

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

Case No.: 743/2004

In the matter between:

**LOUIS FRANCOIS RIVÉ**

First Applicant

**INDUSTRIAL PUMPING SYSTEMS**  
**KLERKSDORP BK**  
**(CK 97/011405/23)**

Second Applicant

and

**STEPHANUS FRANCOIS JOUBERT**

First Respondent

**INDUSTRIAL PUMPING SYSTEMS BK**  
**(CK 88/00998/23)**

Second Respondent

**SAREL FRANCOIS JOUBERT**

Third Respondent

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**CORAM:**

**RAMPAI, J**

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**HEARD ON:**

**13 MAY 2004**

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**DELIVERED ON:**

**19 AUGUST 2004**

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- [1] The matter came by way of urgent proceedings. The proceedings were initiated on 1 March 2004. The urgent application was served on the three respondents the next day. The matter served before Cillié, J on Thursday 4 March 2004. By agreement *inter partes* he granted a provisional order, fixed formal deadlines for the filing of the answering affidavit as well as the replying affidavit, and then

postponed the matter *sine die*.

[2] Subsequently the matter was enrolled for argument on Thursday 13 May 2004. Before me appeared Adv. Marius Esterhuyse for the applicants and Adv. L.G.F. Putter for the respondents. The matter was ripe for argument. The former urged me to confirm the provisional order. The latter urged me to discharge it. Having heard both sides of the argument, I reserved judgment.

[3] The relief sought by the applicants is a prohibitory interdict. It seeks to prohibit the respondents from representing to the world in general and to the applicants' clients in particular that they are the representatives of the second applicant. This is the one leg of the relief. The other leg thereof seeks to prohibit the respondents from contacting any clients of the second applicant directly or indirectly through any intermediary in connection with specific aspects of the second applicant's business, namely black economic empowerment, invoicing payments of money due to the second applicant, receipt of money due to the second applicant, bank accounts and administration of the second applicant. This then is the gist of the provisional order.

[4] I deem it necessary to sketch the background to this dispute. The history has three distinct eras. Before 1997 the first respondent was the sole member of the second respondent. The second respondent

was incorporated in 1988 and became known as Industrial Pumping Systems BK. The second respondent provided plastic pipes to gold mines throughout the country. The second respondent also provided plastic pipes to certain platinum mines in the country. The second respondent had its own distinctive vendor code in respect of each mine. Here ended the first era.

- [5] Nine years later, during 1997 to be precise, the first applicant was engaged as an employee of the second respondent. The first respondent still remained the sole member of the second respondent. Later on during the course of the same year, Industrial Pumping Systems Klerksdorp BK, in other words the second applicant, came into existence. This close corporation was formed by the first respondent and the first applicant. The operational business activities of the second applicant consisted and still consist of the supply of plastic pipes to the mining industry at large. The two gentlemen became the sole members of the second applicant. The equity stakes of the first respondent and the first applicant in the second applicant were 2:1 *ratio*. After the formation of the second applicant the second respondent became dormant. However, the second respondent remained as a registered

supplier in the books of the various mines. Therefore the vendor code of the second respondent remained active, although the vendor itself was inactive. The business order sent to the second respondent by the mines were channelled to the second applicant who then supplied the required goods to the mine customer concerned. The second applicant also obtained its own identificative vendor code in respect of each mine. It follows from this that the second applicant was practically doing business or trading with various mines by using its own vendor codes as well as the vendor codes allocated to the second respondent.

- [6] Still in 1997 the first respondent and the first applicant extended their entrepreneurial operations. They formed two more close corporations. These were called Industrial Pumping Systems Carltonville BK and Industrial Pumping Systems Projects BK. One year later they formed Industrial Pumping Systems Plant and Machinery BK which was incorporated in 1998. Two years later in 1999 yet another close corporation was formed and called Industrial Pumping Systems Converters BK. It was also incorporated in 1999. None of these four enterprises feature in these proceedings significantly.

- [7] The second applicant was an agent of DPI (Edms) Beperk, the manufacturers of the plastic pipes. The latter had a competitor called Amiantit Pipe Systems (Edms) Beperk who tried to take over the market stake of DPI. The impending take-over threatened the business of the second applicant. The first applicant and the first respondent attempted to avert the take-over by negotiating with Amiantit. At that stage the first respondent sold his equity in the second applicant to the first applicant. The two gentlemen signed a sale agreement on 21 November 2001. (See Annexure “AA” to the founding affidavit on p.48 of the paginated record). Since the conclusion of this sale agreement, the first applicant became the universal stakeholder of the equity in the second applicant. The annual turn-over of the second applicant was R10-million. The purchase price was R1 650 000,00.
- [8] On 20 August 2002, the first applicant and the first respondent signed another agreement described as an amended sale agreement. (See Annexure “B” to the founding affidavit, p.57 of the paginated record). This agreement guaranteed the rights of the two applicants in respect of the use of the vendor codes allocated to the second

respondent by the various mining houses in order to ensure the continued flow of the requisitions of business orders from mining customers to the second applicant *via* the vendor codes of the dormant enterprise, in other words, the second respondent. The same agreement accorded identical commercial warranty to the third respondent, the son to the first respondent. On the same day the first applicant, the second respondent and the third respondent signed a tripartite agreement described as a co-operation agreement. (See Annexure “C” to the founding affidavit on p.66 of the paginated record). The first respondent signed this co-operation agreement on behalf of the second respondent. In terms of this agreement the first applicant and the third respondent became the exclusive authorised users of the vendor codes originally used by the second respondent before it became dormant.

