112/94

Case no: 570/93

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

MARTIN JANIT ..... First Appellant

SHELSTATON TWO (PROPRIETARY) LTD .. Second Appellant

AND

MOTOR INDUSTRY FUND ADMINISTRATORS
(PROPRIETARY) LTD ..... First Respondent

MOTOR INDUSTRY PENSION FUND ..... Second Respondent

Coram: HOEXTER, E M GROSSKOPF, EKSTEEN, VAN DEN HEEVER et HOWIE, JJ A

Heard: 23 May 1994

Delivered: 12 September 1994

J U D G M E N T

EKSTEEN, JA :

This is an appeal against an order granted by Myburgh J in the Witwatersrand Local Division interdicting and restraining the appellants from using the contents of certain tape recordings in a case pending in that Division between the parties, or in any other legal proceedings; from disclosing the contents of the recordings to any third party; and for the delivery up of the recordings and transcripts of them to the respondents.

It appears from the papers that

.... / 2

the second appellant, Shelstaton Two (Pty) Ltd ("Shelstaton") does business as a property developer, and that first appellant ("Janit") beneficially owns Shelstaton and is its "guiding mind". The first respondent is a private company which manages the affairs, i a, of second respondent. From approximately 1989 first respondent entered into various agreements with companies controlled by Janit in terms of which these companies developed various projects such as office blocks and shopping centres for first respondent.

During 1991 the relationship between the respondents on the one hand and

.... / 3

Janit and his companies on the other "soured". Matters seem to have come to a head when, on 19 August 1991, Shelstaton's attorneys wrote to the respondents' attorneys purporting to cancel some five development agreements extant between the parties. The grounds for such cancellation were alleged to have been conduct on the part of first respondent which amounted to an unlawful repudiation of the agreements, and which repudiation Shelstaton purported to accept. The letter went on to allege that certain employees of first respondent had defamed Shelstaton and that

> "such conduct actually renders it im-

possible for our client to remain contracted to your client in any way whatsoever",

and furthermore that

"such conduct can be construed as a repudiation of the said agreements which our client hereby accepts."

It also alleged that first respondent's conduct had caused Shelstaton to suffer damages estimated at some R300 million, and threatened to institute action forthwith to recover that amount.

The very next day - 20 August -

Janit in his capacity as a director of Shelstaton addressed a letter to one Pienaar, the chairman of the Motor Industry Employee's Union - i e the union whose members' pension contribu-

tions were held by second respondent and administered by first respondent. In it Janit informed Pienaar of the "major dispute" which had arisen between Shelstaton and the respondents, and warned him that unless the dispute were resolved immediately it could cost his members' fund "an amount in excess of R60 million". A copy of this letter was sent to the chairman and four other members of first respondent's board.

On 21 August Janit addressed a letter to the Registrar of Pension Funds informing him, also of the dispute and of the

"distastrous consequences for the

.... / 6

> pensioners if the dispute is not settled within the next few days."

He called on the Registrar to

> "intervene in this dispute as a matter of urgency, to assist to resolve the situation and to save the unnecessary losses of many millions of rands."

Again copies were sent to the chairman and the same four members of first respondent's board.

It seems fairly evident from these letters that Janit was attempting to rally support for his cause from the Motor Industry Employee's Union and from the Registrar of Pension Funds, and to bring pressure to bear on first respondent's board to negotiate a settlement of the dispute with him. In fact

.... / 7

in his replying affidavit Janit admits as much, and says that "at all times" he had sought to avoid litigation which he could ill afford. This attitude, is however, hardly consistent with his cancellation of all agreements with first respondent, and with the avowed impossibility of remaining contracted to it in any way whatsoever. It seems that, in truth, the termination of the contractual relationships was the last thing that he desired. Hence his immediate attempts to ensure that those relationships should continue - but preferably on his terms.

On 23 August respondents' attor-

neys replied to Shelstaton's letter of the 19th disputing that first respondent had repudiated any of the agreements, and asserting that consequently Shelstaton had no valid grounds for cancelling. The letter also denied that first respondent or any of its employees had defamed Shelstaton in any way. It construed Shelstaton's letter as

> "an unequivocal notice by your client to our client of your client's clear intention that it does not intend to be bound or perform its obligations under the aforementioned agreements."

This, it alleged, amounted to a repudiation of the agreements by Shelstaton, which repudiation respondents accepted.

.... / 9

This letter prompted Janit to in-

struct his attorneys to write a further letter

to Pienaar demanding an immediate response to

his earlier letter of 20 August, failing which

> "our client intends, through the media, if necessary, to convey its concerns directly to your members."

Then on 4 September Janit himself wrote to the

chairman of first respondent's board, Mr Ander-

son, requesting a meeting with him

> "to avert present misconceptions continuing and protracted and expensive litigation with resultant harm to both your Funds and my company."

