

10491/05

1]In the matter between:

FREEFALL TRADING 211 (PTY) LIMITED
t/a *PROPERTY TRADER*

Applicant

2]and

PROPLINK PUBLISHING (PTY) LIMITED
RENIER JANSEN VAN VUUREN

First Respondent

Second Respondent

ALVENÉ SWANEPOEL

Third Respondent

RANDALL WEAVER

Fourth Respondent

MARK HURTER

Fifth Respondent

3]_____

**REASONS FOR JUDGMENT:
DELIVERED 29 NOVEMBER 2005**

4]_____

5]GRIESEL J:

6]This application came before me in motion court as a matter of urgency. After hearing argument on 17 November 2005, I issued an order on 24 November 2005, dismissing the application with costs. I indicated at the time that written reasons for the order would be furnished in due course. These are my reasons.

Introduction

7]The applicant publishes and distributes a weekly magazine, *Property Trader*, in the Western Cape. The first respondent publishes and distributes a similar magazine, *SA PropLink.co.za*, in Gauteng, Mpumalanga, North West and Limpopo. During August 2005, the first respondent expanded its business to the Western Cape, thus starting to publish its magazine in competition with the applicant. Both magazines follow a similar format and advertise properties for sale on behalf of estate agents at a fee. Both are distributed through selected distribution points – mainly at shopping centres, supermarkets and cafés – where the magazines are placed in distinctive and readily accessible magazine stands of similar design, from which members of the public can remove copies of the magazines free of charge.

8]Both publications are published in colour on good quality paper in magazine format. The advertisements are arranged according to the different estate agencies marketing the individual properties and contain photographs of such properties, together with a brief description of each. By and large, the photographs and descriptions are arranged in rows and columns and each agency appears to have its own ‘house style’ insofar as corporate logo, details, colours, fonts and so on are concerned.

9]The second respondent is the marketing manager of the first respondent. The third respondent was previously employed as the applicant's senior designer, while the fourth respondent was in charge of the applicant's distribution. The fifth respondent was likewise employed by the applicant as an assistant to the fourth respondent. The third, fourth and fifth respondents are all now working for the first respondent.

10]The applicant alleges that the first respondent is, in general terms, competing with it unlawfully; more particularly, the applicant relies on alleged breaches of confidentiality agreements and restraints of trade by the third, fourth and fifth respondents, as well as alleged copyright infringements by the first and third respondents. In the process, so it was argued, the respondents are unlawfully using the applicant's confidential information as a 'springboard' to launch their own competing product. (The applicant originally also relied on alleged passing off, but this part of the claim was abandoned during argument and requires no further consideration.)

11]In its notice of motion, the applicant claimed the following final interdicts:

- '2. *that the first and second respondents be interdicted and restrained from employing the third, fourth and fifth respondents;*

3. *that the third, fourth and fifth respondents be interdicted and restrained from remaining in the employ of the first respondent;*
4. *that the third and fifth respondents be interdicted and restrained from breaching the provisions of clause 17 of the confidentiality agreements signed by them on 24 February 2004 and 9 July 2004 respectively;*
5. *that the fourth respondent be interdicted and restrained from breaching the restraint and confidentiality agreement signed by him on 7 July 2005;*
6. *that the respondents be interdicted and restrained from infringing the applicant's rights in and to the copyright in the designs, layouts and templates of the advertisements which appear and/or have appeared in the applicant's magazine [i.e. Property Trader] by either reproducing such advertisements in any manner or form, or making adaptations thereof.'*

Copyright

12]I find it convenient to deal first with the claim based on the alleged infringement of copyright. In terms of the provisions of the Copyright Act 98 of 1978 (*the Act*), copyright exists, *inter alia*, in ‘literary works’ and ‘artistic works’, ‘if they are original’.¹

13]Section 21(1) of the Act, so far as is relevant to the present enquiry, provides as follows, under the heading ‘*Ownership of Copyright*’:

‘(a) ...

(b) *Where a literary or artistic work is made by an author in the course of his employment by the proprietor of a newspaper, magazine or similar periodical under a contract of service or apprenticeship, and is so made for the purpose of publication in a newspaper, magazine or similar periodical, the said proprietor shall be the owner of the copyright in the work in so far as the copyright relates to publication of the work in any newspaper, magazine or similar periodical or to reproduction of the work for the purpose of its being so published, but in all other respects the author shall be the owner of any copyright subsisting in the work*

¹ Section 2(1) of the Act.

by virtue of section 3 or 4.

