ATLAS ORGANIC FERTILIZERS (PTY) LTD v PIKKEWYN GHWANO (PTY) LTD AND OTHERS 1981 (2) SA 173 (T)

Citation	1981 (2) SA 173 (T)
Court	Transvaal Provincial Division
Judge	van Dijkhorst J
Heard	August 18, 1980; August 19, 1980; August 20, 1980; August 21, 1980; August 22, 1980; August 23, 1980; August 24, 1980; August 25, 1980; August 26, 1980; August 27, 1980; August 28, 1980; August 29, 1980; August 30, 1980; August 31, 1980; September 1, 1980; September 2, 1980; September 3, 1980; September 4, 1980; September 5, 1980; September 6, 1980; September 7, 1980; September 8, 1980; September 9, 1980; September 10, 1980; September 11, 1980; September 12, 1980; September 13, 1980; September 14, 1980; September 15, 1980; September 16, 1980; September 17, 1980; September 19, 1980; September 19, 1980; September 25, 1980; September 26, 1980; September 27, 1980; September 28, 1980; September 29, 1980; September 30, 1980; October 1, 1980; October 2, 1980; October 3, 1980
Judgment	November 26, 1980
Annotations	Link to Case Annotations

Flynote : Sleutelwoorde

Trade and trade mark - Trade - Unlawful competition - Action for based on lex Aquilia - Norm to be applied in such action is one of public policy - Approach of Court in determination and application of such norm.

Trade and trade mark - Trade - Unlawful competition - Inducing an employee to leave his employment lawfully - Not unlawful competition - But it is unlawful competition to induce employees to terminate their employment not to benefit from their services but to cripple the competitor.

Master and servant - Breach of confidence by servant - Action by master - Nature of - Such based on Aquilian action on unlawful competition - Principles applicable.

Master and servant - Inducing emplyees to leave their employment - When and when not such conduct would amount to unlawful competition.

Company - Director - Breach of trust by - Action by company - Law restated.

Company - Director - Managing director - Breach of fiduciary relationship -

What constitutes - Managing director, during period of notice of termination of his services, initiating incorporation of competing company - Not a breach of such fiduciary relationship - But such relationship breached by canvassing employees of company he was leaving for new company.

Contract - Breach of - Breach induced by a third party - Remedy to which aggrieved party to

contract entitled - Such party entitled to a delictual remedy.

Headnote : Kopnota

The law of South Africa recognises and grants a general action in the case of unlawful competition based on the principles of the *lex Aquilia*.

The norm to be applied in such a case is the objective one of public policy. This is the general sense of justice in the community, the *boni mores*, manifested in public opinion. In determining and applying this norm in a particular case, the interests of the competing parties have to be weighed, bearing in mind also the interests of society, the public weal. As this norm cannot exist *in vacuo*, the morals of the market place, the business ethics of that section of the community where the norm is to be applied, are of major importance in its determination.

It is not unlawful competition to induce an employee to terminate his contract of employment lawfully. But public policy would dictate that, where the aim in inducing a competitor's employees to terminate their employment is not to benefit from their services but to cripple or eliminate the business competitor, this action be branded as unlawful competition.

A delictual action on "breach of confidence" can only be a manifestation of the Aquilian action on unlawful competition and it has to be determined according to the principles applicable to such an Aquilian action on unlawful competition.

The law on the position of trust occupied by a director in relation to his company restated.

It is inconceivable that the freedom to hold directorships in competing companies can exist in the case of a managing director actively so employed. It is impossible for one to advance the conflicting interests of two actively competing businesses as managing director of both. On the other hand, common sense dictates that the mere creation by a managing director, whose services have been terminated and who is serving his month's notice, of a future alternative means of employment, albeit in competition with his present company, need not necessarily create a conflict of interests greater than that of an ordinary director serving on the boards of two competing companies.

Accordingly, the Court held that the mere incorporation of a company during the period of notice of the managing director of a competing company, on the initiative of such managing director, could not be regarded as a breach of the managing director's fiduciary relationship with the company he was leaving to become managing director of the new company. Nor did the mere preparatory work which the managing director did for the new company transgress the requirements of his duty to the company which he was about to leave. The Court held, however, that he had breached his fiduciary duties by canvassing certain employees of the company he was leaving for the new company during the period of notice.

A delictual remedy is available to a party to a contract who complains that a third party has intentionally and without lawful justification induced another party to the contract to commit a breach thereof.

Case Information

Trial action for an interdict and damages. Facts not material to this report have been omitted from the reasons for judgment.

W P Schutz SC (with him *M S Stegmann*) for the plaintiff.

M M Joffe (with him *P Ginsburg*) for all the defendants on the first five days, and thereafter for the first and fourth defendants.

Second and third defendants in person after the fifth day.

VAN DIJKHORST J

Cur adv vult.

Postea (November 26).

Judgment

Van Dijkhorst J: The plaintiff, a manufacturer and seller of a product known as "ghwamis", claims against its main competitor, the first defendant, an interdict restraining it from manufacturing and against the second and fourth defendants an interdict restraining them from causing and/or permitting the first defendant to manufacture its competing product "ghwanomix". It further claims an interdict restraining the first, second, third and fourth defendants from selling and/or causing and/or permitting the sale of the defendants' competing product under the name of "ghwamis", "ghwamix", "ghwanomix" or any other name whatsoever. The plaintiff also claims damages against the defendants jointly and severally in an amount of R1 542 248 with interest and costs.

The causes of action can be described by the generic term unlawful competition and will be specified in more detail hereunder. For the sake of brevity I will refer to the plaintiff as Atlas, the first defendant as Pikkewyn, the second defendant as Lion-Cachet, the third defendant as Papenfus and the fourth defendant as Hedderwick. Where reference is made to Papenfus' father he will be referred to as Papenfus senior.

Atlas was incorporated in 1966 and has its principal place of business at Meyerton, Transvaal. It is engaged in the manufacture and sale of ghwano (guano) based fertilisers. The evidence indicates that its blended product is unique in South Africa. It consists of a mixture of seabird ghwano, chemicals and organic material in the form of fowl manure. The nature of the material which is blended caused Atlas to experience technical difficulties in moulding the ghwano and fowl manure into a material suitable for spreading onto lands through mechanical planters. Ghwano is sticky and contains feathers and stones. Fowl manure contains feathers and sometimes woodshavings and other unwanted substances. This gives rise to difficulty in milling and screening. Over a long period Atlas experimented and, by trial and error, evolved its present process. (The process now in use differs to a certain extent from that used in 1978 when the cause of action arose.)

In the blended half organic fertiliser described above first grade ghwano is used. This fertiliser is called a group I fertiliser, which is a fertiliser the content of which is prescribed by Government regulation. It is therefore more expensive than ghwamis, upon which attention is focused in this case. Ghwamis is a group II fertiliser which is not subject to such stringent controls as group I fertilisers and is therefore considerably cheaper. Ghwamis is the registered trade mark of Atlas. It is a soil conditioner that improves the structure of the soil.

In 1976 Atlas started manufacturing and marketing ghwamis because it had a large

stock of grade 2 ghwano from its concession island, Bird Island, available. Ghwamis originally contained 5 per cent ghwano and 95 per cent fowl manure but as it was difficult to store and handle, calcium silicate (known as agrosil) was added to the mixture to improve its handling characteristics. Despite this additive the product was throughout the evidence described as an organic fertiliser, to distinguish it from the group I mixture which is a half organic fertiliser; both products do however contain ghwano and fowl manure.

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According to the evidence there was, prior to the manufacturing activities of Pikkewyn, no other product in the world like ghwamis, being a blend of ghwano and fowl manure.

Lion-Cachet joined Atlas in 1974 as general manager and was its managing director from 1975 to 31 March 1978 when he resigned. As remuneration he received a salary and a share of the profits. He was able, full of ideas, energetic and had the capacity to build up a good sales team, the members of which had a degree of loyalty to him personally.

Papenfus was the sales manager of Atlas from 1974 until 30 April 1978 when he resigned. He also received a salary and commission. Lion-Cachet was instrumental in getting him to work for Atlas. Papenfus was an able salesman with new ideas.

The chairman of Atlas has for many years been H R Benecke. He is 73 years old and, although long past his prime and with failing memory, not a mere figurehead.

His son H C Benecke has been a director of Atlas since its inception; in 1968 he was joint managing director and from 1969 to 1975 sole managing director of the company. He was succeeded by Lion-Cachet in 1975 and thereafter largely pursued his own interests until the company's traumatic experience in 1978 which gave rise to this case.

The traumatic experience of Atlas was not unconnected with the personality and actions of H C Benecke. He lit the fuse which led to the explosion. Since 1974 Lion-Cachet had been inwardly hostile towards H C Benecke, though this fact was perhaps unknown to the latter and such hostility was not mutual. Against this background a silly incident known as the gumpole incident occurred. H C Benecke had on an inspection at the factory in 1977 noticed that a gumpole that supported the roof of a rickety structure covering a fowl manure stockpile was missing. Despite his requests that it be replaced it appeared to him that nothing had been done about it and he rather vehemently raised the matter at a board meeting on 15 February 1978. This led to an altercation with a resultant ire on the part of Lion-Cachet which even a peace offering in the form of a carton of cigarettes could not quench.

This smouldering fire turned into a fierce blaze when on 28 February 1978 H C Benecke instructed Lion-Cachet to give an instruction to engineer Lederer to manufacture certain pieces of machinery. Lion-Cachet resented this action which he regarded as an encroachment on his prerogative as managing director and resigned on 1 March 1978 by notice handed to the chairman.

In terms of his contract of employment Lion-Cachet had to give one month's notice and he therefore continued as managing director of Atlas till 31 March 1978. His resignation was not immediately made known on 1 March as the chairman hoped that Lion-Cachet would reconsider his position and withdraw his resignation. This did not occur.

On 2 March 1978 Pikkewyn's name was reserved with the Registrar of Companies by the attorneys attending to its incorporation. On 6 March 1978 a quotation was given by Lederer Foundry Projects (Pty) Ltd to Messrs Pikkewyn Ghwano (Pty) Ltd "attention Mr R P Lion-Cachet, managing director... *re* new ghwamis plant". On 7 March 1978 Lion-Cachet wrote a letter to the Meyerton Town Council on behalf of Pikkewyn applying for permission to erect a bagging plant in an old factory in Meyerton as a temporary measure until such time as a permanent factory

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could be located next to rail facilities. He stated that the matter was urgent as the raw material contract had already been concluded. The material to be bagged was to be fowl manure, ghwano and ammonium sulphate.

The minutes of Pikkewyn, which was incorporated on 15 March 1978, record that on 20 March 1978 Lion-Cachet was appointed its managing director. Lion-Cachet applied for a new business licence for Pikkewyn and advertised his intention to do so on 24 March 1978. He signed as managing director of Pikkewyn. The budget of Pikkewyn indicates that in March 1978 Lion-Cachet received a salary from Pikkewyn.

The stage is thus set for a fertiliser drama with the main actor initially playing the double role of managing director for Atlas and managing director for Pikkewyn. Disaster struck Atlas as virtually its whole sales force and some of its administrative personnel joined Lion-Cachet at Pikkewyn. Atlas' sales plummeted and a projected substantial profit for 1978 of R317 509 turned into a loss of R469 315.

Not only the managing director of Atlas but also its sales manager, Papenfus, exhibited feats of versatility. In April 1978 while still employed by Atlas he was on the payroll of Pikkewyn as general manager and actively canvassed orders for Pikkewyn.

