

**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, JOHANNESBURG**

**CASE NUMBER: 21/38141**

**DELETE WHICHEVER IS NOT APPLICABLE**

1.REPORTABLE: YES  
2.OF INTEREST TO OTHER JUDGES: YES  
3.REVISED YES

**Judge Dippenaar**

In the matter between:

**PAUL'S HOMEMADE (PTY) LTD**

Applicant

and

**BIANCA BOSHOFF**

First Respondent

**SONJA BOSHOFF**

Second Respondent

**IAN NELL**

Third Respondent

**LET'S DO ICE CREAM (PTY) LTD**

Fourth Respondent

**CREAM WE GO (PTY) LTD**

Fifth Respondent

**SUMMA SUNDAE BAR (PTY) LTD**

Sixth Respondent

**SUMMA ON ROSEBANK (PTY) LTD**

Seventh Respondent

**NATALMAHOGANY (PTY) LTD T/A SOKO DISTRICT**

Eighth

Respondent

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## **JUDGMENT**

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**Delivered:** This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 29th of November 2021.

### **DIPPENAAR J:**

#### Introduction

[1] This application pertains to final declaratory and interdictory relief sought by the applicant on an urgent basis against the first to seventh respondents based on breaches of restraint of trade and confidentiality provisions in agreements concluded between the various parties.

[2] In its notice of motion extensive declaratory and final interdictory relief was sought against the first to seventh respondents. The relief included: (i) a permanent interdict prohibiting the first to seventh respondents from opening up a competing ice cream store in the Menlyn Mall Shopping Centre; (ii) a final interdict prohibiting the first to seventh respondents from directly or indirectly carrying on business in the manufacture and sale of ice cream and confectionery products in competition with the applicant within South Africa, for a period of eighteen months from date of the order; (iii) that the restraint of trade agreements entered into by the first to fifth respondents be confirmed and upheld, and the first and second respondents declared to be in breach thereof; (iv) that the Summa Sundae Bar, currently operated by the first, second and

seventh respondents be interdicted from carrying on further trade at the Soko District premises within the Rosebank Mall, and that the respondents take all necessary steps to stop all further trade, together with ancillary relief. As against the eighth respondent, the applicant sought an order that it terminate any lease agreements with the respondents in relation to the Summa Sundae Bar ice cream store within the Soko District, and to take all necessary steps required by it as landlord to prevent the business from continuing to trade.

[3] This relief was substantially attenuated in the applicant's replying affidavit and heads of argument, wherein the relief sought against the eighth respondent was also abandoned. The relief ultimately sought by the applicant at the hearing was the following:

*"[1] The restraint of trade agreements concluded between the applicant and the second to fifth respondents are enforceable and the second to fifth respondents are declared to be in breach thereof;*

*[2] The second to fifth respondents are restrained from carrying on business in the manufacture and sale of ice cream and confectionery products in competition with the applicant, either directly or indirectly, within five kilometres of the applicant's outlets for a period of eighteen months from 1 June 2021;*

*[3] The Summa Sundae Bar, operated by the first, sixth and seventh respondents, is interdicted and restrained from carrying on business at the Soko District Premises within the Rosebank Mall, for a period of six months and the first, sixth and seventh respondents are ordered to take all necessary steps to stop further trade for this period;*

*[4] The first to seventh respondents are interdicted and restrained from opening a competing store at the Menlyn Main Shopping Centre for a period of six months;*

*[5] The first to seventh respondents are directed to pay the costs of the applicant (their liability being joint and several) on an attorney and client scale"*

[4] The application was opposed by the first to seventh respondents. They can be classified in two categories: the first, sixth and seventh respondents (hereinafter collectively referred to as the “Summa respondents”) and the second to fifth respondents (hereinafter collectively referred to as “the franchisee respondents”). The eighth respondent did not participate in these proceedings. Where appropriate the first to seventh respondents are collectively referred to as “the respondents”.

#### Background facts

[5] The background facts were not contentious. The applicant is an ice cream and confectionery manufacturer and retailer. It runs a substantial ice cream and confectionery factory and supplies retailers country wide. It has seventeen stores, some of which are run by franchisees and others by its head office and employs 95 people.

[6] The first respondent was employed as the applicant’s head of marketing and brand design from 18 March 2019 until 7 February 2021 when she resigned. Her employment agreement contained a confidentiality clause and a six month restraint of trade provision. On 26 July 2021, she incorporated the sixth and seventh respondents and concluded a lease in the name of the seventh respondent with the eighth respondent on 2 August 2021. The seventh respondent opened an ice cream kiosk on the Soko district of the Rosebank Mall at the beginning of August 2021.

[7] The second and third respondents operated two of the applicant’s franchise stores through the fourth and fifth respondents in terms of franchise agreements concluded with the applicant during October 2019. The franchise agreements contained both confidentiality clauses and restraint of trade provisions. The two stores at The Grove and Menlyn Mall shopping centres in Pretoria were closed by the second and third respondents during June 2021 after certain disputes arose between the parties. The applicant terminated the franchise agreements with immediate effect on 24 June 2021.

[8] The franchise agreements contained restraint provisions prohibiting the said respondents from operating within 5 kilometres of other operating outlets of the applicant for a period of 18 months. The applicant has taken over the operations at the store situated at The Grove shopping centre. In correspondence from their attorneys of record dated 5 July 2021, the second and third respondents disputed the validity of the franchise agreements based on various alleged contraventions of the Consumer Protection Act<sup>1</sup>. It was common cause that the franchise agreements contained an arbitration clause, making it obligatory for any disputes, other than the granting of urgent interlocutory relief, to be resolved by way of arbitration.

[9] The present application was preceded by an urgent *ex parte* Anton Piller application in which an order was granted on 4 August 2021. An amended *ex parte* order was granted on 12 August 2021. The order was executed on 13 August 2021, during the course of which various electronic devices of certain respondents were seized and removed from their possession. Various inspections of the items seized took place on 17 and 18 August 2021. An urgent application for the reconsideration of the order was launched by the respondents and on 20 August 2021, Wilson AJ set aside the order and directed that all items seized from the respondents were to be returned forthwith. A punitive costs order was granted against the applicant.

