

**IN THE HIGH COURT OF SOUTH AFRICA**  
**(ORANGE FREE STATE PROVINCIAL DIVISION)**

Application No. : 4372/2006

In the matter between:-

**LILLIPUT TREATMENT TECHNOLOGIES**  
**INTERNATIONAL CC**

Applicant

and

**CHARLES POLSON**

1<sup>st</sup> Respondent

**PRESARIO INVESTMENTS (PTY) LIMITED**

2<sup>nd</sup> Respondent

**AMANDLA WATER**

3<sup>rd</sup> Respondent

**DESERT CHARM TRADING 30 (PTY) LTD**

4<sup>th</sup> Respondent

**AMANDLA ENVIRONMENTAL**

5<sup>th</sup> Respondent

**HERMAN PIETERSE**

6<sup>th</sup> Respondent

**BEN MNISE**

7<sup>th</sup> Respondent

**KOPANO MOPELI**

8<sup>th</sup> Respondent

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**HEARD ON:** 14 DECEMBER 2006

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**JUDGMENT BY:** KRUGER J

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**DELIVERED ON:** 15 DECEMBER 2006

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[1] Applicant seeks *interim* relief pending the outcome of proceedings to be  
instituted based on breach of agreements, alternatively unlawful

competition.

[2] In the Notice of Motion the following relief is claimed:

“1. That the forms and service provided for in the Rules be dispensed with in terms of Rule 6(12) and that the matter be dealt with urgently.

2. That, pending the outcome of proceedings to be instituted by the applicant against the respondents, or some of them, for a final interdict and/or damages:

(a) The respondents are interdicted and restrained from:

(i) making use of the applicant's confidential information pertaining to the treatment of domestic effluent, which confidential information includes, but is not limited to:

(aa) technologies in various stages of development;

(ab) designs;

(ac) drawings;

(ad) specifications;

(ae) models;

ii. competing unlawfully with the applicant in the field of domestic effluent treatment;

(b) The sixth and seventh respondents are interdicted and restrained from:

(i) being directly or indirectly involved in any project or business which is or may become competitive with or to the business of the applicant;

(ii) using the applicant's confidential information otherwise than exclusively for the purpose of selling and marketing the

applicant's Lilliput plants;

- ii. disclosing the applicant's confidential information in any manner whatsoever to any person except as authorised by the applicant;
  - iii. exploiting in any manner confidential information of the applicant save as agreed by the applicant;
3. The seventh respondent is interdicted and restrained from being directly or indirectly concerned in the business of treating and/or disposing of sewage within South Africa either as director or shareholder, member employee, trustee, beneficiary, agent or representative of such business;
4. The respondents, jointly and severally, pay the applicant's costs of this application;
5. Further or other relief.

3. That paragraph 2(a) to 2(c) above operate as an interim order with immediate effect.

4. That the applicant institutes the proceedings referred to in paragraph 2 within thirty days of the grant of a final order herein.

5. Further or other relief.”

[3] There are two main parties in these proceedings, namely Mr. Mark Ross who made the founding affidavit and is the member of the applicant and on the other hand Mr. Charles Polson the first respondent, who appears to be in control of the second respondent and other respondents as set out below.

[4] The second respondent is Presario Investments (Pty) Ltd of which first respondent is the managing director. The eighth respondent is also a

director of the second respondent. It trades as Amandla Environmental (the fifth respondent). The first respondent through the second respondent and/or the fourth and fifth respondents previously marketed the applicant's technology.

[5] The fourth respondent is Desert Charm Trading 30 (Pty) Ltd which is according to the first respondent a dormant company.

[6] The sixth respondent, Herman Pieterse and the seventh respondent, Ben Mnise from time to time do work for the second respondent, the first respondent says, on a contractual basis as independent contractors. Sixth and seventh respondents were previously employed by the applicant in applicant's workshop at Drummond, KwaZulu Natal.

[7] Applicant contends that the respondents are unlawfully making use of applicant's confidential information and are unlawfully competing with the applicant which the respondents deny.

