

SOUTH AFRICA / JUDGMENT

# Mullane and Another v Smith and Others (2014/28264) [2015] ZAGPJHC 66; [2015] 3 All SA 230 (GJ); 2015 BIP 474 (GJ) (20 April 2015) [2015] ZAGPJHC 66

## COURT

South Gauteng High Court, Johannesburg

## BEFORE

Spilg

## CASE / FILE NUMBER

2014/28264

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 2014/28264

DATE:

20 APRIL 2015

In

the matter between:

MULLANE,  
ANNE.....First  
Applicant  
COLEMAN  
TUNNELLING AFRICA (PTY)  
LTD.....SecondApplicant  
And  
SMITH,  
PATRICK  
JOSEPH.....First  
Respondent  
AMOD,  
AHMEN  
RASHEED.....Second  
Respondent  
BOTHAR  
BORING AND TUNNELLING  
SOUTH  
AFRICA (PTY)

LTD.....Third  
Respondent

## JUDGMENT

SPILG, J:

### NATURE OF APPLICATION AND THE PARTIES

1. The case came before me on 12 August 2014 as an urgent application in terms of which interdicts were sought to prevent the respondents from unlawfully competing against the second applicant. I was of the view that the matter was prima facie urgent and I was disposed to provide some form of urgent relief of short duration bearing in mind that the respondents had only been afforded since 4 August to deliver an affidavit. Moreover Adv Dippenaar indicated that the first and second respondents wished to engage an IT expert to deal with the allegations regarding the improper accessing and deletion of data that was located in what is commonly known as a 'drop box'.
2. Fortunately the matter could be directed to my court during the opposed motion court week of 8 September 2014. The respondents  
  
accepted that there would be no real prejudice if a diluted interim order along the lines I had mooted was granted. Mr Nowitz on behalf of the applicants agreed not to persist with the interim orders as originally formulated. The order made as an interim  
  
solution was without prejudice to either party's rights, including the respondents' right to contest urgency.
3. Ms Mullane is the first applicant and a 24% minority shareholder in the second applicant. She is also a director of the second respondent and brought the application seeking leave to institute the proceedings in the name, and on behalf, of the second applicant in terms of section 165(6) of the Companies Act 71 of 2008 ('the Companies Act' >). She did so because, at the time, she believed that the first respondent was still a director in the second respondent and that he would frustrate the application by challenging any proceedings purportedly brought by the company against him. He certainly has remained a 24% shareholder in the second respondent.
4. The second applicant is Coleman Tunneling Africa (Pty) Ltd which conducts business as a pipe jacking and specialist tunneling  
  
contractor ('Coleman Tunneling').
5. As mentioned earlier the first respondent is also a 24% shareholder in Coleman Tunneling. It subsequently emerged that he had  
  
subsequently resigned as director.

6. The second respondent was an erstwhile employee of Coleman Tunneling who resigned with effect from 15 July 2014. He is now employed by the third respondent.
7. The third respondent is Bothar Boring and Tunneling (Pty) Ltd. Although it did not fully identify itself and the applicants mentioned only its trading name, it is evident that the third respondent is an external company that was obliged to register with the Companies and Intellectual Property Commission ('the Commission') under section 23 of the Companies Act. However its directors are Australian residents and the company is a wholly owned subsidiary of Petroserv International (Pty) Ltd, itself

an Australian Company with its head office in Brisbane. Petroserv is a specialist engineering service company involved inter alia in the installation of underground services and facilities used for housing cables.

The third respondent claims that through an associate company, EnviroServ South Africa it "already has a footprint in South Africa and Southern Africa with several multinational industry players amongst its current customer base".

8. It is common cause that the third respondent competes directly with the second applicant for custom. It is also common cause that they compete in a specialised sector where the client base is readily identifiable because there are a relatively few number of clients, which aside from the large civil contractors, include municipalities, utility corporations and transport authorities whose details are generally in the public domain.