[10] Although those papers were not placed before me, all the parties referred to the Anton Piller proceedings in their affidavits and heads of argument. The parties were in agreement that it was not necessary for me to consider those papers, but only to consider what was placed before me in the affidavits filed of record in these proceedings.

The issues

[11] The issues which arise for determination are: (i) urgency; (ii) whether the whole or certain portions of the applicant's replying affidavits should be struck out; (iii) whether

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<sup>1</sup> No 68 of 2008 as amended

the applicant is entitled to the final declaratory and interdictory relief sought against the Summa respondents and the franchisee respondents respectively; (iv) costs.

### Urgency

[12] For present purposes, the issue of urgency is relevant in the context of costs. Ultimately the application was not struck from the roll but was dealt with on its merits.

[13] The founding affidavit in the present application was signed on 10 August 2021. The application was issued on 11 August 2021 and only served on the respondents on 13 August 2021. It was enrolled for hearing in the urgent court on 24 August 2021. The respondents were afforded until 18 August 2021 to deliver their answering papers. Their answering papers were delivered on 18 and 19 August 2021 respectively. No time period was delineated in the notice of motion for the delivery of replying papers. It was undisputed that the time periods chosen by the applicant were not in accordance with the applicable practice directives which dictate that all papers should be delivered by 12h00 on a Thursday if a matter is enrolled for hearing the following Tuesday.

[14] The case for urgency advanced by the applicant in the founding affidavit was that restraints of trade are by their nature urgent and that the restraint provisions in the agreements should be enforced. Reliance was also placed on the first respondent's unlawful conduct in the theft of the applicant's confidential information and trade secrets and the opening of a competing store the previous week. In the founding affidavit it was stated: *"which trade is taking place in breach of the restraints and utilising unlawful competition tactics, including the theft of our trade secrets and confidential information, which collectively include the applicant's brands, intellectual property, trademarks, recipes, marketing techniques and strategies, contacts customers and suppliers and the violation of our trademarks and patents"*. As dealt with in more detail later, from this lofty summary, the case ultimately made out by the applicant fell far short of providing facts which sustain such conclusions.

[15] The founding papers referred to the Anton Piller order which had been obtained on 4 August 2021, but made no reference to the amended order of 12 August 2021. The latter order was executed. No mention was further made of the cancellation of the franchise agreements or the disputes which had arisen in relation to the validity thereof during July 2021 between the applicant and the franchisee respondents, other than an oblique reference to those respondents raising unmeritorious disputes under the Consumer Protection Act. The case made out in the founding papers in sum amounted to the first and second respondents acting with common purpose to devise a strategy to unlawfully open competing stores which manufacture and sell ice cream in competition with the applicant.

[16] When the matter was called on 24 August 2021, no replying affidavit had yet been delivered. The applicant requested the matter to stand down, contending that the assistance of counsel could only be enlisted on Sunday and Monday and the attorney was involved in the reconsideration of the Anton Piller order on 19 and 20 August and could thus not timeously draft the replying affidavit. I agree with the respondents that this excuse does not avail the applicant, having chosen the abbreviated time periods for the delivery of affidavits<sup>2</sup>. The only reason the application was stood down to 27 August 2021 was due to the congested state of the urgent court roll on 24 August 2021. Thus, the respondents' rights were expressly reserved. The replying affidavit was only served late during the afternoon of 24 August 2021.

[17] Prior to the hearing on 27 August 2021, both the Summa respondents and the franchisee respondents delivered applications to strike out either the whole or portions of the replying affidavit, which extensively traversed information and documents obtained during the execution of the Anton Piller order. Due to the incomplete state of the papers and with full reservation of the parties' rights, the application was adjourned for hearing to 9 September 2021 and costs were reserved.

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<sup>2</sup> Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk 1972 (1) SA 773 A at 782 A-G

[18] I agree with the respondents that the application had been launched with undue haste and outside the prescripts of the practice directives. There is also merit in their argument that the urgency of the application was self-created. The applicant could not keep to its own time limits. Were it not for the stance adopted by the Summa respondents at the time, that the application had to be dealt with on its merits notwithstanding their objection to the urgency, the application would have been struck from the roll for lack of urgency together with a punitive costs order. In my view a punitive costs order against the applicant is warranted for the appearances of 24 and 27 August 2021.

New case in reply and striking out of the replying affidavit or portions thereof

[19] Both the Summa respondents and the franchisee respondents sought the striking out of the replying affidavit on similar grounds. First, both the Summa respondents and the franchisee respondents argued that the entire replying affidavit should be struck on the basis that it was delivered late and that condonation should not be granted for its late delivery. I am not inclined to accede to this request. In my view an appropriate costs order is sufficient to penalise the applicant for its failure to comply with the relevant prescripts and it would not be appropriate to strike out the entire replying affidavit on this basis.

[20] Second, the Summa respondents sought the striking of paragraphs 5, 22, 25, 26, 27 to 38, 39 to 81 and 93-112 of the replying affidavit on the grounds that it constituted inadmissible hearsay evidence, made out a new case in reply or was inadmissible as it concerns documents seized pursuant to the discharged Anton Piller order. The franchisee respondents supported these arguments and argued that the replying affidavit raised (i) new matter in reply; (ii) introduced inadmissible matter and (iii) contained irrelevant matter and should for those reasons be struck out. Their main opposition was aimed at the new and impermissible evidence raised in reply. The Summa respondents further argued that the amended relief sought in the replying affidavit was not supported by the facts in the founding affidavit.



[21] The averments in paragraphs 25, 27 to 38, 39 to 81 and 93 to 112 of the replying affidavit, raised by the Summa respondents, are based on new matter or information obtained during the execution of the Anton Piller order. The respondents argued that the evidence was obtained illegally and could thus not be used. It was argued that a court's permission should have been obtained before the evidence could be used and that the applicant could not seek leave only after it has used the evidence.

