

**IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)**

CASE NO: 7518/2006

In the matter between:

PHOLOSA ASSET MANAGEMENT (PTY) LTD

First Applicant

MAYIBUYE GROUP (PTY) LTD

Second Applicant

and

MARCEL BRUWER

First Respondent

CHARLES SCHREUDER

Second Respondent

J U D G M E N T

MOSHIDI, J:

[1] **INTRODUCTION:**

This is an application in which the applicants seek a final interdict against the respondents in the following terms:

1. That the first and the second respondents jointly and severally be and are hereby interdicted and restrained from, whether directly or indirectly and whether personally or through an individual, company or other entity, utilising or disclosing whether the whole or any portion of or any combination of the first and/or second applicant's intellectual property and/or confidential information consisting of:

- 1.1 Intellectual property

- 1.1.1 the registered patent under serial number PCT/1B00/01129 known as "**Data Processing System**";

- 1.1.2 the "**RRR**" computer programme, which creates scoring profiles of an individual based on various behaviour patterns and which creates a risk profile in relation to such individual;

- 1.1.3 the "**Internal Behaviour Profile**" (IBP) computer programme, a profile mechanism used to create a profile on behaviour scoring to determine collection behaviour campaigns;

1.1.4 the “**Employed/Unemployed**” computer program, which is a model that, based on certain criteria and scoring, predicts an individual’s employment/unemployment status;

1.1.5 the “**Ready for Legal**” computer programme, which is a model which predicts the probability of success with legal action;

1.1.6 the “**Dollar**” computer programme, which creates pecking orders designed to sort payments into different categories;

1.1.7 the “**Affordability Models**”, which enables a logical segmentation of an individual’s budget against income for the purposes of debt recovery and loan granting;

1.2 Confidential information

1.2.1 the strategies, methodologies, analytics and procedures utilised by the first applicant in conjunction with the intellectual property referred to in 1.1 above as well as associated data and application thereof.

2. The first and second respondents, jointly and severally, are hereby interdicted and restrained from, whether directly or indirectly and whether personally or through an individual, company or other entity, unlawfully competing with the first applicant through the use by him/them of any of the intellectual property or confidential information referred to in 1 above;
3. Ordering the first respondent to hand to the Sheriff within 48 hours of this order all data whether captured electronically, in computer readable form, in hard copy or in any other format of whatsoever nature and whether directly or indirectly containing any of the first and/or second applicant's confidential information and/or intellectual property referred to in paragraph 1 above;
4. Ordering the second respondent to hand to the Sheriff within 48 hours of this order all data whether captured electronically, in computer readable form, in hard copy or in any other format of whatsoever nature and whether directly or indirectly containing any of the first and/or second applicant's confidential information and/or intellectual property referred to in paragraph 1 above;
5. Authorising the Sheriff to search for and seize the information captured in electronic format, and/or in computer readable form and/or hard copy and/or in any other format whatsoever as referred to in paragraph 1 above and wheresoever same may be

found including the first respondent's premises as recorded hereunder;

6. Authorising the Sheriff to search for and seize the information captured in electronic format, and/or in computer readable form and/or hard copy and/or in any other format whatsoever as referred to in paragraph 1 above and wheresoever same may be found including the second respondent's premises as recorded hereunder;
7. Authorising the Sheriff to hand over to the first and/or second applicants the documentation referred to in paragraph 1 above and whether handed to him by the first and/or second respondent or seized by him in terms of this order, the first and the second applicants to be entitled to do with same whatever they wished;
8. Interdicting and restraining the first and second respondents, jointly and severally, from, whether directly or indirectly and whether personally or through an individual company or any other entity, soliciting credit recovery/debt collection business from any of the applicants' clients and potential clients consisting of:

- 8.1 Telkom SA Ltd;
- 8.2 MTN SP (Pty) Ltd;
- 8.3 Cell C (Pty) Ltd;
- 8.4 Home Choice;
- 8.5 Truworths;
- 8.6 Foschini (Potential);
- 8.7 Presles;
- 8.8 Edgars (Potential);
- 8.9 Woolworths (Potential);
- 8.10 ABSA Bank Ltd.

- 9. Ordering the first and second respondents jointly and severally, the one paying the other to be absolved to pay the costs of this application on the attorney and own client scale.

The whole proceedings are centred around the debt recovery industry.

[2] **THE PARTIES:**

- 2.1 The first applicant, a company duly registered in July 1990, has its main business in credit recovery and also registered in 2003 in terms of the Debt Collectors Act No. 114 of 1998.
- 2.2 The second applicant, also duly registered and incorporated from 11 November 1998, is the holding company of, **inter alia**,

the first applicant. The second applicant is joined in these proceedings by virtue of the fact that the intellectual property referred to hereunder was owned by it, as alleged by the applicants. The second applicant has authorised/licensed the first applicant to utilise the said intellectual property.

2.3 The first respondent is an allegedly non-practising attorney whilst the second is an attorney. The precise involvement of both respondents in this matter is dealt with herein later.

2.4 The first applicant is essentially applying its intellectual property and confidential information to strategise and compile methods to effectively, efficiently and cost-effectively recover debts on its own behalf in instances where it has purchased third parties-debtors books as well as on behalf of its clients. In most cases the first applicant instructs Attorneys Meiring and Company Inc (JM Attorneys) in recovery litigation. Both the first and second applicants are therefore clients of JM Attorneys. The first applicant's clients consist of large companies and businesses, many of which are parastatal and whose shares are quoted on the Johannesburg Stock Exchange.

2.5 The applicants seek to protect their confidential information and/or intellectual property against unlawful use and/or disclosure by the first and the second respondents and to

prevent them from utilising such information and/or intellectual property in unlawfully and/or unfairly competing with the applicants' business and to prevent them from soliciting first applicant's clients unlawfully.

- 2.6 In refraining from detailing all the intellectual property and confidential information, for obvious security reasons, the applicants set out such detail in paragraphs 24 and 25 of the founding affidavit as follows:

“24.1 A ‘data processing system’ being the subject-matter of a registered patent under serial no. PCT/IB00/01129 originally registered in the name of the Bismin Trust, the rights, title and interests whereof were sold and passed on by the said Trust and ultimately purchased by the second applicant who became and remains the owner thereof and the holder of all of the rights, title and interest therein save insofar as it has allowed the first applicant the right to utilise same. Briefly stated this system is a data processing system which incorporates a method of manipulating data in database and provides a method of estimating the income of an individual or legal entity. The said program

furthermore incorporates a mechanism of estimating the liabilities of individuals and entities and to also allow for the use thereof to estimate the risk of providing financial assistance to persons or entities. It is this system that facilitates the estimation of liabilities, income or the like of individuals and entities and enables the user thereof to create profiles of individuals and entities as debtors. From the debt profile as well as estimated income it is possible to then estimate whether or not the individual or entity will be in a financial position to meet monthly liabilities incorporating undertakings to liquidate indebtedness either to the First applicant or its clients. Depending on the financial position of the individual or entity and/or changes occurring therein, the system automatically recalculates and generates a new settlement plan based thereon. The system is also designed to assist with estimating the risk of providing financial assistance to individuals and entities.

