

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

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: ~~YES~~ NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ NO.
(3) REVISED: ✓

DATE 9/6/97


SIGNATURE

CASE NO: 12946/97

In the matter between:

SWEECO (PTY) LIMITED

First Applicant

SWEEPA INSTRUMENTS (PTY) LIMITED

Second Applicant

VAN NIEKERK, GERHARD ALBERTUS

Third Applicant

and

MAX ERDMANN CC t/a REMA TOOLS

First Respondent

SWEECO MANUFACTURING (PTY) LIMITED

Second Respondent

SQUEEPER HOLDING B V

Third Respondent

SQUEEPER NEDERLAND B V

Fourth Respondent

VAN NIEKERK, MARIUS

Fifth Respondent

ARENDSSEN, PETRUS JOHANNES KAROLUS MARIA

Sixth Respondent

ERDMANN, MAX HUBERT

Seventh Respondent

ERDMANN, STEFAN

Eighth Respondent

MONOSATA S A

Ninth Respondent

J U D G M E N T

WUNSH, J:

The third applicant, to whom I shall refer as Gerhard, owns the shares in the first two applicants. The role and activities of the second applicant are not entirely clear. It is stated to own some of the patents which relate to the products to which this application refers. The first applicant, the name of which was previously Innovative Productions (Pty) Ltd, and to which I refer as Sweeco, markets in a way upon which I shall elaborate later, brooms and brushes with rubber heads which are manufactured in South Africa by the first respondent, to which I shall refer as Rema Tools, a close corporation owned by Max Erdmann and his son, Stefan. I shall use the word "products" for these items of merchandise which are at times called "sweepers" in the affidavits. The applicants contend that the manufacturing is carried out by the second respondent but this is disputed. What appears to be the case is that in order to present a corporate image of an enterprise which included the manufacture of the products, the second respondent, with a name incorporating "Sweeco" was, at the behest of Gerhard, introduced as the manufacturer in 1996. It has rendered invoices and received payment and is a V.A.T. vendor, but it may be that its activities are apparent only and that they are in fact carried out by Rema Tools. As appears later, Stefan signed an agreement on its behalf in which it is described as the manufacturer of the products. The share capital of the second respondent is owned by Max and Stefan Erdmann and they, together with Gerhard (no doubt as part of the endeavour

to present a Sweeco corporate image) are its directors. Nothing turns on the disagreement about its true role and I shall henceforth generally ignore it and refer, as far as the manufacturing activities are concerned, only to Rema Tools. The products, which originated some 27 years ago, were the brainchild of Gerhard and are sold in many parts of the world, including North America, Europe and other parts of Africa. The international operations have resulted in the participation in the network of business relationships and ownership of intellectual property rights of the ninth respondent, which I shall call Monosata, a corporation established in the Isle of Man, and the third and fourth respondents, established in the Netherlands and which I call the Netherlands companies. ^{In respect of} ~~Many of the external patents~~ to the products are held by Monosata, which is owned as to 25% by Gerhard, 25% by his son, the fifth respondent, whom I call Marius, and 50% by a financier, the sixth respondent, whom I call Arendsen. The third respondent, now known as Squeeper BV, is owned by the shareholders of Monosata in the same proportions. It is alleged by Gerhard that it was formed by Monosata. The relationship between it and the fourth respondent and their different roles have not been explained. The fourth respondent is owned by Arendsen, his nephew and Marius

The voluminous affidavits contain a number of agreements, not all of which are recognised by all the parties and some of which are barely intelligible. The position which they appear to have established is the following:

1. Rema Tools manufactures the products, using moulds and dyes which are the main subject of the litigation. References hereafter to moulds

include the dyes. There are other manufacturers in Germany and Mauritius. Rema Tools started manufacturing the products in 1991.

2. The products are sold by Rema Tools to Sweeco which on 12 January 1996 appointed Usabco Industries as the exclusive distributor for South Africa and other parts of Africa south of the Equator. It was this agreement that Stefan signed on behalf of the second respondent as the manufacturer of the products. Sweeco exports to the Netherlands companies for distribution by them outside Southern Africa and Australia and also consigns products to North America for sale by the appointed distributor there. Sweeco exports products also to Australia.
3. On 1 August 1995 Sweeco appointed a Canadian corporation, called Quality Dino Entertainment Ltd which trades as Quality Speciality Products, as the exclusive distributor for a period of 10 years for the USA, Canada and Mexico. For a reason which will emerge later it is necessary to quote a paragraph in a letter written by Monosata and the third respondent to Quality Dino Entertainment Ltd on 1 August 1995 and signed on their behalf by Marius as a supplement to the exclusive distribution agreement. It reads:

"2. Monosata SA has granted to Innovation Productions (Pty) Ltd (that is Sweeco) the exclusive right to exploit (all patents and patents pending throughout the world pertaining to the 'Sweepa Product') and the Sweepa

Product derived therefrom throughout the world and shall continue said grant of rights for the Term of the Distribution Agreement."

The 'Sweepa Products' appear to have comprehended all the products. Goods are supplied to Quality Dino Entertainment Ltd or to its customers by Sweeco.

4. The products consigned overseas from South Africa are, after manufacture, packed by Rema Tools and Sweeco attends to the export thereof.
5. The ownership of all the patents outside South Africa (the second applicant being the owners of local patents), the licensing agreement in respect thereof and the distribution rights and contracts are far from clear. What is common cause is that, apart from the copyright to which I refer later and which is claimed by Stefan or Rema Tools, none of those rights vest in Rema Tools or the Erdmanns.
6. In the papers relating to the interlocutory application there is an agreement to which **inter alia** Sweepa and Monosata's predecessor in the title were parties granting a company abbreviated as Varadan rights for countries including Japan and the Australasian Region. Its present scope and effect are not clear.

