

CREATIVE CREDIT (PRIVATE) LIMITED
versus
RICHARD TOMU
and
STEPHEN NESHAMBA
and
LAMECK NGOMA
and
K AND K INVESTMENTS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 29 April 2021 & 3, 6 & 20 May 2021

Urgent Chamber Application- Interdict

Advocate *R. Mabwe*, for the applicant
Mr *T. Chihuta*, for the respondents

MUSITHU J:

INTRODUCTION

The applicant is a company duly incorporated according to the laws of Zimbabwe. It specializes in electronics, solar and gas appliances. First, second and third respondents are ex-employees of the applicant. Upon leaving employment, first and second respondents founded the fourth respondent, whose line of business is more or less similar to that of the applicant. Fourth respondent was incorporated according to the laws of Zimbabwe. The applicant accuses respondents of certain business malpractices that it finds synonymous with unlawful competition and therefore a threat to its own business. For that reason, it approached this court seeking an interdict against the respondents. The relief sought reads as follows:

“TERMS OF THE FINAL ORDER

That you show cause to this Honourable Court why a final order should not be made in the following terms:

1. It is hereby declared that the first, second, third and fourth respondents engaged in unlawful competition against the applicant.
2. By reason of the unlawful competition aforementioned, the applicant has sustained loss for which the respondents are liable – upon quantification of said loss by a competent court – to compensate the Applicant.

3. The respondents be and are hereby ordered to pay costs of suit on a legal practitioner client scale jointly and severally the one paying the other to be absolved.

INTERIM RELIEF

Pending finalization of this matter an interim order is hereby granted in the following terms;

IT IS ORDERED THAT:

1. Pending finalisation of the case under HC 1688/21 the Respondents be and are hereby interdicted from: -
 - 1.1 Passing off their business, goods and wares as those of the Plaintiff;
 - 1.2 Diverting the Plaintiff's business and clients to the Fourth Respondent and or any other entity served promoted, controlled or otherwise advanced by the First, Second and Third Defendants;
 - 1.3 Plagiarising the Plaintiff's forms, systems and all intellectual property;
 - 1.4 Misleading the Plaintiff's financial partners into providing funding to the Defendants' business;
 - 1.5 Using the Plaintiff's documents, branded apparel and branded motor vehicles to advance the Fourth Defendant's business.

SERVICE OF PROVISIONAL ORDER

This Order may be served on the Respondents by the Applicant, Applicant's legal practitioners, or any attested member of the Zimbabwe Republic Police"

The matter was set down for hearing on 29 April 2021. Opposing affidavits were filed on behalf of all the respondents prior to the hearing. At the hearing, the applicant withdrew its application as against the third respondent, and sought a postponement of the matter to 3 May 2021 to enable its counsel to consider the remaining respondents' notice of opposition. On 3 May 2021, Ms *Mabwe* appearing for the applicant informed the court that applicant was abandoning part of its claim which was based on allegations of unlawful competition or restraint of trade. That significantly reduced the disputable issues. A settlement was therefore within sight. The matter was postponed to 6 May 2021 to allow the parties to further engage, with an out of court settlement in mind.

On 6 May 2021, the parties returned empty handed. They had failed to settle. Ms *Mabwe* submitted that applicant's main complaint was that the respondents were unlawfully competing with the applicant. The applicant's cause of action was grounded in delict. Paragraphs 1.2 and 1.4 of the interim relief sought spoke directly to that complaint. Mr *Chiwuta* submitted that the respondents had no problems if paragraphs 1.1, 1.3 and 1.5 of the interim order were granted in the interests of an amicable resolution of the matter. They had not acted in the manner complained

of by the applicant. They did not intend to do so in future. The respondents were however opposed to paragraphs 1.2 and 1.4 of the interim relief sought. The arguments before the court were consequently confined to paragraphs 1.2 and 1.4 of the interim relief sought.

FACTUAL BACKGROUND

Applicant claimed that civil servants constituted the bulky consumers of its products. It also engaged lenders and microfinance institutions to set up credit schemes for civil servants and other target groups that complied with its requirements. Over the years it developed a market that resonated well with its brand. First respondent was its sales representative for Mashonaland East. He was offered employment in July 2014. Second respondent was its country sales representative for Masvingo Province. He joined the applicant in January 2014. First and second respondents' contracts of employment contained confidentiality clauses which obliged them to protect applicant's trade secrets. They had access to confidential information which included applicant's clientele and trade secrets. They had also received extensive training on applicant's products, systems and marketing techniques.

