THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 159/2018

In the matter between:

PEXMART CC	**FIRST APPELLANT**
PEXMART LINED PIPE SYSTEMS (PTY) LTD	**SECOND APPELLANT**
MARIUS JOHANNES HENN	**THIRD APPELLANT**

and

H. MOCKE CONSTRUCTION (PTY) LTD	**FIRST RESPONDENT**
HEIN MOCKE	**SECOND RESPONDENT**

Neutral Citation: *Pexmart CC v H. Mocke Construction (Pty) Ltd* (159/2018) [2018] ZASCA 175 (3 December 2018)

Coram: Navsa ADP, Lewis, Mocumie, Molemela and Makgoka JJA

Heard: 20 November 2018

Delivered: 3 December 2018

Summary: Unlawful competition – unlawful use of confidential information and trade secrets of a competitor – principles restated – failure to call material witness – adverse inference drawn from failure to testify.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Louw J sitting as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Navsa ADP (Lewis, Mocumie, Molemela and Makgoka JJA concurring):

[1] Essentially, this appeal, with the leave of the Gauteng Division of the High Court, Pretoria, is about whether Pexmart CC, Pexmart Lined Pipe Systems (Pty) Ltd and Mr Marius Johannes Henn, the first to third appellants respectively, have unlawfully made use of confidential information and trade secrets of Mr Hein Mocke and H. Mocke Construction (Pty) Ltd (Mocke Construction), the second and first respondents respectively, in relation to a pipelining process. The details of the events leading up to the litigation in the court a quo and the issues that arise for adjudication, are set out hereafter. I shall, where it is convenient, refer to the parties collectively as the appellants and the respondents.

[2] Mocke Construction is a pipeline construction company that specialises in lining steel pipes used in the mining industry with a plastic high density polyethylene liner by welding factory manufactured plastic liner pipes together into lengths beyond one kilometre and then lining a one kilometre steel pipe internally with the plastic liner pipe. The plastic lining adds longevity to the steel pipes by protecting the steel from eroding due to sand and slurry mineral deposits. The plastic lining extends the lifespan of a steel pipe by almost 30 years. A specific plastic-lining process is central to this case. More about that later.

[3] Before the material events that gave rise to the present litigation, both Mr Mocke and Mr Henn had developed experience in the plastic lining of steel pipes. They both

studied at the same technical high school and have known each other since their mid-teens. During 1999, they were re-acquainted within an employment environment and, at one stage, built and adapted an extrusion machine, which extruded polypropylene.

[4] Mr Mocke has a BSc degree in Engineering from the University of Potchefstroom and a chemical engineering degree from the Vaal Triangle Technicon based in Vanderbijlpark. In 2009, after conducting business through his own plastic pipe construction company and thereafter being employed by two other companies that were involved in the plastic lining of steel pipes, Mr Mocke registered Mocke Construction. He did this in order to solicit the business of a gold mining company in relation to a pipelining project. According to Mr Mocke he had always harboured the ambition to revolutionise the pipe-lining industry by rehabilitating old pipes through placing a plastic liner inside the steel pipe that would make it last for another 30 years.

[5] With the twin goals set out in the preceding paragraph, Mr Mocke began discussions with Mr Don Gish, an American, who owned Polymeric Pipe Technology Corporation (Polymeric). That entity is the owner of what is described as the Polymeric/Sureline Process (the Process) for plastic-lining steel pipes. The process uses a specialised deformer machine invented by Mr Gish. The latter sold Mr Mocke the 'exclusive and irrevocable licence [to the Polymeric/Sureline Process]'. In turn, Mr Mocke, with Mr Gish's consent, permitted Mocke Construction use of the intellectual property rights that flowed from the licence.

[6] A letter from Polymeric dated 1 May 2010 set out the terms of the 'exclusive licence':

'By this document of confirmation, Mr. Hein Mocke is extended an unconditional license to the Polymeric Process within the continent of Africa, without exclusion.

This irrevocable exclusive license will be for the benefit of Mr. Hein Mocke and Mr. Hein Mocke only.

This license of agreement extended from Polymeric Pipe Technology Corporation, referred to as PPTC, offers the permission to use the trademark "Polymeric or SURELINE®" in all terms of business but not to obligate PPTC of America without PPTC of America permission.

PPTC of America will support Mr. Hein Mocke in all efforts and business pursuits which includes current and any new technical developments, design, however excludes construction of Polymeric equipment which includes Polymeric's Sureline liner deformers.
Mr. Hein Mocke is entitled to share the good will and reputation of the Polymeric Lining Systems generated by PPTC of America.
Beside the construction of the Polymeric deforming equipment to be purchased from PPTC of America, PPTC will be entitled to $0.38 / linear foot of liner royalty installed by Mr. Hein Mocke and his entity.' (Emphasis in original.)

[7] As can be seen, the terms of the licence do not allow for the construction by Mr Mocke of the machine underlying the Process. Polymeric retained the sole right to construct the machine, which Mr Mocke purchased and imported from the United States of America. Mr Mocke purchased the machine and, at his own cost, transported Mr Gish and a Polymeric team to South Africa for two months of on-site training. Mr Mocke paid a total of R17 million for the deformer machine, an accompanying winch, other equipment and 'the intellectual property of Polymeric and the knowledge and experience of Gish'.

[8] For a better understanding of how the Polymeric machine operates and the problems initially experienced by Mr Mocke and Mr Henn, and for a proper appreciation of the issues raised in this appeal, it is necessary to have regard to what, at the time of the acquisition by Mocke Construction of the deformer machine and the licence from Polymeric, were known and accessible methods employed to line a steel pipe with a plastic liner.

[9] The first is a patented method called swagelining. This is where a plastic liner is pulled through a reducing ring or rollers and then pulled into the steel pipe by keeping the liner under tension (stretching the liner) while lining the steel pipe. It takes approximately two weeks for the liner to shrink back in the pipe and interference fit[1] to the inside of the pipe.

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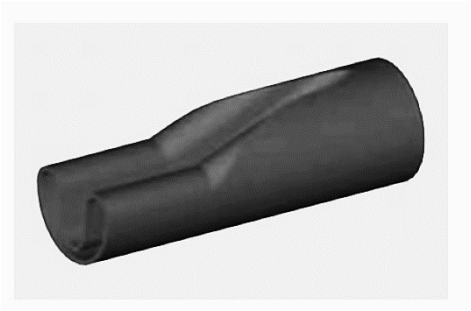
[1] Collocott T C and Dobson A B *Chambers Dictionary of Science and Technology* (1974) Revised Edition defines 'interference fit' as:
'A negative fit, necessitating force sufficient to cause expansion in one mating part, or contraction in the other mating part, during assembly.'

