IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

APPEAL CASE NUMBER: A408/2014

In the matter between

ADRIAAN W DE MEYER	First Appellant
BLUEBERRY MANAGEMENT SERVICES (PTY) LTD	Second Appellant
BLUEBERRY MANAGEMENT PORTFOLIO (PTY) LTD	Third Appellant

and

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

15/12/16 .....
DATE

.....
SIGNATURE PP Fenwick J

20/12/2016

PROPERTY COMPETENCE MANAGEMENT (PTY) LTD Respondent

JUDGMENT

MURPHY J

1. The appellants appeal against two judgments of Kollapen J. In the first judgment handed down on 9 May 2014, the learned judge granted orders interdicting and restraining the appellants from using any confidential information in their possession relating to the respondent's clients for the purpose of soliciting their property management business and from contacting the respondent's clients for a period of six months from the date of the order with the aim of dealing with, securing or soliciting the business of those clients. The appellants were further ordered to hand

over the relevant confidential information in their possession within 48 hours. On 4 June 2014 Kollapen J handed down a second judgment in which he granted an order that pending the outcome of the appeal against his first judgment (leave having been granted by him) the orders granted in that judgment would not be suspended and would remain of full force and effect. As stated, the appellants appeal against both judgments.

2. The respondent is a company specialising in the management and administration of security complexes, especially sectional title developments, on behalf of their bodies corporate or homeowners associations. The first appellant ("De Meyer") was employed by the respondent from 2007 until his resignation in March 2014. At the time of his resignation De Meyer was employed as a portfolio manager. His duties included direct liaison with the different bodies corporate and homeowners' associations. He therefore had knowledge of the respondent's client base.

3. The second and third appellants ("Blueberry") conduct similar business. The managing director of Blueberry is Mr. Leon Visser ("Visser"), a former employee of the respondent.

4. The respondent maintains that De Meyer tendered his resignation on 1 March 2014 with effect from the end of March 2014. It claims that De Meyer was asked about his future plans but refused to disclose them. In early March 2014, Mr Theo Kleynhans ("Kleynhans"), the controlling shareholder of the respondent, was contacted by a business associate, Mr Eppo Kruger ("Kruger") who told him that De Meyer had tried to solicit employment as a portfolio manager with Green Circle Property Management (Pty) Ltd, a company of which Kruger is a director. De Meyer allegedly offered to target clients of the respondent on behalf of Green Circle and told Kruger that he was confident that he could poach and bring to Green Circle over at least 80% of his portfolio.

5. De Meyer admitted that he met Kruger in November 2013 at which meeting the possibility of employment was discussed. De Meyer denied telling Kruger that he could poach 80% of his portfolio but conceded that there was some discussion about "whether there would be any blocks that De Meyer will bring over" to Green Circle. Kruger and De Meyer discussed the question of salary. De Meyer informed Kruger that "he was very good at what he did and that he believed that the income which he would generate would cover his salary". Nothing further appears to have come from their meeting. However, at about the end of January 2014 Kruger contacted De Meyer and invited him to attend a meeting at Visser's office, where De Meyer and Visser were introduced to each other for the first time. According to Visser, Kruger suggested that Green Circle should merge with Blueberry and discussions were held in that regard. Kruger had invited De Meyer to the meeting because he believed De Meyer was a very good managing agent who would be of value to Blueberry. The merger did not happen, but De Meyer nonetheless ultimately became associated with Blueberry.

6. After speaking to Kruger in early March 2014, Kleynhans suspended De Meyer on 7 March 2014 (during his notice period), pending a disciplinary enquiry. The suspension was on condition that De Meyer would not have any contact with the respondent's clients. De Meyer maintains that the true reason for the suspension was the fact that Kleynhans was unhappy about De Meyer's resignation and thus retaliated by suspending him.