24.2 A programme named RRR which is a computer program developed in order to create scoring profiles of an individual based on various behaviour patterns and which creates a risk profile in relation to such individual. This scoring methodology also enables the user to determine an impairment value profile for purposes of IAS39 (International Accounting Standard relating to the valuation of debtors accounts, that is fair value of the debtors as now required in terms of proper accounting procedures). Thus the program enables a user to create an objective performance measure.

24.3 A program named Internal Behaviour Profile (IBP) which is a profiling mechanism that profiles a person based on his behaviour towards a collector enabling the user to create a profile on behaviour scoring which then drives/determines the collection behaviour campaign.

- 24.4 A program named Employed/Unemployed (E/U) which is a model that is based on certain criteria and scoring predicts whether an individual is or is not employed.**
- 24.5 A programme named Ready for Legal which is a model which predicts the probability of legal action against a debtor meeting success, that is recovery of the whole or major portion of the debt.**
- 24.6 A program called Dollar Creates Pecking Orders which is designed to sort payments into different categories.**
- 24.7 Affordability Models which enables a user to logically segment an individual's budget against income and utilise and apply same not only in relation to the debt recovery but also in relation to loan granting. In regard to the loan granting I refer to what I state hereunder in relation to Cerno Cubed (Pty) Ltd.**
- 24.8 I would mention that the programs referred to in paragraphs 24.2 to 24.7 were developed to**

support, compliment and expand on the patent referred to in 24.1.”

The applicants' alleged confidential information is described by the deponent in the founding affidavit in paragraph 25 as follows:

“25. The confidential information relates to the strategies and methodologies developed and adopted by the First Applicant which it utilises in conjunction with the aforementioned intellectual property and masses of data/information that has been captured in electronic format and which relates to:

25.1 campaigning methods which in essence means the determination of the approach to be adopted in relation to individual debtors or classes of debtors in order to achieve the best success rate of debt recovery. This incorporates:

- 25.1.1 collection based on IBP and RRR;**
- 25.1.2 pending strategies based on RRR;**
- 25.1.3 credit control based on all the above programs;**
- 25.1.4 assisting debtors based on RRR and IBP to refinance their debts to ensure**

payment is made to the credit grantor based on the affordability of the debt. This is done by Cerno Cubed (Pty) Ltd. Cerno Cubed (Pty) Limited's core business is property valuation and mortgage origination. The Second Respondent (and I verily believe that the First Respondent is or will be involved as a director and/or shareholder) has caused to be registered a company under the name of CR Megalodon Investments (Pty) Ltd bearing registration number 2006/000508/07. This company has as its main object inter alia financial intermediation which is a technical description for the core business of Cerno Cubed (Pty) Ltd. This, I respectfully submit, is a clear indication that the First and the Second Respondents intend as recorded in their letters of resignation referred to hereunder, to utilise the knowledge that they have gleaned from working for and with the First Applicant respectively and to replicate First Applicant's procedure

strategies, methodologies, etc, and to compete directly with it in the industry. Furthermore, they clearly also intend to replicate Cerno Cubed (Pty) Limited's core business and the working relationship between the debt recovery business that they intend setting up and the company registered under the name of CR Megalodon Investments (Pty) Ltd;

25.2 The assessment of an affordable housing market which incorporates assessment of an individual in order to determine whether they are in a financial position to afford to purchase immovable property. The assessment thereof is once again based on utilisation of the intellectual property, systems and methodologies developed and adopted by the First Applicant. Those individuals who are assessed as being candidates for purchasing immovable property are, for an originating fee payable to the First Applicant, referred to an associated company, being one of the subsidiaries of the Second Respondent, namely Hlano Investments (Pty) Ltd;

25.3 Asset management principles which incorporates:

- 25.3.1** how arrangements are made with individuals for repayment of debts as well as loan granting;
- 25.3.2** debit orders and methods with regard to how to apply debit orders;
- 25.3.3** managing a return based on IBP and RRR and not on normal client based approaches;
- 25.3.4** geographical based management;
- 25.3.5** payment channel meetings of certain personnel of the First Applicant which are held on a weekly basis when all of the above is discussed. At these meetings information is collated, strategies are discussed, planned and decisions taken with regard to implementation;

25.4 At the various meetings held by the First Applicant including payment channel meetings, management meetings, etc, at which were attended by the First Respondent and in some instances the Second

Respondent, highly confidential and privilege discussions take place relating to inter alia:

- 25.4.1 existing strategies and methodologies as well as their amendment and improvement;**
- 25.4.2 the implementation of strategies and methodologies;**
- 25.4.3 forward planning with regard to all aspects of the First Applicant, its business, strategies and methodologies;**
- 25.4.4 discussions regarding capturing of data, how best to secure additional data, what data may or may not be of use to the system and could be incorporated therein;**
- 25.4.5 how data and results are to be interpreted and implemented in order to achieve an optimum result in the market-place;**
- 25.4.6 ideas are exchanged in regard to the aforementioned as well as implementation of debit order methods and the best methods to be adopted in**

order to persuade suitable debtor candidates to utilise debit orders.”

This in essence, is the confidential information and intellectual property that the applicants seek to protect in the relief claimed in the Notice of Motion.

[3] The respondents contend that the information utilised by the applicants was based on public knowledge, and general principles well-established and used in the credit industry and that the methodology and procedures were well-known and widely applied in the industry by all participants and competitors therein. The respondents deny that the applicants are “**protecting their interests**” but rather attempting to paint a distorted picture creating an illusion that they have protectable interests. The respondents dispute that the applicants are leaders in the credit recovery industry and that there are in fact various and larger entities that are more successful in the market.

3.1 As far as the applicants’ intellectual property is concerned, the respondents, contend **inter alia**, that the data processing systems under the registered patent was never used fully in the applicants’ business when the respondents were employed by first applicant. The respondents further contend that if properly scrutinised and analysed, the applicants’ data processing system does not constitute any new idea as it merely incorporates the standard norms in the industry in terms of

which credit grantors use similar score cards to score their clients and determine the credit risk involved. Further that the applicants' "**RRR computer programme**" is not unique as it purely constitutes a weighing which is put on an individual's payment performance and is a standard method which is used widely in the credit recovery. Further that the applicants' internal behaviour profile is not unique or novel, as similar applications are used widely by credit grantors and recovery agents in the industry. The respondents further contend that the applicants' employed/unemployed programme is purely a model which uses information obtained from the various credit bureaus-information and data basis which constitute public knowledge. As far as applicants' Ready Legal programme was concerned, the respondents contend that such programme is purely an evaluation as to whether an individual is likely to be employed and manipulates public knowledge information in order to determine whether in the event of legal action taken against such individual, the individual is likely to be able to pay the debt.

