DUN AND BRADSTREET (PTY) LTD v SA MERCHANTS COMBINED CREDIT BUREAU (CAPE) (PTY) LTD 1968 (1) SA 209 (C)

Citation	1968 (1) SA 209 (C)
Court	Cape Provincial Division
Judge	Corbett J
Heard	October 23, 1967
Jugdmnet	November 16, 1967
Annotations	Link to Case Annotations

Flynote : Sleutelwoorde

Trade and trade mark - Unlawful competition - When actionable. - Nature of remedies available - Trader compiling information and distributing it on a confidential basis - Rival obtaining such information and falsely representing or passing it off as his own - Trader entitled to damages and, in an appropriate case, an interdict.

Headnote : Kopnota

Where a trader has by the exercise of his skill and labour compiled information which he distributes to his clients upon a confidential basis (i.e. 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 true 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.

Case Information

Argument on an exception to the plaintiff's particulars of claim. The nature of the pleadings appears from the reasons for judgment.

S. Aaron, S.C. (with him *L. L. Boshoff)*, for the excipient (defendant).

L. Kooy, S.C. (with him *C. B. van Ryneveld)*, for the respondent (plaintiff).

Cur. adv. vult.

Postea (November 16th).

Judgment

CORBETT, J.: In this matter defendant has taken exception to the plaintiff's particulars of claim, as amended, on the grounds (i) that they do not disclose a cause of action, and (ii) that they are vague and embarrassing. Plaintiff's combined summons, containing its particulars

of claim, was originally filed on 9th May, 1966. As a result of a request for further particulars substantial amendments to the particulars of claim were effected and on 17th October, 1966, and in terms of Rule of Court 28 (5) plaintiff filed an amended particulars of claim. Defendant thereupon requested further particulars to the amended particulars of claim. On 22nd February, 1967, plaintiff furnished certain particulars in response thereto and gave notice in terms of Rule of Court 28 of its intention further to amend its particulars in a minor respect. No objection to this amendment being forthcoming, it was duly effected. On 15th March, 1967, plaintiff filed another amended particulars of claim incorporating this minor amendment. These particulars read as follows:

'1. Plaintiff is Dun & Bradstreet (Pty.) Ltd., a company duly incorporated according to the laws of South Africa and having its registered office at Hollandia House, 127 President Strect, Johannesburg, where (and elsewhere in the Republic) it carries on the business of supplying credit information.

2. Defendant is SA Merchants Combined Credit Bureau (Cape) (Pty.) Ltd., a company duly incorporated according to the laws of South Africa and having its registered office at 96 Main Road, Fish Hoek, Cape, where it carries on the business of supplying credit information.

3. Plaintiff avers that, at all times material to this suit,

(a) it has been the sole owner of the copyright in certain literary works known as 'Credit Records' which are weekly, monthly, quarterly and half-yearly compilations of contemporaneous judgments of the Supreme Court and the magistrates' courts of the Republic of South Africa;

(b) the said literary works were made available by plaintiff to its subscribers only, and it was a term of each contract of subscription that the said works were to be held in confidence and not revealed to any other person;

(c) neither defendant nor its predecessor, SA Merchants Combined Credit Bureau hereinafter referred to, was or is a subscriber to the said works 'Credit Records'.

4. *(a)* On or about 30th June, 1964, defendant acquired the business of a firm styled 'S.A. Merchants Combined Credit Bureau', which conducted the business of supplying credit information.

(b) In acquiring the said business as aforesaid defendant also acquired the firm's cards and/or other records containing credit information, which cards and/or records include *inter alia substantial reproductions from plaintiff's said 'Credit Records' effected wrongfully, unlawfully and in breach of plaintiff's aforesaid copyright.*

5. Since 30th June, 1964, defendant, well knowing the facts set forth in paras. 3 and 4 above, has been:

(a) obtaining, without plaintiff's consent and in some manner to plaintiff unknown, copies of 'Credit Records';

(b) reproducing substantial portions of 'Credit Records' on to its cards and/or other records used by it in its business;

(c) issuing written reports to its own subscribers based on the information reproduced from 'Credit Records' in the manner set out in paras. 4 *(b)* and 5 *(b)* above;

(d) issuing verbal reports to its own subscribers based on the information reproduced from 'Credit Records' in the manner set out in paras. 4 *(b)* and 5 *(b)* above.

6. Plaintiff avers, in the premises, that defendant's conduct described in subparas. 5 *(b)* and

5 *(c)* above was and is wrongful, unlawful and in breach of plaintiff's aforesaid copyright. Plaintiff further avers that defendant's conduct described in sub-paras. 5 *(a)* and 5 *(d)* above is wrongful, unlawful and in breach of plaintiff's aforesaid right (referred to in subparas. 3 *(b)* above) to have the information contained in 'Credit Records' confined to its own subscribers.

7. On 22nd October, 1965, in the above Honourable Court plaintiff was granted a final interdict against defendant, with costs, restraining defendant or any person under its control from making use of plaintiff's 'Credit Records' for the purpose of supplying information to defendant's customers.

CORBETT J

8. As a result of defendant's conduct as set out in para. 5 above, plaintiff has suffered damages in the sum of R2,000.

9. Defendant still has in its possession the said cards and/or other records containing information copied from plaintiff's works as alleged in paras. 4 *(b)* and 5 *(b)* above.

10. Despite demand defendant wrongfully and unlawfully refuses to deliver to plaintiff the cards and/or other records in its possession containing information reproduced from 'Credit Records', or to account to plaintiff for the income it has received from its use of such information.

