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

CASE NO: 19656/2023

In the matter between:

OMNI SOFTWARE SOLUTIONS (PTY) LTD	First Applicant
OMNI SOFTWARE LIMITED	Second Applicant
and	
KOEKEMOER, ELMARIE	First Respondent
ANALYSIS SUPPORT AND VENTURES (PTY) LTD	Second Respondent
KOORSEN, MARIETTE	Third Respondent
KOORSEN, GERT PIETER TIELMAN	Fourth Respondent
BEKKER, JEREMIAS	Fifth Respondent
EPICODE (PTY) LTD	Sixth Respondent

Before: The Hon. Ms Acting Justice Mahomed

Heard: 03 June 2024

Delivered: 19 June 2024

JUDGMENT

MAHOMED, AJ:

[1] This is an application for a temporary interdict which the first applicant ("**Omni SA**") and the second applicant ("**Omni UK**") (*jointly referred to as "**Omni**"*), launched on 3 November 2023 for the following relief:

[1.1] Pending final determination of the action to be instituted against the respondents by Omni SA and Omni UK:

[1.1.1] The first respondent, Ms Elmarie Koekemoer ("**Ms Koekemoer**"), second respondent, Analysis Support and Ventures (Pty) Ltd ("**ASV**") and sixth respondent, Epicode (Pty) Ltd ("**Epicode**") be interdicted from:

(a) Unlawfully competing with Omni SA and/or Omni UK by:

(aa) Using any information which constitutes proprietary and/or confidential information in connection with the business of Omni SA and Omni UK;

(bb) Approaching, contacting, soliciting and/or engaging with any of Omni's clients with a view to:

(i) Inducing them to terminate their contracts and/or dealings with Omni SA and/or Omni UK; and/or

(ii) Securing them as clients for Koekemoer and Koekemoer's new employer, Epicode; and/or

(iii) Representing to them directly or indirectly that the Epicode's system is identical and/or similar to Omni's products and systems;

(cc) Passing off the products, systems and/or services offered by Koekemoer and Epicode:

(i) As being those of Omni;

(ii) As being related to and/or affiliated with Omni;

(dd) Holding themselves out and/or Epicode as being affiliated with Omni;

(ee) Offering the products, systems and/or services which they offered to the public in a manner which is confusingly similar to that of Omni's distinctive set-up, software and/or application layout;

[1.1.2] Disclosing any of Omni's confidential information, including, but not limited to, client lists, pricing information, information relating to the development and maintenance of Omni's systems, Omni Hotels, Omni iManage IT and/or Omni Commercial and Health Care to:

(a) ASV;

(b) Epicode;

(c) Any third party.

[2] Omni are to be directed to institute an action against the respondents for final interdictory relief of the kind mentioned in paragraph 1 above, as well as any other relief which they might seek within 15 (fifteen) court days of the granting of this order “***the action***”.

- [3] The costs of this application be reserved for determination by the trial court in the action, save in the event of opposition hereto, in which case any party opposing this application is to make payment of the costs thereof on a scale as between attorney and client, including the costs of two counsel, where so employed.
- [4] The relief sought by Omni against ASV and Bekker was settled prior to the hearing of the matter. At the commencement of the hearing, the counsel for Omni handed up a draft order by agreement which I granted marked “X”.

COMMON CAUSE FACTS

The business of Omni

- [5] Over the course of 25 years, Omni UK developed software for products and systems which could be used in the hospitality industry to assist the management of its clients, thereby resulting in the saving of costs (“*the products*”). The development of these products came at tremendous cost to Omni UK.
- [6] During February 2020, Omni UK introduced these products to South Africa with Omni SA being licenced to market them to prospective clients.
- [7] Omni UK’s ability to progress and develop its software products arose out of its intricate understanding of the various workflows, traditional bottlenecks and cost-saving possibilities capable of being achieved by the harnessing of the correct software processes. The system is now so flexible that it has, in addition to the hospitality industry and hotels, been used in fleet management, chemical plants, shopping centres, casinos and game reserves.

The relationship between Omni and Ms Koekemoer

- [8] Omni UK and Ms Koekemoer had a history dating back to 2005/2006 when Ms Koekemoer was a recruiter in the United Kingdom and was employed as a director of a recruitment company which Omni UK started in 2011.

- [9] In late 2017/early 2018, Mr Riaz Ladha (**“Mr Ladha”**), the deponent to Omni’s affidavits, visited South Africa at the invitation of a friend, who was a successful hotelier. During the visit, he was introduced by his friend to the Chief Executive Officer of Tsogo Sun, and through one of his regional managers in London, he was introduced to the Managing Executive of Bidvest Prestige. The purpose of these meetings was for Mr Ladha to introduce Omni’s products to the South African market.
- [10] The companies were enamoured with the systems and products which Omni UK offered and ultimately, Mr Ladha concluded contracts for these systems and products to be supplied to the South African clients by way of a licence agreement.
- [11] Pursuant thereto, the South African clients adopted and rolled out the Omni systems within their supply chain which led to the conclusion of contracts with Afriboom (Pty) Ltd (**“Afriboom”**), a specialised cleaning company in the Hospitality, Health care and Food Hygiene and Contract Cleaning sectors, which had been rendering services to Tsogo Sun (Afriboom was subsequently acquired by CSG Cleaning). Bidvest is a competitor of Afriboom with both being outsourced cleaning contract companies. Tsogo Sun/Southern Sun are clients of either Bidvest or Afriboom. Hotels that were part of the Bidvest or Afriboom Group also contracted directly with Omni SA and Omni UK.
- [12] Given the impending expansion of the Omni business into South Africa, Mr Ladha offered Koekemoer the opportunity of handling the South African operations and in return for her involvement, she was offered 20% shareholding in the South African business and salary equivalent to her local position. Omni UK subsidised the establishment of Omni SA and all the costs associated therewith. Ms Koekemoer secured a significant 20% ownership interest in the business without having to contribute anything.
- [13] Ms Koekemoer was the sole director of Omni SA. She was also the company representative and was responsible for sales, training and support of the systems in South Africa, as well as managing and liaising with the South African clients.