- 3.2 The respondents contend further that the applicants' Dollar Creates Packing Orders is a programme generally used in the industry which ensures that a payment from a debtor is first used to cover disbursements, then interest, and then capital and is a generally utilised norm in the credit recovery industry. That similarly, the Affordability Models of the applicants are widely

used in the industry and simply compare an individual's income to expenses in order to determine whether a particular individual is able to afford a particular repayment offer. This principle, according to the respondents, has now been statutorily incorporated in law by the New Credit Act. In short, in regard to the applicants' confidential information and intellectual property, the respondents contend that these are not novel information or specific methodologies but simply principles and norms widely used in the industry.

- 3.3 The respondents emphatically deny that they intend or have replicated any of the first applicant's unique procedures, strategies or methodologies in order to function within the credit recovery industry. The respondents further deny that they intend to or are interested in conducting any business in competition with the company Cerno Cubed (Pty) Ltd. Further that the field of bond originations and evaluations was a highly specialised one which requires specialised IT programmes to operate. In addition that the company CR Megalodon Investments (Pty) Ltd was an Investment Company formed by the second respondent for purposes of his personal investments.

- 3.4 The respondents admit that various meetings were held by the first applicant including payment channel meetings and management meetings which both the respondents attended on various occasions. However, the respondents deny that the confidential and privileged discussions occurred, as alleged by the applicant.

[4] The first respondent holds various legal qualifications including an LL.B degree and worked in a legal capacity at various firms before being connected with the applicants, between 1996 and 2003. He joined Mayibuye Legal Services (Pty) Ltd (“**Mayibuye**”) on 5 November 2001 and on 1 March 2003 he became an employee of the first applicant after the first applicant took over the main business of Mayibuye. The first respondent’s initial appointment with Mayibuye was a collection manager responsible for general collections of various books. In April 2002, and as was the case with all other employees of the first applicant and its subsidiaries, who were privy to its confidential information and/or intellectual property, the first respondent signed a confidential agreement, Annexure “APPL3”. The first respondent also signed subsequent confidentiality agreements. Clauses 1.2.1 and 1.2.2 of Annexure “APPL3” provide as follows:

- “1.2.1 Confidential information’ includes but is not limited to:**
- 1.2.1.1 *Any information in respect of know-how, formulae, processes, systems, business***

methods, promotional plans, financial models, inventions, marketing methods, long-term plans and any other information in whatever form it may be;

1.2.1.2 *All other matter which relates to the business of the parties which shall be treated as confidential; and which is not in the public domain;*

1.2.1.3 *All information of any client of Mayibuye Group to which Mayibuye Group has an obligation of attorney/client privilege.'*

"1.2.2 **'Confidential material' shall mean all corporate and/or incorporated material containing 'confidential information', including, without limitation, written and/or printed documents, computer disks or tapes, whether machine or user readable and all marketing materials."**

Annexure "APPL3" remains in full force and effect whilst first respondent was in the first applicant's employ up to the present. On 1 March 2003, first respondent was promoted to chief operating officer of the first applicant

responsible for the entire contact centre which included the “**pure operations**”. In July 2004 the first respondent was encouraged to embark on a process of obtaining business analytical experience. He, as a result, identified, and later attended various courses. On 13 October 2005, the first respondent was promoted to chief executive/Pholosa Recovery. His duties and functions consisted of, **inter alia**, the effective management of the recovery division of first applicant. These functions included all such other executive roles and responsibilities which are incumbent on a chief executive officer of a division of a company. The functions are fully set out in paragraphs 14.11.1-14.14 of the founding papers. These allegations are largely admitted by the first respondent in the answering affidavit. However, the first respondent adds that at the time he was a duly qualified attorney with three years post-admission experience.

4.1 Further that throughout his articles of clerkship and thereafter, until joining the first applicant, he was involved in debt recovery services. As far as Annexure “APPL3” is concerned, first respondent contends that such agreement refers to and only deals with employees still in the employ of the applicants, and does not mention or deal with employees once they have resigned. When he signed Annexure “APPL3”, he was advised by Meiring of JM Attorneys that if he refuses to sign, his continued employment with the first applicant would be in jeopardy. He had no choice but to sign the document. The first respondent denies that he signed any subsequent confidentiality

agreement. The first respondent also suggests that he was somewhat coerced by Meiring to attend the various courses as alleged by the applicants. He also denies that business analysis was one of his strengths and passions. The first respondent further denies that his responsibilities included ensuring new assets acquired through the sales functions. He avers that the sales division was in fact non-existent at that stage and that there was only one sales executive. At the time of his employment with the first applicant, he already possessed the skills alleged, save for the SAS Enterprise Guide. On joining the first applicant and in his first year of employment, he improved collections on all but one debt book without having access to the systems mentioned by the applicants. The first respondent denies that he became privy to more confidential information or intellectual property and/or strategies of the first applicant during the course of his employment. He adds further that the majority of the strategies actually implemented by him were his own.

[5] The respondents deny that they are currently using any knowledge, insight or experience unlawfully or that they are using such as a springboard to compete unlawfully with the applicants.

[6] The applicants allege that in terms of Annexure "APPL4", entitled **"Standard Terms and Conditions of Employment"**, signed by the first respondent, the first respondent, employed in a managerial position, was

required to give the first applicant **“not less than two months”** written notice of termination of the employment agreement, which the first respondent did not do. This aspect is dealt with later. Clause 14 of Annexure “APPL4” deals with the incompatible activities undertaken by the first respondent and in particular with indulging in activities which compete with any business activities carried on by the first applicant. Clause 15 deals with confidentiality, first respondent having agreed that for the duration of the employment agreement and thereafter, and regardless of the reasons for termination, he shall not **“use for his/her benefit or for any other reason whatsoever, or the benefit, or for any other reason whatsoever of any other person or communicate or divulge to any other unauthorised person: ‘Any confidential matter or information in relation to the business affairs, processes, marketing techniques, trade secrets, customer list and/or trade connections of the company ...’”** Clause 26 sets out a restraint of trade undertaking and in terms of which in essence the employee (first respondent) was restrained from **inter alia**, taking up employment or being associated with or interested in **“any firm, person, undertaking or group which carries on business as a service provider of the company, its subsidiaries and associated companies ...”**.

