

**IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG  
(REPUBLIC OF SOUTH AFRICA)**

CASE NO: **2010/728**

JOHANNESBURG, **15 May 2011**

BEFORE THE HONOURABLE **JUDGE SPILG**

In the matter between:

<b>IOZZO, ANTONIO N.O.</b> (In his capacity as trustee of the <b>M SHARE TRUST</b> )	First Applicant
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<b>IOZZO, NICOLA N.O.</b> (In her capacity as trustee of the <b>M SHARE TRUST</b> )	Second Applicant
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<b>HUTCHINSON, GREGORY CLYDE N.O.</b> (In his capacity as trustee of the <b>M SHARE TRUST</b> )	Third Applicant
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and

<b>ROCHA, MARIO ALEXANDRE DE FIGUEIRDO N.O.</b> (In his capacity as trustee of the <b>M R HOLDINGS AND INVESTMENT TRUST</b> )	First Respondent
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<b>DU PREEZ, TANYA N.O.</b> (In his capacity as trustee of the <b>M R HOLDINGS AND INVESTMENT TRUST</b> )	Second Respondent
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AND;

In the counter application of:

<b>ROCHA, MARIO ALEXANDRE DE FIGUEIRDO N.O.</b> (In his capacity as trustee of the <b>M R HOLDINGS AND INVESTMENT TRUST</b> )	First Applicant in Counter Application
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<b>DU PREEZ, TANYA N.O.</b> (In his capacity as trustee of the <b>M R HOLDINGS AND INVESTMENT TRUST</b> )	Second Applicant in Counter Application
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And

<b>IOZZO, ANTONIO N.O.</b> (In his capacity as trustee of the <b>M SHARE TRUST</b> )	First Respondent in Counter Application
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**And Others**

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**SUMMARY**

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**SPILG, J:**

**Contract- Implied term:** “ *The law implies in every contract a covenant that neither party will do anything that will deprive the other of the fruits of his bargain* “ *per Bergum v Weber* 288 P 2d 623 (136 Cal.App.2d 389 at 392) which was applied in *A Becker & Co (Pty) Ltd v Becker* 1981 (3) SA 406 (A): (paras 25 - 33)

In the context of the sale of a business as a going concern the fruits of the bargain include everything that can be properly said would, *objectively* speaking, have been taken into account and affected (with the possible qualifier of materially) the determination of the consideration payable and includes goodwill. (para 34)

Accordingly a defamatory statement, if proven to have been made by the seller with the intention of having the bank recall or restructure its credit facilities to the business which formed the subject matter of the sale, would constitute a breach of an implied term of the sale of the business if it had the effect of depriving the purchaser of the “*fruits of the bargain*”. (para 35)

**Quaere- Goodwill** – Whether the customer- banker relationship including the continuation of a substantial credit facility for trade constitutes goodwill (para 32)