IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

REPORTABLE

CASE NO: A481/2015

In the matter between:

BEST BOLAND MOTORS CC	First Appellant
BEST BOLAND ONDERDELE CC	Second Appellant
CHRISTIAAN JOHAN COETZEE	Third Appellant
CJ COETZEE INDUSTRIES CC	Fourth Appellant
PA COETZEE	Fifth Appellant
ERICH SCHIEMAN	Sixth Appellant
And	
GRATIMA 130 CC	Respondent

JUDGMENT DELIVERED ON 21 SEPTEMBER 2016

GAMBLE, J:

INTRODUCTION

[1] The Volkswagen Beetle is an iconic 20th century automobile which was developed during the height of the Third Reich when the Chancellor of Germany decided that the *Herrenvolk* needed an affordable mode of private transport, which could travel at a speed of 100kph and cost less than 1000 *Reichsmark*, thereby

becoming truly worthy of the of the nomenclature of "*a people's car*". Based on the original design of a certain Ferdinand Porsche, incorporating a rear-mounted air-cooled engine, the first VW Beetle – so called because of its distinctive curved bug-like shape, was produced in 1939, at a state-owned factory in Wolfsburg, a purpose-built city which owes its origin to the large-scale production of these motor cars.[1]

[2] The car became very popular in South Africa from the 1950s through to the late 1970's as an affordable, reliable and low maintenance vehicle for people of any age - from students, through newlyweds to pensioners and became eponymously known as a '*Volksie',* a *'Vollatjie',* a *'Bug' or* simply a '*Beetle'*[2].

[3] The third appellant, Mr Christiaan Coetzee, evidently acquired his first used Beetle while still in high school, and became most adept at the rebuilding, maintenance and repair thereof. Over the years Coetzee built up a reputation in Stellenbosch as a highly competent Volkswagen mechanic, running a business known as "Best Beetle Motors" which specialised in the repair and maintenance of Beetles.

[4] The business flourished and in 1994 Coetzee relocated to premises in an industrial area at Brackenfell in the Cape Peninsula, where the business was revamped as "Best Boland Motors". The business flourished and eventually Coetzee was able to purchase the premises from which it traded. As a wily businessman he

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[1] Wikipedia Online Encyclopaedia *sv* "Volkswagen";
Toni Younghusband , Wallop! An Advertising Phenomenon Called Rightford, Searle-Tripp and Makin.

[2] The occasional incorrect reference in this appeal record to a "Beatle" relates to another 1960's icon of similar universal popularity.

spotted a niche in the car rental business, namely the hiring of second-hand Beetles for those with the pang of nostalgia for a bygone era, or for those looking for a cheaper form of long-term car rental. He eventually built up a fleet of around 100 Beetles, many of which were made available for rental. Given the shortage of spare parts for Beetles, which had gone out of production at the Volkswagen factory at Uitenhage in 1979, a handy supply of used Beetles enabled the business to efficiently maintain its fleet of hire vehicles by the stripping and sourcing of used parts from those other vehicles.

[5] Through Best Boland Motors CC ("Best Boland"), which traded as "*Best Beetle Hire",* Coetzee operated from premises located at no. 9 Staal Street, Brackenfell, where by 2004, the business employed a fair number of people, including his brothers, Francois Gunter Coetzee and Dirk Arno Coetzee. For the sake of convenience I shall refer to these two family members as "Gunter" and "Dirk" respectively so as to distinguish them from the third appellant. Coetzee claimed that the business was well known both locally and abroad and that many of the rental customers were foreign visitors to South Africa, who had become familiar with Best Beetle via a web page on the Internet which was managed by Gunter.

[6] Towards the beginning of 2004, Coetzee decided to dispose of Best Beetle and to that end placed an advertisement in a local newspaper in May 2004 in which, *inter alia*, the net profit of the business was claimed to be R120 000 per month. Persuant to this advert, the respondent, Gratima 130 CC, a business owned and managed by Mr Pieter Stephan, bought the Best Beetle business from Best Boland as a going concern. Coetzee however maintained ownership and control of Best Boland

as also the name of the business. Stephan was at that stage running a service station and a convenience store business in Paarl, having earlier given up his job as a marketing consultant at the KWV, a large co-operative winery. He admittedly had no experience in the motor trade as such.

