

SOUTH AFRICA / JUDGMENT

Nuwater PTE Ltd and Another v Grahamtek Holdings Ltd and Another (7051/2016)

[2016] ZAWCHC 113 (1 September 2016)

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COURT

Western Cape High Court, Cape Town

BEFORE

K M Savage

CASE / FILE NUMBER

7051/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

CASE

NO: 7051/2016

In

the matter between:

NUWATER
PTE
LTD First
Applicant
NUWATER
SOUTH AFRICA (PTY)
LTD Second
Applicant
and
GRAHAMTEK
HOLDINGS
LTD First
Respondent
GRAHAMTEK
SYSTEMS (PTY)
LTD Second
Respondent
Date
of hearing: 13 June 2016
Date
of judgment: 1 September 2016

JUDGMENT

Introduction

- [1] The applicants, Nuwater Pte and Nuwater South Africa (Pty) Ltd ('Nuwater SA'), and the respondents, Grahamtek Holdings Ltd and Grahamtek Systems (Pty) Ltd, carry on business in competition with each other in the field of water treatment and desalination using reverse osmosis ('RO') water purification.
- [2] Mr William (Koerie) Graham, an engineer and inventor, has since 1984 been involved in water desalination and treatment and was instrumental in developing RO water purification technology. He developed three patents, registered in South Africa and abroad, which are associated with 16" membrane RO technology. These patents are owned by GrahamTek Singapore Pte (Ltd) ('GTS'), which was registered in 2002 with Mr Graham as director, and Garfield International Investments Ltd ('Garfield'), a company of which Mr Graham was previously a shareholder and director. In 2002 GTS was granted the exclusive right of use by Garfield in respect of the patented inventions owned by it.
- [3] The two applicants, which were registered at the end of 2009, conduct business globally and in South Africa as associated companies and licensees of GTS and Garfield, with whom they claim an established trade reputation and goodwill in the water desalination and treatment field in South Africa and abroad. Since April 2010 Nuwater SA has held the exclusive licence to develop and exploit the three patents.
- [4] In 2010 GrahamTek NuWater Singapore Pte Ltd ('GNS') was incorporated in Singapore as a wholly-owned subsidiary of NuWater Ltd, a company incorporated in the British Virgin Islands. GNS purchased the business and assets of GTS. GTS remained in existence for the purpose of holding patents and other intellectual property. GNS, NuWater SA and NuWater Ltd have substantially the same shareholders with the result that work done by GTS in 2014, was work done in a business which is now part of the NuWater group of companies.
- [5] Mr Graham is one of two directors of the first respondent, GrahamTek Holdings Ltd, which was formed in 2015. He is also the sole director and his family trust shareholder of the second respondent, GrahamTek Systems (Pty) Ltd, registered in 2000. Mr Graham is no longer associated with Garfield or GTS, having been a director of GTS until
2010. The respondents are neither associated with nor are licensees of GTS or Garfield. They are therefore not entitled to use or apply the 16" patents in the course of their business.

[6] From October 2010 to September 2011 the second applicant, Nuwater SA, and the second respondent, GrahamTek Systems, were parties to a service agreement in terms of which GrahamTek Systems provided Nuwater SA with knowledge and expertise in manufacturing, installation and related services for contracts between Nuwater SA and its clients. Relations between the parties soured and the agreement was

terminated.

[7] When recent changes made by the respondents to their website were discovered by the applicants in April 2016 the applicants called on the respondents on 22 April 2016 to remove the offending material, viewing it as a prelude to the resumption by the respondents of their business in competition with the applicants. While the respondents undertook to adjust typographical and factual errors appearing in their website, the email sent on behalf of the respondents recording the amendments made was sent to an incorrect email address and was not received by the applicants. The application was therefore launched without the applicants having insight into those amendments which the respondents had made. Nevertheless, it became apparent in due course that most of the amendments made did not resolve the bulk of the applicants' complaints which form the subject matter of this application.

[8] In this application an order is sought in an amended notice of motion, with costs, directing the respondents to remove from their website, including those with domain names www.gtek.org.za and www.grahamtek.com (together referred to as their 'website') advertising and publicity material 'the following claims, misrepresentations and matter':

8.1 on the right side of the homepage, the picture of an award from Global Water Intelligence in 2008, bearing the wording:

"Global Water Intelligence

DISTINCTION

GrahamTek 16" RO Technology

Desalination Plant

of the Year

2008

Power Searaya

Singapore

"The most significant technical advance

in desalination of the year";

8.2 under the heading “Our Guarantee” on the page under the link “ABOUT GRAHAMTEK”, the wording:

“owns and manufactures these patented solutions”;

8.3 on the infographic under the heading “Our History” on the webpage under the link “ABOUT GRAHAMTEK”, the wording:

“2003/4: Flow Distributor and Magnetic Field Improvements”, and

“2010: World’s Biggest Mobile RO deployment”

8.4 under the heading “GLOBAL PRESENCE CASE STUDIES” on the page under the link “CASE STUDIES”, the wording:

“...GrahamTek 16” technology can be witnessed in more than 130 installations, with this technology in use at some of the largest Public Sector Desalination Plants globally as well as Mining, Oil & Gas, Shipping & Ports, Heavy Industry and Agriculture...providing

upwards of 768 Million Liters per day...