The products have been marketed very successfully. Stefan says that Rema Tools' factory operates 7 days a week for 24 hours a day and that its turnover last year was R10 500 000. According to the applicants this is an understatement. They say that between 1 March 1996 and 28 February 1997 the second applicant paid the second respondent R12 222 357 for products purchased from it. In North America the products reach 10 000 retail outlets. The projected retail sales in Germany in 1996 were 60 million DM. The Netherlands companies' annual sales are said by Stefan to be about R15 million but the applicants contend that this is, again, an understatement.

The relationship between Gerhard and his son, Marius, has broken down. It is to this and to Marius' perceived steps to "highjack" his business that Gerhard attributes the developments that have given rise to this urgent application.

Supplies of the products from Rema Tools to Sweeco started dropping significantly in October 1996 and, after the first quarter of this year, had practically ceased. A number of manifestly untrue excuses were given. Sweeco then withheld payment of amounts owing for goods which had been delivered by Rema Tools and that provided a more tenable ground for Rema Tools to withhold supplies. Marius, for the Netherlands companies, communicated angry complaints to Sweeco and threatened an action for damages because of Sweeco's consequential failure to implement their orders. It has transpired that this was a charade. A close corporation owned by members of the Erdmann family, Renate Marketing CC, which I shall call Renate Marketing, has been exporting products manufactured by Rema Tools to the Netherlands companies and, possibly, other destinations. Its existence and operations

were disclosed in the answering affidavits; before then Gerhard and Sweeco had not been aware of it.

Sweeco's frustration in obtaining supplies led to an urgent application, launched on May 14 for hearing on May 27, claiming substantially the following relief:

1. Delivery by Rema Tools and the second respondent, Sweeco Manufacturing (Pty) Ltd, of the moulds to the applicants.
2. An account by Rema Tools and the second respondent of the products manufactured by them with the moulds from 1 October 1996.
3. Interdicts restraining Rema Tools, the second respondent and Max and Stefan Erdmann from disclosing and using what I generically describe as confidential information and trade secrets, from competing with the applicants in respect of "any product in which any of the applicants has an interest" and from manufacturing any rubber brushes with the use of the moulds.

There are some other prayers, not at present material. Alternatively, the applicants seek interim relief, pending the final outcome of the application. The third, fourth, fifth and ninth respondents i.e. the two Netherlands companies, Marius and Monosata are outside the jurisdiction of the court. They were cited because of their interest in the outcome of the application and the papers were served on the attorneys who have acted for them and the other respondents. These attorneys disclaim any authority to

accept service and the peregrini have not consented to the jurisdiction of the court. Where I refer to the respondents from here on I mean those that are before the court.

On 22 May the respondents delivered an interlocutory application, seeking the disclosure of documents in terms of Rule 35(12) and an extension of the date for the delivery of the answering affidavits. This was heard on 27 May instead of the main application. The documents were delivered, without prejudice, and the respondents were ordered to deliver their answering affidavits on 28 May, which they did. The replying affidavit was delivered by 30 May 1997 and the matter was crowded out of the urgent roll for last week. It came before me on June 2 and argument was completed late on June 3.

At the end of the day, apart from some peripheral issues to which I shall return, it appeared to be common cause that the issues facing the court were the following:

1. Had the applicants or any of them established either **prima facie** (for the purpose of interim relief subject to the balance of convenience, a well-grounded apprehension of irreparable harm and the absence of any other satisfactory remedy) or (subject to the rule in **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 3 SA 623 (A)) on a balance of probability (for the purpose of a final order for delivery of the moulds) that they were the owners of the moulds? Similar questions arise with regard to the use of the confidential information and the right

to compete except that the applicants have to have established a clear right in order to obtain final relief.

2. If not, had the applicants in like manner established a right to obtain possession of the moulds i.e. a **jus in personam ad rem acquirendam**?

The respondents did not accept that on the basis of the cause of action presented in the founding affidavit the applicants could seek any relief which was not truly vindicatory.

3. If the applicants overcome the first hurdle, were they entitled to terminate Rema's possession of the moulds i.e. did Rema have a right against the owner of the moulds to continue to possess them?

4. Did Stefan's alleged copyright in the moulds or the interests of the owners of the patents other than Sweeco preclude the applicants from obtaining possession of them without his ^{1401r} consent?

5. If the applicants are not entitled to final relief in regard to the delivery of the moulds, where does the balance of convenience lie?

6. The prohibition on the use and disclosure of confidential information and of competitive articles depended on the effect and validity of an agreement in the papers.

1. The ownership of the moulds

It is clear from the affidavits that the moulds were made from blueprints prepared for ^(not by Rema Tools) the applicants, based on Gerhard's inventions. The moulds were paid for by Gerhard or Sweeco (or, according to the applicants, the second applicant). They were used by Rema Tools to manufacture products for the applicants. In numerous documents Max or Rema Tools acknowledged that the moulds are the property of the applicants. There are four moulds in which Arendsen has a half interest and some moulds were sold to Varadan but they are not the subject of this application. The respondents challenge the applicants' ownership of the moulds on two grounds

The first was that there has been some confusion as to which of the applicants claims to be the owner of the moulds. Some of the documents refer to the "Innovations Products group" or "the I P Group" and to Gerhard "and/or his nominees". By a resolution of the directors of ^{2nd Applicant} ~~Sweeco~~ it purported to transfer ownership of the moulds and certain rights to the second applicant. There was no delivery by attornment because Rema Tools, as the possessor of the moulds, was not even aware of the transaction. The ineffectiveness of the resolution was recognised by the applicants in the replying affidavit and an application was made to amend the prayers in the notice of motion to remove the second applicant from the relief claimed. No one has appeared on the scene claiming to be Gerhard's nominee. While imposing fiduciary duties on owners, such as trustees, our law does not recognise nominee owners of corporeal property. Nominee holders of shares are not nominee owners thereof. It is clear that Gerhard was reserving the right to nominate a person to whom or which

ownership could be transferred or was adding an ineffectual appendage. Ownership of the moulds, subject to the second ground of resistance, must reside somewhere in the Sweeco group. All its members acknowledge that it is Sweeco which is the party for whom the products are manufactured by Rema Tools. The argument is rejected.