- [14] Whilst Omni UK provided substantial support, Ms Koekemoer was the *de facto* face of Omni SA and was responsible for hiring the trainers and installers who had been trained by the Omni UK team. She herself was trained in the UK on the Omni systems.
- [15] Given the level of responsibility given to Ms Koekemoer, was the primary reason that she was offered a 20% share of the South African business.
- [16] Her responsibilities included that of two staff and two branches in Johannesburg and Cape Town. She recommended a package of R118 000.00 per month for herself.
- [17] From approximately 2018 to 2020, the business of Omni SA was doing well, so much so that Bidvest, one of Omni SA's largest clients, wanted to introduce the product to certain banks and, in fact, introduced it to the Peermont Group Hotels. This, in turn, led to Peermont wanting to use the maintenance module for its entire casino offerings.
- [18] Bidvest also wanted to start using the system for health care. Discussions were had about adapting the system for that purpose. It was then decided to re-develop the system, leading to the development of Omni Commercial, Facilities and Maintenance and the rebranding of Omni Clean to become Omni Hotels given that it had new and additional features.
- [19] As the sole director of Omni SA, Ms Koekemoer had fiduciary duties in terms of, amongst others, sections 76(3)(c) and 76(2)(a) of the Companies Act, 71 of 2008 (“***the Companies Act, 2008***”) as well as the common law to act in the company’s best interest and certainly not in conflict with them.
- [20] As part of the position in Omni SA, Ms Koekemoer was also responsible for appointing employees.

The inter-relationship between Ms Koekemoer and the remaining respondents

ASV

- [21] ASV is a company, whose sole director is the fifth respondent, Mr Jeremias Bekker (“**Mr Bekker**”). Mr Bekker started ASV whilst employed by Omni SA and, after his departure from Omni SA in February 2023, ASV now directly competes with Omni SA.
- [22] According to Omni, Mr Bekker and Ms Koekemoer have been friends for many years and that is particularly important since Mr Bekker is the director of ASV which is a direct competitor of Omni SA. The history of how ASV came about and Ms Koekemoer’s involvement therein is discussed below.

The third and fourth respondents

- [23] As regards to the third and fourth respondents, they are Ms Mariette Koorsen (“**Ms Koorsen**”) and Mr Gert Koorsen (“**Mr Koorsen**”) who are married to each other and both of whom were employed at Omni SA by Ms Koekemoer.
- [24] Ms Koorsen is Ms Koekemoer’s sister and Mr Koorsen is Ms Koekemoer’s brother-in-law.
- [25] According to Omni, even though the evidence implicates Mr and Ms Koorsen in having acted with Ms Koekemoer and Mr Bekker in pursuit of a common purpose, no interdictory relief is sought against Mr and Mrs Koorsen.
- [26] Regarding Mr Koorsen's knowledge and expertise and experience, Mr Koorsen himself provided no information regarding this. The information provided in respect of Mr Koorsen comes from Ms Koekemoer and Mr Bekker and is somewhat contradictory in that:
- [26.1] According to Ms Koekemoer, Mr Koorsen has no knowledge of computer engineering or software coding or any other skills to steal information from Omni but this notwithstanding, he was able to tailor-make programs for Epicode to suit clients’ needs and that this can be written in 2 – 3 days.

[26.2] Mr Bekker, on the other hand, states that Mr Koorsen worked for ASV as the head of development.

Epicode

[27] Regarding Epicode, this company was registered on 1 November 2023 but had been in existence as a shelf company since 2 August 2023. The director of Epicode is Ms Koekemoer's husband, Mr Leon Koekemoer and Mr Koorsen.

FACTS WHICH APPEAR TO BE DISPUTED

[28] The facts hereunder appear to be disputed but the admissions made by Ms Koekemoer render them common cause.

[29] According to Omni, Epicode is being used by Ms Koekemoer and the other respondents as a front to conduct ASV's business, alternatively to frustrate the Omni SA and Omni UK in their pursuit of the relief sought in this application and that whilst Ms Koekemoer holds herself out to be a representative of Epicode and has recorded that Epicode is a competitor of ASV, this is not true.

[30] According to Omni, Epicode is peddling ASV's software and unlawfully competing with Omni.

[31] It transpired that all of the employees of Omni SA were family and friends of Ms Koekemoer with whom she had a close relationship.

[32] Omni UK's Chief Operating Officer ("**COO**"), Ms Michelle Daniels ("**Ms Daniels**") also informed Mr Ladha that the salaries being paid in South Africa as per Ms Koekemoer's recommendation to Mr Ladha when she first joined Omni SA was 30% higher than the market-related costs for such salaries

[33] Subsequent to Mr Ladha confronting Ms Koekemoer about this, she effectively reduced all the respondents' salaries by approximately 30%.

- [34] This culminated in Mr Koorsen leaving Omni SA at the beginning of 2023; Mr Bekker resigning in or about February 2023.
- [35] Ms Koorsen's employment was terminated on 21 September 2023 as a result of her working for ASV at the same time that she was working for and being paid by Omni SA. Details of which Ms Koekemoer denies having any knowledge of.
- [36] According to Ms Koekemoer, Mr Koorsen was forced to leave after Mr Ladha instructed her to stop all casual payments at the end of January 2023. He accordingly stopped being a casual for Omni SA at the beginning of February 2023; Mr Bekker left the employ of Omni SA at the end of March 2023 and Ms Koorsen was summarily fired on 21 September 2023. Ms Koekemoer denied that Ms Koorsen was ever employed by ASV.

The decline of Omni SA and the investigation that pursued

- [37] According to Omni, in early 2020, during the advent of the Coronavirus outbreak due to the severe restrictions that adversely affected both tourism and travel, as well as the hospitality industry, many of Omni SA's clients were affected. Omni SA reached agreements with these clients to suspend their services and their obligations during the pandemic notwithstanding the contractual provisions that Omni SA might otherwise have been entitled to enforce.
- [38] Omni UK utilised the pandemic and lockdown period to develop Omni Commercial Health Care and Maintenance in order that it could provide a full suite of modules, as well as fine tune the health care offering particularly for Bidvest.
- [39] As the effects of the COVID pandemic started to subside, Ms Koekemoer started raising what Omni alleges to be spurious concerns about Omni systems and products, the services which Omni SA was offering. These included, *inter alia*, the following:
- [39.1] That the mobile phones which had been rolled out to customers were deficient, this notwithstanding that Ms Koekemoer had been the one responsible for

selecting the mobile devices because the Omni systems have never been unable to operate on mobile devices;

[39.2] That Omni SA clients' staff were unable to use the mobile devices, although it was Ms Koekemoer and her team's job to ensure that the training on the system of adequate as part of Omni SA's obligations to its client;

[39.3] That load shedding was crippling the business because the networks were allegedly being lost, with Omni SA's clients losing data as a result. After investigation, this turned out to be false given that all mobile phones work on SIM cards that would automatically save the relevant information to the hosted served. She also complained that there was no "*offline capability*" on the Omni SA system which was problematic.

[39.3.1] According to Omni, Ms Koekemoer's complaints regarding offline capabilities and loadshedding were simply wrong. Ms Koekemoer was offered the opportunity to prioritise the offline development over other development requirements but she specifically requested that other development requirements be prioritised over offline development.

[39.3.2] This was despite Ms Daniels given indications that offline functionality development could be prioritised over OHIP functionality especially if load shedding had been as detrimental as alleged.

[39.3.3] No explanation was provided by Ms Koekemoer for why she declined the offer to prioritise the offline issue as this clearly required top priority.