[7] Stephan was introduced to the business in May 2004 and eventually a written agreement of sale was concluded early in September 2004 in terms whereof Best Boland's business was sold to him for R2m. The effective date for the takeover was to be 1 December 2004, with the purchase of the new business contingent upon the sale of Stephan's existing business in Paarl. I shall refer to this as the initial agreement. In October 2004 the purchase price was reduced to R1,9m, with a deposit in the amount of R1 150 000 payable on the takeover date and the balance payable in 24 equal monthly instalments, together with interest of 10% per annum due on the outstanding balance. In the agreement of sale, the going concern, ('*die besigheid')* was defined as the hiring and repair of motor vehicles, as also the sale of used motor spares[3]. It was to be conducted at the aforementioned premises at 9 Staal Street in terms of a lease to be concluded with the second appellant, Best Boland Onderdele CC, an entity also effectively owned and controlled by Coetzee[4]. For the purposes of indentification in relation to the lease agreement I shall refer to the second appellant as *'Onderdele'.*

[3] *"'**Besigheid'** beteken verhurings-, motorherstel- en 'n gebruikte onderdele besigheid wat deur die Verkoper as 'n lopende besigheid soos op die bepaalde datum bestuur word en sluit die besigheidsbates in."*

[4] The lease agreement was ultimately concluded at the end of January 2005.

[8] As things turned out the deposit for the purchase of the business was late and only paid on 15 December 2004 but Stephan was given access to the business from the first day of that month. By arrangement between the parties certain of Best Boland's employees stayed on in the business so as to familiarise Stephan with the running thereof given that Coetzee described it as "fairly complex". Early in January 2005, Stephan indicated that he no longer required the assistance of these employees who were released to go back to working for Coetzee at the business refered to immediately below.

[9] On 1 December 2004 Coetzee opened a new business a short distance away at no 5 Staal Street. It was formally conducted by the second appellant under the name and style of "*Boland Kombi Golf and Polo Centre"*, and for the sake of convenience I shall hereinafter refer to this business conducted by the second appellant as "*Boland Kombi".* The business was said to have specialised in the repair of Volkswagen vehicles manufactured after 1984. The significance of this date is that all VW vehicles which left the Uitenhage factory after that date were to be serviced using computer-based technology. The Beetle, which on the other hand had been serviced and maintained according to basic manual methods using standard workshop equipment, was not upgraded to computer-based technology. Coetzee's new business venture would, to all intents and purposes, therefore not service Beetles.

[10] During January 2005, Stephan noticed a significant drop-off in the turnover of his business, then trading as *"Beetle Car Rental".* He attributed this to the success of Boland Kombi which he said had filched customers and competed unfairly

with his business. By February 2005, Stephan was looking around for a purchaser of Beetle Car Rental. After a number of fruitless attempts at disposing of the business to third parties, he reverted to Coetzee in December 2005 and sold the business back to him for R400 000.

[11] On 17 December 2007, the respondent ("Gratima") issued summons out of this court against the first to fifth appellants herein. It sought payment by Coetzee of four distinct claims, being damages for breach of contract and/or unlawful competition, amounts due inrespect of the agreed use of its tow trucks, the refund of its rental deposit paid to the second appellant in respect of the lease at 9 Staal Street and the costs of suit in certain interim litigation between the parties. It was claimed that Coetzee was personally liable for the obligations of the close corporations controlled by him by virtue of the provisions of sec 26(5) of the Close Corporations Act, 69 of 1984.

[12] After a somewhat protracted trial, judgment was granted in favour of the respondent on 27 March 2014. The Court *a quo* awarded Gratima damages in the sum of R1 182 812, 50, payment of the sum of R 47 423, 14 in respect of the use of the tow trucks, repayment of the rental deposit in the sum of R 18 240 and the costs of the interim litigation. Mora interest was also awarded, together with costs of suit, and all amounts were ordered to be paid by Coetzee personally on the basis as claimed.

[13] The Court *a quo* refused Coetzee leave to appeal, but after petitioning the Supreme Court of Appeal, he was granted leave to appeal only the damages award, the order for repayment of the rental deposit and the costs order in the trial

itself. Leave was not granted in respect of the order declaring Coetzee personally liable for the obligations of the close corporations.