Some of GrahamTek’s global experience in the application of 16” RO Intellectual Property and technology is outlined below. Most large scale projects such as these would be done in partnership with other Strategic Partners and specialist engineering firms.”;

8.5 every case study listed on the page under the link “CASE STUDIES”, which, for the sake of clarity, are headed “Singapore Public Sector”, “Singapore Private Sector”, “Israel Public Sector”, “Dubai Public Sector”, “Oil & Gas Private Sector”, “Mining Private Sector” and “Municipal Public Sector”;

8.6 on the webpage under the link “TECHNICAL SPECIFICATIONS”, the headings “55 Mega Liter per Day Waste Water”, “10 Mega Liter per Day Power Plant”, “North Atlantic Test Plant” and “Waste Water to Potable Water” and all of the wording and every link to a report under each and every one of these headings; and

8.7 any other claim or representation to the effect that:

8.7.1 the Respondents hold any right in the patents to technology owned by Garfield International Investments Ltd and in which the Applicants

hold exclusive use rights;

8.7.2 the business of any of the Respondents is that of, or is associated with, the business of any of the Applicants; and/or

8.7.3 the Respondents have performed, or are otherwise associated with, and works and projects which were affected by the Applicant (or either of them).

Preliminary

issues

- [9] At the first date of hearing of the matter the respondents sought leave to introduce further affidavits in opposition to the relief sought by the applicants on the basis that certain material had been omitted from their answering papers given the haste with which such papers had been prepared. In an attempt to resolve certain issues arising in the matter, the applicants recorded in writing following extended argument on the issue that they do not contend that the three 16" patents confer exclusivity on the entire 16" process or that the three patents relate to the entire 16" RO process. In spite of this recordal made the matter remained unresolved.
- [10] The application to file further affidavits was granted by this Court, having regard to the nature of the dispute between the parties and the issues which had arisen on the papers and subject to the applicants' right to reply in due course.
- [11] The applicants' application to strike out portions of the respondents' answering papers on the basis that they contained

legal argument, inadmissible material and were vexatious stood over for later determination.

Issues

in dispute

- [12] The applicants' complaints turn on whether the offending material identified as appearing on the respondents' website constitutes unlawful competition by the respondents with the applicants because it:
- 12.1 contains misrepresentations made by the respondents as to the respondents' business, track record and technology; and
- 12.2 constitutes the passing-off by the respondents of technology, case studies and a track record, of which the applicants are the repository, as being that of the respondents and their associated licensors.
- [13] Website content which was alleged by the applicants to constitute an injurious falsehood denigrating the applicants in relation to a Sedgefield Municipal installation was resolved through an amendment, apart from the question of costs associated with this aspect. The remainder of the changes made by the respondents to their website following the launch of this application did not lead to the matter being resolved with the result that the applicants persist with the relief sought in their amended notice of motion.

Applicants' case

[14] The applicants take issue with the false impression created in the respondents' website that the respondents or Mr Graham hold rights in and to 16" RO patents when the technology which the respondents are using is not patented and the respondents have no rights over the three patents in respect of which the applicants have use rights.

[15] Mr John Holmes, Chief Executive Officer of both of the applicants, states in the applicants' founding affidavit that the misrepresentations made by the respondents are calculated to draw clients away from the applicants to the respondents and that they

have had, or will have that effect. The example of an email was put up in which confusion arose in the mind of a client because the applicants had changed their name from GrahamTek to NuWater and in which the applicants were asked if they still have access to GrahamTek technology. The applicants rely on their rights to the trademark "GrahamTek", which is owned by GNS, following

an agreement entered into in September 2010 between GTS and NuWater Ltd, the parent company of GNS. The applicants persist that the respondents hold no rights in respect of such trademark.

[16] The applicants take issue with the overall impression created by the website, which they state is false, that the respondents have

successfully developed and commercialised patents relating to the 16" RO technology and implemented such technology in respect of the case studies referred to. In addition, the applicants state that technical specifications on the respondents' website embody technical reports in respect of several plants when the technology in those plants is the subject of 16" RO patents and the GrahamTek 16" RO technology is that of GTS and not the respondents. The applicants take issue with the respondents' claim that the respondents are entitled to apply all of the patents to the 16" RO technology in the course of their business.