7. On 20 March 2014, Kleynhans addressed a letter to the trustees of the various sectional title schemes that De Meyer had serviced, informing them that De Meyer had tendered his resignation with effect from the end of that month and that his resignation had been accepted. He then went on to outline that he had received information that De Meyer had been offering the respondent's clients to other managing agents in exchange for employment. He mentioned Blueberry in particular who he noted had absolved the respondent's clients against costs, legal or otherwise, which might be incurred by transferring from the respondent to Blueberry.

He requested trustees contacted by De Meyer or Visser to inform him so that he could take legal action.

8. At the time he sent the letter Kleynhans was aware that four sectional title schemes had cancelled their management agreements with the respondent. All of these clients had been in the portfolio of De Meyer. The respondent accordingly alleged that De Meyer had breached his duty of confidentiality and trust under his contract of employment, with prejudicial consequences for the respondent.

9. De Meyer placed a different interpretation on events. He denied that he approached any of the bodies corporate. He admitted to speaking to certain trustees who he had bumped into and had "informally" informed them that he would be taking up new employment with Blueberry. Certain trustees then approached De Meyer, enquired about his new position and asked whether his new employer (Blueberry) would provide a quote for services. De Meyer denied that he convinced any of the respondent's clients to terminate their agreements with the respondent. He insisted that the clients in fact approached him and that their move to Blueberry was motivated by their appreciation of his competence as a managing agent. The respondent contended that this version was improbable in light of the documentary evidence establishing that in the period between 12 March and 5 April 2014 (during De Meyer's period of suspension) various bodies corporate indicated that they intended to terminate their contract with the respondent and move to Blueberry.

10. The respondent's version is borne out by an email (Annexure TK17) addressed by Mr Willem Scholtz to Kleynhans on 1 April 2014, the relevant part of which reads:

> "I am the current chairman of Helderberg Body Corporate. At our last Trustee meeting in Feb'14 Mr de Meyer mentioned that he will be resigning at the end of March 2014 and that he is going to Blueberry. I left it there, but on Sunday 16 March I was approached by one of my fellow trustees with a proposal from Blueberry signed by Mr Visser. I told her that I am leaving the next morning on holiday and that we can discuss this at the next trustee meeting. I had a

brief look at the proposal and left it at her doorstep when I left the next morning. I suppose she approached the other two trustees staying in the building in the same manner and probably convinced them to co-sign the document for the transfer. My personal opinion is that there are no reasons whatsoever to move away from Property Competence. In the ten years I am involved in this Body Corporate we never had any major problems. I have to mention that no formal decision was made to move away from Property Competence.

When I returned and went through my mails yesterday I only realised what is going on. It was my intention to discuss the matter at the next trustee meeting and/or the AGM.

I suppose that we carry on with business as normal until the investigations are finished."

11. De Meyer failed in his affidavit to identify the trustees he bumped into, and has not filed any confirming or supporting affidavits from them.

12. Furthermore, on 20 March 2014, De Meyer, while still in the employ of the respondent, was in email correspondence with Ms Nowele Rozani, a trustee of the Helderberg Body Corporate, and other trustees which indicated that documentation had been sent by the body corporate to De Meyer in his capacity as an employee of Blueberry and that he had drafted or was in possession of proposal documents drafted on behalf of Blueberry. De Meyer concluded the email by saying: "Welcome to Blueberry and enjoy the long weekend". De Meyer admitted sending the email but denied that he remained employed. He claims he had been unlawfully suspended. He denied there was any lawful restraint of trade upon him or that he had competed unlawfully. He argued that the fact that Blueberry offered cheaper services and that some of the clients preferred to move with him did not mean that he had breached any duty in relation to confidential information or had acted unlawfully in any way.

13. The respondent annexed to the founding affidavit resolutions taken by five of its clients previously managed by De Meyer between 12 March 2014 and 5 April 2014 terminating the services of the respondent and appointing Blueberry as their managing agent. The resolutions are virtually identical and were drafted on the same computer using the same template. All the resolutions record that the trustees of the scheme "confirm that they approached Blueberry Management Services (Pty) Ltd to

act as Managing Agents". They all terminated the services of the respondent on 30 April 2014. The resolutions appointed Blueberry as the managing agent instead of the respondent and authorised it to take over all communication and dealings with members of the schemes. It is common cause that these clients were in fact taken over by Blueberry and continued to be managed by De Meyer.