[8] Applicant says it is the designer of a domestic effluent technology in respect of which application for a trademark (Lilliput) has been made. First respondent says that as the trademark has not been registered, no rights can be enforced in respect thereof.

[9] The application to register the trademark was made by African Water and Waste (Pty) Ltd (AWW) in which the deponent to the founding affidavit, Mr. Mark Ross, held all the shares. The sixth and seventh respondents were previously employed by AWW and subsequently by applicant.

[10] Lilliput is a technology for the treatment of domestic effluent. It turns domestic effluent (sewage) into water, which is fit for discharge into the environment, either by way of irrigation or into streams or other water bodies.

[11] Applicant describes the Lilliput process. First respondent says this process is not unique to the applicant and is utilised widely in the industry. In reply applicant says that Lilliput pre-digestion system uniquely has a “three chamber” system. Applicant says it is not the fact of the existence of the extra chamber, but the use thereof for the balancing process that is unique to Lilliput. Applicant says the devices used by it, are not commercially available. Applicant concedes that Scarab now manufactures “media perfected by the applicant” but the deponent to the founding affidavit says that he does not believe that they are commercially available.

[12] Applicant concedes the process of turning waste or sewage water into fit for discharge into the environment is not unique to Lilliput. However,

there are elements of its design and technology which are unique.

These include -

- (a) the balancing process between the third chamber and the reactor;
- (b) the control of the volume of air in the reactor;
- (c) the return of a measured quantity of effluent back from the reactor to the third chamber.

[13] First respondent says there is absolutely nothing unique and different regarding the applicant's process. Professor W.A. Pretorius, a specialist in water purification, in support of respondents, says in his affidavit that the processing units used in water purification have been known for years in the industry and are used in different combinations in the waste water industry. He says:

“10. Die wyse waarop die eenheidprosesse in die verskillende prosesseenhede van die Lilliput-stelsel toegepas word, is dus niks nuuts of unieks nie.”

He says it is in the public domain and accordingly not capable of protection and in any event the alleged unique features relied upon by the applicant are not being used by respondents.

[14] First respondent says no patent has been registered. Applicant's system

is in the public domain and may be copied in terms of section 15(A3) of the Copyright Act. In reply applicant says that it has the right to insist upon compliance with the agreements and that respondents may not compete with it unlawfully.

[15] The deponent to the founding affidavit says that the first respondent established a relationship with AWW while first respondent was conducting business under “Amandla Water”. First respondent signed a reciprocal non-disclosure agreement with AWW during 2003. At that stage it was envisaged that first respondent would market Lilliput. First respondent says this is correct. First respondent says the applicant was provided with all information pertaining to the Petro process and this is where applicant learned of the method of recycling of oxygen rich water into the anaerobic portions of the plant.

[16] During the middle of 2005 first respondent indicated to applicant that he had prospects of securing contracts to supply effluent purification systems. First respondent agrees with this statement and says that it obtained contracts in the Free State with Leratong School. First respondent is currently focussed on supplying effluent systems to the Free State Schools and Northern Cape. It does not compete directly with applicant.

[17] Applicant says first respondent marketed Lilliput. First respondent was trained by the applicant to install and maintain Lilliput. First respondent says he marketed applicant's products through AWW mainly in Botswana unsuccessfully (no sales resulted) as the products of applicant were too costly. First respondent agrees that he was paid a commission of 10 – 15% for Lilliput systems sold by him.

[18] During the latter part of 2005 a dispute developed between applicant and the first respondent. According to first respondent a breakdown of the relationship was evident. Applicant assumes that the real reason for the disagreement was that first respondent had already formulated a plan to compete with applicant. As a result of the breakdown of the relationship first respondent stopped placing orders for Lilliput systems early in 2006. First respondent says he started employing an alternative source and contacted other suppliers. He says all suppliers used similar equipment and processes. In the replying affidavit applicant contends that they do not use the same processes as Lilliput.