[10] The second, which is foundational to the Process, is the deforming method, using a deforming machine. A deforming machine has a guide wheel or wheels which exert a downward pressure on a perfectly rounded plastic pipe that causes it to deform so as to fit into the steel pipe which it is intended to line. As stated earlier, the deformed plastic pipe is then pulled through the steel pipe by a winch. Once it has been pulled through the steel pipe, air pressure is forced into the deformed plastic liner to enable it to revert to its original form. It then fits snugly into the steel pipe. Generally, the deforming process occurs as the plastic pipe is being pulled into the steel pipe. The photograph set out hereafter shows a cross-section of a plastic pipe in its deformed state.

[11] The photograph that appears below shows how the beginning of the indentation to form the C-shape looks on a slightly longer piece of pipe.



[12] During February 2011, before the Process was refined, as will be described later, Mr Henn was offered and accepted employment with Mocke Construction. He became involved with the gold mining project referred to above, which had prompted Mr Mocke to search for and find an effective pipe-lining method. By that time Mr Henn and Mr Mocke had been friends for a number of years. Mr Mocke described Mr Henn

as a ‘professional confidant’ and as his ‘right-hand man’. I shall, in due course, describe Mr Gish’s decades-long pioneering efforts in developing a deforming process as well as his contribution in relation to the refinement of the Process.

[13] When the machine purchased from Polymeric arrived in South Africa during January 2011, it did not work optimally. This was due to poor South African welding techniques, which led to uneven sharp edges within the steel pipes to be lined with plastic. As stated earlier, the technique generally employed in deforming plastic pipes in order to line steel pipes was that the plastic pipe was deformed as it was being pulled through the steel pipe. This was how the Polymeric machine was employed prior to it being brought to South Africa and initially, when Mr Gish and the Polymeric team as well as Mr Mocke and Mr Henn put it to use. As the plastic pipe was being deformed and pulled through the steel pipe, a tape was applied to keep it in the C-shape. The tape holding the plastic liner in the C-shape would break prematurely due to the uneven sharp edges referred to above. The plastic liner would lose its folded C-shape and it would get stuck in the steel pipe.

[14] The Polymeric team, including Mr Gish, together with Mr Mocke and Mr Henn, worked to resolve the problem. The problem was resolved by deforming the plastic pipe completely outside of the steel pipe and then taping it before pulling it through the steel pipe at speed and then expanding it with air once it was inside the pipe. At this stage it is necessary to have regard to the assertions in the founding affidavit in the application by Mr Mocke, in which relief was sought against the appellants and about which more will be said later. Mr Mocke said the following:

‘The Polymeric team, inclusive of Gish plus two members of his staff, myself and the Third Respondent worked together to resolve the problems and ultimately I created a new technique to deform the plastic liner outside of the steel pipe on rollers and then to pull it in with speed. This was a completely new method and had never been done before in the world; in that Polymeric’s process is to deform the plastic liner while it gets pulled into the steel pipe whereas the First Applicant deforms the plastic liner completely outside of the steel pipe, rests the deformed liner on rollers and then pulls the plastic liner into the steel pipe and then expands it with air once the entire liner is inside the steel pipe.

This was an instant success and resulted in the First Applicant having created and successfully proven the fastest pipe lining process on the African continent, if not in the world

with a modified unique new method of lining, with major cost savings for the benefit of the project duration.'

[15] During October 2013, Mr Henn's services with Mocke Construction were terminated. The reasons for the termination are contested, but is an aspect that need detain us no further. Mr Henn, almost immediately thereafter, took up employment with Pexmart CC. Mr Mocke and Mocke Construction contended that the appellants then became their competitors in the pipe-lining industry through the alleged unlawful actions of Mr Henn.

[16] During October 2013, Mr Mocke warned the appellants that legal action might ensue in the event of their use of the Process. During the second half of 2014, Mr Mocke became aware that the gold-mining company referred to earlier was in advanced negotiations with Pexmart CC for the completion of the plastic pipe-lining project, in respect of which the existing contractor had defaulted. According to Mr Mocke the tender by Pexmart CC was based on the use of the Process. The gold-mining company had opted to use Pexmart CC because its tender was cheaper.

[17] Written exchanges between Pexmart CC's and Mr Mocke's respective attorneys took place. The following is a material part of Pexmart CC's attorneys' response to the threatened legal action:

'We refer to your letter dated 14 July 2014 addressed to our client concerning the alleged breach of an exclusive licence for deforming of a pipeline, as well as the machinery used in the said process.

Our client denies that your client has any rights in the machinery or method used for deforming pipelines nor that our client is or ever has been a licensee of your client. In fact, it is your client that is engaged in unlawful competition with our client by making spurious allegations in respect of intellectual property rights and our client's business, which allegations are intended to harm our client's business and to compete unfairly and unlawfully with our client.

It is in any event our instructions that the *machinery used by our client in deforming pipelines is not in any manner related to the machinery used by H Mocke Construction (Pty) Ltd for pipeline deformation*.

. . .

It is further to be appreciated that pipelines can be deformed by applying various techniques and machinery, which machinery and techniques our client has developed independently from H. Mocke Construction (Pty) Ltd.' (My emphasis.)

It is common cause that the Polymeric machine was not patented.

[18] The respondents communicated with the gold-mining company referred to above, informing it that they intended asserting their proprietary rights but were met by a written response that the mining company reserved its right to call for competitive tenders in accordance with good business practice. All the indications were that the gold-mining company was seriously considering awarding the contract to Pexmart CC.

[19] Mr Mocke and Mocke Construction were adamant that it was clear that the appellants had reverse-engineered the Polymeric deforming machine and intended to market their services competitively, utilising Mr Mocke's trade secrets, intellectual property and licensed technology. The appellants refused to accede to the respondents' demand to cease using the deforming machine, intellectual property and licensed technology, which the latter insisted they were employing unlawfully. This led to an application by Mr Mocke and Mocke Construction in the court below for an order, inter alia, in the following terms:

'1. THAT the First, Second and Third Respondents are hereby immediately restrained and interdicted from:

1.1 imitating, copying, simulating and using;

1.2 reverse engineering, reproducing, constructing and using;

1.3 marketing, selling, tendering and using

directly and indirectly through an agent, third party or otherwise in any manner the Sureline and/or Polymeric deforming process of the Applicant, its machine(s), intellectual property, techniques, on-site training, technology and the know-how associated therewith under sole license to the Applicant.

2. THAT the First, Second and Third Respondents are hereby immediately restrained and interdicted from constructing and utilizing the Sureline and/or Polymeric deforming process of the Applicant or it's machine(s), intellectual property, techniques, on-site training, technology and the know-how associated therewith.'