14. On 29 April 2014, Mr Hendrik Hoffman, a director of the respondent attended a meeting with the trustees of Montanac body corporate, one of the clients who had terminated its agreement with the respondent in the previous month. He averred that the trustees told him that De Meyer at a meeting during January 2014 had informed the trustees of his intention to resign as an employee of the respondent and at a meeting on 14 March 2014 De Meyer brought the trustees under the impression that he had already left the employ of the respondent and that an agreement had been reached between the respondent and Blueberry that the latter would take over the management of Montanac. In the light of that, De Meyer allegedly persuaded the trustees to sign a resolution terminating the respondent's services. The respondent placed this information before the court by way of supplementary affidavits including an affidavit of Mr Hoffman. It was not supported by any confirmatory affidavit of any of the Montanac trustees, and thus, albeit admissible in the course of an urgent application, this evidence is hearsay.

15. De Meyer filed an answering affidavit in response to the supplementary affidavit. He denied that a meeting took place on 14 March 2014 or that he had fraudulently misrepresented that management of the scheme would be transferred by mutual agreement.

16. The respondent relied principally upon clause 24 of De Meyer's contract of employment. Its relevant provisions read:

"The employee undertakes not to disclose any confidential information to any third party or entity during the operation of this agreement or after its termination unless the employer specifically agrees."

Clause 26 of the contract includes a restraint of trade of narrow ambit in the form of an undertaking "not to be engaged in the establishing of a new business" within one year after termination of employment in Gauteng or the Western Cape.

17. The information regarded by the respondent as confidential is that pertaining to the sectional title owners or tenants in the various schemes. Blueberry, in April 2014, was able to address welcome letters to the individual section owners and tenants. These addresses, according to the respondent, were exclusively within its possession. Thus, the most probable inference is that this information was given to Blueberry by De Meyer. Other confidential information the respondent claimed was in the possession of De Meyer included:

- Pricing structures and specific fees charged for specific services and for specific clients.

- The identity of all clients of the respondent specifically those serviced by De Meyer.

- The contracts between the respondent and the clients serviced by De Meyer.

- Address lists of all clients, including all bodies corporate and homeowners associations as well as the address lists of owners of individual properties and their contact information.

- All financial management information of the respondent as well as that of every sectional title scheme, especially those managed by De Meyer.

18. The respondent regards this information as extremely valuable as it was specifically compiled by it to enable it to service its clients and to compete in the market place. The pricing structures are particularly valuable in that they would permit a competitor with access to such information to undercut and strategically price services to outbid the respondent, as appears to have happened in March 2014. The correspondence with Nowele Rozani, for instance, reveals that the move of the Helderberg contract to Blueberry may well have been motivated by savings in management costs.

19. The appellants denied that they were in possession of any confidential information of the respondent and complained that it was not clear what confidential information the respondent sought to protect. In so far as the information was restricted to the identity and details of the respondent's clients, the appellants denied that the respondent has any interest of its own in such information. They contended that the information is public knowledge and thus not confidential. The respondent services various bodies corporate and the identities of such are known. The appellants accordingly denied that the information was confidential and that it had any financial value. They furthermore denied that the information regarding individual owners had come from De Meyer and averred that it had been obtained from a body corporate. They neglected to file any confirmatory affidavit or documentary evidence supporting that averment.

20. The appellants nevertheless did admit that De Meyer "had access to certain information" at the respondent. They did not specify the nature, ambit and value of such information. Instead they averred baldly that the information was not confidential and that De Meyer did not possess it. They reiterated that the identity of the respondent's clients was information in the public domain. They denied that Blueberry was using any information obtained from De Meyer to unlawfully compete with the respondent.