[39.3.4] Ms Koekemoer admitted that she asked for OHIP to take precedence as there was big contract that they needed to retain but that she had been insisting for years that the offline capabilities must be addressed.

[39.3.5] In fact, in Ms Koekemoer's answering affidavit and during oral arguments, she stated as one of the major reasons for referring work to ASV, as being the fact that Omni products do not have an "*offline capability*".

[39.3.6] At no stage did she mention during the course of her argument that Ms Koekemoer was offered the opportunity to address the offline capabilities as a priority, which she declined.

[39.3.7] Ms Koekemoer saw it fit to refer clients to ASV simply because they had offline capabilities when she was well aware that Omni SA was capable of developing offline capabilities for its products but she has not explained why she refused this offer.

[39.4] Omni's clients had complained that the company's prices were too high and when she was encouraged to offer her clients a free trial and to negotiate with the clients in relation to pricing, rather than losing the client or prospective business, she failed to do so.

[39.5] She insisted that "*extra reporting requirements*" were necessary. She complained Mr Ladha did not fully understand as the systems are capable of generating 100 different types of reports. According to Ms Koekemoer, Omni's clients were not willing to log on to see the reports, but instead required weekly summaries.

[39.5.1] According to Omni, it transpired that Ms Koekemoer and her team had not been attending to supplying Omni's clients with proper training despite numerous requests by the clients and reporting required and it was for this reason that the clients were unaware of the systems reporting functionality.

The outcome of the investigation that led to the resignation of Ms Koekemoer

[40] Omni contends that on or about 21 September 2023, developments regarding the respondents and their conduct came to their attention. These primarily related to two of Omni SA's clients:

[40.1] Kievits Kroon Wine Estate (Pty) Ltd and Mr Wayne Hill, previously of Bidvest and more recently the PPLE Group.

The formation of ASV

[41] Omni contends that subsequent to the recent developments of 21 September 2023, it conducted an investigation into Ms Koekemoer which led to the discovery that Ms Koekemoer and the respondents had:

[41.1] Stolen Omni's company proprietary information;

[41.2] Used same to establish ASV which was simply a shelf company, and peddle to the public what they represented to be a product and system which ASV developed which was Omni SA's products; and

[41.3] On that basis, wrongfully and unlawfully diverted Omni's customers to ASV to the detriment of Omni.

[42] According to Omni:

[42.1] Further investigations showed that ASV had been established by erstwhile employees of Omni SA being Mr Bekker, Ms Koorsen and Mr Koorsen in 2021 whilst they were employed by Omni SA. The systems and products which ASV offered to its clients is either identical or substantially similar to that of Omni SA, with such systems and product offerings which had been developed by Omni UK and Omni SA over an extended period of time and at great costs;

[42.2] Ms Koekemoer, Ms Koorsen, Mr Koorsen and Mr Bekker, all of whom were employed by Omni SA, wrongfully, unlawfully and intentionally (while acting in

concert and/or with a common purpose) utilised the proprietary information and know-how which they acquired while employed at Omni SA to:

[42.2.1] Copy its system and product offering;

[42.2.2] Establish ASV and Epicode while Ms Koekemoer was a director and employee of Omni SA and the others employed by it; and

[42.2.3] Divert Omni SA's customers to ASV so that they could use the former as a springboard to launch the latter as a direct competitor in the market. Simply put, what Ms Koekemoer and the respondents did constituted unlawful competition which had to be stopped by way of this urgent application.

[42.3] Ms Koekemoer breached her fiduciary duties and failed to act in the best interest of the company but rather she acted in conflict with Omni SA. They allege further that the respondents had the same obligations to Omni SA because they were employees of the company.

[42.4] Ms Koekemoer's conduct constituted a breach of confidence as contemplated in section 213 of the Companies Act, 2008 in that, while she was a director, and thus carrying out a function under the Companies Act, she disclosed confidential information to Mr Bekker at ASV and permitted ASV to access such information. This also constitutes a criminal offence as contemplated in section 216 of the Companies Act, 2008.

[43] Ms Koekemoer, in her answering affidavit, denies having played any part in ASV at all, be it unlawfully misappropriating Omni SA's clients or deliberately causing Omni SA to overcharge its clients and short servicing them to a degree that drove the clients away and simply directed them to ASV as a substitute.

[44] She states categorically that she never directed any of Omni SA's clients to ASV, but that on two occasions she did refer clients to ASV:

[44.1] First, she was contacted by a cancelled client asking whether Omni SA had obtained offline functionality to which she informed them that it had not and in that instance, she referred that client to ASV;

[44.2] Second, she was contacted by one Ms Adele Esterhuizen of Tsebo who had a similar enquiry as they were previously using Omni SA's software on a different site. Ms Esterhuizen apparently could not continue with the Omni product now that Tsebo had taken over Kievits Kroon. In this case, she again referred Kievits Kroon to ASV.

[45] According to Omni, the following transpired with regards to Kievits Kroon:

[45.1] That Omni SA had an association with Kievits Kroon and contracted with Afriboom (previously owned by CSG Holdings Ltd), to outsource cleaning services, and Omni SA was rendering services to Afriboom.

[45.2] On or about 15 September 2021, Kievits Kroon terminated its outsourcing agreement with Afriboom. According to Ms Koekemoer, the reason for this was because Kievits Kroon had not paid Afriboom an amount of R1.2 million.

[45.3] The Tsebo Group took over as the contract cleaners and at the time, Ms Koekemoer recommended the ASV software to management at Kievits Kroon.

[45.4] Unbeknownst to Omni, by 19 August 2021, Ms Koekemoer was already acting on behalf of ASV and engaging in negotiations with Kievits Kroon, represented by Mr Francois Stemmelaar in order to secure a contract between ASV and Kievits Kroon.

[45.5] In terms of the e-mails exchanged between Ms Koekemoer and Francois Stemmelaar, which e-mails contained ASV's signature, it was clear that Ms

Koekemoer was securing contracts for ASV instead of Omni SA. This was not denied by Ms Koekemoer.

[45.6] On 11 October 2021, the abovementioned negotiations between Ms Koekemoer and Mr Stemmelaar culminated in a licence agreement being signed between ASV and Kievits Kroon on 3 February 2022, duly signed by Ms Koekemoer.

[45.7] The Word version of the licence agreement sent by Ms Koekemoer included a crib of the Omni SA licence agreement. Ms Koekemoer's denied that she was ever employed by ASV and yet, she signed the licence agreement between ASV and Kievits Kroon for and on behalf of ASV.

[45.8] In her answering affidavit, she admits that she signed the contract on request of Mr Bekker as he was out of town, but denies that she ever held herself out to be a director of ASV and never meant to bind herself as such. She also denied that the ASV licencing agreement was a mirror image of the Omni SA licencing agreement, despite the fact that the wording of the two licencing agreements are exactly the same. She also then contends that since no proper power of attorney was given to her to act on behalf of ASV, the agreement was null and void.