Hedderwick is the main shareholder of Pikkewyn, holding 51 per cent of the shares. The other 49 per cent of the shares are held by Lion-Cachet. Hedderwick produced the finances and is also a director of Pikkewyn.

The issues

Against this background the case of Atlas, shorn of those allegations not persisted in during argument, is as follows:

It is alleged that from about September 1977 to April 1978 Lion-Cachet formulated and put into operation a scheme to benefit Pikkewyn, himself, Papenfus and/or Hedderwick at the expense of Atlas. This scheme is referred to as "the campaign of unlawful competition". It is stated that Atlas evolved and developed methods and means for obtaining, removing foreign matter from and otherwise processing and mixing raw ghwano, fowl manure and other ingredients so as to produce economically and market profitably half organic fertiliser and also ghwamis. These methods and means Atlas calls it production secrets and know-how. Atlas alleges that Lion-Cachet who had knowledge of the production secrets and know-how of Atlas made this knowledge available to Pikkewyn which took advantage thereof to set up and equip a new factory for the manufacture of its competing product.

Atlas alleges that, by reason of their employment with Atlas, Lion-Cachet and Papenfus acquired knowlege of the names and addresses of customers and potential customers of Atlas for its product ghwamis and built up cordial relationships with many such

customers and potential customers. It is alleged that this knowledge and all the cordial relationships were confidential matters (called Atlas' marketing secrets and know-how) and that Lion-Cachet and Papenfus unlawfully made use of Atlas' marketing secrets and know-how in furtherance of the interests of Pikkewyn.

It is alleged that Lion-Cachet committed acts of industrial sabotage against Atlas by desisting from entering into favourable raw material contracts as part of the campaign of unlawful competition.

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It is alleged that in furtherance of this campaign Lion-Cachet and Hedderwick brought about the incorporation of Pikkewyn on 15 March 1978 as a competitor of Atlas, Lion-Cachet becoming its managing director.

A further aspect of the alleged campaign is alleged to be the fact that Lion-Cachet obtained for Pikkewyn various favourable contracts or other arrangements for the supply of raw materials for the manufacture of its competing products which contracts or arrangements it was his duty as managing director of Atlas to have obtained for the latter.

Atlas further alleges that during or about March 1978 Pikkewyn and/or Lion-Cachet enticed and induced Papenfus to leave his position as sales manager of Atlas in order to become the general manager for Pikkewyn for the production and sale of the competing product and that during March and April 1978 Pikkewyn, Lion-Cachet and/or Papenfus enticed or induced the sales staff of Atlas to leave their positions at Atlas and join Pikkewyn to sell the competing product. Lastly it is alleged that the defendants are guilty of an infringement of plaintiff's trade mark "ghwamis" and/or passing-off its competing product as Atlas' product ghwamis in the case of a large number of farmers particularised in the pleadings.

On the basis summarised above Atlas' case is that Pikkewyn, at the instance of the other three defendants, alternatively all four defendants, entered into and are engaged in a course of unfair and unlawful competition with Atlas. Alternatively, Lion-Cachet and/or Papenfus has or have committed breaches of their respective service contracts with, or respective fiduciary duties owed to, Atlas. Alternatively, the four defendants jointly and severally have infringed the trade mark of Atlas and/or passed off the competing product of Pikkewyn as Atlas' product ghwamis. It is stated that, in consequence of the aforesaid wrongful and unlawful conduct on the part of the defendants, Atlas has suffered damage in respect of the calendar years 1978 and 1979 in an amount of R1 542 248 and will continue to suffer damage during the calendar year 1980 and thereafter until the defendants are interdicted from continuing their activities. The damage is particularised, as follows:

1978 calendar year	R 786 824
1979 calendar year	R 755 424
	R1 542 248

The figure for the 1978 calendar year is the difference between the loss of R469 315

allegedly suffered by Atlas during the 1978 calendar year and the forecast for that year of a profit of R317 509 which forecast it is alleged would have been realised but for the defendants' activities aforesaid. The damages for 1979 are calculated in the same manner.

During the course of the trial I ruled that the form of the pleadings also permitted the quantification of losses based on individual instances of passing-off or infringement of trade mark.

The law

In short Atlas joined battle with Pikkewyn and its cohorts under the

banners of the filching of production secrets and know-how, the filching of marketing secrets and know-how, industrial sabotage, the acquisition of favourable contracts for Pikkewyn for raw materials instead of for Atlas, the enticement of sales-staff and passing-off.

Is there one delict, unlawful competition, encompassing all the above or is the term unlawful competition merely a generic term for a number of delicts all having the object of granting protection in respect of different legal relationships and with differing elements? What are the elements and how are they to be applied in the given circumstances?

In his doctoral thesis *Grondslae van die Mededingingsreg* H J O van Heerden in 1958 strongly advocated the recognition of one delict, unlawful competition, encompassing all the manifestations set out above and based on the principles of the *lex Aquilia*. In his thesis he complained that the tendency was blindly to follow the English law and that there was an absence of general criteria of unlawfulness and liability in cases of alleged unfair competition (see at 283).

In determining the existence, nature and scope of an action based on unlawful competition it would be well to bear in mind the words of INNES J (as he then was) in *Union Government (Minister of Railways and Harbours)* v *Warneke* 1911 AD 657 at 664 with reference to the applicability of the *lex Aquilia* to modern circumstances:

> "The position of our law with regard to negligence to-day is the result of the growth and the regulated expansion of the original provisions of the *lex Aquilia*. Crude and archaic in some respects, their operation was gradually widened by the application of the *utilis actio*, and by the interpretation of the Roman jurists. The broadening process was continued by Dutch lawyers on the same lines; and there is no reason why our Courts should not similarly adapt the doctrine and reasoning of the law to the conditions of modern life, so far as that can be done without doing violence to its principles."

As I will venture to indicate hereunder our law has since been firmly set on the path of recognition of a general action for unlawful competition based on the *lex Aquilia*. Once this is borne in mind and this course is steadfastly held the danger of investigating precedents in other legal systems is greatly lessened. Indeed, in this field there is a large body of legal thought and practical application especially in the United States that could give profitable guidance in the solution of problems along the lines of our own law. I will refer to some foreign decisions later.

There is a difference between the textbook writers as to the scope of an action based

on interference with trade, business or employment. Under this heading McKerron *The Law of Delict* 7th ed at 270 and following states that in the absence of proof of malice our law does not recognise a wrong of unfair distinguished from illegal competition. He states that interference with the trade or calling of another is not unlawful and is therefore not actionable unless the defendant either used illegal means or was actuated by malice. By illegal means is meant means which involve the commission or threatened commission of a criminal or a civil wrong, for example, assaulting or intimidating the customers of the other trader, threatening to take fictitious legal proceedings or inducing others to break their contracts with him. As regards the element of malice which in the alternative would create liability the learned author states that in his submission interference with business relations constitutes one of the few

exceptions to the general rule that, apart from the doctrine of abuse of rights, motive is not a material element of civil liability. He states:

> "The desirability of admitting an exception to the rule in this class of case is obvious. No doubt, as we have seen, courts of law should not attempt to distinguish between acts of interference which are fair and reasonable and acts of interference which are unfair and unreasonable. But a line can and should be drawn between acts of interference whose object is the defence or advancement of a person's own interests, and acts of interference whose sole or dominant purpose is the infliction of harm for harm's sake. The burden of proving that the defendant was actuated by malice rests, of course, on the plaintiff. To discharge the burden he must show not merely that the defendant intended to damage him in his business or means of livelihood, but also that he had no legitimate interest in doing so. The burden is not an easy one to discharge. Interferences with business relations are ordinarily prompted by economic self-interest, and, whatever the position may be in ethics, in law the advancement of one's own economic interests is always a legitimate motive for action."

On the other hand Van der Merwe and Olivier in *Die Onregmatige Daad in die SA Reg* 3rd ed at 363 recognise the existence of an *Aquilian* action where in the competitive field damage has been sustained by one competitor through the actions of his rival. The learned authors state that this form of delict has received scant scientific analysis in South African Law.

In *Cape of Good Hope Bank v Fischer* 4 SC 368 at 376 the Court referred to the extension by analogy the *Aquilian* law had undergone in the Netherlands to a degree never permitted under the Roman law. It was no longer confined to cases of damage done to corporeal property, but was extended to any kind of loss sustained by a person in consequence of the wrongful acts of another.

In *Combrinck v De Kock* 5 SC 405 at 409 the Court stated:

> "Fair and honest competition, however active, is open to everyone, but no one has the right to take an undue and improper advantage by means of falsehoods, the effect of which is to benefit himself at the expense of another."

Because by fraudulent misrepresentation the defendant had obtained a benefit for himself and caused a corresponding disadvantage to the plaintiff, being the loss of an advantageous contract, *Aquilian* damages were awarded. At 411 the Court quoted with approval from the English case of *Croft v Day* 7 Beav 84:

> "The defendant has a right to carry on the business of a blacking manufacturer honestly and fairly; he has a right to the use of his own name; I will not do anything to debar him from the use of that, or any other name calculated to benefit himself in an honest way; but I must

prevent him from using it in such a way as to deceive and defraud the public, and obtain for himself, at the expense of the plaintiffs, an undue and improper advantage."

At 415 the following is said:

"It is not, therefore, merely a question of assuming a name, but there was a fraudulent misrepresentation of individuality, and an infringement of plaintiff's rights to their business reputation, to the benefit of defendant and to the injury of plaintiffs. None of the cases cited apply to the use of another's name for the purpose of making purchases, but the principle underlying them is, I think, applicable here. That principle may concisely be stated that no one is permitted to carry on trade by fraudulent misrepresentations to the injury of another. Here the plaintiffs have been injured by having been wrongfully deprived of trade through defendant's fraudulent use of their name."

In *Lewis v Lazarus* (1896) 13 SC 420 at 426 the Court stated that it had the duty "to prevent the perpetration of fraud by rivals in trade".

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In *Patz v Greene & Co* 1907 TS 427 the Court recognised the right of action by a trader against his competitor who had caused him damage as a result of illegal trading and stated:

"... granted that the action of the respondents is prohibited by law, and that the applicant is injuriously affected thereby in his business, I am of opinion that a legal right of the applicants has been infringed - the right, viz to carry on his trade without wrongful interference from others. That is a common law right, the existence of which has been recognised in many cases, and which, I imagine, does not admit of controversy. Difficult questions will no doubt arise as to what constitutes a wrongful interference with trade, and grave differences of opinion are to be found amongst the most learned Judges on this subject,... But I cannot conceive that any difference of opinion can arise upon the point that interference with trade is wrongful, when it is caused by competition, which is expressly prohibited by law."

In *G A Fichardt Ltd v The Friend Newspapers Ltd* 1916 AD 1 INNES CJ said at 6:

"Freedom duly and lawfully to exercise one's own energies and to engage in one's own activities is an absolute right. Every person, therefore, and every company is entitled as against all the world to carry on a lawful business in a way which does not trespass upon the rights of others. And any intentional interference with the transaction of such business to the detriment of the person concerned is an actionable *injuria*... Now one of the forms which such interference may take is the circulation of untrue statements which damage the business. Every person intentionally publishing such statements to the detriment of the business of another is therefore liable to an action, even though the allegations are not defamatory."