[17] The applicants state that it is irrelevant that Mr Graham was a director of GTS in that this does not entitle the respondents to make the representations that they do in their website when the respondents have no business or shareholding connection with GTS. The fact that Mr Graham invented the patented inventions this does not make this history the respondents' history, when the respondents had no rights in or to the patents at any time. The applicants take issue with the respondents' inclusion of the picture relating to the 2008 Global Water Intelligence award on their website, which award was not received by the respondents but by GTS. Although Mr Graham was involved with GTS at the time, the applicants claim that the respondents have no right to claim the award as their own or rely on the award as if it was one received by them when it is the applicants that hold use rights over the three 16" patents used in the implementation of the project.

[18] The applicants also rely on these exclusive use rights in respect of the technology at Anglo Vaal's Colliery, in which the 16" patents were applied, and state that Anglo Vaal contracted the second applicant and not the respondents to undertake the project which it designed

and rebuilt. It follows that the world's biggest RO deployment at Anglo Vaal, while built initially by the second respondent, was an installation which failed and was thereafter successfully replaced by the second applicant and not the respondents. Other installations were similarly installed by GTS or third parties and not by the respondents. The applicants deny that the second respondent was used at sites in Singapore and Israel and state that this allegation in the respondents' website is unsubstantiated. Apart from the initial tender awarded to the respondents in Vereeniging and the plant at Sedgefield completed by the respondents, the remainder of the plants and case studies referred to in their website are not installations or works undertaken by the respondents but by GTS. The applicants also take issue with the respondents' blurring of the distinction between the installation of plants and the management of sites. The applicants persist that the technology used in all these installations includes the technology which is the subject of the 16" patents in respect of which the applicants hold exclusive use rights,

while the technology in Israel belongs to a third party and not the respondents.

[19] Furthermore, it was a term of the service agreement entered into by the second applicant with the second respondent regarding the installation at Anglo Vaal that all intellectual property developed including 'any developments, enhancements and/or modification of the Water Technology' arising from the project would belong exclusively to the second applicant. It follows, according to the applicants, that the method design and/or technology which is the subject of any inventions developed by the second respondent while implementing the installation at Anglo Vaal in terms of the service agreement, is intellectual property belonging exclusively to the second applicant.

Respondents' case

[20] In opposing the application the respondents do not dispute that the applicants hold the right to use the three 16" patents as GTS's successor in title in respect of such patented inventions. What is disputed is that these use rights include the 'total GrahamTek technology' and the associated goodwill and record arising from the application of this technology in various projects and case studies. The respondents deny that the applicants have the exclusive right to use all 16" RO technology. In addition, the respondents claim rights to other patented inventions which relate to 16" technology and dispute that they are barred from making a generalised reference to 16" RO technology.

[21] Mr Graham in his opposing affidavit filed for the respondents states that the RO process existed before the three 16" patented

inventions, evidence from the fact that 8" technology has been used in the RO water purification and desalination industry. The three 16" patents are, he states, circumscribed ancillary processes which are not integral to the 16" RO technology

process used by Grahamtek Systems. In any event, according to the respondents the 16" technology is ever-evolving, 'the patents have application on all technologies relating to water treatment' and off the shelf 16" vessels and membranes now include devices which perform the same function as the Flow Distributors Mr Graham invented which make the use of such distributors unnecessary. Furthermore, Mr Graham states that he has now developed a

non-electric technology to replace the ACD patent, being one of the patents in respect of which the applicants' hold use rights. In addition Mr Graham indicates that: '(o)ur new technology is not subject to any ACD or EMF patent right or any other person's patent rights. At present we are causing this

invention to be patented and we expect registration shortly'. In a further affidavit filed Mr Graham relies on various patent and trademark documents annexed to the affidavit as proof of the

existence of patents in respect of which the respondents hold rights and to which they may refer.

[22] The respondents also dispute that the GrahamTek reputation is the sole preserve or property of the applicants, who they claim are relative newcomers to the industry with which Mr Graham has been involved for over twenty years. Instead, Mr Graham states that his reputation and that of his companies' arises from his work, knowledge, inventions and expertise in the field which in 2009 did not the vest in the applicants. The respondents take issue with the applicants' website claims of involvement in various projects which predate their existence and contend that their reference 'to our technical know-how, expertise, experience and to our own patented inventions, all in relation to the 16" reverse osmosis

technology' are not references to their intellectual property.

[23] The respondents claim that their website accurately reflects their patents, history, track record, expertise, intellectual property,

trade secrets and reputation in the GrahamTek technology developed and invented by Mr Graham, not all of which is patented, and which is not owned or controlled by the applicants. While acknowledging that the second applicant was at the time of its registration, together with GTS, the repository of the 'goodwill and track record of GrahamTek technologies', the respondents claim an entitlement to refer to and use for their own benefit their history and reputation in GrahamTek technology.