[45.9] In Mr Bekker's answering affidavit, he states that he was not aware of Ms Koekemoer ever holding herself out to be a director of ASV and that it was for her to explain. He states further that on a few occasions he asked Ms Koekemoer to send an e-mail when he was out of town, that is all. As regards the licence agreement, she states that he and ASV were not responsible for this document.

[45.10] By September 2023, according to Omni, ASV was failing to provide an efficient service to Kievits Kroon making them more disgruntled. Neither Ms Koekemoer nor any other representatives of ASV were responding to Kievits Kroon's complaints satisfactorily and this was told to Mr Ladha by Mr Stemmelaar

himself. What was significant was that Mr Stemmelaar was directing his complaints to Ms Koekemoer as he believed that she representing ASV.

[45.11] In an e-mail dated 20 September 2023, whilst Ms Koekemoer was still in the employ of Omni SA and its sole director, she addressed an e-mail from Omni Software Solutions e-mail address to Mr Stemmelaar advising that:

“Please note Elmarie is with ASV and no longer with Omni. This is Omni’s e-mail address and no longer applicable to this contract. Please delete this e-mail address on your side and update and use [software\[...\]](#).

Kind regards

Elmarie Koekemoer” (Emphasis added)

[45.12] Ms Koekemoer’s response to this was that Mr Stemmelaar’s had the mistaken impression that Ms Koekemoer was employed by ASV and he had emailed her a few times on her work e-mail address at Omni. She decided that she had had it with Mr Stemmelaar and sent him the e-mail in an attempt to get him to contact ASV and leave her alone. This response does not make sense. Had Ms Koekemoer wanted to get Mr Stemmelaar off her back, one would think that her email would have read along the lines that: *“I work for Omni. Kindly contact someone as ASV for assistance.”*

The PPLE Group

[46] According to Mr Ladha:

[46.1] On 5 October 2023, he received an e-mail from Mr Wayne Hill who was a customer of Omni SA, the PPLE Group, wherein he enquired as to whether everything was in order and whether Omni SA was continuing its presence in South Africa. He did so because he informed Mr Ladha that Ms Koekemoer was *“onto something else”* and that Mr Ladha did not know;

- [46.2] He immediately contacted Mr Hill to obtain clarity on the issue and it appeared that during or about August and September 2023, Ms Koekemoer, writing from an e-mail address [software\[...\]a](#) had approached Mr Hill on behalf of ASV with a view to appropriating PPLE as a client for ASV.
- [47] Ms Koekemoer admits the contents of the e-mail thread between Mr Hill and herself wherein, she presents as a representative of ASV advising Mr Hill that she was keen to meet with him in order to present ASV's software. The systems and functionality which Ms Koekemoer was offering to PPLE on behalf of ASV pertained to all of those company operations Omni SA was already servicing and which included, inter alia, time and attendance, stock take, purchase orders, fleet management, audit systems, asset management, health and safety, housekeeping and hygiene management.
- [48] According to Omni, Ms Koekemoer made no effort to conceal her involvement with ASV during the entire time that she was the sole director and an employee of Omni SA. This constituted a breach of the fiduciary duties which she owed to Omni SA in terms of the Companies Act, 2008.
- [49] Pursuant to further investigations conducted by Omni, the following transpired during October 2023:
- [49.1] Mr Bekker is the director of ASV;
- [49.2] Ms Koorsen is involved in installations and support in respect of ASV's product offering (while she was still employed with Omni SA) as evidenced by e-mails from Ms Koekemoer;
- [49.3] Mr Koorsen was now Head of Development for ASV;
- [49.4] That the ASV products functionality mirrored the Omni SA products functionality;

[49.5] Ms Koekemoer was involved in the establishment and running of ASV whilst being a director of Omni SA as evidenced by:

[49.5.1] An invoice in respect of purchases for ASV relating to server services;

[49.5.2] An invoice in respect of Technomobi SIM cards;

[49.5.3] An e-mail between Ms Koekemoer and Euro Cape in relation to enquiries from a client regarding adding functionality and in respect of which Ms Koekemoer indicates that the client should contact Mr Bekker;

[49.5.4] In an e-mail dated 29 August 2023, Mr Koorsen sent Ms Koekemoer a copy of a report obtained from the Omni system 6 months after he had left Omni SA, that this evidence is that Mr Koorsen is clearly accessing the Omni systems using Ms Koekemoer's login details whilst working for ASV as Head of Development.

[50] Ms Koekemoer admits that Mr Bekker is the director of ASV but denies that Mr Koorsen was previously employed by ASV, and states that he is a director and the developer at Epicode. This differs from what Mr Bekker says about Mr Koorsen. According to Mr Bekker, Mr Koorsen was the head of development at ASV and despite now being a director of Epicode, he "*presently*" does freelance work for ASV.

[51] Ms Koekemoer denies being involved in the establishment of ASV whilst being a director of Omni SA, even though the dates of the establishment of ASV, the signing of the licencing agreement with Kievits Kroon and the e-mails sent to Mr Hill trying to solicit him as a client, all occurred during the tenure of Ms Koekemoer as the sole director of Omni SA.

- [52] Ms Koekemoer also admits to paying the Vox accounts as Omni SA paid for fibre for Ms Koorsen as she was working from home. However, the Vox accounts and the SIM card orders were made out to ASV, not Omni SA.
- [53] As regards to the e-mail dated 29 August 2023 from Mr Koorsen to Ms Koekemoer attaching a report obtained from the Omni system, according to Ms Koekemoer this was in fact Ms Koorsen sending her the document from Mr Koorsen's previous Omni SA e-mail address.
- [54] Omni provided further information and evidence in the form of e-mails which show that ASV had also poached Holiday Inn, Rosebank which was a client of Omni SA and which was now a client of ASV.
- [55] In Omni's replying affidavit, Omni sets out further examples that date back from as far as 14 January 2021 with Ms Koekemoer's involvement with ASV and which includes meeting invitations from Mr Bekker to Omni's clients like Topturf and Euro Cape with the intention of poaching them where Ms Koekemoer was invited to these meetings.
- [56] Even though Ms Koekemoer denies ever attending these meetings, the issue that arises here is why was she being invited to these meetings in the first place when she was the director of Omni SA. Ms Koekemoer does not seem to have provided any explanation for this.
- [57] Omni alleges that at the time when Ms Koekemoer had resigned as a director and an employee and was put on notice, she was required to do a handover to one Mr Maharaj Dees of Omni UK.
- [58] During the course of the investigation subsequent to Ms Koekemoer's resignation, Omni found an e-mail where Ms Koekemoer had e-mailed from her work e-mail address to her private e-mail address, all personal details and confidential information including customer details and client lists of Omni SA to herself.