The second basis of opposition to ownership is that no delivery of the moulds took place. There was admittedly no physical delivery. Indeed, it would have been a remarkable and pointless exercise for Rema Tools to have physically delivered the moulds to Sweeco and for Sweeco to have immediately returned them to Rema Tools. The respondents do not suggest that there had to be physical and visible delivery to Sweeco, because third parties could be prejudiced if Rema Tools' continued possession of the moulds concealed Sweeco's ownership. The misleading impression caused by Rema Tools' physical possession could not have been avoided by the delivery to and redelivery by Sweeco of the moulds, ending up with the same possession on the part of Rema Tools, when only the parties involved in the transactions and anyone who assisted them therewith would have known of the delivery and redelivery. C G van der Merwe in **Sakereg** (2nd ed 1989) says:

"Die waarde van die publisiteitsfunksie van registrasie (i.e. in the case of immovable property) is onaanvegbaar. Daarteenoor is die waarde van die publisiteitsfunksie van lewering hoogs twyfelagtig. Die rede hiervoor is dat die besit en eiendomsreg van 'n saak toenemend in verskillende hande kan setel. In alle gevalle waar besit nie daadwerklik van een party aan 'n ander party oorgedra word nie, maar waar van die een of ander vorm van fiktiewe lewering soos **traditio longa manu, traditio brevi manu** of **constitutum possessorium**

gebruik gemaak word, verrig lewering of besitsverandering nie meer 'n publisiteitsfunksie nie. Omdat fiktiewe vorms van lewering by pandgewing streng beperk word, verrig die leweringsvereiste slegs in die geval van pandreg 'n belangrike publisiteitsfunksie. Veral in die moderne kredietwêreld van huurkoopkontrakte met gepaardgaande eiendomsvoorbehoud, verskaf die besit van 'n saak nie publisiteit aan die buitewêreld oor wie die eienaar van die saak is nie." (at 14)

A large number of documents signed by Rema Tools and Max acknowledged Sweeco's ownership of the moulds. Counsel for the respondents argued that they may have been recording their opinion; but it took the matter no further because, as laypersons, they did not realise that the vesting of ownership could not take place without delivery.

The respondents relied on **Vasco Dry Cleaners v Twycross** 1979 1 SA 603 (A) and **Lighter & Co v Edwards** 1907 TS 442 in which it was held that a pledge cannot be constituted by **constitutum possessorium**. These cases involved the interests of third parties. Indeed in **Vasco Dry Cleaners v Twycross**, *supra* Hoexter AJA said:

"The only effective method of constituting a pledge is by agreement accompanied by delivery of possession of the article to the pledgee. Without such delivery of possession, while the pledge may be good as between the parties, the pledgee will lose his preference if a third party **bona fide** obtains real rights in the article pledged, or if a judgment creditor of the pledgor attaches the article pledged; or, should the pledgor be sequestrated, in a **concursum creditorum**." (at 6114 — I underline)

It seems as though the respondents argue that the only way in which the applicants could have acquired ownership by delivery was to expressly agree with Rema Tools that there would be a **constitutum possessorium**. This is entirely unrealistic. The actors were laymen. It is not surprising that there is no evidence of an express agreement to deliver and take delivery. Just as far removed from the real world is an argument that, if there is a **justa causa** for the acquisition of ownership and delivery has not been effected, the possessor can resist a claim of delivery or possession by the person entitled to become the owner on the ground that he has not yet become the owner, that is unless the possessor has a right to assert possession, which is the second defence raised by the respondents if the applicants' ownership is established. In any event, the repeated acknowledgements by Rema Tools and Max that Sweeco was the owner of the moulds was a sufficient agreement by them that delivery had taken place. It was not an express agreement to make and take delivery but it was a very clear tacit agreement to that effect. We are not dealing with a simulated transaction or a devious attempt to achieve what the law does not sanction, nor even with an inept effort to effect a genuine transaction, but with a **bona fide** acknowledgement that ownership has been acquired. C G van der Merwe **op cit** deals with the fourth requirement for a **constitutum possessorium** i.e. the **causa** for which the possessor continues to possess the **res** as follows (footnotes omitted):

"'n Duidelike regsgrond of **causa** word vereis op grond waarvan die vervreemder voortgaan om die saak te beheer. Hierdie **causa detentionis** kan deur uitdruklike ooreenkoms tussen die partye geskep word, of kan van die omringende omstandighede afgelei word. 'n Uitdruklike of stilswyende ooreenkoms skyn in hierdie verband 'n vereiste te wees. In beginsel word geen

beperking op die tipe **causa detentionis** geplaas nie — dit kan byvoorbeeld 'n huurooreenkoms, 'n ooreenkoms tot vruggebruik, of 'n aanbestedingsooreenkoms wees. Indien die regsgrond vir volgehoue houterskap egter geen voordele vir die verkryger inhou nie, soos in die geval van 'n gratis bruikleensooreenkoms of 'n **precarium** ingevolge waarvan die vervreemder toegelaat word om die saak gratis te gebruik tot wederopsegging toe, of waar die verkryger as agent aangestel word om die saak tot sy eie voordeel te verkoop, is die gevaar van bedrog so groot dat ons howe hierdie **causae** met groot omsigtigheid ondersoek.

