

SOUTH AFRICA / JUDGMENT

Evrigard (Pty) Ltd Another v Select PPE (Pty) Ltd and Others (2022-22743)

[2024] ZAGPJHC 183 (26 February 2024)

[2024] ZAGPJHC 183

COURT

South Gauteng High Court, Johannesburg

BEFORE

Nowitz

CASE / FILE NUMBER

2022/22743

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--FLYNOTES:**-INTELLECTUAL – Passing off – Colour get-up –****Claim****based on passing off of plaintiff's gloves in colour green****and unlawful competition – Misappropriation of plaintiff's****formula for fluorescent green coloured polymer applied to gloves –****Various grounds of exception raised****by defendants –****Requirements for colour green and distinctive reputation –****Misuse of confidential information****– No correlation between****the alleged passing off and damages claimed – Unclear on****what precise basis such claims****can be quantified – Exception****is upheld.****IN****THE HIGH COURT OF SOUTH AFRICA****(GAUTENG****DIVISION, JOHANNESBURG)****1.REPORTABLE: NO****2.OF INTEREST TO****OTHER JUDGES: NO****3.REVISED: NO****26/02/2024**

Case**No:** 2022/22743**In**

the matter between: EVRIGARD
 (PTY) LTD
 First Plaintiff
 RONDO
 (PTY) LTD
 Second Plaintiff
 and
 SELECT
 PPE (PTY) LTD
 First Defendant
 NLG
 GLOVES (PTY) LTD
 Second Defendant
 PETRUS
 PIETERSE
 Third Defendant
 SIBANYE
 RUSTENBURG PLATINUM
 Fourth Defendant
 MINES
 (PTY) LTD

JUDGMENT

Delivered: This Judgment and Order was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the order is deemed to be the 26th of February 2024.

CORAM: NOWITZ AJ

INTRODUCTION

1. This is an Exception together with an Application to have the Plaintiffs' Particulars of Claim set aside as an irregular step in terms of Uniform Rule 30. The First to Third Defendants ("the Defendants") served a formal Notice in terms of Rule 23(1) read with Rule 30(2)(b) prior to the service of a Notice of Exception and Application to strike out in terms of Rule 30. [1]
2. This evoked no response from the Plaintiffs and the Particulars of Claim are attacked on eight separate grounds, as identified in the Notice of Exception. [2]

LEGAL PRINCIPLES

3. In *Tembani v President of the Republic of South Africa and another* 2023 (1) SA 432 (SCA) para 14, the Supreme Court of Appeal summarised the general principles relating to, and the approach to be adopted regarding, adjudicating Exceptions as follows:

“Whilst exceptions provide a useful mechanism 'to weed out cases without legal merit', it is nonetheless necessary that they be dealt with sensibly. It is where pleadings are so vague that it is impossible to determine the nature of the claim or where pleadings are bad in law, in that their contents do not support a discernible and legally recognised cause of action, that an exception is competent. The burden rests on an excipient, who must establish that on every interpretation that can reasonably be attached to it, the pleading is excipiable. The test is whether on all possible readings of the facts no cause of action may be made out, it being for the excipient to satisfy the court that the conclusion of law for which the plaintiff contends cannot be supported on every interpretation that can be put upon the facts.” (Footnotes omitted, emphasis added)

4. It is trite that when pleading a cause of action, the pleading must contain every fact which would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment. The *facta probanda* necessary for a complete and properly pleaded cause of action importantly does not comprise every piece of evidence which is necessary to prove each fact (being the *facta probantia*) but every fact which is necessary to be proved.[3]
5. The Plaintiffs’ claims are based on unlawful competition and the Defendants submit that on every interpretation that can reasonably be attached to it, the pleading, same is excipiable.
6. The Defendants aver that in seeking to find a cause of action in unlawful competition, the Plaintiffs have done precisely what Schutz JA cautioned against in *Payen Components SA Ltd v Bovic Gaskets CC and Others*[4] where he warned that:

“Unlawful competition should not be added as a ragbag and often forlorn final alternative to every trademark, copyright, design or passing off action. In most such cases it is one of the established categories or nothing.” [Emphases added]

7. Schutz JA repeated this warning in *Blue Lion Manufacturing (Pty) Ltd v National Brands Ltd*[5], where he again cautioned litigants and practitioners against:

“... using some general notion of unlawful competition to create an ersatz passing off with requirements (in the alternative) less exacting than those required by the common law. Some of the restraints that the common law places on the passing off action (the one relative to this case is the need to be proved the likelihood of deception and confusion) are important in preventing the creation of impermissible monopolies.” [Emphases added]

8. The Defendants contend that the Plaintiffs seek to rely on a concerted scheme devised by the Defendants to engage in unlawful competition and to cause the Plaintiffs harm. In this regard, the Plaintiffs seek to contend for i) injurious falsehoods (“Section E1” [6]); ii) a direct substitution of the plaintiffs’ products (“Section E2”[7]); iii) passing off of the plaintiffs’ gloves (“Section E3”[8]); and iv) misappropriation of trade secrets (“Section E4”[9])

9. The Defendants submit that the Plaintiffs have conflated the elements of delict which relate to pecuniary loss and damages – *damnum iniuria datum* – and the requirements which accompany such a claim based on the Aquilian action, with the principles applicable to the *actio iniuriarum*.^[10] On the basis of the foregoing, the Defendants submit that the Plaintiffs' causes of action do not meet a case for Aquilian liability which is necessary when damages are claimed because of injurious falsehoods.

[11]

10. The Defendants' principal cause of complaint is that the Plaintiffs do not seek to plead one cause of action and then the damages which arise from that cause of action, but rather conflate all their causes of action into one single "scheme" and thereby contend for unlawful competition giving rise to damages. The Plaintiffs plead that it is difficult to quantify their damages at this juncture and that same will be amended in due course. However, as set forth hereunder, in my view, this is not a satisfactory answer, notwithstanding that an Exception should be dealt sensibly and not in an overly technical manner.^[12]
11. The Defendants contend that the *facta probanda* (material facts) which have been pleaded are not sufficient to sustain a cause of action and where vital *facta probanda* have been omitted.
12. In respect of Particulars of Claim having to disclose a cause of action, the Supreme Court of Appeal in *Trope v South African Reserve Bank and Another and Two Other Cases*^[13] ("Trope") held that:

"It is trite that a party has to plead - with sufficient clarity and particularity - the material facts upon which he relied for the conclusion of law he wishes the Court to draw from those facts (Mabaso v Felix 1981 (3) SA 865 (A) at 875A-H; Rule 18(4)). It is not sufficient, therefore, to plead a conclusion of law without pleading the material facts giving rise to it. (Radebe and Others v Eastern Transvaal Development Board 1988 (2) SA 785 (A) at 792J-793G.)"^[14] (Emphasis added.)