[20] In asserting that the appellants were unlawfully making use of their confidential information and trade secrets, the respondents asserted that the following proprietary knowledge was exclusive to them:

(a) the method and know-how used to fold the plastic liner outside the steel pipe is a revolutionary new method that had never been employed on African soil;

(b) during the folding of the plastic liner, a certain skill is required to detect the behaviour of the liner and what procedure to follow should the folded liner get stuck, this skill and knowledge was only possible to obtain through the training with Mr Gish on site;

(c) the specialised tape used to ensure that the liner does not lose its folding state, has very unique manufacturing technology and qualities and is tailor-made for the application and use in the deforming process. This knowledge is crucial to the method and could only be obtained by the transfer of this knowledge from Mr Gish;

(d) the correct use of the tape is an exact science, because the plastic liner wall thickness in correlation to its diameter, determines the spacing, angle of application, speed and width of the tape. If this is done incorrectly the tape will snap; this knowledge was only obtainable through Mr Gish;

(e) the knowledge to know what maximum liner wall thickness will be suitable to use for a specific diameter pipe and relative to the length of pull is a calculation that only Polymeric and Mr Gish have passed on to Mr Mocke. For example, in towing a 30 (thirty) ton plastic liner of 500 (five hundred) metres through a steel pipe with the winch requires the towing head that connects the cable to the liner be prepared in a certain method with specific plate dimensions. This knowledge was transferred by Mr Gish;

(f) to fold the liner two wheels push in tandem down on the liner, the dimensions of the curve of the wheels is proprietary information and of extreme importance as the stresses incurred on the liner may exert beyond the maximum allowable strain, causing the liner to crack or splinter. This knowledge was transferred during the on-site training by Mr Gish. If the pressures are over-exerted with the incorrect radii, the liner will experience excessive strain and the liner will be damaged beyond repair.

(g) to enable the pulling of a plastic liner a cable needs to be pulled through the 500 (five hundred) metre steel pipe. The way to ‘shoot a pig’ is common knowledge, but the unique design of the front cone piece is proprietary knowledge and custom made for the Process. This design was presented to the respondents during their on-site training by Mr Gish;

(h) if the liner gets stuck during the insertion process into the steel pipe, Mocke Construction designed a cut-out device from a drawing received from Mr Gish, this proprietary knowledge is unique and crucial for the rehabilitation of old pipes.

[21] The respondents stated that the proprietary knowledge referred to above had been developed and taught 'in literally thousands of man hours and at a cost of millions'. Mr Mocke was emphatic that the Polymeric deformer machine could only be operated successfully using that confidential information. The respondents alleged that Mr Henn, who was Mocke Construction's operations manager at the time that the expertise referred to above was developed and transferred, abused his position of trust by utilising their confidential information and trade secrets.

[22] The appellants opposed the application. In their answering affidavit, in dealing with Mr Mocke's claims set out in para 20 above, the appellants commenced with a generalised denial of them all. Significantly, however, they then chose to confront certain specific issues but refrained from challenging other material aspects. They asserted that neither Mr Mocke nor Mocke Construction 'owns any alleged specialised exclusive technology and know-how to deform high density polyethylene (HDPE) pipe for insertion and lining of a steel pipe'. They stated that many companies specialise in the deforming of plastic pipes for the lining of steel pipe lines and that various methods for deforming plastic pipes were publicly available on the internet. The following parts of the appellants' answering affidavit are relevant:

'It is further stated that the deformation of a deformable pipe can be achieved by any suitable means. In addition, the means for temporarily keeping the pipe in this deformed status wherein the diameter is reduced, can also be achieved in any conceivable and convenient manner.

The Respondents recently developed their own method for deforming a pipe so as to reduce the diameter thereof.

The method entails the closing off of the ends portions of the pipe and thereafter extracting the air within so as to cause the pipe to collapse.

After insertion of the collapsed pipe into a steel pipe, the sealed ends are opened up causing an influx of air and subsequent expansion of the deformed pipe into its original shape and size. By using this method no tape is necessary for keeping the pipe in the deformed status.

From the abovementioned it is quite clear that in stark contradistinction to the Appellants' allegations, plastic pipe deformation and lining is not a highly specialised technology, nor is

the current method used by the First and Second Respondents in any way similar to the method used by the First Applicant.'

[23] In opposing the relief sought by the respondents, Mr Henn stated that he had personally been involved in 'the optimisation' of the process. He alleged that it was *his* idea to deform the full length of the plastic pipe outside of the steel pipe, before it was inserted. According to Mr Henn he had received training from his previous employer, Quadrant Chemplast (Pty) Ltd (Chemplast), on the procedure to be followed when a plastic liner got stuck within a steel pipe during the lining process and that Mr Gish's contribution in that regard was negligible.

[24] There was no specific denial that the Process, as refined with the participation of the Polymeric team and with directions from Mr Gish, was a revolutionary new method that had never before been used on the African continent. They chose not to engage with the specific assertion that in the deforming process certain skills were required to deal with the unpredictable behaviour of the plastic. Likewise they did not engage with the statement that a special skill was required to deal with the situation when the deformed plastic pipe got stuck during the lining process.

[25] In relation to aspect (c) raised by Mr Mocke, in para 20 above, namely that the specialised tape used to keep the deformed plastic pipe in the C-shape, has very unique technical abilities and was tailor-made for the Process, Mr Henn stated that the 'special tape' is widely available in South Africa under various brand names. It is necessary to bear in mind that Mr Mocke stated that the requisite characteristics of the tape were determined by Mr Gish and transferred to him and Mocke Construction.

[26] Aspect (d) was that the correct use of the tape was an exact science, because the plastic liner wall thickness in relation to its diameter, determines the spacing, angle of application, speed and width of the tape. To this the appellants responded minimally, by stating that pipe deformation is not an exact science.

[27] In response to the assertion by the respondents in respect of item (e), that the required technical knowledge, relative to the maximum liner wall thickness *vis-à-vis* the diameter of a steel pipe and the length of pull, was imparted to Mocke Construction

by Mr Gish, the appellants were vague and stated that Mr Henn *had re-invented* the method of connecting the pulling-head to the deformed liner and that Mr Gish's contribution in that regard was negligible. In respect of the remaining aspects, which dealt with technical know-how, the appellants' response was limited. In effect, there was no real engagement on those aspects.

[28] Mr Henn was emphatic that there was nothing special or unique about the Polymeric deforming machine and the processes used by the respondents in the deformation process. He insisted that no special skills were required. That notwithstanding, the following part of his answering affidavit is instructive:

'The Respondents recently developed *their own method* for deforming a pipe so as to reduce the diameter thereof.

