IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.
2015/02/10 ...... **DATE** ...... **SIGNATURE**

17/2/15

CASE NO: 33948/14

IN THE MATTER BETWEEN

AMIC TRADING (PTY) LTD — Applicant

and

DU PLESSIS WILLEM HENDRIK — First Respondent

IRVING JENNIFER VALERIE — Second Respondent

JUDGMENT

LEGODI, J

[1] In this matter I made an as follows:

"1.1 The first and second respondents are interdicted and restrained from:-

1.1.1 Copying or obtaining copies by any means of any of the applicant's information and communications stored on or otherwise contained on its email and file servers and or any backup drives wherever they may be situated, save such information and information as may be available in the public domain;

1.1.2 sharing, disseminating, publishing and/or utilizing for any unlawful purpose, or for any purpose aimed at causing the applicant embarrassment, harm or prejudice, any information and communications belonging to the applicant that is not in the public domain and/or which is confidential to the applicant, including all information and communications unlawfully obtained by the respondents from the applicant's information technology systems during and after their tenure of employment with the applicant, in whatever form that such information may exist. The respondents are further interdicted and restrained from using, sharing, disseminating, publishing and or utilizing for any purpose confidential information of the applicant currently in their possession (now or in future), specifically referring to the sale agreement entered into between the applicant and Redgwoods (Pty) Ltd and email communication between the directors of the applicant and Mr S Accolla dated September 2013 without the applicant's express permission, which permission will not unreasonably be with-held."

[2] The order was made on the 3 February 2015. I reserved judgment on the issue of costs. I now proceed to deal in this judgment with the issue of costs.

[3] The two respondents were both the employees of a company called AMIC Trading (Pty) Ltd, the applicant. The respondents were initially the employees of Redgwoods until their employment were transferred to the applicant. The first respondent had been employed by Redgwoods during February 2010 as a national risk manager and the second respondent as a personal assistant to one of the directors of

Redgwoods since 2005. When the applicant took over from Redgwoods, it allegedly had to restructure its operations and as a result it had to retrench about nine of its employees.

[4] The two respondents were amongst the employees who were to be retrenched. The respondents were bitter about the retrenchment and or the restructuring insofar as it affected them. For example, on the 19 September 2013 the first respondent is alleged to have displayed a vendetta against the applicant. On the 5 September 2013 a suggestion was made to the second respondent to be transferred to the applicant's head office in Durban. That meant that she had to relocate from Gauteng to Durban. When she refused to be relocated, she was offered a post as internal auditor at the applicant's branch in Stoneridge Johannesburg. She declined the position and resigned on the 19 September 2013. The resignation was launched orally to the applicant's human resources manager, one Mr Sergio Accolla who is also the deponent to the founding affidavit. It is alleged that the resignation was orally tendered in the most aggressive and rude manner, the first respondent allegedly resorting to personal insults against Mr Accolla.

[5] In an email sent to Mr Accolla on the 19 September 2013 at about 21h54, the second respondent sought to retract her resignation and apologized for her conduct. About six days following the retrenchments and or resignations of the two respondents, it is alleged that one Mr Mari, a former employee of the applicant who was retrenched during April 2013, referred a labour dispute against the applicant to the CCMA for unfair dismissal. The respondents also instituted labour dispute proceedings in the Labour Court, Durban. The actions are been defended by the applicant and are still pending in the Labour Court.

[6] Two documents emerged during the exchange of documents in the labour court. The one document was a sole agreement between the applicant and Redgwood and the other, was an email dated 4 September 2013 addressed to two directors of the applicant. In the email, is stated as follows:

> *"Retrenchment package for Wimpie as end of September: R228 588,96 (even though he resigned and then at one stage re-joined the company, the period that he left the employment was not longer than a year therefore his initial date (1 Feb*

2010) of engagement would stand). Here we are not obliged to pay relocation costs, our excuse is that for operational reasons we are relocating Head of Security function to Durban head office (he will raise the argument that can he not work out of a store and then will say NO because of operational reasons and we can justify this). So we would be liable for the package. His current basic is R71 205.00 per month and his current cost to company is R82 880.67.