13. The Appellate Division in *McKenzie v Farmers' Co-operative Meat Industries Ltd*^[15] ("McKenzie") at page 23 defined "cause of action" as follows:

"...every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."^[16] (Emphasis added.)

14. A plaintiff is required to plead its cause of action in an intelligible and lucid manner that identifies the issues relied on and in respect of which evidence will be led.^[17] Thus, in a claim based on delict, the plaintiff is required to plead all the elements of a delict – conduct, negligence, wrongfulness

and causation and the loss suffered. A particulars of claim that does not disclose a cause of action is excipiable.

15. In relation to pleadings that are vague and embarrassing, the Court in *Giant Leap Workspace Specialists (Pty) Ltd v Scoin Trading (Pty) Ltd T/A The South African Gold Coin Exchange*[18] (“Giant Leap”) said the following:

“[32] An exception that a pleading is vague and embarrassing can only be taken when the vagueness and embarrassment strikes at the root of the cause of action as pleaded. See Jowell v Bramwell-Jones and Others 1998 (1) SA 836 (W) at 905 H-I. If the defendant knows which claim it must meet, the particulars of claim cannot be vague and embarrassing, and the exception cannot be upheld.

- [33] This exception covers the instance where, although there is a cause of action, it is incomplete or defective in the way it is set out, resulting in embarrassment to the defendant. At issue is the formulation of the cause of action, not its validity. See *Trope v South African Reserve Bank* 1993 (3) SA 164 (A) at 269I.”

16. In determining whether a pleading is vague and embarrassing the question turns on a twofold enquiry. [19]
17. The first is whether the pleading lacks particularity to the extent that it is vague. The second is whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced. [20] In the Rules, there is no room for further particulars for purposes of pleading. It is therefore incumbent upon the pleader to provide the necessary particularity as part of the original pleading. [21] The exception that a pleading is vague and embarrassing, is intended to cover the case where, although a cause of action appears in the summons there is some defect or incompleteness in the manner in which it is set out, which results in embarrassment to the defendant.[22]
18. An Exception that a pleading is vague and embarrassing strikes at the formulation of the cause of action and not its legal validity.[23] Particulars of claim have been held to be vague and embarrassing where: i) it is not clear whether the plaintiff sues in contract or in delict; [24] ii) the admission of one of two sets of contradictory allegations in the plaintiffs’ particulars of claim or declaration would destroy the plaintiffs’ cause of action; [25] iii) a pleading contains averments which are contradictory, and which are not pleaded in the alternative.[26]
19. In addition, guidance may be obtained as to what may be considered vague and embarrassing from the provisions of Rule 18(6) which provides that:

"A party who in his pleading relies upon a contract shall state whether the contract is written or oral and when, where and by who it was concluded, and if the contract is written a true copy thereof or the part relied on in the pleadings shall be annexed to the pleading."

20. It is trite that the purpose of the above rule, and of pleadings in general, is:

20.1. to bring clearly to the notice of the court and the parties to an action the issues upon which reliance is to be placed[27] on the basis that:

“The object of pleading is to ascertain definitely what is the question at issue between the parties; and this object can only be attained when each party states his case with precision”[28]

20.2. to ensure a party's claim or ground of defence is stated with sufficient precision and in sufficient detail to enable the other party to know what case such party has to meet.[29]

21. Where a pleader would be seriously embarrassed if the offending allegations were not expunged, an exception should be taken. Prejudice must ultimately lie in an inability to prepare to meet the opponent's case.[30] Where it is clear that no cause of action or defence has been pleaded, it is the duty of a litigant to take the most expeditious course to bring the litigation to a conclusion so as to dispose of the dispute or to bring the proceedings instituted to a conclusion.[31]
22. In the case of pleadings that do not meet the requirements set out in Rule 18, the complaint addresses deficiencies in relation to particular allegations or paragraphs that fail to comply with the Rules[32] whereas an exception speaks to vagueness and embarrassment that goes to the root of the cause of action encapsulated by the relevant allegations.
23. The pleading must contain “a clear and concise statement of the material facts upon which the pleader relies for his claim” and set them out “with sufficient particularity to enable the opposite party to reply thereto”. [33] A party's non-compliance with the requirements of Rule 18 may give rise to a successful exception where such non-compliance results in a pleading being vague and embarrassing.[34] With regard to “the material facts relied upon”, the pleader must set out the *facta probanda* upon which it relies for its cause of action.[35] There is no exhaustive test of what constitutes “sufficient particularity”, and the question will be answered in relation

to the circumstances of each case.[36]

24. It is incumbent on a party to plead a complete cause of action which identifies the issues upon which he seeks to rely, and on which

evidence will be led, in an intelligible and lucid form and which allows the defendant to plead to it.[37]

25. A pleading is excipiable on the basis that no possible admissible evidence led on the pleadings can disclose a cause of action.[38]
26. An Exception on the basis that that a pleading is vague and embarrassing is intended to cover the case where, although a case might appear from the claim, there is some defect or incompleteness in the manner in which it is set out (i.e. its formulation) which results in embarrassment to the defendant. This kind of exception is not directed at a particular paragraph within a cause of action but goes to the whole cause of action.[39]

27. The mere fact that it may be possible to plead to the particulars of claim that may be read in a number of ways by simply denying the allegations does not mean that it is not excipiable as being vague and embarrassing.[40]
28. Where an Exception is successfully taken to an initial pleading that it discloses no cause of action, it is appropriate to order that the pleading be set aside and that the plaintiff be given leave, if so advised, to file an amended pleading within a certain period of time.[41]