- (c) *Where a person commissions the taking of a photograph, the painting or drawing of a portrait, the making of a gravure, the making of a cinematograph film or the making of a sound recording and pays or agrees to pay for it in money or money's worth, and the work is made in pursuance of that commission, such person shall, subject to the provisions of paragraph (b), be the owner of any copyright subsisting therein by virtue of section 3 or 4.*
- (d) *Where in a case not falling within either paragraph (b) or (c) a work is made in the course of the author's employment by another person under a contract of service or apprenticeship, that other person shall be the owner of any copyright subsisting in the work by virtue of section 3 or 4.*
- (e) *Paragraphs (b), (c) and (d) shall in any particular case have effect subject to any agreement excluding the operation thereof and subject to the provisions of section 20.'*

14]No attempt was made by the applicant to spell out the category of protected goods into which such 'designs, layouts and templates' would fall. However, during argument, it was accepted by both sides that it must relate either to 'literary' or to 'artistic works' – if copyright exists at all.

15]I am not sure that either category is wide enough to accommodate the 'designs, layouts and templates' that the applicant seeks to protect. Likewise, even if such

designs etc were to be regarded as ‘literary’ or ‘artistic works’, I have grave doubts whether such works can qualify as being ‘original’.² Be that as it may, seeing that these points were not specifically canvassed during argument before me, I shall refrain from expressing any final views in that regard.

16]In the founding affidavit, the applicant based its cause of action in respect of copyright infringement on the following facts:

- (a) The third respondent, who was then employed by the applicant in terms of a contract of service as contemplated in s 21(1)(d) of the Act, was the author of the original works in designing and committing to material form drawings of the layout and design of the various advertisements according to clients’ specifications.
- (b) The aforementioned process required ‘considerable skill, time, labour and effort’.
- (c) At the time that the third respondent created the original works, she was a ‘qualified person’ within the meaning ascribed to that phrase in the Act, inasmuch as she was then a South African citizen and resident and domiciled within the Republic.

² Compare in this regard *Waylite Diary CC v First National Bank Ltd* 1995 (1) SA 645 (A).

- (d) Publication of the original works took place when the various magazines published by the applicant were distributed.

In the circumstances, so it was claimed, the applicant is the owner of copyright in the original works. The corresponding advertisements appearing in the first respondent's magazine constitute infringing copies of the original works in terms of s 23(1), read with s 7, of the Act inasmuch as they constitute reproductions or adaptations of the original works authored by the third respondent and in which the applicant owns copyright.

17]The applicant relied on a comparison between some of the advertisements appearing in the publications of the applicant and the first respondent respectively. It was submitted that the advertisements show a 'marked similarity' to one another, thus justifying the inference that the third respondent had simply copied the applicant's advertising material by means of its templates.

18]The third respondent denied that she had used the applicant's advertisements or templates to design the first respondent's advertisements. The respondents contended that similarities between the respective advertisements of the applicant and the first respondent are to be expected, especially in view of the following facts and circumstances:

- (a) The third respondent is the designer who is responsible for the design and layout of most of the advertisements published by the first respondent's magazine. She was also responsible, prior to her resignation, for the advertisements published in the applicant's magazine.

- (b) The same software package, *CorelDRAW*® (erroneously referred to in the papers as *Coral Draw*) was utilised to produce both sets of advertisements. It is freely available off the shelf in the computer trade and is used internationally for graphic design, page layout, digital imaging, etc.³

- (c) The advertisements are produced on instructions received from clients who are common to both the applicant and the first respondent. It stands to reason, therefore, that all details relating to such clients will inevitably be identical insofar as *inter alia* corporate logo, colours and contact details are concerned. (These assertions are amply borne out by some of the examples to which the respondents referred in their answering affidavits.)

- (d) What is more, where the same estate agent advertises in both publications, the properties offered for sale in the respective

³ Cf <http://www.corel.co.uk>.

advertisements will in most cases be the same, with the inevitable result that the contents of the advertisements will be identical. In short, the advertisements look the same, not because the third respondent copied the applicant's advertisements, but because the estate agents involved *want* them to look the same.

19]In these circumstances, the respondents argued that there was no causal connection between the alleged infringement and the original work. They relied in this context on *Dexion Europe Ltd v Universal Storage Systems (Pty) Limited*.⁴ Based on the facts summarised above, I agree with the submission on behalf of the respondents.