[7] The first respondent’s letter of appointment, Annexure “APPL3.2”, is dated 13 October 2005. In terms of this letter of appointment, the first respondent’s employment rendered him bound by and subject to the following legislation, regulations and codes of conduct:

- Debt Collectors Act 114 of 1998;
- The draft regulations relating to debt collectors; and
- The Association of Debt Recovery Agents Draft Code of Conduct, Ethical Standards and Grievance Procedure.

The first respondent signed Annexure “APPL3.2” on 30 November 2005.

[8] The second respondent, also an admitted attorney, commenced employment with JM Attorneys as a professional assistant on 1 March 2004. He signed a letter of appointment, Annexure “APPL5”, on 5 February 2004. The second respondent and JM Attorneys bound themselves to **inter alia**, the “**Standard Terms and Conditions of Employment**”, “Annexure APPL6”. Clauses 4, 14 and 15 of the latter contain the same provisions as those applicable to the first respondent. The second respondent was subsequently promoted to associate. The second respondent’s duties and functions to JM Attorneys included his attending to collection matters, and as such, his carrying out mandates given by the first applicant to JM Attorneys. The second respondent attended first applicant’s Exco meetings and first and second applicants’ payment channel meetings and became privy to some of first and/or second applicant’s confidential information and intellectual property. The second applicant from time to time instructed and mandated JM Attorneys, which instructions were carried out by the second respondent, as an employee of JM Attorneys. The applicants contend that they have not waived the attorney and client privilege which arose in this regard.

8.1 In the answering affidavit, the second respondent admits that he attended to, **inter alia**, collection matters and certain meetings. However, the second respondent contends that during the meetings of the first applicant little time was devoted to the discussion of confidential information and intellectual property. He concedes that some discussion around legal strategy took place in the form of presentations by second respondent. These presentations, according to the second respondent, were more often than not merely the application of common sense to the process as outlined in the Magistrates' Court Act. As far as the payment channel meetings and the instructions from the second applicant to JM Attorneys are concerned, the second respondent, once more, contends that none of these involved confidential information or intellectual property.

[9] On 2 February 2006, first respondent addressed a letter of resignation to the first applicant, Annexure "APPL13". This, after first respondent had previously committed himself to remain in the employ of the first applicant and also after the first respondent's marked progression in the employ of the first applicant coupled with his attendance of various courses and conferences at the expense of his employer. In his letter of resignation, the first respondent places in issue the validity of **"any contracts entered into between myself and either Mayibuye Group (Pty) Ltd and/or Pholosa Asset Management (Pty) Ltd and/or Pholosa Recover. These contracts were not concluded**

on equal bargaining ground and entered into by me under duress and intimidation of the possibility of my employment being terminated”.

9.1 The first respondent also disputed the validity of the confidentiality agreement. The first respondent had previously signed this document but not returned it to the first applicant. The last paragraph of the letter of resignation, which is relevant to these proceedings, states:

“Finally take note that I am joining a newly formed collection company, as a shareholder and director immediately after termination.”

In the answering papers, first respondent admits that he tendered the letter of resignation as alleged by the applicants, and stresses that he was under duress to conclude the agreements and under threat of intimidation of his employment being terminated. He says the disclosures made in the letter of resignation were frank. The first respondent, like the second respondent, in his letter of resignation, made clear his intentions of competing with the applicants in business.

9.2 The second respondent, similarly, on 2 February 2006, addressed a letter of resignation, Annexure “APPL14”, to JM

Attorneys. Of relevance is the last paragraph of the letter wherein the second respondent states:

“In closing please be advised that I will be a shareholder in a company that will be operational in similar areas to those of JM Attorneys and Pholosa Asset Management.”

- 9.3 The applicants contend that, based on the contents of the letters of resignation, the respondents are acting in collusion with each other and intend on a combined basis utilising applicants’ confidential information and intellectual property acquired by them respectively while employed and in the furtherance of the aim and goal to form a new **“collection company”** which is to compete not only with the first applicant, but also JM Attorneys. The first and second applicants further contend that the utilisation of the confidential information and intellectual property is unlawful, in breach of the applicants’ rights, and is to be used by the respondents as a **“springboard”** for the purposes of launching a **“collection company”** which has as its aim the direct competing with the business of the first applicant and JM Attorneys. In the answering affidavit, the respondents, in denying these allegations, contend that it was not hidden from the applicants that they discussed and decided to go and start a new business venture together. Further that, the only business

in which the respondents have traded is in the debt recovery industry, and that they are entitled to do so in order to earn a livelihood. The respondents further contend that the business they jointly intend to pursue is of a legal nature and that none of the applicants' alleged confidential information will be used, but only public information, commonsense and experience obtained outside their employment with first applicant and JM Attorneys.

[10] Between the period 9 February 2006 and 10 February 2006, the applicants addressed letters to the respondents in which certain issues were raised, **inter alia**, that the respondents have breached their employment contracts; that the first respondent, being in a managerial position, gave applicants only four weeks' notice instead of two months' notice; that the applicants were accepting the repudiation of their employment contracts and cancelled their respective agreements of employment. The respondents did not respond to the correspondence at the time. The respondents deny that they have repudiated their employment contracts and that on advice from their attorneys of record, it was unnecessary to formally respond to the applicants' correspondence.

[11] The applicants contend that on 3 February 2006 the second respondent told Guy Lavender, an advisor to the first and second applicants, that the respondents intend to improve on the applicants' systems and information. A confirmatory affidavit of Guy Lavender, Annexure "APPL23", is attached to the founding papers. The respondents deny this allegation and

state that what they told Guy Lavender was that they were going to do their own '**thing**' based on what they thought best and assured him that no intellectual property or confidential information of the applicants would be used; and that they would be using other systems freely available in the market-place.

[12] The applicants further contend that the first respondent in particular, in the course of his employment with the first applicant, he of necessity became aware of the names, contact details and contact persons of all the first applicant's clients. That it is accordingly a simple matter for him to now contact anyone or more of such clients in order to solicit their business away from the first applicant. The respondents deny these allegations. They contend that they have had to procure the use of other systems at their own cost and that they were currently utilising same, entirely independent of any systems utilised by the applicants. It is common cause that the respondents' contracts of employment were terminated by the applicants on 9 February 2006, as the applicants were of the view that the respondents had breached such contracts. It is also common cause that the respondents have since commenced operating a company in debt recovery although they have not provided full details thereof as well as the systems and methodologies they use. In this regard, the applicants believe that the respondents registered a company under the name of CR Megalodon Investments (Pty) Ltd bearing registration number 2006/000508/07. This company has its main object, **inter alia**, financial intermediation which is a technical description for the core business of Cerno Cubed (Pty) Ltd. In addition, the applicants believe that

this is a clear indication that the respondents intend, as recorded in their letters of resignation, to utilise the knowledge that they have gleaned from working for and with the first applicant and JM Attorneys respectively, and to replicate first applicant's procedures, strategies, methodologies etc, and in order to compete directly with the applicants in the industry. The respondents, in the answering affidavit, do not deny the existence of the company, CR Megalodon Investments (Pty) Ltd. However, they allege that it is an investment company formed by the second respondent for purposes of his personal investments. In addition, the respondents have also declined to furnish to the applicants, a written undertaking not to use the applicants' confidential information and intellectual property. This development evidently led to the present proceedings.

