



**THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE DIVISION, CAPE TOWN)**

In the matter between

Case No: 21137/14

**ENVIRON SKIN CARE (PTY) LTD**

**APPLICANT**

and

**NATIONAL PRIDE TRADING 31 CC t/a TOUCH  
OF SKINCARE AND CONCEPT SKINCARE  
CRAIG MITCHELL**

**FIRST RESPONDENT**

**SECOND RESPONDENT**

**Coram: ROGERS J**

**Heard: 2 AUGUST 2016**

**Delivered: 22 AUGUST 2016**

---

**JUDGMENT**

---

**ROGERS J:**

## Introduction

[1] The applicant instituted these proceedings in November 2014 for final interdicts against alleged trade mark infringement, passing-off and injurious falsehoods. Opposing and replying affidavits were filed in February and March 2015. In February 2016 the matter was set down for hearing on 25 May 2016.

[2] The applicant did not file heads of argument. On 18 May 2016 the respondents' counsel, Mr Dickerson SC and Ms Vaughan, filed their heads.

[3] On 19 May 2016 the applicant delivered a postponement application on the grounds that its attorneys had only learnt of the set-down on 4 May 2016, leaving them insufficient time to engage the advocate who previously assisted them. The postponement application was opposed. After hearing argument Sher AJ postponed the case to 1 August 2016, directing the applicant to pay the wasted costs including the costs of two counsel.

[4] On 6 July 2016 the applicant's counsel, Mr Eloff SC, filed his heads. On the same day the applicant delivered interlocutory applications for leave to file supplementary evidence and to amend its notice of motion so as to seek interdicts in respect of further alleged falsehoods. Mr Eloff's heads were based on the success of the interlocutory applications.

[5] On 1 August 2016 the interlocutory applications, which were opposed, and the main case served before me. By that stage the applicant no longer persisted in claiming trade mark and passing-off relief. Counsel agreed that if I were to grant the interlocutory applications the main case would have to be postponed to afford the respondents an opportunity to amplify their provisional response to the supplementary evidence. I thus directed that counsel should argue the interlocutory applications together with the fate of the main case if I were to refuse the interlocutory applications.

### Factual background

[6] The applicant manufactures skincare products under the name Environ. These products are sold locally and internationally by approved distributors.

[7] The second respondent ('Mitchell') controls the first respondent ('NPT'). NPT previously conducted business under the name First for Skin. I shall refer to this business as B1. NPT was not an approved distributor. This did not preclude its buying Environ products from approved distributors and on-selling them. According to Mitchell, the retail price of Environ products abroad is considerably higher than the domestic retail price. He alleges that the applicant engages in price-fixing to achieve this result. The applicant denies this. Be that as it may, Mitchell saw a business opportunity in the price differential. Through NPT he sold domestically sourced Environ products to customers abroad. This was an online business. I shall refer to its website, conducted under the name First for Skin, as W1.

[8] In 2009 the applicant launched proceedings in England against certain parties, including Mitchell and NPT, for injunctions in respect of alleged trade mark infringement and passing-off. Mitchell claims that this was part of a campaign to prevent his lawfully exploiting the price differential. Although he did not regard the English proceedings as justified, he could not afford to oppose. The result was that on 28 July 2009 an injunction by default was granted by the Chancery Division of the High Court in England.

[9] The applicant's case is that in consequence inter alia of the Chancery order Mitchell has since 2010 conducted the same business first under the name Touch of Skincare and subsequently Concept Skincare. For convenience I shall refer to the businesses conducted under these two names as B2 and B3 and the websites by means of which their online businesses were or are conducted as W2 and W3. The applicant asserts that one or both of the respondents are responsible for the allegedly false statements proclaimed on W2 and W3.

[10] The respondents deny that they conducted B2 or that they now conduct B3. They do not name the proprietor of B2. To the extent that such a person existed, I

shall identify same as X. The respondents allege that B3 is a business conducted by Concept Skincare LLC ('CSC'), an American company of which they are not shareholders or directors. Mitchell says that in consequence of the English proceedings NPT stopped its business of selling Environ products directly to customers online and instead confined its operation to that of a wholesaler, buying Environ (and other) products from distributors and selling them inter alia to X and now to CSC. The respondents deny responsibility for any alleged false statements on W2 and W3 (I will refer to this as the link issue). They in any event deny the falsity of certain of the impugned statements and say that CSC has made corrections in respect of any statements which may have been inaccurate.

