

SOUTH AFRICA / JUDGMENT

Tuscan Mood 179 (Pty) Ltd v ITEC Distribution (Pty) Ltd and Others (15767/13) [2013] ZAGPPHC 92 (2 April 2013)

[2013] ZAGPPHC 92

COURT

North Gauteng High Court, Pretoria

BEFORE

A B Rossouw

CASE / FILE NUMBER

15767/13

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IN

THE NORTH GAUTENG HIGH COURT,
PRETORIA
(REPUBLIC OF SOUTH AFRICAN

Date:

2 April 2013

Case

Number: 15767/13

In

the matter between:

TUSCAN

MOOD 179 (PTY)

LTD.....Applicant

and

ITEC

DISTRIBUTION (PTY)

LTD.....First

Respondent

ITEC

HOLDINGS (PTY)

LTD.....Second

Respondent

ITEC

FINANCE (PTY)

LTD.....

Third Respondent

EXTRA

DIMENSIONS 224 (PTY)

LTD.....Fourth
Respondent
t/a
ITEC PRETORIA EAST
ITEC
CONNECT (PTY)
LTD.....Fifth
Respondent

JUDGMENT

A B ROSSOUW A J

- [1] The matter came before me on 26 March 2013 and I reserved judgment. The order was given on 2 April 2013. What follows, are my reasons for the order.
- [2] I agree with the submission made by Mr Lundell SC that the application is not urgent. I shall nevertheless deal with the merits.
- [3] This is an urgent application to interdict the respondents from unlawfully interfering with the relationship between the applicant

and its customers, from unlawfully competing with the applicant and from unlawfully interfering in the applicant's relationship

with its employees. The final relief that is sought is set out in paragraph 2 of the applicant's Notice of Motion. It reads as follows:

'2. That the Respondents be interdicted and restrained from: -

2.1 Unlawfully interfering in the relationship between the Applicant and its customers, as at 18 December 2012;

2.2 Unlawfully competing with the Applicant by inter alia making use of its client lists, customer base details, contract information,

pricing details and financial arrangements and information, until such time as any of the above falls within the public domain;

2.3 Unlawfully interfering in its relationship with its employees by approaching same;'

- [4] Where a final interdict is sought on an urgent basis, proceedings may be commenced by way of application even though a (real) dispute of a (material) fact is foreseen. (See *Van Niekerk v Van Rensburg* 1959 (2) SA 185 (T) at 187H).
- [5] Real disputes of material facts have indeed arisen from the affidavits. Motion proceedings concerned with final relief are all

about the resolution of legal issues based on common cause facts and they cannot be used to resolve factual issues, because they are not designed to determine probabilities and in motion proceedings the issue of onus also does not arise. (See National Director of Public Prosecutions (Pty) Ltd v Zuma (Mbeki and another intervening) 2009

(2) SA 279 (SCA) par 26). In terms of the Plascon Evans rule, the ‘common cause’ facts are those facts averred in the applicant’s affidavits, which have been admitted by the respondent, together with the facts alleged by the respondent. A final order can only be granted if the ‘common cause’ facts justify such an order.

[6] The ‘common cause’ facts in this application are the following:

[7] During December 2004 the applicant, ie Tuscan Mood 179 (Pty) Ltd (‘Tuscan’), concluded a dealership agreement with ITEC Distribution (Pty) Ltd (‘ITEC’) (the first respondent) in terms of which ITEC granted to Tuscan a non-exclusive right to do business in respect of ITEC branded photostat and business machinery (‘the agreement’). ITEC branded products are actually Konica Minolta products rebranded as ITEC products for purposes of distribution in South Africa through ITEC and its dealers, which included Tuscan.

[8] The agreement between Tuscan and ITEC contained, inter alia, the following terms:

1. ITEC granted the right to Tuscan do business, which included the right to sell, deal, supply, install, service, repair and maintain

ITEC products, including the supply of these products to end-users by means of rental, hire-purchase, lease and such like agreements

concluded between such end-users and ITEC Finance (Pty) Ltd (‘Finance’) (the third respondent).