Wherefore plaintiff claims:

(a) An order that defendant deliver to plaintiff all cards and/or records in its possession containing information reproduced from 'Credit Records' since May, 1963.

(b) Damages in the sum of R2,000.

(c) An order that defendant account to plaintiff for all income received by defendant arising from the use by it of information in plaintiff's 'Credit Records'.

(d) Alternative relief.

(e) Costs of suit.'

It was common cause that these particulars should be read together with the further particulars furnished on 22nd February, 1967. The following allegations contained in these further particulars are relevant for present purposes:

(a) That the 'substantial reproductions' mentioned in para. 4 *(b)* of the particulars refer to all judgment information on the cards and records described in that sub-paragraph and that the plaintiff relies only on reproductions effected since May, 1963;

(b) With reference to para. 5 of the particulars, that defendant obtained all the issues of 'Credit Records' and reproduced all the portions thereof relating to judgments:

(c) That the sum of R2,000 claimed by way of damages represents the plaintiff's estimate of the general loss of its trade over and above * the amount of income received by defendant arising out of the use by defendant of information culled from 'Credit Records'.

Thereafter defendant filed a notice in terms of Rule 23 (1) of the Rules of Court. In para. 2 of this notice defendant states that it appears that plaintiff is alleging two different

---

types of unlawful conduct by the defendant: (i) a breach of copyright by reason of the conduct described in paras. 5 *(b)* and 5 *(c)* of the amended particulars of claim; and (ii) a breach of a right - referred to in para. 3 *(b)* of the amended particulars of claim - to have the information contained in 'Credit Records' confined to its own subscribers, such breach occurring by reason of the conduct described in paras. 5 *(a)* and 5 *(b)* of the amended particulars of claim. Defendant states further that it finds the allegations concerning the second of these two types of unlawful conduct vague and embarrassing and it requests a number of further particulars designed to remove this complaint. Plaintiff filed a reply to this notice declining to furnish the particulars requested in para. 2 thereof. In para. 4 of the notice defendant stated:

'Inasmuch as plaintiff is apparently alleging two different species of legal wrong by defendant, plaintiff is required to indicate what portion of the R2,000 it has allegedly suffered as damages, it suffered in respect of each wrong.' In his reply plaintiff responded as follows:

'Plaintiff apportions the sum of R2,000 equally between

(1) defendant's conduct as alleged in paras. 5 *(b)* and *(c)* of the particulars of claim and

CORBETT J

(2) defendant's conduct as alleged in paras. 5 *(d)* read with 5*(a)* of the particulars of claim.'

The notice of exception subsequently filed by the defendant is directed at that portion of plaintiff's amended particulars of claim which relates to its claim for R1,000 as damages in respect of the conduct alleged in sub-paras. 5 *(a)* and 5 *(d)* thereof. The first ground of exception is that the facts alleged in regard to this claim disclose no cause of action. I shall now consider this ground.

From the aforegoing summary of the pleadings to date it would appear that fundamentally plaintiff has only one main cause of complaint against defendant. This is the reproduction (by the defendant and by its predecessor in title 'S.A. Merchants Combined Credit Bureau') on the cards and records kept by the defendant of portions of 'Credit Records', a literary work compiled by the plaintiff, and the use by defendant of the information contained in these cards and records in order to furnish written and verbal reports to its own subscribers. This complaint is, however, made the basis for two alleged causes of action. In so far as the complaint relates to such reproduction of portions of 'Credit Records' by defendant and the use by defendant of the information contained in these cards to issue *written* reports, plaintiff's cause of action is based upon breach of copyright and is not affected by this exception; while in so far as it relates to the use of these cards and records in order to issue *verbal* reports, plaintiff's cause of action is based upon another right - not categorised in the pleadings - and it is this alleged right which forms the subject-matter of the exception.

Before referring to the arguments advanced in regard to the first ground of exception, viz. that no cause of action is disclosed, it is convenient to summarise briefly the factual allegations made by the plaintiff which would be relevant to establishing a cause of action in respect of the verbal reports. They are:

(1) that plaintiff has its registered office in Johannesburg and that there and elsewhere in the Republic it carries on the business of supplying credit information;

(2) that defendant has its registered office in Fish Hoek, Cape, where it carries on

the business of supplying credit information;

(3) that plaintiff, the author and compiler of, and copyright holder in, 'Credit Records', has made this work available to its subscribers on the condition (which was a term of each contract of subscription) that the information contained therein be held in confidence and be not revealed to any other person;

(4) that neither defendant nor its predecessor, SA Merchants Combined Credit Bureau, was or is a subscriber to 'Credit Records';

(5) that defendant has in its possession certain cards and records containing substantial reproductions from 'Credit Records';

(6) that prior to 30th June, 1964, such reproduction was done wrongfully and unlawfully and in breach of copyright by defendant's aforementioned predecessor and that defendant was thereafter well aware of these facts;

(7) that subsequent to 30th June, 1964 defendant, well knowing the facts set forth in (3) above, has obtained copies of 'Credit

CORBETT J

Records' without plaintiff's consent and in some manner to plaintiff unknown and, acting wrongfully and unlawfully and in breach of plaintiff's copyright, has reproduced substantial portions thereof on its cards and records;

(8) that defendant has issued to its own subscribers verbal reports based on the information reproduced from 'Credit Records' in the manner set forth in (6) and (7) above;

(9) that defendant's conduct, as described in (7) and (8) above, was wrongful and unlawful and constituted a breach of plaintiff's right to have the information contained in 'Credit Records' confined to its own subscribers; and

(10) that as a result thereof plaintiff has suffered damages in respect of the general loss of its trade in the sum of R1,000.