- [59] Ms Koekemoer's reply to this, in her fourth set of affidavits to this allegation, was as follows:

"In my messages whilst compiling the handover I informed Maharaj that I am using 2 PC's and that I am e-mailing documents between my work and my personal e-mail."

- [60] She makes reference to a WhatsApp message that she forwarded to Mr Maharaj and if regard is had to the WhatsApp message, it states the following:

"Working on two PCs to include Annelie's details also so you have details that the support team used before, because quicker to search and type through masses of info from any e-mail, Annelie's PC and Mariette who feeds info to so you will see that I forward from my personal email some stuff and work e-mail to. Hope it is ok." (Emphasis added)

- [61] The submission made by Ms Koekemoer's counsel regarding these averments is that because Ms Koekemoer was working off two PCs, she had to forward her work e-mails to her personal e-mails in order to compile a report for handover.
- [62] This is not what the first respondent states in either her fourth affidavit or her WhatsApp message to Mr Maharaj. What she does say to Mr Maharaj is that she will forward e-mails to him from both her personal e-mail and her work e-mail since she has to collate information from Annelie and Mariette as well.
- [63] The submission made by Ms Koekemoer's counsel in this regard was therefore inaccurate and differed *toto caelo* from what is in fact stated by the first respondent under oath.
- [64] According to Omni, while Ms Koekemoer denies having played any part in ASV unlawfully misappropriating Omni SA's clients, she also deliberately caused Omni SA to overcharge its clients in breach of the price ranges adopted by the company and then following that through by short servicing them to such a degree that she drove the clients away and simply directed them to ASV as a substitute.
- [65] Ms Koekemoer denies these allegations but provides no explanation for her actions suffice to say that she always acted in the best interests of Omni SA.

[66] According to Omni, Ms Koekemoer and the respondents were:

[66.1] Stealing from Omni SA and Omni UK information and know-how necessary to create a product for ASV and establishing ASV as a competitor;

[66.2] Product offering and diverting clients from Omni SA to ASV;

[66.3] Failing to service Omni SA clients in order that they would become frustrated and then recommending such clients that they utilise ASV.

[67] Ms Koekemoer again denies these allegations.

[68] She avers that:

[68.1] Ms Koorsen was never the head trainer and installer at Omni SA but rather the trainer and installer support.

[68.2] Mr Koorsen has no knowledge of computer engineering, software coding or any other skills to steal information from Omni SA. He was merely a casual installing the software on the devices and handing these over to the customers.

[68.3] Mr Bekker, on the other hand, appointed Mr Koorsen as head of development at ASV.

[68.4] During argument, Ms Koekemoer's counsel was at pains to explain that there was no reason for any of Omni's staff to ever access the Redmine digital platform as they were not developers of any products and that Omni SA essentially signed the licence agreement between Omni SA and the client, provided the mobile phone with the application and trained the clients on how to use the product.

[68.5] She mentioned that the Tuesday meetings were development meetings and that except for one occasion where Mr Bekker attended, none of the other respondents were ever at these Tuesday meetings.

[68.6] In argument, Ms Koekemoer's counsel also stated that the product that ASV and Epicode sell is different to the product that Omni sells in that they sell a bespoke application that is specifically designed for the needs of a particular client, each application is unique to the client's needs and they have offline connectivity. What is not explained is why ASV used the exact same licensing agreement as Omni if their product was so different to that of Omni.

The relief sought against Epicode

[69] Ms Koekemoer contended that nowhere in the founding affidavit does Omni make out a case against Epicode and that this arises for the first time in the replying affidavit.

[70] According to Omni, Epicode started after the resignation of Ms Koekemoer.

[71] In addition to what Omni says about Epicode in its description of Epicode as the sixth respondent, Omni also contends that both ASV and Epicode have appropriated Omni's clients and that there exists a risk that Omni will, prospectively, lose more, if not all, their clients if Ms Koekemoer and the respondents are permitted to continue in the manner as they have been.

[72] What is not contested is that Mr Pieter van der Westhuisen of Afriboom became a close friend of Ms Koekemoer over the years while she was at Omni SA and when Afriboom was a client of Omni SA.

[73] As for the Capital Group, four days after Ms Koekemoer left Omni SA, there is an email trail confirming that the Capital Group will be transferring to Epicode and Ms Koekemoer reverting with dates. Omni contends that it is inconceivable that such preparation only commenced after Ms Koekemoer left Omni and that this must have started whilst she was still at Omni SA. Ms Koekemoer has not denied this in her fourth set of affidavits.

- [74] Ms Koekemoer admits that Afriboom and the Capital Group are now clients of Epicode. She, however, denies approaching these clients and contends that the clients approached her after she left Omni.
- [75] Omni, on the other hand, contends that notwithstanding the undertaking which Ms Koekemoer gave in terms of which she undertook not to approach the clients of Omni SA and Omni UK, that she proceeded to do just that and that is how Epicode landed both Afriboom and the Capital Group as clients. According to Omni, Ms Koekemoer had approached both of these whilst she was employed with Omni SA.

ISSUES TO BE DETERMINED

- [76] The issue in dispute is whether Omni SA and Omni UK have satisfied the requirements for an interim interdict against Ms Koekemoer and Epicode arising from unlawful competition perpetrated by way of:
- [76.1] Using confidential and proprietary information belonging to Omni;
- [76.2] Approaching and soliciting Omni's clients in South Africa and the United Kingdom; and
- [76.3] Passing off the products, systems and/or services offered by Koekemoer and Epicode as being those of Omni and/or as being related to and/or affiliated with Omni.

The Undertaking

- [77] Ms Koekemoer provided Omni with essentially two undertakings:
- [77.1] On 10 October 2023, Ms Koekemoer gave Omni an undertaking that she will henceforth:
- [77.1.1] no longer hold herself out as a director or employee or representative of Omni nor do anything to damage or impair their reputation;

[77.1.2] not hold herself out as a representative of ASV, nor pass off ASV nor allow ASV to be passed as an entity associated with Omni or otherwise associate herself with ASV;

[77.1.3] return to the company the laptops, cellular phones and tablet computer belonging to Omni as soon as all of the same was received by her via courier.

[77.2] In her answering affidavit, Ms Koekemoer, under oath, in both her personal capacity and on behalf of Epicode, undertook to not approach any of Omni's clients in South Africa or the United Kingdom.

[78] According to the Omni:

[78.1] They are satisfied with the undertaking by Ms Koekemoer, in her answering affidavit in her personal capacity and on behalf of Epicode that she will not approach any of Omni SA or Omni UK clients;

[78.2] They are not satisfied that the undertaking is insufficient insofar as passing off is concerned and they seek all the relief in the notice of motion as set out above.