Retrenchment package for Jenny as end of September: R149 700.32 (here we get away with this amount by telling her that we offer her a position in store for less than her salary (a salary that is in line with another person in that position, this would be defined as reasonable, naturally her skill set needs to one where she can do the job). So what we could do is offer her position as an admin supervisor (but we the offer needs to be once again reasonable) at a store or we create a position to work out of the store and offer her a reasonable amount as positions in stores are paid much lower than her salary. Should she reject the offer we retrench without paying her the severance package thus she gets nothing. Her current basic salary is R30 474.00 and her cost to company is R35 858.85".

[7] The second respondent obtained the email in the course of her work when she was working on her boss's computer, one of the directors. Because the email had direct bearing on her, she made a copy thereof. As regard the sale agreement between the applicant and Redgwoods (Pty) Ltd, it is not clear who was responsible for the disclosure thereof.

[8] This matter was argued on Tuesday 3 February 2015 after it was stood down on the 02 February 2015. The two respondents represented themselves. As I said, I made an order as indicated in paragraph 1 of this judgment. The order was made after having taken time to explain to the respondents what the court's *prima facie* view was. This was after counsel for the applicant indicated that he will only press for an order as in paragraphs 1.1.3 and 1.1.6 of the notice of motion. The rest of the reliefs sought in the notice of motion were abandoned at the instance of the applicant's counsel.

[9] The parties were therefore asked to address the court only on the issue of costs. Counsel for the applicant wanted the respondents to pay costs, the suggestion been that it substantially succeeded seen in the light of the order made.

[10] An order for costs is an exercise of discretion that has to be exercised judicially having regard to what is fair to parties. Judging by the positions held by both the respondents in Redgwood (PTY) Ltd; and later in the applicant, there can be no doubt that they would have been exposed to a lot of confidential information. The email which was sent out before their retrenchments or resignations, in my view, is extremely relevant to the dispute in the Labour Court. The email suggests that, the applicant never intended to act fairly to the respondents in the process of restructuring or retrenchment. I should not be understood to be making a final determination in this regard. What remains however, is that, the respondents laid their hands on it, whether accidentally or intentionally, it does not matter. The respondents want to use it in the Labour Court. As lay persons, they cannot be blamed for keeping and wanting to use the email. However, it is a confidential document that cannot be randomly used without the permission of the applicant or by an order of the court. I deliberately refrained from making a decision on this. I want to believe that the Labour Court will be in a better position to deal with the issue when it arises in that court.

[11] It is however of great concern that the applicant could deal with the respondents as suggested in the email. I think, the respondents would have been at pains to let it go when the present proceedings were instituted. The present proceedings had the potential to permanently deny them of the opportunity to use the email in the labour court. To burden them with an order for costs in the circumstances of, would in my view, be unfair. The initial proposed order was thus amended at the instance of this court to ensure that the respondents are not permanently and adversely affected in the labour court.

[12] The sale agreement referred to earlier in this judgment is also a confidential document. I am reluctant to express a view on the relevancy or otherwise of the document during the proceedings in the Labour Court. The fact remains, is a confidential document. In seeking to ensure that the respondents are not adversely affected in the labour proceedings, I made a draft order as amended, an order of the court.

[13] It looks like the basis for resisting the present proceedings was the email. In fact, the first respondent said so during argument. As I said, it would be unfair to burden the respondents with costs order.

[15] Consequently, each party is hereby to pay his or her own costs.

M F LEGODI
JUDGE OF THE HIGH COURT

FOR THE APPLICANT: **W P BEKKER**

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FOR THE RESPONDENTS: **IN PERSON**

MATTER HEARD ON: 03 FEBRUARY 2015

JUDGMENT HANDED DOWN: 16/02/2015