[19] During February 2006 the sixth respondent left applicant's employ. An air ticket had been purchased for him to go to Zambia on behalf of applicant to install a Lilliput system. He, however, walked out suddenly according to the applicant. First respondent says the relationship between the parties had broken down. Sixth respondent was unaware of the air ticket which had been purchased and was dissatisfied with



Lilliput management. In the replying affidavit applicant's deponent says he telephoned sixth respondent before the date and confirmed particulars of his air ticket.

[20] A hearing was held into the conduct of the sixth respondent. He walked out, but subsequently asked for his job back. He left suddenly on 20 February 2006.

[21] The applicant obtains its tanks, which form part of Lilliput, from "JoJo", a supplier. Some of these are manufactured according to a mould designed by applicant.

[22] With a view to the fact that first respondent would market Lilliput he signed a reciprocal non-disclosure agreement (Annexure "A"). I shall revert to this and other agreements relied upon by applicant below.

[23] Applicant says that the second respondent, and in particular the first, sixth and seventh respondents, are using applicant's knowledge in their manufacturing. Applicant alleges that the respondents have no idea why the sizes and volumes are what they are. First respondent says that they use their own calculations and evaluate performance to develop the required level of expertise.

[24] Applicant says that because there are similarities, in appearance, between the effluent treatment system manufactured by the respondents and Lilliput, there is a real risk that respondents' system may be mistaken for Lilliput. Applicant does however not rely on passing-off. First respondent points out that there is no proof of any instance where there was in fact any mistake regarding the identity of the products. He also denies that Lilliput has built up a reputation as effluent manufacturer.

## **THE LAW**

[25] Mr. Voormolen, for applicant submitted that, this being an application for *interim* relief the applicant must show a *prima facie* right though open to some doubt. If serious doubt is thrown upon the *prima facie* case, the applicant cannot succeed in obtaining temporary relief. But if there is mere contradiction, or unconvincing explanation, the matter should be left to trial and the right to be protected in the meanwhile, subject to the respective prejudice in the grant or refusal of *interim* relief. See **WEBSTER v MITCHELL** [1948 \(1\) SA 1186](#) (W) at 1189. In regard to disputes of fact the court's approach in determining whether the applicant's right is *prima facie* established, though open to some doubt, is to take the facts as set out by the applicant together with any facts set out by the respondent, which the applicant cannot dispute, and to

consider whether having regard to the inherent probabilities the applicant should on those facts obtain final relief at the trial of the main action. See **L F BOSHOF INVESTMENTS (PTY) LTD v CAPE TOWN MUNICIPALITY** [1969 \(2\) SA 256](#) (C) at 267 E – F.

[26] The test for unlawfulness of a competitive action is essentially public policy and the legal convictions of the community. This includes not only right thinking members of the community, but also those involved in the industry, the business ethics of that section of the community where the norm is applied. There are also elements like an inherent sense of fair play and honesty; the importance of a free market and strong competition in our economic system, the question whether the parties concerned, are competitors. See **GRÜNDLINGH AND OTHERS v PHUMELELA GAMING AND LEISURE LIMITED** [2005 \(6\) SA 502](#) (SCA) at 517 par. 40.

[27] As a general principle every person is entitled freely to exercise his or her trade or professional calling in competition with others. See **G A FICHARDT LIMITED v THE FRIEND NEWSPAPERS LIMITED** [1916 AD 1](#) at 6. The freedom is however, not unfettered. The right to compete is not absolute and competition must remain within lawful bounds. A wrongful interference with a person's right as a trader constitutes an *iniuria* for which one can bring an *aquilian* action if loss

has resulted. See **SCHULTZ v BUTT** [1986 \(3\) SA 667](#) (A). The basic criterion is public policy as manifested in public opinion. The interests of the competing parties have to be weighed bearing in mind also the interest of society and the business ethics of that part of the community are of major importance in this determination. See **WASTE PRODUCTS UTILISATION (PTY) LTD v WILKES AND ANOTHER** [2003 \(2\) SA 515](#) (W) at 570 F – 571 F.