After a series of allegations of maladministra-

tion and dishonesty on the part of members of

.... / 10

first respondent's board and of its administrative staff, Janit concluded by threatening that

> "unless you and your Board of Directors and members of the Trade Union are prepared to meet with me in the absence of lawyers and if necessary, on an off the record basis, I intend making all the facts known, and to pursue this matter until such time as all the people involved in this matter have been brought to task."

Copies of this letter were sent to Pienaar and to five members of first respondent's board.

First respondent's attorneys replied and pointed out that Janit's "letter writing campaign" amounted to an endeavour to bring improper pressure to bear on the respondents, and that unless it ceased forthwith

respondents would consider applying to court for an interdict. This seems to have had the desired effect and for a while Janit's letter-writing stopped.

These letters again seem to reflect a somewhat desperate attempt by Janit to undo the harm done to his company and to its sub-contractors by his initial cancellation of the development agreements. They are consistent with his previous attempts immediately after his purported cancellation, forcefully to influence the respondents to negotiate a settlement in order to reinstate the contractual relationship. The further

.... / 12

inference that Janit wanted such reinstatements to be on his terms is inescapable.

His next move was to issue summons against the respondents and two other companies on 8 April 1992 in which he claimed R40 million as damages suffered by himself and Shelstaton as a result of defamatory statements alleged to have been made by first respondent's general manager, Loock, and respondents' legal adviser, Breedt. The pleadings in this action do not form part of the papers before us, but in his judgment in the court a quo Myburgh J summarised the appellants' cause of action, and in argument before us Mr Slomowitz, who

.... / 13

appeared on behalf of the appellants, not only accepted the correctness of this summary, but indeed relied on it in his argument. In short it amounts to this - that on two occasions (January - August 1991, and January 1992) Breedt accused Janit and Shelstaton of bribing officials of first respondent, and that during June - August 1991 Loock accused Janit and Shelstaton of theft.

The day before the summons was issued, however, Janit wrote a long letter to each of the directors of the second respondent (who seem also to have been the directors of the first respondent) in which he explained

.... / 14

how efficiently Shelstaton had performed its first three development contracts with respondents; how during 1991 the respondents had commenced a "vendetta" against Shelstaton, obviously designed to bring an end to this relationship; and how he had been defamed by Breedt. He went on to tell them that he had written to the chairman of their board "on a number of occasions to request a meeting with your board to try and resolve differences" but that this request had been refused "in a most arrogant fashion" and hence that "the price that your Fund will pay for this act will be several millions of rands." He then

.... / 15

went on to detail various other alleged mal-practices by certain unnamed directors and warned that he would not rest "until a satis-factory answer is given to me and the members of your Fund."

This letter follows the same line as all Janit's previous correspondence, viz an attempt to coerce the respondents' directors to negotiate a settlement of their dispute with him by threats of dire conse-quences which he so confidently predicted. This attempt however, met with as little success as his previous ones, and the matter proceeded. In the course of the pleadings

.... / 16

Janit withdrew his allegations against Loock but increased his claim from R40 million to R113 648 051. This case was eventually set down for hearing on 10 March 1993. Shortly before that date Janit obtained a postponement due to his ill health. Then followed a number of settlement proposals by Janit to respondents, all of which were rejected. On 16 August 1993 respondents' attorneys wrote to Janit's attorneys indicating that respondents were not interested in settling the action on the basis offered by Janit, and on the same day respondents' attorneys received a fresh offer of settlement. The next day - 17 August - a

.... / 17

supplementary discovery affidavit was deposed to by Janit and served on respondents' attorneys. This affidavit purported to discover copies of tape recordings of three meetings of first respondent's Board of Directors respectively held on 26 January 1993, 9 February 1993 and 23 March 1993. These meetings took place long after the alleged defamation, and even after the issue of summons. Janit alleged that these copies had come into his possession after he had deposed to his original discovery affidavit of 9 September 1992. He gave no explanation as to how they had come into his possession. It is these tape recordings which form the subject matter of the interdict presently under

.... / 18

consideration.

At respondents' request they were given copies of the tape recordings to listen to. Shortly afterwards they received information from an undisclosed source to the effect that Janit had made copies of the tapes available to the press. This prompted them to write to Janit through their attorneys on 24 August saying -

> "1 We are instructed that Mr Martin Janit informed Mr Jowell (one of respondents' directors) that unless our clients meet his demands 'certain tape recordings and minutes damaging to the pension funds' which have already been made available to 'a newspaper' will be published upon Mr Janit's instructions.

.... / 19

2 Your client, Mr Janit, is requested to furnish us with an undertaking in writing by 12h00 tomorrow that no such publication will take place of any matter confidential to our clients or the pension funds administered by our clients. Failing such undertaking our clients will take such steps as they may be advised to take."