20]The respondents in any event denied that the applicant is the owner of copyright in the published works. They contended that, because the estate agents commission the applicant to create advertisements and pay for such service, the estate agents consider these advertisements to be their property. In support of this contention, the respondents relied on tacit agreements to this effect between the publishers of the property magazines (the applicant and the first respondent respectively) and the estate agents. They alleged that, if the applicant were to say to the estate agents that ownership in their advertisements vested in the applicant,

⁴ 2003 (1) SA 31 (SCA) para 4.

most estate agents would not continue advertising in the applicant's magazine.

21] This evidence by the respondents was not challenged or refuted on behalf of the applicant. It is not inherently improbable, so as to warrant its rejection merely on the papers; on the contrary, in my view, it would amount to sound business practice for an estate agent to retain ownership of copyright in its own advertising material. Section 21(1)(e) of the Act specifically envisages a situation where the parties may, by agreement, vary the consequences contemplated by the other provisions of s 21(1). In the circumstances, I have not been persuaded that the applicant is the owner of the copyright in the material in question.

22] Even if the applicant's argument regarding ownership were to be accepted, it carries within it the seed of its own destruction: The applicant claims that its original advertisements were produced by the third respondent by means of a process requiring 'considerable skill, time, labour and effort'. On the respondents' version (which must be accepted for purposes hereof, in accordance with the *Plascon Evans* rule⁵), the identical process is followed in producing the advertisements for the first respondent's magazine. It follows that, in creating the advertisements appearing in the first respondent's publication, the third respondent is not infringing the applicant's copyright, but is establishing independent

⁵ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H-I.

copyright in respect of the advertisements in the first respondent's publication.

23]In this regard, the learned authors of *Lawsa*⁶ refer to the example of two authors who, working independently of one another, arrive at the same result. In each instance, the author will obtain protection accorded to an original copyright work. By the same token, the third respondent – through her efforts – can establish copyright for both employers in the advertisements in the two separate magazines.

24]In these circumstances, I conclude that the applicant has not made out a case for protection in terms of the Copyright Act.

The Employment of the Third and Fifth Respondents

25]I now turn to consider the position of the third and fifth respondents. Both of them signed identical 'confidentiality agreements' with the applicant's predecessor-in-title on 24 February 2004 and 9 July 2004 respectively. Clause 17 of both agreements (referred to in prayer 4 of the notice of motion) reads as follows:

26]'17. RESTRAINT OF TRADE/UNFAIR COMPETITION

27]In accepting employment with the Company you specifically agree to and undertake that during and after termination of your employment, you will not in any way disclose to any person, unless

⁶ 5 *Lawsa* (2ed s.v. *Copyright*) para 18.

authorised to do so by the Company, whether directly or indirectly any information relating to the company or any secret or confidential information that may have come into your possession while you were employed, for a period of 12 months from termination.'

(On 7 July 2005, the fourth respondent signed a similar employment contract, containing an identical confidentiality clause, save that the applicable period in his case is three years, instead of 12 months. In addition, the fourth respondent also signed a restraint agreement. His position, therefore, stands on a somewhat different footing from that of the third and fifth respondents and will be considered separately later.)

28]It is evident from the wording of clause 17 that, notwithstanding the heading, the clause does not contain a 'restraint of trade' in the conventional sense; it merely prohibits unauthorised disclosure of 'any information relating to the company or any secret or confidential information'. Thus, there is nothing in their employment contracts that precludes the respondents from being employed by another employer or even from competing with the applicant. In the absence of an enforceable restraint agreement, it must follow that the relief claimed in prayer 3 of the notice of motion cannot be granted against the third and fifth respondents.

29]The corollary is that the relief claimed against the first and second respondents in prayer 2, likewise, cannot be granted insofar as the third and the fifth respondents are concerned: if they are not contractually precluded from working for anyone else, it follows that neither the first respondent nor the second respondent is precluded from employing them. (The position might have been different, had the first or second respondents incited or enticed the other respondents to breach their employment agreement with the applicant.⁷ On the evidence before me, however, the applicant has not made out such a case.)

30]I accordingly turn to consider whether the relief claimed in prayers 4 and 5 can be granted against any of the respondents, before considering the position of the fourth respondent separately.