The *locus classicus* in this field is *Matthews and Others v Young* 1922 AD 492 where at 507 DE VILLIERS JA stated:

"In the absence of special legal restrictions a person is without doubt entitled to the free exercise of his trade, profession or calling, unless he has bound himself to the contrary. But he cannot claim an absolute right to do so without interference from another. Competition often brings about interference in one way or another about which rivals cannot legitimately complain. But the competition and indeed all activity must itself remain within lawful bounds. All a person can, therefore, claim is the right to exercise his calling without unlawful interference from others. Such an interference would constitute an *injuria* for which an action under the *lex Aquilia* lies if it has directly resulted in loss."

The Court found it unnecessary to consider what under our law would constitute unlawful

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interference.

In *Begemann v Cirota* 1923 TPD 270 the Court applied the principles propounded in *Patz v Greene & Co (supra*).

In *Goodman v Von Moltke* 1938 CPD 153 at 156 the Court granted an interdict against the use of confidential information obtained from documents which had been stolen, which information would otherwise not have been available to the defendant.

Malicious rumour-mongering by a trader in respect of the products of a competitor was the successful cause of an action under the *lex Aquilia* in the case of *International Tobacco Co (SA) Ltd v United Tobacco Co (South) Ltd (1*) 1955 (2) SA 1 (W).

An important case is *Geary & Son (Pty) Ltd v Gove* 1964 (1) SA 434 (A), an appeal and cross-appeal against the upholding and dismissal of certain exceptions. The plaintiff's cause of action was a wilful falsehood published in advertisements by its competitor that the competitor manufactured, *inter alia*, suspension coil springs. It was alleged that by this means he had obtained an undue and improper advantage in competition

to the plaintiff and that the plaintiff had suffered loss thereby. STEYN CJ at 440 stated:

> "The plaintiff's action is *Aquilian*. It sues in delict. What it apparently seeks to allege is the wrongful interference by a competitor with its rights as a trader. Although there is no clear statement to that effect in the declaration as amplified, the right upon which the plaintiff may be presumed to rely is its right to attract custom. The interference alleged would, on that basis, appear to be a wilful misrepresentation and dishonest conduct on the part of the plaintiff's competitor by which customers or potential customers have been or will be induced to deal with the competitor rather than with itself. I do not propose to attempt a definition of the limits set to competition in trade by *Aquilian* liability, but, whatever those limits are, it seems clear that interference of the nature indicated is recognised as an infringement of a trader's rights and therefore as a delict in our law."

The CHIEF JUSTICE then quoted with approval from *Combrinck v De Kock (supra*) and continued:

> "The plaintiff does not base its case upon a misrepresentation negligently made but upon wilful falsehood, ie an intentional wrongful act on the part of the defendant. What it has to allege and prove, therefore, is that the defendant has, by word or conduct or both, made a false representation, that it knew the representation to be false, that the plaintiff has lost or will lose customers, that the false representation is the cause thereof, and that the defendant intended to cause the plaintiff that loss by the false representation."

It is important to note that the reference by the Court to the plaintiff's "right to attract custom" as being the right it has as a trader which is protected from wrongful interference by a competitor, is the same as the "reg op die werfkrag" which is the right H J O van Heerden seeks to protect in *Grondslae van die Mededingingsreg (supra*). Sometimes this is referred to as the trader's goodwill, which is defined by Lord MACNAUGHTEN in *Commissioners of Inland Revenue v Millar & Co Margerine Ltd* 1901 AC 217 at 224 as "the attractive force that brings in custom".

The development of the law of unlawful competition was greatly advanced by the case *Dun & Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd* 1968 (1) SA 209 (C). In this case CORBETT J (as he then was) held a rival trader liable in damages where it had knowingly furthered its business with information compiled by

its competitor by the exercise of skill and labour and distributed by that competitor to its clients upon a confidential basis. With reference to the field of unlawful competition the learned Judge stated:

> "... the broad and ample basis of the *lex Aquilia* is available in this field for the recognition of rights of action even where there is no direct precedent in our law."

(At 218E.) He stated that fairness and honesty are the criteria which have been used in the past and which may be used in the future in the development of the law relating to competition in trade. At 221 the Court stated:

> "Reverting to the position in our law, and without attempting to define generally the limits of lawful competition, it seems to me that where, as in this case, a trader has by the exercise of his skill and labour compiled information which he distributes to his clients upon a confidential basis (ie upon the basis that the information should not be disclosed to others), a rival trader who is not a client but in some manner obtains this information and, well knowing its nature and the basis upon which it was distributed, uses it in his competing business and thereby injures the first mentioned trader in his business, commits a wrongful act *vis-à-vis* the latter and will be liable to him in damages. In an appropriate case the

> plaintiff trader would also be entitled to claim an interdict against the continuation of such wrongful conduct. Although there is no precise precedent in our law for this proposition, I am of the opinion that it is a well-founded development of our law relating to unlawful competition in trade and is in accordance with trends of legal development elsewhere. Quite apart from questions of copyright, the fact that the information is distributed upon a confidential basis to a limited class of persons prevents it, in my view, from becoming public property capable of being used or imitated by rival traders. In such circumstances the conduct of a rival trader who obtains and, well knowing the position, uses the information to advance his own business interests and activities amounts to a deliberate misappropriation and filching of the product of another's skill and labour. Such conduct must, in my view, be regarded as dishonest and as constituting a fraud upon the compiler of the information. I consider that, as in the case of false misrepresentations concerning one's own wares or of passing-off, our Courts should treat this as constituting unlawful competition and as being actionable at the suit of the trader damnified thereby. As in those cases, the conduct of the trader misappropriating the information would amount to an infringement of the rights of the compiler thereof to carry on his trade and attract custom without unlawful interference from competitors; and the damage suffered would normally consist of the loss of customers or potential customers who have been induced by such conduct to deal with his competitor rather than with the compiler himself. Bearing in mind the *Aquilian* character of a claim based upon such conduct, it seems to me that the suffering of damage in this form and its causal connection with the acts of unlawful competition are essential ingredients of the claimant's cause of action."

As appears from this quotation the trader's right which is infringed is his right to attract custom (werfkrag). The learned Judge (wisely) did not attempt to define the limits of unlawful competition. As the ingenuity of parasitical entrepreneurs and trade pirates is unlimited, it is, in my view, to be expected that the illegal commercial practices designated as unlawful competition will ever increase in variety and number. This virile branch of the law will be required to expand to meet the schemes of geniuses bent upon reaping where they have not sown. To meet all possible contingencies the law will have to provide an open ended remedy. A general course has therefore to be plotted within certain parameters.

The case of *Dun and Bradstreet (supra*) was welcomed "as extending legal protection where it is obviously needed" by Prof P Q R Boberg in 1968 *Annual Survey of South*

African Law at 195 and Prof A J C Copeling doubted whether any reader would

> "find elsewhere a more comprehensive or erudite exposition of this comparatively new and still developing branch of our law"

(1968 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* at 190). A note of discord was however struck by Prof McKerron *The Law of Delict* 7th ed at 271 who stated:

> "The correctness of this view depends upon whether, in the absence of proof of malice, our law recognises a wrong of unfair, as distinguished from illegal, competition. It is submitted that it does not; nor for reasons of judicial policy - and in particular because of the uncertainity it would introduce into the law - is it desirable that it should."

The learned author refers to the view of English Courts that in cases relating to trade competition and industrial disputes the Courts are not concerned with the propriety on ethical or social grounds of what the parties to the action have done. They are concerned only with the question whether there has been shown to be such an unlawful act on the part of the defendant as entitles the plaintiff to relief. I presume that by

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"unlawful" in this context is meant illegal or an action actuated by malice as I have set out above to be McKerron's point of view. McKerron further criticises the judgment by CORBETT J on the basis that it is inconceivable that any court would go so far as to restrain any trader or manufacturer from exploiting confidential information concerning the trade connections or trade secrets of a rival trader or manufacturer, regardless of the manner in which he acquired the information, as that practice is "commonplace in the business world to-day". McKerron also relies on *Post Newspapers (Pty) Ltd v World Printing & Publishing Co Ltd* 1970 (1) SA 454 (W) where NICHOLAS J, without adverse comment, referred to the broad concept of unlawful competition discussed in Dun & Bradstreet, yet refused to grant an interim interdict to an applicant who complained that its rival newspaper was circulating certain documents to prospective advertisers misrepresenting the relative merits of the rival newspapers, which misrepresentations were false to the knowledge of the respondent and made maliciously; alternatively on the basis that the respondent had published material based on data which they knew to be unreliable. It was alleged that this would have the effect of filching advertising from the applicant, which conduct amounted to unfair competition. After reference to certain English cases the Court held that, if the only false statement complained of is that the defendant's goods are better than the plaintiff's, such a statement is not actionable, because to allow such an action would turn the Courts of law into a machinery for advertising rival productions by obtaining a judicial determination which of the two is the better. The Court referred to the qualification to this principle in English law that an action does lie where a trader does not limit himself to a comparison of his goods with those manufactured by another trader and a mere statement that they are inferior to his own, but makes some untrue statement of fact about its rival's goods. In such a case an action will lie on proof that such statement was published maliciously and (generally) give rise to an award of special damages. NICHOLAS J then stated:

> "There can be no doubt, on the authority of *Fichardt's* case, and subsequent cases, that such statements would also be actionable in our law." (At 456G.)

In respect of the alternative cause of action the Court held:

> "In other words, what the applicant's complaint really amounts to is that Brennan did not honestly believe that his conclusions were supported by the survey report. In my view, it

cannot be the law that it constitutes 'unlawful competition' merely for a seller to express opinions in advertising material which he does not honestly hold. As Wessels points out, *Law of Contract in South Africa* 2nd ed vol I at 310 para 1004:

> 'It is a matter of universal experience and everyone is expected to know that persons who have goods for sale are in the habit of extolling the virtues of their wares, of exaggerating their good qualities and of either suppressing or making little of their defects. On the other hand, the purchaser often exaggerates the defects and even finds, in goods offered to him for sale, faults which do not exist. Hence, there is always a duel between the plausibility of the seller and the circumspection of the buyer. The highest form of morality would no doubt require both parties to be frank and truthful, but the law has never reached such a standard.'

It is commonly accepted that an advertiser frequently paints what he has to offer in glowing and exaggerated colours and with extravagantly laudatory phraseology."

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On this basis the application was dismissed.

The principle that our law of unlawful competition has to develop to offer the commercial man protection from unlawful interference in his business and that the basis of the action in our law is *Aquilian* was clearly stated by DIEMONT J in *Stellenbosch Wine Trust Ltd and Another v Oude Meester Group Ltd; Oude Meester Group Ltd v Stellenbosch Wine Trust Ltd and Another* 1972 (3) SA 152 (C) at 161. He continued:

> "A trader who makes fraudulent misrepresentations about his own business to the detriment of his rivals' business is guilty of unlawful interference. So also a trader who passes off his goods as being those of a competitor, or makes injurious false statements concerning his competitors' business. In each case the interference is unlawful and actionable; and in each case the conduct is unfair or dishonest. I have no doubt that the trader who filches information from a competitor, information which he knows to be secret and confidential, and which has been developed by the competitor's skill and industry, is acting unfairly and dishonestly if he uses the information for his own profit and to the detriment of his rival. His conduct amounts to deliberate misappropriating of a business asset which was acquired by another's skill and industry. It is difficult to appreciate how this conduct differs in principle from the conduct of a man who steals goods from the shelves of a rival's shop. Both types of conduct constitute unlawful interference with the trade of another; both types of conduct are in my view actionable, and fall within the principles of the *lex Aquilia*."

As indicated by MARGO J in *Latham and Another v Sher and Another* 1974 (4) SA 687 (W) at 694 in the history of *Aquilian* relief in modern times there have been progressive extensions to cover the demands of new situations.

