

SOUTH AFRICA / JUDGMENT

All G 2 G Ltd and Others v Janse Van Rensburg and Others (59644/2020) [2021] ZAGPPHC 731 (4 November 2021) [2021] ZAGPPHC 731

COURT

North Gauteng High Court, Pretoria

BEFORE

AC Basson

CASE / FILE NUMBER

59644/2020

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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO.: 59644/2020

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

In the matter between:

ALL G 2 G LTD FIRST

APPLICANT

CJ PROFESSIONAL SERVICES SECOND

APPLICANT

MEADOWS SALARY & ADMIN SERVICES (PTY) LTD THIRD APPLICANT

(Applicants in the application for leave to appeal)

and

KAREN ELIZABETH JANSE VAN RENSBURG FIRST RESPONDENT

ELMARIE IBANEZ SECOND RESPONDENT

CAROL JOUBERT THIRD RESPONDENT

(Respondents in the application for leave to appeal)

APPLICATION FOR LEAVE TO APPEAL

AC BASSON, J

[1] On 25 November 2020 this court granted three orders in favour of the respondents: (i) an order in respect of an application for security for costs; (ii) an order granting the application to strike out and; (iii) an order dismissing the main application. The applicants now seek leave to appeal against the orders relating to the application to strike out and the dismissal of the main application.

Test for leave to appeal

[2] The merits of the application for leave to appeal must be considered against the background of the test for leave to appeal. It is now trite that section 17(1)(a)(i) of the Superior Courts Act[1] have raised the threshold for granting leave to appeal. Bertelsmann, J in *The Mont Chevaux Trust (IT2012/28) v Tina Goosen & 18 Others*[2] explains:

"[6] It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see *Van Heerden v Cronwright & Others* 1985

(2) SA 342 (T) at 343H. The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against."

[3] The Supreme Court of Appeal in *S v Smith*[3] also had occasion to consider what constituted prospects of success in terms of section 17(1)(a)(i):

"[7] What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."

[4] There must therefore exist more than just a mere possibility that another court will, not might, find differently on both the facts and the law.

Merits of the application

- [5] The applicants sought an urgent interdict relating to the return and use of certain information, pending the outcome of an action for damages (prayer 3 of the Notice of Motion).
- [6] Four months after the dismissal of the application the applicants (now the plaintiffs) instituted an action against the respondents and a fourth person (now the defendants) out of this court under case number 17539/21. It appears from the particulars of claim that the plaintiffs claim approximately R12 million from the defendants, which claim is essentially premised upon the same allegations relied upon in the urgent application. This action now instituted was foreshadowed in prayer 3 of the notice of motion in the urgent

application.

- [7] The respondents submitted, and I am in agreement with the submission, that having regard to the fact that action has now been instituted

against the respondents, the “proverbial horse” has now bolted in that, on the applicants’ own version, the respondents have made use of the information and as a result the applicants have suffered damages in excess of R12 million. That being the case, I am of the view that the information no longer has the necessary quality of confidentiality and that the information is no longer deserving of protection. An interdict will therefore not be granted in these circumstances and renders this application in my view academic. Also, the applicants have now exercised the alternative relief which they contended they did not have at the time when they brought the urgent application. The trial court will therefore be in a position to determine the very same issues canvassed before his court and as such the trial will constitute the alternative remedy the applicants asserted in their founding affidavit they did not have. If the applicants are successful at trial and establish that the confidential information has been misappropriated, they may well succeed in claiming such damages as they can prove.

The case made out in the founding affidavit

- [8] Although I am primarily of the view that the application for leave to appeal has become moot, I will nonetheless briefly deal with some of the other reasons why this application cannot succeed. An applicant must make out a case on its founding affidavit. Only in exceptional cases will an applicant be allowed to make out or supplement a case in its replying affidavit and may thus run the risk that those (additional) allegation be struck out.
- [4] The applicants have failed to do so even in circumstances where they have already accessed the respondents’ computers. After the founding affidavit was filed, another attempt was made to access the respondents’ computers to find further information upon which they could rely. These circumstances, particularly where the applicants unlawfully obtained access to the private emails of the respondents, cannot, in my view, be regarded as “exceptional circumstances” entitling the applicants to supplement or bolster the case made out in the founding affidavit. (I will briefly deal with the admissibility of the evidence hereinbelow.)

