference of the respondents which it says is poaching its clients and the use of its brand. It is also entitled to protect the 'Mutual' brand.
- 73] As part of this *prima facie* right, MSS includes the copyrighted design drawings that MSS alleges it has provided to RAW/MSK under the 1998 Agreement and including drawings that have been amended or supplemented over the years.
- 74] Insofar as the issue of the designs/drawings is concerned, Andrew states that the "package" that is mentioned in the 1998 Agreement was in actual fact never provided to RAW/Rhod or MSC. According to him, RAW produced all products in accordance with designs and methods which Rhod had devised over many years and which were then labelled with the 'Mutual' name.

The Interdicts sought

³⁹ Setlogelo v Setlogelo 1914 AD 221; Tshwane City v Afriforum & Another 2016 (6) SA279 (CC) at par [49]

75] In its replying affidavit MSS states the following:

“Simpson Safes is free to obtain customers of its own, but may not do so by means of unlawfully soliciting the existing clients of MSS in the manner that it has done, namely by acting contrary to the interdicts sought in prayers 2.1 to 2.4 of the notice of motion. The respondents may not engage in unlawful competition, or in breach of contract. The interim interdicts are sought to ensure that the respondents conduct themselves lawfully pending the outcome of the action”

76] There can be no doubt that to stifle free trade is not only unlawful, but unconstitutional. In fact, our courts have gone so far as to state

*“Wealthy traders are habitually eager to enclose part of the great common of the English language and exclude the general public of the present days of the lecture from access to the enclosure... The court is careful not to interfere with other persons’ rights further than is necessary for the protection of the claimant and not to allow any claimant to obtain a monopoly further than is consistent with reason and fair dealing.”*⁴⁰

77] But, in my view, that is not what MSS is seeking to do: what it seeks is to protect its brand⁴¹, its reputation, its intellectual property and copyright in the plans / drawings etc of the products produced and manufactured by RAW / MSC / Rhod over the 22 year relationship it has shared with those companies, as well as its client base and reputation.

⁴⁰ Quad Africa Energy (Pty) Ltd v The Sugarless Company (Pty)Ltd and Another 2020 (6) SA 90 (SCA) para [1]

⁴¹ The ‘Mutual’ brand

78] In order to determine what relief, if any, MSS is entitled to those issues must be analysed separately.

The Brand

79] It is common cause that the MSS brand is the 'Mutual' brand. It alleges in its Founding Affidavit that:

- 79.1 MSS is the proprietor of the 'Mutual' trade mark, which is registered in its favour with CIPC in terms of the Trade Marks Act 194 of 1993;
- 79.2 it also alleges that the 'Mutual' trade mark is valid and in force and is applied to the MSS product range;
- 79.3 that this mark is used extensively both in SA and internationally and that *"considerable time, money and effort has been expended by MSS in the promotion and advertisement of its product range and the 'Mutual' mark has, therefore become well-known within the safety and security sector of the public. MSS thus has well-established reputation in its trade mark and its product range"*;
- 79.4 as part of its reputation MSS is registered with SABS for which it pays a yearly fee. This means that it is entitled to apply the SABS mark to those products within its product range.
- 79.5 And according to MSS:
"119 As a further consequence of the continuous and extensive use by MSS of the distinctive trade-marks, and the design, manufacture and production of high-quality products, the 'Mutual' trade mark and brand has become and is identified in the minds of the public with high-quality, SABS-approved safes,

vaults and security products manufactured, produced, marketed and sold by MSS.”

79.6 Furthermore, the importance of the SABS label is that:

“Purchasers and traders, when purchasing SABS-approved safes, vaults and other security products bearing “Mutual” marks do so in the belief that these products emanate from and are supplied by MSS, either directly or through its affiliated companies including Mutual Johannesburg.”