In *Victor Products (SA) (Pty) Ltd v Lateulere Manufacturing (Pty) Ltd* 1975 (1) SA 961 (W) at 965 MOLL J held that provided the requirements of Aquilian liability are satisfied a trader's action for wrongful interference by a competitor with his rights as a trader is covered by the *lex Aquilia*.

A case much relied upon by Atlas and in fact being the matrix of the case before me is *Harvey Tiling Co (Pty) Ltd v Rodomac (Pty) Ltd and Another* 1977 (1) SA 316 (T). In the case before me the basis and scope of liability for unlawful competition in our law was not debated; counsel accepted as correct the principles expounded in the *Harvey Tiling Co* case. In turn in that case counsel were agreed that the legal principle which was applicable was that stated in the English case of *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203 (CA) at 211 where the English action

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on breach of confidence is set out. Without there being any contractual relationship, a right of a party from whom confidential matter has been received in a confidential way may be infringed where such confidence is breached and such information disclosed or utilised without permission. There is some uncertainty as to whether the judgment in the *Harvey Tiling Co* case is based on delict or on breach of a fiduciary duty (on the basis of an implied term in the contract of employment). Cf the views in 1977 *Annual Survey of South African law* at 112 by D J Joubert; at 178 by J M Burchell and at 406 by C H Lewis and E Mureinik. In my view the particulars of claim indicate that the basis of the action and therefore of the judgment itself was delictual.

In *Stellenbosch Wine Trust Ltd and Others v Oude Meester Group Ltd and Others* 1977 (2) SA 221 (C) THERON J dealt with the criticism by

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McKerron of the *Dun & Bradstreet* case and strongly supported the decision of CORBETT J, stating that it is "soundly based on principle and will stand the test of time" (at 248H). Although they had not formulated their case in these words THERON J stated that the applicants "are obviously relying on their right to attract custom" (at 250E).

In *Salusa (Pty) Ltd v Eagle International Traders* 1979 (4) SA 697 (C) VAN ZYL JP spoke of the *Aquilian* nature of the delict and stated that passing off is

> "but a form of unlawful competition, ie the right to attract custom without unlawful interference".

The learned Judge approved of the judgments of CORBETT J and THERON J referred to above.

This was also the case in *Prok Africa (Pty) Ltd and Another v NTH (Pty) Ltd and Others* 1980 (3) SA 687 (W) where GOLDSTONE AJ (as he then was) held that the dishonest use of confidential information is a species of unlawful competition or unlawful interference with the trade of another, and further extended the scope of the *Aquilian* relief.

It is therefore clear from the above cases that what *H J O van Heerden advocated in 1958 has now firmly become entrenched, namely that the law of South Africa recognises and grants a general action in the case of unlawful competition, based on the principles of the lex Aquilia*.

It remains to determine (if possible) the criteria applied and the scope thereof.

I am not the first nor will I be the last to lament upon the difficulty of determining the dividing line between lawful and unlawful interference with the trade of another, cf the *Dun & Bradstreet* case *supra* at 216D; the *Stellenbosch Wine Trust* case (1972) at 161E; the *Stellenbosch Wine Trust* case (1977) at 248A.

In *Combrinck's* case *supra* at 409 and 411 the Court spoke of "fair and honest competition". In the case of *Geary and Son (supra* at 441) the Appeal Court quoted with approval from that case, while itself dealing with dishonest conduct on the part of the plaintiff's competitor. Whether unfairness in itself is a criterion was not discussed. In the *Dun & Bradstreet* case (at 218H) the Court stated:

> "Fairness and honesty are themselves somewhat vague and elastic terms but, while they may not provide a scientific or indeed infallible guide in all cases to the limits of lawful competition,

they are relevant criteria which have been used in the past and which, in my view, may be used in the future in the development of the law relating to competition in trade."

CORBETT J however stressed the element of dishonesty as a criterion in the case before him, after summarising the conduct of the defendant, as follows:

"Such conduct must, in my view, be regarded as dishonest and as constituting a fraud upon the compiler of the information. I consider that, as in the case of false misrepresentations concerning one's own wares or of passing-off, our Courts should treat this as constituting unlawful competition..."

(at 221G.) This was correctly (in my view) understood by THERON J in the *Stellenbosch Wine Trust* case (1977) at 249H to mean that CORBETT J placed his emphasis on the element of dishonesty and did not suggest that "unfairness" in any wide sense alone could render competition unlawful.

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On the other hand in the *Stellenbosch Wine Trust* case (1972) at 161H - 162A it is uncertain whether DIEMONT J regarded "fairness in competition" and "honesty in trade" as separate criteria or not. The terms are used both disjunctively and copulatively:

"In each case the interference is unlawful and actionable; and in each case the conduct is unfair or dishonest. I have no doubt that a trader who filches information from a competitor, information which he knows to be secret and confidential, and which has been developed by the competitor's skill and industry, is acting unfairly and dishonestly if he uses the information for his own profit and to the detriment of his rival."

In *Prok Africa's* case the complaint was about dishonest misuse of confidential information and GOLDSTONE AJ (at 696C) after referring to cases which held that the dishonest use of confidential information is a species of unlawful competition decided the case on that basis. The reference (at 697F) to "a further extension of the *Aquilian* relief for 'unfair competition'" follows upon a reference to the law of unfair competition in the United States of America. I have so far studiously avoided using the term "unfair competition" as that term might tend to incorporate as element unfairness which as a sole basis for unlawfulness is unwarranted.

To summarise: The test of unfairness *per se* as basis for unlawfulness has not been accepted by our Courts. On the other hand the Courts have not been called upon pertinently to deal with the question. If fairness is to be the criterion which is to be applied, we would be lost in a sea of uncertainty. The individual regards as unfair that which is contrary to his moral convictions. But whose convictions are then to be decisive? A particular individual might regard as unfair trade practices commonly accepted in his society, eg, governmental competition with private enterprise or a price war between a chain store and a small corner grocery shop, where the outcome is the inevitable demise of the latter. Yet these are well known phenomena. Unfairness *per se* cannot in my view be the criterion.

Can the criterion be dishonesty? As appears from the cases to which I have referred, where relief was granted it was done on the basis of dishonest conduct. If dishonesty is the criterion the result in the *Post Newspaper* case would have been different. As appears from the judgment therein dishonest puffery in extolling one's own wares is sometimes countenanced by the law. It follows that honesty could not in all cases serve as a criterion for lawfulness in cases of interference with the trade of another. To regard

as lawful all cases where a trader acted honestly would put the stamp of approval upon cases where it may well be regarded that there was "unfair" competition. I think of cases such as the truthful disparagement by one trader of the goods, character, race, nationality or religion of his competitor; or where a trade boycott is *bona fide* organised against a competitor.

In foreign legal systems the test for unlawfulness in unlawful competition is much wider than mere dishonesty. In the United States of America "unfair competition" is a well known term. According to Callmann *Unfair Competition, Trademarks and Monopolies* 3rd ed vol I para 4.3 as the law stands to-day it is recognised as a tort, and very little else is known about it. He refers to a

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> "general tendency in recent years to substitute the elastic chord of feeling for the golden metewand of the law".

Callmann's definition follows in para 6.2 *(c)*:

> "Unlawful competition is a tort *sui generis*, a violation of the order of struggle, and injury to the right of every competitor to require that his competitors act in conformity with the rules of competition. Competition is a relationship with mutual rights and liabilities and the duty to act in harmony with the rules of competition is an affirmative obligation."

In para 6.2 *(d)* he concludes that the pole-star in the law of "unfair competition" is a classification which distinguishes between competition characterised by constructive effort and that characterised by nonconstructive effort. The former will always be allowed, for constructive competition will not be unlawful; the latter should fundamentally be taboo. The learned author defines constructive effort as the effort of one who seeks a commercial advantage through the honestly exercised means of his own strength, ingenuity, skill and capital. In para 6.2 *(f)* fair competitive conduct is defined as "struggle according to game-like rules by means of constructive effort subject to the natural conditions of the market". In para 7.3, he states:

> "Whether competition is unfair is, therefore, not a question of fact to be resolved by testimony; it is a question of law peculiarly within the judicial province. The determination of what competitive conduct is unfair involves a delicate balancing of interests, of rights and duties, against an ever-changing background of public opinion. It cannot be determined absolutely by statute but only by Judges who can take notice of the unforeseeable varieties of life, and are sensitive to moral and legal values...
>
> And since it is a question of law, it matters not whether the defendant thought his conduct fair. Unfair competition is determined by objective *indicia;* it may well be that the defendant should have known whether his conduct would be permissible; if his unfair conduct is also immoral, his ignorance only evidences his moral deficiency. The defendant's state of mind is of no consequence in the concept of unfair competition. It may be important, however, with respect to the remedy, for it may determine whether damages and an accounting for profits are available."

The English Courts have rejected fairness or reasonableness as criteria in this field. *Mobil Steamship Co Ltd v McGregor Gow & Co* (1889) 23 QBD 598 at 615. The English law deals with instances of "unfair" competition under various torts.

According to Van Heerden *Grondslae van die Mededingingsreg* at 15 - 18 and 46 - 50 the criterion for unlawfulness in competition is in Germany the *boni mores* and in the Netherlands the care required by society with reference to the person or property of

another ("die sorgvuldigheid wat in die maatskaplike verkeer ten aansien van 'n ander se persoon of goed betaam").

What is needed is a legal standard firm enough to afford guidance to the Court, yet flexible enough to permit the influence of an inherent sense of fair play.

I have come to the conclusion that the norm to be applied is the objective one of public policy. This is the general sense of justice of the community, the *boni mores*, manifested in public opinion.

In determining and applying this norm in a particular case, the interests of the competing parties have to be weighed, bearing in mind also the interests of society, the public weal. As this norm cannot exist

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in vacuo, the morals of the market place, the business ethics of that section of the community where the norm is to be applied, are of major importance in its determination.

Public policy as criterion for unlawfulness in delict is well-known in our law; it has the stamp of approval of our highest Court. In *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) at 597A the basis of liability was held to be that:

> "... die regsoortuiging van die gemeenskap verlang dat die late as onregmatig beskou behoort te word en dat die gelede skade vergoed behoort te word..."

In *Suid-Afrikaanse Uitsaaikorporasie v O'Malley* 1977 (3) SA 394 (A) at 403 it was stated that public policy is the norm used to determine whether *prima facie* defamatory words were published lawfully. See also the decision of this Division in *S v A and Another* 1971 (2) SA 293 (T) at 299C and *Universiteit van Pretoria v Tommy Meyer Films (Edms) Bpk* 1977 (4) SA 376 (T) at 387. (On appeal in the last-mentioned case this aspect was not dealt with; cf 1979 (1) SA 441 (A).)

This norm for unlawfulness also has the support of a large body of legal writers in South Africa; cf, eg, W A Joubert in 1958 *Tydskrif Hedendaagse Romeins-Hollandse Reg* at 111 - 112 and 1960 *THRHR* at 43; Van der Merwe en Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (1976) at 60, 61; Neethling *Persoonlikheidsreg* at 69, 70; Van der Walt and Potgieter in 1978 *THRHR* at 79 - 80 and 330.

Public policy is not only an acceptable criterion for unlawfulness in delict in South Africa but as has been shown is also the norm applied in determining whether competition is unlawful in other countries.

The application of this criterion will accommodate a decision like that in the *Post Newspaper* case and those based on dishonesty with which it ostensibly is in conflict. It will also render the elasticity required if this branch of the law is to develop as needed. It encompasses the various manifestations of unlawful competition upon which issue has been joined in this case.