LEGAL FRAMEWORK

Unlawful competition

[79] It is settled law that unlawful competition gives rise to two causes of action, namely a delictual claim for damages and/or a claim for interdictory relief; and the applicant is obviously at large to pursue those remedies against the respondents if so minded. In this regard, the *locus classicus* on the remedies available in cases of unlawful competition is ***Dun and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau***¹, where the court stated the following:

¹ 1968 (1) SA 209 (C) at 221C-H

*“Reverting to the position in our law and **without attempting to define generally the limits of lawful competition**, it seems to me that where, as in this case, a trader has by the exercise of his skill and labour compiled information which he distributes to his clients upon a confidential basis (i.e. upon the basis that the information should not be disclosed to others), a rival trader who is not a client but in some manner obtains this information and, well knowing its nature and the basis upon which it was distributed, uses it in his competing business and thereby injuring 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**.*

*The fact that the information is distributed in a confidential basis to a limited class of people prevents it 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 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**”* [emphasis added]”

Using confidential and proprietary information belonging to Omni

[80] One of the main issues for determination in this matter is whether the information which Ms Koekemoer, Mr Koorsen, Ms Koorsen and Mr Bekker were all privy to whilst being employed with Omni SA constituted confidential information and whether they all, in particular, Ms Koekemoer, used it even after her resignation in order to promote the business of Epicode to the detriment of Omni’s business, then that would constitute unlawful competition.

[81] According to Omni, its confidential information comprised of client lists, pricing information and Omni’s databases (“**confidential information**”).

[82] In **Cambridge Plan AG and Another v Moore and Others**², the court held as follows:

“There is authority that a party to a fiduciary relationship may not make a list of customers during the currency of their relationship for the purpose of using it to the detriment of the other party after the relationship has been terminated. In Pelunsky & Co. v Teron 1913 WLD 34, the defendant when he knew he was going to leave the plaintiffs employee, took a copy of a list of customers for use in a business he was setting up for himself. In awarding damages against him, the court extracted the principle from the English decisions that:

‘Speaking generally, a servant is not entitled to use information which he gained in his masters employment in any way inconsistent with good faith. This applies to information which he has honestly acquired during the course of the service on his

² 1987 (4) SA 821 (D) at 846C

master's behalf-*a fortiori* it applies to information acquired from his master in the course of his employment without his master's knowledge.'

*This message was quoted with approval in **Coolair Ventilator Co SA (Pty) Ltd v Liebenberg & Another** 1967 (1) SA 686 (W) at 690."*

- [83] Legitimate competition in trade normally entails infringement of a competitor's right to goodwill³. It is only when the infringement is regarded as wrongful that we talk of unlawful competition. Filching confidential information of a trader to promote the interests of another to his prejudice, is one of the instances that are recognised by our law as unlawful competition, and that trader needs no restraint of trade contract to obtain protection against such unlawful conduct. The position was put as follows in **Easyfind International v Instaplan Holdings**⁴:

"What is clearly established in our law is that it is unlawful for a servant to take his master's confidential information or documents and use them to compete with the master."

- [84] Confidential information is, broadly speaking, information that is meant for the exclusive use of a trader and circulates within the confines of such trader's business. It is not readily available to the public or, as it is generally expressed, it is not public knowledge. The position was stated as follows in **Van Castricum v Theunissen and Another**⁵, where the court held that:

"The information must have the necessary quality of confidence about it, namely it must not be something which is public property and public knowledge."

- [85] Whether the requirements for confidentiality have been met is an issue to be decided with reference to the facts of the particular case. But there are certain factors that would point to the confidential nature of the information. Usefulness to a rival is one such factor in the sense that the information would give him/her an advantage over the trader from whom the information comes. The presumption of confidentiality would be even stronger

³ Neethling, Potgieter and Visser, **Law of Delict** at p.316 refers to this as factual infringement

⁴ 1983 (3) SA 917 (W) at 927D. See also **Coolair Ventilators** (*supra*)

⁵ 1993 (2) SA 726 (T) at 730H

where an employer's information divulged by his/her employee has in fact been used by a rival to the detriment of the employer⁶.

[86] Our law also recognises certain categories of information or documents as being of a confidential nature.

[87] A customer's list is one such type of document⁷. In *Easyfind (supra)*⁸, it is categorically stated:

"Customer lists certainly are confidential information."

[88] There is also no evidence at all pertaining to the:

[88.1] The amount of money that Epicode spent in order to develop its product;

[88.2] Who assisted Epicode to develop its product;

[88.3] Ownership of its software;

[88.4] The functionality of its software and the product; and

[88.5] How Epicode managed to develop this product when until at least November 2023, it was a dormant company.

[89] From the facts as set out above:

[89.1] It is clear that Ms Koekemoer and Mr Koorsen were all involved in filching Omni's client lists and also utilising Omni's Licencing Agreement, somewhat shamelessly, and then denying that it was the same document and that it was, in any event, not confidential.

[89.2] It is clear that the argument by the counsel for Ms Koekemoer and Epicode, that Epicode is not a competitor of Omni is, to put it mildly, devoid of any merit and can be summarily dismissed.

⁶ Coolair Ventilators (*supra*) at 689F-H

⁷ Van Heerden & Neethling, **Unlawful Competition** at p.227 specifically lists a customer's list as such

⁸ At 929D

- [90] Epicode clearly competes with Omni in terms of the products that were developed by Omni at great expense. Ms Koekemoer's evidence regarding the development of Epicode's products is very unclear, unsubstantiated by Mr Koorsen himself and is contradictory to that of Mr Bekker particularly in relation to Mr Koorsen's abilities.

Passing off of Epicode products as that of Omni

- [91] I agree with Omni's submission that given the fact that Ms Koekemoer has always been the "*face*" of Omni SA, it can be accepted that the two clients which Epicode solicited from Omni, were lured with Epicode's product being passed off as that of Omni alternatively that such product is affiliated with Omni.
- [92] Ms Koekemoer's contentions that two of Omni's clients came to Epicode of their own accord and were not lured by her, is somewhat difficult to digest, given her previous conduct with ASV and her display of the same conduct in favour of Epicode to the detriment of Omni. What is clear is that whilst she was the sole director of Omni, she referred Omni's clients to ASV and that she is still actively luring away Omni's clients with products supplied by Epicode.

Solicitation of Omni's clients

- [93] In light of Ms Koekemoer's undertaking in this regard, it is not necessary to address the legal principles pertaining to solicitation of clients as an act of unlawful competition. Suffice to say that the facts above explain why Ms Koekemoer gave the undertaking.