In support of his submission that these allegations disclosed no cause of action Mr. *Aaron*, on behalf of the defendant (excipient), pointed out that the plaintiff's claim in respect of the verbal reports issued by defendant to its subscribers was not founded upon breach of copyright. This appeared clearly from the particulars of claim and was necessarily so in that under our copyright legislation the copyright in a work of this nature could be breached only by the reproduction thereof in a material form. He further pointed out that it was clear that the claim was not founded upon contract in that no privity of contract between plaintiff and defendant was alleged. Finally, Mr. *Aaron* submitted that the facts alleged did not disclose any cause of action in delict.

In reply Mr. *Kooy*, while conceding that the issue of the verbal reports did not constitute a breach of copyright, argued that where copyright material is the subject of a contractually imposed 'confidence' or 'trust' the owner has a remedy at common law for 'breach of confidence' against any person who, knowing of the confidence, verbally reproduces the material. He submitted that, since defendant had knowingly violated plaintiff's right to have 'Credit Records' used exclusively by its own subscribers, it had

committed a breach of confidence.

In this context the term 'breach of confidence' is, as Mr. *Kooy* pointed out, one derived from English Law. It is used to described the equitable cause of action available in England to a plaintiff where confidential ideas or information have been obtained, directly or indirectly, from the plaintiff by the defendant and the defendant, knowingly and without the plaintiff's consent, proceeds to use such ideas or information to the detriment of the plaintiff. (See generally *Saltman Engineering Co., Ltd.*, v *Campbell Engineering Co., Ltd.*, (1963) 3 All E.R. 413; *Peter Pan Manufacturing Corpn v Corsets Silhouette, Ltd.*, (1963) 3 All E.R. 402; *Cranleigh Precision Engineering, Ltd.*, v *Bryant and Another*, (1964) 3 All E.R. 289; Copinger and Skone James on *Copyright*, 10th ed., pp. 36 - 45). The right of action does not depend upon any *nexus* of contract, express or implied, between the paties. As DENNING, M.R., put it in the case of *Seager v Copydex, Ltd.*, (1967) 2 All E.R. 415 at p. 417 -

> 'The law on this subject does not depend on any implied contract. It depends on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it. He must not make use of it to the prejudice of him who gave it without obtaining his consent.'

CORBETT J

The essence of the principle is that -

> '. . . a person who has obtained information in confidence is not allowed to use it as a spring-board for activities detrimental to the person who made the confidential communication . . .'

(*per* ROXBURGH, J., in *Terrapin Ltd v Builers' Supply Co. (Hayes) Ltd.*, as quoted in the *Cranleigh Engineering* case, *supra* at p. 301). It is also essential that the information should be of a confidential nature. This was explained by LORD GREENE, M.R., in *Saltman's* case, *supra* at p. 415, in the following terms:

> 'The information, to be confidential, must, I apprehend, apart from contract, have the necessary quality of confidence about it, namely, it must not be something which is public property and public knowledge. On the other hand, it is perfectly possible to have a confidential document, be it a formula, a plan, a sketch, or something of that kind, which is the result of work done by the maker on materials which may be available for the use of anybody; but what makes it confidential is the fact that the maker of the document has used his brain and thus produced a result which can only be produced by somebody who goes through the same process.'

The remedy has been applied both in the case where the defendant obtained the confidential information directly from the plaintiff (see, e.g., *Seager's* case, *supra)* and in the case where the defendant has obtained it indirectly, e.g. where the plaintiff has given it to a third party and the defendant has succeeded in some way in obtaining it from such third party (see e.g. *Nickrotherm Electrical Co. Ltd. and Others* v. Percy and Another, 195 6 R.P.C. 207; *Exchange Telegraph Co. Ltd v Central News Ltd.*, (1897) 2 Ch. 48).

This right of action for breach of trust or confidence has received legislative recognition in England. Sec. 31 of the Copyright Act of 1911, after providing that no person should be entitled to copyright or any similar right except in accordance with the provisions of the Act, contained a savings provision to the effect that nothing in that section should be construed as -

---

'. . . abrogating any right or jurisdiction to restrain a breach of trust or confidence . . .'.

In the Copyright Act of 1956 there is a similar savings provision in sec. 46 (4) reading -

'Nothing in this Act shall affect the operation of any rule of equity relating to breaches of trust or confidence.'

While all this is interesting and informative as showing the basis upon which another legal system might provide a remedy for the plaintiff, it does not deal directly with the real problem confronting this Court, viz. whether the allegations made by the plaintiff disclose a cause of action in our law. There is, so far as I am aware, no direct authority upon this point. Counsel were not able to refer me to any nor have my own researches been any more productive. I know of no case in which the existence of a remedy similar to the English right of action for breach of trust or confidence has even been considered by our Courts, let alone there being any recognition of such a remedy. There is a similar dearth of authority in the common law sources. Despite this it is intriguing to discover that the South African Patents, Designs Trade Marks and Copyright Act, 9 of 1916, not only adopted (with certain modifications) the whole of the British Copyright Act of 1911, including sec. 31 thereof referred to above, but also contained in sec. 160 a savings clause of its own, similar to sec. 31, in which the right or jurisdiction to restrain a breach of trust or confidence is expressly preserved;

CORBETT J

and, moreover, that the Copyright Act of 1965, which as yet has not been brought fully into operation, contains, in sec. 44 (3) thereof, a provision identical to sec. 46 (4) of the English Copyright Act of 1965, quoted above. It seems obvious that these savings clauses in our legislation cannot be construed as introducing the English equitable remedy for breach of trust or confidence or as creating such a remedy where previously none existed in our law. Whether there is such a remedy or a similar remedy in South African Law must, therefore, be considered independently of this legislation.