[28] A person who has obtained information in confidence is not allowed to use it as a springboard for activities detrimental to the person who made the confidential communication. See **WASTE PRODUCTS**, *supra* at 573 D – E.

[29] Applicant relies in the first instance on the provision of certain agreements concluded with some of the respondents.

- i. Firstly, a reciprocal non-disclosure agreement which was concluded on 31 January 2001 between AWW and Amandla Water (third respondent). At that stage the third respondent was represented by the first respondent. AWW subsequently sold its business to the applicant.
- ii. There is a secrecy undertaking signed by the sixth and the seventh respondents that is Ben Mnise and H Pieterse. They are dated 18 September 2001 and 5 July 2002 respectively and are annexures “B”

and “C”. According to par. 4.1.2 of those agreements they endure indefinitely. They are undertakings given to AWW.

iii. There is a restraint of trade agreement (annexure “D”) with the seventh respondent. That restraint of trade was given to AWW on 18 September 2001. The restraint endures for a year after the person has left the employ of the company in question. In terms of **PRISM HOLDINGS LIMITED AND ANOTHER v LIVERSAGE AND OTHERS** [2004 \(2\) SA 478](#) (W) at 483 A – B the court says that a contract in restraint of trade is to be regarded as part of the goodwill of the business and on sale of the business the benefits of the restraint are *ipso facto* transferred to the purchaser. No cession is necessary. However, Mr. Du Plessis, for respondents, contends that that principle does not apply where there is a non-variation clause, as here, requiring amendments to be in writing.

iv. There is also a memorandum of understanding concluded by the first respondent on behalf of second respondent. These are annexures “E”, and “F”. All are unsigned drafts. The fourth and fifth respondents are mentioned as parties to annexure “H”.

[30] First respondent says that as these agreements are not between the parties at present before the court, but with AWW they cannot serve the interests of the applicant and the applicant cannot enforce them herein

and in respect of the memorandum of understanding that alleged agreement is unsigned, therefore it has no weight. Regarding the restraint of trade first respondent says that the seventh respondent works on a contractual basis as an independent contractor and does not fall within one of the categories mentioned in the restraint of trade.

[31] The high-watermark of applicant's case can probably be found in the affidavit of Gouws. Gouws says that on 14 November 2005 he was dispatched to deliver, install and commission a Lilliput domestic sewage effluent treatment plant at Leratong School in Botshabelo in the Free State. He was on site on 15 November 2005. There he was met by the first respondent whom he believed was the client. First respondent remained on site for the duration of the installation and asked many questions as to the working of Lilliput plants. He took numerous photographs of the plant with particular emphasis on the inner configuration of the bioreactor and media. Towards the end of the day the second respondent asked him whether he would be interested to work for him. The first respondent says this was simply idle chatter which he conducted while he was waiting for the installation. He took photographs because this was the first packaged plant to be installed, including peripheral issues (septic conversion/concrete slab/electrical supply/palisade). He was eager to understand the working thereof.

[32] The question is whether the sixth and seventh respondents are using any information that they cannot use. There is a relationship of good faith between employer and employee. See **HARVEY TILING CO (PTY) LTD v RODOMAC (PTY) LTD AND ANOTHER** [1977 \(1\) SA 316](#) (T): where a businessman wrongfully uses the skill and knowledge of a competitor in business to further his own business interests such use may constitute unfair competition. See Lee and Honoré **The S A Law of Obligations**, 2<sup>nd</sup> Edition, par. 629. In **AUTOMOTIVE TOOLING SYSTEMS (PTY) LIMITED v WILKENS AND OTHERS SCA** case no. 581 of 2005, judgment delivered on 28 September 2006 in par. 8 it is said that the interest must be such that it must properly be described as belonging to the employer rather than the employee. The question in each case is whether the interest that is relied upon, the skill expertise and knowhow that employees undoubtedly acquire in the techniques while doing their work is one that accrued to the employer or the employee. In **ARANDA TEXTILE MILLS (PTY) LTD v HURN AND ANOTHER** [\[2000\] 4 ALL SA 183](#) (E) 192 par. 33 Kroon J points out that an employer trains a workman who is thereby provided with knowledge and skills in the public domain. In the eye of the law such an interest is not in the nature of property in the hands of the employer. It affords the employer no proprietary interest in the workman, his knowhow or skills. Such know how and skills in the public domain become the attributes of