The method entails the closing off of the ends portions of the pipe and thereafter extracting the air within so as to cause the pipe to collapse.

After insertion of the collapsed pipe into a steel pipe, the sealed ends are opened up causing an influx of air and subsequent expansion of the deformed pipe into its original shape and size. By using this method no tape is necessary for keeping the pipe in the deformed status.

From the abovementioned it is quite clear that in stark contradistinction to the Appellants' allegations, plastic pipe deformation and lining is not a highly specialised technology, nor is the current method used by the First and Second Respondents in any way similar to the method used by the First Applicant.' (My emphasis.)

[29] In their replying affidavit, the respondents provided photographic evidence of a deformer machine at Pexmart CC's premises. It was a deforming machine, not identical, but similar to the Polymeric deforming machine. It differed in the number of discs exerting downward pressure to deform the pipe. Polymeric's machine has two discs and the appellants' machine only one. The Polymeric machine has a pair of rotating rings which have taper heads while the appellants' machine contains only one taper head. The appellants' machine, unlike the Polymeric machine, has a taper head angle head adjustment feature.

[30] In a supplementary affidavit, Mr Mocke presented a printout from the Pexmart CC website which reads as follows:

'. . . Pexmart lined pipe systems uses a winch to pull the liner through the folding machine and into the steel pipe itself. After the liner is installed, HDPE sealing stubs are butt-welded to the

ends of the liner and then covered with blowing flanges. Compressed air is then inserted into the HDPE liner and with the elastic nature of the NDPE material causes the liner to expend tight against the steel pipe internal wall. Long pipeline lengths 100mtr-1000mtr can be achieved depending on the pipeline route and contours of the area.'

[31] In his response to the supplementary affidavit, Mr Henn said the following:

'8.1 The website on which the First and Second Respondents advertise has recently been upgraded, and the printout annexed as Annexure SA 1 is a printout from the upgraded website.

8.2 After the filing of the previous affidavits in this application the Respondents took legal advice that the Applicant, in the absence of having filed a patent to protect the way in which it deforms pipes, has no exclusive rights to the manner in which it deforms pipes. The Respondents were furthermore advised that there is nothing unique in the way that pipes are folded, and that therefore the Applicant can in any event not register a patent in this respect.

8.3 Accordingly the First and Second Respondents now deform pipes using the vacuum method, and also using a folding method, which method of deforming pipes is not the same as the method used by the Applicant. The Applicant makes use of the Sureline technology, and the Respondents do not use the Sureline technology. In particular the First and Second Respondents do not tape the deformed pipes in the same way that the Applicant does.

8.4 The Applicant and the deponent [are] constantly seeking to gain insight into the confidential information of the First and Second Respondents which information it is not entitled to. This information is inter alia used to compile tenders, on which tenders the Applicant is a competitor. Argument in this regard will be advanced at the hearing of the matter.'

I pause to observe that 8.3 does not follow logically upon 8.2. Contextually, 8.3 appears to suggest that the new method was resorted to in order to nullify the respondents' challenge.

[32] On 7 March 2016 by agreement, the opposed application was referred for the hearing of oral evidence by Basson J, on the following four issues:

'1.1 Whether the two deforming processes adopted by the Respondents are dissimilar to the Sureline and/or Polymeric deforming process utilized by and under license to the Applicants or are identical thereto;

1.2 Whether the Sureline and/or Polymeric deforming process of the Applicant, its machine(s), intellectual property, techniques, on-site training, technology and the know-how associated therewith is protected by the license awarded to the Applicants;

1.3 Whether protectable confidential information exists in respect to the Sureline and/or Polymeric deforming process of the Applicant, its machine(s), intellectual property, techniques, on-site training, technology and the know-how associated therewith;
1.4 Whether the Respondents are utilizing such protectable confidential information.'

[33] Evidence was adduced before Louw J. Mr Mocke testified. His evidence in relation to the deforming process and the specificity of the Process was largely in line with what was contained in his founding affidavit. A video recording was presented to the court which visually demonstrated the Process. The video is impressive and is indicative of the speed with which a steel pipe can be lined with a plastic pipe by employing the Process. In his evidence-in-chief, Mr Mocke was asked which part of the activities shown in the video recording he claimed proprietary rights to. In this regard, he was referred to the claims made in the founding affidavit, set out in para 20 above, which he confirmed.

[34] To assist him in giving his testimony, counsel representing the respondents, presented Mr Mocke with a cross-section cut-off of a length of deformed plastic liner which had tape around it. Mr Mocke's evidence in relation to the question posed in the preceding paragraph commenced with an explanation of the characteristics of polyethylene. He explained that it was a material that has a density of less than one and that it floated in water. He also described it as having a growing abrasive resistant nature. It was a thermo plastic, which meant that it gets soft when heat is applied. It does not corrode.

[35] Mr Mocke testified that when the pipe was deformed into a C-shape, the two lobes (hemispheres) had to be equal and that if the plastic pipe is not properly centred whilst it was being deformed, it could twist because of torque[2] due to the fabrication of the liner by the supplier. The liner also has the ability to roll upside down while the deformer is folding it. When this occurred, the tape holding the plastic pipe in the C-shape was not equal and the tape was cut and the plastic liner got stuck within the steel pipe. The impact of differing lobes has a twisting, roll effect. Temperature changes due to sunlight on a part of the deforming machine or on parts of the plastic

[2] Torque is defined in the *Chambers Dictionary of Science and Technology* (1974) at 1193, as:
'The turning moment exerted by a tangential force acting at a distance from the axis of rotation.'

pipe and the thickness of the liner all have an effect. When one is dealing with a two kilometre length of pipe, these impacts can cause the plastic liner to snap, causing failure in the lining process.

[36] Mr Mocke also testified that the winch that was used by Mocke Construction to pull the liner through the steel pipe is the largest horizontal winch in South Africa. According to him it was critical that, whilst pulling the plastic pipe to start the deforming process, the molecular chain of the polyethylene is not damaged. If that occurs due to extreme tension, the pipe will crack. He explained how, when the Polymeric deformer machine was first utilised by him and the Polymeric team, the tape was sheared off because of sharp edges within the steel pipes.

[37] With reference to photographs of the Polymeric machine forming part of the record, Mr Mocke testified how the two circular discs which cause the deformation of the plastic pipe as they rotate, have to be adjusted by rollers on the machine to ensure perfect lobes to the C-shape. What is required, according to Mr Mocke, is constant vigilant supervision to prevent twisting or turning resulting in the lobes becoming uneven. The discs also have to be raised or lowered to prevent uneven lobes. A vigilant supervisor would, during the deforming process, have to perform a tweak to ensure that the C-shape does not distort. The behaviour of the plastic pipe in the deforming process, according to Mr Mocke, is unpredictable.