THE FIRST GROUND:

29. The Plaintiffs have instituted a claim in delict for a final interdict and damages against the Defendants jointly and severally in the amount of R10 646 486.50 arising from the following four categories of conduct which they allege give rise to unlawful competition, each in its own right:

29.1. the First Defendant's injurious falsehoods of and concerning the Plaintiffs (Section E1, paragraph 25 to paragraph 32);

29.2. the direct substitution of the First Plaintiffs' masks and gloves with the Second Defendant's gloves and masks, alternatively gloves and masks distributed by third parties (Section E2, paragraphs 33 to 34);

29.3. the passing-off of the First Plaintiff's gloves in the colour green, said to have become distinctive of the First Plaintiff and its gloves (Section E3, paragraphs 35 to 39);

29.4. the misappropriation of:

29.4.1. the First Plaintiff's formula for the manufacture of a fluorescent green coloured polymer applied to the First Plaintiff's gloves;

29.4.2. the First Plaintiff's price list, said to constitute confidential information and a trade secret belonging to the First Plaintiff (Section E4, paragraphs 40 to 52).

29.4.3.

30. The Defendants submit that in order to succeed with a claim for injurious falsehoods, a Plaintiff has to allege and prove the following:

30.1. the Defendant has by word or conduct, alternatively both, made a false representation;

30.2. the Defendant knew the representation to be false;

30.3. the Plaintiff has lost or will lose customers;

30.4. the false representation is the cause of the loss;

30.5. the Defendant intended to cause the Plaintiff that loss by the false representation.

31. The Plaintiffs rely on a series of representations pleaded in the following paragraphs in support of the cause of action based on injurious falsehoods:

31.1. paragraphs 25.1 read with paragraph 26;

31.2. paragraphs 25.2 read with paragraph 27;

31.3. paragraphs 28 to 30 of the Particulars of Claim.

32. Having regard to the allegations pleaded in paragraphs 25.1 read with 26 and paragraphs 25.2 read with 27, the Defendants submit that the Plaintiffs have failed to allege that:

32.1. the representations were the cause of the loss;

32.2. in making the representations complained of, the Defendants intended to cause the Plaintiffs to suffer the loss.

33. The Defendants further submit that the allegations pleaded in paragraphs 28 to 30 are incapable of supporting a claim based on injurious falsehoods in that the Plaintiffs have failed to allege the following:

33.1. the Defendants by words or conduct or both, made a false representation;

33.2. the identity of the recipient of the false representation;

33.3. the Defendants knew the representation to be false;

33.4. the false representation is the cause of the loss;

33.5. the Defendants intended to cause the Plaintiff to suffer the loss by making the false representation.

34. In the circumstances the Defendants contend that the Particulars of Claim omit allegations necessary to sustain a cause of action based on injurious falsehoods, alternatively the Particulars of Claim are vague and embarrassing in that it is unclear on what precise basis such a claim can be justified in the absence of material allegations required to support the cause of action.

35. The Plaintiffs' response is that there is no merit to the First Ground because:

35.1. the Plaintiffs have pleaded that the representations relied upon by the Plaintiffs are clearly pleaded in paragraphs 25 to 29 of the Particulars of Claim and are the cause of the Plaintiffs' loss. Further, the Plaintiffs plead precisely that in paragraph 32 of the Particulars of Claim (the making of the injurious falsehoods "has caused harm to the Plaintiffs"). The amount of harm is quantified in the Damages section of the Particulars of Claim (Section F) (my emphasis);

35.2. the Plaintiffs plead expressly in paragraph 31 of the Particulars of Claim that the representations were intended to benefit the Plaintiffs' competitors (my emphasis) (whose products are substitutable with those of the Plaintiffs and the sale of which will therefore harm the Plaintiffs) and intended to damage their reputation; and

35.3. finally, with regard to the *facta probanda* in support of its pleading of intention and causation, the Plaintiffs have clearly pleaded that a variety of representations were made (detailed in paragraphs 26 to 29) the essence of which was that the mines should not or could not buy the Plaintiffs' products, that these representations were intended to cause harm to the Plaintiffs because competitors' products would be sold in place of the Plaintiffs' products; and that the Plaintiffs have suffered harm as a result.

36. Even if I were to apply the test enunciated in *Tembani supra* in the most benevolent way and find that a cause of action in respect of injurious falsehoods has been established, the Particulars of Claim remain excipiable in that::

36.1. the “scheme” is not properly articulated in paragraphs 21, 22 and 23 of the Particulars of Claim;

36.2. the role of the Second and Third Defendants is not identified therein;

36.3. paragraph 23 of the Particulars of Claim make it clear that the objective of the “scheme” is not designed to benefit only the Defendants, but is designed to benefit other unnamed PPE Manufacturers and Distributors (who have not been joined) including the Second Defendant;

36.4. all of the alleged injurious falsehoods in paragraphs 25 to 31 are attributable to the First Defendant and no case is made out against the Second and Third Defendants in respect thereof;

36.5. the Second Plaintiff was only appointed as the First Plaintiff’s Distributor in July 2020, as per paragraph 4 of the Particulars of Claim;

36.6. no damages claim has been established in paragraphs 25 to 31 viz a vis the Second Plaintiff;

36.7. the formulation of the damages claimed as per paragraphs 53 to 62 of the Particulars of Claim cannot be reconciled with each of the alleged incidents referred to in paragraphs 25 to 31 and paragraph 63 is no answer to the Plaintiffs’ failure to properly plead the damages suffered; (my emphasis)

36.8. further, no case has been established in support of the relief claimed in prayer 3, which provides for the First and Second Defendants to make payment jointly and severally to the Plaintiffs, nor why the Second Plaintiff should share such amount with the First Plaintiff and if so, in what ratio. Similarly, no case has been made out in respect of the amount claimed in prayer 6;

36.9. the First Defendant is not alleged to be a competitor of the Plaintiffs;

36.10. no case has been made out which reflects that the Second Defendant has been unlawfully competing with the Plaintiffs;

36.11. no case has been made out against the Third Defendant and no relief is sought against him.

