

**Interflora Africa vs Sandton Florist**

Interflora African Areas Ltd vs Sandton Florist And Others 1995 (4) SA 841 (T)

1995(4)SAp841

**Citation** 1995 (4) SA 841 (T)

**Case No** A799/93

**Court Judge** Transvaal Provincial Division  
Kirk-Cohen J, JOFFE J, DUKE AJ

**Heard** March 15, 1995

**Judgment** April 11, 1995

**Annotations** [Link to Case Annotations](#)

**Flynote: Sleutelwoorde**

Trade and competition - Trade - Unlawful competition - What constitutes - Respondents setting up business in competition with appellant's florists network whereby orders for flowers placed in one centre could be executed in another centre - Respondents utilising appellant's members to execute orders in centres where respondent's competing network had no members - Such a breach of appellant's rules which were binding on respondents - Respondents' conduct amounting to piracy by stealth - Objectively tested, general sense of justice of community, the boni mores, would condemn such conduct - Respondents acting as they had done solely to enable their competing business to reap where it had not sown - Their scheme dishonest and constituting unfair competition - Interdict granted.

**Headnote: Kopnota**

The appellant provided a service to its member florists whereby orders for flowers, plants and similar gifts placed with a member in one centre could be executed and delivered in another centre, not only in Southern Africa but also internationally. The appellant had a network of more than 600 members throughout South Africa, Swaziland, Namibia and Zimbabwe. Membership of the appellant was not granted as a matter of course. Florists applying for membership were required to have premises of a required minimum standard, their flowers and plants exhibited for sale had also to be of a required minimum standard and these standards had to be maintained. The appellant's emblem was displayed at the business premises of all its members. Members of the appellant were bound by various by-laws made by the appellant, one of which (rule 3.11) provided as follows: 'Under no circumstances may any member permit any person or company to use their Interflora membership number or allow any person or company access to Interflora's network'. The fourth and fifth respondents, W and Z, had been members of the appellant for many years. W carried on business as a florist (the first respondent) and Z also carried

on business as a florist (the third respondent). The second respondent was a company (of which W and Z were its only shareholders and directors) which was formed during November 1991 with the object of competing with the appellant in offering to the general public a 'relay system' for placing orders for flowers in one centre for execution in another. It appeared that the respondents, through the businesses of the first and third respondents, had been utilising the appellant's network of florists for the purpose of effecting delivery of flowers and plants in areas where the second respondent did not have members to execute orders placed with members of the second respondent. Alleging that the second respondent, in so doing, was falsely representing to the members of the appellant, executing the orders of the second respondent in areas where the latter did not have members that it was, itself a member of the appellant, entitled to require the executing members of the appellant to attend to the order, and that the second respondent was thereby enhancing its reputation, the appellant applied in a Local Division for an interdict restraining such conduct. The appellant contended that the respondents' conduct constituted unlawful competition. The application was dismissed. In an appeal to a Full Bench of the Provincial Division,

*Held*, that the scheme used by the second respondent, instigated and carried out by W and Z, of necessity constituted a breach of rule 3.11 of the appellant's by-laws: the

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### **KIRK-COHEN J**

Second respondent (in practice its directors, W and Z), faced with orders placed with the second respondent which it could not execute, utilised by stealth the appellant's relay network by the subterfuge of 'referring' such orders to W or Z, who then changed hats and acted as members of the appellant. (At 847C/D-E.)

*Held* further that W and Z, being members of the appellant, had, by acting as aforesaid, permitted 'a company (the second respondent) to use their Interflora membership number...' and had 'allow(ed) (a) company access to Interflora's network' in breach of the provisions of rule 3.11. (At 847E-F.)

*Held* further that the *modus operandi* of the second respondent, W and Z could properly be described as piracy by stealth: objectively tested, the general sense of justice of the community, the *boni mores*, would condemn this *modus operandi*. (At 849D.)