21. When the matter was enrolled in the urgent court before Kollapen J it was argued that the conduct of the appellants constituted unlawful competition in that they sought unfairly to use the respondent's fruits and labour, misused the respondent's

confidential information in order to advance their own business interests at the expense of the respondent, induced or procured a breach of contract by the trustees of the relevant bodies corporate, and acted in collusion together to achieve these ends.

22. The respondent argued that it was entitled to an interdict restraining the appellants. In particular, it contended that it had a clear right to the protection of its business interests and the confidential information belonging to it and a right to be protected from unlawful competition. It maintained that it was unlawful for De Meyer to take its confidential information and to use it to compete with the respondent. Since Blueberry was a trade rival, it was especially unlawful to obtain its confidential information and use it to compete in a manner infringing its "clear rights of freedom of lawful trade". It accordingly had a reasonable apprehension of further injury by further possible inducements to clients to breach their contracts with the respondent, so it submitted, and in the absence of a satisfactory alternative remedy, it was entitled to a final interdict.

23. Kollapen J held that the matter was urgent and proceeded to deal with what he described as the second issue, "namely that of confidential information". The court referred to clause 24 of the contract of employment and affirmed that De Meyer was under a contractual obligation not to disclose any confidential information to any third party during the operation of the agreement or after its termination. The learned judge followed and applied the reasoning in *van Castricum v Theunissen and another*[1] to conclude that the information in question was indeed confidential.

24. In *van Castricum* the first respondent had been employed by the applicant, an insurance broker, as a claims clerk and underwriter. In performing her duties as a claims clerk the first respondent used a handwritten Bantex telephone directory which contained names, telephone numbers and some fax numbers of existing clients of the applicant. The first respondent subsequently left the employ of the applicant and joined the second respondent (a direct competitor and trade rival of the

[1] 1993 (2) SA 726 (T)

applicant) as an administrative and marketing manager. The first respondent removed the Bantex telephone directory from the applicant's business premises when she left his employ and used the information to approach clients of the applicant on behalf of her new employer. The applicant then sought an interdict restraining the respondents from using any confidential information, including the Bantex telephone directory for the purpose of soliciting the applicant's clients and restraining the respondents from contacting, dealing with, securing or soliciting the business of the applicant's clients.

25. The facts and the relief sought in *van Castricum* are similar in most respects to those in the present matter. As in the present matter, Roos J in *van Castricum* had to consider and determine whether the information contained in the Bantex directory constituted confidential information worthy of protection. Referring to a decision of the Court of Appeal in the United Kingdom, *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd*,[2] Roos J held that in order to be confidential the information must have the necessary quality of confidence about it, that is, it must not be something which is public property or public knowledge. Accepting that it was sometimes difficult to decide whether information was general knowledge or whether it was confidential or constituted a trade secret worthy of protection, the court held that the test was an objective one.[3] It applied the following principles enunciated in *Thomas Marshall (Exports) Ltd v Guinle*.[4] First, the information must be information the release of which the owner believes would be injurious to him or of advantage to his rivals or others. Second, the owner must believe that the information is confidential or secret, that is, that it is not in the public domain. Although some of his rivals may have the information, the court should incline to the grant of the relief where the information is reasonably believed to be confidential. Third, the owner's belief must be reasonable. Fourth, the information must be judged in the light of the usage and practices of the particular industry or trade concerned.