The Design Issue and the Third Respondent's Position

31]As mentioned above, the applicant's case against the third respondent is based on the enforcement of the confidentiality clause quoted above. The inherent difficulties in endeavouring to police an order restraining an ex-employee from disclosing confidential information are well known. The position was succinctly summarised by Lord Denning MR In *The Littlewoods Organisation Ltd v Harris*,⁸ as follows:

⁷ Cf eg Van Heerden & Neethling *Unlawful Competition* 258; *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd and Others* 1981 (2) SA 173 (T) at 202G–H.

⁸ [1978] 1 All ER 1026 (CA) at 1033.

32]‘It is thus established that an employer can stipulate for protection against having his confidential information passed on to a rival in trade. But experience has shown that it is not satisfactory to have simply a covenant against disclosing confidential information. The reason is because it is so difficult to draw the line between information which is confidential and information which is not; and it is very difficult to prove a breach when the information is of such a character that a servant can carry it away in his head. The difficulties are such that the only practicable solution is to take a covenant from the servant by which he is not to go to work for a rival in trade. Such a covenant may well be held to be reasonable if limited to a short period.’

33]The difficulties alluded to by Lord Denning are amply illustrated by the facts of this case. The ‘confidential’ information that the applicant seeks to protect relates to the design and layout of the advertisements that appeared in *Property Trader*. In this regard, the applicant alleged that the third respondent ‘had access to all of the clients’ requirements regarding the presentation, their names and logos, the preferred method of setting out their advertisements, the general layout of the advertisements such as borders, shading, lines to indicate tables and columns, etc. All of this information was stored on templates. The templates were not made available to clients.’ (While it was originally suggested on behalf of the applicant that the third respondent might have appropriated the actual templates containing the clients’ requirements in respect of their advertisements, this

suggestion has been conclusively refuted by the respondents and has not been pursued on behalf of the applicant.) The question, therefore, is simply whether the information regarding the clients' requirements qualifies for protection in terms of the confidentiality clause quoted above.

34]The question as to whether or not information made available to an employee during the course of his or her employment is confidential is a matter that must be decided on the facts of each case. In *Townsend Productions (Pty) Ltd v Leech and Others*,⁹ the court accepted the following three requirements for information to qualify as confidential, quoting with approval from Van Heerden & Neethling:¹⁰

35]'First of all, and this is really self-evident, the information must not only relate to, but also be capable of application in, trade or industry. Secondly, the information must be secret or confidential. The information must accordingly—objectively determined—only be available, and thus known, to a restricted number of people or to a closed circle; or, as it is usually expressed by the Courts, the information “must be something which is not public property or public knowledge”. Thirdly, the information must, likewise objectively viewed, be of economic (business) value to the plaintiff.'

36]In the course of argument before me, the respondents also referred extensively

⁹ 2001 (4) SA 33 (C) at 53J–54B.

¹⁰ *Op cit* at 225. See also *Alum-Phos (Pty) Ltd v Spatz and Another* [1997] 1 All SA 616 (W) at 623g–624a.

to the decision of the Court of Appeal in *Faccenda Chicken Ltd v Fowler & Others*.¹¹ In that case, the respondent (Fowler), together with eight of his colleagues, left the employ of the appellant company (Faccenda) and opened a competing business, specialising in the sale and delivery of fresh chickens in the Midlands of England. Faccenda claimed that the respondents had improperly used confidential information obtained during their employment in order to compete with it. The information that Faccenda sought to protect was listed under five headings: (1) the names and addresses of customers; (2) the most convenient routes to be taken to reach the customers; (3) the usual requirements of individual customers, both as to quantity and as to quality; (4) the days of the week and the time of day when deliveries were usually made to individual customers; (5) the prices charged to individual customers.¹²

37]The claim was dismissed by the trial court. In dismissing the appeal, the Court of Appeal summarised the relevant principles relating to the law of confidentiality in the context of the relationship between employer and employee.¹³ In considering whether the information in question could properly be classified as ‘confidential’, the Court of Appeal regarded the following factors as relevant: (a) the nature of the employment; (b) the nature of the information itself which,

¹¹ [1986] 1 All ER 617 (CA).

¹² At 622a–b.

¹³ At 625d–627g.

while not properly described as a trade secret, is of such a highly confidential nature as to require the same protection as a trade secret *eo nomine*; (c) whether the employer impressed upon the employee the confidentiality of the information; (d) whether the information in question can be easily isolated from other information which the employee is free to use or disclose. On the facts of that case, the court held that none of the information relied on fell within the class of confidential information which an employee is bound not to use or disclose after his employment has come to an end.¹⁴

38]I am mindful of the *caveat* expressed on several occasions by our courts as to reliance on English authorities dealing with confidential information. Nevertheless, as pointed out by Stegmann J in *Meter Systems Holdings Ltd v Venter & Another*,¹⁵ such authorities can be of ‘considerable assistance’ in analysing and solving a similar problem on the principles of our law.

