



**IN THE HIGH COURT OF SOUTH AFRICA**

**(GAUTENG DIVISION, PRETORIA)**

<b>DELETE WHICHEVER IS NOT APPLICABLE</b>	
(1) REPORTABLE: NO.	
(2) OF INTEREST TO OTHER JUDGES: NO	
(3) REVISED.	
2023-09-28	
<u>DATE</u>	<u>SIGNATURE</u>

Case Number: 53194/2021

In the matter between:

**RKSA DC (PTY) LTD**

Applicant

(Company Registration Number: 2015/171524/07)

and

**UNIQUE COLOURS (PTY) LTD**

First Respondent

(Company Registration Number: 2021/868811/07)

**HEINDRICH OBERHOLZER**

(ID number: 911031 5073 088)

Second Respondent

**DEON OOSTHUIZEN**

Third Respondent

(ID number: 820727 5072 083)

**JOHANNES JACOBUS JANSE VAN RENSBURG** Fourth Respondent

(ID number: 780711 5004 088)

*This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 28<sup>th</sup> of September 2023.*

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## **JUDGMENT**

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**POTTERILL J**

*Introduction*

[1] The applicant, RKSA DC (Pty) Ltd [RKSA] launched an urgent *ex parte* Anton Piller application which was granted on 5 November 2021. The order was obtained against the first respondent Unique Colours (Pty) Ltd [Unique Colours], the second respondent Heindrich Oberholzer [Mr Oberholzer], the third respondent Deon Oosthuizen [Mr Oosthuizen] and the fourth respondent Johannes Jacobus Janse van Rensburg [Mr Janse van Rensburg]. Only Mr Oberholzer and Unique Colours opposed the application.

[2] The averments in the founding affidavit were that the respondents had stolen the confidential information and products of RKSA and Unique Colours was now unlawfully competing with RKSA. The order contained a list of what to search for on

all electronic devices of the respondents, including cell phones, computers and computer storage media. The list was comprised as follows:

**“ANNEXURE A (THE LIST)”**

1. *Any copy of the database as used by the Pastel business system;*
2. *The Pastel system files, containing business and contact details of clients of the applicant.*
3. *Extracts from the business system relating to the suppliers of the applicant, their contact details and the applicant's purchase orders;*
4. *Pricelists pertaining to the suppliers and clients or extracts therefrom;*
5. *Item/Inventory listings extracted from the client's business system;*
6. *The Mailchimp-generated 'Rolkem' list;*
7. *Any presentations or documents detailing the marketing strategy of the applicant;*
8. *Any proprietary information of the applicant as set out in the report that is stored on any of the devices in possession of the respondents.”*

[3] The notice of motion provided for the respondents to show cause why the items in the possession of the sheriff should not be retained pending the directions of the court and that the costs of the application be reserved for determination in an action.

[4] The order was served and executed on the respondents on 17 November 2021, with further searches being conducted on 19 and 22 November 2021. The respondents were prepared to consent to this order and defend the action that was to be instituted and recorded same in an email to the attorneys of RKSA. However, an amended notice of motion was filed wherein expanded relief was sought interdicting Unique Colours and Mr Oberholzer or anybody associated with them to compete with the business of RKSA and the consent was withdrawn.

[5] Now, on 20 July 2023, the confirmation of the Anton Piller is sought as well as final interdictory relief to bar Unique Colours and Mr Oberholzer and anybody associated with them from competing with the business of RKSA. No civil action has been instituted against the respondents.

### *Background*

[6] RKSA was founded by the sole director, Mr Kemp's, mother. The business comprised of edible powder colours for cake decoration or otherwise known as sugar art. The business was branded under the name Rolkem. In 2005 Mr Kemp took control of the business. He sets out that he holds the intellectual property rights of these products, also its confidential business information, as well as all the information on the pastel accounting system.

[7] He avers that RKSA is a world leader in this field and some of its products are unique and only available from RKSA. Rolkem is a household name and sponsors programmes like Kokkedoor and has received various international accolades. It develops powder colours and those formulations belong to RKSA. The colour pigments are uniquely blended per unique recipes. These unique formulations belong to RKSA and no employees have access thereto. The employees do not know who his suppliers are, what the raw materials are or have access to the laboratory.