[13] From the papers, and the arguments advanced on behalf of the parties, the issues to be resolved appear to be the following:

- 13.1 Whether the failure of the applicants to join JM Attorneys as a party to these proceedings is fatal to any relief sought against the second respondent;
- 13.2 Whether there exist disputes of fact which are incapable of resolution on paper;
- 13.3 Whether the second applicant is the owner of the intellectual property which the applicants seek to protect;

13.4 Whether the applicants have made out a case for a final interdict;

13.5 The material issues concerning the applicants' alleged confidential information and intellectual property. More specific, what such information is which the applicants seek to protect, and whether such information is protectable. Further, what the intellectual property is, and whether such intellectual property claimed by the applicants is capable of protection; and

13.6 The various defences raised by the respondents.

[14] I now deal with the respondents' contention that the non-joinder of JM Attorneys as a party to the proceedings is fatal to the relief sought against the second respondent. It is common cause that the second respondent was initially employed by JM Attorneys as a professional assistant from March 2004. It is also admitted by the second respondent that the applicants instructed JM Attorneys directly from time to time as the preferred firm of attorneys and that the second respondent indeed carried out such instructions. JM Attorneys remain applicants' attorneys of record in the current proceedings. Attorney Johan Meiring (t/a JM Attorneys) is a director of the applicants, and is also a director of JM Attorneys. He brought the current proceedings on behalf of the applicants. JM Attorneys are clearly not an essential party to these proceedings. It does not seek the protection which the applicants seek. The second respondent, as a litigant, is not generally

entitled to insist on joinder. See in this regard **United Watch and Diamond Co. v Disa Hotels** 1972 (4) SA 410 (CPD) at 415E-H. Such right is limited. See **Morgan and Another v Salisbury Municipality** 1935 (AD) 167. The applicants allege that the second respondent acquired the knowledge in relation to the confidential information and intellectual property on the basis of his employment as a legal representative to the first applicant in the course of his employment as an attorney by JM Attorneys. This does not make JM Attorneys a necessary party to these proceedings. The contention of non-joinder of JM Attorneys, is therefore, without any merit at all.

[15] The issue whether there are any disputes of fact also require attention. The respondents have alleged several facts and defences with a view to refer this matter to oral evidence or trial. Such alleged facts and disputes need to be considered in conjunction with the real issues identified in paragraph 13.3-13.5 above. In deciding whether indeed there exist genuine disputes of fact, I have regard to what is stated in **First Rand Bank of Southern Africa Ltd v Pretorius and Another** 2002 (3) SA 489 (CPD) at 497D-F:

“At this stage I would like to refer to a passage taken from 283F - G of the report of the judgment of Van Heerden J in South Peninsula Municipality v Evans and Others 2001 (1) SA 271 (C), which reads as follows:

'On the other hand, South African Courts have recognised that, in motion proceedings, disputes of fact cannot necessarily be

accepted at face value and that, in each case, the Court should closely scrutinise the alleged issues of fact in order to decide whether there is indeed a dispute of fact that cannot satisfactorily be determined without the aid of oral evidence. . . .'

Lower down on the same page she refers to the following passage from the judgment in *Dhladhla and Others v Erasmus* 1999 (1) SA 1065 (C) at 1072C:

'If, on the papers before the Court, the probabilities overwhelmingly favour a specific factual finding, the Court should take a robust approach and make that finding.'" (See also *Soffiantini v Mould* 1956 (4) SA 154 (E.D.L.D) at F-G.)

[16] It is also instructive to have regard to *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189 where it was held that:

"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 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 right, prima facie 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. Although the ground of a temporary interdict interferes with a right which is apparently possessed by the respondent, the position of the respondent is protected because, although the applicant sets up a case which *prima facie* establishes that the respondent has not the right apparently exercised by him, the test whether or not temporary relief is to be granted is the harm which will be done. And in a proper case it might well be that no relief would be granted to the applicant except on conditions which would compensate the respondent for interference with his right, should the applicant fail to show at the trial that he was entitled to interfere.”

[17] The applicants allege that their intellectual property was developed over a number of years and at substantial cost to them or intellectual property purchased by them. That the computer programmes are not available to the public and/or competitors. It involved much research, development, adjustments, amendments, ingenuity, effort, debate and thought. That the programmes have been designed specifically to meet the needs of the second applicant and its subsidiaries as well as the development and progression of the first applicant’s business. As a result, the first applicant grew up its business from a relatively small insignificant entity to one of the largest and

leading credit recovery companies in South Africa. Such growth is attributable to the intellectual property and confidential information as well as the strategies and methodologies developed and utilised by it. As against this, the respondents' response is simply that the applicants' information is based on public knowledge, general principles well-established and utilised in the credit industry, and the methodology and procedures are in fact well-known and widely applied in the industry by all participants and competitors in the industry.

[18] The applicants seek a final interdict against the respondents. The respondents allege that if such order is granted, it will prohibit them from in any way operating in the debt recovery industry. It is trite law that for the applicants to succeed, they need to show, a clear right; an injury suffered or reasonably apprehended; and that no alternative remedy is available to them. See **Setlogelo v Setlogelo** 1914 AD 221 and **Lasky and Another v Showzone CC and Others** 2007 (2) SA 48 (C). The contentions of the respondents are that they will be excluded from the debt recovery industry, thereby preventing them from practising their chosen careers and earning a livelihood, are not well-founded. A proper reading of the Notice of Motion does not support this contention. The contention has already been discounted by the court during interlocutory proceedings brought in terms of Rule 35(12) and 35(14). Both respondents are legally qualified persons and are entitled to **inter alia**, engaged in debt collection matters on behalf of clients without utilising the applicants' confidential information and/or intellectual property.

[19] In essence, the respondents' opposition to the application, excluding the preliminary issues raised, is that none of the confidential information and/or intellectual property alleged by the applicants is capable of being protected. The respondents in fact allege that such information and intellectual property is used by all participants in the debt collection industry, and there is nothing unique about it. Close scrutiny of the careers, qualifications, and experience of the respondents reveal that they cannot be regarded as experts in the debt collection field to justify the above contentions. The respondents also claim that they are not using any of the applicants' intellectual property or confidential information.