*Held* further that the appellant had over many years built up and established a carefully planned network which was highly efficient, and the second, fourth (W) and fifth (Z) respondents had acted as they had done solely to enable the second respondent to reap where it had not sown: analysed from all angles, the scheme devised and carried out by them was dishonest and could only be stamped as unfair competition. (At 849F-G.) Appeal allowed.

### **The following decided cases were cited in the judgment of the Court:**

*Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd and Others* 1981 (2) SA 173 (T)

*Dun and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd* 1968 (1) SA 209 (C)

*International News Service v Associated Press* 248 US 215 (1918)

*Schultz v Butt* 1986 (3) SA 667 (A)  
Case Information

Appeal from a decision in the Witwatersrand Local Division (MacArthur J). The facts appear from the judgment of Kirk-Cohen J.

*P J van Blerk SC* (with him / *Miltz*) for the appellant.

*G / Hoffmann SC* (with him *S E Weiner*) for the respondents.

*Cur adv vult.*

*Postea* (April 11).

## **Judgment**

Kirk-Cohen J: The appellant, the unsuccessful applicant in the Court *a quo*, appeals against the whole of the judgment handed down in the Witwatersrand Local Division, save that portion in terms of which an earlier order made by Van Schalkwyk J was allowed to stand.

In its notice of motion in the Court *a quo* the appellant sought interdicts and concomitant relief in various forms against the five respondents on the grounds of unlawful competition by the second respondent. It is the appellant's case that the unlawful competition was planned and carried on by the fourth and fifth respondents in their capacities as directors of the second respondent and also through their businesses, being the first and third respondents respectively.

The notice of motion is long and contains a number of alternatives. During the course of the hearing in the Court *a quo* the respondents, in a document headed 'Undertakings and tenders', consented to certain orders without admission of liability. The appellant then incorporated the orders tendered in a document styled 'Proposed order' (record at pp 359-60). As the Court *a quo* found that there was no unlawful competition, none of the relief tendered or sought was made an order of Court. The main relief sought by the appellant (and not tendered by the respondents) is prayer 2.1.1 of the notice of motion, which is incorporated in the 'Proposed order', and reads as follows:

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### **'2.1 Interdicting and restraining the second respondent from:**

2.1.1 utilising, whether directly or indirectly, the membership network of the applicant for placing orders for the delivery by the applicant's members of flowers and/or plants for the purposes of executing orders placed with the second respondent or the second respondent's members;

The appellant, generally known as Interflora, is an association incorporated not for gain in terms of s 21 of the Companies Act 61 of 1973. It has been operating in southern Africa since 1950 and provides a service to its members, all florists, in terms of which orders for flowers, plants and similar gifts may be placed with a member in one centre for execution and delivery in another centre, not only in southern Africa, but also internationally.

The fourth and fifth respondents, Weir-Smith and Zeelie, have been members of the appellant for many years. Weir-Smith apparently carried on business as Sandton Florist for a lengthy period. During 1990, he formed a close corporation, Sandton Florist CC, of which he is the only member. It now conducts the business of a florist under the name of Sandton Florist and it is the first respondent. On 2 November 1990, the first respondent, represented by Weir-Smith, applied for membership of the appellant which

was duly granted. Zeelie conducts his business under the name of Flowers, Kempton Park, and his business is cited as the third respondent.

The second respondent is a company; Weir-Smith and Zeelie are its only shareholders and directors. They formed the second respondent during November 1991 with the object of competing with the appellant in offering to the general public what has been termed a relay system for placing orders in one centre for execution in another.

The appellant's emblem, a figure of Mercury holding a bunch of flowers, is displayed at the business premises of its members, indicating to the general public that such florists, through the relay system operated by the appellant, are able to accept orders for the delivery of flowers, plants and similar gifts elsewhere in southern Africa or internationally. The appellant's emblem and the relay system it operates are well-known, not only in southern Africa but, according to the appellant, also throughout the world.

A florist who is a member of the appellant enjoys the benefit not only of attracting local customers who wish to have flowers delivered elsewhere, but also obtains additional business from other members of the appellant, situate elsewhere, who place orders for execution by the first-mentioned florist.