[22] It is trite that a party must make out its case in its founding affidavit<sup>3</sup>. Although this principle is not immutable, a court has a discretion to allow new matter to remain in a replying affidavit, provided the respondent is afforded an opportunity to deal with it in a further affidavit. Where however the applicant seeks to make out an entirely new case or cause of action, it is not simply a situation of providing additional facts but steers the enquiry into an entirely different direction. This should not be countenanced,<sup>4</sup> specifically in circumstances such as the present where it has resulted in the papers becoming voluminous and being in a state of disarray. It is a salutary practice that the applicant papers so that disputes on motion can be disposed of and resolved in an orderly fashion.

[23] The applicant argued that the respondents were not prejudiced as they were afforded an opportunity to deliver a further affidavit. The applicant did not make however out a case that exceptional circumstances or sound reasons existed to deviate from the general principle already referred to<sup>5</sup>. The respondents were apprised of the case they had to meet in the founding papers<sup>6</sup>. In reply, the applicant substantially deviated therefrom and in so doing, relied on documents obtained in execution of the Anton Piller order.

[24] The applicant's case against the respondents in its founding papers centered around its confidential information and trade secrets and the enforcement of the

<sup>3</sup> Titty's Bar and Bottlestore (Pty) Ltd v ABC Garage (Pty) Ltd and Others 1974 (4) SA 326 (T) ;

<sup>4</sup> Triomf Kunsmis (Edms) Bpk v AE&CI Bpk en Andere 1984 (2) SA 261 (W) at 269B-G

<sup>5</sup> Union Finance Holdings Ltd v IS Mirk Office Mashines II (Pty) Ltd and Another 2001 (4) SA 842 (W) at 847B-848E

<sup>6</sup> Administrateur Transvaal v Theletsane 1991 (2) SA 192 (A) 195F-196I and 200G

restraint of trade provisions in the respective agreements against both the Summa respondents and the franchisee respondents. In the founding affidavit the reference to unlawful competition pertaining to the first respondent was encapsulated in a few averments of her unlawful conduct in theft of applicant's confidential information and the opening of a competing store. The applicant's case in its founding papers was primarily based on first respondent's breach of her restraint of trade and the enforcement thereof. The replying affidavit shifted the applicant's focus entirely from the enforcement of a contractual restraint of trade, which was abandoned<sup>7</sup>, to a case based on unlawful competition and thus substantially relied on a new cause of action. In reply, the applicant's case relied substantially on the documents obtained by it in the Anton Piller application and sought to make out a case that the respondents had been dishonest in their original answering affidavits and thus that their respective versions should be rejected as palpably false.

[25] The respondents' main objection was against the use of the information and documents obtained pursuant to the Anton Piller order. This information and documents were used to make out what the respondents termed a new case in reply.

[26] In my view, there is merit in the respondents' argument that the applicant has sought to make out a new case in reply. This is one of the factors which will be considered in determining whether the offending paragraphs should be struck out.

[27] It is further necessary to consider whether the documents should be admitted into evidence. The applicant disputed that it had obtained the documents unlawfully and argued that it had obtained them lawfully pursuant to an extant court order at the time it was executed and that it did not matter that the order was ultimately discharged. It argued that even if it was found that the documents were unlawfully obtained, as a general proposition a court would allow relevant evidence. Reliance was further placed

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<sup>7</sup> The reason for that is self-evident as the restraint period in the first respondent's employment agreement had already expired at the time the application was launched and no contractual restraint was in place at the time the application was argued on 9 September 2021.

on the principle that a court retains a discretion to exclude improperly, unlawfully or unconstitutionally obtained evidence<sup>8</sup>.

[28] The starting point to determine whether the documents were unlawfully obtained is order itself. In terms of the Anton Piller order, the applicant had been authorised to search for “evidence”, defined as its confidential information and trade secrets and any documents from or belonging to the applicant<sup>9</sup>. The order envisaged that the items seized be retained in the possession of the Sheriff or the applicant’s attorneys pending the return date. The order did not in its terms envisage that the applicant itself would obtain access to the documents prior to the determination of part B of the application. A return date had been set for 4 October 2021, thus well after the date of the present application.

[29] From the undisputed averments in the affidavits, it appears that the way in which the order was obtained and executed was considered an abuse of process by Wilson AJ, resulting in its dismissal on reconsideration together with a punitive costs order. It also appears that information was obtained outside the ambit of the “evidence” as defined in the order.

[30] Whilst the documents may have initially been validly obtained, the applicant should not have had access to the documents prior to the reconsideration of the *ex parte* order. There can also be no dispute that the applicant was not entitled to validly retain the documents subsequent to the order granted on 20 August 2021, discharging the Anton Piller order. Wilson AJ specifically directed that all items seized were to be returned to the respondents forthwith. The order did not entitle the applicant to retain any of the documents. However, they were included in and formed the focus of the

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<sup>8</sup> Harvey v Niland and Others 2016 (2) SA 436 (ECG) para 38, citing Motor Industry Fund Administrators (Pty) Ltd and Another v Janit and Another 1994 (3) SA 56 (W) at 64A-B; Lenco Holdings Ltd and Others v Eckstein and Others 1996 (2) SA 693 (N) at 704C

<sup>9</sup> Paragraph 5.1 of the order dated 12 August 2021, which provided: “originals and copies of the Applicant’s confidential information and trade secrets, including but not limited to any document originally from or belonging to the applicant, its recipes, supplier lists, financial information, customer lists, and any or all documents which have been unlawfully removed from the Applicant’s possession

applicant's replying affidavit, which was deposed to on 24 August 2021. It also appears that documents were seized that self evidently fall outside of the "evidence" as defined in the order. I return to that issue later. That points to the documents not being in lawful possession of the applicant as they were either unlawfully obtained, or unlawfully retained.