2. Tuscan was restricted to conduct its business within a specific area and it was not permitted to be involved in any other commercial

business activity of whatsoever nature without ITEC’s consent.

3. Tuscan could only conduct business in respect of those products that were made available by ITEC, from time to time, for sale to Tuscan. In this regard, Tuscan was obliged to purchase all equipment and consumables from ITEC at an agreed price. Tuscan

was however allowed to sell equipment (not ITEC products) acquired as a trade-in (Tuscan was not allowed to service this equipment), as well as sell second-hand ITEC products acquired from customers, provided that the annual turnover generated by trade-ins and second-hand goods did not exceed more than 10% of Tuscan’s annual turnover.

4. Tuscan was obliged to store, via a centralised server and on the software packages provided by ITEC, up to date, comprehensive and detailed records of all customers, all transactions involving ITEC products, all prospective customers, all employees and all records relating to its carrying out of its obligations in terms of the agreement. This included, inter alia, all the names, contact numbers and addresses of all customers, potential customers and employees

of Tuscan. Tuscan would pay ITEC the fees relating to Tuscan's use of the software packages and/or the maintenance and/or other such support provided by or on behalf of ITEC to Tuscan in respect thereof.

5. ITEC would have full access to all information stored by Tuscan via the centralised server and/or software packages.
6. All service agreements entered into between Tuscan and its customers had to contain provisions obliging customers to acquire consumables, paper and spare parts either from an authorised dealer, such as Tuscan, or from ITEC directly.
7. When supplying ITEC products to end-users thereof who intended to acquire the right to use, and/or possession of, such products, not by means of purchasing, but by means of rental, lease, hire- purchase or such like agreements to be concluded between such end-users (on the one hand) and banks and/or finance houses (on the other), Tuscan was obliged to use, on the terms contained therein, only Finance's agreements.
8. Tuscan would desist from doing business in respect of any financed ITEC product that was not financed through Finance, and where the product was so financed, Tuscan was not permitted to do business with the end-user whilst the latter was in arrears with the rental payments.
9. In order to protect the proprietary interests of ITEC, its product and its network of dealers and resellers, Tuscan, inter alia,

undertook that it would for a period of 18 months from the date of termination of the agreement, for whatsoever reason, not to be engaged, whether directly or indirectly, in any similar or related business and that it would not, in competition with ITEC or any of its dealers or resellers, make any approaches to and/or have any contact with any end-user of ITEC products and/or any of its dealers and/or resellers.

10. Tuscan would ensure that the aggregate value of its current assets would at all times exceed the aggregate of its current liability as determined in accordance with general accepted accounting practices and general accepted auditing standards and that it would trade in circumstances where it would be able to pay its debts when due.
11. Tuscan would comply at all times with company requirements and principles pertaining to corporate governance, including (but not restricted to) all revenue, taxation, employment, company, secretarial and accounting statutory and common law requirements.

Without derogating from the generality of the foregoing, Tuscan would timeously complete and lodge all financial statements and

financial and/or a tax returns with the relevant authorities and it would complete the said documents in accordance with the statutory

requirements pertaining thereto, failing which ITEC would be entitled to cancel the agreement without giving a remedial notice, and in which event Tuscan would be deemed to have granted to ITEC an option to purchase Tuscan's movable goods, debtors, stock, service base and goodwill in the manner and at the price as set out in the agreement.

[9] As part of the dealership agreement, the parties also signed an agreement of cession. This agreement was apparently concluded on 25 January 2005. In terms of this agreement Tuscan 'hereby cedes, transfers, makes over, assigns and pledges to [ITEC] all [Tuscan's] right, title and interest in and to all debts, claims and/or reversionary rights . . . which are now owing, or which may in the future become owing to [Tuscan]' as security for Tuscan's liability of its debts (present and future) due to ITEC. Until such time as Tuscan's debtors would have been notified of the cession, Tuscan would collect all sums of money from the debtors and received by Tuscan as agent for and on behalf of ITEC, which mandate ITEC was entitled to terminate by written notice.