[8] The Applicant employed Mr Oberholzer in 2018 on a full-time basis, for a brief period in 2019 on a retainer when he left the full-time employ of RKSA and then re-employed him in 2020. RKSA employed Mr Oosthuizen in 2020 and Mr Janse van Rensburg in 2020. All three resigned on 5 September 2021. This was just after Mr Kemp returned full-time to the running of the business after he had been absent for two months to take care of his very ill father who was hospitalised. Mr Kemp had extended the loading only to, authorisation of the payments to Mr Janse van Rensburg during his absence. This was necessary to pay for the medical bills of his father.

[9] It is common cause that Mr Oberholzer, Janse van Rensburg and Oosthuizen started the business Unique Colours. Mr Kemp on 23 September 2021 received an e-mail from a client informing him that Unique Colours had approached this client. He proceeded to whatsapp his clients informing them that his products may have been stolen or copied. On 1 October 2020 he became aware the Mailchimp account was accessed without authorisation. A notification received indicated that this was done by Mr Oberholzer on his personal computer. Mailchimp is described as *“a service which assists clients with providing focus to online marketing, automating e-mail product lists and collecting data on client responses thereto. The information so collected is used to drive sales initiatives and the further development of market penetration.”*

[10] Mr Kemp employed Cobalt Business Solutions (Pty) Ltd [Cobalt] to extract and investigate the information obtained from the devices. It reflected that the mail notification informing of the access breach, had been deleted. The loss of this Rolkem list, that drove the sales, is a critical loss for the business. He has no other list of clients because he used this list that he now has no access to.

[11] It is averred that the harm lies therein that Unique Colours may be selling products that may have been obtained illegally; the products may be of the same quality, or content of RKSA's product; may be using the same new marketing strategy to grow in the arts and crafts market. Unique colours did market exactly this to a client of RKSA.

[12] The turnover for the months of August and September 2021 reflected a sharp decline and Mr Kemp asserts that the decline was due to fraudulent transactions and stock theft. He also informs that he realised his vehicle tracking system was accessed and he changed his password. He submits this was done so that his subcontracting suppliers could be traced and identified.

### *The affidavits*

[13] Just as the motion morphed into much more than the confirmation of an Anton Pillar order, RKSA filed affidavits as if the motion was a series and the application

could be done in instalments. That against the trite rule that only three sets of affidavits form the basis of an application and the nature of an Anton Piller being an instant order. Naturally circumstances can arise that call for further affidavits and the court will exercise its discretion to allow further affidavits. The court will consider the prejudice to the respondents and whether the new facts are relevant to the dispute before the court in deciding whether to allow the further affidavits or not.

[14] Besides the founding affidavit, a supplementary affidavit and annexures, two replying affidavits, a supplementary founding affidavit and a second supplementary affidavit were filed. The heads of argument on behalf of RKSA followed the same pattern and supplementary heads were filed.

*The supplementary affidavit*

[15] It sought the court's permission to file the supplementary affidavit dated 28 October 2021 to attach a report from Cobalt that was now streamlined and explained the result of the search. Also to put to the court, that RKSA received notice from an Australian client that Unique colours had contacted them with a product list and prices. It further set out that Mr Oberholzer had no prior knowledge of this type of business and thus stole RKSA's confidential business information and intellectual property.

[16] He also informed the court that his Instagram account known as "*rolkem-universe*" was accessed and his administrative user rights were removed. The contact details of the Mr Oberholzer was then inserted but he changed the contact details back to his own number pursuant to a notification he had received of this change. As a result, he did not have access to his Facebook account and has lost contact with 12 500 followers to which Mr Oberholzer now has access.

[17] He proceeded to inform the court that on 26 October 2021 he received notice from a client, Fond Food from Botswana, that they had received products from RKSA that had incorrect "*best before dates*" on the labels. This he proposes was the work of Mr Oberholzer in sabotaging his business because the product would have to be returned while in fact the dates had not expired.

[18] RKSA then proceeded to put information it was privy to before the founding affidavit was compiled, but was not contained in the founding affidavit. No good reasons are set out as to why it was not set out in the founding affidavit. The new information related to a long history of Mr Oberholzer's employment.