This is so given Mr Graham's involvement in the invention of the technology, the development and completion of the first 16" technology pilot plant and in the construction of plants by GTS while he lived in Singapore between 2003 and 2009 and in South Africa through the second respondent.

Discussion

- [24] Competitive trading is unlawful when it involves wrongful interference with another trader's rights such as to infringe that parties' right to attract custom.[1] While it is actionable under the *lex Aquilia*, fault in the form of negligence or intent is not a requirement for interdictory relief to be granted[2] and a final interdict may follow where there is shown to be a clear right, an injury actually committed or reasonably apprehended and the absence of any other satisfactory remedy.[3]
- [25] Although there is no *numerus clausus* of acts which constitute unlawful competition, the generally recognised categories are misrepresentations made by a rival trader as to its own business;[4] the publication by a rival trader of injurious falsehoods concerning the company's business;[5] and the passing off by a competitor of its goods or business as being associated with that of the complainant, including the unfair use of a competitor's fruits and labour.[6]
- [26] Passing off consists of a representation by one person that his or her business or merchandise is that of another, or is associated with that of another.[7] To succeed in a passing-off action, the applicants are required to show that there is a reasonable likelihood that members of the public may be confused into believing that the business of the one is, or is connected with, that of another and thereby cause injury as a result to the applicants' goodwill.[8]
- [27] In *GrainCo (Pty) Ltd v Van der Merwe and others*[9] it was determined that no passing off exists where a new company relies on relationships its employees have built up with customers during prior employment, or where reference is made to the past history of its employees. In addition, it has been held that goodwill encompasses a number of factors, the most of important being that of reputation,[10] which is the opinion which the relevant section of the community holds of the business or its product. The only aspect of goodwill that can be damaged by way of passing off is reputation, which is the reason that a successful passing off action requires proof of a relevant reputation.[11]
- [28] It is trite that where final relief is sought in motion proceedings, as was stated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[12] and *Wightman trading as JW Construction v Headfour (Pty) Ltd and another*,[13] the version of the respondents will be accepted unless it does not raise a real, genuine or bona fide dispute of fact or raises a dispute of fact that is so far-fetched as to be untenable in which case the Court is justified in rejecting such dispute of fact merely on the papers.[14] However, where the respondent has not sought to have the deponent cross-examined and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this failure to seek to cross-examine among those upon which it determines whether the applicant is entitled to the final relief which is sought.[15]

[29] The respondents deny both that they have misrepresented their business, track record and technology, or that they have passed the applicants' technology, case studies and track record off as their own or that of their associated licensors. The applicants take issue with these denials as contrived given Mr Graham's knowledge of the facts when a director of GTS and Garfield at the relevant times, his signature of the agreement to assign patents and his failure to address the crux of the applicants' complaints relating to the respondents' website in his affidavits filed and in the website amendments made. Given the conflicting stances of the parties it becomes necessary to consider the substance of each of the applicants' complaints raised.

Global Water Intelligence award

[30] The first misrepresentation claimed by the applicants with which they take issue relates to the inclusion by the respondents on their website of a picture of the Global Water Intelligence award in 2008 for the use of GrahamTek 16" RO technology in Power Searaya, Singapore which records this as the 'most significant' technical advance in desalination of the year. There is no dispute that the respondents' website does not record that the award was not received by the respondents.

[31] The respondents claim that the award was granted as a consequence of the application of GrahamTek 16" RO technology, which technology was developed by Mr Graham and implemented by him while he was a director of GTS and that any complaint has been cured by the amendment of the website to reflect that: "This project was done between GrahamTek Singapore Pte Ltd and CH2M Hill". The respondents contend that Mr Graham is entitled to claim the accolade, with the physical award in any event being in his possession, and that the respondents have not misrepresented the true position.

[32] The applicants dispute that the addition of a reference to which entities undertook the project cures the misrepresentation on the website in that the picture is calculated to create the false impression that the award is for technology to which the respondents have rights when they do not; and that the respondents were involved in the project and were recipients of the award when they were not.

[33] There is no dispute that the applicants currently hold use rights in respect of the three 16" RO patents which were patents applied by GTS and CH2M Hill in the Singapore project which was the subject of the award. Although the applicants held no such use rights over the three patents in 2008 when the award was made and Mr Graham remained associated with GTS at the time, the applicants take issue with the fact that the respondents were not associated with GTS when the award was made and did not hold any rights over the patented technology. However, in spite of this, while reflecting that GTS and CH2M Hill were involved in the project, the respondents do not record that they had no involvement in the project. Instead, they justify the inclusion of the award on the basis of Mr Graham's invention of the patented technology and his previous history and involvement with GTS, a company with which he is now no longer involved.