37. In the light of the foregoing, I find that the First Ground of Exception is well taken and should be upheld, in that the Particulars of Claim omit allegations necessary to sustain a cause of action based on injurious falsehoods. If I am incorrect in this regard, the First Ground of Exception should nonetheless be upheld, since having regard inter alia to the difficulties highlighted in paragraph 36 above, the Particulars of Claim are vague and embarrassing in that it is unclear on what precise basis such a claim can be justified.

THE SECOND GROUND:

38. The Plaintiffs allege in paragraph 6 read with paragraph 21 of the Particulars of Claim that the First Defendant:

38.1. was appointed as a vendor management industry (“VMI”) operator by several mining companies including the Fourth Defendant to manage the acquisition, inventory and distribution of personal

protective equipment (“PPE”) products used by the mining company at a particular time;

38.2. controls the Plaintiffs’ access to a significant portion of the ultimate purchasers of the Plaintiffs’ products (i.e. the mining companies) and to the end users of the products (i.e. the miners).

39. In paragraphs 22 and 23 read with paragraph 54, the Plaintiffs make the following allegations:

39.1. the object of the scheme of the Defendants to compete unlawfully with the Plaintiffs has been to occasion harm to their business by diverting sales that would otherwise have been made by them;

39.2. the Second Plaintiff would have expected to sell 68 246 pairs of gloves per annum to the First Defendant and ultimately to the mines where the First Defendant is the VMI operator.

40. The Defendants contend that the Particulars of Claim fail to disclose a cause of action in that the Plaintiffs have failed to plead:

40.1. the sales contract upon which sales were predicted as alleged in paragraph 23;

40.2. the right upon which the Second Plaintiff relies in order to give rise to the expectation of realising the sale of 68 246 pairs of gloves per annum to the First Defendant;

40.3. the basis upon which the mining companies were obliged to purchase 68 246 or any lesser amount of gloves from the Second Plaintiff per annum.

41. The Defendants further contend that the Particulars of Claim in failing to plead any of the foregoing rights and obligations,

accordingly:

41.1. lacks averments to sustain a cause of action;

41.2. alternatively are vague and embarrassing as the First to Third Defendants are unable to determine the basis of:

41.2.1. the right to make sales that were otherwise diverted as alleged in paragraph 23;

41.2.2. the Second Plaintiff's expectation of realising sales of 68 246 pairs of gloves pleaded in paragraph 54.

41.3. further alternatively the Particulars of Claim constitute an irregular step in that the Plaintiffs have not pleaded the material facts relied upon in support of the cause of action with the consequence that the Particulars of Claim constitute an irregular step within the meaning of Rule 18(12).

42. The Plaintiffs contend that they do not plead a claim in contract. They allege, that the Defendants have made injurious falsehoods, substituted products, engaged in passing off and stolen confidential information from the Plaintiffs; and a result of that conduct they have generated R4.1m less in revenue from the sale of gloves per annum than they otherwise would have done so. All of these causes of action, the Plaintiffs contend, are recognized categories of unlawful competition; and the trite principle that a Plaintiff is entitled to protect its goodwill. It is the right to goodwill that is being enforced.

43. Mindful of the facts and my findings as set out in paragraph 36 above, it is to be noted that the Plaintiffs' contentions as summarised in paragraph 42 above constitute a total disconnect and do not satisfactorily address the complaints set forth in paragraphs 40 and 41 above. Accordingly, I find that the Second Ground is well founded and should be upheld, since having regard inter alia to the difficulties highlighted in paragraph 36 above, the Particulars of Claim don't disclose a cause of action and in the alternative, at the very least, are vague and

embarrassing in that it is unclear on what precise basis such a claim can be justified.

THE THIRD GROUND:

44. The Plaintiffs allege that the First Defendant has without knowledge of the mines or mine employees, unlawfully substituted the Plaintiffs' masks and gloves with the Second Defendant's gloves and masks, alternatively, those distributed by third parties (my emphasis) at mines.

45. The basis for protection against unlawful competition under the common law is the actio legis Aquiliae which requires a Plaintiff to allege and prove the following elements:

45.1. a wrongful act or omission;

45.2. fault in the form of either dolus or culpa;

45.3. causation and;

45.4. patrimonial loss.

46. The Defendants submit that the substitution of the Plaintiffs' masks and gloves with the Second Defendant's gloves and masks, alternatively those distributed by third parties at mines is not wrongful per se, at least not in the absence of the Plaintiffs having:

46.1. identified the existence of a subjective right which:

46.1.1. the First Defendant is alleged to have interfered with in a legally unacceptable way by substituting the Plaintiffs' masks and gloves;

46.1.2. precluded the First Defendant from substituting the Plaintiffs' masks and gloves as alleged with the competing products of its competitors;

46.2. in the alternative to paragraph 46.1, alleged the breach of a legal duty owed by the First Defendant to the Plaintiffs recognised in law for purposes of attracting liability and which required the Plaintiffs to plead the facts in support of the existence of such a legal duty that obliged the First Defendant not to substitute the Plaintiffs' masks and gloves.

47. Consequently, the Defendants contend that the direct substitution of the Plaintiffs' masks and gloves with the Second Defendant's gloves and masks, alternatively gloves and masks distributed by third parties does not result in the automatic imposition of Aquilian liability for unlawful competition without more.

48. In the result, the Defendants contend that the Particulars of Claim fail to disclose a cause of action on the basis of the substitution

of the Plaintiffs' products, alternatively the Particulars of Claim are vague and embarrassing as it remains uncertain on what basis the substitution attracts liability in delict.

49. The Plaintiffs respond by contending that with most unlawful competition claims, the right being enforced is the right to goodwill; and the cause of action is one under the action legis Aquiliae (which recognizes the right of traders to the free exercise of their trade). The principles which underpin causes of action of this sort are trite. They were set out by the Constitutional Court in *Masstores (Pty) Ltd v Pick n Pay Retailers (Pty) Ltd* [2017] 1 CPLR 1 (CC).

50. To succeed in their claim based on the direct substitution of their gloves

for those of competitors by Select, therefore, the Plaintiffs were required to plead conduct on the part of the Defendants which

exceeded the bounds of lawful competition and offended against the boni mores, as contemplated in Massstores. The Plaintiffs submit that they have done so in paragraphs 33 and 34 of the Particulars of Claim. For example, paragraph 34.2 reflects conduct that, if established, is dishonest and unfair. The use of gloves not approved by the mine (the ultimate customer), as alleged in paragraph 34.1, for purposes of achieving the objective in paragraph 23 of the Particulars of Claim also plainly offends against the boni mores.