[10] Tuscan commenced doing business as envisaged in the dealership agreement, which was extended from time to time. Consequent upon the conclusion of the agreement, Tuscan promoted the ITEC products, sourced customers and serviced customers with the supply, maintenance and all ancillary aspects relating thereto of ITEC products into the market. In order to achieve it, Tuscan incurred great expense and made great effort to establish the required infrastructure.

[11] ITEC Holdings (Pty) Ltd ('Holdings') (the second respondent) rendered the financial, management and other services

through the centralised server mentioned in the dealership agreement on behalf of those entities that have dealership agreements with ITEC, including Tuscan while the dealership agreement was still operative. Tuscan was obliged to pay Holdings for the services it offered and provided.

[12] Although ITEC, Holdings and Finance have common interests and certain common directors, each of them functions independently and has a separate business focus.

[13] On 22 February 2007 a sale of shares agreement was entered into in terms of which Holdings became the owner of 30% of the issued share capital in Tuscan.

[14] Tuscan was at all relevant times in arrears with its statutory obligations regarding timeous payments to SARS, which was a breach of the terms of the dealership agreement relating to corporate governance.

[15] Tuscan also failed to ensure that the aggregate value of its current assets at all times exceeded the aggregate of its current liabilities as envisaged in the agreement.

[16] On 5 November 2012, ITEC sent a letter to Tuscan informing the latter of its breach of the terms of the dealership agreement relating to, inter alia, corporate governance, ITEC's cancellation of the agreement as a result of Tuscan's breach and the exercise of ITEC's option to purchase Tuscan's assets (to be identified), including Tuscan service base

comprising of all extant service agreements ('the agreement of sale'). Tuscan was also requested to give ITEC access to the premises for purposes of identifying those assets that ITEC would be purchasing as well as access to and possession of the service agreements comprising the service base as envisaged in the dealership agreement.

[17] Tuscan did not construe or consider the letter of cancellation as a valid cancellation and did not allow ITEC access to Tuscan's

documentation or premises. Tuscan adopted the attitude that the deed of cancellation amounted to a repudiation, which Tuscan accepted.

[18] By the middle of December 2012 it was common cause that the dealership agreement was no longer in esse.

[19] Tuscan then prepared a letter during December 2012, which was sent to ITEC, Finance and Holdings ('the ITEC group') informing them of Tuscan's acceptance of ITEC's repudiation and of the invalidity of the agreement of sale. In this letter the ITEC group was also threatened with an urgent application to protect Tuscan's rights.

[20] On 18 December 2013 Tuscan addressed a letter to all its customers advising them that Tuscan had made the decision to change its supplier from ITEC to Konica Minolta with immediate effect. They were also informed that Tuscan's business would carry on as usual and that its contact numbers and banking details would remain unchanged.

[21] On 23 January 2013, ITEC responded with a letter to Tuscan, taking issue with the legal contentions advanced in Tuscan's letter and threatening the latter with a winding-up application. In this letter ITEC also claimed an amount of R455 134 and R633 730 in respect of moneys due and payable to ITEC and Holdings respectively.

[22] On 29 January 2013 a letter was sent by ITEC to all the customers in Tuscan's customer base. The following was stated in this letter:

'This is to confirm that the attached letter contains inaccuracies, untruths and has been sent to you in an attempt to mislead you.'

and 'Our attorneys have been instructed to take steps against [Tuscan] including, if necessary, an application for the winding up of [Tuscan].' and 'As you are a valued client to us, we will make arrangements with an alternative dealer to supply you with products, spares and consumables.'

[23] A further letter was written by ITEC to all Tuscan's customers dated 4 February 2013. It reads as follows:

'This letter serves to confirm that [Tuscan] no longer has any rights in terms of any service agreement that you may have entered with that company. Once [ITEC] terminated its contract with [Tuscan], then [Tuscan] lost all of its rights and interests to all ITEC contracts and service agreements'.