39]Applying these principles to the facts of this case, I am of the view that the applicant has failed to establish the requisite degree of confidentiality in respect of the information in question. In the first place, the applicant’s clients’ preferences regarding the design and layout of their advertisements are apparent from the advertisements that appear weekly in the applicant’s magazine. It has thus become

¹⁴ At 629*b*.

¹⁵ 1993 (1) SA 409 (W) at 427E–I.

a matter of public knowledge, thereby losing any quality of confidentiality that it might have had. Secondly, as explained by the third respondent, the information alleged to be confidential was obtained by her directly from the estate agents in question. It is fallacious for the applicant to claim in this context that the estate agents were *its* clients – as if it had some exclusive right to them. The fact of the matter is that those agents were simultaneously also the clients of the first respondent. They are and have always been entitled to place their property advertisements in whatever publication or advertising medium and in whatever format that they may prefer. Thus, information relating to their requirements does not, in my view, qualify as confidential.

40]In these circumstances, it cannot be found that the third respondent has acted in breach of the confidentiality clause in her employment agreement.

Distribution Points – Fourth and Fifth Respondents

41]The case against the fourth and fifth respondents is based on the premise that information relating to the applicant's distribution points – their location as well as the connections with retailers established in connection therewith – constitutes confidential information in the hands of the applicant, which it is entitled to protect against rival traders.

42]Although it has been suggested that the fourth and fifth respondents took a copy of the applicant's distribution list with them when they left the applicant's employment, the respondents have denied that this is the case. The fourth and fifth respondents accordingly claim that they are entitled, in their current employment with the first respondent, to utilise the information relating to the applicant's distribution points which they acquired during their former employment with the applicant. The applicant contended, on the other hand, that it is entitled to protect such information, which it regards as confidential.

43]As far as the issue of confidentiality is concerned, the same considerations discussed above¹⁶ apply. In addition, strong support for the respondents' stance is to be found in the judgment of the Court of Appeal in *Roberts v Etwell's Engineers Ltd*,¹⁷ where Lord Denning MR said:

44] 'It is settled law that a servant, having left his master's service, may, without fear of legal consequences, canvass for the custom of his late master's customers, whose names and addresses he has learned during the period of his service, so long as he does not take a list of them away with him... All the more so, an agent may do so, especially when the customers have been introduced by the agent

¹⁶ *Supra* paras The question as to whether or not information made available to an employee during the course of his or her employment is confidential is a matter that must be decided on the facts of each case *et seq.*

¹⁷ [1972] 2 All ER 890 at 894. Quoted with approval in *Freight Bureau (Pty) Limited v Kruger & Another* 1979 (4) SA 337 (W) at 341E–F. See also *Meter Systems Holdings Ltd v Venter & Another supra* n at 428F and *Faccenda Chicken Ltd v Fowler & Others supra* n at 625f–g.

himself. In the absence of express restriction (which must be reasonable) he cannot be restrained from canvassing the customers for a new principal.'

45]Applying the above test for confidentiality, I am of the view that the information relating to the applicant's distributors does not qualify for protection.

Fourth respondent – Restraint of Trade

46]This brings me to the case of the fourth respondent, who has, in addition to the confidentiality clause, bound himself in terms of a restraint of trade agreement, which reads as follows:

47] **RESTRAINT**

3.1 *The employee undertakes and warrants in favour of the Company ... that, for as long as he is employed by the Company and for a period of three (3) years from the termination date, he will not anywhere in the prescribed area being the Republic of South Africa be directly or indirectly interested, engaged, concerned or employed ... in any Company, firm, business undertaking, concern or other association of any nature which carries on business directly or indirectly in competition with any part, aspect, or facet of the business carried on by the company during the period during which he is employed by the Company.'*

48]Although the above restraint, on the face of it, appears to be unreasonably

wide, both as far as area and duration is concerned, the fourth respondent has confined his defence to the principle that enforcement of the restraint would be unreasonable because it does not serve to protect an interest worthy of protection.