On 25 August Janit replied and denied having spoken to Mr Jowell "in recent times"; denied the allegations in 1 above; and concluded:

"In the circumstances there is no basis for your request for an undertaking, nor will one be given and, in any event, nor is our client capable of giving an effective undertaking on the terms requested by you."

.... / 20

Respondents then requested Janit to return to them "the original tape recordings, all copies thereof and all transcripts or notes and copies thereof" failing which an application to court would be made. Janit's attorneys replied that -

> "... what has been discovered are copies of tape recordings and not originals. Our client does not have original tape recordings. If our client were in possession of original tape recordings it would return them to your client as our client would not consider exerting the right to possession of property created and owned by your client. However this is not the case."

They then went on to say -

> "You make much of the confidentiality

.... / 21

> of matter on the copy tape recordings. Our client comments that your client is in a similar position to a public body with responsibilities towards its pensioners and members. One would not expect that your client has anything to hide from the public. Should our client be incorrect in this regard please advise us of the reasons why confidentiality is suddenly attributed to meetings whereas, in the past, this was not raised."

How Janit came to be in possession of these copies of the tape recordings is not in serious dispute on the papers. It appears that first respondent employed one A C Murray as committee secretary at the time when the relevant meetings were held. It was his duty to draw up the minutes of the meetings of first

.... / 22

respondent's board of directors. As an aid in the preparation of these minutes Murray was provided with a tape recorder and casettes with which he recorded the entire proceedings at the meeting. The confidential nature of these recordings had been duly impressed upon him.

During June 1993 Murray was dismissed from first respondent's employ. When he left, Murray stole the tape recordings of the three board meetings referred to above, and took them to Janit in order to embarrass first respondent. Janit admits that Murray approached him and offered him the tape recordings. He says -

.... / 23

"I suspected that Mr Murray did not own these tape recordings and was accordingly not prepared to accept delivery thereof. I did however take copies of the tape recordings when he offered them to me. It is these copies of the tapes which are in my possession and which have been discovered."

In the light of Janit's refusal to give any undertaking not to publish confidential matter contained on the tapes in his possession, respondents brought an application on 31 August 1993 in which they sought an order against Janit and Shelstaton in the following terms -

"1 That this matter be heard as one of urgency in terms of the provisions of rule 6(12)(a) and that the forms and service provided for in the rules be dispensed with;

.... / 24

2 That the first and second respondents (the present appellants) be and are hereby interdicted from:

2.1 using in evidence in Case 92/9714 Witwatersrand Local Division, or in other legal proceedings, the contents of tape recordings of meetings of the Board of Directors of the first applicant held on 26 January 1993, 9 February 1993 and 23 March 1993 or any other recordings of meetings of the Board of Directors of the first applicant which the respondents may have in their possession ('the discovered recordings');

2.2 disclosing the contents of the recordings to any third party.

3 The first and second respondents be and are hereby directed to:

3.1 disclose under oath in an affidavit to be delivered to the applicants' attorneys within 6 hours from this order being granted the names of all persons and/or entities to whom the

.... / 25

respondents provided copies or transcripts thereof;

3.2 hand to the applicants' attorneys within 6 hours from this order being granted all copies and transcripts of the recordings in the possession of the respondents and/or their agents.

4 That the respondents, jointly and severally, pay the costs of this application on the attorney and own client scale."

In their application the respondents alleged that the tape recordings contained confidential business information, information subject to legal privilege, and other material quite irrelevant to Janit's defamation action. The theft of the recordings by Murray and his handing them over to Janit, so it was alleged,

.... / 26

constituted an unlawful invasion of the respond-
ents' privacy; that Janit's possession of them
was unlawful; and that his supplementary dis-
covery was mala fide and an abuse of the legal
process. They expressed the fear that Janit
would "give publicity in the financial newspapers
and magazines to certain of the discussions
which took place at the relevant board meetings"
and that he would disclose the confidential in-
formation relating to other litigation between
the respondents and third parties, to such third
parties.

In their founding affidavit the
respondents indicated that the transcriptions

.... / 27

would be placed before the presiding judge at the hearing of the application, and that they were not being annexed to the papers since they contained "matters confidential and privileged which may not be disclosed." In reply to this allegation Janit denied that they contained any confidential or privileged information and promptly proceeded to annex complete copies of the transcriptions of all three meetings to his replying affidavit.

After hearing argument Myburgh J granted an order in terms of prayers 2.1, 2.2 and 3.2. He refused to make an order in terms of prayer 3.1. He ordered Janit and Shelstaton,

.... / 28

jointly and severally, to pay the respondents' costs (as between party and party), which costs were to include the costs of two counsel. It is against these orders that the present appeal is directed.

The papers reveal that what primarily prompted the respondents to approach the court, was the desire to prevent Janit from publishing in the press the confidential information of what had transpired at their board meetings, and from disclosing it to third parties. That this was their main concern appears from their letter of 24 August. In it they sought an undertaking from Janit that he

.... / 29

would not publish that information. It was his refusal to give such an undertaking and his denial of any confidentiality that led directly to the application being launched. The relief sought in this respect was embodied in prayer 2.2, and it will be convenient therefore to deal firstly with this aspect.