APPLICATION FOR CONDONATION

[14] Coetzee was granted leave to appeal on 15 December 2014. In terms of the applicable rules, his notice of appeal was to have been filed on Friday 16 January 2015. As a matter of fact, the notice of appeal was filed the following Monday and was therefore 1 day late. In terms of the Rules of Court, Coetzee was thereafter required to prosecute the appeal within 60 days (i.e. by 13 April 2015). He failed to take this step timeously and only did so early in August 2015.

[15] Accordingly, an application for condonation for the late filing of the notice of appeal and the prosecution of the appeal was filed in August 2015, which application was vigourously opposed by the respondent. In the process, another 168 pages was added to the record in this matter. In the application, Coetzee said that he had been hamstrung by a shortage of funds and had been unable to instruct his attorneys timeously. He pointed out that he had left the motor trade and that his sole source of income was from a building business in which he was then involved. He complained about poor payment by the owner of the house that he was building.

[16] In the answering affidavit Stephan pointed out that Coetzee had been economical with the truth in the founding affidavit in the application for condonation. He had failed to disclose his ownership of a small-holding in the Klipheuwel district from which a monthly rental income was derived. It was suggested that the failure to

prosecute the appeal on the basis of impecunity was contrived and that the real reason was the fact that Coetzee had acquiesced in the judgment of the court *a quo.*

[17] The requirements in an application for condonation for the failure to prosecute an appeal are contained in Rule 49 and the priciples regarding the application thereof are trite: non-compliance with the 60 day time limit prescribed by Rule 49(6) leads to the automatic lapsing of the appeal and the appellant is then required to file a substantive application fully explaining the reasons for the delay. The court hearing the application will consider the reasonableness of the explanation put up and weigh it up against the prospects of success on appeal: the stronger the prospects, the more likely the court is to grant condonation, moreso where the explanation is not convincing. Ultimately, however, the court exercises a discretion with due regard for the interests of justice and the right of the successful party in the litigation to finality in the proceedings.[5]

[18] There is a further procedural hurdle which Coetzee failed to clear in the run-up to this appeal: no heads of argument were filed on his behalf. In terms of Practice Direction 49 of this Division such a failure can lead to the appeal either being struck off the role or dismissed in its entirety. There is no written explanation before us as to the failure on the part of Coetzee to file his heads of argument but the reason is not difficult to find. On 6 June 2016 his attorneys withdrew as attorneys of record and at the hearing of the appeal Coetzee appeared in person, claiming also to represent the first, second and fourth appellants. Given that those appellants are deregistered

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[5] United Plant Hire (Pty) Ltd v Hills 1976(1) SA 717 (A) at 720E-G; Van Wyk v Unitas Hospital (Open Democratic Advice Centre as *amicus curiae*) 2008(2) SA 472 (CC) at 477 A-B.

companies and accordingly non-existent entities, Coetzee was before us only in his personal capacity as the third appellant - the party who had been ordered to effect payment of the amounts due in terms of the judgment of the court *a quo.* Coetzee proceeded to argue the appeal without heads of argument but he was nevertheless more than capable in his address to this court.

[19] In argument before us, counsel for Gratima made much play of the non-disclosure by Coetzee of his additional source of income. I agree that the failure to fully disclose his income and his assets is a serious shortcoming in the application for condonation. However what is clear, is that Coetzee is financially stretched - I have little doubt that had he been able to afford the services of a lawyer he would have appointed one given that the amount that he is liable to pay in terms of the court order is substantial.

[20] In the circumstances, I am prepared (albeit reluctantly) to accept the explanation put up by Coetzee for the failure to prosecute the appeal timeously. Consideration must then be given to the prospects of success in the appeal and it is to that aspect of the case that the focus of this judgment will be directed.

<u>THE PRINCIPAL CLAIM AS PLEADED IN THE COURT *A QUO*</u>

[21] In its particulars of claim as amended, Gratima relied, for its principal claim, on a written agreement of sale concluded with Best Boland on 9 September 2004 with the parties thereto represented as set out above. It alleged that in terms of that agreement (as amemded), it purchased the business as a going concern from

Best Boland for a purchase consideration of R1, 9 million. It went on to allege that the existing stock of certain used spare parts was an integral part of the business.