- [24] On 21 February 2013, an e-mail was sent from Finance to one of Tuscan's customers informing the latter that Extra Dimensions 224 t/a ITEC Pretoria East ('Pretoria East') (the fourth respondent) would attend to his needs in respect of service and equipment. Attached to this e-mail was a letter by Finance to USN, one of Tuscan's customers, informing it that Tuscan was no longer an authorised ITEC dealer.
- [25] On 22 February 2013, Tuscan was informed by its single largest client, ie Mailtronic, that it was cancelling the various service and maintenance agreements as they had decided to sign new agreements with ITEC Connect (Pty) Ltd ('Connect') (the fifth respondent). This decision was taken by Mailtronic subsequent to it being contacted by Connect.
- [26] On Friday 8 March 2013 one of Tuscan's employees received a telephone call from one of Connect's employees who informed him that Connect was willing to offer him a job at a higher salary and with a company vehicle as they were struggling to service the Mailtronic machines.
- [27] Since the beginning of the whole saga, Pretoria East approached Tuscan's employees. All of them resigned because they had not been paid their salary in certain months and it was clear to them that Tuscan was in financial difficulty.
- [28] The employees were not persuaded to terminate their employment with Tuscan.
- [29] On 1 March 2013 ITEC wrote a letter to one of its dealers, stating, inter alia, the following:
- 'While their [Tuscan's customers] existing contract with [Tuscan] has been ceded to us, it is better for them to re-sign a new contract, on the same terms, with us.' and 'Please let me know where they are located and I will organise for an authorised ITEC office to contact them and to do the necessary paperwork.'
- [30] On 25 February 2013 the ITEC group also sent out a letter to all Tuscan's customers, stating, inter alia, the following:
- '[Tuscan] concluded a cession and pledge agreement with us on 25 January 2005 in terms of which, as security for its indebtedness to us, [Tuscan] transferred, assigned, made over and pledged inter alia its rights, title and interest in and to any and all rental, service, maintenance and/or sale agreement entered into between [Tuscan] and you, the customer.' and 'In terms of clause 13 ... [of the cession agreement], we were entitled at any time to give notice to you of this cession and to advise you that all amounts payable by you to [Tuscan] are forthwith and immediately payable to us and that we forthwith terminate [Tuscan's] mandate to collect such amounts from you.' and 'All rights existing under all agreements concluded by you with [Tuscan] vest solely with us and, as a consequence, [Tuscan] has no right to enforce the rights and obligations under any such agreement with you. This is no doubt why [Tuscan] has approached many of you in an attempt to conclude new agreements in the name of a different entity.' and '[Tuscan] is indebted to us and we are taking steps to secure recovery of all amounts due and owing by [Tuscan] to us. You are hereby given notice that all amounts payable by you to [Tuscan] are forthwith payable to us.'

[31] In its founding affidavit, Tuscan says the following regarding its future business plans:

‘The fact that [Tuscan] will now be sourcing its requirements for purposes of the maintenance agreement, such as parts and the like directly from Konica Minolta and no longer from the ITEC group of companies does not mean that the service agreements have become null and void or have in any manner whatsoever been taken over by any of the Respondents.’ and ‘It is for this very reason that they are constantly pushing and contacting [Tuscan's] clients in order to force them into signing new service and maintenance agreements in respect of the continued maintenance of the machines.’

[32] The applicant seeks a final interdict. It is trite law that in order to succeed in obtaining a final interdict, an applicant must establish a clear right; an injury committed or reasonably apprehended; and that there is no satisfactory alternative remedy.

(See *Waste Products Utilisation (Pty) Ltd v Wilkes and another* 2009

(2) SA 515 (SCA) at 286E).

TUSCAN'S CLEAR RIGHT

[33] In terms of the doctrine of subjective rights, which was accepted as part of our law in *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 (4) SA 376 (T), Tuscan must establish that it has legal interest worthy of protection in the goodwill of the business it is presently conducting. Before legal recognition will be accorded to such an interest, it must comply with two requirements: firstly, the interest must be of value to the person concerned; and secondly, it must have a measure of distinctness, definiteness and independence that it is possible to use it, enjoy it and dispose of it. (See *Van Heerden-Neethling Unlawful Competition* 2 ed p 89 - 90 and the authorities therein cited).

[34] The fact that goodwill can serve as the object of an immaterial property right, has been accepted in South African law. (See *Van Heerden- Neethling* p105 - 107, *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* at 386 and *Atlas Organic Fertilisers (Pty) Ltd v Pikkewyn Gwano (Pty) Ltd* 1981 (2) SA 173 (T) at 182D).