80] In response to this, the respondents’ stance is the following:

80.1 that MSS is not the owner of any ‘Mutual’ mark;

80.2 that a search of CIPC records on 7 September 2020 revealed that MSS only applied for registration of the denomination ‘Mutual’ on 8 June 2020 and that the application is still pending;

80.3 that both MSC and MHD (owned by Rhod) were incorporated with the words “Mutual” as part of the company name (but Rhod is in the process of changing the company name) as *“they want to make it clear that they are not in any way associated with MSS.”*

80.4 that Simpson Safes sells its products under that name and *“the founding affidavit contains no allegations that any of the three respondents use the “Mutual” mark and that it does not pass off its products as being the products of MSS.”*

80.5 that its products are clearly labelled “Simpson Safes” and are visually different from those supplied by the Mutual Group, i.e. although they

allege that MSS is not the proprietor of the 'Mutual' mark, they in any event deny any infringement of this mark.

81] In my view the denial of the registration of the 'Mutual' mark is neither here nor there: it is common cause that this name is used by MSS to brand its products. No issue is taken with the fact that the 'Mutual' name has become synonymous with the Mutual Group and no true issue can or is taken with the fact that the 'Mutual' brand is known both locally and internationally. Any denial of these facts is without merit.

82] Similarly the issues surrounding the SABS certification are non-issues: the point is that certain products must be SABS certified e.g. a CAT5 safe (the manufacturer must be SABS approved and carry a valid SANS 751 certificate). It is not disputed that Simpson Safes is not SABS approved and has no SANS 751 certificate. This leads to the issue of its brochure and the misleading comments therein to which I will return.

83] What is also important about the SABS approval is that if Simpson Safes is supplying safes to customers bearing the 'Mutual' mark, it is misrepresenting that these are SABS approved – this places MSS in a position of liability vis-à-vis the customer and it constitutes passing off, infringement and possibly fraud in respect of the SABS issue. It also causes MSS reputational harm.

The product list

84] MSS states that its product range is set out in a catalogue attached to the papers and which indicates model name, descriptions and serial numbers (one assumes for easy identification). It states that it *“is the lawful owner of all intellectual property rights in and association with MSS’s product range including but not limited to trade marks and copyright in the designs, technology, model names and know-how relating to all products within the product range.”*

85] In response, respondents point out that a large number of the products set out in the product list attached by MSS are, in fact, imported primarily from the East and that

85.1 MSS manufactured very few of the products sold by it;

85.2 since the Simpson Group has ceased manufacturing for the Mutual Group, *“all ballistic products distributed by it are now manufactured by a company t/a SA Bullet.”*

86] The response to the issue regarding the importing of the products, by MSS is: *“68. I deny that these allegations are of any relevance to this application.”* and to the remainder – a simple denial.

87] But the issue of whether items on the product list are imported is relevant. It is, in my view illogical that MSS can be the owner of the intellectual property / copyright of a portion of the range which appears to be manufactured by an overseas entity and generically available to anyone who orders it. MSS has provided no proof that those imported products were specifically designed by

it in accordance with technical drawings it sent to the overseas manufacturer. Given that MSS's version is that at the time MSC / Rhod / RAW manufactured MSS products, such a conclusion would be illogical.

88] Furthermore, applicant has failed to identify the specific products on the product list which it says are manufactured / produced by means of its intellectual property / copyright. Where it fails to do so, it cannot expect of this court to grant an interdict of the general and far-reaching variety it asks in the Notice of Motion.

89] The highwater mark of MSS's application are the allegations that it provided RAW / MSC / Rhod with a "package" when the 1998 Agreement was concluded. This "package" it says included the designs, technology and know-how. As a demonstration of proof, one such set of technical drawings have been attached in respect of vault known as the "Porta Vault" or "Demountable Vault". From what MSS states in its papers it appears that in respect of most orders, drawings were produced as part of specific requirements of specific clients. But the interdict sought is not a specific one – it is broad and very general in nature and that is where, in my view it goes too far.

90] Where respondents state that there are many competitors in the market which all sell essentially the same products, it means that any interdict granted which would include these standard products would effectively shut Simpson Safes, and perhaps impact other competitors as well, out of the market and that cannot be the point of this application.

- 91] I am thus of the view that given this, and given that applicant has failed to properly identify its intellectual property or copyrighted drawings, no relief can be granted to it on this basis.
- 92] Insofar as the SABS branding is concerned I also cannot see how MSS is entitled to any relief in this regard. As a general rule it would appear to me that if, in fact, respondents are holding out that their products are SABS approved and they are not, then this is an issue that should be raised either by the end purchaser or SABS itself. Of course, if Simpson Safes is marketing and selling 'Mutual' safes / vaults with the SABS brand then applicant is entitled to relief.

