



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 2679/2016

In the matter between:

MARCOR KONSTRUKSIE BK

Applicant

and

MYLENE BOCSH

First Respondent

ANNALIEN BAKKER

Second Respondent

ICALC TRAINING ACADEMY (PTY) LTD

Third Respondent

HEARD ON: 1 SEPTEMBER 2016

JUDGMENT BY: MHLAMBI, AJ

DELIVERED ON: 08 June 2017

MHLAMBI, AJ

Introduction

- [1] The applicant seeks an order to interdict and restrain the respondents from using and imparting any information of the business of the applicant which they had access to or obtained from its Pastel computer software programme on 1 June 2016. The respondents should furthermore be ordered to deliver to the applicant's attorneys a schedule of the confidential information downloaded by them to any electronic source within three days of the granting of the order, alternatively a written declaration that they did not download any such confidential information. Should the Respondents have downloaded any confidential information they be ordered to destroy it in the presence of the Sheriff for the district of Welkom upon service of the copy of the order on them with the schedule referred to above and to pay costs of the application jointly and severally.

Purpose of the application

- [2] The applicant stated in his founding affidavit that the interdictory relief sought was in essence an order to restrain the respondents from using personal, private and confidential information pertaining to the applicant which was unlawfully obtained by them on 1 June 2016 and also ordering them to deliver to his attorney a schedule of information so obtained and to destroy such

information in the presence of the sheriff of the High court for the district of Welkom.

The applicant's case

- [3] The applicant is primarily a construction business involved mainly in the construction of MTN cellular transmitter towers throughout the Republic of South Africa. Its confidential information is stored on a Pastel computer business management software program. Marius Smit is the only member of the applicant who appointed one Jackie Klopper on an independent contractor basis to assist with the financial management of the business.
- [4] On her advice, he purchased the Pastel software programme at the beginning of May 2016. He was allocated with a unique username / password known only to himself, Klopper, his personal assistant, Zurika Barnard and the second respondent who assisted and had a business connection with Klopper. The third respondent also utilised the services of Klopper, but the relationship between Klopper and the third respondent subsequently soured.
- [5] On 1 June 2016, the first Respondent telephoned Barnard and informed her that she was busy with a fraud case against Klopper. On being informed to communicate with Smit if she required information, the first respondent advised Barnard that she had unsuccessfully contacted him on his cell phone. The first respondent handed the telephone receiver to the second

respondent to continue the discussion. Barnard obliged to second respondent's prompts and requests to provide her with the information pertaining to the applicant's business Pastel programme, inter alia usernames/ password, serial numbers and the like, which enabled her to gain full access to the confidential information.

- [6] Barnard was led to believe by both respondents that they required in particular the serial numbers to establish whether Klopper had incorrectly downloaded the third respondent's Pastel onto the applicant's computers. Marius Smit stated in the founding affidavit that he did not know whether the respondents did in fact perform a download or not but they did have full access to the confidential information and the opportunity to do so.
- [7] Having given the information, and as an afterthought, Barnard contacted and informed Smit of what had happened. He and his wife, Angelique Smit, immediately went to the business of the third respondent with the sole purpose of confronting Bosch. Having being directed to her office, he asked the first respondent why she misled Barnard to obtain access to the applicant's Pastel software. She replied and said that Pastel had provided her with certain information. As she said she had a client with her and could not speak to him, he informed her that the matter had to be resolved and retired to the reception area.

- [8] Five minutes later the respondent's attorney, Mr Edrich du Preez arrived, enraged and pointing his finger in the direction of his wife and shouting at her that she did not know the amount of trouble she was in. Having explained the purpose of his visit to Du Preez, the latter went to the first respondent's office, returned a few minutes later and apologised that he had mistaken him for someone else. Du Preez then made defamatory allegations about Klopper being involved in fraud.
- [9] Du Preez ushered him and his wife into the boardroom where he, Smit, explained to him fully what Barnard told him. Du Preez went to the first respondent's office and on his return, he stated that there was a big misunderstanding ("n groot misverstand"). Smit emphasised to him that as far as he was concerned, the infringement of the confidential information was unlawful and in fact criminal, whereafter he left the building. He consulted with his attorneys on 2 June 2016 and, due to business commitments, was only able to consult with counsel on Thursday, 9 June 2016. Given the devious and fraudulent means used by the respondents to obtain access to the confidential information, he had no doubts that the respondents would not give an undertaking not to use the confidential information in anyway whatsoever.

The respondent's case

- [10] The opposing affidavit was deposed to by the first respondent in her capacity as the company director by virtue of a resolution by

the third respondent dated 14 June 2016. She stated in her affidavit that there was no justification in the application since it was founded mostly on speculation. She denied that she and the second respondent downloaded any confidential data from the applicant's computer system, could not have done it and therefore could not make it available to any third party.