the workman himself and do not belong in any way to the employer and the use thereof cannot be subjected to restriction by way of restraint of trade provision. It is undoubtedly so that in the course of doing work employees acquire certain skills and knowledge of the work they are dealing with. The court has to weigh up the respective prejudice of the parties. The respondent will be prejudiced if the relief against it is granted even on an *interim* basis.

[33] Regarding the restraint of trade that contract is with AWW but the question arises whether it was in terms of the **PRISM HOLDINGS**-case transferred to the applicant. It expires in February 2007.

[34] There are a number of features of applicant's case which are against it:

**(i) Why *interim* relief**

[35] In the final paragraph of the founding affidavit the following is said:

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The Applicant intends to, and undertakes to institute proceedings for final interdict relief with or without a damages claim within such time limits as may be imposed by this Honourable Court in its discretion. Provision therefore will be made in the order sought from this Court.”



[36] The applicant may or may not institute a damages claim. It may decide not to. What would the purpose be of applying only for a final interdict in trial proceedings? By the time the trial is heard – probably a year or two (or more) from now – the second respondent will, if an *interim* interdict is granted – be out of business.

[37] In considering the balance of convenience a value judgment of public interest, one also has to consider the probable duration of the interim order. In this case that is practically indefinite. That does not favour applicant's demand for relief.

[38] This is where the balancing of interests is important. If an *interim* interdict is granted, the second respondent will be put out of business, allowing the applicant to expand its business and capitalise on opportunities not previously exploited by it. The relief claimed is final in essence.

[39] On the papers it cannot be said that the applicant will probably succeed in the main case (for a final interdict, where it will have to establish a clear right).

## **(ii) The patent application**

[40] In the founding affidavit applicant says a South African Patent

Application AWW (No. 2002/0614) is pending. First respondent deals with this allegation. He instructed attorneys to conduct a search through records of South African patents. It was found that the patent application of applicant was withdrawn on 13 January 2003. The attorneys found that two further South African provisional patent applications have been lodged, ZA2003/0379 and ZA2004/3975, both in the name of the deponent to the founding affidavit, both entitled: “A process for treating sewage effluent”.

[41] In reply the deponent says that patent application no. ZA2003/0379 lapsed on 14 April 2004. On 21 May 2004 a new patent application was lodged, accompanied by the same patent specification. The deponent to the replying affidavit does not say what the status of that application is. He says it was not intended to mislead the court. He disavows any reliance on patent rights.

[42] This is an unsatisfactory aspect of applicant’s case. If it had a protectable interest, one would assume that that would by now have been patented.

### **(iii) Confidentiality**

[43] The respondents have put up evidence of an expert, saying there is

nothing confidential about the applicant's process. In reply, the applicant has not put up any expert evidence. In its founding papers applicant replied on a pending application, but when it was pointed out by the respondents that there was no such pending patent application, applicant explained that there was now a new pending patent application, which has been pending since 2004, without any explanation of what the current status thereof is, simply disavowing reliance on patent.

[44] The applicant does not rely on patent or copyright, simply on confidential information. The respondent has provided strong evidence creating serious doubt whether applicant's process it seeks to protect is confidential. Applicant cannot prohibit workmen from using their skills. Applicant would be entitled to protection in respect of novel concepts jealously guarded by patent or otherwise (see **VALUNET SOLUTIONS INC t/a DINKUM USA AND ANOTHER v eTEL COMMUNICATIONS SOLUTIONS (PTY) LTD** [\[2005\] ZAGPHC 10](#); [2005 \(3\) SA 494](#) (W) par. 15 (per Van Oosten J).