In coming to this conclusion I have kept in mind the words of LEARNED HAND J in *Spectator Motor Service Inc v Walsh* 139 F 2nd 809 at 823 (1944) (quoted in 1974 *South African Law Journal* 408):

> "Nor is it desirable for a lower court to embrace the exhilarating opportunity of anticipating a

doctrine which may be in the womb of time, but whose birth is distant."

As I have indicated birth has been given without undue complications to a healthy infant.

The various actions of the defendants now have to be examined in the light of public policy.

The filching of production secrets and know-how

Atlas' case is that its production methods are exclusive, having evolved through trial and error over the course of many years. Without inside knowledge Lion-Cachet could not have got Pikkewyn into production in three months as he in fact did. Although the various components of the production line are not unique to Atlas and most can be bought in the open market, their correlation is something to be found only at Atlas and this constitutes production secrets and know-how of Atlas.

The evidence of H C Benecke was that Atlas was a pioneer. It acquired

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its skills painfully through a difficult process of trial and error. Atlas had to evolve all sorts of new processes. Many reputable engineering firms were approached for assistance and they all made suggestions, but none had any experience in this subject.

[The learned Judge then dealt with the evidence concerning the individual components of the plaintiff's plant, and continued as follows.]

Having dealt with the individual components of the Atlas plant it remains to deal with the evidence of H C Benecke and the contention of Atlas that it is the correlation between the various components which creates the uniqueness amounting to a production secret or confidential know-how of Atlas.

The term "know-how" was not defined by Atlas or its counsel and it may well mean different things to different people. I accept that what Atlas has in mind is

> "factual knowledge not capable of precise, separate description but which, when used in an accumulated form, after being acquired as the result of trial and error, gives to the one acquiring it an ability to produce something which he otherwise would not have known how to produce with the same accuracy or precision found necessary for commercial success."

Per COLEMAN J in *Mycalex Corporation v Pemco Corporation* 64 F Supp 420, 68 PQ 317 Md (1946) quoted in *Trade Secrets* by Ridsdale Ellis (1964 reprint) para 209.

As previously stated the case of Atlas is based upon the case of *Harvey Tiling Co (supra*) which in turn is based upon the English case of *Saltman Engineering Co Ltd and Others v Campbell Engineering Co Ltd* (1948) 65 RPC 203 (CA) which deals with the English action on breach of confidence at 211:

> "The main part of the claim is based on breach of confidence, in respect of which a right may be infringed without the necessity of there being any contractual relationship. I will explain what I mean. If two parties make a contract, under which one of them obtains for the purpose of the contract or in connection with it some confidential matter, even though the contract is silent on the matter of confidence the law will imply an obligation to treat that confidential matter in a confidential way, as one of the implied terms of the contract; but the obligation to respect confidence is not limited to cases where the parties are in contractual relationship."

Insofar as the English action on breach of confidence is based on an implied contractual term relating to confidentiality of information acquired, it finds its counterpart in our law in the action on breach of contract. See, for example, *Coolair Ventilator Co (SA) (Pty) Ltd v Liebenberg and Another* 1967 (1) SA 686 (W).

According to Turner *The Law of Trade Secrets* (1962) at 5:

> "... there can be no doubt that in England the Courts as a whole have relied upon implied *contractual* terms of confidence (where none are expressed). In America the Courts have as often chosen to find confidence, with no mention of contract, express or implied, as they have chosen to find implied contractual confidence. Also, American Courts often rely on quasi-contract and unjust enrichment. It must be confessed that in both countries it is exceedingly difficult to unravel the legal grounds upon which confidence (contractual or noncontractual) has been found. It is not infrequent for a decision to refer to both kinds of relationship in the same paragraph..."

Referring to America and England *Turner* states that it would be unwise for a person applying the law of either country to consult the legal decision of the other although the law on this aspect in these two countries

had a joint origin. This note of caution should be repeated when it is sought without further ado to apply English or American cases on breach of confidence in our situation. As stated, insofar as it is an action based on a breach of contract there is authority for recognising a remedy similar to the English right of action for breach of confidence in our law; cf *Coolair's* case *supra*.

A delictual action on "breach of confidence" can only be a manifestation of the *Aquilian* action on unlawful competition and has to be determined according to the principles set out by me above.

The *Dun & Bradstreet* case *supra* is authority for the proposition that it is a wrongful act knowingly to appropriate confidential information of a rival who has by the exercise of his skill and labour compiled it.

In the *Harvey Tiling* case *supra* it was held that, where by intellectual effort a production method has been evolved using materials which are widely available to the public, and this result is confidential, the law will not permit another who has obtained knowledge thereof to use such knowledge, by-passing intellectual effort of his own, as a springboard to obtain an unfair advantage for himself. The finding that confidentiality can exist in the manner of use of a number of units of equipment which themselves are publicly known is based on English cases like the *Saltman Engineering* case *supra; Terrapin Ltd v Builders Supply Co (Hayes) Ltd* 1960 RPC 128; *Cranleigh Precision Engineering Ltd v Bryant* (1965) 1 WLR 1293 at 1317 - 1318, (1964) 3 All ER 289 and 1966 RPC 81 (QB) at 96 - 97; *Ansell Rubber Co (Pty) Ltd v Allied Rubber Industries (Pty) Ltd* 1972 RPC 811; Ackroyd's (London) v *Islington Plastics Ltd* 1962 RPC 97 (QB); *Seager v Copydex Ltd* 1967 RPC 349 (CA); *Underwater Welders and Repairers Ltd v Street & Longthorne* 1968 RPC 498. In the *Harvey Tiling* case *supra* at 324 the Court referred to and applied the socalled springboard doctrine quoting from the judgment of ROXBURGH J in the *Terrapin* case *supra* :

> "As I understand it, the essence of this branch of the law, whatever the origin of it may be, is that a person who has obtained information in confidence is not allowed to use it as a springboard for activities detrimental to the person who made the confidential communication,

and springboard it remains even when all the features have been published or can be ascertained by actual inspection by any member of the public. The brochures are certainly not equivalent to the publication of the plans, specifications, other technical information and know-how. The dismantling of a unit might enable a person to proceed without plans or specifications, or other technical information, but not, I think, without some of the know-how, and certainly not without taking the trouble to dismantle. I think it is broadly true to say that a member of the public to whom the confidential information had not been imparted would still have to prepare plans and specifications. He would probably have to construct a prototype, and he would certainly have to conduct tests. Therefore, the possessor of the confidential information still has a long start over any member of the public. The design may be as important as the features. It is, in my view, inherent in the principle on which the *Saltman* case rests that the possessor of such information must be placed under a special disability in the field of competition in order to ensure that he does not get an unfair start; or, in other words, to preclude the tactics which the first defendants and the third defendants and the managing director of both of those companies employed in this case."

The Court further quoted from the judgment of BUCKLEY J in the *Underwater Welders* case *supra* at 506:

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"The fact that all the individual units of equipment that are employed in a particular operation may be articles that can be obtained in the general market and the fact that systems are well known to those concerned in whatever sort of activity is involved, does not mean that there cannot be some degree of confidentiality about the way in which they are used to achieve a particular result..."

In the *Ansell Rubber* case *supra* (a judgment of the Supreme Court of Victoria, Australia) GOWANS J, attempting to find a definition of "trade secret" in the English case law, came to the following conclusion:

"There is very little in these English cases to enable one to identify a 'trade secret'. But some collation of the characteristics may be attempted, without trying to make it an exhaustive statement. Its subject-matter may not be a process in common use, or something which is public property and public knowledge, but if it is the result of work done by the maker upon materials which may be available for the use of anybody, so as to achieve a result which can only be produced by somebody who goes through the same process, it will be sufficient. All of its separate features may have been published, or capable of being ascertained by actual inspection by any member of the public, but if the whole result has not been achieved, and could not be achieved, except by someone going through the same kind of process as the owner, it will not fail to qualify by reason of the publication. It may derive from a maker in another country without losing its character, if it is used, or entitled to be used, by the owner alone in the country in which the owner operates. There is no suggestion of the need for invention. Little can be gathered of the degree of secrecy required beyond what is implied in what is said. But it is a fair inference from what is said that the employer must have kept the matter to himself and from his competitors. The emphasis in the cases is on the confidence."

When considering the so-called springboard doctrine regard should be had to the criticism thereof by MEGARRY J in *Coco v A N Clark (Engineers) Ltd* 1969 RPC 41 at 49 - 50 and the statement by Lord DENNING in *Potters-Ballotini Ltd v Weston-Baker and Others* 1977 RPC 202 at 206 that the springboard doctrine is of limited duration. Cf also *Turner (supra* at 436 - 437). It should be noted that the *Terrapin* case, from which I have quoted above and which was relied on in the *Harvey Tiling* case, was apparently a case where breach of confidence was found arising from an implied term in a contract; cf *Turner (supra* at 223).

In determining whether in given circumstances there was unlawful competition in our

law, the considerations upon which the so-called springboard doctrine is founded are relevant when determining the unlawfulness of the acts in the light of public policy. Those are not, however, the only considerations; it is in the public interest that an employee who has in the course of his employment acquired skills and specialised knowledge of a particular trade or industry should be entitled to apply that elsewhere after termination of his employment; cf *Ackermann-Göggingen Aktiengesellschaft v Marshing* 1973 (4) SA 62 (C) at 76; *Allied Electric (Pty) Ltd v Meyer and Another* 1979 (4) SA 325 (W) at 335. Our system of free enterprise requires for its successful functioning a competitive market where personal skills and expertise can be freely bartered.

In this case there does not arise the collision between the two ideas, freedom of trade and the sanctity of contracts, as in the case of contracts in restraint of trade. Despite the controversy surrounding the approach to the latter it is clear that freedom of trade remains one of the ideals which should be given due consideration when public policy is determined; cf *Roffey v Catterall, Edwards & Goudré (Pty) Ltd* 1977 (4) SA 494 (N)

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at 503 - 504; *National Chemsearch (SA) (Pty) Ltd v Borrowman and Another* 1979 (3) SA 1092 (T) at 1099.

This approach is also in conformity with the English and American Law. The latter is stated by Callmann *Unfair Competition, Trademarks and Monopolies* 3rd ed vol II para 54.2 *(a)* as follows:

> "An employee, upon the termination of his employment, is free to draw upon his general knowledge, experience, memory and skill, howsoever gained, provided he does not use, disclose or impinge upon any of the secret processes or business secrets of his former employer. This rather piously oversimplified principle is much easier to state than to apply. The suggested distinction between general and special knowledge is stated as a moral and economic commandment; but it is an issue which can only be resolved by a balancing of the conflicting social and economic interests of two desirable goals. On the one hand, the law encourages competition and supports an individual's right to exploit his own skill and knowledge; on the other, the law should grant established businesses reasonable protection against unfair trade practices."

The English Law, Lord DENNING MR expounded as follows in the *Potters-Ballotini* case *supra* at 205:

> "There is no doubt whatever that a man, even in the course of his employment by others, may have quite a range of expertise and knowledge of his own which he is entitled to have for his own benefit....
>
> As I ventured to say myself in *Stephenson Jordan & Harrison Ltd* v MacDonald & Evans (1952) 69 RPC 23: 'A servant cannot help acquiring a great deal of knowledge of his master's method of business, and of the science which his master practices. The servant when he leaves cannot be restrained from using the knowledge so acquired, so long as he does not take away trade secrets or lists of customers'. I added: 'The claim for breach of confidence seemed to be an attempt to acquire a monopoly of a branch of human knowledge which the law does not permit except so far as Parliament has authorised it'."