- [9] The third respondent’s enterprise, namely Industrial Pumping Systems Projects BK did not independently receive business orders directly from the mining houses. However, there existed a practical avenue through which all the business orders from the various mine customers for the installation work to be done were

sent through the vendor codes of the second applicant who in turn channelled them to the third respondent, Industrial Pumping Systems Projects BK. The position was that Industrial Pumping Systems Projects BK, unlike the second applicant and the second respondent, did not have identificative vendor codes of its own as a recognised and registered supplier of goods or provider of services in its own right. The business of the Industrial Pumping Systems Projects BK comprised of the erection and installation of the plastic products chiefly supplied by the second applicant to the mining customers. Here ended the second era.

[10] On 6 March 2003 the first respondent through his lawyers addressed a letter (see Annexure “D” to the founding affidavit p.72 of the record) to the first applicant informing him that the first and the second applicants were prohibited by the aforesaid amended sale agreement and the multiparty co-operation agreement from registering the second applicant as a distinct and separate provider with any mine, so that only one vendor code could be used by the Forceflo Group in respect of all the mines.

[11] Three weeks later, on 1 April 2003 to be precise, the first

respondent sent out various notices to the mine houses (see Annexures “E1 – E5” on pp. 73-78 of the paginated record). The notices or the letters referred to the three contracts Annexures “AA”, “B” and “C”, the composition of the Forceflo Group, the relationship between the second applicant and one of the close corporations in the group as well as the use of one vendor code by all the members of the so-called Forceflo Group.

[12] The first applicant convened a meeting for 7 April 2003 to discuss the apparent confusion among mine customers and especially the intended use of only one vendor code by all and sundry in dealings with all the mines – such vendor codes being the one previously allocated to the second respondent. The aim of the first applicant in calling the meeting was to ask the first respondent to mind his own business; to refrain from involvement in the business affairs of the second applicant and to explain the apparent confusion which was then prevailing on the mines. Apparently he was unaware of the circular letters which the first respondent had sent out on 1 April 2003.

[13] On 28 October 2003 Kriek & Van Wyk of Parys, the first



respondent's lawyers sent out a circular letter to the members of the Forceflo Group. The letter contained certain advices or recommendations regarding the issue of the black economic empowerment. The policy of the mining houses required that all the recognised service providers doing business with the mines should have a black economic empowerment partner. The effect of this requirement was that only service providers or business enterprises with black economic empowerment components would be considered by the mines when business orders for the supply of goods or for the rendering of services had to be placed. The lawyer's critical advice was that the issue of black economic empowerment should only be done by the second respondent, in other words Industrial Pumping Systems BK and that all the strategies pertaining to the issue be executed only with the consent of the second respondent with its vendor codes. The reaction of the first respondent to this letter was obviously positive. He embraced the recommendations by his lawyer.

- [14] Towards the end of the year 2003, the first applicant took legal advice from his lawyers Sher & Ovsiowitz of Johannesburg. Soon thereafter he received an organogram, Annexure "J", showing the

corporate structure of the Forceflo Group as visualised by the first respondent. On 25 January 2004 these lawyers addressed a letter, Annexure “K”, to the first respondent. The lawyers conveyed to the first respondent the complaints and objections of the first applicant to the following specific issues:

- The attempts of the first respondent to portray himself as the *al supremo* of the Forceflo Group, the name which the second applicant had always been using as his trade name with the knowledge and approval of the first respondent.
- The attempts of the first respondent to re-channel to the second respondent’s bank account the payment earmarked by the mines in favour of the second applicant’s bank account.
- The attempts of the first respondent to take the administration of the second applicant over and to hand it over to the second respondent for exclusive control.
- The deliberate breach of the restraint of trade clause as embodied in clause 13, Annexure “AA” to the founding affidavit.
- The cease and desist letter (see Annexure “K” to the

founding affidavit on p.82 of the paginated record) demanded a written undertaking from the first respondent that he would refrain from committing further acts similar to the acts complained of.

The first respondent was also warned that unless he complied by 4 February 2004 the applicant would sue him for appropriate relief. To this Kriek & Van Wyk replied (see Annexure “L”, founding affidavit on p.84 of the paginated record) that Sher & Ovsiowitz did not have any mandate from the first applicant to address such a letter to their client, in other words, the first respondent.

[15] On 10 February 2004 the first respondent advised the first applicant (see Annexure “M”, founding affidavit on p.85 of the paginated record) about the centralization scheme of the Forceflo Group and ancillary matters such as the trade mark; the centralization of communication channels within the group; the centralization of the separate bank accounts of the members of the group; the transparency concerning the issues of black economic empowerment and the possible mergers. Three weeks later this urgent application was launched. This then is the undisputed

factual background.