26. Roos J in *van Castricum* concluded that a list of clients, together with their contact details could well constitute confidential information, notwithstanding that it may have been compiled from generally available information. The learned judge

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[2] (1948) 65 RPC 203 (CA) at 215
[3] See *Coolair Ventilator Co (SA) (Pty) Ltd v Liebenberg and another* 1967 (1) SA 686 (W) at 689F-H
[4] [1978] 3 All ER 193 (Ch)

opined that information compiled in confidence by one party should be protected because confidential information may not be used as a springboard for activities detrimental to the person who made the confidential information available, and it would remain a springboard even when all the features had been published or can be ascertained by actual inspection by any member of the public.[5] The reason for protecting such information is that an employee who obtained it in confidence should not be permitted to use that information as a springboard for activities detrimental to the person who compiled the information, even where some of that information is in the public domain, because the possession of the information has "a long start" over any member of the public.[6]

27. It is clearly established in South African law that it is unlawful for an employee either to take his employer's information or to use such information to compete with him. The fact that the first respondent in *van Castricum* had left the employ of the applicant made no difference because the duty to preserve such confidential information continues to exist even after the period of employment has terminated.[7] It will be recalled that in the present case Clause 24 of the contract of employment included an express undertaking not to disclose any confidential information to any third party both during the operation of the contract and after its termination.

28. In the present case, Kollapen J applied these principles and concluded that the information in question was likewise worthy of protection. He held that the fact that the clients were known to each other in the industry did not extend to knowledge of systems "in the context of how such information is then compiled by the applicant into a data base". In his view, the respondent was entitled to the protection of such information even if it could be shown that such information taken separately is generally and widely available. That finding is undoubtedly correct.

29. With regard to the denials by the appellants that De Meyer was in fact in possession of any information that could be considered as confidential or that they had used such information, Kollapen J held as follows:

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[5] *van Castricum* 731F-G
[6] See *Valuenet Solutions Inc v eTel Communications Solutions* 2005 (3) SA 494
[7] *van Castricum* 736A-B

> "In dealing with this denial one must consider the following. The first respondent (De Meyer) was employed as a portfolio manager by the applicant for some seven years. That would be a considerable time in my view. Given his job description, it is hardly tenable that he would not have had access to the applicant's clients' records and databases. On the contrary such access would have been necessary for him to have carried out his duties. His duties would also have enabled him to acquire knowledge of the workings of the applicant and the workings of the development or sectional title schemes he was responsible for. Accordingly his denial that he had confidential information can hardly stand in the face of his long period of employment and the nature of his job description."

30. In addition, the learned judge *a quo* held that the evidence established that De Meyer had interacted with the clients of the respondent on behalf of Blueberry while he was still in the employ of the respondent (albeit on suspension). This constituted a conflict of interest, and, in my view, a breach of the contract of employment. This indicated that De Meyer was prepared to interact with the clients of his employer to the detriment of his employer. It hardly mattered that the clients may have initiated contact. The learned judge held:

> "His overriding duty was to his employer (applicant). His stance in this regard gives credence to the allegations made by Mr Kruger that indeed the first respondent had informed him that he was willing and able to bring over a substantial portion of his portfolio from the applicant to his new employer ..... The migration of five clients during March 2014 from the applicant to the respondents could hardly be ascribed to service delivery or financial reasons. If it was for financial reasons then surely migration would have occurred earlier and it is simply too much of a coincidence to suggest that it was anything other than a deliberate targeting based on confidential information the respondent had ... about the applicant's clients and contact details."

31. Kollapen J relied on two further facts to fortify his conclusion that De Meyer had used the confidential information in breach of clause 24 of the contract of employment. The first was the fact that the resolutions adopted by the bodies corporate terminating the respondent's services and appointing Blueberry included a "questionable inducement", namely an undertaking by Blueberry to pay all costs, including legal costs incurred by the client in the event of any litigation arising with the respondent. The second was the fact that Blueberry in its welcome letters used the *domicilium* addresses which could only have been obtained from the

respondent's records as the bodies corporate would not have possessed that information.

32. For those reasons Kollapen J granted the interdict. It is important to note that the primary basis for granting the interdict was the respondent's clear right arising under clause 24 of the contract of employment to the protection of its confidential information. Although the court intimated that the appellants may have acted wrongfully in a broader sense, it made no explicit finding that the appellants had competed unlawfully or had committed any delict.