51. Mindful of the facts and findings set out in paragraph 36 above, coupled with the fact that firstly, if anyone had a complaint, or claim, it would be the Fourth Defendant and secondly, that it allegedly involved the substitution and distribution of unnamed third parties' gloves as well, I find that the Third Ground is well founded and should be upheld. Further, on the Pleadings as they stand, it is impossible to establish what amount of the damages allegedly suffered and claimed, is attributable to the First Defendant, the Second Defendant, or the unnamed third parties for that matter.

THE FOURTH GROUND:

52. The Plaintiffs allege in paragraph 35 read with paragraph 36 that the First Plaintiff has:

52.1. made continuous and extensive use of "its proprietary fluorescent green colour for Evrigard Gloves";

52.2. acquired a substantial reputation and goodwill in respect of gloves bearing that colour such that purchasers of protective gloves associate the colour green as designating that the gloves originate from the First Plaintiff with the result that the colour green has become distinctive of the First Plaintiff and its gloves.

53. The Plaintiffs allege that:

53.1. the application of the colour green is conducted using a production process and is confidential and proprietary to the First Plaintiff (paragraph 17);

53.2. the Second Defendant has since 2017 committed unlawful passing-off in that it has manufactured and sold gloves in the First Plaintiff's proprietary fluorescent green colour which is likely to confuse or deceive purchasers into believing that the Second Defendant's gloves are connected in the trade with those of the First Plaintiff (paragraphs 37 and 39).

54. A claim for passing-off requires a Plaintiff to show that the name, mark or get-up used has become distinctive of its goods or services in that the public associate the name, mark or get-up with the Plaintiff's goods or services.

55. The Plaintiffs are therefore required to show that the get-up of the First Plaintiff's gloves, alleged to constitute the colour green (see paragraph 36), acquired a reputation in connection with its gloves and consequently became distinctive thereof.

56. Where the get-up is alleged to consist of a shape or a colour, a trader does not acquire a right to the get-up on the basis that it has become distinctive, unless and only if it can prove that through the arrangement and composition thereof, the trader has added features to the shape or colour that constitute capricious additions such as inter alia distinctive labelling or a combination of colours.
57. The Defendants submit that the description of the get-up as comprising a fluorescent green colour on its own is insufficient to become distinctive with the common law:
- 57.1. not permitting a monopoly in respect of a single colour per se;
- 57.2. only affording protection to those parts of the get-up said to constitute capricious additions or features to an article that serve as a badge of origin.
58. Accordingly, the Defendants submit that allegations in support of a passing-off claim on the basis that the colour green has become distinctive of the First Plaintiff's gloves are insufficient to sustain a cause of action under the common law by virtue of the fact that:
- 58.1. the common law does not countenance the acquisition of a get-up in a single colour per se;
- 58.2. the Plaintiffs have not alleged the existence of any capricious additions capable of rendering the get-up of the gloves distinctive in character with the colour green on its own not capable of acquiring a distinctive character, nor indicative of any capricious addition.
59. The Defendants accordingly submit that the Particulars of Claim are accordingly bad in law for purposes of sustaining a passing-off cause of action.
60. The Plaintiffs submit that the authorities which the Defendants cite, find to the contrary and are destructive of the Exception taken. The Agriplaas decision makes it clear that the colour of an article may constitute the capricious addition to the article allegedly required in our law. The judgment of Couzens Hardy MR in the same matter refers only to the (trite) principle that a reputation will not vest in common colours because those colours are not distinctive of a single trader; and consumers will not be deceived or confused by the use of those common colours by different traders. The Plaintiffs' case is not based on a common colour. Its case is that its colours for its gloves (red and a distinctive green for one set of gloves and distinctive green for the other) are distinctive of it
- the very antithesis of a common colour.
61. Finally, the Plaintiffs submit that the English authority relied upon by the Defendants is again destructive of their Exception. The cases say only that proving a reputation in a colour applied to an article is difficult. That may be so. The point, however, is that the authorities recognize that it is possible to prove a reputation in a colour applied to an article (the reputation does not vest in a colour per se as suggested by the Defendants but in the colour applied to gloves). Indeed, the quotation in paragraph 90 of the Defendants' Heads of Argument says so in terms ("not impossible"). Once it is recognized that a colour applied to

particular goods may be distinctive, even if difficult to prove, a cause of action is disclosed where a plaintiff pleads that a colour, applied to a particular article, is distinctive of it.

62. Even if I am to apply the test enunciated in Tembani supra in the most benevolent way and find that the Plaintiffs have pleaded the requirements for a Passing Off, having regard inter alia to the difficulties highlighted in paragraph 36 above, it is unclear on what precise basis such a claim can be quantified, ie there is no correlation between the alleged Passing

Off and the damages claimed. For these reasons, the Fourth Ground is upheld.

THE FIFTH GROUND:

63. The Plaintiffs allege in paragraphs 17 and 41 read with paragraph 46 and 47 that:

63.1. the First Plaintiff manufactures its gloves using a fluorescent green-coloured polymer according to a confidential formula and process which:

63.1.1. the First Plaintiff developed through considerable effort, time, cost and money;

63.1.2. has considerable value according to the First Plaintiff;

63.1.3. is confidential and not available to the general public.

63.2. the application of the colour green is conducted using a production process and is confidential and “proprietary” to the First Plaintiff;

63.3. the formula was provided to the First and Second Defendants who have misappropriated it to manufacture the Second Defendant’s gloves.

64. The Defendants submit that South African law does not recognise an intellectual product in which there can be ownership of an immaterial property right, save to the extent catered for under the relevant statutory forms of recognised immaterial property for which legislative recognition is given as follows:

64.1. patents (i.e. the Patents Act 57 of 1978);

64.2. designs (i.e. the Designs Act 195 of 1993);

64.3. copyright (i.e. the Copyright Act 98 of 1978) and;

64.4. trade marks (i.e. the Trade Marks Act 192 of 1993).