First respondent resigned from employment in April 2021. Second had resigned in December in 2020. Applicant claims that the manner of their resignation was suspicious.

Applicant's Case

On 21 April 2021, applicant received a complaint from an aggrieved customer over some substandard goods purchased by that customer. From its investigations, applicant discovered that the goods had actually been supplied by the fourth respondent. That prompted applicant to investigate the fourth respondent. Its investigations revealed that fourth respondent was owned by first and second respondents. It was incorporated on 3 September 2020 when first and second respondents were still in the applicant's employ. Fourth respondent allegedly started passing off to the applicant's customers as far back as November 2020. It allegedly made sales in excess of ZWL12 658 061.63 to the applicant's customers. Those sales were never disclosed to the applicant by first and second respondents.

The applicant contended that first and second respondents violated their contractual obligations as employees of the applicant in that they: diverted applicant's clients to their company; plagiarized and stole applicant's stationary and used it in fourth respondent's business;

misled applicant's financial partners into providing funding to fourth respondent; used applicant's stationary, branded apparel and branded motor vehicles to pass off their business as that of the applicant. Text messages of the applicant's customers that were allegedly deceived were attached to the applicant's affidavit.

Applicant further averred that the respondents were engaged in unlawful competitive practices which were hurtful to the applicant's business. Such practices were manifested through: passing off of fourth respondent's goods as those of the applicant; using applicant's fruits and labour to their advantage; abusing and misusing applicant's confidential information in a manner that unlawfully enriched the fourth respondent to the applicant's detriment. There was a need for the court to intervene and stop the respondents' unlawful conduct. The applicant had since instituted summons for an interdict and lost income against the respondents. The urgent chamber application had been filed to avert further damage to the applicant's business.

Applicant claimed that it had established a *prima facie* case. Its goodwill, business connections and huge clientele base were all under threat. There was the concomitant threat of irreparable harm. Applicant claimed to have lost income in excess of ZWL12 658 061.43. It continued to lose clients to the respondents. Respondents were also accused of overcharging applicant's clients and delivering substandard products in the process. In so doing they were abusing the applicant's name. Applicant contended that the balance of convenience favoured the granting of the relief sought. Respondents were operating in a manner prejudicial to the applicant's business. Applicant claimed that the relief it sought would not drive respondents out of business. It simply wanted the illegal acts stopped. The matter was urgent. The applicant had moved with celerity soon after discovering these infringements.

Respondents' Case

First respondent deposed to the main affidavit on his own behalf and on behalf of fourth respondent. Second respondent deposed to a supporting affidavit. He associated himself with first respondent's opposing affidavit and averments made therein. The respondents' case is as follows. Fourth respondent's business was not dissimilar to that of the applicant. Fourth respondent was also involved in the business of credit facilitation for clients and customers. Its *modus operandi* was that when a customer showed interest in a particular product, fourth respondent would source

the product. The products were sourced from different manufactures and were branded by the manufacturer or supplier concerned. The products were available on the open market and sold to anyone. No products were branded in the names of the applicant or fourth respondent. Applicant's customers were mostly civil servants. In the case of fourth respondent, any person in confirmed employment and able to arrange a stop order facility with their employer could be a customer. Once a sale was made, the stop order facility was activated until full payment was made.

Fourth respondent further refined the payment system by roping in financiers who paid on behalf of the customer upfront, and thereafter recovered their money from the customer through an instalment arrangement. Respondents claimed that they identified a market opportunity which involved high risk customers, who ordinarily would not qualify under the applicant's scheme. These constituted the bulk of the fourth respondent's customers.

Respondents averred that applicant had no intellectual property rights over its products. Applicant's methodology was not peculiar to it alone. The methodology had been popularized by several other entities in the same line of business. If applicant's claim was based on perceived violations of its intellectual property rights, then it ought to have protected those rights through registration. Without that, applicant could not claim monopoly over the civil service market or any other market for that matter. It was free for all. Customers were free to approach a supplier of their choice.

First respondent admitted that he resigned from applicant's employ in December 2020. He did so voluntarily. He had irreconcilable differences with the applicant. His exit was without drama. The required handover-takeover with his successor was smooth. He denied acting in any malicious manner towards the applicant. Applicant had actually tried to persuade him to stay on for another three months but he declined. First respondent admitted that he and second respondent received training from the applicant. However, at the time they joined the applicant they had already acquired considerable experience in their respective fields. He considered it absurd that they should not be allowed to use their knowledge and skill elsewhere. Whilst admitting that they registered the fourth respondent when they were still employees of the applicant, first and second respondents denied that fourth respondent was unlawfully competing with the applicant.