- [16] Mr Esterhuyse, counsel for the applicant, on the one hand argued that the applicants have made out a clear case which justified the confirmation of the provisional order. He then referred me to the following authorities for the various submissions he made:

**SETLOGELO v SETLOGELO 1914 on 221 ON 227;**

**MATTHEWS AND OTHERS v YOUNG 1922 AD 492 on 507;**  
**STELLENBOSCH WINE TRUST AND OTHERS v OUDE**

**MEESTER GROUP LTD AND OTHERS 1977 (2) SA 221**

**(CPD);**

**R & I LABORATORIES (PTY) LTD v BEAUTY WITHOUT**  
**CRUELTY INTERNATIONAL (SOUTH AFRICAN BRANCH)**  
**1990 (3) SA 746 (C) on 753-754;**

**ELIDA GIBBS (PTY) LTD v COLGATE PALMOLIVE (PTY) LTD**  
**1988 (2) SA 359 (W).**

- [17] Mr Putter, counsel for the respondents, on the other hand argued that the applicants had made out no case and that there was no provisional order for the court to confirm. He cited the following authorities in support the various submissions he made:

**WELKOM BOTTLING CO (PTY) LTD EN ‘N ANDER v**

**BELFAST MINERAL WATER LTD 1967 (3) SA 45 (O) at**

**56C-H;**

Section 6 of the Companies Act No. 61 of 1973.

**PLASCON-EVANS PAINTS (PTY) LTD v VAN RIEBEECK**

**PAINTS (PTY) LTD 1984 (3) SA 623 (a) on 634;**

Prest C.B.: **Interlocutory Intedicts** (1993) 47;

**FREE STATE GOLD AREAS LTD v MERRIESPRUIT (OFS)**

**GOLD MINING CO LTD AND ANOTHER 1961 (2) SA 505**

**(W) on 524;**

**DE VILLIERS v SOETSANE 1975 (1) SA 360 (EC) on 602;**

**BEUKES v CROUS EN 'N ANDER 1975 (4) SA 215 (NCD) on**

**219;**

**MAGNA ALLOYS AND RESEARCH (SA) (PTY) LTD v ELLIS 1984 (4) SA 874 (A) at 897I-898A;**

**BASSON v CHILWAN AND OTHERS 1993 (3) SA 742 (A) on 745I-746B;**

**SIBEX ENGINEERING SERVICES (PTY) LTD v VAN WYK AND ANOTHER 1991 (2) SA 483 (T) at 502J-503C;**

**PETRE v MADCO LTD t/a T-CHEM v SANDERSON KASNER AND OTHERS 1984 (3) SA 850 (W) on 859C-D; TURNER MORRIS (PTY) LTD v RIDDELL 1996 (4) SA 397 (ECD) at 406J-507B;**

**NATIONAL CHEMSEARCH (SA) (PTY) LTD v BORROWMAN AND ANOTHER 1979 (3) SA 1092 (T) at 1117C;**

**NEW UNITED YEAST DISTRIBUTORS (PTY) LTD v BROOKS AND ANOTHER 1935 WLD 75 on 81;**

**POOLQUIP INDUSTRIES (PTY) LTD v GRIFFIN AND ANOTHER 1978 (4) SA 353 (W) on 360;**

R.H. Christie: **Law of Contract** 4<sup>th</sup> ed. on 236 fn 253.

[18] On 4 March 2004 Cillié, J granted an interim relief. The provisional order in question consisted of five legs. The relevant portion thereof is its second leg which reads as follows:

“2. Die respondente tender en onderneem:

(i) om hulle nie voor te doen as verteenwoordigers van eerste of tweede applikante nie.

(ii) om nie direk of indirek, deur middel van enige ander persoon of entiteit, insluitende tweede respondent enige van die tweede applikant se kliënte te kontak met betrekking tot die volgende aspekte van tweede applikant se besigheid nie, naamlik:

bemagtiging, fakturering, betaling en ontvangs van fondse verskuldig aan tweede applikant, bankrekenings en administrasie van tweede applikant.”

[19] The case of the applicants was that the second applicant was an autonomous commercial enterprise legally entitled to make use of the second respondent's vendor codes and the second respondent's trade name Forceflo in his business dealings with the various

mining houses. On behalf of the applicants it was contended that the applicants' right stemmed from the provisions of the written contracts as well as from the principles of our common law.

[20] The defence of the respondents was that the second applicant was not an autonomous legal entity, but a member of a cluster of commercial enterprises called "The Forceflo Group" or lately Forceflo (Pty) Ltd. The contention was that the first respondent was at the helm of that group of close corporations. Moreover, so the argument developed, the applicants were legally entitled neither to the exclusive use of the second respondent's vendor codes, nor the use of the word "Forceflo" as the second applicant's trade name.

[21] The applicants seek the confirmation of the above provisional order. The relief they seek is a final interdict. The law requires that they should establish the requisites of the permanent relief they seek on a balance of probabilities. Those requisites are that they have a clear right which is worthy of legal protection; that the respondents have actually injured such a right or that the applicants have a reasonable fear that the respondents are poised to harm such

a right; and that the applicants have no other alternative, ordinary and effective remedy (*vide* **SETLOGELO v SETLOGELO 1914 AD on 227** and **WELKOM BOTTLING CO v BELFAST MINERAL WATER LTD 1967 (3) SA 45 (O) at 56C-H.**

- [22] The first leg of the enquiry is whether the applicants have shown that they have a clear right. It is a matter of available evidence whether the alleged right exists or not. It is a matter of substantive law whether a clear right exists or not (*vide* C.B. Prest: **Interlocutory Interdicts** (1993) p.47).