### The interlocutory applications

[11] The supplementary evidence which the applicant wishes to introduce concerns (i) the alleged link between the respondents and W2 and W3; (ii) further allegedly false statements 'recently' identified on W3. The application to amend the notice of motion depends on the granting of the second leg of the supplementary evidence.

[12] The general principles governing the interlocutory applications are trite. Ordinarily only three sets of affidavits are allowed in motion proceedings. The general rule must not be applied rigidly. There is a measure of flexibility, controlled by the judge's discretion, bearing in mind that a litigant who tenders an affidavit late and out of its ordinary sequence is seeking an indulgence, not asserting a right (*James Brown & Hammer (Pty) Ltd v Simmons* 1963 (4) SA 656 (A) at 660E-H; *Standard Bank of SA Ltd v Sewpersadh* 2005 (4) SA 148 (C) paras 9-10). It has been said that the question is ultimately one of fairness to both sides (*Milne NO v Fabric House (Pty) Ltd* 1957 (3) SA 63 (N) at 65A). The factors the court will take into account in assessing whether to allow a supplementary affidavit include (i) the reason why the evidence was not produced timeously; (ii) the degree of materiality of the evidence; (iii) the possibility that it may have been shaped to 'relieve the pinch of the shoe'; (iv) the balance of prejudice to the parties; (v) the need for finality in judicial proceedings; (vi) whether the additional evidence was omitted through inadvertence or whether the party previously elected not to place it before the court

because he thought it unnecessary (*Nick's Fishmonger Holdings v Fish Diner in Bryanston CC 2009 (5) SA 629 (W)* at 642 B-D).

### *The linking evidence*

[13] The supplementary linking evidence comprises an affidavit by a computer expert, one Ahlers. He says that an internet user logging onto W2 is automatically redirected to W3. This is uncontroversial. A similar allegation was made in the founding papers. Mitchell's response to it was that B2, which was conducted through W2, ran into financial difficulties. Rather than leaving customers stranded, B2 (ie the unidentified proprietor X) redirected its customers to another supplier, B3 (CSC).

[14] More controversially, Ahlers says that through various technical investigations he has ascertained that one Michael James is the registrant of domain names incorporating the words Touch of Skincare and Concept Skincare. Mitchell is the registrant of certain other unrelated domain names. However these apparently unconnected websites, registered to James on the one hand and Mitchell on the other, share a single Google Analytics tracking code, being a code which allows the code's 'owner' to collect and analyse internet traffic data on the owner's websites and to effect search optimisation strategies. Ahlers infers from this that James and Mitchell are the same person or that there is at least a close association between them.

[15] In a provisional response the respondents, and their computer expert, one Ziffo, deny Ahlers' logic. The respondents continue to deny being the persons behind W2 and W3. Ziffo says that it is wrong to assume an association between websites merely because they share a Google Analytics tracking code. Each code can track up to 50 websites. A single Google Analytics account enables an IT service provider to track multiple websites in order to provide analytic reports to the owners of the websites. Google Analytics work is usually performed by persons who have the necessary skills such as marketing digital agencies and web developers. Business owners rarely have the necessary skills.

[16] Ziffo also denies the logic behind Ahlers' apparent assumption that if one website redirects a user to another website the websites have a common owner.

[17] The applicant did not deal with Ziffo's provisional views in reply.

[18] The relationship between the respondents on the one hand and B2/W2 and B3/W3 on the other was always going to be contentious. At least on the applicant's version, the respondents – following the English proceedings – sought to 'put daylight' between themselves and the online business by changing its name and conducting it through new websites. It was thus important for the applicant from the outset to establish the link. The applicant did indeed attempt to offer some such evidence in its founding papers, through an affidavit by one Potter who conducts intellectual property investigations. He established that W1 redirected users to W2 (Mitchell seems not to dispute this) and that the domain names for W1 and W2 were registered through a domain name registrar in the USA (which also seems not to be controversial).

[19] The applicant may be concerned that Potter's affidavit does not take them very far. However, if the applicant was concerned about the strength of its evidence, it should have caused further investigations to be undertaken before launching the main case.