[35] In *The Commissioners of Inland Revenue v Muller & Co's Margarine Ltd* [1901] AC 217 at 223 - 224 the meaning of the term ‘goodwill’ is described as follows:

‘What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of a 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 be preponderate here and another element there. To analyse goodwill and split it up into its component parts, to pair it down as the Commissioners desire to do until nothing is left but a dry residuum ingrained in the actual place where the business is carried on while everything else is in the air, seems to me to be as useful for practical purposes as it would be to resolve the human body into the various substances of which it is said to be composed. The goodwill of a business is one whole . . . ‘ (Own italics).

[36] There can be no argument that the goodwill is of value to Tuscan and that the latter can dispose of it. What has to be considered,

however, is the effect the cession and the agreement of sale has on Tuscan’s real right in order to establish the ambit of the (clear) right that was exposed to infringement. This is obviously the principal factor that requires consideration when the issue of wrongfulness is to be decided.

[37] From the wording of the cession agreement ([‘Tuscan] hereby cedes’) it is clear that Tuscan’s personal rights were indeed transferred to ITEC when the agreement of cession (the obligatory agreement) was concluded. Further, the cession is nothing more than a cession of personal rights in securitatem debiti, the consequence of which is that Tuscan has retained the dominium of the ceded rights in the form of a reversionary interest therein, whilst ITEC has acquired restricted real rights in the rights of action to exercise such rights in the event of non-payment of the principal debt. (See *Inclendon (Weikom) (Pty) Ltd v Qwagwa Development Corporation Ltd* [1990] ZASCA 85; 1990 (4) SA 798 (A) at 804G-J and *Land- en Landboubank van Suid-Afrika v Die Meester en andere* 1991 (2) SA 761 (A) at 771D-F).

[38] The term ‘assign’ (the cession of rights and the delegation of obligations) in the agreement of cession is a misnomer,

because it is clear from the terms of the agreement of cession that the parties never intended to delegate Tuscan’s obligations. In any event, a contractual obligation cannot effectively be transferred from the debtor to a third person by agreement unless the creditor consents thereto and agrees to accept the third person as the debtor in substitution for the original debtor. (See *Van Achterberg v Walters* 1950 (3) SA 735 (T) at 745).

[39] The end result of the cession is that Tuscan has only retained obligations in respect of its contracts with its customers coupled

with the right to claim a re-cession of its personal rights upon payment of all amounts due to ITEC.

- [40] The only significant right that Tuscan has in respect of the goodwill of its business is the right, in terms of the agreement of sale, to claim payment of the purchase price in respect of the movable goods, debtors, stock, service base and goodwill once the contractual process relating to the determination of the purchase has been finalised. This right obviously has a corresponding obligation and that is to deliver the merx to ITEC, which includes the goodwill.
- [41] Furthermore, if regard is had to the agreement as a whole, it is clear that the intention of the parties was that upon cancellation of the agreement Tuscan would cease all business activities in order to preserve the goodwill of the business with a view to placing ITEC in a position from where it could take an informed decision as to whether it should exercise its option to purchase, without the goodwill being contaminated with any on-going activities.
- [42] Goodwill is, as stated in the The Commissioners of Inland Revenue - case, one economic whole and it may continue to exist for some time notwithstanding the breaking up of the undertaking as an economic unit.
- [43] Tuscan's on-going activities with ITEC customers and its activities relating to Konica Minolta customers in competition with ITEC, in spite of the fact that the movable goods, debtors, stock, service base and goodwill have been sold to ITEC, is, in my view, rather an infringement of ITEC's personal right to claim transfer of an uncontaminated economic whole. This is so because, if a seller disposes of the goodwill of a business he is not allowed thereafter to act contrary to the sale. The obligation of the seller not to solicit his former customers or to conduct his business in such a manner as to deprive the buyer of the 'goodwill'

that he paid for, stems from a nature of an agreement of purchase and sale. This is so, irrespective of whether there is a restraint of trade. It is even possible, depending on the terms of the agreement, that the nature might outlive the restraint. This was decided in *A Becker and Co v Becker and others* 1081 (3) SA 406 (A), in which case Van Heerden Wn R at 419H said the following:

'Die erkende naturalia van 'n koopkontrak van liggaamlike goed kan egter analogiese toepassing vind op die verkoping van 'n

immateriele goed soos werfkrag. Die wat ten gunste van die koper strek, is gerig op beskerming van sy genot en gebruik van die menx. Vandaar bv. die verkoper se verpligtinge rakende uitwinning en verborge gebreke. Soos reeds aangedui, konstitueer 'n direkte inwerking deur die verkoper 'n nadelige aantasting van die koper se genot en gebruik van die werfkrag. Daar is dus alle rede om sodanige inwerking in stryd te ag met 'n naturalium (sic) van die betrokke koopkontrak.'

- [44] The fact that Tuscan is obliged to render prestation in terms of its agreements with its ITEC and Konica Minolta customers and that a cessation of all business activities might expose Tuscan to claims for breach of contract, is, mindful of what was decided in the Becker case, no excuse to carry on with the business. In any event, Tuscan could have safeguarded itself in this regard by the insertion of an appropriately worded clause in its standard customer agreements.
- [45] It follows that Tuscan's (clear) right in respect of the goodwill of the business is limited to his claim for payment of the purchase price in respect of the movable goods, debtors, stock, service base and goodwill, and that it has no powers of use and enjoyment - only obligations.
- [46] This is basically the end of the applicant's case. I shall nonetheless deal with the alleged wrongful acts of the respondents on the assumption that Tuscan lawfully cancelled the dealership agreement by its acceptance of ITEC's alleged repudiation.

WRONGFULNESS

- [47] In South African law the general normal or basic criterion to be employed in determining delictual wrongfulness is the legal

convictions of the community: the boni mores. The boni mores test is an objective test based on the criterion of reasonableness. The basic question is whether, according to the legal convictions of the community and in the light of all the circumstances of the case, the defendant infringed the interests of the plaintiff in a reasonable or unreasonable manner. The application of the boni mores criterion essentially entails the balancing or weighing up of, on the one hand, the interests which the defendant actually promoted with his act, and, on the other, those which he actually infringed. The court must weigh the conflicting interests of the plaintiff and the defendant in the light of all the relevant circumstances and in view of all pertinent factors - also the public interest - in order to decide whether the infringement of the plaintiff's interest was reasonable or unreasonable. (See Van Heerden-Neethling 123-124 and the authorities therein cited).

- [48] Of course, the courts do not actually test what the legal convictions of the community are when they exercise their discretion to decide whether a particular instance of harm-causing is to be branded as wrongful. The reference to legal convictions of the community is better understood as an acknowledgement of the fact that the court, in exercising its judicial discretion to decide the wrongfulness issue, must be sensitive to the boni mores, or rather to the appropriate norms of the objective value system embodied in the Constitution. (See the discussion in Wille's Principles of South African Law, 9 ed, 1096 - 1102 and the authorities cited therein. See also Phumela Gaming & Leisure Ltd v Grundling & others (2006) JOL 17421 (CC) at p 15-18).

INTERFERENCE WITH TUSCAN'S CONTRACTUAL RELATIONSHIPS

- [49] Under this heading I shall deal with the alleged interference with all Tuscan's contractual relationships, in other words, its contractual relationships with its customers and employees.

[50] In *Atlas Organic Fertilisers (Pty) Ltd v Pikkewyn Gwano (Pty) Ltd* at 202 it was decided that the *actio legis Aquiliae* is available to a party to a contract who complains that a third party has intentionally and without lawful justification induced another party

to the contract to commit a breach thereof.

[51] It should, however, be kept in mind that in *Atlas Organic Fertilisers (Pty) Ltd v Pikkewyn Gwano (Pty) Ltd* the court was dealing with a trial action for an interdict and damages and not with an application for an interdict. The *actio legis aquiliae* is one of two bases for protection against unlawful competition. In terms of this action a competitor may claim damages for the wrongful and culpable causing of patrimonial damage. The other basis is an interdict, which is tailored to prevent a (threatening) wrongful competitive act.