Is Simpson Safe using the Mutual mark?

- 93] The issue regarding the JDLV contract comes into play here. From the correspondence it appears that Andrew and Kyle approached the end-client directly, informing it that MSS cannot deliver on the order, that the order is actually ready in George and can be delivered immediately if purchased through Simpson Safes; that MSS has been buying its products for years so the product quality is exactly the same.
- 94] Respondents version is that the particular product in question was ordered through Kyle (at Mutual Jhb) in December 2019 and manufactured by RAW in February 2020. It was however not delivered because by that time, Mutual Jhb owed MSC / RAW substantial sums of money and delivery would not take place until payment had been made. In August 2020 Andrew received a query

from Corné Bester of JDLV and he informed Corné that he and Kyle were no longer employed by Mutual Jhb which had closed down; that the product had already been completed and that RAW and MSC were no longer supplying to the Mutual Group.

95] The point is that, at the time that the latter conversation took place, the product had already been invoiced through Mutual Jhb.

96] The inference drawn by the conversation between Andrew and Corné is inescapable – Mutual Jhb had closed, the product was available but RAW and MSC were no longer supplying the Mutual Group. Therefore, if the client wanted the product, it would have to be ordered through Simpson Safes.

97] The second incident is that involving Fours Cash and Carry which is an existing client of MSS. According to this email, on 19August 2020 one Michel wrote to Kyle asking for a quote on certain specified items. Kyle provided that quote on 20 August 2020 and on the same day Saleem Malique of Fours also asked for a quote for a CAT5 safe.

98] Kyle's response was

"So the ones you have taken in the past is the LS175CAT5 drop safe, would you want that again or something different?"

99] Andrew's answer to this is the following:

99.1 Kyle confirms that on 19August 2020 Michael of Fours Cash and Carry in Botswana contacted him telephonically. He told him that

he had been retrenched by Mutual Johannesburg, who had closed down, and that he was now working at Simpson Safes;

99.2 Michael asked him to provide him with a quote for among other things a CAT5 drop safe;

99.3 Kyle provided Michael with a quote;

99.4 the quote was accepted and the product would be supplied during October 2020.

100] But Andrew also states that the product to be supplied by Simpson Safes is different from the Mutual Jhb product:

100.1 the concrete mix is different;

100.2 the lock placement is different, the bolt works differently, the colour is different and it has a SS label attached.

101] But it is not just the product specifications that is the issue here – it is the fact that Kyle has made use of his customer connections, built up over the time he worked for Mutual Jhb, to redirect orders away from MSS to the benefit of Simpson Safes. This he may not be under his restraint.

102] The third example is that set out in the replying affidavit which relates to MSS Gun Safes models RHS11, RH59 and MK15 seen at Safari and Outdoor in Brooklyn. Although they were painted a different colour and were branded “Simpson Safes”, they retained the *“look and feel”* of the MSS product. It appears that Simpson Safes therefore solicited the business of this existing MSS client as well.

103] The last example was the incident regarding Hilton Franks of SA Bullet. In respect of this de Villiers states:

“86.24 On 31 August 2020 I received a WhatsApp message from Hilton Franks of SA Bullet informing me that he was on vault site in Kempton Park. Hilton phoned me surprised about how many sages MSS had installed on the vault. When I told him about these safes he responded by saying that “my friend”, Andrew, was there on site 31 August 2020 with Hilton and Norman. Hilton sent me photos of the safes ...”

104] These clearly depict the ‘Mutual’ mark and the SABS mark on the serial number plate and according to de Villiers, these were neither processed nor invoiced by MSS.

105] A subsequent meeting between Norman van Rooyen and de Villiers revealed that Andrew had indicated an ability to provide ‘Mutual’ products.

106] Thus, the inescapable inference is that Andrew and Kyle (and by implication) Simpson Safes are using their customer connections to poach existing MSS clients.