[20] In the founding affidavit in support of the interlocutory application the applicant's deponent, Ms Carstens, said that following the execution of her replying affidavit on 18 March 2015 she 'discovered additional evidence' linking the respondents to B3/W3. Later she said that Ahlers had 'recently' conducted investigations into the ownership of various domain names. Although the interlocutory applications were only served on 6 July 2016, her affidavit was dated 30 June 2016 and Ahlers' affidavit 1 July 2016.

[21] The respondents challenged the adequacy of this bald explanation. In reply Carstens provided the sort of detail I would have expected to find in her founding affidavit. She referred to settlement negotiations which took place in the latter part of 2015 and which came to an end in February 2016. In the meanwhile during

December 2015 the applicant engaged Ahlers' company to conduct an audit of the applicant's 'digital brand assets'. This was unrelated to the litigation. During April/May 2016 Ahlers 'flagged' various sites as being harmful to the Environ brand because they disseminated misinformation. W3 happened to be one such site. Ahlers suggested that through various techniques he might be able to extract more concrete information about the ownership of W3. He got the go-ahead and gave Carstens an 'initial report' on 23 May 2016. The report was made available to the applicant's attorneys who required Ahlers to provide a 'more comprehensive analysis'. This 'eventually culminated' in Ahlers' affidavit of 1 July 2016.

[22] This is unsatisfactory. I would have expected the applicant, a well resourced entity, to have sought information from an appropriate digital expert before launching the main case. Even if Carstens' explanation were sufficient, she should have given her full explanation in the affidavit made in support of the interlocutory application and not left it for reply.

[23] The applicant anticipated as early as 'April/May 2016' that Ahlers might be able to link the respondents to B3/W3. By 23 May 2016 the applicant had Ahlers' initial report. More than six further weeks were allowed to pass before the interlocutory applications were delivered. Particularly since the applicant would be seeking an indulgence, it needed to act with due expedition. The applicant has not disclosed Ahlers' initial report. The affidavit he subsequently filed is not so detailed and complex as to have justified the six-week delay.

[24] There is a further aspect which troubles me. The applicant launched its postponement application on 19 May 2016. It is a reasonable inference from Carstens' explanation in the interlocutory applications that by this date she was awaiting a report from Ahlers which would hopefully shore up the applicant's case. Yet no mention was made of Ahlers' investigation in the postponement papers. By the date the postponement application was heard the applicant actually had Ahlers' initial report. While I have no reason to doubt that the applicant's attorneys only learnt of the set-down at a late stage, it is difficult to resist the conclusion that the applicant expected that if a postponement were granted it would have an opportunity

to adduce Ahlers' evidence. There should have been frank disclosure so that Sher AJ could properly assess the applicant's bona fides in seeking a postponement.

[25] The respondents' provisional response to Ahlers' proposed evidence (to which the applicant did not reply) suggests that his evidence is unlikely to be conclusive and that to assess its true weight there would have to be oral evidence from the experts. However, before this could happen further supplementary answering and replying papers would have to be filed, calling for a second postponement. There has already been one postponement at the applicant's cost. The respondents complain that they are facing a well-heeled litigant with deep pockets for litigation.

[26] In summary, I do not think there is a satisfactory explanation why the evidence was not produced timeously. The explanation ultimately advanced was not contained, as it should have been, in the founding affidavit in support of the interlocutory application. While the supplementary evidence, if true, might be material, its correctness will probably require oral evidence, which is not the norm in motion proceedings. There has already been one postponement and the need for finality thus assumes particular significance. In my discretion I thus decline to receive the supplementary linking evidence.

#### *The further alleged falsehoods*

[27] The falsehoods alleged in the founding papers were set out in annexure "X" to the notice of motion. They were grouped under four headings.. The applicant wishes to substitute the said annexure with a new annexure "Y". The only change is the addition of some further alleged falsehoods in respect of the first heading (the additions comprising items (iii) – (xvi) of "Y").

[28] I shall deal later in more detail with the falsehoods alleged in the founding papers. What I note at this stage is that the additional alleged falsehoods do not seem to me to travel materially beyond the original complaints. If the respondents were interdicted from perpetuating the falsehoods alleged in annexure "X", they would also be precluded from making the statements which the applicant wishes to



insert by way of annexure “Y” because those statements would contain the same essential falsehoods.

[29] In justifying the late application to supplement the evidence on the injurious falsehoods, Carstens said that it has been ‘continuously necessary’ for the applicant to examine the respondents’ websites to deal with queries from customers who are confused or misled. In conducting a ‘recent examination’ of the websites, she discovered ‘misleading product specific claims’ additional to those mentioned in the founding papers.