[20] In my view, the applicants have plainly established on a balance of preponderance the ownership of the confidential information and intellectual property as described in the founding papers. Both the respondents had access to the confidential information before they resigned. When the first respondent joined the first applicant as an employee, he clearly did not have such unique and specialised skills in the debt recovery industry as utilised by the first applicant. In this regard the same can be said of the second respondent. In the case of the second respondent, it is immaterial that he was employed by the JM Attorneys. The latter attorneys, as described earlier, acted as legal representatives and still represent the applicants in the present matter. The relationship between JM Attorneys and the applicants is a closed one, delicate and highly confidential in matters of debt recovery. Not only did the first respondent sign and accept the first applicant's standard terms of employment, he also signed confidential agreements. He specifically

undertook not to compete in business with the first applicant on termination of his employment contract. In addition, the first respondent signed a restraint of trade undertaking and in terms of which, in essence, he is restrained from, **inter alia**, taking up employment or being associated with or interested in institutions or organisations which carry on business as a service provider of the first applicant, its subsidiaries and associated companies. In doing this, the first applicant clearly does not wish that employees who have had access to its confidential information and intellectual property unfairly compete with it. The first respondent occupied a very senior position within the first applicant. He was a key-employee in the strategies of the first applicant. He was employed by the first applicant for a period of about four years and three months at great cost. At the termination of his employment, subsequent to his resignation, the first respondent had become privy to the innermost confidential and secretive information, facts and figures being the exclusive property of the first applicant. The same applies to the second respondent, although in a slightly different manner than the first respondent. The second respondent bound himself to the same standard terms of employment as the first respondent when he became employed by JM Attorneys. In his capacity as a professional assistant and subsequently associate to JM Attorneys, the second respondent in performing and carrying out mandates for and on behalf of the first applicant, became privy to inside and confidential information of and concerning the first applicant and the use of its systems, technology, methodologies and intellectual property as well as the implementation thereof. The second applicant often instructed JM Attorneys which instructions were

wholly or partially carried out by him. In this regard, the applicants believe that he is bound by attorney and client privilege which they have not waived.

[21] The respondents' denial of the applicants' assertions, **inter alia**, that they had access to the confidential information and intellectual property; that they are acting in cohorts; and that they intend to utilise such information at their newly created company, is less than convincing. They both resigned on the same date in letters delivered to the applicants, the wording thereof being identical. The probabilities favour the applicants' version that the respondents told Guy Lavender of their intention to improve on applicants' systems and information on their departure from the applicants.

[22] In approaching the matter on the basis of **First Rand Bank of South Africa Ltd v Pretorius and Another supra**; **Webster v Mitchell supra**, and **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A) at 634E-635C, I find that there are clearly no real disputes of fact as alleged by the respondents. There is undoubtedly no need to refer this matter to oral evidence or trial. The matter is capable of resolution on the papers. The various defences raised by the respondents are unsubstantiated and amount to typical red-herrings. The latter include the allegation that the first respondent, a qualified attorney, was forced to sign contracts/agreements; the circumstances of the respondents' termination of employment; the validity of the agreements now sought to be enforced by the applicants; that the first respondent was forced to sign documents; and other obvious matters such as the first respondent's promotion within the first applicant, and the reasons

as to why the first respondent was allowed to attend various courses at the expense of the first applicant.

[23] In my view, the applicants have set out sufficient particularity of their confidential information and intellectual property and their joint ownership thereof. The respondents simply deny that such information is confidential, alternatively unique or protectable. It is trite law insofar as the intellectual property is owned by or used under licence by the one or other applicant, such property is protectable.

[24] In order for the applicants to succeed, they must have an interest in the intellectual property or confidential information. Invariably, although this consists of ownership, ownership is not always a necessary requirement. In **Prok Africa and Another v NTH and Others** 1980 (3) SA 687 (WLD) at 696D-F, the Honourable Goldstone AJ, as he then was, said:

“Thus the question which falls to be decided is whether in our law it is only at the instance of the owner of confidential information that an action will lie against a third party who unlawfully filches that information ... in principle I can see no reason for limiting the scope of this type of action by conferring it only upon the owner of confidential information. The wrong upon which the cause of action is founded and for which the remedy lies is not an invasion of rights of property ...”

In the present matter, the respondents' contention in challenging the applicants' ownership of the confidential information and intellectual property is therefore misplaced.

[25] The **onus** is on the applicants to prove also that the information they seek to be protected is of a confidential nature. This information, as set out above, relates to the strategies and methodologies developed and adopted by the first applicant in the credit recovery industry which it utilises in conjunction with the intellectual property. All employees of the first applicant enter into confidential agreements and sign restraint clauses. The first respondent was no exception. The respondents, without any substantiation, vaguely contend that the applicants' strategies and methodologies are standard in the industry and are being used by all entities functioning within the parameters of the credit recovery industry. However, they do not deny the existence of the first applicant's unique procedures, strategies or methodologies.

[26] The first respondent was indeed aware of the applicants' confidential information when he was employed initially. He signed confidentiality agreements in 2002. He rose to senior positions within the first applicant. In March 2003 he was promoted to Chief Operating Officer. On 13 October 2005 the first respondent was promoted to Chief Executive Officer. He signed first applicant's standard terms and conditions of employment which included a further confidentiality clause, as well as a restraint clause. In **Harvey Tiling Co v Rodomac (Pty) Ltd** 1977 (1) SA 316 (T), an ex-employee, who after leaving his employer and became instrumental in forming a company of which

he became a shareholder and its managing director, was interdicted from competing with his former employer in manufacturing a similar product as his former employer whilst using confidential information gained while employed by his former employer. At page 322A-D, of the judgment, the following is stated:

"It is a matter of common knowledge that, under a system of free private enterprise and therefore of competition, it is to the advantage of a trader to obtain as much information as possible concerning the business of his rivals and to let them know as little as possible of his own. He would be happiest if only what he himself chooses to disclose comes to the knowledge of his competitors. He is of course aware of the fact that his employees collectively know a great deal if not all of his business affairs. Whilst in his employ, or even after leaving it, it is in their power to disclose to competitors information capable of use adverse to him. The information may be a trade secret, e.g. a method of production not protected by a patent, or a business secret, such as the financial arrangements of the undertaking, or a piece of domestic information like the salary scale of clerks, or the efficiency of the firm's filing system. Some of this information would be of a highly confidential nature, as being potentially damaging if a competitor should obtain it, some would be less so, and much would be worthless to a rival organisation. All this being well known to employers and employees alike, it must be

presumed that every employer who has trade competitors would, if asked the question, say: 'But of course my employees are under a duty to me not to disclose information which can harm my business,' and the employees would confirm that such a term is implied in their contract of service. If an employee or ex-employee breaches this term he is liable to be interdicted from continuing to do so and to be made to compensate for damages caused."