#### INTERIM ORDER OF 13 AUGUST

9. The terms of the order made on 13 August 2014 read:
  1. The Application is postponed for hearing before Spilg J at 09h30 on 8 September 2014.
  2. The Respondents are to deliver their Answering Affidavit by 13h00 on 25 August 2014.
  3. The Applicants are to deliver their Replying Affidavit by 16h00 on 1 September 2014.
  4. The parties are directed to deliver their Heads of Argument by 13h00 on 4 September 2014.
  5. The relief sought in prayer 2 of Part A of the Notice of Motion is postponed for hearing on 8 September 2014.
  6. Pending the outcome of the hearing on 8 September 2014, with full reservation of their rights, including the right to argue urgency and without any admission of liability, the Respondents furnish the following undertakings, which are embodied in this Order of Court:

6.1. not to unlawfully utilise, communicate and/or publicise any of the Second Applicant's confidential information and/or trade secrets;

6.2. not to approach directly or indirectly, or assist any other person in approaching directly or indirectly, any client, customer or principal of the Second Applicant or to engage with any of them in order to unlawfully compete with the Second Applicant, for the benefit of the Third Respondent or any other person;

6.3. not to directly or indirectly and whether for their own benefit or the benefit of any other person, offer employment to and/or entice any employee of the Second Applicant to become employed by the Third Respondent or any other entity with which they are associated in order to unlawfully compete with the Second Applicant; and

6.4. not to take advantage, to the prejudice of the Second Applicant, of any relationship involving the use of the Second Applicant's confidential information with the Second Applicant's clients or customers or any other employee, which they established during their employment with the Second Applicant, for the benefit of the Third Respondent or any other person;

7. Each Respondent is directed to return to the Second Applicant, all of the Second Applicant's confidential and proprietary information and/or all copies thereof, including but not limited to:

7.1. BEE and the 198 more folders contained in the device referred to in annexure JD1 on page 93 of the Applicants' Founding Affidavit; and

7.2. 0001 Docs Sent for Coleman's BEE.pdf and 712 more files contained in the device referred to in annexure JD1 on page 93 of the Applicants' Founding Affidavit

which may be in such Respondent's possession or under his/its control.

8. the costs of this Application are reserved.

#### CHARACTERISATION OF APPLICANTS RIGHTS

10. The most important feature of this case is that neither the first or second respondents were subject to a restraint of trade agreement.

11. Accordingly the applicant can only rely on a claim based on unlawful competition against them and, in respect of the first

respondent only, an additional right founded on the breach of the director's duty towards his or her company, provided of course that he was still a director at the time.

#### UNLAWFUL COMPETITION

12. The starting point is that competition is as essential for the operation of an efficient free market economy as is the right to freedom of trade, occupation and profession in a constitutional democracy[1]. Nonetheless each is limited; the former by the common law principles of unlawful competition as a form of delict under the Aquilian action and the latter by the correlating rights of others, which would include the rights to protection of property under section 25 of the Constitution. Both are also impacted by a number of

statutes which, aside from the Competition Act 89 of 1998, directly or tangentially regulate business practice and competition law[2].

13. The right to protection from unlawful competition requires a wrongful interference with another's rights as a trader. See *Schultz v Butt* 1986(3) SA 667 (A) at 678G.
14. While mentioning at 678G that as "a general rule, every person is entitled freely to carry on his trade or business in competition with his rivals" Schultz confirms at 678H to 679E that:

In order to succeed in an action based on unfair competition, the plaintiff must establish all the requisites of Aquilian liability,

including proof that the defendant has committed a wrongful act. In such a case, the unlawfulness which is a requisite of Aquilian

liability may fall into a category of clearly recognized illegality, as in the illustrations given by Corbett J in *Dun and Bradstreet*

(Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd 1968

- (1) SA 209 (C) at 216F - H, namely trading in contravention of an express statutory prohibition; the making of fraudulent misrepresentations by the rival trader as to his own business; the passing off by a rival trader of his goods or business as being that of his competitor; the publication by the rival trader of injurious falsehoods concerning his competitor's business; and the employment of physical assaults and intimidation designed to prevent a competitor from pursuing his trade. But it is not limited to unlawfulness of that kind. In the *Dun and Bradstreet* case supra at 218 CORBETT J referred to the fact that in the cases of *Geary & Son (Pty) Ltd v Gove* (supra) and *Combrinck v De Kock*

(1887) 5 SC 405 emphasis was placed upon criteria such as fairness and honesty in competition and said:

"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."

See also *Stellenbosch Wine Trust Ltd and Another v Oude Meester Group Ltd ; Oude Meester Group Ltd v Stellenbosch Wine Trust Ltd and Another* 1972 (3) SA 152 (C) at 161G - H. In judging of fairness and honesty, regard is had to boni mores and to the general sense of justice of the community (cf *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd and Others* 1981 (2) SA 173 (T) at 188 - 189 and the cases there cited, and *Lorimar Productions Inc and Others v Sterling Clothing Manufacturers (Pty) Ltd ; Lorimar Productions Inc and Others v OK Hyperama Ltd and Others ; Lorimar Productions Inc and Others v Dallas Restaurant* 1981 (3) SA 1129 (T) at 1152 - 1153). Van der Merwe and Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* 5th ed at 58 note 95 rightly emphasize that

"die regsgevoel van die gemeenskap opgevat moet word as die regsgevoel van die gemeenskap se regsbeleidmakers, soos Wetgewer en Regter".