65. The Defendants further submit that the Plaintiffs have not alleged:

65.1. the existence of statutory rights that would vest the First Plaintiff with any proprietary right or interest in the fluorescent green coloured polymer or the production process or formula that produces the polymer in a fluorescent green colour;

65.2. sufficient facts to justify legal recognition and protection to a proprietary right or confidentiality interest at common law in the fluorescent green coloured polymer or the production process and formula giving rise thereto in that:

65.2.1. the Plaintiffs have only alleged that the formula

and process "has considerable value" to the first Plaintiff as a subjective matter (paragraph 41.2 of the Particulars of Claim);

65.2.2. it was necessary for the Plaintiffs to allege that the

information forming the subject of the trade secret is when objectively viewed, of economic or business value with the result that its protection under the common law is not dependent on the First Plaintiff's own evaluation which is insufficient to vest with it legal protection.

66. Accordingly, in the absence of statutory protection or allegations which justify the recognition of common law protection, the Defendants submit that any person or entity is free to copy a competitor's product which does not per se constitute an actionable wrong. Thus, they submit that the Particulars of Claim in the circumstances do not disclose a cause of action insofar as the Plaintiffs seek to protect a manufacturing formula and process in relation to a fluorescent green coloured polymer, alternatively are vague and embarrassing in that the Defendants are left in the dark concerning the precise basis the Plaintiffs claim that the production process and formula is "proprietary" to the First Plaintiff.

67. The Plaintiffs in response submit that our law has, for more than 60 years, recognized that the misuse of the confidential information of another trader is wrongful. As made clear by Corbett J in *Dunn & Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd* 1968 (1) SA 209 (C) p. 221 - 222 a rival trader who

"... in some manner obtains this [confidential] information and, well knowing its nature and the basis upon which it was distributed, uses it in his competitive business and thereby injures the first-mentioned trader in his business, commits a wrongful act vis-a-vis the latter and will be liable to him in damages ... in such circumstances the conduct of a rival trader who obtains and, well knowing the position, uses the information to advance his own business interests and activities amounts to a deliberate misappropriation and filching of the products of another's skill and labour."

68. Seemingly recognizing this, the Defendants go on to argue that the Plaintiffs have not pleaded the *facta probanda* in support of a common law claim for damages arising from the misuse of confidential information. They place particular emphasis on the fact that Plaintiffs are said not to have pleaded that the information in question was useful to a competitor or has value when "objectively viewed".

69. The argument is misplaced. For information to qualify as confidential it must have "the necessary quality of confidentiality"

about it. This quality will be inferred where the information in question is:

69.1. useful, in the sense that is capable of application in trade or industry;

69.2. not public knowledge or public property but is known only to a restricted number of persons; and

69.3. of economic value to the plaintiff.

70. The Plaintiffs submit that they have clearly pleaded these requirements in paragraph 41 of their Particulars of Claim. In any event, the fact that the colour can be applied to gloves to render them distinctive of a particular trader clearly evidences the usefulness of the colour, including to the Defendants. "Viewed objectively", the proprietary information (relating to the formula and process) which enables the colour to be applied to the gloves in question is clearly valuable to the Defendants. That is why they took the information and used it to compete with the Plaintiffs.

71. Even if I am to apply the test enunciated in *Tembani supra* in the most benevolent way and find that the Plaintiffs have pleaded sufficient facts, which if proved, would justify legal recognition and protection of a proprietary right or confidentiality interest at common law in the fluorescent green coloured polymer or the production process and formula giving rise thereto, having regard inter alia to the difficulties highlighted in paragraph 36 above, it is unclear on what precise basis such a claim can be quantified. For these reasons, the Fifth Ground is upheld.

THE SIXTH GROUND:

72. The Plaintiffs allege in paragraph 43 read with paragraphs 44 to 46 and paragraph 50 that:

72.1. the First Plaintiff maintains a price list which it created over the course of many years, that has considerable value to the First Plaintiff and is confidential in that it is only disclosed to customers in confidence and not available to the general public;

72.2. the price list constitutes confidential information belonging to the First Plaintiff;

72.3. a former employee and director of the First Plaintiff, provided the price list to the First and Second Defendants;

72.4. the Second Defendant is making use of the price list to compete with the Plaintiffs.

73. The Defendants contend that the Plaintiffs have not alleged sufficient facts to give legal recognition and protection to a confidentiality claim at common law in respect of the price list in that:

73.1. the Plaintiffs have only alleged that the price list “has considerable value” to the First Plaintiff as a subjective matter (paragraph 43.2 of the Particulars of Claim);

73.2. it was necessary for the Plaintiffs to show that the information forming the subject of the trade secret is when objectively viewed, of economic or business value with the result that its protection under the common law is not dependent on the First Plaintiff’s own evaluation which is insufficient to vest the price list with it legal protection.

74. Accordingly, the Defendants submit that the Particulars of Claim do not disclose a cause of action insofar as the Plaintiffs seek to allege that the First to Third Defendants committed an actionable wrong ex delicto arising from a breach of confidentiality in relation to the price list.

75. The Plaintiffs submit that the Sixth Ground is very similar to the Fifth, the only difference being that the Defendants now contend that the Plaintiffs have not pleaded that the Plaintiffs' price list qualifies as confidential information when "viewed objectively". Aside from the fact that that is not the test, the Exception fails because the Plaintiffs do indeed plead that the price list has the necessary

qualities of confidential information in paragraph 43 of the Particulars of Claim.

76. Applying the test enunciated in *Tembani supra* in the most benevolent way, I find that the Plaintiffs have pleaded sufficient facts, which if proved, would justify legal recognition and protection of a proprietary right or confidentiality interest at common law in the price list. However, having regard inter alia to the difficulties highlighted in paragraph 36 above, it is unclear on what precise basis such a claim can be quantified. For these reasons, the Sixth Ground is upheld.

THE SEVENTH GROUND:

77. The Plaintiffs allege in paragraph 53 to 63 that they have suffered damages.

78. The Plaintiffs have sought to base their claim for damages on a loss of profits.

79. The Defendants submit that the allegations in paragraphs 56, 57, 58 and 59 (including the reference to annexure “A”) do not sustain a claim for a loss of profits in that the averments fail to plead:

79.1. the costs of manufacture;

79.2. the costs of goods sold;

79.3. the Plaintiffs’ fixed costs;

79.4. the difference between the total cost of manufacturing and the total sales.