It is not disputed that the respondents have a right to conduct the meetings of their board of directors in strict confidence so that any matters affecting the company may be discussed freely and openly. In his judgment in Sage Holdings Ltd and Another v Financial Mail (Pty) Ltd and Others 1991 (2) SA

.... / 30

117 (W) at 132 I - 133 A Joffe J held that -

> "In exercising the right to trade and carry on a lawful business, a company or other juristic person would be entitled to regard the confidential oral or written communications of its directors and employees as sacrosanct and would in appropriate circumstances be entitled to enforce the confidentiality of the aforesaid oral and written communications. To my mind, such right would in appropriate circumstances be enforceable against whomsoever is in possession thereof and whomsoever seeks to utilise it. The fact that the person who is in possession thereof was not party to the unlawful conduct in obtaining it does not exclude the right which the applicants would have."

This view of the law was approved of by this court on appeal (Financial Mail (Pty) Ltd and Others v Sage Holdings Ltd and Another 1993 (2)

.... / 31

SA 451 (A) at 464 D-F). In delivering judgment in that case Corbett CJ quoted with approval the dictum of Griffiths L J in Lion Laboratories Ltd v Evans and Others (1994) 2 All E R 417 at 433 d-e that -

> "There is a public interest of a high order in preserving confidentiality within an organisation. Employees must be entitled to discuss problems freely, raise their doubts and express their disagreements without the fear that they may be used to discredit the company and perhaps imperil the existence of the company and the livelihood of all those who work for it."

This would, in my view, apply a fortiori to the confidential discussions of a board of directors.

Murray's action in stealing the

.... / 32

taped recordings of those meetings and offering them to Janit was an unlawful invasion of their privacy for which there is here no justification. Janit concedes that when Murray offered him the original tapes he "suspected" that Murray did not own them. That was why piously he did not accept the originals. He concedes that he "did however take copies of the tape recordings when he offered them to me". It is not quite clear from this whether Janit made the copies himself, or whether he left it to Murray to make them. Janit, however, knew full well that the information on the tapes had been obtained by means of an unlawful in-

trusion upon the privacy of the respondents, and consequently any disclosure by him of that information would itself constitute an invasion of respondent's privacy (Sage Holdings Ltd and Another v Financial Mail (Pty) Ltd and Others (supra) at 463 C - F). In that case, while laying this down as a general proposition, Corbett CJ added (at 463 G) -

> "It might well be that, if in the case of information obtained by means of an unlawful intrusion the nature of the information were such that there were overriding grounds in favour of the public being informed thereof, the Court would conclude that publication of the information should be permitted, despite its source or the manner in which it was obtained."

.... / 34

In the present case there do not appear to be any such overriding grounds in favour of the general disclosure of this information, nor have any such grounds been suggested to us. Respondents therefore had a clear right to protect the content of their confidential discussions from disclosure.

Mr Slomowitz contended that on the papers the respondents failed to show that they had any reasonable apprehension that Janit would indeed publish the information or disclose it to any third party. He submitted that the letters written by Janit to Pienaar, to the Registrar of Pensions, to Anderson and

.... / 35

to the directors of the respondents were merely laudable attempts to settle the dispute between the parties and subsequently the ensuing litigation; and that none of this afforded grounds for any reasonable apprehension on the part of respondents that Janit might publish the information in the press or disclose it to third persons. I find myself unable to agree with this submission.

In his letter to Pienaar on 20 August 1991 Janit not only informed Pienaar of the dispute with respondents which could cost his members' fund "in excess of R60 million", but also went on to say that he was aware of

.... / 36

"various other developments of the ... Pension Fund, the results of which are, at the very least, highly questionable" and offered to give Pienaar full details of these if he could meet him.

When Pienaar did not respond to this letter Janit, through his attorneys, addressed another letter to Pienaar on 27 August in which he threatened to convey his concerns directly to the members of the trade union "through the media if necessary" unless Pienaar responded to his demands as a matter of urgency.

His subsequent letters of 4 and 11 September 1991 and 7 April 1992 contained further threats to expose the respondents' alleged

.... / 37

malpractices and not to rest until all concerned had been brought to book. It is against this background that one must see respondents' reaction to Janit's explicit refusal to give any undertaking that he would not publish the confidential information contained on the tapes when requested to do so, and, indeed, his refusal to recognize the confidentiality of any of the information.