Respondents denied supplying any substandard material or passing off as applicant to any of the applicant's customers. No evidence was placed before the court linking them to the alleged complaints. Respondents argued that it was not possible for them to conduct sales or receive payment in the applicant's name since the banking details for the two entities were different. Respondents dismissed the sales schedule attached to the applicant's affidavit showing an alleged financial prejudice of ZWL12 658 061.43. They averred that its source was unknown and could not be safely relied on. The schedule did not identify who applicant's customers were and how they were diverted by the respondents. Also attached to the applicant's founding affidavit was a template of an "Application form and invoice" that was allegedly plagiarized by respondents. Respondents denied plagiarizing the document. The document was in fourth respondent's name. It was just a standard form which could not have been plagiarized as alleged.

An agreement between fourth respondent and an entity called Red Sphere Finance (Private) Limited (Red Sphere) for the provision of credit facilities was also attached to the applicant's affidavit. It was meant to show that respondents fraudulently obtained funding from the applicant's financiers. The respondents denied the accusation. That agreement had nothing to do with the applicant. It was fourth respondent's own financial arrangement with Red Sphere.

Respondents also denied manipulating applicant's branded documents, apparel and vehicles. To show that fourth respondent had created a brand of its own, second respondent attached to his affidavit pictures of fourth respondent's vehicle and apparel that were branded in fourth respondent's name. Respondents also dismissed the text messages that allegedly emanated from applicant's aggrieved customers, who complained about having been deceived by the respondents. The text messages were not dated. They did not state when the sales complained of occurred or how the customers were deceived. Respondents denied allegations of unlawful competition and unjustified enrichment. They were simply competing in a free market just like any other player.

First and second respondents contended that they could not be restrained from setting up their own business simply because they once worked for the applicant. They averred that applicant was seeking a lifelong restraint of trade against them. Such restraint was grossly unreasonable. Their profession was their only source of livelihood. If the relief sought by applicant were to be

granted, then the fourth respondent's business would be ruined. The balance of convenience did not favour depriving respondents a legitimate source of livelihood. Respondents averred that applicant had failed to establish a *prima facie* right over goods sold by fourth respondent. Respondents also denied that applicant would suffer irreparable harm. It had already computed its alleged losses and caused summons to be issued against the respondents. The matter was not urgent at all. The court was urged to dismiss it with costs.

Applicant's Reply

In reply, applicant averred that first and second respondents had not denied breaching the confidentiality clauses in their respective contracts of employment. They had established a business venture similar to that of the applicant. In the process they used the same methodology as that of the applicant to reach out to their market. They did not deny using the expertise they acquired during their tenure with the applicant. They had access to the applicant's database of customers and were therefore familiar with applicant's trade secrets. They were abusing that privileged information to engage in unlawful competition with the applicant.

Applicant averred that the delict of passing off did not necessarily require the registration of intellectual property over an idea or business concept. All that an applicant was required to prove was that respondents were misleading the public by passing off their business as that of the applicant. Applicant averred that it was not seeking that respondents be barred from exploiting available market opportunities. Its gripe was that respondents were passing off their products as those of the applicant.

Attached to the answering affidavit, was a police statement attributed to one Bere Rudlof who claimed to have been approached by second respondent on 30 April 2020. Second respondent was allegedly driving a vehicle branded with applicant's colours, when he visited Bere's school. He was offering solar, electronics products and gas tanks for sale. He is alleged to have introduced himself as applicant's sales representative. The customer purchased a cellphone and a solar light. Second respondent is alleged to have completed the contract invoices which Bere countersigned. Second respondent however left with all the copies. The customer latter visited the applicant's offices in Masvingo to collect his copy of the contract invoice, and to check whether his monthly

instalment had been deducted. At applicant's offices he was told that he was not in the applicant's database and therefore not a customer.

Investigations revealed that the products had in fact been supplied by fourth respondent. According to the applicant, that confirmed that respondents were hoodwinking members of the public. Also attached to the applicant's answering affidavit was a warned and cautioned statement signed by the second respondent in which he allegedly admitted to a charge of concealing an interest in a transaction from his principal. The statement was recorded at Masvingo Central Police Station on 27 April 2021. The alleged admission was in respect of a complaint lodged by the applicant against the second respondent.