The requirements for an interim interdict and whether Omni has satisfied these requirements

- [94] The relief sought by Omni is analogous to that of a temporary interdict, which requires Omni to show that:

- [94.1] The right which is the subject matter of the main action and which they seek to protect is a clear or alternatively *prima facie* right established though open to some doubt;
- [94.2] The right is only *prima facie* established, that there is a well-grounded apprehension of irreparable harm to Omni if the interim relief is not granted, and they ultimately succeed in establishing their rights;
- [94.3] That the balance of convenience favours granting Omni the interim relief; and
- [94.4] That Omni has no other satisfactory remedy.
- [95] The court must take into account the allegations made by Omni, as well as Ms Koekemoer in respect of herself and Epicode in deciding whether a *prima facie* right has, in fact, been established by Omni. It is not sufficient that Omni has in its affidavits made out a *prima facie* case.
- [96] In **Webster v Mitchell**⁹, Clayden, J set out the following approach which has been followed by our courts for more than 70 years:
- “The use of the phrase ‘prima facie established though open to some doubt’ indicates I think that more is required than merely to look at the allegations of the applicant, but something short of a weighing up of the probabilities of conflicting versions is required. The proper manner of approach I consider 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 could on those facts obtain final relief at a trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown on the case of the applicant, he could not succeed in obtaining temporary relief, for his prima facie right established, may only be open to ‘some doubt’. But if there is mere contradiction, or unconvincing explanation, the matter should be left to trial and the right be protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief.”*
- [97] In **Olympic Passenger Services (Pty) Ltd v Ramlagan**¹⁰, the court succinctly set out the position in relation to the granting of interim interdicts as follows:

⁹ 1948 (1) SA 1186 (W) at 1189

¹⁰ 1957 (2) SA 382 (D) at 383C-G

“It thus appears that where the applicant's right is clear, and the other requisites are present, no difficulty presents itself about granting an interdict. At the other end of the scale, where his prospects of ultimate success are nil, obviously the Court will refuse an interdict. Between those two extremes fall the intermediate cases in which, on the papers as a whole, the applicants' prospects of ultimate success may range all the way from strong to weak. The expression 'prima facie established though open to some doubt' seems to me a brilliantly apt classification of these cases. In such cases, upon proof of a well-grounded apprehension of irreparable harm, and there being no adequate remedy, the Court may grant an interdict — it has a discretion, to be exercised judicially upon a consideration of all the facts. Usually this will resolve itself into a nice consideration of the prospects of success and the balance of convenience — the stronger the prospects of success, the less need for such balance to favour the applicant: the weaker the prospects of success, the greater the need for the balance of convenience to favour him. I need hardly add that by balance of convenience is meant the prejudice to the applicant if the interdict be refused, weighed against the prejudice to the respondent if it be granted.”

Application of the legal principles to the facts

- [98] It has been laid down that for competition to become unlawful it must infringe upon a legal norm. That norm is the legal convictions of the community, also referred to as the *boni mores* or public policy.

- [99] There are certain categories of competition that the Courts have classified as being *contra bonos mores* or offensive to the convictions of the community and therefore amount to unlawful competition.

- [100] The filching of confidential information by an employee or ex-employee to be used to harm the business interests of the employer, is one such instance.

- [101] It is clear that whilst in the employ of Omni SA, Ms Koekemoer engaged in unlawful competition with Omni in favour of ASV and that Omni was entitled to stop such activities, *inter alia*, with an interdict had it come to its attention sooner than October 2023.

- [102] Should Omni now be denied an interim interdict simply because Ms Koekemoer is no longer its employee, especially given the facts in this matter?

- [103] What Ms Koekemoer did was abuse her position as the sole director of Omni SA, to build two rival businesses, ASV and Epicode, and as soon as she was caught and suspended,

she tendered her resignation and even then, during the handover, she continued to filch Omni's confidential information, with the intention of taking Omni's clients with her.

[104] In my view, that is by all accounts morally reprehensible conduct that the trading community would frown upon. It is certainly unfair and dishonest practice that cannot be tolerated. Ms Koekemoer was employed precisely to bring in clients for Omni SA, which is not denied, but she did exactly the opposite.

[105] She was paid a rather handsome salary for doing her job as an employee of Omni SA and was even given additional incentive in the form of a 20% share in Omni without any financial investment by her.

[106] Once the clients were brought on board, they became the clients of Omni and Ms Koekemoer was not and is not entitled to lure them as if they are her personal property by using Omni's confidential information to do so, for the purposes of building Epicode's business.

[107] It is not only the fact that Ms Koekemoer has been filching confidential information prior to her resignation and during the hand-over phase or canvassing the clients after her resignation that taints her conduct. What does taint her conduct is that she abused her relationship of trust with Omni in order to initiate this process of luring away the clients by using Omni's confidential information.

[108] And this notwithstanding, she wants to be free to complete that illegitimate process from outside. This kind of conduct serves to legitimise unlawful conduct and cannot be countenanced.

Whether Omni has established a *prima facie* right

[109] The facts set out above confirm that Omni has at least established a *prima facie* right for the relief that it seeks.

- [110] The unlawful conduct of Ms Koekemoer and Epicode as set out above is gravely prejudicial to Omni.
- [111] Omni developed the information for its products over a period of 25 years and spent millions of Pound Sterling to develop these products and Ms Koekemoer, in her capacity as the sole director, usurped that information, in concert with the ex-employees of Omni who now own Omni's rival companies, ASV and Epicode.
- [112] The very fact that clients left Omni to contract with ASV initially and now Epicode for the same product for which they initially contracted with Omni, is sufficient evidence for showing that the products that ASV and Epicode are advertising, come directly from the information utilised to create the Omni's products.

Well-grounded apprehension of harm and balance of convenience

- [113] It is clear from the facts set out above that Ms Koekemoer has been openly soliciting Omni's clients and has been successful in luring at least two major clients being Afriboom and the Capital Group.
- [114] Prior to the formation of Epicode and whilst she was the sole director and employee of Omni, she also openly referred Omni's clients and new potential Omni clients to ASV instead of Omni, in clear breach of her fiduciary duties to Omni.
- [115] In light of the above, it is clear that Omni's business is at risk and that there is at least a reasonable apprehension of harm should the interim interdict not be granted.

The balance of convenience

- [116] Omni contends that it will be prejudiced if the interim interdict is not granted, but that Ms Koekemoer and Epicode will not suffer any prejudice whatsoever, as they are free to develop their own product.

[117] Given Ms Koekemoer's contention that Epicode does not compete at all with Omni and that they sell a different product altogether and that Epicode does not directly compete with Omni at all, an interim interdict will not harm Ms Koekemoer and Epicode.

Absence of satisfactory alternative form of relief

[118] Based on the facts as set out above, Omni contends that Ms Koekemoer and Epicode need to be stopped in their tracks and that based on *Dun and Bradstreet (supra)*, at this stage, there is no alternative remedy except an interim relief pending the outcome of the damages claim which they will institute within 15 days of the granting of this order.

DISCUSSION

[119] Based on the facts read with the legal principles enunciated above, Omni has a right to the protection of its goodwill against unlawful infringement.