[22] Gratima pleaded that the agreement was breached in the following respect -

22.1 That Best Boland removed almost the entire stock of spare parts from the workshop prior to 1 December 2004 when Gratima took over the business; and

22.2 That the removal of the said stock of spare parts (which were said to be unobtainable elsewhere) rendered the rental component of the business incapable of operation by virtue of the non-availability of spare parts with which to repair the rental vehicles.

[23] In the alternative, Gratima contended that Coetzee had intentionally and unlawfully competed with it in 4 respects, namely, by

23.1 opening the business of Boland Kombi at 5 Staal Street, Brackenfell, which was identical to the unique repair and rental business operated by Gratima and which was in direct competition with it;

23.2 wrongfully removing all of the customer books and lists from the business premises;

23.3 intentionally filching clients from the business; and

23.4 intentionally causing the erosion of the goodwill of the business, which was said to form an essential component of the *res vendita.*

[24] It was said that in consequence of Coetzee's aforesaid unlawful competttion, after a 10 month period the business was incapable of trading profitably and in order to limit its loses Gratima was obliged to sell the business to Boland Kombi in December 2005 for the sum of R400 000. Gratima claimed that as a consequence of the breach of the initial agreement, alternatively the unlawful competition by Coetzee, it had suffered damages in the amount of R1 182 812,50 being the revised purchase price (R1,9m) less the sum of all payments made to Best Boland under the agreement (R1 582 812.50) and less the proceeds of the resale (R400 000).

[25] The plea to the allegations of unlawful competition in support of the principal claim reads as follows –

> "*13.1 The Defendants plead that to the knowledge of the Plaintiff the Third Defendant was already conducting a car rental and repair business at 5 Staal Street, Brackenfell Industria at the time of the conclusion of the agreement with the Plaintiff, and that the parties were aware that such business would continue.*
>
> *13.2 The Third Defendant sold the aforesaid business during or about March 2005.*

> *13.3 The Third Defendant admits that he was in competition with the Plaintiff for a period but denies that his conduct was a breach of the agreement concluded between the parties and/or constituted unlawful competition.*
>
> *13.4 Save as aforesaid, the contents of this paragraph are denied as if specifically traversed."*

[26] The plea to the allegations of the unlawful removal of spare Beetle parts from the premises at 7 Staal Street was a blanket denial thereof and there was also a denial of the alleged importance of such parts to the business which Gratima had purchased. Further the quantum of the plaintiff's claim was placed in issue by Boland Kombi.

<u>THE CLAIM FOR THE RETURN OF THE RENT DEPOSIT</u>

[27] In the particulars of claim, Gratima referred to an agreement of lease it concluded with Onderdele on 31 January 2005, in terms whereof, it leased the premises at 9 Staal Street, Brackenfell Industria for a period of three years at a monthly rental of R 18 240, 00. Clause 5.1 thereof provided for payment of one month's rental in advance as a continuing deposit under the lease and clause 5.3 thereof provided for repayment of the deposit 60 days after the expiry of the lease and the complete discharge of all the lessee's obligations towards the landlord. Gratima claimed that, notwithstanding its entitlement to repayment of the deposit, Onderdele had failed to effect payment thereof to it.

[28] In the plea Onderdele replied as follows –

> *"The Defendants deny that the Second Defendant has an obligation to repay the deposit allegedly paid by the Plaintiff. The Defendants plead that it was a specific term of the agreement evidenced in annexure "A" hereto that the the Plaintiff agrees and undertakes to accept the termination of the agreement of lease in respect of the premises and agrees that it shall have no further claim against the landlord."*

[29] The agreement alluded to in this paragraph of the plea was the memorandum of agreement concluded between the parties on 9 December 2005 in terms whereof Gratima resold the business to Onderdele. In clause 16 thereof, which is entitled "**Whole agreement**", the following was agreed upon:

> *"16.3 Best Boland Motors CC and the Seller hereby agree that upon fulfilment of the obligations of the Parties in terms of this agreement, all the obligations of the Parties to the Initial Agreement as amended or extended from time to time, shall have been extinguished.* ***D.W.S alle vorige oorenkomste.***"

The Afrikaans phrase in bold, which was added to the typed document in manuscript, is to be translated as "*i.e. all previous agreements".*

[30] In the circumstances, there is no defence to the claim for repayment of the rent deposit other than the assertion that the issue had been settled in terms of clause 16.3 of the resale agreement.