Applicant further averred that the schedule attached to its founding affidavit showing the income that it lost was not challenged by the respondents. It confirmed that the respondents were poaching the applicant's customers. Such conduct was unjustified more so considering that: applicant was incorporated first; fourth respondent started trading when the first and second respondents were still employees of the applicant; first and second respondents were still diverting applicant's customers to the fourth respondent; and fourth respondent was passing off as the applicant. Applicant maintained that respondents had all but admitted that their conduct was unlawful. The relief sought was therefore unimpeachable.

THE ISSUES AND THE LAW

Two issues stand out for determination. These are whether the applicant grounds its cause of action in delict or contract, and whether the applicant has set out a *prima facie* case justifying the granting of the relief sought.

THE SUBMISSIONS

Ms *Mabwe* submitted that applicant's cause of action was founded in delict under the *Aquilian* action. She submitted that respondents were engaged in unlawful competition against the applicant under three heads, namely: passing off; learning on; and the unfair use of the applicant's fruits and labour. She further submitted that all that applicant was required to prove was that the first and second respondents were in possession of confidential information acquired during the course of their employment with applicant, and that they were abusing that information to advance

fourth respondent's business interests. Ms *Mabwe* cited the case of *Waste Products Utilisation (Pty) Ltd v Wilkes and Ano*¹.

Ms *Mabwe* urged the court to note that first and second respondents did not deny that in the course of their employment with applicant; they acquired confidential information about applicant's customers, its methodology, and database of clients and financiers; they had a contractual obligation to preserve such confidential information; that confidential information was unlawfully used as the springboard to set up the fourth respondent. Such conduct constituted unlawful competition, as it entailed the misuse of information acquired in the course of one's employment. The court was further referred to the cases of *Faccenda Chicken Ltd v Fowler & Ors*². Counsel submitted that the applicant had managed to demonstrate its entitlement to the relief sought based on the evidence that first and second respondents were unlawfully approaching applicant's customers and passing off fourth respondent's wares as those of the applicant.

In response, Mr *Chiwuta* submitted that what was before the court was clearly an application for a restraint of trade, which had been metamorphosed into one based on the *Aquilian* action. He submitted that paragraphs 1.2 and 1.4 of the interim relief sought spoke to a restraint of trade. He argued that paragraph 1.2 had the effect of barring first and second respondents from seeking employment anywhere, while paragraph 1.4 was not clear on the identity of the alleged financial partners that had contractual relations with the applicant. No evidence had been placed before the court to show that the respondents interfered with applicant's financing partners. The agreement between fourth respondent and Red Sphere had nothing to do with the applicant. It did not mention the applicant. Red Sphere did not say it was misled by the respondents in any manner. Mr *Chiwuta* argued that clause 1.4 sought to bar the respondents from approaching financiers. Those financiers were not identified. The restraint was therefore unreasonable. Mr *Chiwuta* referred to the case of *Greendale Hardware & Electrical v Goodfellow Bangaba*³, to advance his argument.

Mr *Chiwuta* further submitted that the oaths of confidentiality signed by first and second respondents also constituted an unreasonable restraint. He further submitted that the applicant's

¹ 2003 (2) SA 515 (WLD) at 570 G - 571 C and 571 G - H

² 1986 (1) AER 617 @ 625

³ SC 15/07

complaint remained a contractual restraint as it had its origins in the employment contracts between applicant and the two respondents.

As regards the statement attributed to Rudlof Bere, Mr *Chiwuta* urged the court to disregard it, as it was not properly before the court. It had no name. Respondents had not been given an opportunity to comment on it. A matter stood or fell on the founding affidavit. Counsel submitted that the application was devoid of merit and ought to be dismissed with costs.

Reply

Ms *Mabwe* submitted that the second respondent did not deny signing the warned and cautioned statement in which he admitted to the criminal complaint made against him by the applicant. While conceding that there was no name on the statement, Ms *Mabwe* urged the court to exercise its discretion and request a record of those criminal proceedings. She further submitted that the documents attached to the answering affidavit were official court records which were relevant to the current proceedings. She further submitted that significance of the statement was buttressed by the averments made in paragraph 19.4 of the founding affidavit. The two spoke to each other.

THE ANALYSIS

Whether the cause of action is grounded in delict or contract

It is necessary at the outset to determine whether the applicant's cause of action is grounded on the delict of unlawful competition or on a restraint of trade as submitted by Mr *Chiwuta*. In the South African Constitutional Court case of *Phumelela Gaming and Leisure Limited v Gründlingh*⁴, LANGA CJ, described unlawful competition as follows:

“[31] The delict of unlawful competition is based on the *Aquilian* action and, in order to succeed, an applicant must prove wrongfulness. This is always determined on a case by case basis and follows a process of weighing up relevant factors, in terms of the *boni mores* now to be understood in terms of the values of the Constitution.