- [34] A reading of the website indicates that the respondents do not make it clear that they did not receive the award, that they were not involved in the project which led to the award being made and that they hold no rights over the patented technology which was applied in the project. In failing to do so, the true state of affairs is misrepresented. This is so in spite of Mr Graham's involvement with GTS at the time and his invention of the patented technology.
- [35] I am satisfied that the applicants' complaint in this regard does not constitute an attempt to claim the award as their own. Given the applicants' rights to use the patented technology which was used in the project, the respondents' reference to and reliance on the award amounts to a misrepresentation made by a rival trader as to its own business and the passing off of patented technology not available to the respondents as technology available to them. The respondents fail to appreciate that the award was one given to a distinct company with which the respondents were never associated, one in which Mr Graham is no longer associated and that Mr Graham's history is distinct from that of the respondents. Where a reliance is placed on Mr Graham's history, as much is required to be expressly stated by the respondents on the basis sent out in Grainco and the failure to do lays the respondents open to complaints of misrepresentation and passing off as raised by the applicants.
- [36] The fact that the three patents do not confer exclusivity on the entire 16" process and that they do not relate to the entire 16" RO process matters not given that it is impermissible for the respondents to lay claim to a right to use such patents.

Existence of patented solutions

- [37] The applicants take issue with the inclusion on the respondents' website under the heading "Our Guarantee" on the page under the link "ABOUT GRAHAMTEK", the wording: "owns and manufactures these patented solutions". While the respondents put up documents which purport to prove the existence of patented solutions belonging to them and to which

reference is made in their website, it is apparent from their further affidavit filed that these either relate to trademarks, or

provisional or complete applications for patent registrations which have lapsed or which have not been approved. None of the documents

put up by the respondents prove the existence of registered patents owned or possessed by either the respondents or Mr Graham in respect of which they hold any rights. In addition, the proof of a registered patent granted to GTS on 29 October 2008 in respect of the 'manufacture of membranes for desalinisation and filtration' is not proof of a patent held by the respondents.

- [38] Instead, the evidence shows that over a ten year period from 2004 a total of five patent applications were submitted, four provisional and one complete relating to a method of building pumps, the treatment of contaminated water and the separation of dissolved salts from water. The provisional

applications made were not followed by complete applications and therefore lapsed and the rights to the patent in respect of a

complete application granted numbered 2010/05811 were assigned to Garfield during December 2011. No patents were shown to be registered to the respondents or Mr Graham and no pending patent application was discernable from the documents put up by the respondents. This is so in spite of Mr Graham's statement that '(o)ur new technology is not subject to any ACD or EMF patent right or any other person's patent rights. At present we are causing this

invention to be patented and we expect registration shortly'.

[39] Consequently, with no proof that the respondents hold any rights in or to any registered patents pertaining to the 16" membrane RO system the reference to the respondents owning and manufacturing "patented solutions" misrepresents the true position. Given that it is the applicants that hold exclusive rights in and to the only patents proved to have been registered over the 16" RO process, the respondents' misrepresentation constitutes unlawful competition insofar as it is a statement which is factually incorrect and made by a rival trader in a manner which amounts to the wrongful interference with the applicants' right to attract custom.

Recordal of history

[40] In relation to Mr Graham's history, the applicants initially took issue with the inclusion on the respondents' website under the heading "William (Koerie) Graham – Executive Chairman" and under the link "MANAGEMENT TEAM" of the wording: "and has successfully negotiated and installed GrahamTek Technology in more than 16 countries covering a total of 130 installations and in excess of 780 Meg/Liter per day...". The basis for the complaint was that Mr Graham did not negotiate or install the technology as claimed and that in this regard the

respondents refer and rely upon projects in which both they and Mr Graham were not involved.

[41] As a consequence of this complaint the respondents amended their website to reflect that Mr Graham 'is world-renowned and is synonymous with the desalination process and the industry. He has been instrumental either as principal

consultant, advisor, technical specialist or has been consulted in the use and application of the GrahamTek Technology in more than 16 countries covering a total of 130 installations and in excess of 780 Meg/Liters per day'. This amendment did not however resolve the respondents' reference to their historical involvement in previous projects and case studies in 130 installations.

[42] The dispute turns in the first instance on whether the respondents or Mr Graham have been instrumental in 130 installations and in excess of 780 Meg/Liters per day or whether what is intended from the wording used, as the respondents suggest, that it is the GrahamTek technology which has been used in this manner.

