REPORTABLE

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No. 384/98

In the matter between:

GORDON LLOYD PAGE & ASSOCIATES **Appellant**

and

FRANCESCO RIVERA **1st Respondent**
TIBER PROJECTS (PTY) LTD **2nd Respondent**

Coram:	SMALBERGER, HARMS & OLIVIER JJA, AND MELUNSKY & FARLAM AJJA
Heard:	16 AUGUST 2000
Delivered:	31 AUGUST 2000
Subject:	Confidential information

JUDGMENT

HARMS JA

HARMS JA:

[1] The appellant, a partnership, claimed payment of damages from the respondents because of an alleged unlawful appropriation of the appellant's confidential information. At the close of the appellant's case relating to the merits of its claim, the court below (Wunsh J in the Witwatersrand Local Division) granted absolution from the instance with costs. It is against that order that the appellant, with the leave of the Chief Justice, appeals.

[2] The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G-H in these terms:

". . . when absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its

mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (*Gascoyne v Paul and Hunter*, 1917 T.P.D. 170 at p. 173; *Ruto Flour Mills (Pty.) Ltd. v Adelson (2)*, 1958 (4) SA 307 (T))."

This implies that a plaintiff has to make out a prima facie case - in the sense that there is evidence relating to all the elements of the claim - to survive absolution because without such evidence no court could find for the plaintiff (*Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) 37G-38A; Schmidt *Bewysreg* 4th ed 91-92). As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one (Schmidt 93). The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is "evidence upon which a reasonable man might find for the plaintiff" (*Gascoyne* loc cit) - a test which had it origin in jury trials when the "reasonable man" was a reasonable member of the jury (*Ruto*

Flour Mills). Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another "reasonable" person or court. Having said this, absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises a court should order it in the interests of justice. Although Wunsh J was conscious of the correct test, I am not convinced that he always applied it correctly although, as will appear, his final conclusion was correct.

[3] When Johannesburg was relatively younger, the Carmelite nuns established a convent on the outskirts of town along Rivonia Road in what is now known as Sandton. Township creep created the potential for the property as a prime business site and made it less attractive as a convent. The appellant, a property developer and project manager with

no financial backing, realised the potential of the property. When the Carmelite nuns decided to put the property out on bid during 1992, the appellant submitted one in the name of one shell company for R13,5 m and in that of another for R17m, in the latter case subject to certain conditions. The first bid was successful. In order to pay, the offeror company required financial backing. For this purpose the appellant put together a team of experts or consultants consisting of architects, town planners, quantity surveyors, retail property brokers, engineers and traffic consultants to prepare a preliminary feasibility study which would have enabled it to convince one or other property developer or investor to invest in the scheme. The involvement of the consultants was on a purely speculative basis and they were not entitled to any remuneration from the appellant and had to bear their own expenses.

[4] Acting on the assumption that the property had been sold, the

order evacuated the convent. However, in spite of a great deal of effort, the appellant was unable to obtain the necessary backing and the sale was cancelled notwithstanding a number of artificial hurdles placed in the way of the Church by the appellant, well knowing that the Church could not recover any damages from an empty shell. Having formed a kind of attachment to the property, the appellant persisted in its efforts to interest others in it, sometimes even representing that it had exclusive rights to the property, which it did not have. Its experts - at least one being under the impression that the appellant had such rights - were called upon to prepare plans and outlays, to obtain commitments from possible tenants, to discuss with the local authority the question of access and procure undertakings from it in relation thereto, and even to make a soil evaluation. In particular, through the agency of a prospective developer (JCI) which had an option for a while, the Church was induced to

provide a power of attorney to enable the town planners to prepare an application for the rezoning of the property. This application had already been advertised when the power of attorney lapsed; the application consequently remained dormant pending further action by the owner of the property.

[5] Every property developer knows that in order to plan any shopping centre of substance the commitment of an anchor tenant is required. In our country there are but few of these and for a property with this location and value, Pick 'n Pay, a major retailer, was the obvious choice. The appellant did much to interest Pick 'n Pay and although its appetite was somewhat whetted, it was not prepared to commit itself. Mainly because of this, the appellant was unable to obtain a backer. Having more or less exhausted the list of institutional investors and developers over a period of more than two years, the appellant turned its attention to

the second respondent, a builder and developer under the control of the first respondent, Mr Rivera.