That respondents entertained a real apprehension that Janit would procure the publication of confidential information from the tapes in the media, or at the very least would disclose it to third persons admits of very

.... / 38

little doubt. The question is whether such an apprehension was reasonable. The test is thus an objective one viz whether a reasonable man would, in the light of all the circumstances outlined above, have entertained such an apprehension (Free State Gold Areas Ltd v Merriespruit (Orange Free State) Gold Mining Co Ltd and Another 1961 (2) SA 505 (W) at p 518 A - C; Nestor and Others v Minister of Police and Others 1984 (4) SA 230 (SWA) at p 244 E - I and Minister of Law and Order and Others v Nordien and Another 1987 (2) SA 894 (A) at 896 G - I). The learned judge in the court a quo came to the conclusion that this question yielded an

.... / 39

affirmative answer. I agree. Janit brought matters to a head when he purported to cancel his contracts with respondents. This would seem to have been done with an ulterior motive, because, far from withdrawing his purported repudiation he immediately attempted to draw the trade union and the Registrar of Pensions into the dispute in order to coerce respondents to comply with his demands. Respondents' acceptance of his repudiation dismayed him, and prompted him to step up his pressure by dire threats of retribution against various directors

.... / 40

and employees of respondents for alleged mal-practices. He even threatened to invoke the assistance of the media if necessary to expose the respondents and their employees. When Murray stole the tape recordings of respondent's board meetings and offered them to Janit, he readily helped himself to the information they contained despite the fact that he knew that the tapes had been unlawfully obtained, and that they contained the private and confidential discussions of respondents' directors. In so doing he violated and infringed their legal right to privacy. This violation was subsequently compounded by making transcripts

.... / 41

of the recordings; by his refusal to give an undertaking not to publish the information; and by his denial that it warranted any confidential treatment. This conduct was, in my view, calculated to raise the gravest apprehension in the minds of the respondents, and indeed of any reasonable man, that Janit would in fact publish transcripts of the recordings or disclose them to third persons. In the light of Janit's conduct this apprehension which respondents harboured was, in my view, a reasonable one. This is borne out by his act of annexing the transcripts to his replying affidavit.

.... / 42

It has not been suggested that respondents had any remedy other than an interdict to protect the privacy of their discussions. The interdict sought in prayer 2.2 was therefore properly granted.

I turn now to consider the interdict granted in terms of prayer 2.1 i e prohibiting Janit from using the tape recordings in the defamation action or in any other legal proceedings. The transcriptions of these recordings which Janit annexed to his replying affidavit cover some 320 pages. They deal, generally speaking, with :

(a) Discussion of certain of first

.... / 43

respondents' investments; the nature of these investments and how they should be dealt with in the future; the administration of the affairs of first respondent - evident shortcomings and how they should be dealt with in future. All this amounts to general business information of a sensitive and confidential nature.

(b) Reports by Loock to the directors concerning

(i) the progress and chances of success of litigation between

.... / 44

the respondents and third parties; and

(ii) the progress and prospects of success in the defamation action instituted by Janit and Shelstaton; facts relevant to the action; proposed strategies of respondents' counsel in the action and particularly in respect of the cross-examination of Janit;

(iii) details as to future litigation between Janit and the respondents.

.... / 45

(c) Discussion of various other matters which can have very little if any relevance to the defamation action between the parties.

Mr Gauntlett, on behalf of the respondents, submitted that the privileged information contained in the transcripts - i e the reports by the respondents' legal adviser to the board on the progress of the legal proceedings against Janit and against other litigants, and the strategies respondents' counsel intended pursuing - could not be disclosed. This privilege, designed to protect the confidentiality of communications between a legal adviser and

.... / 46

his litigant client, Mr Gauntlett submitted, was one of the cornerstones of the functioning of our legal system, and one long recognized by our courts. The importance of this privilege and its ambit has been referred to i a in Wigmore on Evidence, (Mc Naughton Revision, 1961) Vol VIII para 2285 and 2291; Euroshipping Corporation of Monrovia v Minister of Agricultural Economics and Marketing and Others 1979 (1) SA 637 (C) at 643 H - 644 C and S v Safatsa and Others 1988 (1) SA 868 (A) at 885 D - 886 G.

As to the confidential information relating to respondents' business and administrative activities, Mr Gauntlett again relied on

.... / 47

Sage Holdings Ltd and Another v Financial Mail (Pty) Ltd and Others (supra) for his submission that inasmuch as the tapes had been obtained in an unlawful manner and had constituted an invasion of respondents' privacy not only by Murray but also by Janit, he should be prohibited from using that information not only in the defamation action but in any other proceedings.

Irrelevant matter, he submitted, would, in any event, be inadmissible at the trial and no good reason could be advanced for its discovery.

Mr Slomowitz did not seek to deny

.... / 48

that the transcripts contained matter that would attract professional privilege, and that the court was bound to exclude it from discovery, but submitted that this could be achieved simply by directing that the privileged portions be deleted.

He did not concede that any portion of the transcripts could be regarded as confidential, but submitted that, even upon that assumption, this would be no bar to discovery. The touchstone in this respect was admissibility in evidence at the trial. A trial court, he submitted, was not concerned with the way in which evidence had been obtained, but only

.... / 49

with the consideration whether it was admissible or not. The trial court was therefore the proper forum to decide this issue and not the court a quo.