Die bogenoemde vereistes word streng in die praktyk toegepas. **Constitutum possessorium** word nooit veronderstel nie — die party wat hom daarop beroep, moet dit bewys.

Verder moet die goeie trou van die partye bo twyfel staan. Daar sal bewys moet word dat dit werklik die bedoeling van die partye was om in hierdie omstandighede eiendomsreg aan die verkryger oor te dra. Indien die partye bloot 'n skyntransaksie aangegaan het, of indien daar maar 'n sweem van bedrog aan die transaksie kleef, weier ons howe om te aanvaar dat eiendom deur **constitutum possessorium** oorgegaan het. Indien die regte van derdes geraak word, word die transaksie nog noukeuriger ondersoek en word nie maklik aangeneem dat eiendom **constituto possessorio** oorgegaan het nie, selfs indien geen **mala fides** bewys kan word nie.

Soms word beweer dat die erkenning van die instelling van **constitutum possessorium** daarop dui dat eiendom in die Suid-Afrikaanse reg ook deur blote ooreenkoms kan oorgaan. Hierdie standpunt berus op 'n onsuivere siening van die wese van **constitutum possessorium**. Eerstens is dit nie die verbintenisskeppende ooreenkoms ingevolge waarvan eiendomsreg oorgaan nie. Die wese van **constitutum possessorium** is juis dat die vervreemder met toestemming van die verkryger sy besit van die saak opgee en ingevolge die een of ander regsgrond 'n nuwe beheer oor die saak verkry waarkragtens hy feitlike beheer oor die saak namens die verkryger uitoefen." (at 325-6)

In **Stratford's Trustees v The Londen 1 SA Bank** (1884) 3 EDC 439, a case of an "aanbestedingskontrak" or **locatio conducto operis**, a dealer in wool who was also a wool-washer pledged certain specific bales of wool to the defendants and a third person undertook to hold the wool at the disposal of the defendants. The wool was left by the third person with the pledgor for the purpose of being washed. SMITH, J., referred to Voet **ad Pandectas** 20.1.12 who says that in the case of a pledge delivery is invalid if the article is left in the hands of the debtor commodato aut precario (i.e. for loan or for use at his pleasure) as that is a fraud upon the custom requiring delivery and tends to the injury of other creditors and pointed out that in the case under consideration

"the property was not left with the debtor on what may have been spoken of as a precarium, that is to be used gratuitously by him for so long as the creditor allowed, but it was rather left under a contract of locatio operis faciendi under which the debtor was to do something to it for a money payment."

Upholding the pledge the learned judge said :-

"If it should be said that this doctrine of a constituted possession tends to fritter away the wholesome rule that there must be actual possession in order to protect creditors, I think the answer is, that the exigencies of commercial transactions render it necessary to make certain exceptions, and that such exceptions should only be made as the result of some contract stipulating for the possession of the pledger under circumstances in which such possession is deemed compatible with good faith, and does not hold out false colours to creditors."

In the present case the moulds were left with Rema Tools not under a contract of **locatio operis** but for the purpose of manufacturing products to be ordered by and sold to Sweeco. The exigencies of the transaction necessitated the retention of possession of the moulds by Rema Tools. There was no simulation. The parties were **ad idem** that Rema Tools was possessing the tools for the owner, Sweeco.

A case involving the two parties to the transaction and not the interests of third parties was **Prinsloo v Venter** 1964 3 SA 626 (O). The plaintiff bought a big and bulky steel frame from the defendant. While at the farm where the frame was situated, he gave the defendant the address to which he should physically transport the frame. Smit JP said:

"Thereafter plaintiff left the farm, leaving the frame on the farm with defendant. Dealing with the goods which he had just bought in this way, I think that plaintiff took delivery of the frame from defendant and, at the same time, passed possession thereof to defendant for purposes of transportation to his farm and

that the latter accepted control and possession thereof which was still on his farm for purposes of delivery, by agreeing to deliver the frame 'soos dit daar lê' and taking plaintiff's name and address. It cannot be accepted that he would only take delivery of the goods lying on his farm and under his physical control from the moment he loaded the goods for transportation. This is an example of the doctrine of **constitutum possessorium** (**Goldinger's Trustee v. Whitelaw & Son**, 1917 A.D. 66 at p. 74). Where the rights of third parties are concerned, this form of delivery which is established by intention alone is always closely scrutinised (**Orson v. Reynolds**, (1885) 2 Buch. A.C. 102) because it can lead to fraud. But when the question of delivery concerns only the parties, there is no such danger." (at 628G-629A - I underline)

I was pressed with **Mankowitz v Loewenthal** 1982 3 SA 758 (A). The appellant had removed two paintings when leaving the appellant's residence where she had lived with him and the respondent obtained a spoliation order. The paintings had remained in the possession of the respondent. The court found that there had been no **constitutum possessorium**. (There were not, as in this case, documents from time to time signed by the respondent acknowledging the appellant's ownership.) The crucial passage in the judgment of Jansen JA for the purpose of this case is:

"(Savigny On **Possession** s 29 — translation by Kelleher) states that a **consitutum** is not to be presumed and it is clear that he only infers the intention 'from the other circumstances of the case' where there is some other transaction entitling the transferor to remain a holder e.g. where he 'gives a thing as a gift, and at the same time hires it' (Cf Lauterbach **ad D 41.2 s 18**).

