

SOUTH AFRICA / JUDGMENT

H Mocke Construction (Pty) Ltd and Another v Pexmart CC and Others (58201/2014) [2017] ZAGPPHC 718; 2017 BIP 212 (GP) (13 November 2017) [2017] ZAGPPHC 718

COURT

North Gauteng High Court, Pretoria

BEFORE

Louw

CASE / FILE NUMBER

58201/2014

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REPUBLIC

OF SOUTH AFRICA

IN

THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

CASE

NO: 58201/2014

Reportable

Of

interest to other judges

Revised

13/11/2017

In

the matter between:

H
MOCKE CONSTRUCTION (PTY)
LTD First
Applicant
HEIN
MOCKE
Second Applicant
and
PEXMART
CC First
Respondent
PEXMART
LINED PIPE SYSTEMS (PTY)

LTD Second
Respondent
MARIUS
JOHAN NES
HENN Third
Respondent

JUDGMENT

LOUW, J

- [1] This is an opposed application which has been referred to the hearing of oral evidence in terms of a court order made by Basson J on 7 March 2016 on four agreed issues. In the notice of motion, the applicants seek an order restraining the respondents from making use of, what the applicants claim to be, confidential information and trade secrets relating to what is referred to as the Sureline or Polymeric deforming process in respect of which the second applicant is the exclusive licensee within the continent of Africa from Polymeric Pipe Technology Corporation of the USA (PPTC). The second applicant in turn granted the first applicant, a pipeline construction company of which he is the sole director, a sub-license in respect of the claimed intellectual property.
- [2] The Sureline process involves the internal lining of steel pipes with a high density polyethylene plastic liner which protects the steel pipe from erosion by sand and slurry deposits that are pumped by mines through such pipes. The applicants claim that the plastic liner extends the lifespan of the steel pipes by almost 30 years. They describe the process in para. 5.4 of their founding affidavit, deposed to by the second applicant, as a technology that in effect folds a fully dimensional plastic liner pipe into a C- shape by using a specially made and imported deformer machine on site. The deformer machine folds the plastic liner pipe into a C-shape while at the same time wrapping the folded plastic liner pipe with a specially designed tape. This process enables the folded plastic liner pipe, which has the same diameter as the internal diameter of the steel pipe, to be pulled through the steel pipe in a section of up to 1 km at a time. Once pulled through, the folded plastic liner is then expanded by way of air pressure. The air pressure causes the tape to break and the liner pipe then expands to fill the internal diameter of the steel pipe.
- [3] The third respondent was formerly employed by the first applicant as its operations manager. He is now employed by the first respondent and is a director of the second respondent. The respondents oppose the application, alleging that the process used by the applicants is not confidential and contains no trade secrets.
- [4] The issues which the parties agreed to be referred for oral evidence are the following:

"1.1 Whether the two deforming processes adopted by the Respondents are dissimilar to the Sureline and/or Polymeric deforming process utilised by and under license to the Applicants or are identical thereto;

1.2 Whether the Sureline and/or Polymeric deforming process of the Applicant, its machine(s), intellectual property, techniques, on-site training, technology and the know-how associated therewith is protected by the license awarded to the applicants;

1.3 Whether protectable confidential information exists in respect of the Sureline and/or Polymeric deforming process of the Applicant, its machine(s), intellectual property, techniques, on-site training, technology and the know-how associated therewith;

1.4 Whether the Respondents are utilising such protectable confidential information. "

[5] The court order further provides that the evidence shall be that of the deponents to the affidavits, that no further witnesses may be called unless an affidavit deposed to by such witness is filed and served at least 21 days before the hearing of the matter and that the provisions of Rules 35 and 36 shall apply.

[6] The witnesses who testified on behalf of the applicants were Mr. Hein Mocke (the second applicant), Mr. Donald Gish (who was referred to as the owner of PPTC) and Mr. Patrick Broli. The respondents did not call any witness and elected to stand by their evidence on record.

The first issue:

Whether the two deforming processes adopted by the Respondents are dissimilar to the Sureline and/or Polymeric deforming process utilised by and under license to the Applicants or are identical thereto.