[38] In his evidence-in-chief, Mr Mocke denied that the tape used to retain the C-shape, was readily available off the shelf from suppliers. He was adamant that it was specially designed in the United States of America for the Process and was subsequently designed in South Africa under the supervision of Mr Gish. Other tapes have a polypropylene base. They also have a specific hot-melt glue which contains a synthetic rubber. The tape used in the Process does not have polypropylene. It has a synthetic (polyester) base and works with an acrylic glue. The tape is designed, ultimately to be destroyed. This happens when the compressed air is entered into the plastic pipe after insertion into the steel pipe and then, due to the inserted air pressure the tape snaps and the plastic pipe reverts to its original shape. The thicker the plastic pipe, the greater should be the tensile strength of the tape. There is also the question of how many wraps of tape are required per linear ten metres of plastic pipe. The

spacing of the tape, its thickness and the angles at which it is applied are all significant factors.

[39] The tape used by Mocke Construction was manufactured in Malaysia in a master batch roll. It was then sliced to provide the required width. Mr Mocke had an exclusivity supply arrangement with the supplier of the tape. A letter from the supplier indicates that the tape is manufactured and supplied to meet Mocke Construction's specifications and that the tape is a special grade filament tape that is not readily available in South Africa. The letter states that the supplier had not supplied any other company with the product and that Mr Mocke enjoyed exclusivity.

[40] The winch used to pull the plastic pipe through the steel pipe, does so at great speed. The speed at which it is pulled is a factor to be taken into account as against the thickness of the liner and its diameter.

[41] When the welding quality of the steel pipes caused a problem at the time that the Polymeric team and Mr Gish first used the machine in South Africa, it required the collective efforts of Mr Henn, Mr Mocke, Mr Gish and the Polymeric team to come up with a solution. It was then that the idea arose to deform the plastic pipes completely outside of the steel pipe rather than deforming it as it entered the steel pipe and then to lay it out on rollers and pull it through the steel pipe at enormous speed, so that the protruding edges within the steel pipe narrowly shaved the plastic pipe as it entered without damaging it.

[42] Mr Mocke testified on whether there was a distinction between the machine built by Mr Henn and Pexmart CC and the Polymeric deforming machine. In this regard, it is necessary to recall that the appellants denied having made a mechanical deforming machine, but stated that they had developed their own method of lining a steel pipe, namely, of closing off the ends of a plastic pipe and thereafter extracting the air, resulting in the plastic pipe collapsing. After insertion into the steel pipe, the ends were opened, causing an influx of air. When Mr Mocke visited the appellants' premises, all that he was shown was a vacuum pump on the back of a bakkie without an electrical plug. In his view, one pump on its own would not be able to generate sufficient suction pressure in order to collapse a plastic pipe. It was also likely that if

that kind of pressure were to be exerted, it would have a destructive effect on the plastic pipe.

[43] Mr Mocke testified that if the trade secrets he had acquired from Mr Gish and further developed with the Polymeric team, were used by a competitor, he would be at a disadvantage. A competitor would thus be using the expertise developed over a long period and would be saved a great deal of expense and time. The royalty he was required to pay would also not be an expense for a competitor and it would unfairly destroy his competitive advantage.

[44] Under cross-examination, Mr Mocke accepted that the Polymeric machine was not patented nor was the Process. He also accepted that there was no design registration for the machine in South Africa. Mr Mocke did not have any drawings, technical plans or technical specifications for the Polymeric machine. He was adamant that Mr Henn had gained confidential knowledge and experience with Mocke Construction and had transferred that knowledge and experience to Pexmart CC, to his detriment and the detriment of Mocke Construction.

[45] Mr Mocke accepted that the video recording demonstrated to potential clients how the machine was employed and the Process was utilised. He was adamant, however, that the video recording did not sufficiently convey what is set out in paras 33 to 41 above.

[46] The problems presented by the welding quality of the steel pipes, according to Mr Mocke, enabled an adaptation of the methods and knowledge imparted by Mr Gish and the Polymeric team. Any further problems encountered in using the Process were resolved by Mr Gish when he was contacted about them. Mr Gish, so Mr Mocke testified, had taught the Polymeric team how to handle the behaviour of the plastic liners and taught how to rectify matters when problems arose. Mr Gish had advised on tolerances and the use of additives. Suppliers of pipes were also advised in this regard by Mr Gish. He did not, however, impart the full breadth and knowledge of experience to suppliers. The knowledge and secrets acquired were transferred to Mocke Construction’s operators and staff, including Mr Henn.

[47] According to Mr Mocke, after directions from the Deputy Judge President, a visit to Pexmart CC's premises was arranged for the purpose of inspecting the vacuum machine which Mr Henn allegedly had developed for a new pipe-lining process, as set out in para 23 above. This allegedly involved applying negative pressure – extracting the air within a plastic pipe, causing it to collapse so as to be able to insert it within a steel pipe – a vacuuming process. Mr Mocke testified that when he arrived at the premises, he was not shown such a machine, but rather saw a deforming machine.

[48] Mr Mocke said that the litigation he had embarked on was to protect not 'what he did' in relation to the plastic lining process, but it is 'how' he did it that he sought to protect. Mr Mocke readily accepted that the Polymeric machine could easily be copied and built by someone else at a cost far less than what he paid for it. Mr Mocke testified that he had not seen the appellants' deforming machine nor did he know which kind of tape they used. Before us, this aspect of Mr Mocke's evidence was heavily relied on by counsel on behalf of the appellants. I shall deal with their submissions in relation thereto in due course. Mr Mocke could produce no confidentiality or restraint of trade agreements involving any of his present or past employees, including Mr Henn.

[49] Mr Patrick Broli, a chemical engineer and former Managing Director of Chemplast, testified briefly in support of the respondents' case. He confirmed the contents of an affidavit he had made earlier. He did not support the assertions in the answering affidavit of Mr Henn, namely, that he had been trained by Chemplast in how to deal with plastic lining pipes that had become stuck in the steel pipes in situations similar to those when the Process was employed. Mr Broli's affidavit refers to training in a very specific Teflon method unrelated to the Process.

[50] Mr Gish, who is a chemical engineer and biochemical scientist, was the third and last witness to testify. In essence, he confirmed the gist of Mr Mocke's testimony in relation to the acquisition of the licence to employ the Polymeric machine and utilise the Process, as well as in relation to the on-site training. Mr Gish insisted that he was the inventor of the Process. The Process was developed and refined for over a decade and involved trial-and-error. He commenced working on the development of the Process in 1983. Prior to that, he had built up experience of six years in relation to pipe-line rehabilitation. Mr Gish identified polyethylene as material that was chemically

resistant and had hard as well as malleable properties. Deforming the pipe manually did not work and he concluded that he had to build a deforming machine. It took him months to build the machine and thereafter to refine the manner in which it operated.