This is consonant with Schorer requiring a **causa** or **justus titulus** — a **causa detentionis** for the transferor. It is from the existence of this transaction that the transferor's intention to hold on behalf of the transferee is inferred." (at 766E-G)

In the **Mankowitz** case the respondent had no **causa** for continuing to possess the paintings — he did not hire them or borrow them or need them to do any work on them for the appellant. In this case the reason why Rema Tools continued to possess the moulds was to use them to manufacture products for Sweeco which had granted it exclusive manufacturing rights. There was a **causa detentionis** and, having regard to the business basis thereof and the absence of any third party interest, there is adequate evidence that ownership passed to Sweeco.

I would add that in the **Mankowitz** case, if the appellant had proved that the respondent had agreed to give her the paintings and on the basis that the donation was one **propter nuptias** and, therefore, not required to be in writing in terms of s 5 of the General Law Amendment Act No 50 of 1956, she would have been able successfully to claim delivery of the paintings from the respondent, unless he had other grounds for impeaching the donation.

The respondent's first defence, absence of proof of ownership or a right to ownership, fails.

Whether the respondents' right of possession of the moulds has been terminated

The applicants have not invoked the procedure sanctioned in **Graham v Ridley** 1931 TPD 476, by asserting simply that Sweeco or Gerhard is the owner of the moulds and that Rema Tools is in possession thereof. They allege that Rema Tools possesses the moulds for the purpose of manufacturing the products for it. The terms upon which the use of the moulds was, for that purpose, granted to Rema Tools and it, therefore, possesses them have not been spelled out but it is clear that the use and possession were for the purpose of manufacturing products for the applicants and their distributors and that there was an ongoing relationship in terms of which the applicants placed orders for the manufacture of products and Rema Tools manufactured them. The applicants, therefore, have "to prove the termination of any right to hold which (they) concede() (Rema Tools) would have had but for the termination" (**Chetty v Naidoo** 1974 3 SA 13 (A) at 21G-H).

What the applicants have tendered in evidence is an agreement which reads as follows:

"ADDENDUM TO AGREEMENT DATED 25 MAY 1995

BETWEEN

MAX HUBERT ERDMANN

AND/OR

REMA TOOLS

AND

GERHARD ALBERTUS VAN NIEKERK

AND/OR

INNOVATION PRODUCTIONS (PTY) LIMITED

WHEREAS during May 1995 the parties concluded a confidentiality agreement and in amplification of such agreement the parties are agreed that:-

1. The below mentioned dies are the sole and exclusive property of **GERHARD A VAN NIEKERK** and/or his nominee namely:-

(10 models are listed)

2. It is furthermore recorded that the below-mentioned dies which are not currently being utilised belong to **GERHARD A VAN NIEKERK** as do all and any intellectual property rights namely:

(4 models are listed)

3. **MAX** and/or **REMA TOOLS** have the exclusive rights of manufacture products for **GERHARD A VAN NIEKERK** and agree that payment in respect thereof shall be made within thirty (30) days on statement or such further extended period of time that may be mutually agreed upon between the parties. In the event that any products are to be manufactured outside South Africa it is agreed that **GERHARD** shall have the sole authorization rights in respect thereof.

4. All products as manufactured by **MAX** and/or any of his associated Companies are to comply with the quality control standards as set by **GERHARD** and in the event that such products do not comply to acceptable standards **MAX** undertakes to credit such unacceptable products. In the event that products are exported and are subsequently found to be of an unacceptable standard **MAX** shall be responsible for uplifting such products and will be responsible for all resultant costs incurred which would include airfreight, duty and packaging of such products.
5. In all other respects the parties confirm the contents of the prior agreement and furthermore confirm that this agreement is to be read as if incorporated in the main agreement.
6. No further variation shall be of any force or effect unless reduced to writing and signed by the parties hereto."

The "confidentiality agreement" of 25 May 1995 to which the agreement was an addendum is not at present material. In completing his clients' argument the respondents' junior counsel submitted that Rema Tools had been given the exclusive right to manufacture products for Gerhard but not only for him so that there was no reciprocal obligation of exclusivity on the part of Rema Tools. Having regard to the genesis and nature of the relationship, the ownership of and payment for the moulds and the respondents' own assertion of a joint venture, to which I come presently, this

is unhelpful and unsuccessful literalism. As Rumpff CJ said in **Swart en 'n Ander v Cape Fabrix (Pty) Ltd** 1979 1 SA 195 (A) at 202B-C:

"Wat natuurlik aanvaar moet word, is dat, wanneer die betekenis van woorde in 'n kontrak bepaal moet word, die woorde onmoontlik uitgeknipt en op 'n skoon stuk papier geplak kan word en dan beoordeel moet word om die betekenis daarvan te bepaal. Dit is vir my vanselfsprekend dat 'n mens na die betrokke woorde moet kyk met inagneming van die aard en opset van die kontrak, en ook na die samehang van die woorde in die kontrak as geheel."

It was clearly at least implied that Rema Tools could not use the moulds to manufacture the products for anyone else, whatever rights it may have had to make competing products (without using the moulds or copying the applicants' products) for others. While Rema Tools disclosed in its answering affidavit that it had manufactured products for Renate Marketing, it is nowhere explained on what basis it had the right to do so. The applicants, when they terminated Rema Tools' right to manufacture, had learned that it was making the products for others and in separate proceedings it later obtained an order attaching products exported by Rema Tools, so it thought, and which were found in Antwerp after having been diverted from their original destination, i.e. Rotterdam to which the respondents in the answering affidavit said they had been consigned. It was only when they received the answering affidavit that the applicants discovered that Renate Marketing was involved.