In order to prove a clear right, it is incumbent upon an applicant to show on a balance of probability what right he has and wishes the law to protect (*vide* **NIENABER v STUCKEY 1946 AD 1049 on 1053 – 1054** per Greenberg, JA; **FREE STATE GOLD AREAS LTD v MERRIESPRUIT (OFS) GOLD MINING CO LTD 1961 (2) SA 505 (W) at 524C-D** per Williamson, J; **WELKOM BOTTLING CO (PTY) LTD v BELFAST MINERAL WATER (OFS) (PTY) LTD** (*supra*) at **56F-C** per Erasmus, J; **DE VILLIERS v SOETSANE 1975 (1) SA 360 (ECD) at 362B-C**



per Eksteen, J and **BEUKES v CROUS EN 'N ANDER 1975 (4)**  
**SA 215 (NCD) at 219A-B** per Van den Heever, J.

The dispute in these proceedings revolved around three points, namely the vendor code, the trade name and the group identity. Each of these issues has a direct impact on the disputed right I am called upon to evaluate.

[23] In the first place I shall deal with the issue of the vendor codes.

This issue is the heart of the dispute. A vendor code, as I understood it, was not merely a sort of a supplier's unique business identity code allocated to a supplier by a particular gold mine or a platinum mine and used at all times to identify such a supplier in all the business dealings between the two. It was much more than that. It was an indispensable method of doing business with a mine. Broadly speaking, the method and the procedure entailed the following aspects, among others:

- That the provider must be registered with a particular mine;
- That the provider must be allocated a unique business code

for identificative purpose;

- That the provider must comply with certain peculiar requirements of the mine concerned;
- That the provider must promote transformation by having a black economic empowerment partner;
- That the mine must order specific goods from the provider with a valid vendor code only;
- That the mine concerned must use the vendor code in settling the bills of the provider.

It should be readily appreciated from all these general features that a vendor code was more than just a mere reference number. It was much more than that. The bottom line was that no supplier could do any business with any mine unless such a provider was the holder of a vendor code.

[24] The parties are agreed that the second respondent who was formed in 1988 was a registered supplier with vendor codes. Likewise, the parties are also agreed that when the second applicant was formed in 1997 it was also registered with the various mines which

recognised the second applicant as a vendor. The mines allocated separate vendor codes to the second applicant. Initially the second respondent alone had the vendor codes. Later the second applicant obtained the vendor codes of its own. When the second respondent became dormant after the formation of the second applicant, its vendor codes were not disused. Notwithstanding the fact that it was dormant, the second respondent was not deregistered. The mines carried on placing the business orders in the vendor codes of the inactive second respondent. But at times the orders were placed in the vendor codes of the active second applicant. However, the second applicant always provided the required goods to the mines whichever the vendor codes the mine had used to place the order. For all intents and practical purposes the second respondent was merely the bearer of the vendor codes through which business was channelled to the second applicant. The first applicant and the first respondent were the only members of the second applicant.

- [25] The aforesaid entrepreneurial relationship between the two gentlemen continued for approximately four years. It came to an end on 21 November 2001 when the first respondent sold his entire

equity in the second applicant to the first applicant. At the time Amiantit Pipe Systems (Edms) Bpk was still contemplating the take-over of DPI Plastic (Edms) Bpk. The lucrative business of the second applicant was seriously threatened by the take-over. The important clauses of the original sale agreement relating to the vendor codes were:

- That the second applicant would be entitled to use the vendor codes of the second respondent in connection with the delivery and distribution of its products to the various mines; (*vide* clause 15).
- That the first respondent would have no further interests whatsoever in the business affairs of the second applicant; (*vide* clause 15).
- That the second applicant and the third respondent would be entitled to use the vendor codes of the second respondent in their dealings with the various mines.

[26] It follows from these contractual stipulations that the second applicant acquired the right to use the vendor codes of the second respondent. The first respondent reaffirmed the right of the

applicants in the subsequent sale agreement. He gave the unconditional and exclusive right to the first applicant (and the third respondent) to use the vendor codes of the second respondent in order to trade in the name of the second applicant (*vide* clause 1 of the amended sale agreement, Annexure “B” dated 20 August 2002). This clause expressly precluded the first respondent from using the vendor codes of the second respondent without the written consent of the first applicant (and the third respondent). It is not the first respondent’s case (or the second respondent) that such written consent has ever been sought and granted to the first respondent. The third respondent had to pay R75 000,00 to the first respondent for the right to use the vendor codes of the second respondent (*vide* clause 2). Implicit in this contractual stipulation was the inference that the first applicant acquired such a right by virtue of the purchase price he paid to the first respondent in terms of the original sale agreement, Annexure “AA”, dated 21 November 2001.

- [27] Mr Putter submitted that the vendor code was not amenable to the real right of ownership and that it was merely a contractual relationship between the supplier and the mine house. The

submission is academic. The fact of the matter is that by signing the original sale agreement and the subsequent sale agreement, as he did, the first respondent substantially diminished or curtailed, if not virtually extinguished or alienated, his right in respect of the vendor codes we are here talking about. The converse is also true. By signing such an agreement, the first applicant pragmatically fortified the right he already had since the formation of the second applicant to use the vendor codes belonging to the second respondent. The first applicant practically became the real and *de facto* owner or co-owner of such vendor codes. In my view the sale of the first respondent's interest in the second applicant was inclusive and not exclusive of the vendor codes belonging to the second respondent, which vendor codes the second applicant had been economically exploiting for almost a four year period immediately preceding the original sale agreement. There was no reservation or exclusion of such commercial interest as was embodied in the vendor codes from the whole transaction. The first applicant's right was only limited by the right of the third respondent who had an equal interest in respect of such vendor codes in terms of the amended sale agreement. At best for the first respondent, it may be argued that he still has some potential or

remote prospect of been allowed to use such vendor codes. To me the right of the applicants to the vendor codes is perfectly clear. Therefore I would find in favour of the applicants on this score.