[52] Since an interdict is directed at the prevention of a wrongful act and not at retribution for wrongfulness already committed, there is no reason why fault on the part of the wrongdoer should be a requirement for the granting of an interdict. Neither *culpa* nor *dolus* need to be proved where the interdict sought has a preventative function. What the applicant has to show is an act that has commenced or merely be threatening and the wrongfulness of the act, which means that there must be a threat to or an infringement of a recognised subjective right. In the case of unlawful competition, wrongfulness lies in the (threatened) infringement of a competitor's right to the goodwill of the business. (See *HR South Africa BV v Hall (aka Baghas)* 2004 (4) SA 174 (WLD) at 180 and *Van Heerden- Neethling* p 84 -87).

[53] One of the circumstances, I think, that has to be taken into consideration in deciding wrongfulness, is the restraint of trade

contained in the dealership agreement. A party wishing to be absolved from such a term must allege that the enforcement of the restrictive conditions would be contrary to public policy and he must set out the factual basis for this allegation. (See *Magna Alloys & Research (SA) (Pty) Ltd v Ellis* [1984] ZASCA 116; 1984 (4) SA 874 (A) at 893).

[54] Tuscan did not attack the validity of the restraint of trade in its founding affidavit in view of which I must accept, for purposes of this application, that the restraint is valid and enforceable.

[55] Furthermore, it is clear that the actions of the ITEC group in respect of Tuscan's customers, were primarily aimed at the protection of what they perceived their rights were in terms the dealership agreement and the sales agreement. There is, however, no indication to be found in the common cause facts that the customers breached or threatened to breach their agreements with Tuscan as a result of ITEC's interference. This does not mean that should a firm systematically induce his competitor's customers to leave, his conduct would necessarily be lawful. Public policy dictates that, where the aim in inducing a competitor's customers to terminate their agreements lawfully is not to obtain their business, but cripple or eliminate the business competitor, this action be branded as unlawful competition. The common cause facts do not justify such an inference.

- [56] Regarding the alleged interference with Tuscan's employees, I cannot find fault with any of the respondent's actions in this regard. Their principal aim was to benefit themselves, which is not an illegitimate aim and thus not wrongful. (See *Vital Administration CC v Irengo (Pty) Ltd and others* (2004) 4 ALL SA 354 (T) at 364). In any event, the employees decided to terminate their employment with Tuscan for financial reasons.
- [57] In the light hereof, I cannot find that the respondent's interference with Tuscan's customers or employees was unreasonable and thus wrongful.

THE CONFIDENTIAL INFORMATION

- [58] Before information can qualify as confidential it must, first of all, be capable of application in the trade or industry. Secondly, it must only be known to a closed circle, or, to put it differently, it must be something that is not public property or public knowledge. Thirdly, the information must be of economic value to the plaintiff. (See *Van Heerden-Neethling* 215 - 216 and the authorities therein cited).
- [59] I agree with the submission made by Mr Rip SC that the information is confidential because it is capable of application in the trade, it is only known to the ITEC group, which is a closed circle, and it has an economic value to Tuscan.
- [60] The fact that the information is confidential does not assist Tuscan, because of the restrictive conditions contained in the restraint of trade: Tuscan has undertaken that it would for a period of 18 months from the date of termination of the agreement, for whatsoever reason, not to be engaged, whether directly or indirectly, in any similar or related business and that it would not, in competition with ITEC or any of its dealers or resellers, make any approaches to and/or have any contact with any end- user of ITEC products and/or any of its dealers and/or resellers.
- [61] The only damage that Tuscan can suffer because of the unauthorised use of its confidential information is the loss of customers or potential customers and that is exactly what it has agreed to.
- [62] Thus, I find that the infringement of Tuscan's right to its confidential information was under the circumstances not wrongful.

CONCLUSION

- [63] In the premises, I am not persuaded that those facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the respondent justify the order sought.
- [64] In the result, I make the following order: The application is dismissed with costs.

DATE: 02/04/2013

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Prepared on 12 October 2026 · Esheria