Rema Tools failed to implement orders placed by the second applicant on pretexts which were manifestly false. Instead, it manufactured products for another party. One of the employees of Rema Tools told a friend of Gerhard that between 6 and 8

containers of products had been shipped by his employer in the preceding two months (March and April 1997). This was not disputed by the respondents. **Prima facie** it seems to be an impertinence for it to claim that its business relationship with Sweeco has not ceased or that Sweeco has not lawfully terminated it. The case it sets up rests on two limbs. In para 14.8 of its answering affidavit we find the first mention of a joint venture to which it claims it and the second applicant were parties. There are frequent later references to this figure. A joint venture, certainly one which is not confined to a single transaction, is a partnership (**Pezutto v Dreyer & Others** 1992 3 SA 379 (A) at 390C-D). If it is not, the respondents have not explained what kind of legal creature it is in this case. The respondents, if they rely on a tacit partnership, were obliged to show that there are facts from which its existence can be inferred as a probability, not only to allege the terms, and place and time of conclusion of and parties to the partnership but to make the averments of fact which proved them (**Bezuidenhout v Otto**, 1966 3 SA 339 (W)). Nowhere is there any adequate indication of any of these matters. I shall quote what the respondents say in their effort to establish the existence of the joint venture.

"Accordingly has grown an enterprise in the nature of a joint venture, in which each partner has a specific role to play and the relationship between the partners is symbiotic: the Distributors require the product to be manufactured and the manufacturers require the Distributors to penetrate and expand the market. In so doing, all the parties make profits or royalties."

While it said that the joint venture was "perpetual", the answering affidavit, signed by Stefan, tells us:

"I state that there was, at the very least, an implied contract between the Applicants, the First Respondent, the Seventh Respondent and myself to the effect that we would remain the sole manufacturing partner of the joint venture to which I have referred. Although I am advised that is a matter for legal argument, I respectfully submit that the contract of appointment of the First Respondent as sole manufacturing arm of the joint venture was terminable, if at all, upon reasonable notice. I emphatically state that no such reasonable notice has been afforded the First Respondent."

And even if there had been a partnership, on the respondents' own case it was repudiated, if not by Rema Tools, then by the applicants, thus bringing it to an end (**Harinarain v Baijath**, 1990 2 SA 765 (N)).

The applicants terminated Rema Tools' exclusive manufacturing rights on 29 April, 1997 and called for the delivery of the moulds. At that stage the applicants were not aware of the existence and operations of Renate Marketing.

Dealing with a case of a claim for damages for the alleged wrongful dismissal of an employee, Bowen LJ said in **Boston Deep Sea Fishing & Ice Company v Ansell** (1888) 39 Ch.D 339 (CA):

"that the managing director, having been guilty of a fraud on his employers, was rightly dismissed by them, and dismissed by them rightly even though they did not discover the fraud until after they had actually pronounced the sentence of dismissal" (at 364).

This principle was applied in a case involving the termination of the appointment of an independent contractor in **Cyril Leonard & Co v Simo Securities Trust Ltd** (1971)

3 All ER 1313 (CA). Sachs LJ said (footnotes omitted):

"(Counsel submitted) that we should not follow **Boston Deep Sea Fishing and Ice Co v Ansell** in relation to those parts of the judgments that are relevant to the present case. In that case, which in principle applies equally to contracts of service and to contracts for services, it was held (see the judgments of Cotton LJ and Bowen LJ) that where an employee has in fact been guilty of uncondoned misconduct so grave that it justifies instant dismissal, the employer can rely on that misconduct in defence of any action for wrongful dismissal even if at the date of the dismissal the action was not known to him.

That rule has been followed in this country repeatedly throughout this century and appears even in 1889 to have been regarded as well settled law: see the uncontradicted arguments of Lawrance QC and Warrington and also the then current text-books such as Bullen and Leake and Smith on Employment. The text of the relevant footnote in Bullen and Leake reads:

'The Master is justified in dismissing his servant without notice if the latter has been in fact guilty of misconduct, although that was not the actual motive which induced the Master to dismiss him; and notwithstanding the Master did not know of the misconduct at the time of dismissal; but it seems that where the plea embodies the Master's knowledge with the cause of dismissal, it becomes a part of the description of the offence and must be proved.'

(The last observation referred to **Mercer v Whall**, a case which turned on pleading points.) Indeed, counsel for the plaintiffs both stated and accepted that now for something like 100 years all textbooks have invariably stated the rule to be in the terms already mentioned. In those circumstances it is of course quite impossible in this court to hold that the rule in the **Boston Deep Sea Fishing** case, which is directly relevant to the fact at issue before the court, is wrong.

Anyway, that ruling seems to me to embody a thoroughly sensible principle. It would be absurd that an employee who has been guilty of grave but undiscovered misconduct should be in the position of being able to put in a claim for damages for wrongful dismissal. Instances of the absurdities which could flow from a contrary conclusion naturally abound. One that has been mentioned is the position which would result if an employer rightfully dismissed somebody for misconduct of which he, the employer, was the sole witness, but died before an action brought by the employee could come to trial, so that that piece of misconduct could not be proved, and meanwhile it had been discovered that the employee had deliberately and wrongfully disclosed a vital trade secret to a rival albeit without desire for personal gain. It would be odd, indeed, if the employee could succeed in an action. (I have refrained from referring to more emotive instances involving, for instance, fraud, which could be no less hazardous in producing a catalogue of absurdities.) In my view the long established rule is sound, salutary and simple." (at 1322d-1323c)

This principle was applied in early cases in the High Court of Griqualand — **Kenrick v Central D M Co Ltd** (1884) 3 HCG 414 at 419-20 and **Haupt v Diebel Brothers** (1888) 5 HCG 185 at 188 — and, was recognised by Innes CJ in **Flemmer v Ainsworth** 1910 TPD 81 who said that it was "clear law" (at 90 — see also 91).