[7] In the respondents' answering affidavit, deposed to by the third respondent, it was stated that the respondents had recently developed their own method for deforming a pipe so as to reduce the diameter thereof. The method entailed the closing off of the end portions of the pipe and thereafter extracting the air within so as to cause the pipe to collapse. In an answering affidavit to the applicants' supplementary affidavit, which was filed a year after the first answering affidavit, the respondents say that they had, pursuant to legal advice, since commenced also using a pipe liner folding method of deforming pipes which is not the same as the method used by the applicants. They did not say what this pipe liner folding method was, neither did the third respondent give evidence about it.

[8] The vacuum method first used by the respondents clearly is not similar or identical to the method employed by the applicants. The question is therefore whether the folding method later adopted by the respondents is dissimilar to that used by the applicants, or identical thereto. A Mr. Hans Strydom, an engineer employed by the first applicant, deposed to an affidavit to which he attached a photograph, an enlargement of which was handed in as exhibit "C", which he took at the respondents' premises. He states in his affidavit that

he has close to eight years experience working with deformer machines and that he has knowledge of what a deformer machine looks like and how it works. He confirms that the photograph is that of a deformer machine. Mr. Mocke confirmed that exhibit C was sent to him by Mr. Strydom.

[9] It was not denied by the respondents that the photograph depicted a deformer machine. It was, however, contended by the respondents that their machine was not an exact copy of the applicants' machine. Mr. Puckrin, who appeared for the applicants, accepted that the respondents' deformer machine was not identical to the Sureline machine used by the applicants. It was also conceded by the second applicant during cross-examination that the respondents' machine is not an exact copy of the applicants' machine. It was, however, submitted that, on the probabilities, the respondents' machine must be performing an identical process to the Sureline process.

[10] I agree with the submission. The deforming machine of the respondents must achieve the folding of the liner pipe in the same way that the liner pipe is folded by the applicants' machine. Although the applicants' machine has two wheels which forcefully press down onto the liner pipe, causing it to be folded into a C shape, as opposed to the respondents' machine which has only one wheel, and the respondents' machine has different dimensions, the process performed by the respondents' machine is identical, not dissimilar, to the process performed by the applicants' machine, which process includes the use of tape to keep the liner pipe in the folded position. The second respondent conceded in cross-examination that he did not know what tape the respondents were using, but the process of taping the liner pipe must obviously be the same as the process used by the applicants. The first issue is therefore decided in favour of the applicants.

The second issue

[11] The second issue is "whether the Sureline and/ or Polymeric deforming process of the Applicant, its machine(s), intellectual property, techniques, on-site training, technology and the know-how associated therewith is protected by the license awarded to the applicants". The answer to that question is dependent on whether the third issue is determined in favour of the applicants. I shall therefore first deal with the third issue.

The third issue

Whether protectable confidential information exists in respect of the Sureline and/ or Polymeric deforming process of the Applicant, its machine(s), intellectual property, techniques, on-site training, technology and the know-how associated therewith.

[12] Mr. Mocke said the following in his founding affidavit:

"6.31 The following proprietary knowledge is exclusive to the applicants:

6.31.1 The method and know-how used to fold the plastic liner outside the steel pipe is a revolutionary new method and had never been done on African soil;

6.31.2 During the folding of the plastic liner, a certain skill is required to detect the behaviour of the liner and what procedure to follow should the folded liner get stuck, this skill and knowledge was only possible to obtain through the training with Gish on site;

6.31.3 The specialised tape used to ensure that the liner does not lose its folding state, has very unique manufacturing technology and is tailor-made for the application and use in the deforming process, this knowledge is crucial to the method and could only be obtained by the transfer of this knowledge from Gish;

6.31.4 The correct use of the tape is an exact science, because the plastic liner wall thickness in correlation to its diameter, determines the spacing, angle of application, speed and width of the tape. If this is done incorrectly the tape will snap; this knowledge was only obtainable through Gish;

6.31.5 The knowledge to know what maximum liner wall thickness will be suitable to use for a specific diameter pipe and relative to the length of pull is a calculation that only Polymeric and Gish have passed on to me. For example, in towing a 30 ton plastic liner of 500 meters through a steel pipe with the winch requires the towing head that connects the cable to the liner be prepared in a certain method with specific plate dimensions, this knowledge was transferred by Gish;