One of the difficulties in determining this question arises from the fact that it is difficult to ascertain the accepted juridical basis for the action for breach of confidence in English Law. Apart from emphasising that it does not depend upon breach of contract, express or implied, the English Courts have generally refrained from assigning the action to any particular juristic niche. Although, in the circumstances, tort would seem to be the most appropriate niche, neither the Courts not the leading text-book writers in England appear to have classified the action in this way. In so far as an action for breach of confidence lies in the United States of America, it seems to be regarded as a tortious remedy and as falling under the general rubric of 'Interference with Business Relations' (see *Restatement of the Law of Torts*, secs. 708 et seq; 757 - 9) or 'Interference with Prospective Advantages' (see Prosser, *Law of Torts*, 2nd ed., p. 752).

In was conceded by Mr. *Kooy* in argument that there was no South African common law of copyright upon which a cause of action for a verbal reproduction of copyright material could be based. It would appear that this concession was correctly made (see *Nelson and Meurant v Quin & Co.*, 1874 Buch. 46); and, in any event, breach of copyright at common law was not pleaded as the basis of plaintiff's action in respect of the verbal reports. It was, nevertheless, submitted by plaintiff's counsel that there were two possible bases for the claim in the South African law of delict. The first of these was that the information contained in 'Credit Records' constituted property in the plaintiff's hands and that the unlawful misappropriation and use of this property by defendant constituted a delict in our law. It is true that our law of delict provides relief for various types of

conduct involving an invasion of a person's possession and enjoyment of his corporeal property. Moreover, incorporeal property, such as a personal right flowing from contract, also enjoys a measure of protection in that a delictual remedy is available to a party to a contract who complains that a third party has intentionally and without lawful justification invaded his enjoyment of such property by inducing the other party to the contract to commit a breach thereof (see *Isaacman v Miller*, 1922 T.P.D. 56 at p. 61; *Solomon v Du Preez*, 1920 CPD 401). In the present case, however, the plaintiff is not claiming that the defendant has invaded the contractual rights which it enjoys as against its subscribers and thereby disturbed its rights of property therein. On the contrary no breach of contract by subscribers or any inducement thereto is alleged. What the plaintiff is claiming is that the subject matter of these contractual rights, viz. the confidential information imparted in 'Credit Records', and not the rights themselves, is incorporeal property at common law and

---

CORBETT J

that plaintiff is entitled to be protected against the unlawful use of this property by defendant. In my view, this claim is unfouded. I do not think that, except in a somewhat loose sense, such information, as distinct from the contractual rights, can be regarded as property at common law; nor do I believe that the plaintiff can found a cause of action upon an alleged invasion of its rights of 'property' in such information, (cf. *Nelson and Meurant v Quin & Co., supra).*

The second basis for plaintiff's claim, suggested by its counsel, was the form of delictual liability, in our law often referred to as 'unlawful interference with trade or business' (see e.g. McKerron, *Law of Delict*, 6th ed., pp. 251 *et seq.)*. It is well established that our common law recognises every person's 'right' - 'liberty' would, perhaps, be a more correct term - to carry on his trade without wrongful interference from others, including competitiors. As it was put by DE VILLIERS, J.A., in the well-known case of *Matthews and Others* v. Young, 1922 AD 492 at p. 507:

> '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.'

(See also *Patz v Greene & Co.*, 1907 T.S. 427 at p. 436). The main difficulty in this branch of the law is to determine the dividing line between lawful and unlawful interference with the trade of another. One of the 'rights' comprehended in the general right to carry on a trade is the right to attract custom. Competition by a rival trader necessarily involves an interference with the exercise of this right in that it results, to some degree, in the diversion of such custom to the rival trader. As pointed out in the above-cited passage from *Matthews v Young, supra*, such competition is not in itself unlawful. It may, however, be rendered unlawful by the manner in which the rival conducts his trade and a trader damnified thereby is entitled to relief. Examples of unlawfulness in this sphere are trading in contravention of an express statutory prohibition (see *Patz v Greene & Co., supra);* the making of fraudulent misrepresentations by the rival trader as to his own business (see *Geary & Son (Pty.), Ltd v Gove* 1964 (1) SA 434 (AD); the passing-off by a rival trader of his goods or business as being that of his competitor (see *Policansky Bros. Ltd v L. & H. Policansky*,

1935 AD 89); the publication by the rival trader of injurious falsehoods concerning his competitor's business (see e.g. *Grobbelaar v Du Toit*, 1917 T.P.D. 433); and the employment of physical assaults and intimidation designed to prevent a competitor from pursuing his trade (see e.g. *Ebrahim v Twala and Others*, 1951 (2) SA 490 (W) at p. 494. Conduct falling under the latter two examples may, of course, be actionable not only where the responsible party is a rival trader but also where he does not himself carry on such a trade. Moreover, although certain of the above-mentioned examples of unlawfulness are sometimes classified under other delictual heads (e.g. passing-off which is treated by McKerron, *Law of Delict*, 6th ed., pp. 201 - 3, as a form of liability for nondefamatory

---

CORBETT J

statements), they all have this in common that they constitute forms of unlawful competition in trade for which our law affords relief to other traders who are injured thereby.