THE IMPORT OF CLAUSE 16.3 GENERALLY

[31] Significantly, Best Boland did not put up a plea of novation or compromise in respect of Gratima's contractual claims to the extent that clause 16.3 may have afforded it such a defence. Nevertheless, in the court below the parties approached the matter on the basis that clause 16.3 could be interpreted to mean that Gratima was precluded from claiming any contractual damages whatsoever (and not just in respect of the rental deposit). However, in argument before us, Mr Vivier SC, focused his energies on the claim arising out of unlawful competition and did not delve too deeply into the effect of clause 16.3 upon the contractual claims before the court *a quo*. In my view, this is the prudent way to approach the matter.

[32] It seems to me that the particulars of claim purported to advance a double-barrelled approach. On the one hand it was said that Best Boland had breached the initial agreement and that as a consequence thereof Gratima had suffered contractual damages. Secondly, it was said that certain of the alleged wrongful acts which constituted the breach of the initial agreement were facts which, when viewed in conjunction with others, were unlawful and permitted a claim in delict

against Boland Kombi. This type of pleading is permissible as the judgment of Grosskopf AJA in *Lillicrap*[6] confirms:

> *"In the present case it is common cause that the damages which the respondent is claiming pursuant to the Aquilian action could, insofar as they arose before the assignment of the contract… have been claimed on the basis of breach of contract. The respondent's contention is that in the circumstances of the present case the facts gave rise to both causes of action. In principle there would be no objection in our law to such a situation. Roman law recognised the possibility of a concursus actionem ie the possibility that different actions could arise from the same set of facts. More particularly, the facts giving rise to a claim for damages under the lex Aquilia could overlap with those founding an action under certain types of contract such as deposit… lease, partnership… etc. In such a case a plaintiff was in general entitled to elect which actio to employ…… In modern South African law we are of course no longer bound by the formal actiones of Roman law, but our law also acknowledges that the same facts may give rise to a claim for damages ex delicto as well as one ex contractu , and allows the plaintiff to choose which he wishes to pursue…. The mere fact that the respondent might have framed his action in contract therefore does not per se debar him from claiming in delict. All that he needs show is that the facts pleaded*

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[6] Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd 1985(1) SA 475 (A) at 495 I – 496 H. See also Durr v ABSA Bank Ltd 1997(3) SA 448 (SCA) at 435 G; Holtzhausen v ABSA Bank Ltd 2008(5) SA (SCA) at [7]; Van der Merwe *et al* Contract, General Principles 4th ed at 283 - 7

> *establish a cause of action in delict. That the relevant facts may have been pleaded in a different manner so as to raise a claim for contractual damages is, in principle, irrelevant."*

[33] The submissions advanced before the court *a quo* on behalf of Boland Kombi that a contractual claim by Gratima was hit by the provisions of clause 16.3 was a compelling argument indeed. However, in view of the argument put up before us by Mr Vivier SC in regard to the alternative claim for unlawful competition, I am of the view that it is not necessary to deal with the court *a quo's* apparent finding in the judgment at [114] that Boland Kombi was liable to Gratima *'for such damages as plaintiff will be able to prove for breach of contract.'*

UNLAWFUL COMPETITION

[34] The court *a quo* thouroughly analysed the principles applicable to a claim for unlawful competition and I agree with approach adopted. To be sure, there can be no complaint that in a market economy such as our's fair and honest competition between parties with similar business interests is permissible. Indeed, the proponents of a free market economy would suggest that it lies at the core of a vibrant economy, an approach which has been endorsed by our courts over time. For instance, in *Silver Crystal*[7] Page J remarked that –

> *"[I]t is not the function of the Courts to stifle healthy competition which, in a free enterprise society, can only redound to the benefit of the public".*

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[7] Silver Crystal Trading (Pty) Ltd v Namibian Diamond Corporation (Pty) Ltd 1983(4) SA SA 884 (D) at 888

[35] In *Grundlingh*[8] Comrie AJA cautioned that such competition may not be unbridled –

> *"[24]….. Businessmen sometimes believe that markets created or materially enhanced by them somehow belong to them. This is a fallacy in a free market economy. Subject to statutory protection, granted for legislative good reason, commercial demand is open to all competitors to supply. Supply and demand is a basic tenet of any free economy, which explains why competition is regarded as healthy and not generally to be curbed. Non constat that the manner of competition may not travel beyond what is recorded by courts as fair (and even robust), and cross the border into the realm of legal unfairness and therefore unlawfulness."*