[30] Mitchell responded by saying that Carstens’ assertions were ‘demonstrably untrue and misleading’. He noted that she had ‘avoided’ disclosing the date on which the applicant supposedly discovered the new false statements. He said that the statements in question had been known to Carstens for more than a year, pointing to the fact that all but one of them were contained in annexure “VDC56” to Carstens’ founding affidavit in the main case. According to Mitchell, the product-comparison table from which the applicant extracted items (vi) – (xvi) of annexure “Y” had been on W3 since at least 19 May 2014. Ziffo, using an internet archive which stores the historical content of webpages, retrieved and annexed the relevant part of W3 as it existed on 19 May 2014, 9 November 2014 and 18 December 2014. The table is to be found in each iteration of W3.

[31] Mitchell concluded by stating that, in the light of the applicant’s vigilance in monitoring W3, it must have known of the ‘new’ statements since at least December 2014 if not earlier.

[32] Carstens’ reply is distinctly lame. She says that Ziffo’s annexures only provide ‘snapshots’ at specific points in time. While that may be true, Carstens does not say or provide any evidence that the product-comparison table disappeared between the various dates for which Ahlers was able to retrieve archive information. She also says that although annexure “VDC56” might contain ‘much of the same information’, the statements are not identical and that there have been some ‘minor alterations’. This does not detract from the point, however, that in substance the statements in question were known to the applicant when it launched the main case.

[33] Carstens then refers to a letter dated 10 June 2015 which the respondents' attorneys addressed to the applicant's attorneys. They stated inter alia that the 'misleading statements' complained of in the main case had been addressed by changes to W3, even though in the respondents' view the statements were not misleading. Carstens says that following the receipt of this letter the applicant was under the impression that the misleading statements either had been or would be addressed. It was this impression which prompted the applicant to enter into settlement discussions. In the 'midst' of the settlement negotiations, in October 2015, she noticed that the misleading statements had not yet been removed. However because settlement negotiations were ongoing the applicant did not introduce the supplementary evidence at that stage.

[34] Carstens says that settlement negotiations terminated in January 2016. Following such termination (presumably in early 2016) the applicant discovered that W3 no longer reflected the misleading statements and it was thus assumed that they had been removed. She claims that throughout the 'negotiating period' and up to April/May 2016 the applicant conducted only 'ad hoc investigations' of the respondents' websites. The applicant was thus not aware that the respondents' unlawful conduct had continued. The issue only reached a 'critical mass' when the information discovered by Ahlers in May 2016 was communicated to the applicant.

[35] According to Carstens, the applicant and its attorneys then conducted 'thorough investigations' of the websites and discovered that the misleading statements that form the subject of the interlocutory application had been republished. This was discussed in consultation with senior counsel on 15 June 2016 and a decision was made to supplement the applicant's evidence.

[36] Once again, we have here an explanation in reply which should have been contained in the founding affidavit in support of the interlocutory applications. The replying affidavit paints a very different picture to the bald explanation in the founding affidavit. The respondents have not had an opportunity to comment on the 're-publishing' thesis. In any event the explanation in reply is unsatisfactory. One still does not know why the complaints which the applicant now seeks to introduce were not included as part of the main case. There was also no justification for the

applicant to have waited for Ahlers' affidavit. The application to adduce supplementary evidence of alleged falsehoods is quite distinct from the application to adduce supplementary linking evidence.

[37] Although the respondents were not able to respond to the explanation in the replying affidavit, their counsel in argument said that Carstens' description of settlement negotiations was overblown. The 'negotiations' comprised: (i) the respondents' attorneys letter of 10 June 2015, mentioned above, in which they invited the applicant to withdraw the application; (ii) a response on 11 August 2015, setting out an unacceptable counter-offer; (iii) a further letter from the respondents' attorneys dated 3 September 2015 with a further proposal; (iv) a rejection from the applicant's attorneys on 26 January 2016, almost five months later.<sup>1</sup> The 'ongoing settlement negotiations' asserted by Carstens thus comprised two exchanges of correspondence 'with intervening periods of complete inertia on the part of the applicant' (counsel's words).