[31] I agree with the applicant that even if the documents were unlawfully obtained, or retained, a court retains a discretion to admit such documents into evidence.<sup>10</sup> In considering how the discretion afforded is to be exercised, Brand J, held as follows in *Fedics Group (Pty) Ltd and Another v Matus and Others; Fedics Group (Pty) Ltd and Another v Murphy and Others*<sup>11</sup>("Fedics Group"):

*"Without trying to formulate principles of general validity or rules of general application, the implications of these differences between criminal and civil proceedings in the present context are, in my view, twofold. On the one hand, the litigant who seeks to introduce evidence which was obtained through a deliberate violation of constitutional rights will have to explain why he could not achieve justice by following the ordinary procedure, including the Anton Piller procedure, available to him. On the other hand, the court will, in the exercise of its discretion, have regard to the type of evidence which was in fact obtained. Is it the type of evidence which could never be lawfully obtained and/or introduced without the opponent's co-operation, such as privileged communications, or the recording of a tapped telephone conversation, or is it the type of evidence involved in this case, namely documents and information which the litigant would or should eventually have obtained through lawful means? In the latter case, the court should, I think, be more inclined to exercise its discretion in favour of the litigant who seeks to introduce the evidence than would be in the case of the former. It goes without saying that the court will, in any event, have regard to all the other circumstances of the particular case."*

[32] The majority of the documents here in issue, may well fall in the latter category and may in due course be discoverable, provided they are relevant to the issues requiring determination. This factor can however not be seen in isolation. Other relevant considerations would include the extent to which, and the manner in which, one party's right to privacy or other right has been infringed, the nature and content of the evidence concerned and whether the party seeking to rely on the unlawfully obtained evidence attempted to obtain it by lawful means<sup>12</sup>. It is also necessary to consider how the

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<sup>10</sup> Waste Products Utilisation (Pty) Ltd v Wilkes and Another 2003 (3) SA 515(W)

<sup>11</sup> 1998 (2) 617(C) para 92

<sup>12</sup> Harvey supra para [47]

documents came into the possession of the applicant and the context of all the relevant facts of this matter.

[33] In support of its argument that the relevant considerations supported an exercise of the discretion to allow the evidence, the applicant argued that the documents obtained illustrated that the respondents: (i) unlawfully appropriated and retained the applicant's documents and confidential information, thereby breaching its privacy and proprietary rights; (ii) are unlawfully competing with the applicant; and (iii) have been dishonest on oath in these proceedings. It was argued that in such circumstances, the respondents could not argue that the evidence was inadmissible for breach of their right to privacy. It is necessary to consider whether these arguments have merit.

[34] In support of their contentions, the respondents relied on *Mathias International Ltd and Another v Baillache and Others*<sup>13</sup> ("Matthias") which dealt with the reconsideration of an Anton Piller order granted *ex parte* and the granting of interdictory relief in the same motion proceedings. Although the context is somewhat different than the present application, it is apposite to refer to various of the principles enunciated therein as they are relevant to the present issues. *Matthias* contains a useful exposition of the provisional nature of the Anton Piller procedure, its constitutionality and the relevant applicable principles<sup>14</sup>.

[35] Binns-Ward J held that implicit in an Anton Piller order was an undertaking to use the documents only for the stated purpose, being the action as it has obtained prior discovery. In *Matthias*, the applicant had sought and obtained an order that it have access to the seized documents prior to the reconsideration date. To this extent *Matthias* is distinguishable on the facts<sup>15</sup> and the findings pertaining to an implied undertaking. However, the principles in *Matthias* remain applicable insofar as they state the importance of a strict approach being adopted in relation to Anton Piller orders.

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<sup>13</sup> 2015 (2) SA 357 (WCC)

<sup>14</sup> paras [11]-[20]

<sup>15</sup> Paras [48]-[50]

[36] Matthias emphasised the well-established principle that it is impermissible to use the procedure to enable searches to be undertaken to look for evidence to found a case as distinct from the preservation of vitally needed evidence for use in an already identifiable claim<sup>16</sup>. The sole purpose of the Anton Piller procedure is the preservation of evidence; it is not a substitute for possessory or proprietary claims<sup>17</sup>. As stated in *Matthias*:

*"The strict limitation of the use of the procedure to the preservation of evidence as distinct from, say a search for evidence, the so-called fishing expedition) is a feature that is essential to the legality of the procedure within the requirements of s36 of the Constitution. "*

[37] *Matthias* further highlighted the need for strict compliance with the stringent requirements of the Anton Piller procedure as a matter of policy and law<sup>18</sup>. By analogy as a matter of policy and law, the use of documents obtained via the Anton Piller procedure, specifically where the order was set aside on reconsideration, should, in my view, as a matter of policy, be strictly regulated.

[38] As pointed out in *Matthias*, discovery is an exceptional procedure in motion proceedings, requiring the leave of a court<sup>19</sup> prior to its use. Condonation for its use would only be granted in exceptional circumstances. I further agree that the granting of condonation would send the entirely wrong message on important issues incidental to the implementation of Anton Piller orders. As stated by Binns-Ward J:

*"The ambit of the court's discretion to overlook or condone non-compliance and irregularity in relation to the Anton Piller order is in any event limited in law because it cannot be exercised to purportedly lend validity to an order granted outside the constraints of the applicable law".<sup>20</sup>*

[39] I conclude that by parity of reasoning the same considerations should apply pertaining to the use of documents obtained pursuant to an Anton Piller order<sup>21</sup>. Thus, I

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<sup>16</sup> Para [20]

<sup>17</sup> *Memory Institute SA CC t/a SA Memory Institute v Hansen and Others 2004 (2) SA 633 (SCA) para [3]*

<sup>18</sup> Para [35]

<sup>19</sup> Para 22

<sup>20</sup> Para 35

<sup>21</sup> *Matthias* para 52

agree with the respondents that the applicant should have sought consent to use the documents as the documentation would not ordinarily be discoverable in interdict proceedings brought on motion, and that the applicant has not illustrated exceptional circumstances or good cause for condonation to be granted.

[40] The irregularities in the execution of the Anton Piller order is illustrated, *inter alia*, by the seizure of documents outside the ambit of the order, such as the minutes of a meeting held between the first, second and third respondent on 2 July 2021 to which much weight was attached by the applicant in its replying affidavit.

[41] This also illustrates that an impermissible fishing expedition was embarked on in order to look for evidence to found a claim, rather than the preservation of evidence for use in an already identifiable claim.

[42] These are important additional factors which militate against allowing the documentation and evidence pertaining thereto into evidence. Although the applicant may have sought to obtain the documents via lawful means, this does not assist the applicant as the process was flawed and fell foul of the various applicable legal principles in various respects.