107] But this example goes further: it is clear that Simpson Sages is actually passing off the ‘Mutual’ mark. As Norman states in an email to de Villiers dated 17 September 2020:

“I am aware that Andrew left your Pretoria branch in August of 2019 and assured us that as a director of Mutual Safes Southern Cape the supply and installation of the above will still conform to the high standards of Mutual Safes and SABS standards.”

The Brochure

108] There are two specific incidents that are relevant to the complaint about the content of the brochure itself:

108.1 the first is the meeting with Woolworths⁴². Given what was said, it is quite apparent that MSS reputational ability to not only service its existing clients, but provides the quality products it has in the past was questioned;

108.2 the second incident is the meeting between Shoprite and de Villiers on 27 August 2020⁴³ where similar concerns were raised. It was subsequent to this meeting that the Simpson brochure was provided to de Villiers.

109] MSS’s case is that the brochure has *“the potential to create uncertainty and confusion amongst MSS’s current and potential clients as they did with Shoprite.”*

110] It is respondents’ case that this is not the correct test: the correct test is a likelihood of confusion and not a potential for confusion and there is no evidence of actual confusion adduced by MSS.

⁴² see paragraph 26 supra

⁴³ see paragraph 27 supra

111] But the broader question is: what does the brochure say? These are what the applicant specifically refers to as “the misleading claims” which are “*designed to mislead and confuse members of the public and existing client of MSS*”:

111.1 *“The Simpson family has been manufacturing safes and ballistic products in SA since 1976. After more than 40 years of supplying customers via intermediary companies, Simpson Safes was launched in 2019 in order to cut out the middleman and provide direct access between the manufacturer and the customer.”*

111.1.1 the complaint is that the impression created is that the “Simpson Family” is the driving force behind these products which it is not. It has only been manufacturing and producing MSS’s product range pursuant to the 1998 Agreement and MSS is not a “middleman” but the owner of the intellectual property rights in their product range;

111.1.2 thus the intention is to mislead the reader into thinking that the MSS products are actually Simpson products;

111.1.3 I disagree. It cannot be contested that the Simpson family (which includes RAW / MSC / Rhod) have been operating since 1976 and that they manufacture safes and ballistic products and can supply the customer directly. There is no reference to MSS here and no inference of the nature imported by MSS can therefore be made.

111.2 *“The Simpson family is also known for setting the benchmark for scientifically tested blast-resistant doors, after manufacturing blast-resistant doors for a large petroleum plant in SA in 2012”:*

111.2.1 as it turns out this order was produced and manufactured by MSS at its Pretoria plant for Transnet (an MSS client) in 2012 and was only assembled by MSS / RAW as part of the project;

111.2.2 these claims are therefore deliberately misleading and, I agree, will create confusion and uncertainty amongst MSS’s current and potential clients.

111.3 Similarly, the references to *“Simpson-manufactured safes are commonly found in the local diamond and jewellery industries. The security needs of the bulk of local retail and fast-food chains have also been met by the Simpson family... ,”* are misleading and will create confusion and uncertainty amongst MSS’s current and potential clients as they did with both Woolworths and Shoprite.

111.4 Then there is the statement that *“The Simpson family manufacturing plant was established in 1976 and is situated at 9 Foundry Road, George, SA, allowing for ease of service to the network of depots in Johannesburg, Cape Town, PE and Durban.”:*

111.4.1 the complaint is that many of MSS’s clients are aware that its product range is manufactured and produced at 9 Foundry Road and that the above statement will therefore conflate MSS’s products with those of Simpson Safes;

111.4.2 but this claim has no proper standing. It can never be accepted that simply because MSC / RAW operated to manufacture MSS products from this address that, to obviate any possible confusion between MSS and Simpson products, the factory would have to operate from different premises or Simpson Safes may make no reference to their premises in any promotional material. In my view, the differentiation between the two products is in the “labelling” and not the place of manufacture. Therefore, to draw the parallel that MSS seeks to do is artificial. In any event, in order to obviate any possible confusion all that would be necessary is for example a statement from MSS that its products are no longer manufactured / produced by MSC / RAW.