There is no reason why the case should be any different where the principal or employer is resisting not a claim for damages for wrongful termination or dismissal but a contention that it wrongfully terminated a contract for services or one of employment. Nor is there a reason why the principle should not apply where a party terminates a business relationship and it subsequently learns of fraudulent or **mala fide** conduct by the other party before the termination took place.

As regards employees, the position is now generally governed by legislation.

In their letter cancelling Rema Tools' rights and calling for the return of the moulds, the applicants' attorneys did not expressly state the reason for their clients' action, which must have been well known to Rema Tools.

In **Beck v Du Toit**, 1975 1 SA 366 (OPD) the applicant relied for an ejectment claim on a breach on the ground of which she had cancelled a lease. The respondent answered that the breach had been waived. In reply the applicant relied on a further breach which had not been mentioned to the respondent when she cancelled the lease. The respondent argued that the applicant had not stated in the affidavit that she had elected to cancel on the ground of the further breach. Smuts J said:

"The moment his (the innocent party's) election to cancel (on the grounds of a breach of contract) is communicated the contract is dissolved and a formal declaration by the Court to that effect is not necessary. I do not however understand the law to be that a party who alleges facts which disclose more than one breach of contract justifying cancellation must in addition to stating that he claims cancellation specifically state that he is cancelling on each ground available to him on pain of being precluded from relying on any particular ground not expressly stated to be a ground of cancellation. (at 368F-G)

And in **Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd** 1985 4 SA 809 (A) at 832C-D Smalberger AJA said:

"Where a party seeks to terminate an agreement and relies upon a wrong reason to do so he is not bound thereby, but is entitled to take advantage of the existence of a justifiable reason for termination, notwithstanding the wrong reason he may have given (cf **Matador Buildings (Pty) Ltd v Harman** 1971 (2) SA 21 (C) at 28A); **Stewart Wrightson (Pty) Ltd v Thorpe** 1977 (2) SA 943 (A) at 953G.)"

In the present case Rema Tools knew that it had acted in material breach of its duties to Sweeco and why Sweeco was aggrieved. It is not open to it to complain that the letter terminating its role as manufacturer did not explicitly say why that was being done.

The sales to or through Renate Marketing were not mentioned in the founding affidavit but they have been admitted by Rema Tools and they are part of the complex of facts which were the ground for cancellation i.e. the persistent failure to fulfil orders, in fact the reason for it.

There is no doubt that the applicants terminated their business relationship with the Rema by accepting its repudiation of its obligations.

I hold that the business relationship with Rema Tools and its right to possess the moulds was lawfully terminated by Sweeco.

The other ground advanced by the respondents for resisting the applicants' termination of their business relationship and the respondents' consequential right to retain the moulds in their possession was that the applicants had not given a reasonable period of notice of termination. Given the grounds upon which the applicants cancelled the business relationship, this argument falls away.

The patents and the copyright

The respondents have also argued that patents and pending patents vest in parties other than the applicants — it is clear, for example, that many of them vest in Monosata. That has nothing to do with the relationship between the applicants and the respondents or the ownership and right of possession of the moulds. In any event it appears that the South African patents vest in the second applicant. Monosata has

been a party to several agreements recognising the applicants' rights to procure the distribution of the products and is obviously aware, given its shareholders, of the arrangement made by Sweeco to have the products manufactured by Rema Tools. The respondents say that they fear that by delivering the moulds to the applicants they will be facilitating patent infringements. It will be recalled that on 1 ^{August} ~~May~~ 1995 Monosata recorded that it had granted Sweeco the exclusive right to exploit the patents throughout the world. The respondents argued that this acknowledgement is **res inter alios acta** and is not evidence admissible against them. That may be, but it removes any suggestion of action against them as accessories to the infringement of patent rights by Monosata. In any event in the answering affidavit in the interlocutory application Gerhard said:

"The deponent's fears and those of his Counsel are unfounded. On my own behalf and on behalf of the First and Second Respondents herein, I am prepared to indemnify any of the Applicants against any of the alleged claims for damages for patent infringements by parties other than the Respondents as a result of such infringements provided:

32.1 that such claims are **bona fide** and valid claims, and

32.2 that such claims will be defended with due diligence."

Finally, Stefan contends that the moulds are works of craftsmanship and as such, artistic works as defined in s 1 of the Copyright Act 98 of 1978, that he is the author thereof and, the other requirements being present, that he or Rema Tools is the owner

of the copyright. There are drawings which were submitted to Rema Tools in which Sweeco, under its previous name, is reflected as the copyright owner and that was acknowledged by Rema Tools. The broom heads were designed by Gerhard. The moulds themselves were not original works. They were created by Rema Tools or Stefan on its behalf on the basis of specifications in the form of blueprints furnished by the applicants and in which they have the copyright. No original or creative work by Stefan qualifies him as the author of the works. In any event, even if Stefan were the owner of the copyright, that does not detract from the applicants' rights to obtain possession of the moulds which belong to them. If Rema Tools or Stefan is the copyright owner, they will be able to preclude the reproduction of the moulds, not their use by persons for whom they manufactured them.