[43] To determine whether the documents should be allowed into evidence, it is also necessary to consider their nature and content. Some of the documents were attached to the replying affidavit, whereas others were simply listed.

[44] Some of the primary documents relied on by the applicant were: (i) minutes of a meeting held between the first, second and third respondents dated 2 July 2021; (ii) a document styled “recipe” which is a tasting menu pairing certain ice cream flavours with other ingredients; (iii) a spreadsheet containing the sales figures of applicant’s stores for the period January 2019 to June 2020; (iv) marketing material being a photograph of an ice cream sundae, (v) fortune cookie messages, and (vi) an email sent by the second

respondent to the first respondent containing certain ice cream flavours of the applicant and (vii) employment contracts concluded between the Summa respondents and certain of their employees. It is not necessary to refer to all the documents seized by the applicant.

[45] In reply, the applicant placed specific reliance on the minutes of a meeting between the first, second and third respondents held on 2 July 2021 which inter alia recorded an agreement between them that each would hold a one third interest in Summa and particularising their plans pertaining to the business. This was one of the documents seized in the execution of the Anton Piller order.

[46] That document clearly does not fall within the ambit of “the evidence” as defined in the Anton Piller order and is not a document of the applicant. The applicant should thus not have obtained access to in the execution of the Anton Piller order.

[47] The applicant considered these minutes as the proverbial “smoking gun” supporting its speculative contentions of conspiracy and untoward conduct on the part of the first, second and third respondents averred in its founding papers. The applicant contended that this minute illustrated the falseness of the versions put up by the first, second and third respondents in their answering affidavits and laid bare the falseness of their defences to the applicant’s claims.

[48] In their respective supplementary affidavits, the first, second and third respondents put up versions regarding the state of affairs prevailing at the time of the meeting between them on 2 July 2021 and the context in which that meeting occurred, albeit in slightly contradictory terms. I agree with the applicant that those versions are not entirely consistent and that the said respondents had not disclosed their discussions in their original answering affidavits. That is however not the end of the issue and the versions of the said respondents must be considered in context.



[49] In sum, the respondents admitted the contents of the minutes as being what they discussed at the time of the meeting on 2 July 2021. Thereafter, the franchisee respondents received legal advice not to pursue any involvement in the first respondent's businesses until the issues pertaining to the validity of the franchise agreements had been resolved and they had not followed through with what was reflected in the minutes. Their lack of involvement is supported in the formal company documents of the sixth and seventh respondents. On their version funding was provided by the third respondent to the first respondent in her personal capacity.

[50] The applicant, relying purely on the contents of the minutes, and certain inferential conclusions drawn therefrom, contended that the respondents' versions have been illustrated to be palpably false and untenable and thus should be rejected.

[51] I do not agree. The case advanced by the respective respondents does not raise fictitious disputes of fact and is not palpably implausible, far-fetched or clearly untenable once the context of the meeting of 2 July 2021 is taken into consideration.

[52] The rest of the documents are by and large documents of the applicant. However, they represent either generic or outdated documents. The tasting menu for an event held during March 2020, was defined by the applicant as "a recipe", used to bolster the applicant's case. That characterisation however does not pass muster. It is no more a tasting menu pairing certain ice cream products with other ingredients. The document does not in any way substantiate the applicant's case that it constitutes confidential information or is useful. From the first respondent's supplementary affidavit it further appears that the document was in any event put in the public domain, as copies were provided to all guests attending the tasting.

[53] Similarly, the email sent by the second respondent to the first respondent containing the applicant's winter flavours, does not constitute confidential information as those flavours are readily available on the applicant's website and constitutes information in the public domain.

[54] The financial information contained on the applicant's spreadsheet is old and of limited use, specifically in context of the consequences of the intervening Covid 19 pandemic and the various limitations imposed in terms of the various regulations imposed pursuant to the National State of Disaster.

[55] The applicant's fortune cookie messages complained of, were penned by the first respondent and it is not surprising that they were found in her possession. According to the Summa respondents, they do not produce fortune cookies. It cannot be concluded that these messages are useful to the Summa respondents.

[56] The "marketing material" consists of a picture of an ice cream sundae. According to the first respondent, it was obtained from a generic website containing pictures of various styled pictures of ice cream products.

[57] The employment contracts relied on are based on the first respondent's employment contract with the applicant, with certain adaptations made thereto by the second respondent, which the first respondent was entitled to retain in her possession.

[58] In my view, an analysis and consideration of the documentation does not reveal that these documents are all relevant, nor do they constitute satisfactory proof of the applicant's contentions. It cannot be concluded that the documents assist the applicant's case. Even if the documents constitute documents which fall to be discovered by the parties in due course, applying the test enunciated in *Fedics Group*, they are not of particular relevance.

[59] Thus, even if the documents had been lawfully obtained and were of a discoverable nature, it is but some of the factors to consider in exercising a judicial discretion whether to allow their introduction into evidence. In my view, there are more important policy considerations at play, notably the stringent nature of Anton Piller

orders and the principles applicable thereto and how the applicant has failed to adhere to these principles.

[60] I conclude that if an applicant obtains documents in the execution of an Anton Piller order which is subsequently rescinded, it should not be allowed to use such documents in proceedings such as the present, absent a proper application for authorization and absent exceptional circumstances and compelling reasons being provided to a court to condone its use.

[61] Considering all the circumstances of this case and all the relevant factors. I am not persuaded that the documents seized pursuant to the execution of the Anton Piller order should be admitted into evidence or that the applicant should be allowed to make out a new case in reply.

[62] I conclude that the portions of the replying affidavit pertaining to the documents seized in the execution of the Anton Piller order, including the conclusions sought to be drawn from those documents should not be admitted and should be struck from the replying affidavit as sought by the respondents. An order will be granted striking paragraphs 22, 25, 26, 27 to 38, 39 to 81 and 93 to 112 of the replying affidavit. Insofar as the remainder of the replying affidavit is not tainted, it will be considered.