While fairness and honesty are relevant criteria in deciding whether competition is unfair, they are not the only criteria. As pointed out in the Lorimar Productions case *ubi cit*, questions of public policy may be important in a particular case, eg the importance of a free market and of competition in our economic system."

15. In order to succeed with its application for final interdictory relief the second applicant had to demonstrate that there is a wrongful act

[3] of competition, or one which is impending, and which is infringing or threatening to infringe its business goodwill and that no other suitable remedy is available.

16. Since final relief is sought the second applicant must show the infringement or threatened infringement of a clear right to the

goodwill of its business. The facts that the court can take into account are limited to those presented by the respondents, including

admissions made to the applicants' affidavit unless one of the exceptions mentioned in Plascon-Evans applies[4].

17. The generic description of the right attached to the goodwill of a business is to be found in Unlawful Competition (2nd ed ) at Chap 3 para 2.2 where the co-authors, after explaining 'the right to trade without wrongful interference'[5] , rely on the following passage by Van Dijkhorst J in *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd and others* 1981

(2) SA 173 (T) at 182D-E:

*"It is important to note that the reference by the Court to the plaintiff's "right to attract custom" as being the right it has as a trader which is protected from wrongful interference by a competitor, is the same as the "reg op die werfkrag" which is the right H J O van Heerden seeks to protect in Grondslae van die Mededingingsreg (supra). Sometimes this is referred to as the trader's goodwill, which is defined by Lord Macnaughten in Commissioners of Inland Revenue v Millar & Co Margarine Ltd 1901 AC 217 at 224 as "the attractive force that brings in custom".*

18. The concept of goodwill and its content was dealt with in two separate judgments in *Commissioners of Inland Revenue v Muller & Co's Margarine Ltd* 1901 A. C. Firstly Lord Macnaughten described goodwill as follows at 217:

"It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start. The goodwill of a business must emanate from a particular centre or source. However widely extended or diffused its influence may be, goodwill is worth nothing unless it

has power of attraction sufficient to bring customers home to the source from which it emanates. Goodwill is composed of a variety of elements. It differs in its composition in different trades and in different businesses in the same trade. One element may preponderate here and another element there... For my part, I think that if there is one attribute common to all cases of goodwill it is the attribute of locality. For goodwill has no independent existence. It cannot subsist by itself. It must be attached to a business. Destroy the business and the goodwill perishes with it, though elements remain which may perhaps be gathered up and revived again. No doubt, where the reputation of a business is very widely spread, or where it is the article produced rather than the producer of the article that has won popular favour, it may be difficult to localise goodwill."

Lord Linley then said:

"Goodwill regarded as property has no meaning except in connection with some trade, business or calling. In that connection I understand the word to include whatever adds value to a business by reason of situation, name and reputation, connection, introduction to old customers, and agreed absence from competition, or any of these things, and there may be others which do not occur to me. In this wide sense, goodwill is inseparable from the business to which it adds value, and, in my opinion, exists where the business is carried on. Such business may be carried on in one place or country or in several, and if in several there may be several businesses, each having a goodwill of its own."

These dicta were adopted by the full court in *Horseshoe Caterers (Greenpoint) (Pty) Ltd v Burnkloof Caterers (Pty) Ltd* 1975 (2) SA 189 (C) at 196C-G. See also the extract from *Atlas Organic* at 182E (supra)

19. The concept of goodwill and its composition is well understood in cases of passing off such as *Williams t/a Jenifer Williams & Associates & Ano v Life Line Southern Transvaal* 1996(3) SA 408 (A) at 418E-F[6]
20. It is also dealt with in tax cases dealing with expenditure in respect of the sale of businesses as a going concern. In *Commissioner for the South African Revenue Service v SA Silicone Products (Pty) Ltd*

[2004] 2 All SA 1 (SCA) Heher JA said at para

[21] that:

*"The Sale of Business agreement contains no reference to the customer connection as a specific item of the business for which payment was made. However, the sale was of a business as a going concern and it is logical that the customer connection went with it. There were two possible sources for such a connection, - derived from the use of the trademark or built up independently of the trademark. In the latter regard it is significant that the respondent paid separately for the goodwill and the trade mark rights. The usual meaning of 'goodwill' is 'the possession of a ready-formed connection of customers considered as a separate element in the saleable value of a business' (Shorter OED 871). "*

See also *SIR v Cadac Engineering Works (Pty) Ltd* 1965 (2) SA 511 (A) where the court adopted the statement by Lord Lindley in the *Muller & Co's Margarine Ltd* case ([1901] AC 217) at 235 that defined goodwill "... to include whatever adds value to a business by reason of situation, name and reputation, connection, introduction to old customers and agreed absence from competition".

21. *Dun & Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd* 1968 (1) SA 209 (C) dealt pertinently with the case where a business utilised confidential information compiled by its competitor; Corbett J (at the time) in categorising the right claimed said at 221C- 222A:

"Reverting to the position in our law, and without attempting to define generally the limits of lawful competition, it seems to me that where, as in this case, a trader has by the exercise of his skill and labour compiled information which he distributes to his clients upon a confidential basis (ie upon the basis that the information should not be disclosed to others), a rival trader who is not a client but in some manner obtains this information and, well knowing its nature and the basis upon which it was distributed, uses it in his competing business and thereby injures the first mentioned trader in his business, commits a wrongful act vis-à-vis the latter and will be liable to him in damages. In an appropriate case the plaintiff trader would also be entitled to claim an interdict against the continuation of such wrongful conduct. Although there is no precise precedent in our law for this proposition, I am of the opinion that it is a well-founded development of our law relating to unlawful competition in trade and is in accordance with trends of legal development elsewhere. Quite apart from questions of copyright, the fact that the information is distributed upon a confidential basis to a limited class of persons prevents it, in my view, from becoming public property capable of being used or imitated by rival traders. 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 product of another's skill and labour. Such conduct must, in my view, be regarded as dishonest and as constituting a fraud upon the compiler of the information. I consider that, as in the case of false misrepresentations concerning one's own wares or of passing-off, our Courts should treat this as constituting unlawful competition and as being actionable at the suit of the trader damnified thereby. As in those cases, the conduct of the trader misappropriating the information would amount to an infringement of the rights of the compiler thereof to carry on his trade and attract custom without unlawful interference from competitors; and the damage suffered would normally consist of the loss of customers or potential customers who have been induced by such conduct to deal with his competitor rather than with the compiler himself. Bearing in mind the Aquilian character of a claim based upon such conduct, it seems to me that the suffering of damage in this form and its causal connection with the acts of unlawful competition are essential ingredients of the claimant's cause of action."

22. Nonetheless care must be taken in unlawful competition cases to recognise the erstwhile employee's right to utilise knowledge

and skills acquired when moving to a new employer.

In this regard Adv Dippenaar submitted that the case of *Meter Systems Holdings Ltd v Venter* and another 1993(1) SA 409 (W) especially at 428D-F and 430E-F was authority for the proposition that customer lists derived from memory, or the employee's own endeavours do not constitute confidential information and can be utilised by a competing business that subsequently engages that employee.

23. In my view the submission goes too far and takes the passages relied on out of context. In my respectful view the list set out at pages 428D-430H of Stegmann J's judgment in *Meter Systems* of information that either qualifies for protection or does not is intended to be construed holistically. The respondents seek to

isolate certain passages while ignoring the fundamental criteria that will result in information being regarded as confidential to the employer.

24. The respondents' broad submission also fails to take into account the case of *Rawlins & Another v Caravan Truck (Pty) Ltd* [1992] ZASCA 204; 1993 (1) SA 537 (A) at 542F-H. Albeit that *Rawlins* was concerned with a restraint of trade agreement, certain of the underlying principles to which I will refer are applicable in

relation to what does or does not constitute the proprietary interests of the employer as opposed to the acquired skill and know-how that an employee is entitled to exploit in order to obtain other employment. See also *Nampesca (SA) (Pty) Ltd & Another v Zaderer & Others* 1999 (1) SA 886 (C) at 894I- 895B and 896B and *Ntsanwisi v Mbombi* 2004 (3) SA 58 (T) especially at 62D - 63H.

25. In *Dr Jacovides & Partners Inc v Dr Moodley and others* 2010 JDR 0418 I was obliged to consider these cases in the context of a restraint agreement between registered medical practitioners in order to determine whether the applicant enjoyed goodwill in a patient "customer base".