[36] As adverted to by Comrie AJA, the *locus classicus* in our law of unfair competition is the judgment of Corbett J in *Dun and Bradstreet*[9] where the learned judge gives some guidance as to how to give definition to the unlawfulness element of such a delict –

> *"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*

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[8] Grundlingh and Others v Phumelela Gaming and Leisure Ltd 2005(6) SA 502 (SCA) at 513

[9] Dun and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd 1968(1) SA 209(C) at 216 E -217 G

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 [1922 AD 492 at 507], *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…*

…. 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…. 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." (Authorities otherwise omitted)

[37] After a detailed discussion of the law both here and abroad, Corbett J summarised his understanding of the position thus at 221 C – 222 A -

"Reverting to the position in our law and without attempting to define generally the limits of unlawful 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 on 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 obtained 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 on 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 introduced 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."*

WAS THERE COMPETITION AND WAS IT UNLAWFUL?

[38] As I have attempted to demonstrate above, it was not in dispute on the pleadings that Boland Kombi competed with Gratima after the sale of the business to it. The apparent defence on the pleadings to the claim of unlawfulness is not clearly articulated but seems to be one of consent. It is said that Gratima was aware of the state of affairs at 5 Staal Street at the time that the initial agreement was concluded and that the parties conducted their affairs on that basis.

[39] The initial agreement was concluded on 6-8 September 2004 and thereafter subjected to various written amendments. The evidence presented by Coetzee sought, in the first place, to demonstrate that he had not conducted any business in competition with Gratima. Not only was such evidence inadmissible in light of the admissions made in the pleadings, but it failed woefully to establish the proposition contended for. Secondly, Coetzee attempted to show that his new

business had started long before September 2004 (around May 2004, he suggested) and that at the time the agreement of sale was concluded his new enterprise was up and running, a fact which he claimed would have been known to Stephan when he concluded the deal with Coetzee.

[40] The court *a quo* undertook a detailed assessment of the evidence and came to the conclusion that Coetzee was a poor witness. I agree with those credibility findings which are in any event, not lightly to be interfered with on appeal. The record shows that Coetzee was a shocking witness who opportunistically changed his version when it suited him without so much as the blink of an eye. His denial of competition and the assertion that the new business was being openly conducted by September 2004 is manifestly not capable of belief.

[41] But, perhaps the most damning evidence against the denial of the establishment of a competitor is to be found in a string of email correspondence between Gunter and a German client, one Constantine, who had come across the Best Beetle hire business being conducted by Boland Kombi through a web page which Gunter continued to operate after the sale of the business to Gratima. Through some deft handiwork, Stephan came across the correspondence which demonstrates how brazenly Gunter went about soliciting business over the Internet. I shall quote just a portion of the correspondence to demonstrate this.

> "*Constantine*
>
> *We can indeed arrange car for your friend too, and there will definitely be discounts if you take a second Beetle for a longer period. We are in*

> *Brackenfell, but Best Beetle has moved from our old offices to new ones. Make sure that you do not go to the old offices as another operator who bought all our old cars we (sic) discontinued will probably try to rent a couple of tacky Beetles out to you without you realising you're at the wrong place…"*

[42] Furthermore, certain photographs were placed before the trial court of a Beetle parked outside the premises of Boland Kombi at 5 Staal Street. Emblazoned on the driver's door of the car are words *"Best Boland Group, Kombi, Golf & Polo Centre*" replete with the 2 landline telephone numbers of Boland Kombi. On the right rear window the words "*Best Beetle Car Rental, Brackenfell*" appear together with a cell phone number used by Coetzee. Coetzee's explanation that this vehicle was only used as a courtesy car by Boland Kombi is not persuasive if regard be had to the Constantine email. Self-evidently it was also used as a mobile advertisement for the competing hire business.

[43] In the circumstances, I am satisfied that the court *a quo* correctly found that Coetzee had almost immediately set up a business in direct competition with Gratima just a short distance away from his previous business. The question that must now be addressed is whether that business competed unlawfully with that of Gratima.