The appellant has more than 600 members who carry on business in the Republic of South Africa, Swaziland, Namibia and Zimbabwe. The network created and built up by it operates as follows: a customer in, say, Johannesburg, places an order with a florist in that city who is a member of the appellant for delivery to a person in Cape Town. The Johannesburg member is known as the sending member. The sending member instructs another member in Cape Town where the order is to be executed and that member is known as the executing member; the executing member then makes up the order and delivers it in terms of the instruction.

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The sending member obtains payment from the customer when the order is taken. The amount which this sending member charges and collects from its customer is made up as follows:

the cost of the flowers;  
the delivery cost;  
the relay or service charge;  
the transmission cost; and  
value added tax thereon.

At the end of the appellant's accounting period, which is monthly, the executing member renders an account to the appellant which includes all orders executed through the appellant's network. The executing member gives a discount of 20% on the total of the price of the order and the delivery fee to the sending member. In addition to receiving these credits, the sending member retains the amount of the transmission cost together with the value added tax payable on the order. The service or relay fee is paid by the sending member to the appellant.

The sending member, who receives the money, does not submit an account to the appellant; only the executing member does so. The appellant then reconciles the account and the appropriate amount due to or by each member is paid or collected by the appellant.

Taking the example set out above further, and assuming that it was the only transaction involving the two hypothetical members in the month in question:

1. The sending member would retain 20% of the cost of the order and the delivery charge and also the transmission charge.

2. 2. The sending member would pay to the appellant 80% of the cost of the order and 80% of the delivery charge as well as the whole of the service or relay charge.
3. 3. The appellant would retain the relay or service charge.
4. 4. The appellant would pay to the executing member the amount representing 80% of the cost of the order and the delivery charge.

Membership of the appellant is not granted as a matter of course. Applicants are required to have premises and fixtures and fittings which are of a minimum defined standard. Their flowers and plants exhibited for sale must also be of a minimum standard. Successful applicants are required to maintain those standards, pay a deposit which may be varied from time to time and display the Interflora Mercury emblem in a specified manner.

In terms of the agreement between the appellant and its members, the appellant is responsible for paying the executing member regardless of whether or not the sending member is able to meet its commitments. The appellant therefore guarantees payment to all executing members and large sums of money are guaranteed in this manner.

In addition to the financial aspects referred to above, the appellant also guarantees satisfaction to customers who place orders with its members. From time to time customers are dissatisfied with the service provided and they do complain to the appellant which then attempts to solve all such problems to the satisfaction of everyone concerned.

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The appellant also provides other benefits for its members, such as educational seminars, florist training workshops, advertising and promotional campaigns, the production of a monthly magazine, floral competitions to maintain and improve standards and it also brings out international floral designers who give seminars for the benefit of members.

The administration involved in carrying out the operations of the appellant is vast, complicated and the cost thereof substantial.

Members of the appellant are bound by:

1. the memorandum and articles of association of the appellant;
2. the order procedure by-laws;
3. the general by-laws;
4. the membership by-laws;
5. the clearing house by-laws.

One of the rules binding all members is rule 3.11 of the membership by-laws, which provides:

'Under no circumstances may any member permit any person or company to use their Interflora membership number or allow any person or company access to Interflora's network.'

The object of rule 3.11 is clear. The appellant thereby limits the benefits and use of what it has developed over 40 years and its reputation to its members.

On 26 November 1982, the Minister of Industries, Commerce and Tourism published an arrangement pursuant to the provisions of the Maintenance and Promotion of Competition Act 96 of 1979, in terms of which the appellant undertook not to refuse membership to persons who are members of other flower

relay organisations and to refrain from penalising its own members who become members of any other such organisation. Thus any florist is entitled to be a member of more than one relay system.