[28] In the second place I shall proceed to deal with the issue of the trade name. The marketing name Forceflo was used by the various Industrial Pumping Systems close corporations among them the second respondent and the second applicant. The group of such close corporations consisted of the following:

Industrial Pumping Systems BK 1988.

Industrial Pumping Systems Klerksdorp BK 1997.

Industrial Pumping Systems Projects BK 1997.

Industrial Pumping Systems Plant & Machinery 1998.

Industrial Pumping Systems Carltonville BK 1998.

Industrial Pumping Systems Converters BK 1999.

As I have already pointed out earlier in this judgment, the second respondent became dormant since the formation of the second applicant in 1997 and has remained dormant until early in 2003. At the time the original sale agreement was signed, the second applicant was using the trade name. Prior to the signing of the original sale agreement the second applicant had already been using the trade name. Subsequent to the signing of the original sale

agreement, the second applicant continued using the same trade name, Forceflo. The second applicant continues doing so to this day. When the second respondent became dormant, he ceased using the trade name or marketing name. But the second applicant continued using the marketing name as its trade name at all times as I have just indicated. All this was done with the knowledge, consent and the blessing of the first and the second respondents. For more than half a decade the second applicant carried the same marketing flag like all the Industrial Pumping Systems group of close corporations. Three agreements were signed, but none of them precluded the applicants from using the group trade name, Forceflo.

- [29] In his founding affidavit the first applicant alleged that this particular trade name was transferred from the second respondent to the second applicant. In his answering affidavit the first respondent denied that the trade name was ever transferred to the second applicant and averred that the trade name was used by the different entities, in other words, the various close corporations with IPS hallmark. The first applicant's allegation is not backed up by any specific contractual stipulation, but the first respondent's



allegation is supported by the documentary material on record. Be that as it may, the original sale agreement divested the first respondent of all the business or commercial interests in all the close corporations with the IPS hallmark. There can be no question about it. Such relinquished interests were inclusive of the first respondent's right to use the trade name we are here talking about (*vide* clause 15 of the original sale agreement). Although the first respondent also relinquished all his commercial interests in all but one of those close corporations, the business interests he retained in one of those close corporations were inclusive of the right to use such trade name. In reaching this conclusion I am fortified partly by the construction of all the contracts and partly by the long and open usage of the trade name by the second applicant. I would therefore find in favour of the applicants on this issue.

[30] In the third place, I now turn to consider the issue of the group identity. Here the focus of the enquiry is whether the second applicant was an autonomous business enterprise or not. In his founding affidavit the first applicant alleged that on 6 March 2003 the first applicant received a letter (*vide* Annexure "D" on p.72 of the paginated record) which showed that the first respondent was

labouring under the wrong impression that the second applicant could not autonomously conduct its business since, as the first respondent saw things, the applicants were prohibited by the subsequent sale agreement and the multiparty corporation agreement from keeping the second applicant registered with any mine as a separate and independent vendor or provider or supplier. In his answering affidavit the first respondent denied the aforesaid allegation. He countered that the intention of the Forceflo group was that only one united business front with only one common vendor code be presented to the mining customers.

- [31] Now perusal of the letter shows that it was a circular letter addressed to the members of the IPS group. Such an entity was not defined by any of the three contracts. The heading showed that the subject matter was the equity stake in the IPS group. The first paragraph showed that the first respondent caused the letter to be written and circulated seeing that he was unhappy with certain problematic aspects of the agreements. The second paragraph stated that there were indications that the provisions of the agreement between the first respondent and the second respondent had been relaxed. Precisely what those indications were the letter

did not say. In any event no relaxation of the terms of the agreement was permissible unless such amendment had been reduced to writing and signed by both the first respondent and the first applicant (*vide* clause 19 Annexure “AA” on p.54 of the paginated record and clause 19 Annexure “B” on p.63 of the paginated record). The letter went on to list five problems. I deem it necessary to quote the last three of the five.

- “3. Daar bestaan ‘n persepsie dat Industrial Pumping Systems Klerksdorp die dienste van kontrakteurs buite die Industrial Pumping Systems groep gebruik vir projekte wat die ooreenkoms kan beïnvloed (paragraaf 5 van Driedelinge ooreenkoms).
4. Kommunikasie soos bepaal in die kontrak by wyse van korrespondensie hetsy van lede of mynhuise of owerheid word nie bespreek of deurgevoer na die res van die groep nie wat lei tot nadeel van die groepbelang.
5. Kommunikasie wat wel gevoer word ten opsigte van swart bemagtiging word eensydig deur Industrial Pumping Systems Klerksdorp hanteer. Die res van die groep word skynbaar aan hulle eie lot oorgelaat.”