In this case the claim of the plaintiff which is presently in issue relates to a competitive act which does not fall within any of the above-mentioned examples or categories of unlawful competition; and the question as to whether or not it constitutes unlawful competition is, so far as I am aware, *res nova* in our law. The question, therefore, arises as to whether there is any broad criterion of unlawfulness by which the competition in question can be tested.

In the case of *Gove v Geary & Son (Pty.) Ltd.*, 1963 (4) SA 95 (D), HENNING, J. referred (at p. 101) to the statement of the law given in McKerron's *Law of Delict*, 5th ed at p. 236, to the effect that an interference with the trade or calling of another is not unlawful and, therefore, not actionable unless the defendant either used unlawful means or was actuated by malice; and that by 'illegal means' was meant means which in themselves are civil wrongs or in the nature of civil wrongs. Apart from the question as to whether malice could convert conduct which was otherwise permissible into unlawful conduct - upon which he expressed no opinion - the learned Judge approved this statement.

With respect, I do not find this statement very helpful, particularly in the present context. It seems to me that it tends to beg the question as to what in fact constitutes unlawful means in competitive trading. Applying the test suggested therein, there may be no difficulty in classifying as unlawful competition trading which is conducted in contravention of a statutory prohibition, but, on the other hand, the test fails to provide a satisfactory *rationale* for holding that, for example, passing-off or the making of misrepresentations about his own wares, constitute unlawful methods of competition. There is no independent criterion whereby the conduct of a trader who seeks to pass off his goods as being those of a competitor can be categorised as unlawful; it is unlawful because of the general principle, known to Roman-Dutch Law, that a person cannot by imitating the name, marks or devices of another, who has acquired a reputation for his goods, filch the former's trade (see *Policansky's* case, *supra*, at p. 97). The position is similar in the case of a trader who makes a wilful misrepresentation as to his own business, as a result of which customers or potential customers of a competitor are induced to deal with him rather than with his competitor. I know of no ground upon which such trading methods can be held unlawful apart from the fact that they constitute an unlawful infringement of the competitor's rights.

In this connection it is appropriate to refer again to *Gove's* case, supra. On appeal (*sub. nom. Geary & Son (Pty.) Ltd v Gove*, 1964 (1) SA 434 (AD)), the decision of the Court *a*

---

quo was reversed upon grounds which are not relevant for present purposes. The observations of the CHIEF JUSTICE upon plaintiff's cause of action are, however, relevant and instructive. The parties in that case were rival traders and the plaintiff's complaints were that the defendant had falsely stated, or implied, in its advertisements that it manufactured, *inter alia*, suspension coil springs and that it had sold, as being of its own

CORBETT J

manufacture, suspension coil springs manufactured by the plaintiff. In the course of his judgment STEYN, C.J., stated (at pp. 440 - 1) -

> '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. As stated by DE VILLIERS, C.J., in *Combrinck v De Kock*, 5 S.C. 405 at p. 409:
>
> '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.'
>
> According to BUCHANAN, J., in the same case (at p. 415) the underlying principle is that
>
> 'no one is permitted to carry on trade by fraudulent misrepresentation to the injury of another'.
>
> The plaintiff does not base its case upon a misrepresentation negligently made, but upon wilful falsehood, i.e. 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.'

Although this statement does not define the limits set to competition in trade (the CHIEF JUSTICE expressly refrained from doing so), it does give some indications as to these limits. The first of these is that the basis of a plaintiff's action for wrongful interference by a competitor with his rights as a trader is clearly stated to be Aquilian. The significance of this is that it means that, while such an action must satisfy all the requirements of Aquilian liability, 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. It was essentially upon this basis that relief was granted in the case cited by the CHIEF JUSTICE in *Gove's* case, *supra*, viz. *Combrink v De Kock*, 5 S.C. 405. The plaintiff in that case complained that the defendant had falsely and fraudulently represented to a third person that he was the authorised agent of the plaintiff to purchase certain cattle and thereby induced such third person to sell the cattle to him. The Court, having found that the Roman-Dutch authorities did not offer much assistance upon the point and having referred to certain English and American authorities, awarded plaintiff damages. The basis of the Court's decision appears to have been the principle embodied in the quotations from the judgments contained in the above-cited passage from the judgment in *Geary and Son (Pty.) Ltd v Gove, supra*. Secondly, it is significant

that in both these cases emphasis is placed upon criteria such as fairness and honesty in competition. It may also be mentioned that in *Lewis v Lazarus*, 13 S.C. 420 at p. 426, DE VILLIERS, C.J., spoke of the duty of the Court 'to prevent the perpetration of fraud by rivals in trade'. 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

CORBETT J

be used in the future in the development of the law relating to competition in trade.

Inasmuch as the question arising in the present case must be decided on principle rather than direct authority (in our law), it is of some value to ascertain the attitude of other legal systems to this and like problems. I have already referred fairly extensively to the English Law relating to breach of confidence, which provides relief in the case of certain kinds of unlawful competition. Apart from this there is a tort described by Winfield, *Tort*, 6th ed., p. 733, as 'unlawful competition and interference with business' which comprehends such wrongs as interference with contract or freedom of contract, damage caused to a trade or business by unlawful threats, slander of title and passing-off. The concept of 'unfair competition' is virtually unknown to English Law (see Pollock on *Torts*, 15th ed., p. 233).