6.31.6 To fold the liner two wheels push in tandem down on the liner, the dimensions of the curve of the wheels is proprietary information and of extreme important (sic) as the stresses incurred on the liner may exert beyond the maximum allowable strain causing the liner to crack or splinter. This knowledge was transferred during the training on site by Gish. If the pressures are exerted too much with the incorrect radii, the liner will experience excessive strain and the liner will be damaged beyond repair;

6.31.7 To enable the pulling of a plastic liner a cable needs to be pulled through the 500 meter steel pipe, the way to "shoot a pig"[1] is common knowledge, but the unique design of the front cone piece is proprietary knowledge and custom-made for the Polymeric and/ or Sureline process. This design was presented to the applicants during our on-site training by Gish;

6.31.8 If the liner gets stuck during the insertion process into the steel pipe, the first applicant designed a cut-out device from a drawing received from Gish, this proprietary knowledge is unique and crucial for the rehabilitation of old liner pipe. "

[13] Mr. Mocke commenced his evidence by explaining the contents of a video which was screened in court and which is used by the first applicant to demonstrate the Sureline process to prospective clients. The video can also be seen on the first applicant's website. The video shows, in graphic form, how a liner pipe is deformed by the process. He was asked in cross- examination why the process (which process is also described in paragraph 5.4 of the applicants' founding affidavit, referred to above), was secret. His answer was that it was not what was done, but how it was done that was the secret. He explained the "how" in his evidence in chief, all of which, save for one aspect to which I shall later refer, was taught

to him by Mr. Gish during on-site training. He said that when the liner pipe enters the deformer machine, it needs to be absolutely square and centered. If the two lobes of the C are not equal while the liner is being deformed by the wheel, the liner starts to turn on itself and can turn upside down. When this occurs, the tape will be destroyed. If that happens before the liner has gone through the steel pipe, the liner gets stuck inside the steel pipe. Various factors, such as uneven temperature when the sun shines on one side of the liner, the thickness of the liner relevant to its diameter, the type of liner material and the length of the pipe impact on the manner in which the liner pipe behaves. It is by the knowledge of how to operate and to adjust the machine that one is able to counteract

the unpredictability of the liner pipe. The machine has turn buckles with which rollers are adjusted to manipulate the machine to push and guide the liner to a correct lobe formation as soon as the liner pipe starts showing any behaviour of twisting, turning, rolling or getting out of balance. This requires constant and vigilant supervision of trained operators. By standing next to the machine, a skilled operator of a different lining process would not be able to know what these operators were doing. When the deforming process starts, it is critical that the molecular chain of the polyethylene liner pipe is not damaged as that could crack the liner. The forces exerted on the deformer machine by the winch when pulling the liner through the steel pipe are immense and may break the machine if the process is operated incorrectly.

- [14] Mr. Mocke testified that the tape which is used to keep the liner pipe in its folded position was designed in the USA at the instance of Mr. Gish and was later on designed in South Africa under the guidance of Mr. Gish in order to get the correct tensile strength. What is also regarded as a trade secret, is the angle at which the tape must be applied relative to the diameter and thickness of the liner pipe and the speed at which the liner pipe goes through the machine.
- [15] When the Sureline process was used for the first time in South Africa, a problem was encountered. While the liner was entering into the steel pipe, the tape was sheared by bad welding on the inside of the steel pipe. Mr. Mocke testified that the calibre of welding in the USA is more advanced than in South Africa where the steel welding has a burr, what is also called an icicle, which sticks out and which cuts the tape as the liner is transferred through the steel pipe. That caused the liner to get stuck inside the steel pipe. Mr. Gish was present at the time and the problem was discussed between them. Mr. Mocke came up with the idea of doing the deforming and taping of the liner pipe outside of the steel pipe, not while it is entering the steel pipe, and to then push it through the steel pipe at a far greater speed. This solved the problem. Before the liner pipe could expand completely as a result of the tape being cut, it was already through the steel pipe.
- [16] During cross-examination, Mr. Mocke was referred to various publications and to various patent specifications, more particularly

a US patent specification referred to as the Thompson patent, and it was put to him that those publications and specifications showed that there was nothing secret about the Sureline process. Mr. Mocke was able to explain how the process described in each of those publications and specifications differed from the Sureline process.