[19] He further avers that towards the end of 2020 information was sought to be extracted from the business and when his father took ill he gave Mr Oberholzer the administrator's password. This led to confidential information being obtained and even destroyed. It is not specified what was destroyed.

[20] I have to accept that Hurley AJ when granting the *ex parte* application had taken cognisance of this affidavit and had granted permission for it to be filed, despite no such order being reflected on the granted order.

*The second supplementary affidavit*

[21] This affidavit was filed subsequent to the Anton Piller being granted *ex parte*. It sets out that Mr Kemp received an e-mail from Mr Janse van Rensburg that he and Mr Oosthuizen had left the employ of Unique Colours and this e-mail had attached a list of a client base of Unique Colours that he and Mr Oosthuizen "*hul dood aan gewerk het.*" He then makes the averment that he was told that the mother of Oberholzer did the research and threatens her with criminal proceedings. He further makes the statement that his personal Facebook page was hacked.

*The supplementary founding affidavit*

[22] RKSA is requesting the court to permit this affidavit because after the execution of the order an old broken laptop was fixed for a new employee. From this laptop, which was previously used by Mr Oberholzer, it could be ascertained that he created a drop box and a copy of the access data base was stored therein. The owner of this drop box can via the internet give access to anybody of the access data base.

[23] Mr Oberholzer and Unique Colours object to this affidavit being admitted. They submit that four affidavits were filed and this affidavit is filed on 6 May 2022, a year and a half after the replying affidavit. This laptop was in the possession of RKSA all the time and did not form part of the Anton Piller order.

[24] I am not allowing this affidavit and am not taking any evidence contained therein into account. An Anton Piller is an urgent application with the order granted covering specified items. This laptop was in possession of RKSA all along, but was not included in the order. It cannot now be slipped in. RKSA can, when it institutes a claim, discover this evidence if it wishes to do so.

*The answering affidavit of Unique Colours and Mr Oberholzer*

[25] It is submitted that RKSA did not fulfil the required duty of an applicant that brings an application *ex parte*. They submitted that the allegations that RKSA is a market leader is misleading, it is one of many suppliers of powder colour. It only has one exclusive product and not many as it avers. It does not develop powder colours, it purchases all its powder colours and then resells it. RKSA does so by re-packaging the colours under a Rolkem label or it mixes the colours it bought and then sells it as another shade. RKSA does not develop and accordingly has no “formulations.” Mixing the colours together is quite a crude process that anybody can do, even if you were not in that industry. RKSA does not have a laboratory.

[26] It is further set out that It is untrue and misleading to assert that all the information of the business was kept confidential, most staff members had access thereto as it was saved on Pastel. It is denied that Mr Oberholzer or Unique Colours has any confidential information of RKSA. There is nothing like a “*confidential client*”. The recipe book was kept in the blending area unattended. It just has instructions as to what colours must be combined together to make a particular shade. In fact, he was instructed to make electronic copies of the recipe book and it was kept at Mr Oberholzer’s workstation. He was also instructed to make an access database which he did and many employees utilised this database. The only unique product is the Lumo Colours where Mr Kemp mixes colours with fluorescent pigments and sells them



as edible powder colours.

[27] Furthermore, it is untrue that RKSA has the intellectual property rights of the powder colours. He just marketed it under Rolkem. The averment that the products have been stolen is a bald averment with no substantiation and is denied. It is untrue that Mr Oberholzer stole the mailchimp, because Mr Oberholzer had created the mailchimp on his personal account. The decline in the turnover was due to Mr Kemp's absence, the payment of his father's medical bills and Mr Kemp regularly closing down the operation of the business up to three months at a time.

[28] The resignation was a long time coming due to the erratic behaviour of Mr Kemp and at least 50 other employees had resigned over time. This was because he would talk about sex, men's genitals and ask employees to shower with him at work. One employee who suffered a stroke Mr Kemp had accused of faking it and told him to come to work. He would insist that Mr Oberholzer come to his house after hours and then he had to sit there till after 11:00. This happened often. He once locked all the staff in the building because a decifix roll went missing. The employees were daily subjected to verbal abuse that included him wishing that their families would die. He also threatened Mr Oberholzer with Nigerians or the "*Snyman brothers*."