[51] He had experimented with a variety of tapes to keep the plastic pipe in a C-shape in order to see which would work best. He was initially limited to low-strength tapes vulnerable to heat. In the end he required a tape that was durable. Together with a collaborator, Mr Gish took years to develop a tape that was ideal. He said that the tape used in the Process was the most expensive tape on the market. It had to have a specific tensile strength and had to have good scuff resistance. The following is a material part of his evidence:

'There have been many people that have copied what they thought our machine is like and there have been some that have reproduced what our machine was like. All of the people went bankrupt because they did not have the technology, the intellectual property to control the liner going through the machine. They all went bankrupt.'

Mr Gish testified that the Chinese had copied his machine but had received no instruction on how to fold the plastic liner and they ultimately abandoned the project.

[52] According to Mr Gish, the Polymeric machine and the Process is employed in 26 countries in the world. He had no problem with Mr Mocke passing on to Mocke Construction the use of the technology he had sold him. He confirmed that Mocke Construction pays him a royalty of $0.38 per linear foot of pipe lining.

[53] Mr Gish testified about how he had sold the licence to the machine as well as the Process to Mr Mocke. The licensing 'agreement', referred to earlier, had not been drawn by an attorney or a lawyer. He drafted it in a hotel room because he trusted Mr Mocke and he thought that a one-page document would suffice.

[54] In respect of patents filed in 1992 and at other times, Mr Gish insisted that none approximated his machine and the Process. He kept the secrets of how the Process was to be conducted 'discrete' and only shared them with those with whom he had chosen to work.

[55] For completeness, it is necessary to record that a patent in relation to a deforming machine using thermal technology which was put to Mr Mocke in cross-examination was registered, after Mr Gish had developed his machine and the Process. Mr Gish was adamant that his machine and Process operated in a unique manner and in accordance with instructions imparted by him.

[56] It was uncontested that subsequent to the licence being granted to Mr Mocke, Pexmart CC had approached Mr Gish for a licence to use the machine and the Process and had been rebuffed. Mr Gish was not subjected to any cross-examination.

[57] Although Mr Henn had filed an expert notice in which he set out his intended testimony in relation to the distinction between the appellants' deforming machine and the Polymeric machine, he chose not to testify. The appellants produced no evidence in support of their case.

[58] The court below dealt with the four issues set out in para 32 above. In respect of the first, namely, whether the two deforming processes adopted by the respondents were dissimilar to the Sureline/Polymeric deforming process. Louw J stated the following:

'It was not denied by the respondents that the photograph depicted a deformer machine. It was, however, contended by the respondents that their machine was not an exact copy of the applicants' machine. Mr Puckrin, who appeared for the applicants, accepted that the respondents' deformer machine was not identical to the Sureline machine used by the applicants. It was also conceded by the second applicant during cross-examination that the respondents' machine is not an exact copy of the applicants' machine. It was, however, submitted that, on the probabilities, the respondents' machine must be performing an identical process to the Sureline process.

I agree with the submission. The deforming machine of the respondents must achieve the folding of the liner pipe in the same way that the liner pipe is folded by the applicants' machine. Although the applicants' machine has two wheels which forcefully press down onto the liner pipe, causing it to be folded into a C shape, as opposed to the respondents' machine which has only one wheel, and the respondents' machine has different dimensions, the process performed by the respondents' machine is identical, not dissimilar, to the process performed by the applicants' machine, which process includes the use of tape to keep the liner pipe in the folded position. The second respondent conceded in cross-examination that he did not

know what tape the respondents were using, but the process of taping the liner pipe must obviously be the same as the process used by the applicants. The first issue is therefore decided in favour of the applicants.'

[59] On the second and third issues (recorded in para 32), which it regarded as inextricably linked, the court below had regard to what was claimed by Mr Mocke in his founding affidavit, reproduced in para 20 above. He also referred to the video described earlier in this judgment. Furthermore, he considered Mr Mocke's evidence, set out above, namely, the difficulty of ensuring that the lobes of the C-shape were equal and manoeuvring it to prevent the effects of torque and the unpredictability of the behaviour of the plastic pipe as it was being deformed and the directions he received in this regard from Mr Gish. The court below thought it was part of the trade secrets developed during the refinement of the Process that one was required to understand the angles at which the tape had to be applied to keep the pipe in the C-shape and that the tape had the required tensile strength.

[60] Louw J considered it significant that it was never put to Mr Mocke in cross-examination that it was Mr Henn's idea to deform the full length of plastic pipe outside the steel pipe. The court below took into account that Mr Henn, as an employee of Mocke Construction, had intimate knowledge of the Polymeric machine and its method of operation. Against this, it weighed Pexmart's submissions that it was entitled to reverse-engineer the deforming machine. Louw J accepted that there were no restraint of trade or confidentiality agreements between Mocke Construction and Mr Henn. He had regard to the decision in *Van der Merwe & another v Els & another* 2008 BIP 404 (C) at 409H-411A/B, that there was no general right under the common law to be protected against reverse-engineering. In similar vein, with reference to s 15(3A) of the Copyright Act 98 of 1978,[3] this court, in *Premier Hangers CC v Polyoak (Pty) Ltd* 1997 (1) SA 416 (A), held that the scope for arguing that reverse-engineering of

[3] Section 15(3A)*(a)* provides:
'The copyright in an artistic work of which three-dimensional reproductions were made available, whether inside or outside the Republic, to the public by or with the consent of the copyright owner (hereinafter referred to as the authorised reproductions), shall not be infringed if any person without the consent of the owner makes or makes available to the public three-dimensional reproductions or adaptations of the authorized reproduction, provided –

(i) . . .
(ii) the authorized reproductions primarily have a utilitarian purpose and are made by an industrial process.'

technological objects generally constituted unlawful competition was reduced. On the third issue Louw J went on to hold as follows:

'I find that protectable confidential information exists in respect of the Sureline deforming process used by the applicants. The third issue is accordingly decided in favour of the applicants.'

In relation to whether the Sureline and/or Polymeric deforming process of the respondents, their machine(s), intellectual property, techniques, on-site training, technology and know-how associated therewith were protected by the licence awarded to the applicants, Louw J examined the terms of the licence agreement with reference to *Prok Africa (Pty) Ltd & another v NTH (Pty) Ltd & others* 1980 (3) SA 687 (W) at 696F-697A, which held that an action based on unlawful competition was not limited to owners of confidential information. Fairness and honesty, so it was held, enter into the equation. The court below decided the second issue in favour of the respondents.