80. The Defendants further submit that the Particulars of Claim do not comply with:

80.1. Rule 18(4), in that they omit material facts upon which the Plaintiffs rely in support of the damages claim for a loss of profit;

80.2. Rule 18(10), in that the Plaintiffs have not set out their damages in such a manner as will enable the first to third Defendants to reasonably assess the quantum thereof.

81. In the circumstances, the Defendants submit that the Plaintiffs' Particulars of Claim constitute an irregular step within the meaning of Rule 18(12), alternatively, are vague and embarrassing.

82. The Plaintiffs respond by contending that they have pleaded the (i) quantum of sales lost; (ii) the margin that they would have made on such sales; and (iii) the profits lost as a result of the conduct of the Defendants. They accordingly submit that the pleading therefore complies with rule 18(10) and is not otherwise excipiable in that the Defendants have all the information they need to assess the quantum of the damages, to plead thereto and to make a tender.

83. I do not agree with the Plaintiffs' contentions, firstly, for the reasons set forth in paragraph 36 above; secondly, because there is a total disconnect between the alleged causes of action relied upon and the globular and arbitrary manner in which the Plaintiffs' alleged damages have been computed and thirdly because the globular amounts cannot be linked to the separate causes of action relied upon. Thus, at the very least, the Particulars of Claim are vague and embarrassing. Accordingly, this Seventh Ground is upheld.

THE EIGHTH GROUND:

84. In paragraphs 57 to 61, the Plaintiffs allege that they have jointly suffered damages in the form of a loss of profit in the amount of:

84.1. R4 108 026.62 in respect of the sale of the First Plaintiff's gloves between 2019 and 2021;

84.2. R6 538 459.91 in relation to the sale of the First Plaintiff's masks from 2019 to 2021.

85. Having regard to the fact that:

85.1. the Second Plaintiff is alleged in paragraph 4 to have been appointed at the First Plaintiff's distributor from July 2020, only from which date it purchased from the First Plaintiff products for on-sale to customers including mining companies and companies appointed by mining companies to manage the acquisition, inventory and distribution of products at their mines;

85.2. no allegations have been made of and concerning the Second Plaintiff's involvement in the purchase and sale of products during the period 2019 to July 2020,

the Defendants submit that no cognisable claim lies in the name of the Second Plaintiff for damages during the period 2019 to July 2020.

86. While the Plaintiffs have pleaded that they have jointly suffered damages, the Defendants further submit that the Particulars of Claim do not identify the amount of damages suffered by each party.
87. In the circumstances, the Defendants submit that:
- 87.1. the Particulars of Claim fail to disclose any damages in respect of either Plaintiff with sufficient particularity to give rise to a cognisable cause of action for either one or both of them;
- 87.2. alternatively, the Plaintiffs have not set out their damages in such a manner as will enable the First to Third Defendants to reasonably assess the quantum thereof for purposes of Rule 18(10) with the result that the Plaintiffs' Particulars of Claim constitute an irregular step within the meaning of Rule 18(12);
- 87.3. further alternatively, the Particulars of Claim are vague and embarrassing.
88. The Plaintiffs submit that the Second Plaintiff is the distributor of the First Plaintiff's products. They are both therefore harmed by the Defendants' conduct, not least because sales lost by the First Plaintiff are also lost by the Second Plaintiff.
89. In any event, the Plaintiffs contend that there is no suggestion that the Second Plaintiff is not entitled to the interdictory and declaratory relief sought by the Plaintiffs. This argument cannot be accepted, since the Eighth Ground does not address interdictory and declaratory relief. The Plaintiff further contend that whether or not the Second Plaintiff has a separate claim for damages is of not appropriate subject matter for an Exception. I disagree with this contention, for the reasons set forth in paragraphs 36 and 81 above. Accordingly, this Eighth Ground is upheld.

CONCLUSION

90. In the circumstances, the Exception is upheld and the Plaintiffs' Particulars of Claim are struck out.

ORDER

1. The Exception is upheld and the Plaintiffs' Particulars of Claim are struck out.
2. The Plaintiffs are granted leave to amend their Particulars of Claim within 15 [FIFTEEN] days from the date of this Order.
3. The Plaintiffs are ordered to pay the costs of the Exception and Application to strike out, jointly and severally, the one paying the other to be absolved, including costs of two counsel.

M NOWITZ

ACTING JUDGE OF THE HIGH COURT

OF SOUTH AFRICA GAUTENG DIVISION, JOHANNESBURG

26 FEBRUARY 2024

APPEARANCES:

FOR THE PLAINTIFFS: Adv. G Marriot

082 824 0616

marriott@counsel.co.za

Adv. M C Scheepers

082 788 0729

scheepers@group621.co.za

FOR THE DEFENDANTS: Adv. Subel, SC

082 450 4055

subel@group621.co.za

Adv. C C Bester

079 191 3890

chrisbester@group621.co.za

[1] CaseLines 004-1.

[2] CaseLines 005-1.

[3] McKenzie v Farmers' Co-Operative Meat Industries Ltd 1922 AD 16 at 23.

[4]

[1995] ZASCA 57; 1995 (4) SA 441 (AD) at 453G-H.

[5] 2001 (3) SA 884 (SCA) at para [1].

[6] CaseLines; Particulars of Claim ("POC"); 001-12 to 001-15; para 25 to 32.

[7] CaseLines; POC; 001-15 to 001-16; para 33 to 34.

[8] CaseLines; POC; 001-16 to 001-17; para 35 to 39.

[9] CaseLines; POC; 001-17 to 001-19; para 40 to 52.

[10] See Van Heerden-Neethling, Unlawful Competition, Second Ed, page 268 to page 271 for a general discussion regarding the uncertainty as to which delictual principles are applicable to the cause of action of injurious falsehoods.

[11] See Bredell v Pienaar 1924 CPD 203 and Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk 1977

(4) SA 376 (T) 385.