The appellant relies upon the following alleged conduct on the part of the respondents to establish its case of unlawful competition:

1. The second respondent utilises the appellant's relay system for the purposes of effecting delivery in areas where it, the second respondent, does not have members to execute such orders. The second respondent telefaxes to the appellant's members orders on the appellant's standard stationery, which is provided to Zeelie for Zeelie's use in the operation of his business, being the third respondent. The appellant alleges that the second respondent, by so transmitting these orders, falsely represents to the executing members of the appellant in the areas where the second respondent does not have its own members, that it is itself a member of the appellant entitled to require the executing member to attend to the order. It is the appellant's case that this is done to enhance the reputation of the second respondent.

2. The first respondent, which advertises itself as a member of both the appellant and the second respondent, accepts orders for execution by members of the second respondent and, when doing so, issues to the customers receipts bearing the appellant's emblem. The first respondent thereby creates the impression that the orders are to be placed through the appellant's Interflora network; the first respondent does not inform these customers that their orders will be placed with the second respondent and not the appellant.

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As will appear from facts which are not in dispute, much of what the appellant complains of is common cause. I now deal with those facts.

In his affidavit, Zeelie testifies that he spends much time in the offices of the second respondent and that he operates the third respondent's accounting system from the second respondent's offices. His business, the third respondent, uses the second respondent's telefax system. When his business, the third respondent, places an order by telefax with an Interflora executing member in another centre, the second respondent's telefax number appears on the message telefaxed together with Zeelie's Interflora membership number. (When a sending member uses the appellant's network, that member is obliged to furnish his membership number to the executing member.) When Zeelie acts in this manner, the executing member receives an order bearing the Interflora number of the sending member together with a telefax number which is not that of the appellant or one of its members. Zeelie says that there is nothing sinister in this; seen in isolation this may be correct but, when viewed in the light of all the evidence, it is not so.

Both Zeelie and Weir-Smith admit to the following: where the second respondent receives an order for flowers, for example from the United Kingdom, for delivery in a centre where the second respondent does not have an executing member, the second respondent does not refuse or decline to carry out the order. Instead, the second respondent, duly represented by Zeelie and/or Weir-Smith, executes the order through the appellant's relay system by 'referring' the order to Zeelie's business (the third respondent) or Weir-Smith's business (the first respondent). Zeelie or Weir-Smith, being members of the appellant, executes the order as a member of the appellant through the appellant's relay system without disclosing that the order in truth and in fact is the second respondent's order. In this manner, the impression is created, certainly with a customer in the United Kingdom, that the second respondent has a wider network than it has and that the service it renders in the centre in question is efficient.

Weir-Smith and Zeelie also admit that, where the second respondent receives orders from one of its members in the Republic of South Africa for delivery of flowers in a centre where the second respondent

does not have a member, they adopt the same strategy. As directors of the second respondent, they execute the orders in their capacities as members of the appellant and again use the appellant's network for the benefit of the appellant's rival, the second respondent.

I stress that, on the respondents own papers, it is the second respondent, which is not a florist, which initiates the use of the rival network of the appellant for its own purposes.

1995(4)SAp847

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In a brochure issued to the general public the second respondent represents unequivocally that it can and does deliver'... anywhere. Fast. Deliveries throughout South Africa and abroad'. Zeelie says of this brochure:

This brochure was in fact sent to members of the public to advertise the procedure utilised by the second respondent. Either members of the public or florists are able, through Beltel or phone, to contact Linkwith (i.e. the second respondent) and place an order utilising a credit card.'

The orders solicited in this manner are not placed with a florist, but directly with the second respondent.

Weir-Smith, like Zeelie, makes this clear:

The third respondent/fifth respondent is using its membership of Interflora to place orders through the applicant. The fact that some of the orders are received from Linkwith is not a breach of by-law 3.11 of the membership by-laws.'

In my judgment, the scheme used by the second respondent, instigated and carried out by Weir-Smith and Zeelie, of necessity constitutes a breach of rule 3.11. The second respondent (in practice its directors, Weir-Smith and Zeelie), faced with orders placed with the second respondent which the second respondent cannot execute, utilise by stealth the appellant's relay network by the subterfuge of 'referring' such orders to Zeelie or Weir-Smith, who then change hats and act as members of the appellant.