[32] Any form of competition will pose a threat to a rival business. However, not all competition or interference with property interests will constitute unlawful competition. It is accordingly accepted that it is only when the competition is wrongful that it becomes actionable. The role of the common law in the field of unlawful competition is therefore to determine the limits of lawful competition. This determination, which takes account of many factors, necessitates a process of weighing up interests that may in the circumstances be in conflict. Fundamental to a determination

⁴ [2006] ZACC 6; 2007 SA (6) 350 (CC); 2006 (8) BCLR 883 (CC) at paragraph 31 of the judgment

of whether competition is unlawful is the *boni mores* or reasonableness criterion. This is a test for wrongfulness which has evolved over the years.”

In *Greendale Hardware & Electrical v Goodfellow Bangaba*⁵ MALABA JA (as he then was), dealt with a restraint of trade scenario as follows:

“A restraint of trade is an obligation voluntarily undertaken by the employee to refrain from the exercise of freedom of trade in favour of the employer in the exercise of freedom of contract. It is therefore *prima facie* valid and the *onus* is on the employee who seeks to resile from its burden to show that it is nonetheless against public interest and unenforceable. See *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874(A); *Book v Davidson* 1988(1) ZLR 365(S) at 385D.

A restraint of trade which does no more than protect the employer against mere competition from a former employee by preventing him or her from carrying on business similar to that undertaken by him or entering the services of an undertaking carrying on business similar to that undertaken by him in fear that in doing so the employee would exercise the knowledge and skill acquired during employment with him is an unreasonable restraint. So is a restraint of trade which is too wide as to time or place or scope depending, of course, on the nature of the business carried on and the duties of the employee”

The distinction between the two causes of action is not difficult to decipher. The *lex Aquilia* or the *Aquilian* action is a general delictual action used to claim for patrimonial or financial loss. The restraint of trade on the other hand arises *ex contractu*. It seeks to restrain an employee from performing similar work or accepting future employment in competition with that of his current employer, usually for a defined period of time after the termination of his employment contract. In *casu*, in as much as the applicant alleged that first and second respondents had confidentiality clauses in their contracts of employment, its cause of action though seemingly convoluted with certain aspects of restraint of trade, is premised on alleged incidences of unlawful competition attributed to the respondents.

First respondent’s contract of employment with an entity called Creative Cellular contained a confidentiality clause that restrained him from divulging information about office matters that came to his attention in the course of employment. The clause did not restrain the first respondent from taking up employment with a competitor. It is not clear whether applicant and Creative Cellular are one and the same entity. The oath of confidentiality that second respondent signed with applicant required him to keep confidential any information that he obtained during the course

⁵ *Supra* at pages 8-9

of his employment and even thereafter. It did not restrain him from taking up employment that competed with the applicant. It was just about preservation of applicant's information.

What remains of the interim relief that applicant seeks is also instructive. Paragraph 1.2 seeks to have respondents restrained from diverting applicant's business and clients to fourth respondent. Paragraph 1.4 seeks to restrain respondents from misleading plaintiff's financial partners into providing funding to fourth respondent. I do not read the relief sought as seeking to restrain first and second respondent from setting up a competing business of their own. From its founding papers, it seems the source of the applicant's ire is the alleged abuse of its name by the respondents. In my view, it would be stretching the interpretation a bit far to suggest that the relief sought is aimed at infringing respondents' right to freedom of trade, occupation and profession. I accordingly find that the relief sought is grounded in the *lex Aquilian* delictual claim for unlawful competition.

Whether the applicant established a prima facie case of unlawful competition justifying the granting of the relief sought

Section 64 of the Constitution of Zimbabwe entrenches the right to freedom of profession, trade or occupation. It states as follows:

“64 Freedom of profession, trade or occupation

Every person has the right to choose and carry on any profession, trade or occupation, but the practice of a profession, trade or occupation may be regulated by law.”

Commenting on the effect of a similar provision in the South African Constitution, SPILG J in the South African case of *Mullane & Another v Smith & Others*⁶ said:

“.....

12. The starting point is that competition is as essential for the operation of an efficient free market economy as is the right to freedom of trade, occupation and profession in a constitutional democracy⁷. Nonetheless each is limited; the former by the common law principles of unlawful competition as a form of delict under the *Aquilian* action and the latter by the correlating rights of others, which would include the rights to protection of property under section 25 of the Constitution.