[29] It is untrue that on personal cellphones no business was discussed and Mr Oberholzer attaches a telegram message to confirm that business was discussed on his personal cell phone.

[30] Mr Kemp did not in the founding affidavit inform the court that Mr Oberholzer, after his resignation, assisted Mr Kemp to change all the passwords on the cPanel, the local network server, social media passwords and website admin passwords. Mr Kemp confirmed to him that the passwords were changed and Mr Oberholzer no longer had access.

[31] The companies that Unique Colours contacted were found by simple google searches, searching for baking supply stores, cake decorators, bakeries, arts and craft stores and angling stores. It is denied that it used the information of RKSA as it did not

need to; it was a simple exercise. It denied that it sold RKSA's products.

*The first Cobalt Report*

[32] The first finding was that the mailchimp profile was nefariously terminated. It concluded that Mr Oberholzer downloaded and deleted the customer information profile. The second finding was that incriminating emails were being deleted from Rolkem servers and user e-mails. One of the two e-mails reporting that the mailchimp was terminated was found in hardcopy but had been deleted from Mr Kemp's e-mail on his laptop.

[33] The third finding was that there was deliberate extraneous and information access overreach. The workstation of Mr Oberholzer was configured in a way that allowed extraneous access through the internal network to access any information elsewhere in the company "*and has done so unlawfully and without access.*" Cobalt submitted that remote access was again activated on Mr Kemp's laptop as the Wi-Fi access password was not changed.

[34] The fourth finding is that the Pastel financial information, supplier, customer, stock, dispatch, sales and other records were compromised. This finding states that further investigation is required. The fifth finding is that there is a high likelihood of remote interference with the Rolkem System. No facts are set out in support of this conclusion.

*The second Cobalt report.*

[35] This report was compiled after the execution and relates to the 8 areas identified in the order. No copies of the Pastel database or database files were found. No copies of the Pastel client info were found. As for data containing the suppliers of Rolkem, this was not found. A list of suppliers of Unique colours was found. None of Rolkem's pricing list were found but a list of Unique Colours was found. As for product inventory, a complete content inventory of the product information, the ingredients and the *ratio*

of the raw products were found. It avers there was a significant overlap with Rolkem's formulations. The Mailchimp profile of Rolkem was deleted and the information was downloaded. The recovered information was obtained from the newly created Unique Colours Mailchimp largely consisting of Rolkem data with some exceptions. A copy of the Rolkem strategy marketing document was found in its original form. As for the IP it sets out that the access credentials and passwords saved on Google Chrome were verified and is confirmed to contain Rolkem asset access with likely potential for service denials as with Facebook

### *The replying affidavits*

[36] From this affidavit it emerges that Mr Kemp cannot deny the version put up by Mr Oberholzer pertaining to how the mailchimp came about and its operation. He also does not deny that he requested Mr Oberholzer to visit, the unbecoming comments at work and that he chased away the employees from work locking the doors of the business often. He explains that he was emotionally erratic at that time due to his medical problems.

[37] Most of the answering affidavit contains new evidence to which RKSA was privy to before the Anton Piller was granted. The new evidence contained in the affidavits from the employees of RKSA now attached for the first time relevant to the subcontractors, the recipe book and the confidential information cannot be set out in reply. Not only because new evidence is not allowed in reply, but because of the duty placed on an applicant when bringing an *ex parte* application. RKSA had a duty to set out in its founding affidavit all the evidence it had, it cannot bolster its case in reply. It was privy to this evidence. This is further so because of the nature of an Anton Piller; a draconian form of relief that cannot be achieved through bolstering, but must be there from the outset. The new evidence in the replying affidavit is disallowed and will not be considered.