[44] The Constantine email demonstrates a clear misrepresentation by Gunter regarding the business trading as Beetle Hire - the prospective client is cautioned about mistaking the old business for the new. As Corbett J suggested in *Dun and Bradstreet* such a misrepresentation, made with the intention of filching

clients away from the competitor, would render the competition unlawful. But there are other factors too which point towards unlawful conduct on the part of Coetzee and Boland Kombi. Firstly, there is the claim that a large proportion (said to be of the order of 70% or more) of the used Beetle spares which were housed at 9 Staal Street before the sale of the business were missing when Stephan took over. Coetzee's denial of this fact was at odds with the evidence of certain employees of Best Beetle who described how parts were removed and stored elsewhere. Secondly, there was a claim by Stephan that the customer invoice books which formed part of the business at no. 9, had disappeared. Once again, Coetzee's denial of this fact was contradicted by a former administrative clerk who described how she had handed the documents in question over to an ex-employee who had accompanied Coetzee to the new business.

[45] Something such as an invoice book is an integral part of the records of any business and would enable a person taking over such business immediate contact with previous clients, and, given that Coetzee's admitted practice was to use the invoice book to follow up with existing clients every couple of months or so, the utility thereof to his competing business is obvious.

[46] Then there is the fact that the initial agreement contained a restraint of trade clause which precluded Coetzee from being involved in any competitive business within a radius of 8km for a period of two years. This clause was not the subject of any subsequent variation. The reason for the inclusion of such a clause makes good business sense: obviously Stephan did not think that it would be financially viable to buy the business if the seller was allowed to compete with him by

opening up a similar venture just down the road. The restraint of trade clause as such is probably hit by the provisions of clause 16.3 of the resale agreement and would therefore not afford Gratima a cause of action in contract. But for the purposes of a delictual claim it affords strong proof, in my view, of what the parties considered to be fair in the circumstances.

[47] In assessing whether a competitor's business is being conducted fairly or not Comrie AJA described the approach as follows in Grundlingh at 514 E –

> *"[28] The question which remains is whether the appellant's conduct is or is not to be condemned as unlawful. The answer depends on this Court's assessment of the boni mores of the community…. Where a competitor has directly misappropriated his rival's business system, product, performance and repute – at no significant expense to himself - I consider that right-thinking members of the community should and would condemn it without much ado…"*
> (Authorities omitted)

[48] At 517 F in *Grundlingh* Farlam *et* Conradie JJA (who differed with Comrie AJA on the facts) described the test as follows –

> *'[40] The test for the unlawfulness of a competitive action is essentially public policy and the legal convictions of the community. The latter concept ordinarily includes not only right-thinking members of the community who might be expected to hold a view on the particular topic*

but also, as Van Dijkhorst J said in Lorimar Productions [10]… ‘*(t)he business ethics of that section of the community were the norm is to be applied.’ Apart from these considerations there are elements like ‘an inherent sense of fair play and honesty; the importance of a free market and strong competition in our economic system;[and] the question whether the parties concerned are competitors…”*

[49] In *Schultz*[11] Nicholas AJA concurred with the assessment of Corbett J in *Dun & Bradstreet* [12] that -

> *‘(f)airness 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 unlawful 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.”*

However , said Nicholas AJA ,

> *“(w)hile fairness and honesty are relevant criteria in deciding whether competition is fair, they are not the only criteria. As pointed out in the* Lorimar Productions *case… questions of public policy may be important*

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[10] Lorimar Productions Inc and Others v Sterling Clothing Manufacturers(Pty) Ltd; Lorimar Productions Inc and Others v OK Hyperama Ltd and Others; Lorimar Productions Inc and Others v Dallas Restaurant 1981(3) SA 1129 (T) at 1153 A-C

[11] Schultz v Butt 1986(3) SA 667 (A) at 679 A-H

[12] At 218

> *in a particular case, e.g. the importance of a free market and of competition in our economic system."*

[50] When the mandated approach is applied to the facts of this case there can be little doubt that Boland Kombi's admitted competition was unfair and accordingly unlawful. No right-thinking person would pay around R2m for a business, include a restraint of trade provision in the agreement of sale and permit or tolerate the seller opening up a competitive business just a few doors away in the same street. The situation is compounded when the seller unlawfully removes spare parts essential to the continuation of the going concern and takes documentation with him which enables him to make immediate contact with his former clients effectively providing him with a springboard in the new business. In my view, therefore the trial court correctly found that Coetzee conducted the hire business of Boland Kombi unlawfully in competition with that of Gratima.