- [9] Also, the applicants deliberately omitted to attach annexures F22 to F48 to the founding affidavit whilst contending that these documents contain the Information which they sought to protect. This, in my view, in any event, rendered the application defective and as a result had to fail.

Inadmissible evidence

- [10] It is only in the replying affidavit that the applicants rely on annexure RO1 to bolster their case for the interdictory relief sought.
- [11] The respondents applied to strike out material portions of the replying affidavit on the grounds that on the basis that (i) The evidence was inadmissible and/or was illegally or improperly obtained contrary to the provisions of the legislation and (ii) The evidence was inadmissible and/or was illegally or improperly obtained and was protected by legal professional privilege and/or litigation privilege.
- [12] I have fully dealt with the reasons for my finding that the offensive paragraphs fall to be struck out. I do not intend rehashing my findings. The applicants are highly critical of the decision of the court in striking out the offending paragraphs.
- [13] I have considered the submissions filed on behalf of the applicants and the case law referred to in support of the submission that the rule regarding unlawfully obtained evidence is not absolute and is subject to a discretion to exclude such evidence. In this regard the court was referred to, inter alia, *Waste Products Utilisation (Pty) Ltd v Wilkes and another*.^[5] The court was also referred to *Gaertner & others v Minister of Finance*^[6] where the court held as follows:

“[49] Privacy, like other rights, is not absolute. As a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks. This diminished personal space does not mean that, once people are involved in social interactions or business, they no longer have a right to privacy. What it means is that the right is attenuated, not obliterated. And the attenuation is more or less, depending on how far and into what area one has strayed from the inner sanctum of the home.”

- [14] It is accepted that privacy is not an absolute right and it is also accepted that information that was illegally obtained is not

necessarily protected. But that does not mean, as the court in *Gaertner*^[7] pointed out that the right is “obliterated”. It merely means that the right is “attenuated”. Ultimately it is a matter of discretion and the weighing up of all the relevant factors whether to allow the illegally obtained evidence to be used. As explained in *Waste Products Utilisation (Pty) Ltd v Wilkes and another*:^[8]

“Unlawfulness

The general rule is that if evidence is relevant it is admissible, and the court will not concern itself with how the evidence was obtained: *Kuruma Son of Kaniu v R* [1955] AC 197 (PC) ([1955] 1 All ER 236). However, the Court has a discretion to exclude evidence improperly obtained: see *Motor Industry Fund Administrators (Pty) Ltd and Another v Janit and Another* 1994

- (3) SA 56 (W) at 64A - B where Myburgh J said: 'In my view, as a matter of public policy, a Court should have a discretion to exclude evidence which was unlawfully obtained.' See also *Fedics Group (Pty) Ltd and Another v Matus; Fedics Group (Pty) Ltd and Another v Murphy and Others* 1998
- (2) SA 617 (C) at 636C - D; *Lenco Holdings Ltd and Others v Eckstein and Others* 1996
- (2) SA 693 (N) at 704C and *Protea Technology Ltd and Another v Wainer and Others* 1997 (9) BCLR 1225 (W) at 1234. At the same time, the Court does retain a discretion to admit evidence unlawfully or improperly obtained if fairness and public policy so dictate."