In his judgment Myburgh J held that he had a discretion to disallow the evidence because of the improper way in which it had been obtained, and because of the privileged and confidential nature of the information contained on the tapes. He relied for this conclusion on a dictum of Lombard J in Shell SA (Edms) Bpk en Andere v Voorsitter, Dorperaad van die Oranje-Vrystaat, en Andere 1992 (1) SA 906 (O) at 916 E - I to the effect that there

.... / 50

was no good reason why a court, in a civil case, should not have the same discretion as it had in criminal cases to exclude otherwise admissible evidence because of the improper way in which it had been obtained. Courts in England have for a long time accepted that they have a right in criminal cases to exclude otherwise admissible evidence when justice and fairness to the accused require it, for example where the evidence was obtained by a trick or by fraud (cf Noor Mahomed v R (1949) AC 182; Kuruma Son of Kaniu v R (1955) AC 197 and R v Sang (1979) 2 All E R 1222 (H of L). In South Africa our courts have exercised a similar discretion (cf

.... / 51

S v Forbes 1970 (2) SA 594 (C) at 600 A-C and S v Lebea 1975 (4) SA 337 (W)). Although the discretion was referred to by this court in S v Mushimba en Andere 1977 (2) SA 829 (A) at 840 D-F and S v Mphalele and Another 1982 (4) SA 505 (A) at 513 B-E a decision as to its existence in our criminal law was left open. Until the dictum of Lombard J to which I have referred, there seems to have been considerable doubt as to whether any such discretion existed in civil cases (Lawsa Vol 9 para 496 pp 298-9, and Hoffmann and Zeffertt The South African Law of Evidence 4th ed at pp 291-2.) In the view I take of the matter,

.... / 52

however, it is not necessary to discuss this aspect any further.

As I have already pointed out, Janit's initial letter of 19 August 1991 - in which he purported to cancel the five agreements between the parties because of respondents' alleged unlawful repudiation of them - was written with an ulterior motive. Cancellation of the agreements was the last thing Janit wanted. This was apparent from his immediate and urgent attempts to draw the trade union and the Registrar of Pensions into the matter in an obvious attempt to bring pressure to bear on respondents to settle the matter with him on his

.... / 53

terms. Significantly this attempt was made even before the respondents had reacted to his letter of cancellation. When on 23 August respondents accepted Janit's repudiation and indicated their intention to treat the contracts as being at an end, Janit redoubled his efforts to retrieve the situation without apologising or expressing any regret for what he had done. Instead he resorted to allegations of mal-practice and dishonesty on the part of re-spondents' directors and administrative staff, and threats to make all this public "through the media if necessary", and not to rest until all concerned had been brought to book. These

.... / 54

threats were all directed at compelling respondent to enter into negotiations with him to reinstate their contractual relationship. To his dismay they did not achieve the desired effect. He then went further and issued summons for defamation claiming R40 million. At the same time - a day before the summons was issued - he made yet another attempt to get the directors of respondents to settle the whole dispute. In his letter to them he pointed to the "arrogance" of their chairman in refusing to meet with him, told them he had information of dishonest practices of some of them, and warned them once again of the price they were

.... / 55

going to have to pay. This letter, like his previous letters, was full of thinly veiled threats designed to instil fear of the consequences for them of a trial in open court, and a warning rather to settle while they could still do so. Again no success attended these efforts, nor did the subsequent increase of the claim to R113 648 051 bring respondents to heel. All Janit's overtures to settle the matter during 1993 were rejected. And then Murray approached him with the cassettes he had stolen from the respondents. This was an unexpected windfall for Janit. Now he had irrefutable and highly confidential information of respondents' business

.... / 56

discussions covering the first three months of 1993. He must have realized from the start how confidential and how sensitive this information was, and how embarrassing its disclosure would be to respondents. He also realized that it constituted an unlawful intrusion upon the respondents' privacy but did not hesitate to make himself a party to it. Exactly when he was offered and took the information is not disclosed on the papers. In their founding affidavit respondents pertinently pointed out that in his discovery affidavit Janit had not explained "when, where, how and from whom such tape recordings

were obtained." Janit's reply was simply that the discovery affidavit was in the usual form. He repudiated any suggestion of improper conduct or mala fides on his part.