### *Reasons for decision*

[38] One can understand the frustration and anger when erstwhile employees start

a competing business, but this does not *per se* constitute a claim for damages or automatic confirmation of an Anton Piller order. In this matter many issues are raised not relevant to what this Court must decide. Much relates to credibility and this Court does not on affidavit make credibility findings. Much of the evidence is driven to prove the cause of action and not the confirmation of the Anton Piller order. I do not address these issues. What I must decide is whether the initial order must remain in force pending the discovery process in the intended action, or whether it should be discharged or set aside. RKSA has the duty to convince me that it has a strong *prima facie* cause of action. However, it must on a balance of probabilities prove that Unique Colours has vital information in its possession and that there is a real and well-founded apprehension that the information may be destroyed or hidden.<sup>1</sup>

[39] The reports of Cobalt do not on a balance of probabilities prove that Unique Colours has vital information in its possession. The Anton Piller order was specified as to what evidence it sought to be extracted from the devices. Much reliance was placed on the Pastel database. The Cobalt reports could not find copies of the Pastel database or database files. No evidence of the Pastel client base was found. Only Unique Colours' client data base was found. No pricing of Rolkem was found, a price list of Unique Colours was found similar to Rolkem. No data of suppliers of Rolkem was found, excepting Unique Colours' list.

[40] Pertaining to the product inventory Mr Oberholzer sets out that on his personal computer there were no files that contained formulations of Rolkem or Unique Colours products. At the search he gave permission to access an Excel file called "*Master Ingredient Listing*" which he uses for Unique Colours. This file contains information copied from Unique Colours showing the ingredients used in the products from the suppliers. This file does not show the ratios used. Rolkem is not the only reseller of pigments that use the ingredients listed, all other resellers use the ingredients listed. There is thus an overlap of ingredients between all pigment resellers. This version is not untenable and has to be accepted.

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<sup>1</sup> *Universal City Studios Inc and Others v Network Video (Pty) Ltd* 1986 (2) SA 734 (A) at 755A.

[41] As for the marketing material of Rolkem Mr Oberholzer attaches an e-mail where Mr Kemp sent him the material to his personal laptop when he worked as a consultant. As for the social media accounts Mr Kemp denies that that he had any access to the social media accounts and this was proved with William of Cobalt in the presence of the independent attorney. This version is not untenable and is accepted. The Mailchimp was created on Mr Oberholzer's personal account, not on RKSA's account, and contained no monitoring information.

[42] There is no clear evidence that Unique colours has vital information in its possession. No recipe book or unique formulations were found. None of the findings of Cobalt on a preponderance of possibilities prove that Unique Colours has the specified vital evidence in substantiation of RKSA's cause of action.<sup>2</sup>

[43] Where information was discovered the version put up by Unique Colours must be accepted, or created *bona fide* factual disputes that cannot be decided on affidavit and renders the Anton Piller to be discharged.

[44] With this requirement not met the Anton Piller Order must be discharged. I will remark that RKSA would also not have come over the next hurdle of proving on a preponderance of probabilities that there is a real and well-founded apprehension that the evidence would be destroyed or spirited away.

### *The final interdictory relief*

[45] This relief cannot be granted as it is based on the fact that Unique Colours is using the information of RKSA to trade. Its foundation thus flows from the Anton Piller order; with the Anton Piller order being discharged this application is dismissed.

### *Costs*

[46] I see no reason why the normal rule of the costs being awarded to the successful

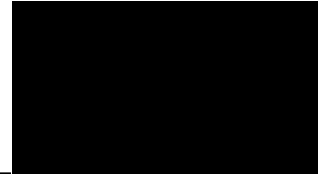
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<sup>2</sup> *Viziya Corporation v Collaborit Holdings (Pty) Ltd and Others* 2019 (3) SA 173 (SCA) at 185F-G.

party must not be followed.

[47] I accordingly make the following order:

[47.1] The Anton Piller Order granted on 5 November 2021 is discharged with costs.

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**S. POTTERILL**  
**JUDGE OF THE HIGH COURT**

CASE NO: 53194/2021

HEARD ON: 20 July 2023

FOR THE APPLICANT: ADV. A. THEART

INSTRUCTED BY: Borman Snyman & Barnard c/o Le Grange Attorneys

FOR THE 1<sup>ST</sup> AND 2<sup>ND</sup> RESPONDENTS: ADV. N. LOUW

INSTRUCTED BY: Bennecke Thom Incorporated

DATE OF JUDGMENT: 28 September 2023