111.5 As regards the controversial issue of the SABS mark, the brochure states:

“.... Not only does Simpson Safes confirm to the minimum SABS guidelines, but far exceeds these specifications, with products ranging from Category 1 to Category 5 ...”

and

“... The family’s success within the category of free-standing and drop has been replicated within the strong room door market. Simpson Safes, again has taken the minimum SABS guidelines and has exceeded the Category 1 up to Category 5 mark in the strong room vault door segment ...”

- 111.5.1 the objection to these statements is that these claims are designed to mislead the reader into believing that Simpson Safes is SABS registered and its products are SABS certified and approved. By making these claims, the intention is to confuse the reader into believing that the products emanating from Simpson Safes are on par with these of MSS as regards the SABS certification, which they are not;
- 111.5.2 but the brochure does not claim that Simpson Safes products are SABS approved. The brochure states that the products conform to SABS specifications and are SABS rated. There is no indication that this is untrue. In my view, anyone in that industry and indeed MSS own clients who are knowledgeable regarding their products, would know the difference between being “SABS approved” and “conforming to SABS specifications”;
- 111.5.3 it would appear from these papers that MSS clients, being the likes of SAPS⁴⁴, Safari and Outdoor JDLV (a construction company), Transnet, are sophisticated clients and discerning clients who would know what they are looking for and be able to discern the difference between a product that is “SABS approved” and one that is no.

44

Each year MSS produces +- 100 MK15 safes

111.6 As to the “Porta Vault” or “Demountable Vault” that is depicted in the company profile, MSS states that this was designed by it⁴⁵ and thus, by depicting this vault in its brochure, it must lead to the inescapable conclusion that Simpson Safes produces this product which would be an infringement of MSS’s intellectual property and copyright:

111.6.1 according to Andrew, whilst it is true that the image of the Porta Vault⁴⁶ is a rendered CAD drawing and he was involved in the sale of a demountable vault whilst employed at Mutual Jhb, various competitors make these vaults;

111.6.2 he states that the nature and design of this product is essentially common to all competitors and that, as it is expensive, *“there are very few customers who would have a need for such a product. As such no one in the industry would keep the product in stock, and it would only be made to order and in accordance with a client’s specific requirements”*;

111.6.3 this statement is not dealt with in the replying affidavit.

The interdict

Re the prima facie right

112] I agree with MSS that it must establish and found its *prima facie* right. This lies in the right to protect its reputation, its product range, its confidential information, its client connections and that these all stems from the restraints

⁴⁵ And the technical drawing is attached it states that MSS developed and produced the vault and the rendered drawing in the Simpson profile is in fact the MSS vault

⁴⁶ Which is what Simpson Safes calls it

contained in Andrew and Kyle's contracts and, in my view, has been established by MSS in this application.

Re the irreparable harm

113] In considering this, it is clear that Andrew and Kyle have already approached MSS clients and in at least one instance have attempted to sell a product produced for MSS to the MSS client directly. Both Woolworths and Checkers have questioned not just MSS's ability to supply but the product quality and JDLV have also threatened to take their business elsewhere seemingly as a result of the respondents' interference.

114] Furthermore the harm lies in Andrew and Kyle utilizing their connections with clients built up over the period they worked for Mutual Jhb to poach these existing clients.

115] The harm also lies in the unauthorised use of the 'Mutual' brand which has been established as belonging to MSS and in respect of which MSS has spent years building up its reputation and standing within the specific security community with clients such as Woolworths, Shoprite.

116] It is therefore clear that MSS would indeed suffer irreparable harm were relief not to be granted.

Re balance of convenience

117] Here the test is that the court must weigh the prejudice the applicant will suffer if the interim interdict is not granted against the prejudice the respondent will suffer if it is.⁴⁷

118] In my view this favours the applicant as well. The balance of demonstrates that MSS's rights must be protected from interference given its reputation and standing in the industry and also given the fact that at least *prima facie* the unlawful acts of the respondents demonstrate that there are prospects of success in the action (to be included).

119] I also bear in mind that the relief does not prevent the respondent from doing business, it will simply stop any unlawful competition.

Re any alternate remedy

120] The last question is whether the applicant has another adequate remedy⁴⁸. In my view there is no other but for the interdictory relief sought.