[6] Mr Page of the appellant paid Rivera a visit on 26 July 1994. After having exchanged pleasantries, Page gave Rivera a history of the property, the position relating to access and the rezoning application and told him about the failed efforts to purchase the property and to obtain financial backing for the project. He handed him an aerial photograph indicating the location of the property. Rivera told him from the outset that he knew the property, something that Page expected since the property had been for sale for four years and because Rivera was a Catholic and a businessman who lived in that area and who knew well that part of town, its population and general environment. Page also handed him some colourful conceptual drawings prepared by a firm of architects. The drawings related to a piazza type convenience shopping centre (one

where customers can drive up to the shops) because, as Page mentioned to Rivera, a larger or different complex was not deemed viable. Lastly, he handed Rivera a feasibility study prepared by a firm of quantity surveyors based upon the sketch plans and certain assumptions relating to tenants and building costs. The document gave no details relating to the identity of possible or probable tenants.

[7] Page then put a proposition to Rivera. Rivera was to secure the property. The second respondent would be employed as building contractor. The appellant would receive a R1m project assembly fee up front, project management fees, tenant co-ordination fees, letting fees, development fees and a substantial share of any development profit. Thereafter Page left with a promise from Rivera that he would consider the proposal after having checked part of the information given. During subsequent conversations Rivera informed Page that he had problems

with the proposal: the uncertainty about Pick 'n Pay, the size of the appellant's remuneration, the number of restaurants, the rentals assumed for the viability study and, generally, the form of the outlay of the complex. On 31 August 1994, Rivera wrote to Page, informing him that he had considered the proposal and found it not to be viable "in its present form" and expressed the view that it was not worth discussing further.

[8] During February 1995, the second respondent purchased the property and in due course a shopping mall and office complex, known as The Cloisters, was erected thereon. To the surprise of Page, Rivera was able to secure Pick 'n Pay as tenant, something that had eluded him for some years. Against this background the present claim, which is based on breach of a tacit contract and, in the alternative, in delict, arose. The remedy relied upon is not, as Wunsh J said at the outset of his

judgment, a remedy that in England would be an equitable remedy. The English law remedy exists independently of contract or delict and the underlying principles are not necessarily the same as ours (cf *Dun and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd* 1968 (1) SA 209 (C)). Our law relating to unlawful competition is well developed and foreign law in this field should be approached with due circumspection because it may be influenced by legislation (sometimes supranational) and other public policy considerations.

[9] The breach of contract complained of in the particulars of claim was the exploitation of "the proposal" and the wrongful act the development of the site "in accordance with the proposal", both to the exclusion of the appellant. The "proposal" was said to have consisted of the following:

(a) a detailed plan for the development of the site as commercial

premises;

(b) the results and bases of studies commissioned by the appellant resolving problems as to access to the site;

(c) the results and bases of investigations undertaken by the appellant concerning the rezoning of the site;

(d) the results and bases of investigations and negotiations concerning prospective tenants for the premises;

(e) a financial viability report setting out the basis upon which sufficient income might be generated from the letting of the premises in order to secure an acceptable return on the investment;

(f) architectural drawings.

[10] The pleadings rely on the "sum" of this information, as did Page in his evidence when he stressed that he had given a "package" to Rivera. It is well established that the mere fact that knowledge or information is

useful or of value does not make it legally worthy of protection. Something more is required, for instance the information must have the necessary quality of confidentiality. The plaintiff must also have at least a quasi-proprietary or legal interest ("regsbelang") in the information. There is something to be said for the view that the idea was fairly commonplace, that the appellant had no interest worthy of legal protection in at least items (b) and (c), that much of the information had but a limited shelf-life (especially item (e)) and that most (if not all) of the information was readily accessible to any property developer or in the public domain. The question whether the appellant was able to cross the required threshold is open to doubt. Nevertheless, I shall assume for purposes of this judgment that it did succeed in passing the test for absolution in relation to the project though not in relation to all its integers.

[11] The tacit agreement was allegedly concluded at the said meeting between Page and Rivera. It essentially provided that the proposal was to be put to the respondents on a confidential basis and could not have been used except for the purpose of determining whether a joint venture was viable. As pleaded, the contract was concluded before the proposal was put to Rivera. Since this case is concerned with the test for absolution at the end of a plaintiff's case I am obliged somewhat to restate the ordinary test for proof of a tacit contract (*Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd* 1984 (3) 155 (A) 164G-165G; cf *Samcor Manufacturers v Berger* 2000 (3) SA 454 (T)). It was, at that stage it was, at least necessary for the appellant to have produced evidence of conduct of the parties which justified a reasonable inference that the parties intended to, and did, contract on the terms alleged, in other words, that there was in fact *consensus ad idem*. Counsel, having