13. The right to protection from unlawful competition requires a wrongful interference with another's rights as a trader. See *Schultz v Butt* 1986(3) SA 667 (A) at 678G.

⁶ [2015] 3 All SA 230 (GJ)

⁷ See section 22 of the Constitution of South Africa

14. While mentioning at 678G that as “a general rule, every person is entitled freely to carry on his trade or business in competition with his rivals” *Schultz* confirms at 678H to 679E that:

In order to succeed in an action based on unfair competition, the plaintiff must establish all the requisites of Aquilian liability, including proof that the defendant has committed a wrongful act....”

In its supplementary heads of arguments, the applicants referred to two forms of unlawful competition applicable to this case as espoused in *Willie’s Principles of South African Law*⁸. These are passing off and leaning on. In her oral submissions, Ms *Mabwe* alluded to a third form of unlawful competition, which is the unfair use of the applicant’s fruits and labour by the respondents. I now turn to deal with these three forms of unlawful competition as pleaded by the applicant.

Passing off

In *Brian Boswell Circus (Pty) Ltd and Another v Boswell Wilkie Circus (Pty) Ltd*⁹, it was held that:

“Passing-off is a form of wrongful competition. It is unlawful because it results, or at any rate is calculated to result, in the improper filching of another’s trade and an improper infringement of his goodwill and/or because it may cause injury to the other’s reputation”

In its supplementary heads of argument, applicant alluded to passing off in the context of the alleged depiction of the fourth respondent’s products as those of the applicant. Section 6 of the Trade Marks Act¹⁰ states as follows:

“6 No action for infringement of unregistered trade mark

No person shall be entitled to institute any proceedings to prevent, or to recover damages for, the infringement of an unregistered trade mark:

Provided that nothing in this Act shall affect the right of any person, at common law, to bring an action against any other person for unlawful competition or for passing off goods or services as the goods or services of another person.” (Underlining for emphasis).

The common law recognizes the right of a party to bring a claim based on unlawful competition or passing of. The submission by Mr *Chiwuta* that the applicant’s claim was incompetent because it had no registered trademark for its goods is therefore untenable. It is

⁸ 9th Edition, Juta at page 1110

⁹ 1985 (4) SA 466 (A) at 4871

¹⁰ [Chapter 26:04]

common cause that applicant's claim is not based on the infringement of a registered trademark. It is based on the common law.

For one to succeed in a claim for passing off at common law, they must establish the following elements; misrepresentation, damage and goodwill¹¹. In its heads of argument applicant submitted that the respondents' conduct was demonstrably wrongful and tantamount to passing off for reasons that: fourth respondent commenced trading whilst first and second respondents were still in the applicant's employ. In so doing they diverted some of the applicant's customers to fourth respondent; they misrepresented their wares as those of the applicants; respondents plagiarized and stole applicant's forms and used them to advance fourth respondent's business; they misled applicant's financial partners into providing funding to fourth respondent; they used applicant's documents, branded apparel and motor vehicles to create the impression that they were representing the applicant.

Has the applicant made a *prima facie* case justifying the granting of the relief sought based on passing off? Mr *Chiwuta* submitted that no evidence was placed before the court to show that the respondents were culpable of the alleged transgressions. I agree with that submission. While it was admitted that fourth respondent was incorporated when first and second respondents were still in the applicant's employ, there is no evidence that they diverted applicant's customers to fourth respondent. The schedule attached to the applicant's founding affidavit showing the sales allegedly made to the applicant's customers by the respondents is not helpful. It is not labelled. It has 12 columns. They do not have any headings. What one can easily decode are the names of persons, their dates of birth, and mobile numbers. It is not clear where the schedule came from or who prepared it. How the court is supposed to accept that it represents a list of applicant's customers diverted to fourth respondent is beyond comprehension. The deponent to the applicant's affidavit did not bother to explain the columns and how the sales amounting to ZWL 12 658 061.43 were arrived at. Not a single supporting affidavit was attached to the application just to explain how those customers were diverted. The schedule is meaningless. It cannot be relied upon.

Also attached to support the applicant's cause is a copy of the applicant's "Application Form & Invoice", and an almost similar form allegedly plagiarized by the fourth respondent. The

¹¹ See *Zimbabwe Gelatine (Pvt) Ltd v Cairns Foods Pvt Ltd* 2003 (1) ZLR 352 (S)

applicant claims that its form was plagiarized by the respondents since the two forms are similar. First and second respondents denied plagiarizing the applicant's stationery. Fourth respondent had its own form bearing its name. The respondents' submission is persuasive. The form which was allegedly plagiarized appears to me to be a standard document which can be downloaded from the internet. It would have been a different proposition if respondents had used the applicant's form when approaching their customers. That is not the position. In the absence of evidence linking the respondents to the abuse of the applicant's forms, I find the applicant's argument rather hollow and without merit.