*Rawlins* was relied upon for determining when goodwill attaches to a customer base. At 541D-I the then appellate division confirmed that the employer enjoyed a protectable interest in his trade connections if "... the employee has access to customers and is in a position to build up a particular relationship with the customers so that when he leaves the employer's service he could easily induce the customers to follow him to a new business".

The appellate division also referred to the House of Lords decision in *Morris (Herbert) Ltd v Saxelby* [1916] 1 AC 688 (HL) at 709 where the extent of the relationship resulted in the employee acquiring "... such personal knowledge of and influence over the customers of his employer ... as would enable him (the servant or apprentice), if competition were allowed, to take advantage of his employer's trade connection ...".

The court in *Rawlins* then summarised the position in the following terms;

*“Much will depend on the duties of the employee; his personality; the frequency and duration of contact between him and the customers;*

where such contact takes place; what knowledge he gains of their requirements and business; the general nature of their relationship

(including whether an attachment is formed between them, the extent to which customers rely on the employee and how personal their

association is); how competitive the rival businesses are ... and whether there is evidence that customers were lost after the employee left”.

26. In the present case the first respondent was a director and employee of the second applicant. He had in fact introduced the third respondent to the second applicant as a potential purchaser of its business. As a result of these overtures the third respondent was given access to the second applicant’s confidential information for purposes of a due diligence. The third respondent was obliged to sign a confidentiality agreement. The papers indicate that by the end of March 2014 the third respondent sought more information but had not yet signed the confidentiality agreement. On 2 April 2014 the applicant informed the third respondent that it was prepared to hand over the information requested and have the confidentiality agreement signed. The response was a volte face and the second applicant was told that they would not proceed to look at acquiring its business. The first respondent claims that the third respondent, effectively out of the blue, approached him in May 2014 to enquire if he was still employed by the second applicant. The first respondent’s employment was terminated by the second applicant by way of notice which set out a number of grounds, which if correct, demonstrated a serious undermining of the company’s business by him and a failure to carry out his director’s duties. That issue is in dispute but it is unnecessary to make any findings in that regard.

The second respondent subsequently resigned from the second applicant and quickly took up employment with the third respondent.

27. The respondents contend that they are entitled to make use of the information derived while at the applicant for a host of reasons.
28. In my view none of these reasons addresses the fundamental issue of whether or not the applicant enjoyed a protectable interest in respect of its customer contact details of persons with whom it deals, pricing information regarding contracts for which it has tendered, bid or was negotiating ( at least up to the time it brought the application which was on 4 August 2014) and confidential information regarding the internal operations of its business including its business and financial relationships with any of its suppliers or sub-contractors.

29. I am however not satisfied in respect of the other interdictory relief sought that the second applicant has satisfied the requirements of Plascon-Evans for the purposes of obtaining final relief.

#### BREACH OF FIDUCIARY DUTY BY FIRST RESPONDENT

30. The first respondent effectively sought to overcome the alternative ground for interdicting him based on his directorship of the second applicant by resigning from its board. It is however unnecessary to consider that independent ground because of the findings already made on the first ground.

#### WRONGFUL APPROPRIATION OF CONFIDENTIAL INFORMATION

31. The respondents sought to make much of the fact that knowledge of second applicant's customers and potential customers would be readily available within the industry.
32. The Achilles heel to this argument is the customer lists that were claimed by the first respondent to have been compiled from memory and found on his email. The list however also contains private contact details of the relevant persons at the customer company. That information was certainly acquired while at the applicant and is confidential to it, irrespective of how good an employee's memory might be. The good memory of an employee cannot render otherwise confidential information no longer protectable. That certainly is not the ratio of *Meter Systems* as is clear from the passages referred to earlier. It would also conflict with the decision in *Dun & Bradstreet* mentioned earlier.
33. Moreover many contracts obtained by the applicant are as sub-contractors to main bidding companies that successfully acquired tenders. A substantial number of the applicant's clients are smaller firms of civil engineers who also feature on the first respondent's emailed list.
34. The second applicant's confidential proprietary information was also found on the second respondent's computer. He claims that this had presumably been copied onto his computer by reason of the 'drop box' settings applied which resulted in applicant's files being automatically and regularly synchronised with his own computer. He was found in possession of project measurement certificates, applications for BEE ratings, workmen compensation annual returns and information regarding what are termed 'white collar' information and the applicant's payroll. There can be little doubt that in its totality this information is confidential to the second applicant. The second respondent also does not explain why he still retained the information on his computer after he had resigned from the applicant.
35. There would also have been negotiations in progress between the applicant and potential customers up to the time that the application was launched and to which the first or second respondents would have been privy or would have had access while still employed or while still a director of the second applicant. That information and the nature of the negotiations for contracts, or ones which were being prepared for tender, are confidential to the second

applicant. Any competitor would gain a head start and an unfair advantage by being able to undercut or otherwise use such knowledge that was internal to the second applicant. The applicant is entitled to be protected in that regard and has a clear right to the extent I have identified.