In the *Ansell Rubber* case *supra* at 815 GOWANS J stated:

> "In this field a distinction has to be maintained between information and knowledge acquired in confidence by an employee during his employment which he uses or discloses for his own

advantage while he is still an employee, and information and knowledge so acquired which he uses for his own advantage after his employment is finished. A further distinction has to be drawn between information which forms part of the employee's stock of general knowledge, skill and experience, and that which should fairly be regarded as a separate part of the employee's stock of knowledge (whether it be identifiable as 'particular' or 'detailed' or 'special') which a man of ordinary intelligence and honesty would regard as the property of the former employer."

In *Herbert Morris Ltd v Saxelby* (1916) 1 AC 688 Lord ATKINSON, after referring to the employee's

"skill and knowledge which he had acquired by the exercise of his own mental faculties on what he had seen, heard and had experience of in the employment of the appellants themselves",

dealt with the following unprotectable knowledge:

"It is claimed, however, by the appellants that this organisation and general method of business are trade secrets which the respondent is not entitled either to divulge to another, or use his knowledge of them in the service of any persons other than themselves. The respondent cannot, however, get rid of the impressions left upon his mind by his experience in the appellants' works; they are part of himself; and in my view he violates no obligation express or implied arising from the relation in which he stood to the appellants by using in the service of some persons other than them the general knowledge he has acquired of their scheme of organisation and methods of business."

He further quoted from *Sir W C Leng & Co v Andrews* (1909) 1 Ch 763 at 774:

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"... I apprehend that a man who goes into an office is entitled to make use in any other office, whether his own or that of another employer, of the knowledge which he has acquired in the former of details of office organisation, such as the establishment of one department with a chief or head and grades of subordinates under him,... and the like. To acquire the knowledge of the reasonable mode of general organisation and management of a business of this kind, and to make use of such knowledge, cannot be regarded as a breach of confidence in revealing anything acquired by reason of a person having been in any particular service, although the person may have learnt it in the course of being taught his trade;..."

Bearing in mind the principles and *dicta* set out above I have to determine whether public policy requires that the actions of Pikkewyn in setting up a production process in competition with Atlas were unlawful.

Firstly, I do not think that the process for which protection is sought in the instant case is confidential. There is no evidence that the production sequence was kept secret or limited to certain employees only; all employees and visitors had access to the plant. The various units used in the process were more or less openly used in Atlas' factory (see *Callmann (supra* vol II at 392)).

There is a further reason why Atlas cannot succeed. The Atlas plants, the concept of which has allegedly been copied, was an Abrahams' design, which was scrapped by Atlas.

As I have indicated, the basic components of the Atlas plant (on either of the Abrahams designs) are either commonplace or conceptually not unique to Atlas. It is also clear that these components have not been used by Pikkewyn in the same sequence wherein they were employed by Atlas. It was contended on behalf of Atlas that that made no difference and that the fact that the plant was not obvious is evidenced by the long

period of trial and error. If I am correct in finding, as I do, that the use of the basic components of the Atlas plant would have been prescribed by any engineer applying his mind to this problem, though not necessarily in the same sequence, then Atlas is actually applying for protection for a sequence of components and method of production it has itself scrapped as useless. What Atlas actually contends for is that an entirely useless result, incompetently conceived, should be protected as a production secret of an owner that has itself scrapped it. A strange approach indeed. From the fact that Atlas has through a long period of trial and error evolved a process (which is not copied or taken over), it does not follow that it could be entitled because of its trials and tribulations to protection in respect of components which are public knowledge or in respect of a discarded and useless step in the process.

It may be that knowledge of mistakes to be avoided, when a useful adjunct to the successful working of a process, may very well qualify as part of the "know-how" of the process and be protectable as such; cf *Turner (supra* at 34 and 11). That is not the case here. That which is sought to be protected should in my view not only differ from what was previously generally known, but be of value as well. *Callmann (supra* vol II at 372) states:

> "However, such a combination of commonly known elements or steps can only be deemed a trade secret if it represents a valuable contribution differing materially from other methods taught by the prior art."

There is no evidence that this was the case in the Atlas factory. H C

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Benecke did not have adequate knowledge to speak authoritatively upon this subject and no one else who could was called.

I cannot conceive that public policy requires that in the circumstances set out above the actions of Pikkewyn in setting up its production plant should be branded as unlawful.

The fact that in certain letters Lion-Cachet and in his evidence H C Benecke have described the process as unique does not alter the facts set out above.

It was argued that Lederer had learnt of Atlas' process by working at Atlas on the group I plant and that there was a confidentiality between Lederer and Atlas. There was no evidence as to what Lederer learnt and what new ideas Lederer brought to Atlas. Atlas has no monopoly on Lederer's knowledge.

It was further argued that as Lion-Cachet had worked with Lederer he knew that Lederer was a man to be approached for the new Pikkewyn plant and that he did this while he was still with Atlas. The answer to this argument is that the plant which Lederer designed for Pikkewyn differs substantially from the existing plant at Atlas and the knowledge of which experts to employ to solve this type of problem is not the type of knowhow which is protected; cf *Premier Medical and Industrial Equipment (Pty) Ltd v Winkler and Another* 1971 (3) SA 866 (W) at 869H.

It was argued that Lion-Cachet believed that Lederer had the answer to the problems, but kept that knowledge to himself. On 2 March 1978 he wrote to Abrahams that Abrahams' plant was unacceptable, but LionCachet did not inform Atlas of the fact that Lederer had a solution. It should be remembered that on 2 March 1978 Lederer's first design was made for Pikkewyn. In evaluating this argument it should be borne in mind

that there is no evidence that Abrahams' brief, in which a large sum of money had been invested, could be terminated summarily. It would be reasonable to require Abrahams to rectify his mistakes. Neither is there evidence that Lion-Cachet in fact believed that Lederer's answer was fool-proof. In any event the non-disclosure of an alleged solution by Lederer does not fall under the head of the utilisation of production secrets and know-how. At best it would fall under the rubric of industrial sabotage.

It follows from the above that Atlas does not succeed insofar as its claim is based upon an unlawful filching of production secrets and knowhow.

The filching of marketing secrets and know-how

Atlas alleges that Lion-Cachet and Papenfus acquired knowledge of the names and addresses of customers and potential customers of Atlas for its product ghwamis and built up cordial relationships with many of them. The aforesaid knowledge and cordial relationships were, so it is alleged, confidential matters described in the pleadings as Atlas' marketing secrets and know-how, which the two defendants were obliged to use for the benefit of Atlas only and not entitled to use for the personal benefit of themselves or for the benefit of any third party in competition with Atlas. Atlas alleges that Pikkewyn, Lion-Cachet and Papenfus with the knowledge and approval of Hedderwick wrongfully and unlawfully made use of Atlas' said marketing secrets and know-how.

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Pikkewyn and Hedderwick put Atlas to the proof of these allegations and Lion-Cachet and Papenfus, although admitting that they had access to the customers of Atlas and had built up cordial relationships with those they met, denied the secrecy of the identity of the customers and denied that Atlas had a list of potential customers.

There was no evidence adduced that Atlas had lists of potential customers. There was, however, evidence that a large number of order books which were in the possession of the various representatives of Atlas were not returned to it when these representatives left the employ of Atlas. There is, however, no proof that these order books came into the possession of Pikkewyn.

The evidence indicated clearly that there exists a special relationship between the salesmen in the field and the farmers who buy their range of products and that fertilisers are generally marketed through the goodwill and personal contact of such salesmen. Every salesmen has his special clientele who tend to support him. In view of this special relationship which exists between salesmen or independent agents and purchasers of fertiliser there was little room for Atlas to argue that the identity of purchasers and potential purchasers of its products are marketing secrets. Counsel for Atlas therefore quite rightly conceded that this allegation in the summons had not been proved.

Industrial sabotage

Atlas alleged in the pleadings that during or about the period September 1977 to April 1978 and as part of the campaign of unlawful competition industrial sabotage was committed by Lion-Cachet in the following respects:

(a) He neglected to negotiate and to conclude on behalf of Atlas long term contracts or other arrangements for the supply of raw materials for the manufacture of

Atlas' fertilisers, including ghwamis, when he had a reasonable prospect of concluding such contracts or arrangements with various suppliers, including: Homara Chix, Springvale Farms, Klipdrif (all suppliers of fowl manure) and Day (a supplier of ghwano).

(b) Instead of causing Atlas to puchase fowl manure in the Transvaal from one of its suppliers referred to in para *(a)* above at R11,01 per ton or thereabout, Lion-Cachet caused Atlas to purchase fowl manure from National Plant Food Co, Eiko Poultry Farm and Jacobs Brothers at prices ranging between R31,68 and R46,77 per ton.

(c) Lion-Cachet caused Atlas to purchase "unclean" fowl manure.

(d) Lion-Cachet caused Atlas to minimise the use of double super phosphates and increased the use of mono ammonium phosphates in its fertilisers well knowing the latter to be inferior to the former in that the latter causes fertilisers to set into blocks that cannot be spead over the land to be fertilised.

(e) Lion-Cachet caused Atlas to manufacture, sell and deliver as much sub-standard fertiliser as possible with the view to and with the effect of damaging the reputation of Atlas' products and Atlas' trade connections and profits.

The serious allegations contained in paras *(c)*, *(d)* and *(e)* above

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were not withdrawn by Atlas, but during the opening address I was informed that they would not be proceeded with. The allegation in para *(b)* above was not substantiated by the evidence and not persisted in by Atlas.

There remains therefore one allegation of industrial sabotage under the heading of the campaign of unlawful competition. I will deal first with the failure to conclude or arrange long term contracts in respect of the raw material fowl manure.

[The learned Judge analysed the evidence on this issue and continued as follows.]

In view of the aforesaid I find that no case has been made out that Lion-Cachet neglected to enter into long term contracts with fowl manure suppliers when he could have done so.

This brings me to the contract with Day. Day who did business as Eiland Ghwano in South West Africa was very important to Atlas. The secure supply of ghwano is the very basis of existence, to use the words of Lion-Cachet in a memorandum to the chairman dated 7 June 1977. It was in the interest of Atlas to obtain all the ghwano that Day could deliver. Apart from Day there was the concession island in Algoa Bay called Bird Island which contained grade II ghwano and which concession Atlas held. There was also the Klein family of Swakopmund who had under the trade name Seabird Ghwano held certain ghwano concessions. These were then the sources of supply.

The complaint is not that Lion-Cachet did not negotiate with Day on behalf of Atlas. The complaint is that Lion-Cachet at the stage when he knew that he was leaving Atlas took a presumptuous attitude with Day which caused Day to alter a proposed draft contract between the parties to the detriment of Atlas. [The learned Judge analysed the evidence on this issue and continued as follows.]

On the basis of the facts set out above I am therefore of the opinion that Lion-Cachet was guilty of a breach of his fiduciary duties as director and employee of Atlas in sabotaging Atlas' chances for a long term contract with Day and subverting and taking over its contract.

The law on the position of trust occupied by a director in relation to his company is clear. It is his duty to act for the benefit of the company and not for his own benefit. *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at 177 - 180; *R v Herholdt and Others* 1957 (3) SA 236 (A) at 258D; *S v De Jager and Another* 1965 (2) SA 616 (A) at 625B. The words of Lord BUCKMASTER in *Cook v Deeks* 1916 AC 554 at 563 are apposite:

> "... men who assume the complete control of a company's business must remember that they are not at liberty to sacrifice the interests which they are bound to protect, and, while ostensibly acting for the company, divert in their own favour business which should properly belong to the company they represent."