In the United States of America, however, unfair competition has figured prominently as a basis of tortious liability. Prosser, *Law of Torts*, 2nd ed., pp. 749 - 50, after emphasising that the policy of the common law has always been in favour of free competition, states (at p. 571):

> 'Though trade warfare may be waged ruthlessly to the bitter end, there are certain rules of combat which must be observed. 'The trader has not a free lance. Fight he may, but as a soldier, not as a guerrilla.' In the interests of the public and the competitors themselves, boundaries have been set by the law, and numerous practices have been marked out as 'unfair' competition, for which, in general, a tort action will lie in favour of the injured competitor, although very often the tort is given some other name.'

A leading case in the United States on the subject of unfair competition is the decision of the Supreme Court in *International News Service* v. Associated Press, 248 U.S. 215 (1918). Unfortunately the report of this case is not available to me. From summaries thereof contained in other writings (see Dr. H. J. O. van Heerden's interesting and instructive theses entitled *'Grondslae van die Mededingingsreg';* Callmann, *He who reaps where he has not sown: Unjust Enrichment in the Law of Unfair Competition*, 55 Harv. L.R. 595; Chafee, *Unfair Competition,* 53 Harv. L.R. 1289, 1309 - 10) it would seem that the facts were briefly as follows. The plaintiff was a news agency engaged in the gathering of the latest news from the war front in France and making this available to its member newspapers. The defendant was also a news agency acting for the Hearst group of newspapers. Owing to the fact that this group was on bad terms with the authorities in France the defendant was unable to obtain war news directly. To do so defendant copied war news from the plaintiff's bulletin boards - apparently resorting to the bribery of plaintiff's officials in this connection - and from early editions of plaintiff's newspapers. The news thus copied on the Atlantic Coast was telegraphed to the Pacific Coast and in this way the Hearst newspapers often got the war news on the street before it appeared in plaintiff's newspapers. The Supreme Court (by a majority) granted an injunction against the defendant. It was argued that the defendant, just like any purchaser of a newspaper, had the right to communicate the news to others. In answer thereto the

Court stated -

> 'The fault in the reasoning lies in applying as a test the right of the complainant as against the public, instead of considering the rights of complainant and defendant, competitors in business, as between themselves. The right of the purchaser of a single newspaper to spread knowledge of its contents gratuitously,

CORBETT J

> for any legitimate purpose not unreasonably interfering with complainant's right to make merchandise of it, may be admitted; but to transmit that news for commercial use, in competition with complainant . . . is a very different matter. In doing this defendant, by its very act, admits that it is taking material that has been acquired by complainant as the result of organisation and the expenditure of labour, skill, and money, and which is saleable by complainant for money, and that defendant in appropriating it and selling it as its own is endeavouring to reap where it has not sown, and by disposing of it to newspapers that are competitors of complainant's members is appropriating to itself the harvest of those who have sown. Stripped of all disguises, the process amounts to an unauthorised interference with the normal operation of complainant's legitimate business precisely at the point where the profit is to be reaped, in order to divert a material portion of the profit from those who have earned it to those who have not; with special advantage to defendant in the competition because of the fact that it is not burdened with any part of the expense of gathering the news. The transaction speaks for itself, and a court of equity ought not to hesitate long in characterising it as unfair competition in business.'

With regard to another of the defenant's submissions the judgment proceeded -

> 'It is said that the elements of unfair competition are lacking because there is no attempt by defendant to palm off its goods as those of the complainant, characteristic of the most familiar, if not the most typical, cases of unfair competition . . . But we cannot concede that the right to equitable relief is confined to that class of cases. In the present case the fraud upon complainant's rights is more direct and obvious. Regarding news matter as the mere material from which two competing parties are endeavouring to make money, and treating it therefore, as *quasi* property for the purposes of their business because they are both selling it as such, defendant's conduct differs from the ordinary case of unfair competition in trade principally in this that, instead of selling its own goods as those of complainant, it substitutes misappropriation in the place of misrepresentation, and sells complainant's goods as its own.'

This decision is peculiarly apposite in the present case. Here the gravamen of the case is that information garnered by the plaintiff by means of its skill, labour and money and intended to be sold to its customers has been misappropriated by the defendant and used in its own business. The allegation, in effect, is that defendant is 'endeavouring to reap where it has not sown'. On the facts, however, this case is a stronger one than the *International News Service* case in that, unlike the news gathered in that case, the information collected by plaintiff and published in 'Credit Records' constituted a literary work (so it is alleged) and was not made public property by general publication.

The *International News Service* case might have been regarded as giving rise to an expectation of a rapid development by the American Courts of a body of equitable principles which would compel business practice to measure up to minimum standard of public morality. This expectation has not been entirely fulfilled (*Callmann, ibid*, in 55 Harv. L.R. at pp. 595 - 6). There have, nevertheless, been decisions displaying the same trend and giving protection against the piracy of news, radio broadcasts and similar literary property (see Prosser, *Law of Torts*, 2nd ed., p. 753). Parties seeking relief against such piracy have had to contend with the competing principle that, in the absence of patent, copyright or deception as to identity or source, the law countenances

the imitation of ideas, designs and schemes. Even here, however, relief is granted, under certain circumstances, where trade secrets have been misappropriated and used by a rival trader (see *Restatement of Law of Torts*, secs. 757 - 9).