[32] In all these three instances repeated reference was made to the group interest. The assertion or deduction that could be made from all the thrust of the letter as a whole was that the second applicant, in other words Industrial Pumping System Klerksdorp CC, was not an independent and a separate business entity but rather a dependent and familial member of the bigger family or group of close corporations. But the impression or the assertion is wrong. It is contrary to the clear and unequivocal provisions of the three agreements. Clause 12.1 Annexure “AA” on p. 52 of the record reads as follows:

“Die Verkoper se uitvoerende magte en bestuur van die Beslote Korporasie sal ten einde loop op 21 November 2001 waarna die totale uitvoerende magte, bestuur en besluitneming by die Koper sal berus.”

Clause 13 Annexure “B” on p. 61 of the record reads as follows:

“Die Verkoper erken en plaas op rekord dat hy na 21 November 2001 nie verder betrokke sal wees by enige onderhandelinge met Amiantit of enige ander vervaardiger of verspreider van plastiese produkte nie, hetsy as eienaar, vennoot, aandeelhouer, lid, werknemer, konsultant of in enige ander hoedanigheid hoegenaamd nie, binne die grense van die Republiek van Suid-Afrika nie, sonder die skriftelike toestemming van die Koper nie.”

Clause 4 Annexure “C” on p. 69 of the record reads as follows:

“Die onderskeie Beslote Korporasies sal outonoom en afsonderlik handeldryf en besigheid doen en elk sal verantwoordelik wees vir hulle eie bemarking, verspreiding, lewering en handel in die algemeen. In hierdie opsig sal elkeen se onderskeie onderhandelinge, kontrakte en die uitvoering daarvan vir die risiko van elke afsonderlike Beslote Korporasie.”

Clause 6 Annexure “C” on p. 69 of the record reads as follows:

“Elke party sal verantwoordelik wees vir sy eie administrasie en hou van rekenkundige rekords. Om die Koöperatiewe entiteit te beskerm (verw 2) sal die faktuering aan die myn van beide Industrial Pumping Systems Projekte en Industrial Plant & Machinery deur Rive gedoen word. Die faktuering van die nie-myn kliënte vir beide Industrial Pumping Systems Projekte en Industrial Systems Plant & Machinery sal deur Francois gedoen word. Industrial Pumping Systems Projekte se debiteure sal onmiddellik na ontvangs van die myn oorbetal word.

Dit staan Francois vry om enige tyd direk aan die myn te verkoop (faktureer) indien hy nie tevrede is met die hantering van sy belange deur Rive nie.”

[33] The first respondent appeared to have been of the opinion that the

subsequent sale agreement and the multiparty co-operation agreement had given him authority over the business of the second applicant. Neither the subsequent sale agreement nor the multiparty co-operation agreement prohibited the second applicant from retaining its autonomy as a distinct and a separate business enterprise with no subsidiary or subordinate or affilial ties to the so-called Industrial Pumping Systems Group or for that matter the Forceflo group. It seems to me that no group of close corporations or an umbrella company called Forceflo (Pty) Ltd ever formerly existed prior to the signing of the three agreements. The phrase “Forceflo Group” was loosely and repeatedly used in the agreement without any defining legal implication. Similarly the names of all the close corporations were pre-fixed by the same three words Industrial Pumping System. Besides the fact that the first and the second respondents were the stakeholders in almost all of those close corporations I could find nothing on the papers before me to show that there was any firm legal bond to support the contention that they were members of the same group. The submission of Mr Esterhuyse was persuasive and convincing that the second applicant was an autonomous business enterprise with a clear right to free trade and to conduct business as a separate and

independent entity responsible for its marketing strategies, distribution of its products, promotion of its own corporate image, appointment of its own black economic empowerment partner, appointment of its own management executives, keeping its own separate records and books of account, responsible for its own separate banking account and the separate administration of its own business affairs in general.

- [34] The first respondent's representation to the various mine houses before and after the meeting on 7 April 2004 that he was the sole member of the second respondent and the authorised chief representative spokesman of the so-called Forceflo Group was inaccurate, misconceived and misleading. It was a misrepresentation for the first respondent to represent to the mine consumers of the second applicant's products, that the second applicant was an integral part and parcel of a company which traded on the mines as Industrial Pumping Systems t/a Forceflo. On this third issue as well, I would find in favour of the applicants, that the second applicant was an autonomous corporate entity affiliated to no other group of business entities.

[35] Having consider the three issues I have come to the conclusion that the applicants have established on a balance of probability that they had a clear right. Such right stemmed from the three contracts I have mentioned previously. The rights of the applicants were fully set out in paragraph 37 on p. 9 and paragraph 47 on p. 15 of the record. Among others the first respondent relinquished his interest in the second applicant and was handsomely rewarded. The second applicant was granted a partially exclusive right to use the vendor codes of the second respondent. The second applicant was allowed to act as the sole agent of DPI Plastic (Edms) Bpk and the first respondent accepted the status of the second applicant as an autonomous corporate entity. The right of the applicants is perfectly clear in this case.

[36] The second leg of the enquiry is whether the respondents have committed an injury to the right of the applicants or whether the applicants have a reasonable anticipation of such injury. On 1 April 2003 the first respondent addressed a number of letters to the various mines in which he informed the mines, among others, that the second applicant was a member of his corporate empire. He portrayed himself as the group executive of the so-called Forceflo



Group. Moreover, he told the various mines that it had been agreed by the group members who, as he said, included the second applicant that only the vendor codes of the second respondent should be used by all in doing business with the mines. He told the mines that it had also been agreed that the vendor codes previously allocated to the second applicant should be revoked and no longer be used in the future. All this misinformation boiled down to wrongful interference with the trade of another.