[38] Once again, therefore, one has an unsatisfactory explanation for the failure to adduce the evidence at an earlier time and a failure to advance such explanation as there was in the founding papers in support of the interlocutory application. The evidence lacks materiality – it is not a real advance on the falsehoods alleged in the original papers. If the evidence were allowed there would need to be a further postponement to allow the respondents to deal with it substantively. Together with the balance of prejudice and the need for finality, these circumstances impel me to reject the requested indulgence.

#### The main case

[39] This being my decision, I proceed to consider the fate of the main case without regard to any of the material contained in the interlocutory applications.

[40] Mr Eloff did not argue that the respondents' denial that they were the persons behind W2 and W3 was so far-fetched or untenable that I could reject it on the papers (cf *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) paras 55-56).

---

<sup>1</sup> This correspondence was part of the previous postponement application.

What he submitted is that there was reason to doubt the truthfulness of the respondents' version. Particularly since this concerned matters peculiarly within their knowledge, it would be just to require Mitchell to be cross-examined and to require the respondents to make discovery on the link issue before such cross-examination. He did not ask for a general referral of the link issue to oral evidence.

[41] In support of this proposed course Mr Eloff referred me inter alia to *Moosa Bros & Sons (Pty) Ltd v Rajah* 1975 (4) SA 87 (D). I do not think that *Moosa* is of assistance. It deals with the circumstances in which a court may, at the instance of a respondent, require a deponent for the applicant to be cross-examined, even though the respondent cannot deny what the deponent says. This is situation (d) of the four situations identified by Murray AJP in the well-known case of *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163. Unlike situations (a), (b) and (c), situation (d) does not raise a genuine or real dispute of fact and the court is entitled to determine the case on the papers. There is, however, a discretion to require the deponent to be cross-examined.

[42] In the present case the party seeking cross-examination is the applicant. There is a dispute of fact of the kind contemplated in Murray AJP's situation (a). On behalf the respondents, Mitchell – a person with direct knowledge of the facts – denies that he or NPT are the persons behind W2 and W3. The question is whether, because of this dispute of fact, I should dismiss the application or whether I should allow some form of oral evidence.

[43] If the question depended solely on whether there is reason to doubt the truthfulness of Mitchell's version, I would have felt little difficulty in allowing oral evidence. If Mitchell were providing such evidence for an applicant, a respondent's deponent might with some justification say that, although she does not have direct knowledge of the facts, Mitchell's version is untruthful or biased or unreliable. The case would then fall within Murray AJP's situation (c) or perhaps (d).

[44] The circumstances which call Mitchell's version into doubt include the following: (i) that W2 started shortly after the Chancery order was granted; (ii) that W3 started shortly after the applicant's attorneys foreshadowed legal steps in

respect of W2; (iii) the similarities between W1, W2 and W3; (iv) that when W1 was discontinued users were automatically redirected to W2 and that when W2 was discontinued users were automatically redirected to W3; (v) that Mitchell has not disclosed X's identity; (vi) that Mitchell has not disclosed the identity of the persons in control of CSC, despite the fact that NPT is CSC's only or major supplier of Environ products; (vii) the implausibility that first X and then an American company would, without close input from Mitchell, become major online suppliers of a South African product with a sales pitch very similar to that which Mitchell had deployed on W1 and with the risk that they might be pursued by the applicant; (viii) the implausibility that Mitchell would have been prepared to share his margin first with X and then with CSC in circumstances where they could have contributed little by way of expertise and product information; (ix) that the American attorney who has made an affidavit *inter alia* regarding the existence of CSC has not disclosed the identity of its controllers or said that Mitchell is not the person to whom he looks for instructions; (x) the facts revealed by two test purchases, both of which show that products ordered via W2 and W3 were dispatched to foreign buyers from South Africa; (xi) that proceedings directed at the respondents have apparently brought about alterations to W3.

[45] However the test is not whether I have reason to doubt the truthfulness of Mitchell's version. It is the applicant which chose to seek final relief on motion. On its thesis the respondents are not honourable people. The applicant could not reasonably have expected Mitchell to admit that he was behind W2 and W3. Unless the applicant had virtually irrefutable proof, its proper course was to issue summons so that it could obtain discovery and reap the advantages of oral evidence. In this respect the position of an applicant is very different from a respondent who through no choice of his own is embroiled in motion proceedings and thus denied the benefits of a trial action.