[17] Mr. Gish, a chemical engineer and a biochemical scientist, testified that he was the inventor of the Sureline process. He confirmed the correctness of the affidavit to which he had deposed. He testified that, prior to 1983, he had been doing underground pipeline

rehabilitation for about six years. A problem which he encountered was that putting a low capability pipe inside another pipe limited

that pipe to the low pressure of the pipe put inside it, even if put into a steel pipe. They[2] were having to replace steel pipelines over and over again. They were one of the largest users of stand-alone polyethylene pipe which could be buried in the ground by itself and was chemically resistant to carbon dioxide and hydrogen sulfite which devoured steel. He applied his mind to the manner in which a polyethylene pipe could be put inside of a steel pipe so that they could go to a high pressure. He started folding a polyethylene pipe by putting it in a vice and keeping it folded with masking tape. The attempt was unsuccessful. He thereafter used low strength tape, but this was vulnerable to the heat of the sun and they could not get work because people thought that he destroyed the pipe by folding it. He then decided to manufacture a machine. He gave instructions to a "welding shop" how to manufacture the machine. The manufacturing of the machine took 2 to 3 months. Although the machine did not work perfectly the first time, it did fold the pipe. He did not apply for the registration of a patent for the invention because, he said, patent registration is prohibitively expensive in the USA.

[18] At the time, there was no tape in existence that was strong enough to keep the polyethylene pipe in the folded position. He explained the problem to the lady who was his tape supplier. She helped him, by using elements that were available in the tape industry, to develop a product which had the tensile strength that could do the job that he intended it to do. The development of the tape took another two years. It is the most expensive tape on the market and he is not aware of any other manufacturer of such tape in the USA. The specifications of the tape which is manufactured for the first applicant in South Africa, is regarded by the applicants as a trade secret. Mr. Macke testified that he had an agreement with the supplier of the tape which was confidential and in terms whereof the supplier would not sell the tape to anyone else.

[19] Mr. Gish testified that the methodology to operate the machine satisfactorily in all conditions and effectively in all circumstances

was not something which could be ascertained by simply seeing the machine or deducing it from the design of the machine. He said that there have been many people that have copied the machine that have gone bankrupt because they did not have, what he referred to as, the technology or intellectual property to control the liner pipe going through the machine. He referred to a Chinese company to whom he had shown his machine, and who copied the

machine. He did not tell them how to operate the machine and they abandoned the project. He has used the Sureline process in 26 different countries.

[20] Mr. Gish first met Mr. Macke in the USA four or five years before

2010. In 2010 he was contacted by Mr. Macke, who inquired whether Mr. Gish would work with him on his deforming process, to which Mr. Gish agreed. Mr. Macke then went across to the USA with certain of his employees to see Mr. Gish. Mr. Mocke then purchased a machine from Mr. Gish and Mr. Gish taught Mr. Mocke's technicians the secret of how to operate the machine and control the process. Mr. Gish said that he kept the operation of the machine discreet and only disclosed it to people he worked with as licensees.

[21] Mr. Gish was not cross-examined by respondents' counsel. I shall refer later to the evidence of Mr. Broli. The respondents elected not to lead any evidence and to stand by what is contained in the affidavits filed on their behalf. The evidence of Mr. Macke and Mr. Gish that the method of operation of the deforming machine, the specifications for the manufacture of the tape and the manner in which the tape was applied in use were confidential trade secrets, is uncontroverted save for what is stated in the third respondent's answering affidavit in answer to paragraphs 6.31.1 to 6.31.8 to Mr. Mocke's founding affidavit, quoted in paragraph [12] above. What is stated in the third respondent's answering affidavit, but about which he did not testify, is the following:

"37.2 Without derogating from the generality of the aforementioned denial, the following paragraphs are specifically worth commenting on:

37.2.1 It was my idea to deform the full length of the plastic pipe outside the steel pipe before insertion thereof into the steel pipe.

37.2.2 I received training at my previous employer, Chemplast, on the procedural aspects to follow when a plastic liner gets stuck in a steel pipe during the mining process. Mr. Don Gish's contribution in this regard was negligible.

37.3.3 The "special tape" referred to for keeping the deformed pipe in the deformed status is widely available in South Africa under various brand names.

37.3.4 Again, pipe deformation for lining of steel pipes is not an exact science. Pipe deformation can also be achieved via various other techniques, as more clearly described in paragraph 19.