36. The conduct of each of the respondents demonstrates a disregard for the applicant's rights and a clear attempt to take unfair and wrongful advantage of inside knowledge that is otherwise protectable against filching or economic espionage. I see no reason why such protection cannot be extended in the present situation to issues of unfair competition.

#### URGENCY

37. I am satisfied that this matter is urgent having regard to need to protect the second applicant's interests from unfair

competition before the horse has bolted, for reasons that ought to be clear from the body of this judgment.

#### ORDER

38. It is for these reasons that the following order was made;

1. The first, second and third respondents are interdicted from:

1.1. Utilising, communicating or publicising any of the Second Applicant's;

1.1.1. Customer contact details of persons with whom it deals;

1.1.2. pricing information regarding contracts for which it has tendered, bid or was negotiating at any time up to and including 3 August 2014;

1.1.3. confidential information regarding the internal operations of its business including its business and financial relationships with any of its suppliers or sub-contractors;

1.2. Approaching directly or indirectly, or assisting any other person in approaching directly or indirectly, any client, customer or principal of the second applicant or to engage with any of them in order to unlawfully compete with the second applicant, for the benefit of the third respondent or any other person in respect of any contract for which it has tendered, bid or was negotiating at any time up to and including 3 August 2014;

1.3. Taking advantage, to the prejudice of the second applicant, of any relationship involving the use of the second applicant's pricing information or customer contact details with the second applicant's clients or customers or any other employee in respect of any contract for which the second applicant has tendered, bid or was negotiating at any time up to and including 13 August 2014, for the benefit of the third respondent or any other person;

2. Each respondent is interdicted and precluded from accessing or utilising the following documents or copies, whether in electronic or hard copy format;

2.1. The “BEE and 198 more folders”

2.2. “0001 Docs Sent for Coleman’s BEE.pdf and 712 more files”

contained in the device, and referred to in annexure JD1 on page 93 of the Applicants’ Founding Affidavit

3. The first and third respondents are to pay the costs of the application including the costs of the application in respect of the second respondent, but excluding the costs relating to the orders sought in Part B paras 8 to 13, jointly and severally, the one paying the other to be absolved.

DATES OF HEARING: 12 August and 12 September

DATE OF ORDER: 26 September 2014

DATE OF FINAL JUDGMENT: 20 April 2015

LEGAL REPRESENTATIVES:

FOR APPLICANTS: Adv M Nowitz

Schindlers Attorneys FOR 1st and 3rdRESPONDENTS: Adv F Dippenaar SC

Adv HP van Nieuwenhuizen

Cliffe Dekker Hofmeyer Inc

[1] See section 22 of the Constitution

[2] See the statutes mentioned in LAWSA vol2(2) (2nd ed) para 273

[3] Negligence will suffice as intention is not a requirement for Aquilian liability. See generally Van Heerden –Neethling Unlawful Competition (2nd ed) Chap 3 para 4.3.3

[4] See Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd[1984] ZASCA 51; 1984

(3) SA 623 (A) at 634E – 635C. In Wightman t/a JW Construction v Headfour (Pty) Ltd and Another[2008] ZASCA 6; 2008

(3) SA 371 (SCA)at para 12 the SCA said the following when applying Plascon-Evans: ‘... an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so farfetched or clearly untenable that the court is justified in rejecting them merely on the papers’

[4] See Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd[1984] ZASCA 51; 1984

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[5] See at Chap 4 para 3.1.2

[6] At 418E-F: "In its classic form it usually consists in representing, either expressly or impliedly (but almost invariably by the latter means)

that the goods or services marketed by him emanate in the course of business from B or that there is an association between such goods or services and the business conducted by B.... (and) ... it results, or is calculated to result, in the improper filching of another's trade and/or in an improper infringement of his goodwill and/or in causing injury to that other's trade reputation"

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