12 For a general discussion on these principles, see *De Ribeira v Woudberg* 2021 (1) SA 530 (WCC) at paras [15] to [20], as well as what is set out in *Erasmus Superior Court Practice* at D1-297 and the authorities cited at FF1. See also *Telematrix (Pty) Ltd ta Matrix Vehicle Tracking v The Advertising Standards Authority* 2006 (1) SA 461 (SCA) at 465.

[13] *Trope v South African Reserve Bank and Another and Two Other Cases* 1993 (3) SA 264 (A).

[14] At p 273A-B.

[15] 1922 AD 16 (AD).

[16] The SCA in *Blue Chip 2 (Pty) Ltd t/a Blue Chip 49 v Ryneveldt and Others* 2016 (6) SA 102 (SCA) endorsed this definition at § 14.

[16] The SCA in *Blue Chip 2 (Pty) Ltd t/a Blue Chip 49 v Ryneveldt and Others* 2016 (6) SA 102 (SCA)

endorsed this definition at § 14.

[17] *Koth Property Consultants CC v Lepelle-Nkumpi Local Municipality Ltd* 2006 (2) SA 25 (T) (“Koth”) § 18.

[17] *Koth Property Consultants CC v Lepelle-Nkumpi Local Municipality Ltd* 2006 (2) SA 25 (T) (“Koth”)

§ 18.

[18] (2014/37464) [2016] ZAGPJHC 321.

[19] See *Trope* supra at 221A-E.

[20] *Quinlan v MacGregor* 1960

(4) SA 383 (D) at 393E-H.

[21] See *Jowell v Bramwell-Jones* 1998

(1) SA 836 (W) at 901 E-F where Heher J (as he then was) said: “It is also highly unlikely, in my opinion, that the Legislature, in abolishing the Rules relating to further particulars, intended to substitute a procedure which was more lax than that in force at the time of abolition. Where Rule 18(4) relates to material facts, it continues, in my view, to require that a plaintiff shall furnish only those particulars which are strictly necessary to enable the defendant to plead, the only difference being that such particulars are now required to be incorporated in the statement of the plaintiff's cause of action from the outset.”

[22] *Liquidators Wapejo Shipping Co Ltd v Lurie Bros* 1924 AD 69 at 74; *Lockhat v Minister of the Interior* 1960

(3) SA 765 (D) at 777E; *Trope* at 268F.

- [23] Trope at 269 I; Venter and Others NNO v Barritt; Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd 2008
- (4) SA 639 (C) at 643I-644A
- [24] Dunn and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd 1968
- (1) SA 209 (C); Gerber v Naude 1971
- (3) SA 55 (T); Pocket Holdings (Pvt) Ltd v Lobel's Holdings (Pvt) Ltd 1966 (4) SA 238 (R).
- [25] Levitan v Newhaven Holiday Enterprises CC 1991
- (2) SA 297 (C) at 298J and 300G.
- [26] Trope at 211 E.
- [27] Imprefed (Pty) Ltd v National Transport Commission 1993
- (3) SA 94 (A) adopting the dictum from Durbach v Fairway Hotel Ltd 1949
- (3) SA 1081 (SR) at 1082.
- [28] Imprefed citing with approval Odgers' Pleading and Practice in Civil Actions in the High Court of Justice 22nd Ed at 113.
- [29] Neugebauer & Co Ltd v Bodiker & Co (SA) 1925 AD 316.
- [30] Francis v Sharp 2004
- (3) SA 230 (C) at 240.
- [31] Allen & Others NNO v Gibbs & Others 1977
- (3) SA 212 (SECLD) at 215H to 216C and see also Scheepers and Nolte v Pate 1909 TS 353 at 360 per Wessels J (as he then was).
- [31] Allen & Others NNO v Gibbs & Others 1977
- (3) SA 212 (SECLD) at 215H to 216C and see
- also Scheepers and Nolte v Pate 1909 TS 353 at 360 per Wessels J (as he then was).
- [32] See the comprehensive treatment in Nel & Others v McArthur & Others 2003
- (4) SA 142 (T) at 146B- 149G, with reference to the important authorities in this regard, and in particular the seminal decision in Jowell v Bramwell-Jones & Others 1998
- (1) SA 836 (W).
- [32] See the comprehensive treatment in Nel & Others v McArthur & Others 2003
- (4) SA 142 (T) at 146B-

149G, with reference to the important authorities in this regard, and in particular the seminal decision in *Jowell v Bramwell-Jones & Others* 1998

(1) SA 836 (W).

[33] Uniform Rules, Rule 18(4).

[34] *Sasol Industries (Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a LH Marthinusen* 1992

(4) SA 466 (W) at 469J; *Jowell* (supra) at 902E.

[34] *Sasol Industries (Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a LH Marthinusen* 1992

(4) SA 466 (W) at 469J; *Jowell* (supra) at 902E.

[35] *McKenzie v Farmers' Co-operative Meat Industries Ltd* 1922 AD 16 at 23; *Makgae v Sentraboer (Koöperatief) Bpk* 1981 (4) SA 239 (T) at 245D-E.

[35] *McKenzie v Farmers' Co-operative Meat Industries Ltd* 1922 AD 16 at 23; *Makgae v Sentraboer (Koöperatief) Bpk* 1981 (4) SA 239 (T) at 245D-E.

[36] *Imprefed (Pty) Ltd v National Transport Commission* 1993

(3) SA 94 (A) at 107C-H.

[37] *Jowell v Bramwell-Jones* supra at 902H-I; *McArthur* supra at 146 – 148.

[38] *McKelvey v Cowan* NO 1980

(4) SA 525 (Z) at 526D.

[39] *Trope v South African Reserve Bank* at 269H; *Lockhat v Minister of Interior* 1960 (3) SA 765 (T) at 777E; *Jowell* supra at 899G.

[39] *Trope v South African Reserve Bank* at 269H; *Lockhat v Minister of Interior* 1960 (3) SA 765 (T) at 777E; *Jowell* supra at 899G.

[40] *Trope v SA Reserve Bank* at 211A-D.

[41] *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)* [1993] ZASCA 4; 1993

(2) SA 593 (A) at 602-603.

[41] *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)* [1993] ZASCA 4; 1993

(2) SA 593 (A) at 602-603.

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