37.3.5 The method of connecting the pulling head to the deformed liner was reinvented by myself as the original method as proposed by Gish did not work. Again, Gish's contribution in this regard was negligible.

37.3.6 The quality of the HOPE liner rather than the dimensions of the wheel of the deforming machine resulted in cracks and splintering of the HOPE liner during the deformation process. It is clear that the second applicant has little understanding of his own "licensed process".

37.3.7 "Shooting a pig" to remove all protuberances from the interior of the steel pipe inserting the plastic liner, is a common and well-known process in the pipe lining industry."

[22] It was not put to Mr. Mocke during cross-examination that it was the third respondent's idea to deform the full length of the plastic pipe outside the steel pipe before insertion thereof into the steel pipe. As to the allegation in paragraph 37.3.2 that the third respondent received training at his previous employer, Chemplast, on the procedural aspects to follow when a plastic liner gets stuck in a steel pipe during the mining process, the evidence of Mr. Broli in his affidavit, which he confirmed on oath and about which he was not cross-examined, was that he was the managing director at Quadrant Chemplast during the third respondent's employment there as works manager for lined pipe systems, that the third respondent and other staff members were trained by a Mr. John Thaxton of the USA and that the training was strictly in respect of Teflon (PTFE) processing for lined pipe purposes. The parameters of processing are unique to Teflon, which processing is explained by him. The allegations in paragraphs 37.3.3, 37.3.5, 37.3.6 and 37.3.7 were not put to Mr. Mocke during cross-examination. The allegations in paragraph 37.3.4 that pipe deformation can also be achieved via various other techniques is common cause.

[23] The applicants' cause of action against the respondents is founded on unlawful competition, more particularly the misuse of confidential information. It is common cause that the third respondent, as a former employee of the first applicant, has intimate knowledge of the applicants' deformer machine and its method of operation. The respondents' defense is that they were entitled to reverse engineer the machine.

[24] Every person is, in principle, entitled to freely exercise his or her trade, profession or calling in competition with others. That freedom, however, is not unfettered. Competition must remain within lawful bounds, otherwise the Aquilian action will be available to the injured party.[3] In *Meter Systems Ltd v Venter and Another*, [4] the court said the following at 426F-J:

"(O)ur law recognises fiduciary relationships which, as a matter of law, give rise to an obligation to respect the confidentiality of information imparted or received in confidence, and to refrain from using or disclosing such information otherwise than as permitted by law or by contract. The fiduciary relationships which give rise to such legal duties are in some instances based on contracts and in some instances they are not.

.....

When the fiduciary relationship is not based on a contract, it is necessary to look to the law of delict, and in particular to the

principles of Aquilian liability, in order to ascertain the extent of the legal duty to respect the confidentiality of information imparted or received in confidence. "

[25] It is common cause that no agreement containing restraint of trade or confidentiality provisions exists between the first applicant and the third respondent. In *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd and Others*, [5] the following was said by Van Dijkhorst J at 188-189 in regard to the criterion to be applied in cases where there is no contract:

"I have come to the conclusion that the norm to be applied is the objective one of public policy. This is the general sense of justice of the community, the *boni mores*, manifested in public opinion.

In determining and applying this norm in a particular case, the interests of the competing parties have to be weighed, bearing in

mind also the interests of society, the public weal. As this norm cannot exist in *vacuo*, the morals of the market place, the business

ethics of that section of the community where the norm is to be applied, are of major importance in its determination."

[26] In my view, the *bani mores* would set itself against the conduct of the third respondent as being contrary to the morals of the market place and business ethics. The third respondent was the operations manager of the first applicant and acquired intimate knowledge of the first applicant's confidential information of how to operate the machine to remedy the problems which may occur during the pipe deforming process. Mr. Mocke's evidence, which was uncontested, was that no skilled person would be able to operate the machine and control the process by just seeing the machine.

[27] It was submitted on behalf of the respondents, relying on the following dictum of Giese! J in *Van der Merwe and Another v Els and Another*, [6] that there is no general right under the common law to be protected against reverse engineering :

"As pointed out by Dean '[7] the decision in *Schultz v Butt* 'has given recognition to a remedy of unlawful competition of very limited scope in the field of the copying of three dimensional utilitarian objects '. He submits that the case falls far short of giving a general remedy of unlawful competition for restraining reverse engineering of technological products.