[45] The respondents point out that the applicant has not identified any trade secrets or confidential information which the respondents are using at this point in time, or which must be protected. The confidential information which the applicant wants protected pertaining to the treatment of domestic effluent has not been identified. The prayers in

the notice of motion are based on the definitions of confidential information in the non-disclosure agreement (Annexure “A” to the founding affidavit) and the secrecy undertaking (Annexure “B” and “C” to the founding affidavit). Mr du Plessis says the applicant has not made out a case of what it wants protected. What the applicant seeks to protect should be before the court. The designs, drawings, specifications and models referred to in the notice of motion are not identified.

[46] Applicant has failed to show a breach of a fiduciary duty. Regarding the requirements for the interdict applicant seeks, it has not shown it has a *prima facie* case which will probably succeed on trial.

[47] Mr. Du Plessis contends that, whatever the respondents have taken from the applicant, is, on the evidence, especially that of Prof. Pretorius, in the public domain.

**(iv) Irreparable harm and urgency**

[48] The application was brought as one of urgency. The deponent to the founding affidavit says that the unlawful actions of the respondents are on-going. The applicant can no longer afford to delay the proceedings. In the replying affidavit the deponent says: “The object of these

proceedings is to prevent irreparable harm”, without detailing the alleged “irreparable harm”. There is a bald allegation of irreparable harm without any details.

[49] The applicant does not say why it could not successfully institute a damages claim. It should be relatively simple to identify sites where second respondent has installed units, and the losses could be calculated.

**(v) The agreements**

[50] As to the transfer of the agreements as being part of the goodwill, there are the following two problems which applicant has to face:

- i. The non-variation clause;
- ii. Annexure "A" to Annexure "X", the sale agreement, listing the assets transferred, is not attached to the papers. One does not know whether the agreements were part thereof.

[51] It is a factual enquiry whether the restraint and other contracts were transferred. The applicant must place the necessary evidence before the court – **SECURICOR (SA) (PTY) LTD AND OTHERS v LOTTER AND OTHERS** [2005 \(5\) SA 540](#) (E) par 12. The applicant has failed to provide proof that the rights under the agreements were transferred to

it.

[52] The first respondent says he would not have signed a document such as a memorandum of understanding, for a period longer than six months. This statement appears to be borne out by clause 4 of Annexure "E", which states that its term will be until 1 December 2006. Clause 3 of Annexure "F" states its term to be until 1 December 2006. As the applicant has been unable to provide a signed final copy of the memorandum of understanding, and as, according to the drafts furnished by applicant, they expired on 1 December 2006, the applicant cannot place any reliance on any memorandum of understanding.

## **CONCLUSION**

[53] The applicant has not put up details of its alleged confidential operations; it has not given any plans or drawings. It has said that the information is in the heads of the respondents. Such information has not been shown to be a protectable interest.

[54] In my view serious doubt has been created on the facts as to the alleged confidential information which the respondents allegedly have. Further, looking at the balance of convenience, a value judgment must be made. On the facts before the court the applicant is not entitled to relief which will put the second respondent out of business and leave the

other respondents to look for work. My value judgment on fairness to all parties requires that no relief be granted.

[55] Applicant seeks to enforce a restraint of trade agreement against the seventh respondent. In view of the non-variation clause therein, and the lack of proof that it was transferred from AWW to the applicant because of the absence of annexure “A”, and the fact that only about two months of the period remains, it would not be in the public interest to enforce it, also considering the respective interests of applicant and seventh respondent.

[56] As to costs, this is a substantial application in which intricate points of law were raised which are important to the parties. The respondents were justified in employing two counsel.

[57] The application is dismissed with costs, including the costs consequent upon the employment of two counsel.

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**1. KRUGER, J**

On behalf of applicant: Adv. Vos Voormolen  
Instructed by:  
Webbers  
BLOEMFONTEIN

On behalf of respondents: Adv. Roelof du Plessis SC

Adv. Craig Snyman

Instructed by:

O.J. van Schalkwyk

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