been asked to point to any evidence which justifies the inference that Rivera at the outset of the meeting had an *animus contrahendi,* was unable to do so. He then relied upon acquiescence, but the question arises immediately: In what did Rivera acquiesce? We have not been provided with any answer. If one considers the possibility of the evolvement of an agreement as the meeting proceeded, nearly everything points away from an agreement relating to confidentiality. Much of what Page had to convey was known to Rivera. Much was public knowledge. Some of the information "belonged" to the owner of the property. The information relating to the tenants who had committed themselves was pointedly omitted from the feasibility study. Viability studies are transient and dependent upon the particular assumptions made. Page told him that he had put similar proposals to almost all developers and institutional investors of note. He permitted Rivera to pass the information on to

others. He not once mentioned the question of confidentiality although it was in his mind. After the proposal had been rejected, Page went to Rivera's office to collect the drawings to present them to yet another developer, but he did not ask for the viability calculations which, according to the submission, formed the kernel of the confidential information. Against this counsel relied upon the fact that Rivera had asked for the permission of Page (which was granted) to verify with some consultants certain facts, that the information was the result of hard work and had commercial value and that the eventual venture would require trust and confidence. In my judgment these factors taken together do not create a reasonable inference of a tacit agreement in the terms alleged especially because of its far reaching and open-ended consequences.

[12] The claim in delict was premised upon the statement that the appellant had approached the respondents “on the basis of a proposal

that was to be disclosed in confidence to the [respondents], which disclosure was based upon a confidential relationship subsisting between [the parties]." I have already in the context of the contractual claim mentioned that there is no evidence which underpins the first part of the allegation. Counsel was asked upon what evidence the second part is based but failed to provide a satisfactory answer.

[13] As stated, the breach of contract and the delict complained of are both based upon the proposition that the respondents have exploited the proposal and have developed the site in accordance therewith. The six elements of the proposal have been listed in par 9 above. I shall deal with them in random order. The complex built by the respondents is a closed mall-type development, one which differs materially from a piazza-type development in nature, design, structured parking, air-conditioning and cost structure. It will be recalled that Page had told Rivera that only a

piazza convenience complex would be feasible. Page had earlier considered a mall but the idea was shelved and not put to Rivera. In addition, Rivera increased the size of the development materially and changed the relationship between office space and shopping area significantly. Provision for parking increased by 250%. Building operations began some fifteen months later and lasted substantially longer than envisaged by Page, and building costs amounted to R115m instead of the appellant's projection of R68m. Although the estimated return on capital did not differ significantly, it was based upon a new design and different parameters. Apart from Pick 'n Pay, whose commitment was in any event obtained by respondents, there was no evidence of any tenant in the complex who had been canvassed by the appellant (in any event, their identities were never disclosed to Rivera) nor was there any evidence to show that the same or a similar tenant mix as that proposed

had been used or that the rentals charged had any relationship to those presented to Rivera, who knew what the going rates in the area were. Turning to access problems, the evidence is that the respondents employed their own traffic consultants and there is no evidence that the traffic solutions suggested by those of the appellant had been utilised. The rezoning application was filed on behalf of the owner of the property and paid for by the then option holder, JCI. The application had been advertised and was dormant, free for any new owner to pursue. Also Page, with knowledge of the purchase of the property, gave his town planner permission to hand his file relating to the application to the respondents' town planner. In sum, neither the totality of the proposal nor any element of it had been exploited.

[14] Faced with these facts, counsel submitted that what the appellant had handed to Rivera was proof of the fact that the property could be

developed profitably and that there was thus a causal relationship between the proposal and the purchase of the property. This, it was submitted, required legal protection. Had the claim been one for agent's commission, there may have been some merit in the argument. The appellant may have kindled the interest of the respondents in the property and it gave them its opinion as to a profitable way of developing the property. But that is not what the claim is about - it concerns the appropriation of confidential information.

[15] In the result the appeal has to be dismissed with costs, including the costs of two counsel. Concerning the record, it appeared that of the forty-one volumes only eleven were of any relevance to the appeal. Counsel and the attorneys should have been alive to this fact and should have taken steps to limit the record before it was prepared. However, since the appellant was unsuccessful and because there were other

problems with the preparation which may have diverted the attention and seeing that the record had been prepared during the transition period between the old and the new rules of this Court, a special order as to costs will not be made. That does not mean that the practice of preparing records containing irrelevant matter can be condoned.

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

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L T C HARMS
JUDGE OF APPEAL

AGREE:

SMALBERGER JA
OLIVIER JA
MELUNSKY AJA
FARLAM AJA