#### Ad merits

[63] It is apposite to state the applicable principles. The applicant seeks final declaratory relief. It is trite that the so-called Plascon Evans<sup>22</sup> test applies and that the application is to be determined on the basis of admitted facts in the applicant's papers

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<sup>22</sup> Plascon Evans Paints (ty) Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634E-635C

together with the respondent's version<sup>23</sup>, unless the respondents' version is palpably false or untenable and can be rejected on the papers.<sup>24</sup>

[64] The applicant further seeks final interdictory relief. It is trite<sup>25</sup> that the applicant must establish: (i) a clear right; (ii) that injury had been actually committed or is reasonably apprehended and (iii) that there are no alternative satisfactory remedies available to it.

[65] It was undisputed that public policy dictates that account must be taken of the circumstances prevailing at the time enforcement is sought<sup>26</sup>, thus as at 9 September 2021 when the application was heard. It was common cause that the six-month restraint of trade covenant in the first respondent's employment contract had expired. It was also common cause that the first respondent had resigned from the employ of the applicant on 7 February 2021 and had, since that date, not been exposed to any confidential material belonging to the applicant. In terms of the employment agreement, the parties had agreed that the six-month period was reasonable and reasonably necessarily required by the applicant to maintain the goodwill of and its legitimate business interests in respect of its business. The applicant's case against the Summa respondents is thus limited to one based on unlawful competition.

[66] The applicant's case against the franchisee respondents is based on the restraint of trade provisions in the franchise agreements and on unlawful competition. The franchise agreements contain an arbitration clause<sup>27</sup>, the relevant portion of which provides:

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<sup>23</sup> National Director Public Prosecutions v Zuma 2009 (2) SA 277 (SCA) para [26]

<sup>24</sup> J W Wightman (Pty) Ltd v Headfour (Pty) Ltd 2008 (3) SA 371(SCA) para [12]

<sup>25</sup> Setlogelo v Setlogelo 1914 AD 221; Organisasie vir godsdienstige –Onderrig en Demokrasie v Laerskool Randhart 2017 (6) SA 129 (GJ) at 134E

<sup>26</sup> National Chemsearch SA (Pty) Ltd v Borrowman and Another 1979 (3) SA 1092 (T) at 1007G-HJ Louw & Co (Pty) Ltd v Richter and Others 1987 (2) SA 237 (N) 238B-E, confirmed in Reddy v Siemens Technologies (Pty) Ltd 2007 (2) SA 486 (SCA) para [10]; Den Braven SA (Pty) Ltd v Pillay and Another 2008 (6) SA 229 (D)

<sup>27</sup> Dispute resolution clause 22 of the franchise agreements

*"This clause is a separate, divisible agreement from the rest of this Agreement and shall:*

*22.1.1 not be or become void, voidable or unenforceable by reason only of any alleged misrepresentation, mistake, duress, undue influence, impossibility (initial or supervening), illegality, immorality, absence of consensus; lack of authority or other cause relating in substance to the rest of the Agreement and not to this clause. The Parties intend that any such issue shall be subject to arbitration in terms of this clause; and*

*22.1.2 remain in effect even if the Agreement terminates or is cancelled.*

*22.2 Save as may expressly provided for elsewhere in this Agreement for the resolution of particular disputes, any other dispute arising out of or in connection with this Agreement or the subject matter of this Agreement including any dispute concerning*

*22.2.1 the existence of the Agreement apart from this clause;*

*22.2.2. the interpretation and effect of this Agreement;*

*22.2.3 the Parties' respective rights or obligations under this Agreement;*

*22.2.4 the rectification of the Agreement;*

*22.2.5 the breach, termination or cancellation of the Agreement or any matter arising out of the breach, termination or cancellation;*

*22.2.6 damages in delict, compensation for unjust enrichment or any other claim, whether or not the rest of the Agreement apart from this clause is valid and enforceable;*

*shall be decided by arbitration as set out in this clause*

*....*

*22.7 Nothing contained in this clause 22 shall prohibit a party from approaching any court of competent jurisdiction for urgent interim relief pending determination of the dispute by arbitration".*

[67] The franchisee respondents pointed out that the present relief sought by the applicant does not fall under the provisions of clause 22.7 of the agreement. I agree with the franchisee respondents that the final relief presently sought, based on the

breach of the provisions of the franchise agreements, must thus be resolved by way of arbitration in terms of the agreements between the relevant parties.

[68] The applicant did not seek interim interdictory relief. Moreover, on the papers, there are numerous disputes regarding the validity of the franchise agreements by virtue of non-compliance with various provisions of the Consumer Protection Act<sup>28</sup>. The franchisee respondents contend that the franchise agreements are unlawful and voidable. This version cannot be rejected on the papers as patently false and untenable.

[69] As against the franchisee respondents, the applicant's case is thus also reduced to a claim based on unlawful competition and it must be considered whether the applicant has established a clear right against the franchisee respondents on this basis. Whether the applicant has a right is a matter of substantive law, whereas whether that right is clearly established is a matter of evidence<sup>29</sup>.

[70] The general principles are stated thus in *Matthias*<sup>30</sup>:

*"[55] It is well established that, absent an enforceable restraint of trade agreement, it is unexceptional for an employee after the termination of his/her employment to compete with his/her erstwhile employer and in that regard to utilize the business knowledge and experience gained during the period of the previous employment. The erstwhile employee is also, in general permitted to canvass business from the customers and connections of the erstwhile employer. The erstwhile employee is not, however, permitted to compete unlawfully with his/her former employer. Using the former employer's confidential information for the purpose of competing in business with him/her would constitute unlawful competition; and the former employer would be entitled to obtain an interdict prohibiting such conduct".*

*[56]... It is trite that lists of customers and suppliers maintained by a business are regarded as proprietary to it, and ordinarily treated as being of a confidential nature in that they are considered to be specifically compiled information that any owner of a business would quite reasonably not wish to fall into the hands of a competitor. The taking away in his/her head by an erstwhile employee of information that might be apparent in such list is unexceptionable, but the taking away of the list itself, or even the special committing to memory of the content of the list for the purposes of recreating it for use in competition with the erstwhile employer is regarded as wrongful'*

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<sup>28</sup> 68 of 2008

<sup>29</sup> *Dyalo v Mquma Local Municipality* (unreported ECM case number 8490/2016 dated 9 September 2016) para [9]

<sup>30</sup> Para [55]

[71] The applicant's case was that the first and second respondents appropriated its confidential information and trade secrets to set up rival operations. The first element is whether the applicant has established a protectable interest.