[15] A court in considering the admissibility of information thus considers a host of factors and weighs up competing interests. This is a discretion in the true sense and higher courts are generally reluctant to interfere with such a discretion. In this regard the Constitutional Court in *Hotz and others v University of Cape Town*[9] held as follows:

"[25] In Trencon this court dealt with the power of an appellate court to interfere with the High Court's order. It held that the proper approach on appeal is for an appellate court to ascertain whether the discretion exercised by the lower court was discretion in the true sense or whether it was a discretion in the loose sense. The distinction in either type of discretion, the court held, 'will dictate the standard of the interference that an appellate court must apply'. This court remarked, per Khampepe J, that '(a) discretion in the true sense is found where the lower court has a wide range of equally permissible options available to it' [para 85]. In such instances the ordinary approach on appeal is that 'the appellate court will not consider whether the decision reached by the court at first instance was correct, but will only interfere in limited circumstances; for example, if it is shown that the discretion has not been exercised judicially . . .'. 'This type of discretion has been found by this court in many instances, including matters of costs . . .'. The question remains whether the High Court, in considering the relevant circumstances and available options, judicially exercised its discretion in mulcting the applicants with costs."

- [16] In this regard this court considered that the evidence was illegally obtained. What compounded matters was the fact that the manner in which the evidence was obtained undermined the principle of legal privilege which is an important principle in our law. I am not persuaded in these circumstances that a discretion should have been exercised in favour of the applicants.
- [17] I am also not persuaded by the argument that because the respondents were employed by the applicants, that somehow gave the applicants the right to access information from the private e-mail accounts of the respondents,

[18] Apart from the fact that I am not persuaded that another court would interfere with the discretion exercised in this matter, the matter has now, as already pointed out, become moot in light of the action that was now instituted against the respondents.

Order

[19] In the event, the application for leave to appeal is dismissed with costs including the costs of senior counsel where so employed, such costs to be paid by the applicants jointly and severally

AC BASSON

JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 4 November 2021.

APPEARANCES

For the 1st, 2nd & 3rd Applicant: ADV. J BRAND SC

ADV. D A DE KOK

Instructed by: LANGENHOVEN PISTORIUS

MODIHAPULA ATTORNEYS

For the Respondents: ADV.

M M ANTONIE SC

Instructed by: WERKSMANS

ATTORNEYS

[1] Act 10 of 2013.

[2] 2014 JDR 2325 (LCC).

[3] 2012 (1) SACR 567 (SCA).

[4] Bayat v Hansa 1955

(3) SA 547 (N) at 553C – E: “I come now to Mr. Warner's application to strike out paragraphs from the applicants' replying affidavits. He referred

to Mauerberger v Mauerberger, 1948

(3) SA 731 (C) at

p. 732, and the cases there cited and relied upon the principle which I think can be summarised as follows, namely, that an

applicant for relief must (save in exceptional circumstances) make his case and produce all the evidence he desires to use in support of it, in his affidavits filed with the notice of motion, whether he is moving ex parte or on notice to the respondent, and is not permitted to supplement it in his replying affidavits (the purpose of which is to reply to averments made by the respondent in his answering affidavits), still less make a new case in his replying affidavits. Mr. Friedman, in opposing the application to strike out, made the submission that in matters of urgency a measure of latitude is allowed to an applicant who is moving ex parte before the Court for a rule nisi. He also submitted, relying upon *de Villiers v de Villiers*, 1943 T.P.D. 60, that the power to strike out averments in affidavits should be used sparingly. Assuming that an applicant moving as a matter of urgency is entitled to some indulgence, I do not consider that the present application could rightly be described as a matter of urgency, but in any event I consider that, even if it were, the applicants have gone much too far in their replying affidavits, as I shall show. My reasons for concluding that this could not rightly be described as a matter of urgency are as follows:..”

[5] 2003 (2) SA 515 (W) at 549J et seq: “The general rule is that if evidence is relevant it is admissible, and the court will not concern itself with how the evidence was obtained: ... However, the Court has a discretion to exclude evidence improperly obtained: see *Motor Industry Fund Administrators (Pty) Ltd and Another v Janit and Another* 1994

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[6] 2014 (1) SA 442 (CC).

[7] *Supra*.

[8] 2003 (2) SA 515 (W) at 549 – 550.

[9] 2018 (1) SA 369 (CC).

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