33. As stated at the outset, paragraph 1 of the interdict prohibited and restrained the appellants from using any confidential information in their possession. The information specifically identified was that related to the respondent's clients and included but was not limited to the respondent's pricing structures, contracts between the respondent and its clients, address lists of owners and the persons or entities responsible for the paying of levies, contact details of such persons and financial management information of the respondent pertaining to clients. Paragraph 2 of the court order interdicted the appellants from contacting the clients of the respondent, nor dealing with them, securing or soliciting their business for a period of six months. Paragraph 3 of the order directed that any and all information set out in paragraph 1 of the order, including all computer records, handwritten records, otherwise be handed over to the respondent within 48 hours of the order.

34. On 4 June 2014, Kollapen J handed down judgment in two further applications ("the second judgment"). The first application was an application for leave to appeal. The learned judge granted leave to appeal to a full court of this division. The second application was an application in terms of the then existing rule 49(11) seeking an order that the order made by Kollapen J on 9 May 2014 not be suspended pending the outcome of the application for leave to appeal, or any possible appeal processes that might follow.

35. The second application was determined in accordance with the provisions of section 18 of the Superior Courts Act,[8] which came into operation on 23 August 2013. In general terms the section provides that unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal is suspended pending the decision of the application or appeal. In terms of section 18(3) a court may only order otherwise if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders. Kollapen J held that the respondent would indeed suffer irreparable harm if the order was not put immediately into operation, whereas De Meyer would be entitled to continue and remain in the employ of Blueberry who could conduct business within the constraints of the interdict without suffering any significant prejudice. He accordingly ordered that the order of 9 May 2014 would not be suspended pending the appeal.

36. In the appeal before us, the appellants appeal against the judgment and order of 9 May 2014 and the order granted in terms of section 18 of the Superior Courts Act on 4 June 2014.

37. The appeals were originally set down for hearing on 5 August 2015. However, the matter was postponed as it transpired that a notice of appeal had not been lodged against the judgment of 9 May 2014. The appellants then filed a condonation application requesting that the late delivery of the notice of appeal be condoned and that the appeal be reinstated. The basis for the condonation application is an alleged misunderstanding between the attorney and counsel for the appellants. The respondent argued that sufficient explanation was not given for the default and that there are no prospects of success on appeal. The application for condonation can therefore best be determined after due consideration of the merits.

38. Notwithstanding the fact that a notice of appeal was lodged in terms of section 18 of the Superior Courts Act no urgent date of appeal was allocated. The respondent accordingly submitted that the various orders have become moot, and that the

[8] Act 10 of 2013

appeal will have no practical effect. As I understand the submission, the respondent relies upon section 16(2)(a)(i) of the Superior Courts Act which provides that when at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on that ground alone.

39. The essential ground of appeal advanced by the appellants in relation to the merits of the main application was that there was a dispute of facts on the papers that precluded Kollapen J from granting the interdict. De Meyer denied that he was in possession of confidential information or that he had breached his contract of employment by disclosing that information to a trade rival. Blueberry further averred that there was no contractual relationship between it and the respondent, that it had no confidential information belonging to the respondent and that the information it used was a matter of public knowledge. Blueberry also denied that it induced any breach of contract or had competed unfairly.

40. The finding that De Meyer had breached his contract is in my opinion unassailable for the reasons stated by the court *a quo*. The court applied the methodology ordained in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[9] and correctly rejected the denials of De Meyer as untenable, un-creditworthy denials and was right to do so on the papers for the reasons stated. Where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or other relief, may be granted if those facts averred in the applicant's affidavit which have been admitted by the respondent, together with the facts alleged by the respondent, justify such order. Where the allegations or denials of the respondent are so far-fetched or clearly untenable then the court may be justified in rejecting them merely on the papers.[10] The court *a quo* favoured the respondent's version because it felt that De Meyer's denials and explanations for how Blueberry came into possession of the confidential information were un-creditworthy and untenable. In its view, a conspectus of the evidence revealed that De Meyer had confidential information in the form of client lists, contact details and the like and was engaged in discussions or negotiations with these clients which led to some of them migrating to Blueberry. I agree with those findings. The information

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[9] 1984 (3) SA 623 (A) at 634H-I
[10] At 635C

was confidential for the reasons stated in *van Castricum* and De Meyer used that information for the benefit of his employer's rival while still in employment, in breach of his contract of employment and in unfair competition with the respondent. Those facts alone justified the interdict against De Meyer to prevent his further breach of the obligation he undertook and which endured beyond the termination of his employment.