Further:

"See also Stellenbosch Wine Trust Ltd. and Another v Oude Meester Group Ltd., 1972 (3) SA 152 (C) at pp. 160, 162.

Even if there exists no contractual relationship between plaintiff and defendant, "if a defendant is proved to have used confidential information, directly or indirectly obtained from a plaintiff and without the consent express or implied of the plaintiff, he will be guilty of an infringement of the plaintiff's rights". (per Lord GREENE, M.R., in the Saltman Engineering case, supra at p. 213). And "anyone who aids, abets or procures the breach of (a) contract of confidence may be enjoined together with the servant against the user of the information"."

In the present matter the first respondent resigned in February 2002. The overwhelming evidence establish that the applicants, through the various measures introduced, regard the information as highly confidential and

deserving of protection against unlawful use. It is information that is not only useful in the debt collection industry, but also unique and objectively of economic value to the applicants. See in this regard **Alum-Phos (Proprietary) Ltd v Spatz and Another** [1997] 1 All SA 616 (W) at 623. In **Schultz v Butt** 1986 (3) SA 667 (AD) at 678F the following is 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 the Aquilian action lies if it has directly resulted in loss.”

[27] Prior to their simultaneous and similar resignations, both the respondents’ conduct compelled the applicants to reasonably believe that the respondents intend to use the confidential information and intellectual property which they jointly gained in the employ of the first applicant and JM Attorneys, respectively, in competition with the applicants. In proof thereof, the respondents set up a company for such purpose. The respondents’ bare denial that such was not their intention, is insufficient comfort for the applicants. The respondents declined to furnish the applicants with the necessary undertaking in this regard. The relationship between the applicants and the respondents was such that it imposed a duty on them to preserve the confidence of information imparted to the respondents. In the circumstances of this matter it will be patently unfair to permit the respondents to make use

of or disclose confidential information belonging to the applicants gained during their employment and even after termination thereof. Indeed, it will equally be unfair to allow the respondents to utilise the applicants' clearly established confidential information as a springboard in order to enable them to compete with the applicants at the respondents' newly created company, CR Megalodon Investments (Pty) Ltd. See **Easyfind International (SA) (Pty) Ltd v Instaplan Holdings and Another** 1983 (3) SA 917 (W) at 927C. In **S A Historical Mint (Pty) Ltd v Sutcliff** 1983 (2) SA 84 (C) at 90-91 Van den Heever J, held:

“There is not and cannot be a general duty burdening an employee, whether humble or at “top management” level, not to compete with the company that formerly employed him. But in the process of competing he may not “steal” what is the company’s property – its trade secrets or confidential internal business information; or “steal” the energy expended in efforts, whether of research or negotiation, made to benefit it.” Cf. Automotive Tooling Systems (Pty) Ltd v Wilkens and Others 2007 (2) SA 271 (SCA), which dealt with an alleged breach of certain covenants in restraint of trade in **‘independent contractor’** agreements. It is also not a requirement that the information sought to be protected is **‘secret’**, the real question being whether the material sought to be protected is the product of the employer’s investments for his own use. See **Van Castricum v Theunissen and Another** 1993 (2) SA 726 (T) at 731F. The respondents allege that the strategies and

methodologies of the applicants are not novel or unique. Further that these are freely available and public knowledge in the credit recovery industry. However, this need not be the case. See **S A Historical Mint (Pty) Ltd v Sutcliff** *supra* at 90A. Such trade secret may even be a compilation of information publicly available. See **Van Castricum v Theunissen and Another** *supra* at 731F-G where it is said that:

“... someone who saves himself the trouble of going through the process of compilation of the document, even where it is compiled from information which is available to anybody, such a person would be interdicted if that information had been obtained in confidence. The reason is simply that confidential information may not be used as a springboard for activities detrimental to the person who made the confidential information available. It would remain a springboard even when all the features have been published or can be ascertained by actual inspection by any member of the public.”

The applicants' contentions are substantially correct in regard to the above matters.

[28] In the answering papers the respondents allege that the applicants are seeking to prevent them from following their chosen careers and from earning a livelihood in the debt recovery industry. This contention was dealt with

partly earlier on in this judgment. However, close scrutiny of prayers 1, 2 and 8 of the Notice of Motion, which are pertinent to the relief sought, does not support the respondents' contention as is further shown in the replying papers. There is no suggestion at all that the respondents should not as employee or otherwise be employed and/or operate in the credit recovery industry.

[29] Further close scrutiny of the respondents' answering affidavit reveals that the respondents in general deny the contentions of the applicants without any real substantiation. Where they are expected reasonably to proffer information, they simply decline to do so. I refer here in particular to their failure to disclose any details of the systems they intend utilising in their newly created company. Honesty and forthrightness demand that they do so. Their combined versions cannot be true.

[30] I need to deal briefly only with the restraint of trade undertaking in clause 26 of the applicants' Standard Terms and Conditions of Employment signed by the first respondent. This is Annexure "APPL4" to the founding papers. The duration of the restraint is twelve months following the termination of the first respondent's employment, for whatever reason. The first respondent resigned in February 2006. When this matter was before me in February 2007 the duration of the restraint had already expired. However, as far as the confidentiality clause is concerned, the first respondent bound himself thereto for the duration of his employment and thereafter. With regard to the second respondent, based on the credible evidence, there is no

justification to treat him any different than the first respondent, as alleged by the respondents. He was employed by JM Attorneys, initially as a professional assistant from March 2004. The close relationship between JM Attorneys and the first applicant has been proven. In his contract of employment, he bound himself, firstly, not to compete in business with his employer and secondly, not to utilise or divulge any confidential information of his employer during his employment or thereafter. He had access to the first applicant's confidential information through JM Attorneys. The overwhelming evidence prove that the second respondent was, and is, acting in concert with the first respondent in forming the company, CR Megalodon Investments (Pty) Ltd, and to the prejudice of the applicants. It is noteworthy that in his letter of resignation dated 2 February 2006, the second respondent, as in the case of the first respondent, informed his employers that he will become a shareholder in a new company operating in similar areas than his employers.

It is common cause that Pholosa Asset Management is in fact the first applicant in this matter. This, in my view, spells out in the clearest terms, the intention of the second respondent in competing with the first applicant after his resignation.

[31] I conclude therefore that the contentions of the respondents as set out in the answering affidavit fall to be rejected, as not credible, for several reasons. These reasons include the following:

- (a) The extent to which they minimise and downplay their exposure to the applicants' clearly defined confidential information and intellectual property during their respective employment;
- (b) The basis on which the first respondent, a qualified attorney, now repudiates the contracts/agreements he entered into between himself and the first applicant. In his letter of resignation dated 2 February 2002 he proffered the following rather lame explanation:

“... these contracts were not concluded on equal bargaining ground and entered into by me under duress and intimidation of the possibility of my employment being terminated.”