49]It is settled law that a restraint is unenforceable as being contrary to public policy if the effect of enforcing the restraint would be unreasonable.¹⁸ The reasonableness of a restraint is assessed with reference to the broad interests of the community and the interests of the contracting parties *inter se*. When assessing whether the enforcement of the restraint would be unreasonable as between the contracting parties *inter se*, there are three questions to be asked:

- (a) Does the employer have an interest that deserves protection after the termination of the employee's services?
- (b) If so, is the ex-employee's conduct endangering that interest?
- (c) If so, does the employer's interest – viewed qualitatively and quantitatively – match up to the employee's interest in not being rendered inactive and unproductive?

If the answer to the third of these questions is in the negative (in other words, if

¹⁸ Cf *Basson v Chilwan and Others* 1993 (3) SA 742 (A) at 767C–768E.

the employee's interest outweighs the employer's), the enforcement of the restraint will generally be unreasonable and therefore contrary to public policy. This is a question of judgment, based on the facts of the case.

50]The interests of employers which have traditionally been found worthy of protection have generally fallen into one of two categories, viz trade secrets and trade connections.¹⁹ I have already found that, on the facts of this case, there can be no suggestion of trade secrets (or even confidential information) regarding the applicant's distribution points. As for the applicant's trade connections, this again relates to the same distribution points, with the added dimension of the personal contact of the fourth (and fifth) respondents with managers and owners of businesses at which the applicant's magazines are distributed.

51]In *Walter McNaughtan (Pty) Ltd v Schwartz and Others*,²⁰ the court dealt with the requirements before a protectable interest in customer connections can be established and held as follows:

52] 'A protectable interest in the form of customer connections does not come into being simply by having contact with an employer's customers. What is required is the establishing of relationships of such a nature that the employee could easily induce customers to

¹⁹ *Basson v Chilwan and Others* (*supra*) at 770C–E.

²⁰ 2004 (3) SA 381 (C) at 390D–G (other case references omitted).

follow him or her to a new business. Whether such relationships have come into being is a question of fact and depends on the nature of the employee's duties; his personality; the frequency and duration of the contact with customers; where such contact take place; what knowledge he gains of their requirements and business; the general nature of their relationship (including whether an attachment is formed between them, the extent to which customers rely on the employee and how personal their association is); how competitive the rival businesses are; in the case of a salesman, the type of product being sold; and whether there is evidence that customers were lost after the employee left.'

53]On the facts of this case, the applicant does not sell anything to the owners of the various distribution points, nor does he buy anything from them. The applicant simply approaches the owner of a particular retail outlet for permission to display its magazines in stands supplied by the applicant itself. These 'customer connections' with such distribution outlets do not strike me as the type of interest that would ordinarily be capable of protection by means of a restraint agreement. In any event, there is no evidence that the applicant has suffered any loss of business or turnover as a result of the entry into the market by the first respondent. Moreover, the fourth and fifth respondents denied that they have the required influence over managers and owners of the businesses at the distribution points.

54]In the circumstances, the applicant is not, in my view, entitled to enforce the

restraint in question against the fourth respondent.

Unlawful Competition

55]What remains is a somewhat nebulous claim based on the generic delict of unlawful competition. In the founding affidavit only one aspect of the conduct of the respondents was dealt with under this heading. This relates to the claim that the first respondent's magazine is the same as the applicant's magazine, only substantially cheaper. (*'Selfde as Propertytrader, maar teen ongelooflike lae tariewe.'*)

56]In argument, however, it was submitted that all the aspects dealt with above (save for that of copyright infringement) are properly categorised as unlawful competition. The applicant argued that the respondents' conduct amounted to a 'springboard' to launch their own product.

57]The applicant's argument calls to mind the remarks of Schutz JA in *Payen Components SA Ltd v Bovic CC and Others*,²¹ where the court held as follows:

58]'Unlawful competition should not be added as a ragbag and often forlorn final alternative to every trademark, copyright, design or passing off action. In most such cases it is one of the established categories or nothing.'

²¹ 1995 (4) SA 441 (A) at 453G.

59]In my view, this is particularly apposite on the facts of the present case. I have held that the respondents' conduct complained of does not amount to infringement of copyright, breach of restraint or of confidentiality, or to passing off. Whether it amounts to unlawful competition need not be decided, because it is clear that, even if the conduct amounted to unlawful competition, it cannot justify any of the relief claimed in the notice of motion.

Conclusion

60]For the reasons set out above, I concluded that the applicant is not entitled to any of the relief claimed. In the premises, **the application was dismissed with costs.**

61]

62]_____

63]**B M GRIESEL**

Judge of the High Court