- [43] There is no merit in the respondents claim that the website has been misread in that it is stated that GrahamTek technology has been applied in all of the projects referenced and not that the website does not record that the respondents were directly involved in every project. This is so given the absence of any evidence that the three patents in respect of which the applicants hold use rights were not applied with the implementation of GrahamTek technology in the installations referred to. The respondents are not entitled to represent that the technology as installed in those installations referenced in their website is available to them when it is not.
- [44] From a plain reading of the sentence under 'Our History' it is apparent that the respondents intended to represent an association with the application or implementation of the GrahamTek technology applied in 130 installations. Had this statement been intended to represent that their involvement was limited to Mr Graham's invention of the technology and its application only in a restricted number of countries and installations, as opposed to the extensive roll-out of the technology referred to, the website should properly have stated as much. By failing to make this clear the representation is made that the respondents' history in relation to the implementation and application of the GrahamTek technology is one of involvement in large scale installations in various countries as referred to under 'Case Studies'. The evidence however does not support such claims.
- [45] Furthermore, given that the applicants hold use rights to the three patented inventions which have been used in the application of 16" RO technology, in the absence of any evidence to the contrary, the reference to the installation of the GrahamTek technology encompasses a reference to such use rights. While the respondents sought to make out a case that the three patents were outdated and had been replaced by off-the-shelf technology now available, there is no indication on the papers that any of this new technology was available in the installations and applications referenced in the respondents' website or that the three patents had not been applied. The result is that the respondents' reference to the GrahamTek technology includes a reference three patents in respect of which the applicants' hold use rights.
- [46] The respondents' website at first referred to "GrahamTek's global experience in the application of 16" RO Intellectual Property and technology" with its stated that "(m)ost large scale projects ...would be done in partnership with other Strategic Partners and specialist engineering firms." This was changed to reflect that: 'Some of GrahamTek's global experience in the application of 16" RO Intellectual Property and technology is outlined below. Most large scale projects such as these would be done in partnership with other Strategic Partners and specialist engineering firms.' Allied to the applicants' complaint on this aspect is the respondents' reference to technical specifications under headings "55 Mega Liter per Day Waste Water", "10 Mega Liter per Day Power Plant", "North Atlantic Test Plant" and "Waste Water to Potable Water" and the wording and reports which appear on the website under each heading which suggests the respondents' involvement in these projects and reports.

- [47] The applicants claim rights in and to the trademark 'GrahamTek' held by GNS following an agreement entered into in September 2010 between GTS and the first applicant. They claim that the goodwill and reputation associated with the trademark is vested in GTS and not in Mr Graham or the respondents and state that the second applicant was registered under the name of GrahamTek NuWater (Pty) Ltd specifically to vest it with the goodwill and track record of the GrahamTek technologies.
- [48] What is clear is that the respondents' are not entitled to lay claim to an extensive history in the application and implementation of the technology when they hold no use rights over a portion of it. To do so is to encroach on the applicants' rights. Furthermore, it is not permissible for the respondents to misrepresent a history in respect of the application of the GrahamTek technology when they have had no such history. Accordingly, the representation that the respondents have an extensive history in the application and implementation of the GrahamTek technology is not a true reflection of the facts, nor are the respondents at liberty to rely on such extensive implementation of the technology given the applicants' use rights. It follows that the respondents' website claims and representations in this regard seek to indicate falsely that they hold the rights in and to technology which they do not.

Case studies

- [49] The applicants dispute that the case studies listed on the respondents' website, being those in the "Singapore Public Sector", "Singapore Private Sector", "Israel Public Sector", "Dubai Public Sector", "Oil & Gas Private Sector", "Mining Private Sector" and "Municipal Public Sector" are case studies or projects in which the respondents have been involved. In addition, the applicants take issue with the respondents' claim of involvement in projects that were projects of the applicants, GTS and/or third parties.
- [50] It is apparent from the papers that there is no evidence to support the respondents' claim of involvement in the case studies cited or to their claim of involvement in large-scale projects undertaken in partnership with strategic partners and specialist engineering firms. Furthermore, the GrahamTek technology applied in these case studies and projects includes the application of the patented technology in respect of which the applicants' hold use rights. With no evidence of involvement by the respondents in the case studies they refer to and with no rights to the use of the patented technology, the respondents misrepresent that the technical information put up as arising from such projects is their own when it is not. The respondents by so doing misrepresent the true position and seek to appropriate for themselves a trade reputation and goodwill which they are not entitled to.
- [51] There is furthermore no evidence of intellectual property and technology belonging to the respondents having been installed at any of the sites referred to when other companies or international third-party contractors and not Mr Graham installed technology or built the plants using the patented technology in respect of which the applicants now hold use rights.

- [52] The reference to case studies, projects and technical information by the respondents on their website misrepresents the true position and is aimed at creating confusion in the minds of clients as to the business, goods and/or services of the respondents. While Mr Graham may refer to his history, his involvement in projects and his inventions, the respondents may not appropriate such history as their own. The effect is that there is a likelihood of confusion caused or which may reasonably be caused between the business of the applicants and that of the respondents amongst customers.