All Janit's efforts after his initial letters of 19 August 1991 were persistently and continuously directed to persuading the respondents to settle the dispute and to restore their contractual relationship. Even the institution of his defamation action was directed to this end, as is evidenced by the letter he wrote to all respondents' directors the day before summons was issued. The probabilities are therefore overwhelming that the use to which he

.... / 58

intended putting the tape recordings would be directed to this same end. This was borne out by the fact that although his latest overture for a settlement had been rejected on 16 August 1993, a fresh offer of settlement was made that very day, and the supplementary discovery of the copies of the tapes was made the next day i e 17 August. It is not unreasonable to infer, in the light of all the attendant circumstances, that the discovery was so timed in order to constitute a disclosure to the respondents that he was in possession of the tapes in the hope that this would extort from them acceptance of his latest offer of settlement,

.... / 59

in preference to courting publication of their contents. It is conceded that portions of the transcripts were privileged and ought not to have been disclosed. The rest was private and confidential to the respondents whether it was relevant to the action or not. Anything relevant to the action was, in its very nature, confidential. Moreover the three meetings were held long after the alleged defamation and in fact just prior to and after the date set for the trial, so that the discussions could hardly yield anything pertinent to the action other than that which was clearly privileged.

.... / 60

In the light of all this the supplementary discovery of the unlawfully obtained tapes cannot be seen as an ordinary step in the course of litigation. On the contrary it amounts to an abuse of the process of the court directed to the attainment of an ulterior goal viz to compel respondents to reinstate their contractual relationship, moreover, on Janit's terms. The court is in duty bound to protect its process against such intolerable abuse. In my view, therefore, the court a quo was correct in interdicting Janit and Shelstaton from using the contents of the tape recordings in the defamation action between the parties. The further order prohibiting their use "in any other

proceedings", however, does not seem to me to be warranted on the papers. No "other proceedings" are alleged to be in progress between the parties or even to be contemplated, nor is there any allegation that Janit or Shelstaton intend using them in any proceedings other than the defamation action for the purposes I have mentioned.

The order that Janit should hand all copies and transcripts of the recordings in his possession to the respondents' attorneys, is one which, on the face of it, presents some difficulty. The copies and the transcripts did not belong to the respondents but were made

subsequent fo the theft of the original record-
ings. The proceedings for their recovery are
therefore not of a vindicatory nature. As I
have indicated above, it is not clear on the
papers whether Janit made the copies or whether
they were made by Murray.

In support of his submission that
respondents were entitled to the delivery up of
the copies and the transcripts Mr Gauntlett re-
lied i a on the judgment in English and Ameri-
can Insurance Co Ltd v Herbert Smith (1988)
F S R 232. In that case the papers of
counsel acting for the plaintiffs in an action
pending in the Commercial Court, were mistakenly

.... / 63

sent to the solicitors for the other side. The papers were clearly entitled to legal professional privilege. On the instructions of their clients the solicitors for the defendants read the papers and informed their clients of what they had discovered. They then returned the papers to the plaintiffs' solicitors. By notice of motion plaintiffs claimed an interlocutory order restraining the defendants from making any use of any information derived from the privileged documents, and for an order that the defendants deliver up to the plaintiffs or their solicitors "any note, letter written record (including any attendance note) or other

.... / 64

document within their possession or power containing any information derived from the bundle" - i e plaintiffs' counsel's bundle of papers. Both these orders were granted - though with certain qualifications which are not of any importance for present purposes. In his judgment Sir Nicholas Browne-Wilkinson V-C referred to the apparent conflict between the decision in Calcraft v Guest (1898) 1 QB 759 (CA) which had held that secondary evidence could be led as to the contents of a privileged document however it had been obtained, and Lord Ashburton v Pape (1913) 2 Ch 469 (CA) where an injunction was granted restraining the use of

.... / 65

confidential information contained in privi-

leged documents obtained from the applicant

by a trick. This apparent conflict, he held,

had been resolved by the Court of Appeal in

Goddard and Another v Nationwide Building So-

ciety (1986) 3 WLR 734 where it was held that

the position depended on whether the proceed-

ings were taken before the document was tender-

ed in evidence or not. The learned Vice-

Chancellor then went on (at p 236) to say -

> "If such proceedings are taken before the document is tendered, then the person entitled to the legal professional privilege is entitled to delivery up of the documents and the copies and to an injunction restraining the other side from making any

.... / 66

> use of them including the use of them in the proceedings which are pending."

He followed the decision in Goddard's case in making the orders to which I have referred. In that case, it must be borne in mind, it was the defendants' solicitors who had made the copies of documents contained in counsel's bundle before handing the originals back to plaintiffs' solicitors.

A subsequent English case in which an injunction was granted restraining the respondent from using information contained in certain privileged documents and ordering him

.... / 67

to return all copies of the privileged documents to the applicant is Derby & Co Ltd and Others v Weldon and Others (No 8) (1990) 3 All E R 762. In that case the applicants' solicitors had inadvertently disclosed documents to which legal professional privilege attached in their discovery, and had given the respondents' solicitors copies of these documents. The court held that the documents were of such a nature that respondents' solicitors must have realized that they had been inadvertently disclosed, and that therefore they were bound to return them.