[72] It is well established that our law generally recognizes two forms of protectable interests<sup>31</sup> as deserving of protection, being first: trade or customer connections and second: confidential information or trade secrets.<sup>32</sup> Trade secrets are a species of confidential information<sup>33</sup>. The applicant is further obliged to set out when and where the information was disclosed to the respondents and set out facts which support a finding that a conclusion can be drawn that something is confidential or secret. Importantly, the mere say so of an applicant on its own does not suffice to establish a protectable interest<sup>34</sup>. In opposing the applicant's version, the respondents placed specific reliance on *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff and Another ("Mozart")*<sup>35</sup> wherein Davis J dealt with a dispute similar to the present between a franchisor and two of its former franchisees relating to an ice cream outlet.

[73] It was common cause that the Summa respondents operate a small ice cream outlet which competes with the stores and franchises of the applicant. No case was made that the applicant's customer connections were endangered. The applicant did not rely on an interest in its customers and no averments were made in the applicant's affidavits that a relationship exists between the first respondent and any of the applicant's customers. The customers of the retail ice cream outlets are visitors to the respective shopping malls within which they are situate. There are no customer lists as the shops are frequented by random members of the public who want ice cream on any given day.

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<sup>31</sup> *Basson v Chilwan* 1993 (3) SA 742 (A)

<sup>32</sup> *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another* 1991 (2) SA 482 (T)

<sup>33</sup> *Harvey Tiling Co (Pty) Ltd v Rodomac (Pty) Ltd and Another* 1997 (2) SA 316 (T) 322H-324H; *BHT Water Treatment (Pty) Ltd v Leslie and Another* 1993 (2) SA 47 (W) 57F-58D

<sup>34</sup> *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff and Another* 2009 (3) SA 78 (C) at 86

<sup>35</sup> 2009 (3) SA 78 (C)

[74] The applicant thus has no customer connections to protect considering the type of business conducted by the Summa respondents and the type of customers to which ice cream is supplied<sup>36</sup>. Similarly, no case was made out by the applicant for protection of its trade connections.

[75] Turning to confidential information, it is trite that confidential information which is useful to the restrainer's business and which, if disclosed to a competitor will give him or her an unfair advantage is protectable by a restraint covenant. Mere confidentiality is not sufficient, it must be a trade secret.

[76] The well-known test to be applied pertaining to a trade secret, was stated thus in *Walter Mc Naughton (Pty) Ltd v Schwartz and Another*<sup>37</sup> ("Mc Naughton"):

*"(a) be capable of application in trade or industry, that is, it must be useful; not be public knowledge and property; (b) it must be known only to a restricted number of people or a close circle; and (c) be of economic value to the person seeking to protect it."*

[77] The facts set out by the applicant in its affidavits in support of its "trade secrets" and "confidential information" are scant. These phrases are used in bald and unsubstantiated terms and with reference to brands, recipes, marketing techniques and strategy, intellectual property contacts, customers and suppliers. What is absent from the affidavits of the applicant are primary supporting facts from which it can be concluded that there are indeed trade secrets involved in the information provided to the first respondent.

[78] It must further be established, whether objectively speaking, the reasonable possibility exists that the first respondent might disclose trade secrets to her new employer<sup>38</sup>. The applicant has failed to make out such a case on its papers.

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<sup>36</sup> *Rawlins and Another v Caravan Truck (Pty) Ltd* 1993 (1) SA 537 (A) at 541

<sup>37</sup> 2004 (3) SA 381 (C) at 389A-B

<sup>38</sup> *Eoh Mthombo (Pty) Ltd v Bheeki-Odhav* [2012] JOL 28736 (LC) para 25.



[79] In support of its contention for trade secrets, the applicant referred to its recipes. However, it was undisputed that the first respondent is purchasing ice cream from a manufacturer and is not manufacturing the ice cream. The applicant on the other hand, manufactures ice cream and sells it through its own stores and franchisees to members of the general public. No case was made out that the respondents are in possession of the applicant's recipes.

[80] I respectfully agree with the reasoning adopted by Davis J in *Mozart*<sup>39</sup> in concluding that there was no confidential information as the former franchisee was not manufacturing ice cream. The same conclusion falls to be drawn in the present instance.

[81] It must further be established by the applicant that the respondents' conduct was wrongful. It is apposite to refer to *Discovery Ltd and Others v Liberty Group Ltd*<sup>40</sup> ("*Discovery*"), wherein Keightley J summarized the relevant principles. As held in *Discovery*:

*"The question is whether, according to the legal convictions of the community, the competition or the infringement on the goodwill is reasonable or fair when seen through the prism of the spirit, purport and object of the Bill of rights. Several factors are relevant and must be taken into account and evaluated. These factors include the honesty and fairness of the conduct involved, the morals of the trade sector involved, the protection that positive law already affords, the importance of competition in our economic system. The question whether the parties are competitors, conventions with other countries and the motive of the actor"*

*[67] Misappropriation of a rival's performance and appropriation of goodwill do not, per se, fall within the category of clearly recognised illegalities constituting unlawful competition in our common law. These recognised illegalities have been listed as including trading in contravention of an express statutory prohibition, the making of fraudulent misrepresentations by a rival trader, passing –off, the publication by a rival trader of injurious falsehoods concerning a competitor's business, and the employment of physical assaults or intimidation directed at a rival trader. Of course, this does not mean that the applicants do not have a case. The real question is whether the conduct complained of, however it is labelled, is wrongful".*<sup>41</sup>

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<sup>39</sup> Fn 31 supra

<sup>40</sup> 2020 (4) SA 160 (GJ) paras [61]-[67]

<sup>41</sup> Para [63]

[82] In the present instance, I am not persuaded that the applicant has illustrated that the respondents have committed a wrongful act, based on the *boni mores* or reasonableness criterion. Our courts have held that the skill and expertise gained by an employee during the course of his or her employment form part of the general skill and knowledge of the employee and become attributes of the employee and is not protectable<sup>42</sup>.