It follows from the above that Atlas is entitled to claim such damages as it can prove to have flowed from the actions of Lion-Cachet in connection with the Day contract.

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The setting up of Pikkewyn as an act of unfair competition

It is alleged by Atlas that in furtherance of the campaign of unlawful competition Lion-Cachet and Hedderwick caused or assisted in causing Pikkewyn to be incorporated and registered on 15 March 1978 as a company, the principal purpose of which was to manufacture and sell the competing product; that both took up shares in the company and that Lion-Cachet with the assistance of Hedderwick, in March 1978 became the managing director of Pikkewyn. It is stated that Lion-Cachet in acting as aforesaid acted in breach of his obligations as managing director of Atlas, including his fiduciary duties as such, and that Hedderwick was aware of this.

Except for the knowledge of Hedderwick the factual allegations are conceded and the question arises whether the actions of Lion-Cachet amount to a breach of his fiduciary duties as managing director of Atlas. Neatly put the question is whether the managing director of a company when he has resigned and is serving his period of notice may take any steps to create a competitor of that company.

The general principle as stated by INNES CJ in *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at 177 is that where one man stands to another in a position of confidence involving a duty to protect the interest of that other, he is not allowed to place himself in a position where his interests conflict with his duty. This general statement is narrowed down in the field of company law, as an individual director is not as such an agent of a company and is therefore as a rule free to transact business on his own account even in competition with the company of which he is a director (*per* SOLOMON JA at 216). (This does not pertain to the divulging or use of confidential information accessible to him as director.) This principle was stated as follows by Lord BLANESBURGH in *Bell and Another v Lever Brothers Ltd and Others* 1932 AC 161 (HL) at 195:

> "The principle will be found in the case usually cited in relation to it, although reported only in the *Weekly Notes*, of *London and Mashonaland Exploration Co v New Mashonaland Exploration Co* 1891 WN 165, where it was held that, it not appearing from the regulations from the

company that a director's services must be rendered to that company and to no other company, he was at liberty to become a director even of a rival company, and it not being established that he was making to the second company any disclosure of information obtained confidentially by him as a director of the first company he could not at the instance of that company be restrained in his rival directorate. What he could do for a rival company, he could, of course, do for himself."

Cf Gower *The Principles of Modern Company Law* 3rd ed at 547; Cilliers and Benade *Company Law* 2nd ed at 239. The matter must in my view be approached on a common sense basis. It is inconceivable that this freedom to hold directorships in competing companies can exist in the case of a managing director actively so employed. It is impossible for one to advance the conflicting interests of two actively competing businesses as managing director of both. Cf Naude "Mededinging deur 'n Direkteur met sy Maatskappy" 1970 *SA Law Journal* 193 and Naude *Die Regsposisie van die Maatskappydirekteur* at 139.

On the other hand common sense dictates that the mere creation by a

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managing director, whose services have been terminated and who is serving his month's notice, of a future alternative means of employment, albeit in competition with his present company, need not necessarily create a conflict of interest greater than that of an ordinary director serving on the boards of two competing companies.

The mere incorporation of Pikkewyn during March 1978 on the initiative of Lion-Cachet can therefore in my view not be regarded as a breach of the fiduciary relationship that existed between Lion-Cachet and Atlas. Nor did the mere preparatory work Lion-Cachet did for Pikkewyn in, for example, finding accommodation for its factory, transgress the requirements of his duty to Atlas.

Nor do I think that the setting up of Pikkewyn *per se* can be regarded as an act of unfair competition. Lion-Cachet was entitled to take up other employment, even with a competitor of Atlas, after due termination of his services. The planning of his future and the preparatory steps taken to enable him to obtain alternative employment and earn a living even if taken during his month of notice cannot be regarded as against public policy and therefore unlawful. It can therefore not be branded as unfair competition. On this aspect Atlas fails.

The acquisition of favourable contracts for raw materials for Pikkewyn instead of for Atlas

Atlas alleges that during or about March and April 1978 Lion-Cachet obtained for Pikkewyn, which accepted, various contracts or other arrangements for the supply of raw materials which it was the duty of Lion-Cachet as managing director of Atlas to have obtained for Atlas. These contracts include contracts or other arrangements for the supply of fowl manure by Homara Chix, Springvale Farms and Klipdrif and a contract for the supply of ghwano by Day.

I have already found that Atlas' allegation is well-founded in respect of the ghwano contract of Day. This has been dealt with above. The contract with Homara Chix has also been dealt with above. It was negotiated in open competition and well after Lion-Cachet left the employ of Atlas. In this respect Atlas fails.

No argument was addressed to me in respect of Springvale and Klipdrif and neither do I

recall any evidence substantiating an allegation that Lion-Cachet negotiated any contracts with these parties during his employment with Atlas. These claims fail.

The enticement of sales staff

Atlas alleges that during or about March 1978 Pikkewyn and/or LionCachet enticed and induced Papenfus to leave his position as sales manager of Atlas in order to become general manager for Pikkewyn for the production and sale of the competing product.

Atlas further alleges that during or about March and April 1978 Pikkewyn and/or Lion-Cachet and/or Papenfus enticed and induced Beyers and Strydom, two sales representatives of Atlas, to become sales representatives for Pikkewyn to sell the competing product, and Van Niekerk, an independent commission salesman who had been selling ghwamis for Atlas, to assist in the sale of the competing product and to that end to make use of his knowledge of Atlas' customers and of the

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fact that he was known to such customers to be a salesman for Atlas' product ghwamis.

The alleged action of Lion-Cachet and Papenfus is alleged to have been a breach of their respective service contracts with Atlas or their fiduciary duties or, in respect of all three mentioned defendants, unfair and unlawful competition.

[The learned Judge analysed the evidence on this issue and continued as follows.]

In my view it should be found on the probabilities that Lion-Cachet during March 1978 approached Papenfus with an offer of employment. The fact that Papenfus invited Lion-Cachet to a braaivleis to explain to the staff what his intentions were does not mean that at that stage Papenfus was unaware thereof; it may well be that this occasion was needed to attempt to solicit the other staff.

It is also clear that Papenfus during his employment with Atlas in April 1978 induced Beyers and Strydom to terminate their employment with Atlas. Both Lion-Cachet and Papenfus acted throughout on behalf of Pikkewyn.

It was argued that, for enticement or inducement of sales staff in these circumstances to be unlawful, the servant should be induced to a breach of his service contract and not merely to give lawful notice of termination thereof.

This poses the following question. Is it unfair competition to induce an employee to terminate his contract of employment lawfully? Put differently, can it be unlawful conduct to exhort someone to do something lawfully? This proposition falls strange on the ear. In our competitive economy it is normal for employers to bid for their labour, the price of which is subject to the law of supply and demand. As long as the employee is free to leave others are entitled to offer him better terms of employment. The fact that the loss of the employee might cause damage to the employer is incidental and irrelevant. Cf *New Klipfontein Co Ltd* v Superintendent of Labourers 1904 TS 241. This does not mean that should a businessman systematically induce his competitor's employees to leave, his conduct would necessarily be lawful. In my view, public policy would dictate that, where the aim in inducing a competitor's employees to terminate their employment is not to benefit from their services but to cripple or eliminate the business competitor, this action be branded as unlawful competition. Cf *Callmann (supra*

vol II para 33.1 *(a)*).

Applying this test to the facts of the case, I find that the actions of Pikkewyn have not been proved to have been unlawful competition. Atlas was certainly dealt a devastating blow by the defection of its most important employees. Pikkewyn clearly realised that their actions would have this effect on Atlas. This was, however, incidental. The aim of Pikkewyn was to obtain the services of those employees to corner the market. That was a legitimate aim. In these circumstances it cannot be said that its actions amounted to unlawful competition.

This does not mean that Lion-Cachet while employed by Atlas as managing director could, without breaching his fiduciary duties, during March 1978 canvass the employees of Atlas for Pikkewyn; nor does it mean that Papenfus could, without breaching his service contract, do so before the end of April 1978. This both of them did in the case of

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Henning. As Henning did not in fact leave, this caused no damage.

I have found that Lion-Cachet breached his fiduciary duties in respect of the enticement of Papenfus and that the latter breached his service contract in respect of the enticement of Beyers and Strydom. As LionCachet and Papenfus acted on behalf of Pikkewyn within the scope of their authority, Pikkewyn is liable with them. As Lion-Cachet, on the probabilities, not only was aware of what Papenfus was doing and approved thereof, but instructed Papenfus to do so, he is liable for all damages arising from the action of Papenfus aforesaid. Lion-Cachet in fact induced Papenfus to breach his service contract with Atlas, well knowing the terms thereof.

It follows that Pikkewyn and Lion-Cachet are liable for damages flowing from the breach of the fiduciary duty of Lion-Cachet in enticing Papenfus to leave and that Pikkewyn, Lion-Cachet and Papenfus are liable in respect of the enticement of Beyers and Strydom. As Papenfus could have been won over with impunity after March 1978 (after Lion-Cachet had left Atlas) and as the same applies to Beyers and Strydom after April 1978, the damages that Atlas suffered were merely those caused by the one month's acceleration, if any.

I have not dealt with the position of Van Niekerk. Van Niekerk was an independent commission salesman who specialised in selling seed and as a minor line sold ghwamis. There is no evidence at all of any approach to Van Niekerk by any of the defendants except for the fact that during April 1978 he took to the field accompanied by Papenfus to canvass orders for Pikkewyn. I do not think that this fact is adequate proof of enticement or inducement.

The unlawful selling campaign

Atlas was entirely oblivious of the fact that Papenfus accompanied by the commission salesman D J van Niekerk had taken to the field early in April 1978 armed with a Croxley order book (exh J1) stamped with the stamp "Pikkewyn Ghwano (Edms) Bpk, Posbus 75, Meyerton, 1960". A large number of farmers were visited on this campaign which lasted from 4 to 18 April 1978. Orders were taken form them mostly for a product called ghwamix or gwamix but also in four instances for a product called ghwamis, at R15 per ton. Papenfus was introduced as the sales manager of Atlas. Some farmers were brought under the impression that they were buying from Atlas, others that they were buying from Pikkewyn but that Pikkewyn was affiliated to Atlas, and others that

this was a new company unconnected with Atlas with a new product better than the ghwamis of Atlas.

[The learned Judge analysed the evidence on this issue and continued as follows.]

It is clear that the Croxley order book evidences clearly a campaign of passing-off (an infringement of trade mark) which is supported by the evidence of various witnesses, some of whom will be mentioned here. In the absence of any evidence by Papenfus and Van Niekerk I am forced to the conclusion that the use of the word ghwamix was not a mistake on the part of either Van Niekerk or Papenfus but a deliberate attempt to subvert Atlas' product and replace it with Pikkewyn's.

In this respect the law is clear. Passing-off is one of the forms of unlawful competition which has developed to maturity. The remedy is

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Aquilian - Salusa (Pty) Ltd v Eagle International Traders 1979 (4) SA 697 (C) at 704. It consists of the direct or indirect representation by a person that his business or merchandise are those of another or are associated with those of another. *Capital Estate and General Agencies (Pty) Ltd and Others v Holiday Inns Inc and Others* 1977 (2) SA 916 (A) at 929; *Policansky Bros Ltd v L & H Policansky* 1935 AD 89 at 96; *Adcock-Ingram Products Ltd v Beecham (SA) (Pty) Ltd* 1977 (4) SA 434 (W) at 436; *Stellenbosch Wine Trust Ltd and Another v Oude Meester Group Ltd (supra* 1972 (3) SA 152 (C) at 160).