[61] In respect of the fourth issue, whether the appellants were using the respondents' protectable confidential information, the court below reasoned and concluded as follows:

'In their answering affidavit to the applicants' founding affidavit, the respondents stated that the first and second respondents deform pipes using a vacuum method. However, in their answering affidavit to the applicants' supplementary affidavit, filed a year later, they say that they had, pursuant to legal advice, commenced using a pipe folding method which *"is not the same as the method used by the applicant"* and that the respondents *"do not use the Sureline technology"*. They do, however, not give any explanation of the technology which they use, neither did the third respondent testify about the process used by the respondents.

As previously mentioned, a deformer machine was photographed on the respondents' premises. I have found, in respect of the first issue, that the respondents' machine must, on the probabilities, be performing an identical process to the Sureline process. It follows that the process which the respondents say they use, is the process which forms part of the applicants' confidential information. The fourth issue is therefore also determined in favour of the applicants.

The above four issues were the only issues which I was required to determine in terms of the court order of 7 March 2016. The order which I accordingly make, is that the four issues that were referred to the hearing of oral evidence, are determined in favour of the applicants.'

It is against that order and the conclusions on which it was based that the present appeal is directed.

[62] Before dealing with whether the conclusions by the court below were justified, it is necessary to pause and consider the principles on which liability for unlawful competition rests. In *Schultz v Butt* 1986 (3) SA 667 (A) at 678F-H the following was stated:

'As a general rule, every person is entitled freely to carry on his trade or business in competition with his rivals. But the competition must remain within lawful bounds. If it is carried on unlawfully, in the sense that it involves a wrongful interference with another's rights as a trader, that constitutes an *injuria* for which the Aquilian action lies if it has directly resulted in loss.'

In *Dun and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) Pty Ltd* 1968 (1) SA 209 (C), the following was stated at 219C-D:

'Though trade warfare may be waged ruthlessly to the bitter end, there are certain rules of combat which must be observed. "The trader has not a free lance. Fight he may, but as a soldier, not as a guerrilla."'

[63] There is no closed list of acts that constitute unlawful competition. The following are well-known:

(a) trading in contravention of a statutory prohibition;

(b) fraudulent misrepresentations made by a rival trader as to that trader's own business or goods;

(c) the publication by a rival of injurious falsehoods concerning the competitor's business;

(d) the passing-off by a rival trader of that trader's goods or business as being that of a competitor;

(e) the employment of physical assaults and intimidation designed to prevent a competitor from pursuing her or his trade;

(f) the unfair use of a competitor's fruits and labour;

(g) the misuse of confidential information in order to advance one's own business interests and activities at the expense of a competitor's;

(h) the inducement or procurement of a breach of contract: an action for damages (and, in appropriate cases, for an interdict) will lie against any person who intentionally

and without justification induced or procured another to breach a contract made with any other person; and

(i) interference with character merchandising rights.[4]

We are, of course, in the present case, dealing, principally with the misuse of confidential information and trade secrets, incorporating, if regard is had to the claims set out in para 20 and the fourth issue for adjudication in the court below, the unfair use of a competitor's fruits and labour.

[64] In J Neethling *Van Heerden-Neethling Unlawful Competition* (2008) 2 ed at 213-216, the author, under the title 'Acquisition and use of competitor's trade secrets or confidential information' and the sub-title 'Right to trade secret', with reference to case law, states the following:

'A trade secret may be described as trade, business or industrial information belonging to a person (usually an entrepreneur) which has a particular economic value and which is not generally available to and therefore known by others. It is evident that an entrepreneur's trade secret represents a valuable economic interest for him (as proprietor) which is worthy of legal protection. There is currently much support for the view that a trade secret, as an incorporeal product of the human mind embodied in a tangible agent, constitutes *immaterial property* which serves as the *object of an independent immaterial property right*. In, for example, *Harchris Heat Treatment (Pty) Ltd v Iscor* [1983 (1) SA 548 (T), at 555], the court unequivocally described the confidential information *in casu* as *"intellectual property* belonging to the plaintiff". Accordingly, "the owner of a trade secret [has] the *right to exploit* it". The independent immaterial value of the right to the trade secret is particularly evident from the fact that this right is freely transferable; moreover, its independent value is emphasised by its applicability outside the competitive context.

Before information can qualify as a trade secret – and therefore as an independent legal object – it must comply with *three requirements* apparent from case law. First of all, and this is really self-evident, the information must not only relate to, but also be capable of application in, *trade or industry*. Secondly, the information must be *secret or confidential*. The information must accordingly – objectively determined – only be available, and thus known, to a restricted number of people or to a closed circle; or, as it is usually expressed by the courts, the information "must be something which is not public property or public knowledge". Thirdly, the information must, likewise objectively viewed, be of *economic (business) value* to the plaintiff.' (Footnotes omitted.) (Emphasis in original.)

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[4] See L T C Harms *Amler's Precedents of Pleadings* (2015) 8 ed at 373 and the cases there cited.

[65] The protection of confidential information is not always absolute nor is the protection always permanently available.[5] In *Faccenda Chicken Ltd v Fowler & others; Fowler & Faccenda Chickens Ltd* [1985] 1 All ER 724 (Ch) at 732, the following is stated:

'Third, however, there are to my mind, specific trade secrets so confidential that, even though they may necessarily have been learned by heart and even though the servant may have left the service, they cannot lawfully be used for anyone's benefit but the master's.'

[66] In *Schultz*, this court did not uphold a finding based on the misuse of confidential information. It was dealing with the use of a hull of a ship to form a mould with which to make boats in competition with a rival boat builder. It found that a case of unlawful competition had been made out on another basis. After setting out the broad equitable approach adopted by our courts in unfair competition cases,[6] this court, in dealing with the facts of that case, said the following at 683G-I and 684A-B:

'One's initial response to Schultz' conduct in the present case is no different. There can be no doubt that the community would condemn as unfair and unjust Schultz' conduct in using one of Butt's hulls (which were evolved over a long period, with considerable expenditure of time, labour and money) to form a mould with which to make boats in competition with Butt. He went further. Having trespassed on Butt's field, he added impudence to dishonesty by obtaining a design registration in his own name for the Butt-Cat hull, with the object no doubt of forbidding the field to other competitors.

. . .

In my opinion, therefore, Mullins J was right in his conclusion that Schultz' conduct amounted to unfair competition, against which Butt was entitled to be protected.'

[67] In *Schultz*, this court, at 678J-679B, had regard to the role that fairness and honesty played in determining whether competition was lawful. In this regard, it referred to what was said in *Dun and Bradstreet* at 218H-219A by Corbett J:

'Fairness and honesty are themselves somewhat vague and elastic terms but, while they may not provide a scientific or indeed infallible guide in all cases to the limits of lawful competition, they are relevant criteria which have been used in the past and which, in my view, may be used in the future in the development of the law relating to competition in trade.'