[83] I agree with the Summa respondents that the first respondent's skills as head of marketing and running the day to day operations of the applicant do not belong to it and are not protectable interests. In the present instance, the applicant has not made out a case on any of the recognised grounds of illegality against any of the respondents.

### Conclusions

[84] For these reasons I conclude that the applicant has failed to establish any wrongful conduct on the part of the respondents and any clear right to either the interdictory or declaratory relief sought.

[85] Even if I am wrong in concluding that certain portions of the replying affidavits were to be struck out and they are considered in their totality, together with the respondents' supplementary affidavits, I am still not persuaded that the applicant has established an entitlement to the relief sought, for the understated reasons.

[86] The applicant's reliance on its trade connections in the form of a relationship with Promix Ingredients (Pty) Ltd t/a RBL ("RBL"), which is also the supplier of the Summa respondents' ice cream, does not pass muster. It was the applicant's case that it manufactures its own ice cream, not that BRL was one of its suppliers. The applicant further sought to rely on certain common suppliers such as suppliers of cleaning materials, chocolate and sugar cones. No case was however made out that these

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<sup>42</sup> Automotice Tooling Systems (Pty) Ltd v Wilkens 2007 (2) SA 271 (SCA); Aranda Textile Mills (Pty) Ltd v Hurn and Another [2000] 4 All SA 183 (E0)

suppliers are confidential connections to which the applicant would not during the course of her trade have discovered or that the applicant has the exclusive right to use such suppliers. It cannot in my view be concluded that the applicant has established a protectable interest in the form of its trade connections.

[87] The applicant's case based on confidential information and trade secrets, and applying the test enunciated in *Mc Naughtan*, to which I have already referred, similarly does not pass muster.

[88] It cannot be concluded that the applicant's March 2020 tasting menu or its spreadsheet pertaining to certain financial information dating back to June 2020, some fifteen months ago, is at this time useful or of economic value. The same pertains to the other documents referred to by the applicant in reply.

[89] I am further not persuaded that the applicant has established that its confidential information is being used by the respondents. The applicant's reference to "recipes" is a red herring. The high water mark of the applicant's case is a reference to a tasting menu dating back to March 2020 which was moreover was in the public domain and provided to individuals attending that function. It was not disputed that the franchisee respondents had no access to the applicant's recipes. As against the first respondent the high water mark of applicant's case is that she had access thereto, not that she had accessed or used any such recipes.

[90] In her supplementary affidavit, the first respondent further disputed that she had any of the recipes. It was not disputed that the first respondent purchases ice cream from a manufacturer, RBL and on-sells it to her customers. No case was made out that the first respondent of the other Summa respondents manufacture ice cream. RBL, which supplies the ice cream to the Summa respondents has its own proprietary rights over its ice cream. No case was made out that the first respondent is infringing upon the applicant's confidential rights to its ice cream. The flavours used by the first respondent are those supplied by RBL. Moreover, the applicant's flavours are in the public domain

and readily available on the internet. As such these flavours do not constitute confidential information or a protectable interest. No case was made out that any of the respondents manufacture ice cream.

[91] The high watermark of the applicant's case is that certain invoices issued to the first respondent indicated that she had acquired equipment to manufacture ice cream. The invoices do not support that contention.

[92] In addition, the minutes of the 2 July 2021 meeting does not constitute the smoking gun alleged by the applicant. Whatever the intention may have been of the respondents, on legal advice it was decided not to open a business which would be contrary to the franchisee respondents' restraint provisions until those issues had been resolved. Based on the legal advice obtained, the respondents decided that only the first respondent would open the shop and would be involved and would be the only shareholder of the sixth and seventh respondent. This is confirmed in the company documents of the sixth and seventh respondent. The minutes thus evidence no more than an agreement at a particular point in time which was not executed and was superceded by subsequent events and agreements.

[93] On the papers, the applicant has further not established that the respondents are using the information obtained to advance their own business interests and activities<sup>43</sup> or that their conduct was wrongful. I have already dealt with the generic and historic nature of the documentation referred to in the replying affidavit.

[94] Under these circumstances, the applicant has not established a clear right to the relief sought, nor has it established that the respondents are unlawfully competing with it or that an injury has been committed or is reasonably apprehended. I am further not persuaded that the applicant established that it has no alternative remedy at its disposal and that a damages claim would not afford it an adequate remedy.

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<sup>43</sup> As envisaged in *Dun and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Nureau (Cape) (Pty) Ltd* 1968 (1) SA 209 (C) at 221D-H

[95] It follows that the application must fail.

[96] There is no reason to deviate from the normal principle that costs follow the result. I have already concluded that the appearances of 24 and 27 August 2021 justify the granting of a punitive costs order against the applicant. Considering the conduct of the applicant in relation to this matter, I am persuaded that a punitive costs order is warranted as sought by the respondents. The parties were all in agreement that the costs of two counsel were justified and all employed the services of two counsel. Considering the complexities involved, I am satisfied that the employment of two counsel was justified.

[97] I grant the following order:

[1] Paragraphs 22 and 26 as well as paragraphs 25, 27 to 38, 39 to 81 and 93 to 112 of the applicant's replying affidavit are struck out, the latter insofar as they pertain to information and documentation obtained through the Anton Piller proceedings;

[2] The application is dismissed with costs on the scale as between attorney and client, such costs to include the costs of the hearings on 24 and 27 August 2021 and the costs consequent upon the employment of two counsel.

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**EF DIPPENAAR  
JUDGE OF THE HIGH COURT  
JOHANNESBURG**

**APPEARANCES**

<b>DATE OF HEARING</b>	24, 27 August 2021 and 09 September 2021
<b>DATE OF JUDGMENT</b>	: 29 November 2021
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<b>APPLICANT'S ATTORNEYS</b>	: Taitz and Skikne Attorneys Mr R Zimerman
<b>1<sup>st</sup>, 6<sup>th</sup> and 7<sup>th</sup> RESPONDENT'S COUNSEL</b>	: Adv. AG. South SC : Adv. JHF le Roux
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<b>2<sup>nd</sup> to 5<sup>th</sup> RESPONDENT'S COUNSEL</b>	: Adv. JO Williams SC : Adv. JBW Mouton
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