Technological improvements and the 2010 mobile installation

- [53] The applicants take issue with the respondents' claims and representations made regarding their history in respect of "2003/4: Flow Distributor and Magnetic Field Improvements" and an installation in "2010: World's Biggest Mobile RO deployment". The applicants do so on the basis that the reference to the Flow Distributor and Magnetic Field Improvements is a direct reference to the patented technology in respect of which the applicants hold use rights, which technology forms no part of the respondents'

history. Furthermore, the 2010 mobile RO deployment refers to the second applicant's contract to re-build a plant for Anglo Vaal colliery in circumstances in which the initial build had failed and Mr Graham was contacted to the second applicant to assist with the re-building process in terms of an agreement entered into with the second applicant.

- [54] The applicants' state that it was they and not the respondents who re-built the Anglo Vaal Colliery plant, with the respondents at no stage involved in this process. Mr Graham was involved in this re-build with the terms of his agreement entered into with the second applicant being that any intellectual property which was developed during the course of his work on the project was to belong to the second applicant.

- [55] While the respondents dispute that the statements are untrue and rely on Mr Graham's entitlement to refer to his own history and achievements and to associate these with his present businesses, as stated above, while Mr Graham may refer to his history in various projects, that history is to be distinguished from the history of the respondents. This is so in that a failure to do so misrepresents the facts concerning the respondents' involvement in circumstances in which they are not entitled to refer to a history which is that of the applicants. It follows that the reference to 2010 mobile RO deployment fails to reflect that it was not the respondents that were contracted to undertake the 2010 re-build of the mobile plant but the applicants.

- [56] Furthermore, Mr Graham and not the respondents was involved in the 2003/4 technology improvements referenced in their website. It follows that the reference to the respondents' history as including 2003/4 improvements to patented inventions in respect of which the applicants hold use rights is factually incorrect and misrepresents the true position. Had the respondents intended to reference Mr Graham's history in this respect it can reasonably have been expected of the respondents to expressly state this fact and distinguish Mr Graham's history, in the manner approved of in Grainco, from their own.

Conclusion

[57] With fault in the form of negligence or intent not a requirement for interdictory relief, it is clear that the respondents have

misrepresented their own business, track record and technology by the claims in their website in relation to the existence of patented

technology which does not exist, their claim of involvement in case studies and projects which were implemented by other parties,

including GTS and the applicants, and their reference to the 2008 award in respect of a project with which the respondents were not involved.

[58] In addition, the respondents' website reference to patented 16" technology and case studies using such technology with which they were not involved but which concerned technology in respect of which the applicants hold use rights, amounts to both passing-off and the unfair use of a competitor's fruits and labour. The respondents falsely represent that their business and services are that of, or associated with, businesses that were responsible for the implementation of projects and case studies when the rights to patented technology reside in such other businesses.[16]

[59] I am not persuaded that the respondents' website references which are the subject of the applicants' complaint are reasonably

accurate or that they do not constitute a false description.[17] I am furthermore not persuaded, as the respondents' claim, that they derive no benefit or do not seek to derive benefit in the claims and representations made on their website. I accept that the applicants have established the existence of a reputation in the name GrahamTek and its technology. Given their use rights in respect of the three patents, their involvement in projects which include the Anglo Vaal colliery re-build and other projects and their proven relationship with GNS and GTS it is clear that the applicants' reputation is one worthy of protection. The GrahamTek reputation is neither exclusive to the respondents nor Mr Graham and provides no basis on which to deny the applicants the relief that they seek.

[60] For all of these reasons I am satisfied that the applicants have shown the existence of a clear right to the interdictory relief sought, the existence of an injury which has actually been committed or one which is reasonably apprehended and the absence of any other satisfactory remedy available to them. I consider it unnecessary to deal with the merits of the application to have certain objectionable material in the supplementary answering affidavit of the respondents struck out on the grounds that it is irrelevant, inadmissible or argumentative.

[61] Turning to the issue of costs, having been unsuccessful in this application there is no reason as to why the respondents should not pay the applicants' costs. This is so in spite of the respondents' amendments to certain aspects of their website content. These amendments did not resolve the bulk of the applicants'

complaints and it follows that the applicants were entitled to approach the matter and proceed with the application in the manner

that they did.[18]

Order

[62] In the result, the following order is made:

1. The respondents are directed to removed from their websites, including those with domain names www.gtek.org.za and www.grahamtek.com the following claims, misrepresentations and matter –

1.1 on the right side of the homepage, the picture of an award from Global Water Intelligence in 2008, bearing the wording:

1.2 under the heading “Our Guarantee” on the page under the link “ABOUT GRAHAMTEK”, the wording:

1.3 on the infographic under the heading “Our History” on the webpage under the link “ABOUT GRAHAMTEK”, the wording:

1.4 under the heading “GLOBAL PRESENCE CASE STUDIES” on the page under the link “CASE STUDIES”, the wording:

1.5 every case study listed on the page under the link “CASE STUDIES”, which, for the sake of clarity, are headed “Singapore

Public Sector”, “Singapore Private Sector”, “Israel Public Sector”, “Dubai Public Sector”, “Oil & Gas Private Sector”, “Mining Private Sector” and “Municipal Public Sector”;

1.6 on the webpage under the link “TECHNICAL SPECIFICATIONS”, the headings “55 Mega Liter per Day Waste Water”, “10 Mega Liter per Day Power Plant”, “North Atlantic Test Plant” and “Waste Water to Potable Water” and all of the wording and every link to a report under each and every one of these headings; and

1.7 any other claim or representation to the effect that:

i. the Respondents hold any right in the patents to technology owned by Garfield International Investments Ltd and in which the Applicants

hold exclusive use rights;

ii. the business of any of the Respondents is that of, or is associated with, the business of any of the Applicants; and/or

iii. the Respondents have performed, or are otherwise associated with, any works and projects which were affected by either of the applicants or both of them.

2. The respondents are to pay both the costs of this application and the costs in respect of their application to file further affidavits.

K M SAVAGE

Judge of the High Court

Appearances:

For applicants: J Dickerson SC

Instructed by Edward Nathan Sonnenberg Inc.

For respondents: M Seale

Instructed by Bornman & Hayward Inc.

[1] Dunn v Bradstreet v SA Merchants Combined Credit Bureau 1968

(1) SA 209 (C); Van Heerden & Neethling Unlawful Competition (1995) at 101.

[2] Elida Gibbs (Pty) Ltd v Colgate Palmolive (Pty) Ltd (1) 1988

(2) SA 350 (W) at 335; William Grant & Sons Ltd v Cape Wine & Distillers 1990

(3) SA 897 (C).

[3] Setlogelo v Setlogelo 1914 AD 221.

[4] Stellenbosch Wine Trust Ltd v Oudemeester Group 1977

(2) SA 221 (C); Van Heerden (supra) at 149.

[5] Van Heerden (supra) at 283.

[6] Dunn & Bradstreet (supra); Schultz v Butt 1986

(3) SA 667 (A); Van Heerden at 149 and 247.

[7] Capital Estate and General Agencies (Pty) Ltd and others v Holiday Inns Inc and others 1977

(2) SA 916 (A) at 929 C-D.

[8] Brian Boswell Circus (Pty) Ltd and another Boswell v Wilkie Circus (Pty) Ltd 1985

(4) SA 466 (A) at 478. Reckitt & Colman SA (Pty) Ltd v SC Johnson & Son SA (Pty) Ltd 1993

- (2) SA 307 (A) at 315A-C.
- [9] Grainco (Pty) Ltd v Van der Merwe and others 2014
- (5) SA 444 (WCC) at paras 142-144.
- [10] Premier Trading Company (Pty) Ltd and Another v Sporttopia (Pty) Ltd 2000
- (3) SA 259 (SCA) at 266J - 267A.
- [11] Caterham Car Sales & Coach Works Ltd v Birkin Cars (Pty) Ltd and another
- [1998] ZASCA 44; 1998
- (3) SA 938 (SCA) at para 16 with reference to Hoechst Pharmaceuticals (Pty) Ltd v The Beauty Box (Pty) Ltd (in liquidation) and another 1987
- (2) SA 600 (A) at 613F-G; Brian Boswell Circus (Pty) Ltd and another v Boswell-Wilkie Circus (Pty) Ltd 1985
- (4) SA 466 (A) at 479D; Williams t/a Jenifer Williams & Associates and another v Life Line Southern Transvaal [1996] ZASCA 46; 1996
- (3) SA 408 (A) at 419A-B, 420B.
- [12]
- [1984] ZASCA 51; 1984
- (3) SA 623 (A) at 643E-635C.
- [13] 2008
- (3) SA 623 (A) at para 12.
- [14] With reference to Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949
- (3) SA 1155 (T); Da Mata v Otto NO 1972
- (3) SA 858 (A) at 882 D-H.
- [15] Rikhoto v East Rand Administration Board and Another 1983
- (4) SA 278 (W) at 283 E-H.
- [16] Pioneer Foods (Pty) Ltd v Bothaville Milling (Pty) Ltd [2014] 2 All SA 282 (SCA); Premier Trading Co (Pty) Ltd v Sporttopia (Pty) Ltd 2000
- (3) SA 259 (A).
- [17] Eserich Development (Pty) Ltd v Andrew Mentis Steel Sales (Pty) Ltd 1983
- (3) SA 810 (W).

[18] FNB of Southern Africa Ltd v First EC Financing; Nkume v Firststrand Bank Ltd 2012

(4) SA 113 (ECM) at para 9.

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