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[5] See *Meter Systems Holdings Ltd v Venter & another* 1993 (1) SA 409 (W) at 430E-H.
[6] *Schultz v Butt* 1986 (3) SA 667 (A) at 683C-D.

At 679E of *Schultz*, this court said the following:

'While fairness and honesty are relevant criteria in deciding whether competition is unfair, they are not the only criteria. As pointed out in the *Lorimar Productions* case *ubi cit*, questions of public policy may be important in a particular case, eg the importance of a free market and of competition in our economic system.'

[68] I can find no fault with the reasoning and conclusion of the court below in relation to whether the processes adopted by the appellants are dissimilar to those employed by the respondents. The photographs presented at trial confirm the similarity between the Polymeric machine and the appellants' machine. The differences described above are not material. The appellants' vacillating statements in relation to whether they were employing a deforming machine or whether they had developed an entirely different process by way of suction, could rightly be held against them. Furthermore, they failed to produce their vaunted new process. Instead, what was on display, was a single compression machine that Mr Mocke was adamant could not remotely perform the task. He was adamant that the degree of pressure required to collapse the plastic pipe, as suggested by the appellants, was likely to cause structural damage. This evidence was not contradicted.

[69] Mr Henn's failure to testify is another factor that counts against the appellants, not only on the first aspect, but also in respect of the remaining issues presented for adjudication. There is no merit to the suggestion by counsel on behalf of the appellants that Mr Henn was available and could have been called to testify and be cross-examined by the respondents and that therefore an adverse inference could not be drawn against the appellants. It is true that this court in *Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd* 1979 (1) SA 621 (A) at 624B-F, enunciated that its earlier decision in *Elgin Fireclays Ltd v Webb* 1947 (4) SA 744 (A), did not lay down a general and inflexible rule to be applied without more in every case, that an adverse inference is to be drawn where a party fails to call as a witness one who is available and able to elucidate the facts. Whether such an inference is to be drawn will depend on the facts peculiar to the case in which the question arises. In *Munster* this court had regard to the circumstances which justified the adverse inference. During the course of the plaintiff's case it was indicated that the witness would be called. This court held that to say that the witness was 'equally' available, was to ignore the realities, particularly if

the association was taken into account. The witness not called was also clearly able to elucidate the facts. He was the most knowledgeable of the plaintiff's representatives on a material aspect. This court also took into account that, during the course of the plaintiff's case, contradictory evidence had been led which could have been clarified had the witness been called. It held that the probable reason for not calling him as a witness was that it was feared that his evidence would expose facts unfavourable to the plaintiff's case.

[70] In the present case, Mr Henn was at the centre of the dispute. The affidavits he filed were emphatic in their denial of material aspects of the respondents' case. It was asserted that he had developed a machine different from the Polymeric machine. He insisted that it was his idea to develop the revolutionary new technique. In addition, it was suggested by Mr Henn that the techniques he employed in the service of the appellants were acquired from and taught to him by Chemplast. These assertions were contradicted by his erstwhile employer. Mr Henn had been emphatic that there was nothing special in the directions and techniques imparted by Mr Gish. He disputed the special nature of the tape that was applied to the pipe. The evidence to the contrary by Mr Mocke and Mr Gish called for rebuttal, which was not forthcoming. The material assertions by him in the answering affidavit filed on his behalf ought to have been testified to during the trial. In this case the failure to testify could rightly be held against the appellants.

[71] The concession by Mr Mocke, referred to earlier in this judgment, on which counsel on behalf of the appellants relied, namely, that he had not seen the processes they employed and consequently did not have knowledge of them, must be seen in proper perspective. The respondents were consistent in asserting, and referring to evidence in this regard, that the appellants could only have been competing with them by using their confidential information and trade secrets and by employing the Process. That evidence, in conjunction with what is set out in the preceding paragraphs leads to the compelling conclusion that the finding by the court below, that the appellants are using a similar process to that employed by the respondents, is wholly justified.

[72] In determining whether there was protectable confidential information in respect of the Process, its machine, intellectual property, techniques and on-site training, technology and the know-how associated therewith, the court below was correct in having regard to the claims made by Mr Mocke, set out in para 20 above and to the evidence related thereto, described in detail above in paras 33-41.

[73] It is clear, as submitted by counsel on behalf of the respondents, that the protectable information was not only that which was developed over decades by Mr Gish through trial-and-error, but also included the refinement of the Process after the Polymeric machine arrived in South Africa as explained above. The difficulties of manoeuvring the plastic pipe when problems were presented, the method of dealing with the pipe when it became stuck, the quality of the tape and the required tensile strength, the angles at which the tape had to be applied, the dimensions of the plastic pipe in relation to specific parts of the process were all asserted to be part of the trade secrets and confidential information. None of this was controverted by any *viva voce* evidence.

[74] That the appellants had unsuccessfully sought to obtain a licence from Polymeric is yet another factor militating against their case, that deforming processes were well-known within the industry and that there was nothing special about the Polymeric machine and/or the Process. Mr Henn was best suited to testify on this aspect.

[75] Mr Mocke and Mr Gish's evidence on the confidential information and trade secrets developed over years and many hours of practical application referred to in extensive detail above were, essentially, uncontroverted. There were no manuals or design drawings. The details of the Process referred to above were not within the public domain and were known only to those with whom Mr Gish and Mr Mocke chose to work, including their employees. It is clear that the information had economic value to Mr Gish and his licensees.

[76] I agree with the submissions by counsel on behalf of the respondents that this is not a case about reverse engineering. The principles in that regard were correctly set out by the court below as described above. This case was about whether unlawful

use was made by the appellants of the respondents' confidential information and trade secrets.

[77] The details of the licencing agreement are sparse. However, it should be understood that it was concluded on a handshake and on the basis of a relationship of trust. It clearly did not enjoy the attention of lawyers but must be understood contextually to have contemplated confidentiality. It certainly embraced in broad terms the use of the Polymeric machine and the Process. The lack of restraint and written confidentiality agreements involving employees, including Mr Henn, does not detract from the respondents' enforceable rights.

[78] The court below had regard to the licence agreement and rightly held that the respondents as licensees had enforceable rights extended to them by the licence agreement and Mr Gish's assent. For all the reasons set out above, its conclusions on all four issues cannot be faulted. Applying the principles that emerge from the cases set out in paras 64, 65 and 67, the ultimate conclusion by the court below cannot be faulted.

[79] The following order is made:
The appeal is dismissed with costs, including the costs of two counsel.

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M S Navsa

Acting Deputy President

Appearances:

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