[46] The application was not urgent and was not brought as such. If there was need for urgent protection, the applicant could have sought an interim interdict pending the outcome of an action. The applicant would then have needed to address the question of irreparable harm and balance of convenience. As will

appear from my brief discussion below on the question of harm, the applicant might have battled to show irreparable harm but this does not affect the principle.

[47] In deciding whether to accede to the request for Mitchell's cross-examination preceded by discovery, I think it permissible and appropriate to take into account the scale of the harm against which the applicant is seeking to protect itself. The more real the harm and the greater its impact, the more one might incline to allow the oral evidence (though this would not be decisive). Of course apprehended or actual harm, in the sense of infringement of a right and resultant prejudice, is an independent requirement for a final interdict (*LAWSA* 2<sup>nd</sup> Ed Vol 11 para 398). But even if an applicant passes this threshold, the infringement and prejudice might be adjudged insufficient in all the circumstances to justify extending the life of the application by way of oral evidence.

[48] Since the applicant seeks final relief and since there is no request to refer the issues relating to infringement and prejudice to oral evidence, I must assess the question of harm on the basis of the respondents' version where it differs from the applicant's.

[49] One should bear in mind that in general the respondents, whether as suppliers of CSC or as the persons actually conducting CSC's business, have no reason when selling Environ products to badmouth them.

[50] I deal first with para 2 of annexure "X". The applicant complains that W2 and W3 incorrectly state that the applicant's Roll-CIT range involves the puncturing of the epidermis with micro-needles. The applicant has provided evidence that this is not so. In the answering affidavit Mitchell was content to accept the applicant's version but said that the offending statement has been removed from W3. There is no evidence that the statement has been repeated. Furthermore Mitchell provided compelling evidence to support his assertion that what was said on W2 and W3 was a reasonable interpretation of what the applicant itself had said, *inter alia* in a presentation made by the applicant's founder in Paris in March 2010.

[51] I deal next with para 4 of annexure “X”. The impugned statement was contained not on a website but in an email promotion, the author purporting to be one ‘Amy’ of CSC. In the email she said that C-Boost had ‘long been a favourite of mine’ and that CSC was very excited to launch ‘an exciting new upgrade – the DermaFix ACC Vitamin C!’. As a ‘loyal customer’, the recipient of the email would get an exclusive chance ahead of everyone else to buy the new product. The promotional email ended: ‘Using C-Boost? Upgrade today. You’ll LOVE the NEW DermaFix ACC Vitamin C’. It is common cause that C-Boost is an Environ product and that ACC is not. The applicant complains that these statements falsely proclaimed that Environ manufactures ACC and that it is an upgrade from C-Boost.

[52] In respect of this complaint the respondents might plausibly have had reason to proclaim a falsehood, since they were promoting a competing product. However Mitchell said in his opposing affidavit that the email campaign was a limited historical promotion which ran its course and the content of which was not reused (the promotion was in September 2014). There is nothing to gainsay this. The statements in question have apparently never appeared on W2 or W3.

[53] Mitchell also said that CSC did not claim in the email that ACC was an Environ product; CSC was merely recommending ACC to customers who had previously used C-Boost. This explanation is disingenuous. The word ‘upgrade’ clearly conveys that the later product is a new and improved version of the earlier one. Recipients may well have been misled into thinking that ACC was an Environ product. Nevertheless the falsehood appears now to be of historic interest only. Furthermore the statements would only need to be slightly modified in order to convey that which CSC and the respondents could legitimately say, namely that in their view ACC is a better product and that users of C-Boost should switch to ACC.

[54] This leaves the statements in paras 1 and 3 of annexure “X”. Since they are related I take them together. In various ways W2 and W3 contain statements to the following effect: (i) that Environ’s AVST range was essentially a 2008 repackaging of Environ’s earlier ‘first-generation’ Original range; (ii) that Environ had launched the AVST repackaging to raise the range’s price points, resulting in a 30% price increase which was unjustified; (iii) that the 2008 AVST range had in turn been

superseded by Environs' 2012 'second generation' A+ Original range which provided a complete skincare program; (iv) that erstwhile AVST users who wanted to take their regime 'to the next level' could alternatively (ie in the alternative to using the A+ Original range) 'upgrade directly' to Environ's lonzyme CQuence range, which was Environ's 'gold standard product'.

[55] All of the products which the respondents were promoting by way of these statements are Environ products.