The allegation that respondents misled applicant's financial partners into providing funding to fourth respondent is equally devoid of merit. The agreement attached to back up this claim is between fourth respondent and Red Sphere Finance. It has nothing to do with the applicant. If indeed fourth respondent misled Red Sphere into providing it with finance under the guise that it was connected to the applicant, then a supporting affidavit ought to have been procured from this financier. As it stands, the agreement confirms some financial arrangement between fourth respondent and Red Sphere. It does not suggest any passing off. The attached text messages of customers who were allegedly deceived by the respondents can only suffer the same fate. The evidence is not on oath. The customers' mobile phone numbers are not stated. The court is left wondering whether such text messages actually emanated from applicant's aggrieved customers. Why the applicant failed to obtain supporting affidavits from these customers is also bewildering.

In its answering affidavit, the applicant attempted to make reference to second respondent's warned and cautioned statement in which he allegedly admitted to the offence of corruptly concealing a transaction from a principal. The principal is not identified in that statement. It is not clear whether that statement was connected to the applicant. Also attached to the answering affidavit is a statement which is attributed to one Bere Rudlof, in which he claims that second respondent came to his school passing off as a representative of the applicant.

Although the applicant's answering affidavit claims that the statement was made by Bere Rudlof, the statement does not suggest so. It is handwritten and what was attached to the answering affidavit is a photocopy or scanned copy. The name of the writer missing. The signature is not legible for one to clearly identify the signatory. Mr *Chiwuta* urged the court to disregard the

statement, more importantly because it was being submitted at this late stage thus denying the respondents an opportunity to comment on it. I agree with Mr *Chiwuta's* contention in this regard. I can do no more than refer to the sentiments by SANDURA JA in SANDURA JA in *Mangwiza v Ziumbe*¹², where he said:

“It is well-established that in application proceedings the cause of action should be fully set out in the founding affidavit, and that new matters should not be raised in an answering affidavit. That principle was laid down many years ago in cases such as *Coffee, Tea and Chocolate Co Ltd v Cape Trading Company* 1930 CPD 81. At p82. GARDNER JP said:

“A very bad practice and one by no means uncommon is that of keeping evidence on affidavit until the replying stage, instead of putting it in support of the affidavit filed upon the notice of motion, the result of this practice is either that a fourth set of affidavits has to be allowed or that the respondent has not an opportunity of replying. Now these affidavits of Barnes, Turnbull, Lee Gardner and Lang should in my opinion properly have been put in support of the notice of motion. They are not a reply to what has been said by the respondent, and I am not prepared to allow them to be put in at this stage”

Ms *Mabwe* urged the court to take judicial notice of its own record and request the record pertaining to the criminal proceedings involving second respondent. I find that submission a bit fanciful. Firstly, it is not clear at what stage the criminal proceedings involving the second respondent are, and whether they involve the applicant. This is what the applicant ought to have established and place such evidence before the court. For this court to do so would be interfering with a matter which is probably yet to be placed before the Magistrates Court. Secondly, this matter was postponed to allow the parties an opportunity to settle. If the applicant needed more time to secure that evidence through an affidavit, then it could have simply sought a postponement of the matter. For that reason, I am persuaded by Mr *Chiwuta's* submission that applicant's case must stand or fall on its founding papers. The applicant failed to prove that respondents passed off the fourth respondent's business as that of the applicant.

Leaning on

In the supplementary heads of argument, applicant submitted that the complaint based on leaning on pertained to the inappropriate use of the applicant's efforts by the respondents in order to promote the fourth respondent's products at the expense of the applicant. Leaning on occurs where an entity relies on the reputation or goodwill of another entity for its own financial gain. It

¹² 2000 (2) ZLR 489 (SC)

also involves the dilution of the advertising value of a symbol in relation to the repute of an entity, goods or services associated with such a symbol.¹³ In order to advertise its products, and in the process promoting and expanding its own business, an entity may choose to abuse the advertising trademark of another entity. In its heads of arguments, the applicant claims that respondents inappropriately used the applicant's efforts to promote fourth respondent's business. The argument was not advanced further in the oral submissions.