In our courts consideration has

.... / 68

been given to the question whether, in granting an Anton Piller order, the court also has jurisdiction to order the attachment of an article in which the applicant had no proprietory right as an interim measure pending a claim for delivery up of the article. In Roamer Watch Co SA and Another v African Textile Distributors also t/a M K Patel Wholesale Merchants and Direct Importers 1980 (2) SA 254 (W) Cilliers AJ held at p 275 H - 276 A that it had such a jurisdiction where this was necessary "to render the principal remedy of an interdict effective". In Cerebos Food Corporation Ltd v Diverse Foods SA (Pty) Ltd

.... / 69

and Another 1984 (4) SA 149 (T) at 173 F - I the court held that it had no such power, but in Universal City Studios Inc and Others v Network Video (Pty) Ltd 1986 (2) SA 734 (A) at 756 A - B this court left the matter open.

However, in what amounted to an obiter dictum (at pp 754 E - 755 E) the learned Chief Justice referred to the "inherent reservoir of power" which our Supreme Court undoubtedly has to regulate its procedures in the interests of the proper administration of justice. Recognizing that the court probably does not have inherent power to create substantive law, he pointed to the difficulties attendant upon

.... / 70

drawing a clear dividing line between substantive and adjectival law. In further elaboration of this right adverting to the matter before him - an Anton Piller matter - he expressed the view that where an applicant could establish a prima facie cause of action against a respondent, and where that respondent had in his possession certain specific documents which would constitute vital evidence in substantiation of applicants cause of action "(but in respect of which applicant can claim no real or personal right)" it would not be beyond the inherent powers of the court to order that that evidence be preserved by copying the

.... / 71

documents or even by placing them temporarily in the custody of a third party.

In his judgment in the court a quo Myburgh J does not deal specifically with this prayer, but seems to have granted the order on the basis that he had a discretion "to exclude evidence which was unlawfully obtained." Having come to the conclusion that he ought to exercise that discretion in favour of the respondents he simply proceeded to grant prayers 2.1 and 3.2.

In the present case, as I have indicated, it is not clear on the papers whether Janit made the copies from the original

.... / 72

tape recordings, or whether Murray did so. It would appear, though, from Janit's replying affidavit that Murray offered to give him the original tape recordings. He immediately suspected that Murray did not own them but that they belonged to respondents - in other words that Murray had stolen them from respondents. That was apparently the reason why he was not prepared to accept the originals. He was, however, very eager to have the information contained on the tapes. In the absence of any explanation from Janit as to the nature of the surreptitious transaction whereby he acquired the copies from Murray, or how the

.... / 73

copies came to be made, the inference seems to be irresistible that Janit either had the copies made himself or that he asked Murray to make them for him. In either event they would have been made at his insistence at a time when he knew full well that acceptance of the tapes would make him a party to the unlawful invasion of respondents' privacy. Nevertheless he took the copies and had transcripts of their contents made. The cassettes and the paper on which these copies and transcriptions are contained were of minimal intrinsic value. It is the information recorded on them, which was of great value both to Janit and to respondents and in

.... / 74

which respondents may be said to have had a proprietary interest. Having regard to Janit's past behaviour and to his threats to publicise respondents' private affairs and alleged mal-administration widely - even through the media if necessary - respondents were, in my view, justifiably concerned at what might leak out if Janit was allowed to remain in possession of the copies and transcripts containing not only legally privileged matter, but also a mass of confidential and sensitive information - information to which he was not entitled and which had been unlawfully obtained. I am not un-mindful of the fact that respondents also asked

.... / 75

for and were granted an order restraining Janit from disclosing the contents of the recordings to any third party, and that the additional order to deliver up the copies and the transcripts to respondent might be seen as presupposing that Janit would disregard the interdict (see Cerebos Food Corporation case, supra, at p 173 G - I). However, in the circumstances of the present case - and particularly in the light of the circumstances pertaining at the time when the application was brought and when the judgment in the court a quo was given - it was a salutary precaution to take, because if Janit were left in possession he might well

.... / 76

have been "tempted to commit a breach of the injunction which he would not otherwise commit" (per Russell J in Mergenthaler Linotype Co v Intertype Ltd (1926) 43 RPC 381 at 382). It was therefore an order which, in the present case, justice reasonably required in order to render the protection by the court of respondents' confidential information effectual. In these circumstances the court has inherent power to make such an order.

Although, therefore, the appellant has succeeded in obtaining an amendment to the first order made by the court a quo he cannot be said to have been so substantially success-

.... / 77

ful on appeal as to affect the order of costs.

In the result the following orders are made:

(1) The order made by the court a quo is altered by the deletion of the words "or in any other legal proceedings" in 1.1 ;

(2) Otherwise the appeal is dismissed with costs, such costs to include the costs of two counsel, as well as the costs incurred in the application for leave to appeal.

J P G EKSTEEN, JA

HOEXTER, JA)
E M GROSSKOPF, JA)
VAN DEN HEEVER, JA) CONCUR
HOWIE, JA)