41. The basis of the grant of the interdict against Blueberry is admittedly less clear. A careful reading of the judgment (granted in the context of the busy urgent court) reveals that there had been debate during argument about the scope of the relief. Kollapen J stated that he was mindful "not to make orders that have the effect of stifling lawful competition and that could operate to the prejudice of the respondents (appellants) in an open and free market". From this it may be deduced that Blueberry was interdicted on the basis that its conduct in acting in collusion with De Meyer constituted unlawful competition.

42. The conduct of Blueberry in using the information supplied to it by De Meyer involved the commission of what might rightly be regarded as a civil wrong. While its conduct did not constitute a breach of contract, it served as an inducement to De Meyer to breach his. Its undertaking to indemnify migrating clients for legal costs in the event of any dispute arising with the respondent is a clear indication that it was consciously and deliberately engaged in enticing clients away from the respondent; and was using the information in possession of De Meyer to achieve that end. The test of wrongfulness applied in such an instance is one of fairness and honesty having regard to the *boni mores* and the general sense of justice in the community.[11] A combination of two or more persons wilfully to injure another in his trade (by breach and inducement) will normally be unlawful, and if it results in damage, or may so result, should be actionable.[12] The wrongful use of a competitor's fruits and labour, as well as the misuse of confidential information in order to advance one's own business interests and activities at the expense of a competitor is therefore

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[11] *Schultz v Butt* 1986 (3) SA 667 (A) at 679
[12] *Sorrell v Smith* [1925] AC 700 at 712; and *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 (2) SA 173 (T) at 200

wrongful and actionable in terms of the *lex Aquilia*[13] and the extension of the relief to include the conduct of Blueberry was accordingly justified and permissible in law.

43. In the premises, the appeal against the judgment of 9 May 2014 has no prospects of success. For that reason the application for condonation and reinstatement of the appeal falls to be dismissed with costs.

44. As for the appeal in terms of section 18(4) of the Superior Courts Act against the order allowing the interdict to remain operative pending appeal, the appeal against paragraph 2 of that order is certainly moot and will have no practical effect. The six month period of prohibition has long since expired. The prohibition against the use of any confidential information and the return of it pending the appeal would not have caused irreparable harm to the appellants, and they have made out no convincing case that it would do so. On the other hand, the use of such information in all probability would have prejudiced the respondent as contemplated by section 18. I see no basis for concluding that the court *a quo* erred or misdirected itself in reaching its conclusion that the circumstances were exceptional and that the respondent would have suffered irreparable harm.

45. In the result I make the following orders:

i) The application for condonation and the reinstatement of the appeal is dismissed with costs.

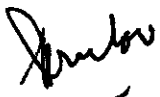
ii) The appeal in terms of section 18(4) of the Superior Courts Act 10 of 2013 is dismissed with costs.

JR MURPHY

JUDGE OF THE HIGH COURT

[13] *Schultz v Butt* 1986 (3) SA 667 (A) at 679

I agree



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JUDGE OF THE HIGH COURT

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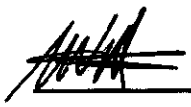

NV KHUMALO

JUDGE OF THE HIGH COURT

Counsel for Applicants:	Adv. C Woodrow
Instructed by:	AJ van Rensburg Attorneys
Counsel Respondent:	Adv JR Minnaar
Instructed by:	Pretorius Le Roux Inc.
Date Heard:	14 September 2016
Date of Judgment:	