It is noteworthy that some, if not all, of the contracts/agreements were concluded long before he resigned;

- (c) The extremely dubious circumstances under which both the respondents resigned. The first respondent, in a managerial position was obliged to give first applicant not four weeks but two months' notice;
- (d) The fallacious manner in which the first respondent attacks the validity of the contracts/agreements;

- (e) The failure/refusal of both respondents to furnish the applicants with an undertaking not to utilise or divulge the confidential information and intellectual property of the applicants when they were asked to do so and under circumstances when they could easily and reasonably have done so;
- (f) When they were initially confronted by the applicants about their future intentions and the allegations which ultimately led to the present proceedings, the respondents did not respond thereto immediately, citing the absence of their legal representative as a reason;
- (g) In the answering affidavit, the respondents attempt to raise various lame defences and alleged disputes of fact which are all smokescreens and largely unsubstantiated;
- (h) Prior to the hearing of the matter initially, the respondents utilised the provisions of Rules 35(12) and 35(14) ostensibly to delay finalisation of the matter. This being so despite the fact that both respondents are attorneys, the first respondent claiming to be a non-practising attorney, however, according to the applicants, his name appears on the Practising Roll of Attorneys;

- (i) Respondents, without any proper basis, challenge the authority of Lynne Colleen O'Flaherty, the deponent to the founding affidavit, to act on behalf of the applicants, once more, in an attempt to seemingly delay the determination of the real issues;
- (j) Neither of the respondents were employed significantly in the debt recovery industry prior to their employment with the applicants and/or JM Attorneys;
- (k) The respondents' denial of the applicants' "**data processing systems**", being the subject-matter of a registered patent later bought by the second applicant is not reliable. In the answering affidavit, which is a joined affidavit of the respondents, the first respondent acknowledges the existence of such patent but avers that it was never developed to such extent that it was fully implemented by the applicants. This is clearly untrue;
- (l) Of greater significance, and which tilts the balance of convenience substantially in favour of the applicants succeeding, is the respondents' failure to disclose precisely anywhere in the answering affidavit what the nature is of their current business. They also fail to disclose what methodologies, policies, strategies and systems they use in their new business; and,

- (m) The least of incredibilities in the versions of the respondents is indeed, endless.

[32] From all the foregoing, it follows that the applicants have established the requirements of a final interdict as opposed to interim relief. See **Laskey and Another v Showzone CC and Others supra** at 67-68. The applicants will, or may already have suffered irreparable harm and the potential for further harm is substantial should the respondents be allowed to persist in their conduct of utilising unlawfully applicants' confidential information and/or intellectual property or disclosing same in order to compete unfairly with the applicants' business and soliciting first applicant's clients unlawfully. The applicants' rights in this regard are incapable of protection by any other and ordinary remedy. I find that the balance of convenience undoubtedly favours the applicants, as indicated earlier. The respondents have already set up a company to trade in competition, and unfairly with the applicants. A damages award in the future would be cold comfort for potential losses which the applicants are likely to sustain. In any event, a damages claim would be difficult, if not impossible, to quantify. On the papers, I specifically find that the applicants have made out a cogent case that they have an interest in the intellectual property and confidential information as owners thereof; that the intellectual property and confidential information are in fact of a confidential nature, are not public knowledge or public property, are unique and not as alleged by the respondents. The respondents were and are under a duty to preserve the confidence of information imparted to them. The rights of the respondents to make a living and pursue their careers as attorneys will not be

affected. However, the applicants have not made out a case for the relief claimed in paragraphs 3-7 of the Notice of Motion, and I did not understand counsel for the applicants during argument to persist in such prayers. As far as the costs are concerned, the applicants have achieved substantial success. I can think of no reason why costs should not follow the result. It also seems to me that it would be fair if I were to award the costs as claimed by the applicants particularly in view of the respondents' conduct coupled with their unsubstantiated claims.

[33] In the circumstances there will be an order in the following terms:

1. That the first and the second respondents jointly and severally are hereby interdicted and restrained from, whether directly or indirectly and whether personally or through an individual, company or other entity, utilising or disclosing whether the whole or any portion of or any combination of the first and/or second applicant's intellectual property and/or confidential information consisting of:

- 1.2 Intellectual property

- 1.1.1 the registered patent under serial number PCT/1B00/01129 known as "**Data Processing System**";

- 1.1.8 the “**RRR**” computer programme, which creates scoring profiles of an individual based on various behaviour patterns and which creates a risk profile in relation to such individual;
- 1.1.9 the “**Internal Behaviour Profile**” (IBP) computer programme, a profile mechanism used to create a profile on behaviour scoring to determine collection behaviour campaigns;
- 1.1.10 the “**Employed/Unemployed**” computer program, which is a model that, based on certain criteria and scoring, predicts an individual’s employment/unemployment status;
- 1.1.11 the “**Ready for Legal**” computer programme, which is a model which predicts the probability of success with legal action;
- 1.1.12 the “**Dollar**” computer programme, which creates pecking orders designed to sort payments into different categories;
- 1.1.13 the “**Affordability Models**”, which enables a logical segmentation of an individual’s budget

against income for the purposes of debt recovery and loan granting;

1.2 Confidential information

1.2.2 the strategies, methodologies, analytics and procedures utilised by the first applicant in conjunction with the intellectual property referred to in 1.1 above as well as associated data and application thereof;

2. The first and second respondents, jointly and severally, are interdicted and restrained from, whether directly or indirectly and whether personally or through an individual, company or other entity, unlawfully competing with the first applicant through the use by him/them of any of the intellectual property or confidential information referred to in 1 above;
3. Interdicting and restraining the first and second respondents, jointly and severally, from, whether directly or indirectly and whether personally or through an individual company or any other entity, soliciting credit recovery/debt collection business from any of the applicants' clients and potential clients consisting of:

- 3.1 Telkom SA Ltd;
- 3.2 MTN SP (Pty) Ltd;
- 3.3 Cell C (Pty) Ltd;
- 3.4 Home Choice;
- 3.5 Truworths;
- 3.6 Foschini (Potential);
- 3.7 Presles;
- 3.8 Edgars (Potential);
- 3.9 Woolworths (Potential);
- 3.10 ABSA Bank Ltd.

- 4. Ordering the first and second respondents jointly and severally, the one paying the other to be absolved, to pay the costs of this application on the attorney and own client scale.

D S S MOSHIDI
JUDGE OF THE HIGH COURT

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