THE ASSESSMENT OF GRATIMA'S DAMAGES

[51] With the amendment of its particulars of claim in August 2012, Gratima refined the quantification of its damages on the basis set out in para 24 above. Boland Kombi sought to demonstrate at trial that the failure of the new business was attributable to Stephan's admitted lack of experience in the trade. It was also suggested that he had not shown sufficient interest in the business initially (the allegation that he had unnecessarily gone on leave in December 2004 was, however, disputed) and had unwisely released former employees of Beetle Hire who were assisting Gratima in January 2005 from their obligation to continue working in the business after the purchase thereof. The fact of the matter is that within the third

month of operation, the new business was in dire trouble and urgent steps had to be taken to address the situation. Stephan decided that the best way to limit his damages was to look for a new purchaser.

[52] Stephan's attempts to procure a purchaser were hamstrung by Coetzee's obstinate refusal to agree to the transfer of the Beetles in the rental business to a third party until sufficient payment had been made to warrant the cancellation of a notarial deed held over the vehicles to secure payment of the outstanding purchase price. In such circumstances, Gratima was held in a double bind and given little room within which to manoeuvre. Ultimately, the only deal which was practically attainable (particularly in light of the notarial deed) was a resale to Coetzee, hence the significantly reduced value which was placed on the business by him a year later. The calculation of damages was therefore based upon the initial purchase price, the resale price and all payments made in the interim. None of these components was seriously challenged before the trial judge and, as Mr Vivier SC pointed out in argument, there was therefore no real issue at trial as regards the quantification of the claim.

[53] Counsel for Gratima went on to refer the court to various decisions in which it has repeatedly been emphasised that such damages need not be established with any great degree of precision. To be sure, special damages need not be established and as Corbett JA said in *Reeva Forman* [13] "*.. in the nature of things the Court's assessment of the loss here cannot be more than a rough estimate",* while in

[13] Caxton Ltd and Others v Reeva Forman (Pty) Ltd and Another 1990 (3) SA 547 (A) at 573 J

Hushon SA [14] Nienaber JA (following Reeva Forman) observed that *"(i)n those circumstances* [ie where there is difficulty in devising an appropriate method of quantification] *a court has no option but to resort to the rough and ready method of the proverbial estimated guess…. and to do the best it can on such material as is placed before it."*

[54] In my view, therefore the trial court cannot be faulted for the way it went about quantifying Gratima's loss and given that the calculation of damages is pre-eminently the function of the trial court, this court would in any event be loath to intervene where the trial court has properly exercised its discretion as to the quantification of the damages.

THE CLAIM FOR RECOVERY OF THE DEPOSIT

[55] Finally, I come to the claim for recovery of the rental deposit. This was resisted before the trial court by Onderdele on the basis that the claim fell foul of the provisions of clause 16.3.of the re-sale agreement. The answer to that claim, addressed at the level of the interpretation of the clause[15], is that the obligations addressed by the clause relate to contractual obligations of the parties to "*the Initial Agreement".* The rental deposit was paid to Onderdele which was not a party to the original agreement of September 2004 between Best Boland and Gratima, the lease

[14] Hushon SA (Pty) Ltd v Pictech (Pty) Ltd and Others 1997 (4) SA 399 (SCA) at412 H

[15] Applying the approach in cases cases such as KPMG v Securifin Ltd and Another 2009(4) SA 399 (SCA) at [39] ; Ekurhuleni Municipalty v Germiston Municipal Retirement Fund 2010(2) SA 498 (SCA) at [13] and Unica Iron and Steel (Pty) v Mirchandani 2016(2) SA 307 (SCA) at [21]

agreement having only been concluded with Gratima in January 2005. The trial court accordingly was correct in upholding this claim.

CONCLUSION

[56] In light of the aforgoing, I am of the view that there is no merit in the appeal and there are accordingly no prospects of success in the application for condonation in terms of Rule 49. In the circumstances, I would order that the appeal be struck from the roll with costs.

GAMBLE, J

I AGREE.

IT IS ORDERED THAT THE APPEAL BE STRUCK FROM THE ROLL WITH COSTS.

LE GRANGE, J

I AGREE.

WEINKOVE, AJ