[120] It is trite that for the purposes of an interim interdict it is sufficient that there be potential prejudice.

[121] Omni has established a *prima facie* right. There can be no doubt that the conduct of Ms Koekemoer and the other respondents was calculated to cause Omni prejudice.

[122] Using of confidential information and luring clients away from Omni obviously entails a diminution of Omni's business. I am therefore satisfied that Omni has shown a reasonable apprehension of harm and the threat of such harm continued even after Ms Koekemoer's resignation which is also when all of these events and untoward conduct by Ms Koekemoer and the respondents came to Omni's attention.

[123] Omni has contended that it has no alternative remedy. In principle it would be entitled to sue for damages and that seems to be the relief that Omni intend to pursue as per paragraph 3 of the notice of motion but this would entail a quantification of such damages which would entail more time that could lead to further harm.

COSTS:

- [124] The parties argued with regards to the costs of the postponement application and the hearing on 30 November 2023.
- [125] According to Omni, the hearing of the interim interdict application was set down for 30 November 2023, but that a postponement was triggered by the fact that Omni was not timeously able to access more than 59 000 e-mails that Ms Koekemoer had deleted prior to leaving her office, and that these needed to be recovered in order to consider them before finalising their replying papers.
- [126] Ms Koekemoer contended that Omni brought this application in an undue hurry as they should have obtained all of the information prior to bringing this application and that accordingly, because the postponement was at the behest of Omni, that Omni should pay the costs of the postponement.
- [127] Omni only became aware of Ms Koekemoer and the respondents' conduct relating to its business in South Africa during October 2023 and given the in-depth investigation that had to be undertaken and how quickly this all unfolded, Omni had every right to bring this application on an urgent basis.
- [128] It is common cause that Ms Koekemoer opposed the application and insisted that Omni urgently serve a substantive application for postponement which would be opposed. In the end, a formal application was brought and, contrary to Ms Koekemoer's threats to oppose the application for a postponement, she did not, and the Honourable Mr Justice Thulare granted the postponement for the matter to be heard on 3 June 2024 with the issue of costs to stand over for later determination.
- [129] I understand that Omni was not in a position to file their replying affidavit based on the deletion of 59 000 e-mails by Ms Koekemoer and the time that it took to retrieve these e-mails.

- [130] However, Ms Koekemoer's explanation for why 59 000 emails were deleted from her work computer is not implausible. She states that these were deleted since 2016 over a period of "*seventeen years as all my emails were amalgamated as they changed. Therefore, my inbox represents messages from all my employment obligations with Ladha*". I point out first that between 2016 and 2023 is seven years and that these submissions, therefore, seemingly lacks merit.
- [131] Her insistence that Omni bring a substantive application for postponement was also unreasonable since not only did she not oppose the postponement application but she also filed a fourth set of affidavits once she was served with Omni's replying affidavit.
- [132] In light of the foregoing, I am of the view that the costs for the postponement application and the hearing of 30 November 2023 should be borne by Ms Koekemoer and Epicode, jointly and severally, the one paying the other to be absolved.
- [133] With regards to the main application, I see no reason why costs should not follow the result.

CONCLUSION:

- [134] For all the reasons set out above, Omni SA and Omni UK had no alternative but to approach a court on an urgent basis in order to secure temporary interdictory relief pending the final determination of an action which Omni SA and Omni UK will institute against all of the respondents.
- [135] The temporary relief required by Omni SA and Omni UK is not to address the damage already done, but it will have the effect of restraining any continuation of the aforesaid unlawful conduct by Ms Koekemoer and the respondents.
- [136] The reason for this is because both Omni SA and Omni UK reasonably apprehend that since Ms Koekemoer no longer works for Omni SA, she and the respondents are at large

to approach all of Omni SA and Omni UK's clients with a view to inducing them to leave Omni SA and Omni UK and take their business to ASV and/or Epicode.

[137] Having copied Omni's product without having to spend the years and the millions of Rands/Pounds Sterling that would otherwise be required to develop such a product, as Omni did, there exists a very real risk that the respondents will simply pursue not all of Omni SA's clients, but also those of Omni UK as well.

[138] In light of all of the facts as set out above read with the case law pertaining to unlawful competition, I am satisfied that Omni SA and Omni UK have satisfied the requirements for an interim interdict and that there is no reason why such interdict should not be granted against Ms Koekemoer and Epicode.

[139] Accordingly, I make the following order:

[139.1] Pending the final determination of the action to be instituted against the respondents, as contemplated hereinbelow:

[139.1.1] That Ms Koekemoer and Epicode are interdicted from:

- (i) Unlawfully competing with Omni SA and Omni UK by:
 - (a) Using any information which constitutes proprietary and/or confidential information in connection with Omni's business in South Africa and the United Kingdom;
 - (b) Approaching, contacting, soliciting and/or engaging with any of Omni's clients with a view to:
 - (aa) Inducing them to terminate their contracts and/or dealings with Omni SA or Omni UK or either of them;
- and/or

(bb) Securing them as clients for Ms Koekemoer and/or Epicode; and/or

(cc) Representing to them directly or indirectly that Epicode's systems are identical and/or similar to Omni's products and systems, which are described in the founding affidavit.

(c) Passing off the products, systems and/or services offered by Ms Koekemoer and/or Epicode:

(aa) As being those of Omni SA and Omni UK;

(bb) As being related to and/or affiliated with Omni SA or Omni UK.

(d) Epicode holding itself out as being affiliated with Omni SA and/or Omni UK.

(e) Offering the products, systems and/or services which they offer to the public in a manner which is confusingly similar to Omni SA and Omni UK's distinctive get-up, software and/or application layout.

[139.1.2] Disclosing any of Omni's confidential information, including, but not limited to, client lists, pricing information, information relating to the development and maintenance of Omni's systems to include but are not limited to Omni Hotels, Omni iManage It and/or Omni Commercial and Health Care to:

(i) Epicode;

(ii) Any third party.

[139.2] That Omni SA and Omni UK are directed to institute an action against the respondents, as well as any other relief which they might seek, within fifteen (15) court days of the granting of this order (“*the action*”).

[139.3] As regards the issue of costs, that Ms Koekemoer and Epicode are ordered to pay the costs of Omni SA and Omni UK jointly and severally, the one paying the other to be absolved as follows:

[139.3.1] The costs of the main application on a party and party Scale C including the cost of two counsel, where so employed in respect of attendances on or after 12 April 2024.

[139.3.2] The costs of the postponement application and opposed hearing on 30 November 2023 on a party and party Scale C, including the cost of counsel.

The Hon. Ms Acting Justice Mahomed
Of the Western Cape High Court

APPEARANCES:

Applicant’s Counsel: **Adv Rod Howie**

Instructed by: **David Shapiro & Associates Inc.**

Respondents’ Counsel: **Adv Mea Steyn**

Instructed by: **AB Attorneys**