The relief itself

121] It is the respondents case that the relief sought is far too general and overbroad in its formulation:

Prayer 2.1

⁴⁷ RS v MS and Others 2014 (2) SA 511 (GJ) at par [29]

⁴⁸ National Chemsearch (SA)(Pty) Ltd v Borrowmon 1979(3) SA 1092 (T) at 1123; Candid Electronics P/L v Merchandise Buying Syndicate (Pty) Ltd 1992(2) SA 459 (C) ; Moyane v Ramaphosa and Others [2019] 1 All SA 718 (GP)

121.1 this relief is sought in respect of MSS's entire product range. I am of the view that MSS is not entitled to such overbroad relief. In my view MSS is entitled to relief interdicting and restraining respondents from passing off or selling goods bearing the 'Mutual' brand.

Prayer 2.2

121.2 This is in respect of the interdict sought against making use of MSS's intellectual property. Given that allegedly copyrighted/infringed works have not been properly or clearly set out in the papers, no relief can be granted.

Prayer 2.3

121.3 Insofar as the relief regarding the existing clients is concerned, it must be borne in mind that whilst Andrew's restraint has lapsed, Kyle's has not and insofar as he is an employee of first respondent, the relief must extend to both. While applicant does not set out a full client list in the papers, both Andrew (as shareholder / director of Simpson Safes) and Kyle have full knowledge of the MSS clients – they were after all employed within the group for over seven years each. The restraint therefore applies and this relief is to be granted.

Prayer 2.4

121.4 As regards MSS's ability to fulfil orders and the quality of its products, this has been clearly demonstrated in these papers and the applicant is therefore entitled to this relief.

Prayers 2.5 and 2.6

121.5 Other than the poaching of clients, MSS has completely fail to explain what its "trade secrets" are, what "man-hour tariffs" are

referred to or how this was breached and the same holds true as regards “logistic techniques, business and for finance, systems, methods or processes” or what “other information of a confidential nature” was breached. Therefore applicant is not entitled to this relief.

Prayer 3

121.6 I am of the view that the period of Kyle’s restraint is unreasonable and a ten month restraint is reasonable⁴⁹ and it is also clear that it is limited to the geographic area of Gauteng.

Costs

122] I bear in mind that the applicants are to institute action within 15 days of the order granted herein. Given the substantial success of the first applicant, I am of the view that the respondents should be ordered to pay the costs of this application, which shall include the costs of two counsel. I am not of the view that a punitive costs order is warranted.

Order

123] Thus the order I make is the following:

123.1 Pending the finalisation of the action to be instituted by the applicants against the respondents within 15 days of date of this order, the following interim interdicts are granted:

123.1.1 the first, second and third respondents are interdicted and restrained from using the first applicant’s ‘Mutual’

⁴⁹

See Den Braven SA (Pty) Ltd v Pillay and Another 2008 (6) SA 229 (D) at 236 D-E

brand name in any manner, on any product or promotional material or in any other manner at all;

123.1.2 the first, second and third respondents are interdicted and restrained from approaching the applicants existing clients with a view to soliciting their trade until the lapse of the third respondent's restraint of trade on 31 March 2021;

123.1.3 the first, second and third respondents are interdicted and restrained from making any misrepresentations to any person or entity regarding the business of the first applicant, the origin and/or quality of first applicant's product range or the ability of the first applicant to fulfil its orders or any comparative claims between the first applicant's product range and the product range of the first respondent;

123.1.4 the third respondent is interdicted and restrained, from date of this order until 13 March 2021 from being directly or indirectly interested in, or carry on or be engaged in or connected with any business, company, firm, partnership, close corporation, trust, undertaking or concern either as an employee or in any other capacity of whatsoever nature, which carries on business which competes in any way, either directly or indirectly, with the business carried on by MSS in the geographical area of Gauteng.

123.2 the respondents are ordered to pay the costs of this application, which shall include the costs of two counsel.



NEUKIRCHER J

Date of hearing: 9 October 2020

Date of judgment: 8 January 2021

Hearing conducted via videoconferencing

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 8 January 2021.

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