However, as was the case in respect of the complaint based on passing off, the applicant, did not place evidence before the court to demonstrate in what way first and second respondents inappropriately used applicant's efforts to promote fourth respondent's products. The court cannot rely on unsubstantiated allegations. It was the easiest thing for the applicant to procure supporting affidavits from its customers and financiers in order to illustrate the existence of the alleged infringements. The submission is without merit.

Unfair use of applicant's fruits and labour.

In the American case of *American Safety Table Co Inc v. Schreiber*¹⁴, it was held as follows:

"...(At) first glance it might seem intolerable that one manufacturer should be allowed to sponge on another by pirating the product of years of invention and development without licence or recompense and reap the fruits sown by another. Morally and ethically such practices strike a discordant note. It cuts across the grain of justice to permit an intruder to profit not only by the efforts of another but at his expense as well."

Applicant claims that first and second respondents abused its fruits and labour acquired during their time in applicant's employ to advance fourth respondent's business. The two allegedly abused confidential information that they acquired from the applicant's database. Unfortunately, the applicant's complaint is afflicted by the same infirmities as the earlier ones. The alleged abuses are generalized as no evidence was placed before the court to back them up.

It is common cause that first and second respondents came into contact with applicant's trade secrets during the course of their employment. What the applicant has failed to demonstrate is how the respondents abused those trade secrets and used them as a springboard to set up the fourth respondent. The use of knowledge and skill acquired during the course of employment to set up a legitimate business can hardly be construed as unlawful competition, unless it can be

¹³ Klopper H, Pistorius T, Tong L et al, *Law of Intellectual Property in South Africa* 2ed (2017)

¹⁴ (1959) 269 F 2nd 255, at 271-272

shown that the setting up of the business amounted to a wrongful interference with the applicant's rights as a trader. This court is also alive to the need to create a balance between the respondents' constitutional rights to freedom of profession, trade and occupation¹⁵ and the applicant's right to protection against unlawful competition. In the *American Safety Table Co Inc v Schreider* case¹⁶, the court went on to say:

“For imitation is the life blood of competition. It is the unimpeded availability of substantially equivalent units that permits the normal operation of supply and demand to yield the fair price society must pay for a given commodity. Unless such duplication is permitted, competition may be unduly curtailed with the possible resultant development of undesirable monopolistic conditions”

Lamentably for the applicant, no evidence was submitted to persuade this court to find that respondents unfairly used the applicant's fruits and labour. The submission lacks merit.

CONCLUSION

Broadly speaking, the applicant's cause of action was based on unlawful competition. Amler¹⁷ opines that there is no *numerous clausus* of acts that constitute unlawful competition. The relief sought by the applicant had far reaching consequences. It made serious inroads into the respondents' constitutional rights of freedom of profession, trade or occupation. The paucity of evidence to support the applicant's claims was its Achilles heel in this case. There was no evidence to support applicant's claims of the alleged infringements of those variants of unlawful competition that it chose to advance as a basis for the relief sought.

The court also finds that there is no evidence of unlawful competition even in respect of paragraphs 1.1, 1.3 and 1.5 of the interim relief sought. Those were the paragraphs in regards to which Mr *Chiwuta* was agreeable to them being granted for the sake of a settlement. Mr *Chiwuta*'s position was not based on an admission that respondents were guilty of the alleged transgressions. They were made with a view to motivate a settlement since according to him, respondents had never committed the alleged acts, and did not intend to commit such violations even in the future. It therefore did not make any difference whether or not the interim relief was granted in respect of those uncontested items. The circumstances under which the compromise was made by Mr

¹⁵ See section 64 of the Constitution.

¹⁶ *supra*

¹⁷ Amler's Precedents of Pleadings, Eighth Edition page 373.

Chiwuta do not merit that this court should then grant interim relief in respect of the uncontested items. The court must be satisfied that a *prima facie* case has been established¹⁸. Applicants failed to establish a *prima facie* case of unlawful competition to justify the granting of the entire interim relief sought. The remedy sought is not just free for the taking. The application is meritless and it must fall for the reasons stated.

COSTS

The general rule is that costs follow the event. I see no reason for departing from this general rule. The applicant ought to have put its house in order before approaching the court for the relief it sought.

DISPOSITION

Resultantly it is ordered that:

1. The application is dismissed.
2. Applicant shall pay the 1st, 2nd and 4th respondents' costs of suit.

Tamuka Moyo Attorneys, applicant's legal practitioners
Ziumbe & Partners, 1st, 2nd & 4th respondents' legal practitioners

¹⁸ Rule 246 (2) of the High Court Rules