A plaintiff has to prove that its name, mark, sign or get-up has become distinctive, that is, that in the eyes of the public it has acquired a significance or meaning as indicating a particular origin of the goods in respect of which that feature is used. A plaintiff further has to prove that the use of the feature was likely or calculated to deceive thus probably causing loss to the plaintiff. Cf *Adcock-Ingram's* case at 436 - 438 and cases there mentioned.

The evidence proves that ghwamis, the name of Atlas' product, had become a distinctive name and it is clear that the use by Pikkewyn of the names ghwamix, or gwamix or ghwamis was calculated to deceive and cause loss to Atlas.

Pikkewyn was therefore guilty of passing-off and liable for damages to Atlas. It is not necessary therefore to deal with the infringement of Atlas' trade mark.

Certain farmers were not confused at all and well knew that they were buying a new product from a new company unconnected with Atlas. This, however, does not absolve the defendants. This unlawful selling campaign was conducted on behalf of Pikkewyn by Papenfus who was still sales manager for Atlas. As such he acted in breach of his contractual duties and also in breach of his duty of good faith as employee of Atlas. Furthermore he well knew that Van Niekerk was employed by Atlas under a service contract which could terminate on one month's notice and that no notice had been given. This contract stipulated that Van Niekerk was not entitled to sell competing products. By assisting Van Niekerk to sell Pikkewyn's product and by even writing out the orders himself Papenfus clearly either induced or aided Van Niekerk in breaching his contractual duties.

A delictual remedy is available to a party to a contract who complains that a third party has intentionally and without lawful justification induced another party to the

contract to commit a breach thereof. *Solomon v Du Preez* 1920 CPD 401 at 404; *Jansen v Pienaar* (1881) 1 SC 276; *Isaacman v Miller* 1922 TPD 56; *Dun & Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd* 1968 (1) SA 209 (C) at 215. On this basis therefore Papenfus is equally liable in delict.

I find it highly improbable that Lion-Cachet, the managing director of Pikkewyn, which had only just started in April, would be unaware of the doings of Papenfus especially when orders were of vital importance to Pikkewyn. What is more, the orders taken during the initial weeks of Pikkewyn's existence were exhibited with glee to Henning when he visited Pikkewyn's Marendas factory in the second half of April 1979 and it is extremely unlikely that Papenfus would not have shown them to

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his managing director. Had this not been the case one would have expected Lion-Cachet to produce such evidence. In the absence thereof I find that Lion-Cachet, acting on behalf of Pikkewyn as its managing director, was at all times aware of the unlawful selling campaign conducted by Papenfus and Van Niekerk on Pikkewyn's behalf, and that it was conducted with his concurrence.

The evidence shows that this unlawful selling campaign was not merely limited to the instances set out on annexure Q nor was it solely conducted by Papenfus and Van Niekerk. A number of others were involved.

As Atlas relied in its claims for damages in the alternative upon a calculation of lost profit in respect of each ton of organic fertiliser passed off or otherwise unlawfully sold, it is necessary to categorise and deal with the various instances proved.

[The learned Judge then analysed the evidence on this question and continued as follows.]

When the totals of paras A, B and C above are added and the quantity in respect of Goosen is included a total of 3 433 tons is arrived at which is to be taken into account in the further determination of damages.

The liability of each of the defendants

In view of the fact that not all of the defendants were directly involved in all the unlawful activities set out above, the liability of each has to be separately determined.

In respect of the irregularities surrounding the Day contract LionCachet is directly involved and liable for all damages flowing therefrom. As he was acting on behalf of Pikkewyn before its incorporation and as its managing director thereafter and as Pikkewyn accepted the benefits of the Day contract Pikkewyn is equally liable.

In respect of the alleged enticement of sales staff I have found that Pikkewyn, Lion-Cachet and Papenfus are liable on the basis already set out. The unlawful selling campaign was actively conducted by and under the leadership of Papenfus. I find it improbable that Lion-Cachet was unaware of what was happening and find that it was done with his approval. For the reasons set out above Pikkewyn is liable for what these two gentlemen did. I find therefore that in respect of damages flowing from the unlawful selling campaign Pikkewyn, Lion-Cachet and Papenfus are liable.

There remains the position of Hedderwick. It was contended that he instructed the

attorneys to incorporate the company, that he lent them money which made the venture possible, and that he became the major shareholder and a director of Pikkewyn. He must have known that LionCachet was still employed with Atlas during March 1979 when these initial steps were taken. It is alleged that in view of these facts he should have given evidence and that nothing would have been easier for him than to say that he did not know of any irregularities.

As I have found that the mere incorporation of Pikkewyn and the taking of preparatory steps like the obtaining of finance or the advertising of its application to do business or applying to the relevant authorities for permission to do so, do not in itself constitute unlawful conduct, Hedderwick cannot be required to give any explanation of his

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participation in this respect. Although there might be a suspicion that Hedderwick might have known about the activities of his companions, there is no proof of any knowledge on his part. The fact that he is a director and shareholder does not mean that he has knowledge of the intrigues and corrupt practices of his managing director and sales staff. I find that there is no evidence which he had to answer and that I cannot draw any inferences from his failure to give evidence.

It follows that Hedderwick cannot be held responsible for any damages flowing from malpractices committed by or on behalf of Pikkewyn.

The interdict claimed

The claim for an interdict restraining the defendants from manufacturing and/or selling ghwanomix under any name whatsoever is based upon the campaign of unlawful competition and mainly rested upon the alleged filching of Atlas' production secrets and know-how. In view of the fact that I have found against Atlas on that part of its claim, the foundation for an interdict has largely been caved away. The remaining unlawful conduct which I have found to have been proved was not a continuing wrong at the date of issue of summons and nor is it at present. The Day contract irregularities were confined to 1978. The enticement of sales staff occurred during March and April 1978 and has not occurred since. The unlawful selling campaign ended in May 1978 and there is no evidence that it had been resumed.

In respect of the passing-off and infringement of a trade mark a permanent interdict was granted in favour of Atlas already on 4 July 1978 by consent.

In my view therefore no case for an interdict has been made out.

Damages

Atlas claims damages on three alternative bases. Firstly, the difference is claimed between the expected profit for the years 1978 and 1979 and the actual results. Secondly, it is alleged that whatever tonnages Pikkewyn sold during that period Atlas would have sold, and the resultant loss of profit per ton is calculated. Thirdly, the actual instances of unlawful sales in terms of the aforesaid unlawful selling campaign are taken as basis and multiplied by a profit figure per ton to arrive at the result. As will be evident from what follows none of these methods of calculating damages makes provision for loss caused by the so-called enticement of sales staff where both Lion-Cachet and Papenfus acted in breach of their fiduciary and/or contractual duties towards Atlas during the last weeks of their employment there. The damages, if any,

caused by their premature canvassing of staff is impossible to determine or quantify and no award will be made in respect thereof.

In support of the first basis upon which damages was claimed H C Benecke gave evidence that 1977 was a favourable year and that the prospects for 1978 were equally favourable for Atlas. This latter view of his was shared by Lion-Cachet as is evident from numerous documents. The profit of Atlas in 1977 was R193 067 and in the budget for 1978 which was drawn by Lion-Cachet with the help of Darroll, Gilberson and Papenfus a profit of R317 509 was projected on a budgeted 24 000 tons of ghwamis *inter alia*. In support of his statement that this assessment

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of damage was realistic H C Benecke referred to the fact that Pikkewyn produced 27 000 tons in its first 13 months and sold 28 000 tons in the period ending 30 June 1979. Pikkewyn started production early in June 1978. Instead of the expected substantial profit disaster struck Atlas. Not only was there a difference of 17 180 tons of ghwamis between that budgeted and that actually sold, but the total sales of all products also dropped drastically; this includes the half organic fertilisers. The result was that in 1978 the difference between the budgeted profit and actual loss on the total profits of Atlas amounted to R786 824. This Atlas claims as damages. It was conceded, however, that in respect of contract bagging, where there was a drop in income, and in respect of credit notes for bad products which could not be proved to be ascribable to the defendants, certain deductions had to be made amounting to some R18 826 and R121 000 respectively.

In respect of 1979 H C Benecke's evidence was that it would be fair to add 20 per cent growth to the expected 1978 figures, assume that selling prices and costs will remain constant and on that basis arrive at a figure of expected profit of R530 000 which, compared with the actual loss of R225 424 during that year, resulted in a claim for damages in respect of that year for R755 424.

[The learned Judge further analysed the evidence on this aspect of the damages claimed and continued as follows.]

In view of the aforesaid, I am of the opinion that no reliance can be placed on this calculation of H C Benecke upon which the main claim for damages is based. The fact that Lion-Cachet played a major role in the preparation of the 1978 budget does not detract in my view from what I have said as to its reliability.

The second basis upon which Atlas relied in its claim for damages was referred to in *Omega Africa Plastics (Pty) Ltd v Swisstool Manufacturing Co (Pty) Ltd* 1978 (3) SA 465 (A) at 471G, 475D. That basis is that Atlas could and would have made and sold whatever Pikkewyn manufactured and sold and that a fair measure of Atlas' damages is then the profit Atlas would have made if it had had the benefit of those sales made by Pikkewyn.

From 15 March to 31 December 1978 Pikkewyn produced 15 231 tons and sold 12 963 tons. From 1 January to 30 June 1979 Pikkewyn produced 13 381 tons and sold 15 572 tons. On this basis the tonnages sold are then multiplied by a profit per ton to which reference is made later.

The fallacy of this approach in the present instance is that by presupposing that Atlas could have sold everything that Pikkewyn in fact sold it negates the existence of

Pikkewyn. As stated I have found that this cannot be done in the calculation of Atlas' damages. It follows that this method of calculating damages for Atlas cannot be followed.

The last method employed to determine the damages suffered by Atlas involves a tortuous process to determine the profit per ton which Atlas would have made on each additional ton sold over and above that actually sold by it during 1978 and 1979. In this respect Darroll testified on behalf of Atlas.

[The learned Judge then analysed this evidence and concluded as follows.]

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As previously stated I find that Atlas has proved an unlawful selling campaign in respect of 3 433 tons of organic fertiliser and that Pikkewyn, Lion-Cachet and Papenfus are liable for any damages suffered by Atlas as a result thereof. The damages suffered by Atlas is the loss of profit of R5,16 per ton calculated as set out above. It follows that the total amount of damages to be awarded to Atlas is R17 714,28.

I was requested by the parties that, in the event of my finding not being a clear-cut decision in favour of either the one or the other party, the question of costs should be reserved and on that basis no argument in respect of the award of costs was addressed to me. In view of my finding it is desirable that an order for costs should not be made without full argument and I will therefore reserve this question.

I make the following order:

1. The claim for an interdict is dismissed.

2. Judgment is granted against the first, second and third defendants jointly and severally in favour of the plaintiff in an amount of R17 714,28 with interest thereon at 11 per cent per annum from date of judgment to date of payment.

3. The claims against the fourth defendant are dismissed.

4. The question of costs is reserved for determination at a date to be arranged with the Registrar.

Plaintiff's Attorneys: *E F K Tucker Inc*, Johannesburg; *Macintosh, Cross & Farquharson*, Pretoria. Defendants' Attorneys: *Weavind & Werksmans* Inc, Pretoria.