- [11] She is a mechanical engineer and the third respondent is a training academy and renders educational services. They pose no threat to the applicant as they are not in the same line of business, neither do they deal with MTN as a client nor have any knowledge, interest or affiliation with the applicant's business. During the latter part of 2015 negotiations took place with Klopper to be employed as a lecturer by the third respondent as she had proper knowledge and training to do the bookkeeping of the ordinary business like the applicant's. Klopper assured them that she had several clients that would be interested to enter into an agreement with the third respondent to do their bookkeeping. On this basis an agreement was concluded in terms of which Klopper would be paid a salary of R20 000.00 per month.
- [12] Time passed and despite Klopper alleging that several clients, including the applicant, were billed, no money was deposited into the account of the third respondent. This gave rise to a concern that Kloppers was not earning her salary. She also caused financial harm to the third respondent in the manner that she dealt with third respondent's finances as the person responsible for its

financial administration. Her services were suspended on 13 May 2016. She terminated her services on 17 May 2016.

[13] Third respondent bought the computer program called "Pastel" from Sage Pastel and it was delivered by way of computer discs which were then loaded onto the purchaser's computers. On termination of her duties, Klopper had in her possession the third respondent's computer discs containing the Pastel program. On demand she delivered to the third respondent someone else's outdated and old sets of discs and not the discs that were bought. As at the time of this deposition, the third respondent's Pastel program was still in her possession.

[14] Enquiries were made to clients who were exposed to Klopper to establish whether they had downloaded the third respondent's programs or made use of the Pastel programs furnished by Klopper as she had no authority to provide them to any person. On 24 May 2016 the Pastel program was downloaded and it could only be done with the Pastel program in the possession of Klopper.

[15] On 1 June 2016 the first respondent called Smit on the landline as she did not have his cell number. As he was not in the office, she spoke to the lady on the line, presumably Barnard, advising her of the communication from Pastel that their discs had been used somewhere. She requested her to check on her system whether the software was used. She handed the phone to the

second respondent who understood the system better to discuss the matter further with Barnard. The first respondent asked the second respondent to apologise for any inconvenience caused should it turn out that the program used by the applicant was not the third respondent's. Barnard was very polite and she was in no way pushed to divulge any information other than to ensure that the program used was not the third respondent's. It was incorrect that first and second respondents wanted the serial numbers to establish that Klopper had downloaded the program. Second respondent only guided Barnard to ascertain whether the software was used or not. In support of their allegations, a letter from Sage Pastel dated 14 June 2016 addressed to the first respondent was attached to the opposing affidavit and marked annexure "M8". It confirmed that the serial number allocated to the third respondent was last registered on 24 May 2016 using the online registration of Pastel and that having an account number or serial number for the contract at Pastel did not mean that one had access to the financial information of a company.

The replying affidavit

- [16] In his replying affidavit, Smit mentioned that prior to the filing of the opposing affidavits, there was communication between his and the respondents' attorneys about his willingness to accept a declaration that no information was downloaded from the applicant's systems. Subsequently, his attorney Preller informed Du Preez by way of SMS of 15 June 2016 that the applicant

would be prepared to accept a declaration and an undertaking that if any information was obtained, it would not be used. Furthermore, the respondents must pay the costs until then. For the sake of completeness the SMS reads as follows:

“Het met klient en Mike gepraat. Klient is bereid om te skik dat die deklarasie en onderneming opgestel word. Mike het deurgegee hy sal dit doen. Dit word n bevel van die hof gemaak die 30 ste en jou klient betaal die kostes. Die onderneming kon direk na die insident gegee word en moes daar eers n aansoek kom voor dit gegee word. So nee geen onderhandeling op kostes nie. Ek laat jou weet”.

On 21 June 2016 Preller addressed a facsimile to the respondents’ attorneys referring to the communication of 15 June 2016. The second paragraph reads as follows:

“Geliewe kennis te neem soos aan u deurgegee is ons klient bereid om op die volgende basis te skik: Die nodige deklerasie (sic) word opgetrek en die onderneming word gegee deur u klient dat geen van die inligting afgelaai en / of gebruik en / of versprei is nie;”.

- [17] Respondents’ attorneys responded by way of an e-mail dated 22 June 2016 stating that the respondents did not obtain any of the applicant’s information and as the applicant insisted on the payment of costs despite their being willing to furnish a

declaration, the application would be opposed. The second paragraph reads as follows:

“Ons het instruksies vanaf ons klient bekom om hierdie aaspek te opponeer weens die feit dat daar reeds aan u telefonies meegedeel is dat ons kliente geen van u klient se inligting bekom het nie en was ons kliente bereid om ‘n deklarasie tot die effek te lewer maar het u aangedring op koste welke nie vir ons kliente aanvaarbaar is nie.”

Applicant’s attorneys responded in writing on the same day and paragraph 2 of their letter reads as follows:

“You only enquired (never tendered) on behalf of your clients, obviously with a view to settling the matter, whether our client would accept a declaration and each party pay their own costs, contending that although your clients accessed our clients system they had not obtained any of our client’s information (“...geen inligting van u klient bekom het nie ...”).

Paragraph 6 of the said letter reads as follows:

“To date hereof we have not received a declaration from your client, nor have we received an undertaking. We emphasize that you initially only enquired whether our client was prepared to accept a declaration and never mentioned that your client was prepared to give an undertaking. We are therefore somewhat surprised to hear that your client was prepared to give a declaration”.