However one looks at the matter, Weir-Smith and Zeelie, being members of the appellant, by acting as aforesaid, are permitting a 'company to use their Interflora membership number...' and they 'allow (a) company access to Interflora's network' in breach of the provisions of rule 3.11.

Unlawful competition is not necessarily limited to conduct which falls within certain categories. See *Dun and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau Cape (Pty) Ltd* 1968 (1) SA 209 (C)flr 216F-217A; *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd and Others* 1981 (2) SA 173 (T) at 188-9; *Schultz v Butt* 1986 (3) SA 667 (A).

In the *Dun and Bradstreet* case Corbett J referred with approval to the United States decision of *International News Service v Associated Press* 248 US 215 (1918) in which the conduct of the defendant was held to amount to unlawful competition on the basis that the defendant was 'reaping where it has not sown' (see at 219C-220E).

In the *International News Service* case the defendant, during wartime, was unable to obtain war news directly from France and copied news from the plaintiffs bulletin boards and early editions of the plaintiffs newspapers and then telegraphed that information from the Atlantic to the Pacific coast, thus enabling it, the defendant, to publish war news before it appeared in the plaintiff's newspapers on the Pacific coast.

An argument that that information was available to the ordinary purchaser of the newspaper was rejected and the Court held:

The fault in the reasoning lies in applying as a test the right of the complainant as against the public, instead of considering the rights of complainant and defendant, competitors in business, as between themselves. The right of the purchaser of a single newspaper to spread knowledge of its contents gratuitously, for any legitimate purpose not unreasonably interfering with complainant's right to make merchandise of it, may be admitted; but to transmit that news for commercial use, in competition with complainant... is a very different matter. In doing, this defendant, by its very act, admits that it is taking material that has been acquired by complainant as the result of organisation and the expenditure of labour, skill, and money, and which is saleable by complainant for money, and that defendant in appropriating it and selling it as its own is endeavouring to reap where it has not sown, and by disposing of it to newspapers that are competitors of complainant's members is appropriating to itself the harvest of those who have sown.'

1995(4)SAp848

In the *Atlas Organic Fertilizers* case Van Dijkhorst J considered a number of authorities and came to the following conclusion at 188H-189A:

What is needed is a legal standard firm enough to afford guidance to the Court, yet flexible enough to permit the influence of an inherent sense of fair play.

I have come to the conclusion that the norm to be applied is the objective one of public policy. This is the general sense of justice of the community, the *boni mores*, manifested in public opinion.

In determining and applying this norm in a particular case, the interests of the competing parties have to be weighed, bearing in mind also the interests of society, the public weal. As this norm cannot exist *in vacuo*, the morals of the market place, the business ethics of that section of the community where the norm is to be applied, are of major importance in its determination.

Public policy as criterion for unlawfulness in delict is well-known in our law; it has the stamp of approval of our highest Court. In *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) at 597A the basis of liability was held to be that:

'.. die regsoortuiging van die gemeenskap verlang dat die late as onregmatig beskou behoort te word en dat die gelede skade vergoed behoort te word ..."

This reasoning has been endorsed by the Appellate Division: see *Schultz's case supra* at 678J-679C.

Weir-Smith and Zeelie seek to justify their conduct by testifying that a practice has developed that

'... non-members are able to and do utilize a member to place orders through the applicant when they wish to do so. There is nothing 'unlawful' about this. It is part of the applicant's business. Linkwith is similarly using a member of the applicant Oust as if Linkwith was a non-member florist or a member of the public and the third respondent is utilising its Interflora membership number to place such orders through Interflora to anyone.'

Linkwith is the second respondent's trade name.

Assuming that this practice exists, I pass the following comments thereon:

1. If a member of the appellant so acts, that member will be contravening the provisions of rule 3.11 and would be acting unlawfully as a member of the appellant.
2. In the example given the non-member florist is not a competitor of the appellant as is the second respondent.