As far as the modern Continental approach to these matters is concerned, the main source of information available to me is Dr. *van Heerden's* aforementioned thesis. From this it would appear that, both

---

CORBETT J

in the case of Germany and the Netherlands, an extensive body of law relating to unlawful competition in trade has been developed. Although the problem posed by cases such as the *International News Service* case does not seem to have been directly considered, there is nothing which leads me to believe that these systems would have adopted a different attitude thereto (see also *Callmann, ibid.* pp. 609 - 10). In Germany, for example, the statute law contains specific provisions against such practices as false advertising, bribery, disparaging of a competitor or his goods, imitating, defamation, disclosure of trade secrets, etc. In addition there is a general provision providing for judicial relief against a person who in the course of business engages in competitive acts which are contrary to good morals ('guten sitten'). This latter provision has provided considerable scope for the interpretative arts of the German Judge.

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 (i.e. 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 products 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

---

CORBETT J

form and its causal connection with the acts of unlawful competition are essential ingredients of the claimant's cause of action.

Having thus determined the nature and scope of the cause of action available in cases of such misappropriation of confidential information, I turn now to the question as to whether in this case the allegations in plaintiff's particulars of claim relating to its claim in respect of verbal reports sufficiently and pertinently make out a cause of action upon this basis.

The particulars do allege, in effect, that the plaintiff has compiled information which it issues in the form of 'Credit Records'. These compilations are described as 'literary works' and I think that it is to be inferred that the compilation of 'Credit Records' involved labour and a certain degree of skill and knowledge on plaintiff's part. It is further alleged that this information was distributed on a confidential basis to plaintiff's subscribers and to them only; and that defendant, who, at all material times, was not a subscriber, obtained this information and, well knowing its confidential nature, nevertheless used it in its business. It is not expressly alleged, however, that plaintiff and defendant carry on business in competition with one another or that defendant used this purloined information in a competing business. In my view, some such allegation is essential, not only because of the basis advanced for plaintiff's claim, viz. interference with its trade arising from unlawful competition, but also because it furnishes part of the causal connection between the conduct complained of and the damage suffered by the plaintiff. I shall assume, however, that it is sufficient if an allegation to this effect is to be implied in plaintiff's particulars of claim (cf. *Naidoo v Ramnarrain*, 1962 (3) SA 903 (D)). It is true that it is alleged that each of the parties carries on the business of supplying credit information but it does not necessarily follow from this that they compete with one another. Plaintiff is alleged to operate in Johannesburg and 'elsewhere in the Republic'; defendant is stated to carry on business in Fish Hoek, Cape. It is not clear whether their spheres of business activity overlap or not. It might be anticipated that, in a case like this, an implication as to competition might arise from the allegations made in regard to the manner in which plaintiff suffered damage as a result of defendant's conduct. Here, however, the particulars given are extremely meagre. All that plaintiff states is that as a result of defendant's conduct it has suffered damages in the sum of R1,000, this amount representing plaintiff's

> 'estimate of the general loss of its trade over and above the amount of income received by defendant arising out of the use by defendant of information culled from 'Credit Records'.'

Not only does this allegation telescope the concepts of damage, being the injury suffered by plaintiff, and damages, being the monetary compensation claimed in respect of such damage, but it gives little clue as to the nature of such damage or as to how it is alleged to have been caused. Admittedly it is difficult to visualise how in this context plaintiff could have suffered 'general loss of its trade' (whatever the precise meaning of these words may be) except by custom - in the form of subscribers - having been diverted to defendant's competing business, i.e. by competition; but I cannot exclude the possibility of such loss having been suffered in other ways. It is to be noted that these damages

CORBETT J

are said to represent plaintiff's general loss of trade over and above the income received

by defendant from the use of information culled from 'Credit Records'. This is presumably an adjustment necessitated by the fact that such income is the subject-matter of a separate prayer. This statement fails to clarify the position. It is susceptible of the construction that the damages are qualitatively similar to the income received by defendant and, therefore, that it is loss of custom to defendant that is being alleged; or it might mean that the damages are claimed for a loss of trade of an entirely different (and unspecified) character. I am, accordingly, not satisfied that an allegation to the effect that the parties carry on business in competition or that defendant used the information taken from 'Credit Records' in a competing business is to be implied from plaintiff's particulars of claim. It would follow that in the absence of this essential allegation the particulars fail to disclose a cause of action.

There is another criticism to be levelled at plaintiff's statement of its cause of action. As I have indicated, the cause of action available to it is essentially a delictual one based, broadly speaking, upon its 'right' to engage in trade and attract custom without interference in the form of unlawful competition by others. In para. 6 of its particulars of claim plaintiff has sought to define its cause of action by stating that defendant's conduct in using information from 'Credit Records' to furnish verbal reports to its own subscribers was wrongful and unlawful and in breach of plaintiff's 'right (referred to in para. 3 *(b)* above) to have the information contained in 'Credit Records' confined to its own subscribers'. I do not think that in this context the words 'wrongful' and 'unlawful' add substantially to the allegation: the essence of it is that the afore-mentioned conduct constituted a breach of this right to have the information confined to plaintiff's subscribers. From whence is this right derived? The right is described as being referred to in para. 3 *(b)*. Reference to this sub-paragraph fails to reveal any right as such; there is, however, an allegation therein to the effect that it was a term of plaintiff's contracts with its subscribers that the information contained in 'Credit Records' was to be held in confidence and not revealed to any other person. This term would have conferred upon plaintiff a contractual right to have the information held in confidence by its subscribers; but this right would have been enjoyed only against plaintiff's subscribers. Defendant was not one of these. No other right is referred to, even by implication, in para. 3 *(b)*. In the circumstances I find it impossible to determine what this definition of plaintiff's cause of action, contained in para. 6, really means. The only cause of action to which it apparently does not refer is that based on unlawful competition; and that, in my view, is the only one available to it. It has been argued that a pleader need not put a label to his cause of action. Be that as it may, a conclusion of law based upon the facts alleged is usually included in a pleading. Where the pleader has done so and has thereby defined his cause of action, it is difficult to see how the pleading can be interpreted as referring to a different cause of action.