The issues

- [18] Applicant's counsel submitted that the issues to be decided are whether the first and second respondents had unlawful access to the application on 1 June 2016 and that their conduct constituted unlawful interference in the applicant's business and costs. The respondent's counsel submitted that the issues for determination are costs, whether applicant had alternative remedies, why the applicant waited nine days before consulting with counsel and what happened on 1 June 2016 during the telephone call to the applicant's office by the respondents.

Applicable Law

- [19] The requirements for the granting of a final interdict are trite¹. The applicant would have to establish (a) a clear right, (b) unlawful interference with that right, actually committed or reasonably apprehended, and (c) the absence of any other satisfactory remedy². Both counsel referred me to the case of **Plascon Evans Paints LTD v Van Riebeeck Paints (Pty) LTD**³ for the application of the principles established therein in this matter. In my view the approach is correct as the applicants are seeking relief which is final of nature and the parties have not requested that any factual issues be referred for trial or evidence in terms of Rule 6(5)(g) of the Uniform Rules of Court. The interdict sought can be granted only if the facts as stated by the respondents

¹ *Van Deventer v Ivory Sun Trading 77 (Pty) Ltd* [2015] 1 All SA 55 (SCA) para [26]. See also *Setlogelo v Setlogelo* 1914 AD 221 at 227.

² *Ibid.*

³ *Plascon Evans Paints LTD v Van Riebeeck Paints (Pty) LTD* 1984 (3) SA 623 (A)

together with the admitted facts in the applicant's affidavits, justify the granting thereof. The court can decide the issues only if it is satisfied that there are no real and genuine disputes of fact⁴.

Analysis

[20] The wording and construction of prayers 2 to 5 in the notice of motion presuppose that the respondents were indeed in possession of the confidential information which forms the subject matter of the interdict. In prayer 2 use is made of the expression "using any information of the business which they had accessed or obtained of- or about the business". The New Oxford dictionary meaning of the verb "access" is, when it refers to computing, "gain access to, read, obtain, examine or retrieve (data or a file)". A list was then set out as to the type of information that was referred to. In particular paragraph 4 stated clearly that the respondents should be ordered to deliver a schedule of the confidential information downloaded by them, alternatively, furnish a written declaration that they did not download the information. Surprisingly, the construction of prayer 5 and the order sought appear to be conditional on the respondents having downloaded the conditional information. This poses a difficulty for me as it creates the impression that the applicant is uncertain of the factual basis whereupon his claim is based. Viewed from the affidavit of Marius Smit that he did not know whether the information was downloaded or not and in the absence of positive

⁴ *Nampesca (SA) Products (Pty) LTD v Zaderer and Others* 1999 (1) SA 886 (C) at 892 (H). See also *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E

evidence by the applicant's witnesses that the downloading did take place on 1 June 2016, it becomes apparent that the prayers are without foundation and cannot be sustained.

- [21] The Respondents' counsel argued, and correctly so, that it was not in dispute that the respondents would furnish the applicant with a declaration that they did not download any confidential information. This is in line with the alternative prayer in 4 and was stated in attorney Du Preez' communication with the applicant's attorneys. The correspondence between the attorneys indicates that a settlement or agreement could not be reached as the applicant insisted on the payment of costs and an undertaking that the respondents would not use the applicant's information that they "might have access to".

The events of 1 June 2016

- [22] It is clear that Smit was upset on the day he visited the third respondent's premises "with the sole purpose of confronting Bosch". Despite Du Preez' explanation that there was a big mistake ("groot misverstand"), he emphasised his standpoint that the respondents acted unlawfully and criminally and left the building without the matter having been resolved. It is evident that he neither demanded a declaration nor instructed his attorneys to do so and that the first time the idea came to the fore, was during the preparation of the application. The respondents' version is

that they never downloaded applicant's information on that day or any other. They simply made enquiries to protect their interests.

Absence of any other satisfactory remedy

[24] The applicant has to show the absence of any other satisfactory remedy. *In casu*, the applicant averred that it had no option but to approach the court for an interdict. The respondents stated that the applicant had more than one remedy: either to act civilly and responsibly through the parties' respective attorneys to secure an assurance that the respondents did not download the applicant's information or seek access to their computers to ascertain that it did not happen. I agree with this view.

Conclusion

[25] In the circumstances, and having thoroughly considered the total facts presented, I cannot find that there was an act which was prejudicial to or interfered with the applicant's rights. A rights invasion will be effected most often by way of physical conduct, but to prove the necessary injury, it is enough to show that a right has been invaded⁵. The applicant must show objectively that his apprehensions are well grounded and not just mere assertions. I am satisfied that there are no real and genuine disputes of fact. I am however not persuaded that the facts presented justify the granting of the orders sought and they are therefore denied.

⁵ *V & A Waterfront Property (Pty) Ltd and Another v Helicopter & Marine Services (Pty) Ltd and Others* 2006 (1) SA 252 (SCA) at 257F-258 A.

Costs

[26] In the result, the costs should follow the event.

Order

[27] The following order is made:

The application is dismissed with costs.

MHLAMBI, AJ

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