Dean refers, furthermore, to the significance of the amendment of the Copyright Act 98 of 1978, more particularly the introduction of s 15(3A), which reads as follows:

(3A)(a) The copyright in an artistic work of which three- dimensional reproductions were made available, whether inside or outside the Republic, to the public by or with the consent of the copyright owner (hereinafter referred to as authorised reproductions), shall not be infringed if any person without the consent of the owner makes or makes available to the public three-dimensional reproductions or adaptations of the authorised reproductions, provided

(i)

(ii) The authorised reproductions primarily have a utilitarian purpose and are made by an industrial process.

Dean accordingly submits, rightly in my view, that this section appears to have reduced the scope for arguing that reverse engineering of technological objects constitutes unlawful competition.

A similar conclusion was reached by Plewman JA in *Premier Hangers v CC Polyoak (Pty) Ltd*[8] where he said the following, with reference to s 15(3A):

The introduction of s 15(3A) to the Copyright Act 98 of 1978 in 1983 authorising 'reverse engineering' under given conditions also serves as an example of an ongoing common thread in intellectual property legislation favouring a freedom to copy works which have been permitted to pass into the public domain.

He further emphasised "the intricacies of the interrelationship between the protection afforded industrial designs in the [Designs]

Act and the equivalent forms of protection afforded by copyright, on the one hand, and patent protection on the other'. He pointed out 'that the absence (or expiration) of statutory protection is regarded as opening the field to competition by copying or imitating and that this is quite legitimate.' He concluded as follows:

Thus it appears to me that in our law, as in many of the foreign systems to which Ms Fellner refers, where statutory protection can be claimed but is not, or where statutory protection expires or is lost, anyone is free to copy.

In the light of these dicta from *Premier Hangers*, together with the amendment of the Copyright Act referred to above, it appears that the 'remedy of very limited scope' created by *Schultz v Butt* has been diluted even further. The inference seems irresistible, as submitted by counsel for the Respondents, that the legal landscape has changed quite considerably since *Schultz v Butt* was decided more than twenty years ago. After all, how can the *boni mores* denounce as unlawful conduct that is specifically authorised by the legislature in s 15(3A) of the Copyright Act? ">

[28] The present matter is, however, not about reverse engineering. The applicants purchased the deformer machine from Mr. Gish. The license agreement which Mr. Gish concluded with the second applicant expressly excludes the right to construct the deformer machine. The applicants claim no proprietary interest in the machine. What they claim, is the protection of their confidential information of how to operate the machine and to remedy problems which occur during the pipe deforming process. This information they acquired from Mr. Gish on a confidential basis. Mr. Mocke testified that an initial amount of R17 million was paid to Mr. Gish for the machine and for the trade secrets and confidential information of how to operate the machine. In terms of the license agreement, a royalty of 38 US cents per linear foot installed is further paid to Mr. Gish's company.

[29] I find that protectable confidential information exists in respect of the Sureline deforming process used by the applicants. The third issue is accordingly decided in favour of the applicants.

Whether the Sureline and/or Polymeric deforming process of the Applicant, its machine(s), intellectual property, techniques, on-site training, technology and the know-how associated therewith is protected by the license awarded to the applicants.

[30] The conclusion of the license agreement between Mr. Gish's company PPTC and the second applicant is not in dispute. In terms thereof, the company granted to the second applicant an irrevocable exclusive license which provides the following:

"This license of agreement extended from Polymeric Pipe Technology Corporation, referred to as the PPTC, offers the permission to use the trademark "Polymeric or SURELINE" in all terms of business but not to obligate PPTC of America without PPTC of America permission.

PPTC of America will support Mr. Hein Macke in all efforts and business pursuits which includes current and any new technical developments,

design, however excludes construction of Polymeric equipment which includes Polymeric's Sureline liner deformers.

Mr. Hein Macke is entitled to share the good will and reputation of the Polymeric Lining Systems generated by the PPTC of America.

Beside the construction of the Polymeric deforming equipment to be purchased from the PPTC of America, PPTC will be entitled to \$0.38/ linear foot of liner royalty installed by Mr. Hein Macke. "

[31] As mentioned earlier, a sub-license was granted by the second applicant to the first applicant. Mr. Gish confirmed that he had no difficulty with this.