[37] The first respondent has disseminated inaccurate information among the mine customers of the second applicant which created the wrong impression that the vendor codes which the second applicant was using in order to access business from the mine customers had to be changed. This was done behind the first applicant's back. The first respondent did not have any authority to do so. The aim was to gain effective control over the business of the second applicant.

The first respondent's representation that the second applicant was not an autonomous corporate entity but a member of his Forceflo Group; that he was the chief executive or representative of such

group; and that the group had decided to use only one vendor code, were false and unwarranted interference with the free trade of the second applicant. In his founding affidavit the first applicant stated that though he was at first unaware of the letters he became aware of the state of confusion among the mine customers of the second applicant. The confusion became so bad that he and the first respondent held a meeting on 7 April 2003. At the meeting he called upon the first respondent to stay out of the business affairs of the second applicant and to remove the confusion he had caused on the mines by disseminating false information. In his answering affidavit the first respondent relied on this meeting as the source where a mandate was given to him to inform the various mines that only the vendor code of the second respondent was to be used. This contention is doubly flawed. Firstly, it implicitly boils down to an admission by the first respondent that as on 1 April 2003 when he wrote the letters, he did not have any mandate to do so on behalf of the second applicant. Secondly, even if any mandate was given to him on 7 April 2003 as he claims, such mandate was of no binding legal force and affect. The reason for my view is that the purported mandate, even if it was truly given, went out to the very nucleus of the two agreements, the vendor codes. Yet it was not

reduced to writing let alone signed by the parties as those two agreements expressly stipulated. The argument of Mr Putter that the majority of those meetings were also attended by the auditors common to the litigants, and that the auditors who minuted the proceedings gave the minutes an objective complexion does not carry the matter any where. However accurate the minutes and however objective the auditors might have been in general, a record of the proceedings in a meeting cannot in law vitiate a clear term of an agreement.

- [39] The various correspondence exchanged between the parties showed that the first respondent went flat out in his efforts to take complete control of the second applicant and its customers or business and that the first applicant relentlessly resisted such attempts. In my view the first respondent's case has been standing on thin ice all along. I could find no substance to the contention or suggestions that he derived any competent powers from any agreement or any meeting to spread such information concerning the second applicant and its business. His involvement, actions and false representations amounted to an interference in the business affairs of the second applicant. Such interference was wrongful. Such

interference cannot be sanctioned in law. It constituted breach of the terms of the agreement. It has the potential to cause serious harm to the second applicant's right.

De Villiers AJ in MATTHEWS AND OTHERS v YOUNG (*supra*) on p. 545 said:

“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.”

[40] Earlier on I have alluded to the paramount importance of the vendor codes in the mining business world. It follows therefore that making false representation about a recognised and registered vendor may have very harmful consequences on the business of such a vendor. Our common law affords a business enterprise which is a victim of such false and deliberate representations common law legal protection (*vide* STELLENBOSCH WINE TRUST LTD AND ANOTHER v OUDE MEESTER GROUP LTD AND ANOTHER 1977(2) SA 221 (CPD) per Theron J; R & I LABORATORIES v BEAUTY WITHOUT CRUELTY

**INTERNATIONAL 1990 (3) SA 746 (CPD) on 753J – 754F per**

Opperman A.J and **ELIDA GIBBS (PTY) LTD** v

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**COLGATE PALMOLIVE (PTY) LTD 1988 (2) SA 350**

**(WLD)** per Van Schalkwyk J.

I am convinced that the applicants will suffer serious financial harm if the business orders from the mines no longer come their way *via* the vendor codes they are currently using. As a result of the false but deliberate representations made by the first respondent, the wrong perception created among the second applicant's mine customers that the first respondent is the authorised and authentic representative of the second applicant cannot be allowed to persist unchecked.

In the eye of the law the applicants have proved a reasonable apprehension of pecuniary harm to the second applicant's legal right resulting directly from the *iniuria* engineered by the first respondent.

[41] I now turn to consider the third requisite of a final interdict. On the

strength of the facts before me it is clear that the applicants have no other ordinary and effective remedy. The underlying purpose of this application is to ensure the continued survival of the second applicant in his business dealings in the mining world. There is no logical manner whereby a claim for damages may be quantified in the circumstances of this case, seeing that the harmful actions of the first respondent cannot be readily detected. I would therefore confirm the provisional order by Cillie J, it being the only effective and protective remedy available to the applicants.

[42] After all has been said and done, I have come to the overall conclusion that the applicants have, on a balance of probabilities, established the three requisites of a final interdict. The respondents on the contrary have no valid defence either individually or collectively. I can see no reason in the circumstances of this case why I should not exercise my discretion in favour of the applicants by granting the relief sought.