3. Two wrongs in any event do not make a right.

The statement that Linkwith is using a member of the appellant 'just as if Linkwith was a non-member florist or a member of the public' is naive in the extreme; Linkwith is a competitor and nothing else. The object which the second respondent, Weir-Smith and Zeelie wished to, and did, promote and achieve was the enhancement not only of the second respondent's reputation but the expansion of its business as a competitor of the appellant. In acting in this manner Weir-Smith and Zeelie, as directors and shareholders of the second respondent and as members of the appellant, deliberately breached the provisions of rule 3.11 to achieve what they otherwise could not do. Their excuse that members of the appellant and the appellant itself received an income from their machinations is of no consequence. That income was a necessary and unavoidable concomitant of their scheme.

1995(4)SAp849

I mention another example of the conduct of Weir-Smith and the first respondent: when the first respondent took orders for delivery of flowers elsewhere and intended to use the second respondent's network, Weir-Smith and/or the first respondent gave to the purchaser of the flowers a receipt on the appellant's form bearing the Interflora emblem of Mercury. The impression thus created is obvious.

The *modus operandi* of the second respondent, Weir-Smith and Zeelie can properly be described as piracy by stealth. Objectively tested, the general sense of justice of the community, the *boni mores*, would condemn this *modus operandi*.

In the *Dun and Bradstreet* case (at 219C-D), Corbett J referred with approval to the following extract from the American textbook, Prosser *Law of Torts* 2nd ed at 571:

Though trade warfare may be waged ruthlessly to the bitter end, there are certain rules of combat which must be observed. 'The trader has not a free lance. Fight he may, but as a soldier, not as a guerrilla.' In the interests of the public and the competitors themselves, boundaries have been set by the law, and numerous practices have been marked out as 'unfair' competition.

The second respondent, Weir-Smith and Zeelie may be described as not fighting as soldiers but as guerrillas or, as mentioned above, as pirates. The appellant has over many years built up and established a carefully planned network which is highly efficient. The second, fourth and fifth respondents have acted as aforesaid solely to enable the second respondent to reap where it has not sown. Analysed from all angles, the scheme devised and carried out by them is dishonest and can only be stamped as unfair competition.

In the circumstances it is unnecessary to consider the facts any further. The appellant was entitled in the Court *a quo* to orders in terms of its 'proposed order' (record at pp 359-60). Some of these orders are today redundant or of academic interest only, but they were tendered by the respondents in the Court *a quo* and incorporated in the 'proposed order'.

A further and subsidiary issue in the Court *a quo* which was raised on appeal is whether the fourth and fifth respondents were lawfully suspended as members of the appellant. This issue is also of academic interest only, as the fourth and fifth respondents have now resigned as members. (This was common cause between counsel before us.) In view of this fact, and also because the appellant is entitled to the main relief sought- an interdict in terms of prayer 2.1.1- it is unnecessary to decide this subsidiary issue. Even if we were to hold against the appellant on this subsidiary issue it would not affect costs to the extent that it would warrant a special order.

1995(4)SAp850

Lastly on costs. The parties agreed that this matter warranted the employment of two counsel. I agree that this is so, both in the Court a *quo* and on appeal. I also agree with the submission that the second, fourth and fifth respondents should be ordered to pay the costs and that their liability be joint and several.

I grant the following orders:

1. The appeal is upheld with costs which:

1.1 are to be paid by the second, fourth and fifth respondents jointly and severally;

1.2 will include those consequent upon the employment of two counsel.

2. The order of the Court a *quo* is set aside and the following substituted therefore:

2.1 orders are granted in terms of paras 1, 2, 3, 4, 5, 6 and 7 of the 'Applicant's proposed order' appearing at pp 359 and 360 of the appeal record;

2.2 the costs referred to in para 7 will include those consequent upon the employment of two counsel.

3. It is noted that there is no appeal against the following order of the Court a *quo*:

'The relief granted on 21 July 1992 in terms of prayers 3.3 and 4.3 of the notice of motion will be determined by the trial Court.'

Joffe J and Duke AJ concurred.

Appellant's Attorneys: *Dykes, Daly*, Pretoria. Respondents' Attorneys: *J GusAckerman*, Florida; *Adams & Adams*, Pretoria.

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