The relief to which the applicants are entitled

The applicants have established their right to the delivery of the moulds referred to in the notice of motion. The applicants are entitled to an account of the products manufactured by Rema Tools for others in breach of their obligation to manufacture for the applicants. As regards the claim for an interdict against disclosure of confidential information and competition the applicants rely on a "confidentiality agreement", to which I have referred previously, signed by Max Erdmann and Gerhard on 25 May 1995. This agreement imposes obligations on what are called "third parties". Although the respondents suggest that this expression was intended to involve sub-contractors, the agreement, read as a whole, does not bear this out. The

persons reflected as parties were Max, Rema Tools, Gerhard and Sweeco. The following appears:

"1.4 The parties are desirous of making known certain information to various third parties to enable them to do certain work on its behalf, with a view to exploiting and marketing such products of theirs.

1.5 The parties are associated in various related activities.

1.6 The parties agree that during the course of their association and inasmuch as they be required to peruse and inspect and will have access to certain classified and confidential documentation and/or information.

1.7 Such third parties are prepared to enter into an agreement of confidentiality and restraint.

IT IS THEREBY AGREED AS FOLLOWS:

The third parties agree:

2.1 Not to disclose to anyone, any part of any formulations, information, technical data, plans, techniques, strategies, ideas, trade secrets or clientele.

2.2 Not whether as principal, agent or otherwise make use of any part of any formulation, information, technical data, plans, techniques, strategies, ideas, trade secrets or clientele.

2.3 Not to manufacture or cause to be manufactured or distribute any of the designs or non-patentable products of the parties subject to the written approval of the two parties.

2.4 Not to disclose any confidential information and/or knowledge obtained associated with such parties.

2.5.1 That in order to the parties to be adequately protected and in view of the fact that the company trades worldwide, it is fair and reasonable for a restraint of trade to be imposed in terms whereby:

2.5.2 Such third parties will not, whether as agent, principal, directly or indirectly, or whether through the medium of a third party, company, close corporation, trust or otherwise, complete with or be involved with any product in which such parties have an interest for a period of 15 years anywhere world wide.

2.6 The party that is directly or indirectly a distributor with the company will in terms of this agreement not associate upon termination of with any of the companies clients.

2.7 That the restraint is fair and reasonable in order to protect the interests of the company."

"Such third parties" obviously means Max and Rema Tools. The founding affidavit does not identify any confidential information or trade secrets, other than the drawings and the moulds. The applicants cannot come to court with a blanket allegation of "formulations, information, technical data, (unspecified) plans (and) techniques, strategies, ideas, trade secrets or clientele" nor can or should the court make an order in such general terms (see **Mead & McGrouther (1996) (Pty) Ltd v Vosloo** 1997 CLR 111 (W) at 123-5). I cannot, therefore, grant an order prohibiting the use of general and unspecified forms of information. The applicants are entitled to an order prohibiting the use of the moulds by the respondents.

As regards the restriction on competition, the agreement seeks to preclude Max (not Stefan) and Rema Tools from "compet(ing) with or (being) involved with any product in which such parties (presumably Gerhard and Sweeco) have an interest for a period of 15 years world wide". That this covenant is ridiculous in its scope and fatally imprecise in its application is so obvious that I do not consider it necessary to embark upon a detailed analysis of it.

There were interlocutory proceedings the costs of which were reserved. Conflicting submissions were advanced as to who should be liable for them. I consider it fair that they be costs in the cause. The applicants have achieved their main objective and should be awarded all their party and party costs.

The following order is made:

1. The notice of motion is amended by substituting in paras 2 and 3 "First or Third Applicants" for "Second Applicant".
2. The first and second respondents or any person who is in possession of the moulds/dies described hereinafter are ordered to hand the moulds/dies immediately to the first or the third applicant.

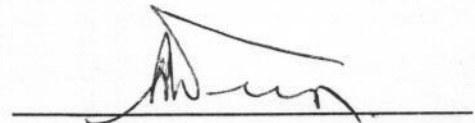
MODEL NO	NUMBER OF CAVITY	NO OF MOULDS
50i	12	1
100iA	8	1
100iE	6	1
100i	6	1
150i	6	1
100i	6	1
180i	6	1
200i	4	1
250i	4	4

300i	2	3
350i	2	3
400i	2	1
450i	2	1
Wonderboom	6	4
Real Sweepa	4	1
Real Sweepa	4	1
Salon broom	2	1
Peticare	4	2
420i	2	1
120i Squeeper	4	1
320i Squeeper	2	1
380i Squeeper	2	1
Squeeper jumbo		
squeeper	2	1

or any other moulds/dies related to rubber brooms and brushes which have been manufactured for the first and third applicants.

3. If the first and second respondents fail to comply with para 2, the Sheriff is authorized and instructed to attach and remove the said moulds/dies and deliver the same to the first or the third applicant.

4. The first and second respondents shall render to the applicants an account of the products manufactured by them utilising any of the moulds/dies referred to in paragraph 2 above from 1 October 1996 to date.
5. The first, second, seventh and eighth respondents are interdicted from manufacturing rubber brushes by using any of the moulds or dies referred to in paragraph 2 or replicas thereof.
6. The applicants' costs, including those consequent upon the engagement of two counsel, are to be paid by the first, second, seventh and eighth respondents, jointly and severally.



B WUNSH
JUDGE OF THE HIGH COURT

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DATES OF HEARING

JUNE 2 AND 3, 1997

DATE OF JUDGMENT

JUNE 9, 1997