[56] The applicant says that the AVST range has not been superseded by the so-called A+ Original range and that applicant has never produced anything called 'A+' Original. Carstens says that the AVST range is different from, and in some instances superior to, the Original range. There is no 'second-generation' Original range. Carstens also says that it is a 'blatant untruth' to say that a customer's skin regime would be taken 'to the next level' by switching from AVST to lonzyme.

[57] In response Mitchell says the following. The AVST brand was introduced in 2008. It is an export-only product. The applicant's own documents show that it was targeting a price for AVST midway between the Original and lonzyme range. The minutes of an Environ conference held in 2007 indicate that the AVST branding was the applicant's attempt to deal with the fact that online sales to foreign customers, which exploited the price differential between the domestic and foreign pricing of Original products, were eroding the approved distributors' foreign turnover.

[58] In regard to the Origin range, Mitchell says that it was repackaged and rebranded in 2011/2012. This is what W2 and W3 were referring to as the 'second-generation' Origin range. The prefix 'A+' was based on the applicant's own advertising. Mitchell annexed a copy of an advertisement in which tubes of the repackaged Original products are displayed beneath the words 'A+ Brilliant Skincare'. However, and in apparent recognition that the repackaged range is not actually called 'A+ Original', W3 has been corrected.

[59] As to the second-generation Origin range having superseded the AVST range, Mitchell says that the applicant's own authorised distributors have a chart



which furnishes the (second-generation) Original equivalents of the AVST range (eg AVST 'mild' = Original Debut etc).

[60] Regarding the advice to customers that they could, as an alternative, switch to the lonzyme range, Mitchell alleges that the applicant's own marketing material says of this range (i) that it is one of the 'most advanced skincare systems in the world': (ii) that it enables users to achieve results 'that were previously considered impossible to achieve'; (iii) that it is Environ's 'premium range of skin care products'; (iv) that this 'improved range is the most luxurious environment home treatment available'.

[61] In reply Carstens acknowledges that the Original range underwent 'some alterations' between 2011/2012, 'mostly limited to its packaging'. She says that the concentration of vitamin A and antioxidants remained the same. Later she says the only changes were 'cosmetic' (pun perhaps not intended). In regard to the AVST/Original conversion chart, she says it is 'out of date' and in any event limited to a comparison of vitamin A concentrations. She notes the respondents' removal of the reference to the Original range as 'A+' but says there is no assurance that there will not be a repetition.

[62] As to the lonzyme range taking users to the 'next level', she says that the applicant has no reason to promote one range above another whereas the respondents have a motive to downplay AVST: because AVST is an export-only product, the respondents cannot acquire it locally for sale abroad and thus might wish to promote products like Original and lonzyme as preferable to AVST. While this might be true, it may also be true that the applicant has a reason to promote AVST abroad in circumstances where it is not in truth superior to the lower-priced and differently branded Original products.

[63] I am not in a position to decide whether AVST is in fact superior to the current Original range in any material respects. While the applicant may dislike what the respondents say about Environ's pricing strategy for AVST, I cannot on the papers find that those statements are false (which is not the same as saying that they are true). The reference to A+ in describing the current Original range has been

explained and corrected. The impugned statements regarding lonzyme do not appear to me to be inconsistent with what Mitchell says is the applicant's own marketing material.

[64] In short, in the absence of a more detailed investigation into competing product claims, which could only be achieved by oral evidence (which the applicant does not seek), I do not think that on the papers the applicant has established that any material falsehoods are being perpetuated or that serious prejudice is being suffered by the applicant.

[65] For these reasons I have come to the conclusion that I should not accede to the request for oral evidence in any form, even limited to Mitchell's cross-examination. It follows that the main application fails.

### Conclusion

[66] I accordingly make the following order:

(a) The interlocutory applications dated 6 July 2016 are dismissed with costs, including those attendant on the employment of two counsel.

(b) The main application is dismissed with costs, including those attendant on the employment of two counsel.

---

ROGERS J

### APPEARANCES

For Applicant

Mr CM Eloff SC

Instructed by

Adams & Adams

28<sup>th</sup> Floor, 1 Thibault Square

Cnr Long Street & Hans Strijdom Avenue

Cape Town

For Respondents

Mr JG Dickerson & Ms BJ Vaughan

Instructed by

Bernadt Vukic Potash & Getz

11<sup>th</sup> Floor, 1 Thibault Square

Cnr Long Street & Hans Strijdom Avenue

Cape Town