[32] It was contended on behalf of the respondents that the applicants' license does not entitle them to any protection under the common law and that it does not entitle them to interdict the respondents from using the process. The question whether in our law it is only at the instance of the owner of confidential information that an action will lie against a third party who unlawfully filches that information was considered in *Prok Africa (Pty) Ltd and Another v NTH (Pty) Ltd and Another*. [9] The court said the following at 696F-697A :

"In principle I can see no reason for limiting the scope of this type of action by conferring it only upon the owner of confidential

information. The wrong upon which the cause of action is founded and for which the remedy lies is not an invasion of rights of property: the *Dun and Bradstreet (Pty) Ltd* case supra at 215F - 216A. The wrong is the unlawful infringement of a competitor's right to be protected from unlawful competition: *Geary & Son (Pty) Ltd v Gove* 1964 (1) 434 {A} at 440 -

1. As CORBETT J remarked in the *Dun and Bradstreet* case (at 218H - 219A):

"Fairness and honesty are themselves somewhat vague and elastic terms but, while they may not provide a scientific or indeed infallible guide in all cases to the limits of lawful competition, they are relevant criteria which have been used in the past and which, in my view, may be used in the future in the development of the law relating to competition in trade. "

If A is in lawful possession of the confidential information of B and such possession was obtained by A to further his own business

interests, it would be a wrong committed against A for C, a trade rival of A, to obtain that information by dishonest means from A for the purpose of using it to the detriment of the business of A. That it might also be a wrong committed against B is another matter. Once there is dishonest conduct of the type just posited and loss or damage

suffered thereby to the person against whom the wrong has been committed, it seems to me that the requisites for Aquilian liability

are present. "

[33] It is therefore clear that an action for unlawful competition does also lie at the instance of a licensee.[10] The second issue is accordingly decided in favour of the applicants.

The fourth issue

Whether the Respondents are utilising such protectable confidential information.

[34] In their answering affidavit to the applicants' founding affidavit, the respondents stated that the first and second respondents deform pipes using a vacuum method. However, in their answering affidavit to the applicants' supplementary affidavit, filed a year later, they say that they had, pursuant to legal advice, commenced using a pipe folding method which "is not the same as the method used by the applicant" and that the respondents "do not use the Sureline technology". They do, however, not give any explanation of the technology which they use, neither did the third respondent testify about the process used by the respondents.

[35] As previously mentioned, a deformer machine was photographed on the respondents' premises. I have found, in respect of the first issue, that the respondents' machine must, on the probabilities, be performing an identical process to the Sureline process. It follows that the process which the respondents say they use, is the process which forms part of the applicants' confidential information. The fourth issue is therefore also determined in favour of the applicants.

Conclusion

[36] The above four issues were the only issues which I was required to determine in terms of the court order of 7 March 2016. The order which I accordingly make, is that the four issues that were referred to the hearing of oral evidence, are determined in favour of the applicants.

Counsel for applicants: Adv. C E Puckrin SC; Adv. B D Stevens.

Instructed by: Jurgens Bekker Attorneys, Bedfordview.

Counsel for respondents: Adv . A J Bester SC.

Instructed by: Hahn & Hahn Attorneys, Pretoria.

- [1] The second applicant testified that a "pig" is a tool that is shafted into the steel pipe, pushed by compressed to clean the pipe and to carry the cable with which the liner pipe is pulled through the steel pipe.
- [2] His evidence was that "we" were having to replace the steel pipelines. I understood that to be a reference to himself and other persons involved with him in the business of pipeline rehabilitation.
- [3] See Waste Products Utilisation (Pty) ltd v Wilkes and Another 2003
- (2) SA 515 (WLD) 570G-J and authorities there referred to.
- [4] 1993 (1) SA 409 (WLD)
- [5] 1981 (2) SA 173 (T)
- [6] 2008 BIP 404 (C) at 409H-41 I A/B
- [7] OH Dean "Reproduction of Three Dimensional Utilitarian Objects
- Copyright Infringement and Unlawful Competition ' (1990) I Stell LR 49 at 64
- [8] 1997 (1) SA 416 (A)
- [9] 1980 (3) SA 687 (W)
- [10] See also Meter Systems Holdings v Venter and Another, supra, at 430B-D

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