For these reasons I have come to the conclusion that the only valid cause of action available to plaintiff, viz. a delictual claim based upon unlawful competition interfering with its right to trade and attract custom

to its business, has not been pleaded or, at any rate, has not been adequately pleaded and that, therefore, plaintiff's particulars of claim (as amended) disclose no cause of action. The first ground of exception is accordingly upheld.

In case this conclusion should be incorrect I propose to consider as well the second ground of exception. This is to the effect that the portion of the amended particulars of

claim relating to the claim presently in issue is vague and embarrassing in that -

'*(a)* It is not clear from the facts alleged in the amended particulars of claim, as read with plaintiff's notice dated 11th May, whether plaintiff relies on copyright or some other right for the allegation that the conduct set out in paras. 5 *(a)* and 5 *(d)* of the amended particulars of claim is wrongful and unlawful.

(b) If plaintiff does not rely on copyright for this allegation, then it is not clear what the nature of the right is on which it does rely.'

There is no substance in the contention advanced in *(a)* above: clearly plaintiff does not rely upon copyright for its allegation that the conduct described in paras. 5 *(a)* and 5 *(d)* was wrongful and unlawful. On the other hand, I agree that it is not clear what the nature of the alleged right or of plaintiff's cause of action is. In dealing with the first ground of exception I have already pointed out that the plaintiff has nowhere alleged in its pleadings that the parties traded in competition or that the defendant used information culled from 'Credit Records' in a competing business; nor is it clearly stated what damage plaintiff sustained as a result of this conduct or how it was caused. I have also stressed plaintiff's own definition of its cause of action as being a breach by defendant of the plaintiff's right to have the information confined to its own subscribers. I do not propose to repeat what I have already said in regard to these matters when discussing the first ground of exception; most of this is again relevant in regard to the second ground of exception. Assuming that a cause of action on the basis accepted by me and indicated above is disclosed, I consider that the pleading of it is so lacking in particularity and the definition of it as a breach of a right to have the information confined to plaintiff's own subscribers is so confusing and misleading as to render the pleading vague and embarrassing. With regard to this latter point, I would just add that, inasmuch as the right alleged is apparently a contractual one, the pleading suggests that the cause of action might be based on contract. At any rate the pleading does not make it clear whether the claim for damages is based upon delict or breach of contract or on both and on that ground as well may be said to be vague and embarrassing (cf. *Wellworth's Bazaars Ltd v Chandlers Ltd. and Another*, 1948 (3) SA 348 (W)). It was suggested by Mr. *Aaron* that in truth the plaintiff had based its pleading upon the English action of breach of confidence and that that was why it did not conform to the requirements of the Aquilian action founded upon unlawful competition. There may well be some substance in this suggestion. Whatever the position may be it does not render the pleading any less excipiable.

Accordingly, I hold that the plaintiff has failed to indicate with sufficient clarity what right it relies on for the basis of its cause of action and that, assuming that my conclusion in regard to the first ground of exception is incorrect, the second ground of exception to the effect that the particulars of claim are vague and embarrassing must be upheld.

CORBETT J

In determining the claim for costs I have not lost sight of the fact that, in a sense, the exception has resolved a question of law in plaintiff's favour, viz. that on a certain basis and assuming that it can establish certain requisites, a cause of action is available to it. On the other hand, in my view this cause of action has not been properly pleaded and, in the alternative, both grounds of exception have been upheld. In the circumstances costs must follow the result.

Finally, I would just point out that, in determining what cause of action is available in respect of unlawful competition taking the form of the misappropriation of confidential

information in the manner complained of in this case, I did not overlook the fact that part of the process of misappropriation consisted of the reproduction of 'Credit Records' upon defendant's cards and other records. This is alleged to constitute a breach of plaintiff's copyright. It might well be argued that this fact alone would render the competition unlawful and actionable. I preferred, however, to deal with the matter upon a broader basis which would apply irrespective of whether or not there had been breach of copyright.

Defendant's exceptions are upheld and plaintiff's amended particulars of claim (dated 15th March, 1967) are set aside with costs. Plaintiff is given leave to file fresh particulars of claim within one month of the date of this order.

I should perhaps add in explanation of this order that I have held that subject to certain facts being present a cause of action in respect of verbal reports is available. But I have upheld the exceptions on the ground that it has not been pertinently and adequately pleaded.

As far as the question of costs is concerned I have taken that into account and I have decided to allow the exceptions with costs. However, while that is my *prima facie* view, in view of the basis of my upholding the exceptions counsel may wish to argue the question of costs

Should the aforementioned order as to costs stand then it should be understood as including the costs of two counsel and to be upon the higher scale.

Excipient's Attorneys: *Jos Cohen & Brett*. Respondent's Attorneys: *Syfret, Godlonton & Low*.