I have been mindful of the warning of Erasmus J in WELKOM BOTTLING COMPANY (PTY) LTD EN ANDERE v

**BELFAST MINERAL WATERS (OFS) (PTY) LTD (*supra*) at**

**56F–G** that a court must guard against the danger of blindly giving great consideration to the preservation of applicant's legal right and too little consideration of the negative impact the granting of the final interdict will have on the respondents legal right. Some meaningful balancing act is called for. *In casu* the right of the respondents is to have free trade with the mines without unlawful restrictions. Though the restraint of trade clause in this case is unreasonably wide and therefore unlawful in that it completely prohibits the first respondent from doing similar business to that of the applicant with any mine in this entire country, the applicants are not seeking a order to enforce such a clause. Indeed Mr Esterhuyse very wisely did not contend that the applicants were entitled to rely on clause 13 but conceded that the clause was indefensible. He conceded that the first respondent was at liberty to trade as if clause 13 of the original sale agreement and amended sale agreement was *non pro scripto* provided he pursued his trade without any unwarranted interference with the competing legal right of the second applicant. To interfere with another in his lawful trade is a wrongful act or an injurious harm in our law. It is clear and obvious therefore that the granting of this final interdict

will in no way have any adverse impact on the respondents' legal right to free trade provided the respondents keep their business activities within lawful bounds, regard been had to the terms and conditions of the aforesaid agreements.

[43] I now proceed to deal with the question of costs. Prior to the institution of these proceedings the first respondent was urged to give the applicants an undertaking that he would refrain from interfering in the business affairs of the applicants pending an out of court solution of the dispute between the parties. The request was summarily dismissed. The refusal led to the launching of these current proceedings. During the initial hearing, the first respondent ended up giving the undertaking which, by agreement between the parties, was made an order of the court. The undertaking was given before the answering affidavit was filed by the first respondent.

[44] In his answering affidavit the first respondent stated that he was withdrawing such an undertaking. Mr Putter relied on the case of

**JOHANNESBURG TAXI ASSOCIATION v BARA-CITY**



**TAXI ASSOCIATION AND OTHERS 1989 (4) SA 808 (W).** In that case the applicant sought a prohibitory interdict against the respondents. Before the respondents delivered their answering affidavit, they gave the applicant the undertaking that they would not, among others, assault the applicant's members or unlawfully interfere with the members of the applicant in the conduct of their legitimate business operations. The applicant accepted the undertaking. By the consent between the parties, the judge incorporated the undertaking in the court order.

The applicant subsequently launched another application, against the respondent, alleging the disobedience of the court order, because as they averred, the first respondent continued with the behaviour which was contrary to the said undertaking.

Flemming, J reckoned that since the undertaking was so arranged between the parties and not so ordered by the court itself after considering the two versions, in other words the complete merits of the dispute, such an undertaking did not amount to an enforceable order of the court as envisaged in Rule 32(5).

But in the case of **YORK TIMBERS LTD v MINISTER OF WATER AFFAIRS AND FORESTRY AND OTHERS** 2003 (4)

SA 477 (T), the court came to a different conclusion.

In the latter case, **YORK TIMBERS LTD**, Southwood, J said the following at **500G-I**:

“I have no doubt that the *ratio* in the *Johannesburg Taxi Association* case is wrong. In my view, there is no difference between the legal effect of an undertaking to do something or refrain from doing something which is made an order of court and the legal effect of an order to the same effect made by the court after considering the merits and giving judgment. In my view the effect of an undertaking made an order of court is accurately stated in *Halsbury’s Laws of England* 4 ed vol 9 para 75:

‘An undertaking given to the court by a person or corporation in pending proceedings, on the faith of which the court sanctions a particular course of action or inaction, has the same force as an injunction made by the court and a breach of the undertaking is misconduct which amounts to contempt’.”

[45] I am persuaded by the reasoning in the latter case and not the

former. As I see it, when the answering affidavit was signed there was no longer a simple undertaking by the first respondent. The original status of such an undertaking had undergone a series of significant changes. It was tendered to the applicants. It was considered. It was accepted. Finally, by consent of both parties and the sanctioning of the court it was made a binding court order. In my view, once the character of the private undertaking has been so judicially transformed it can no longer be withdrawn at the whim of the party who tendered it into court or the party who accepted it in court. To allow a litigant to unilaterally circumvent the due process of the law in this manner can lead to serious abuse of the judicial process. I shudder to think of the chaotic situation which may arise. Our civil legal system may be brought into disrepute if litigants are allowed to set aside court orders *mero motu* without bringing any substantive formal application fully setting out the facts and the grounds as to why an undertaking was made in the first place and why the court order emanating from it now has to be set aside.

In my view, the earlier order by Cillié J, has to stand.

[46] In the notice of motion, the applicants indicated that no order of costs was sought against the second and the third respondents unless they too opposed the application. The notice of opposition showed that they, like the first respondent, also opposed the application. The first respondent stated in his answering affidavit that he was authorised to depose to the answering affidavit on behalf of the second respondent and the third respondent as well.

I am satisfied that had it not been for the recalcitrant attitude of the respondents, the applicants would probably not have initiated these urgent proceedings. They were left with no choice but to come to court when their reasonable request was turned down by the respondents. They have finally emerged victorious. They are entitled to the payment of the costs of the litigation by the unsuccessful party which in this case includes all three respondents. The three respondents are liable for the payment of the taxed costs of the applicants on the ordinary scale applicable to contested motion matters.

[47] Accordingly I make the following order:

47.1 The provisional order by Cillié J dated 4 March 2994 is finally confirmed.

47.2 The three respondents are directed to pay the taxed costs of this application jointly and severally, the one paying the others to be absolved.

47.3 The costs are to be paid on the ordinary scale as between party and party.

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**M.H. RAMPAL, J**

**On behalf of Applicants:**

Adv. M. Esterhuyse  
Instructed by  
Israel & Sackstein

**On behalf of Respondents:**

Adv. Putter  
Instructed by  
Symington & De Kok

/scd