IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

Case No. 20/1732

In the matter between:

M, S **APPLICANT**

And

B, A **RESPONDENT**

Coram: Millar AJ

Heard on: 01 September 2020

Delivered: 11 September 2020 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GLD and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 11 September 2020.

Summary: Civil Law and procedure - requirements for granting of a final interdict - whether claim for damages an appropriate alternative remedy for ongoing infringement of rights to dignity and privacy - finding that due to ongoing nature of infringement damages not appropriate - final interdict granted.

ORDER

It is ordered:

[1]. Paragraph 3 of the Order granted on 28 July 2020 reading:

> *"3. The respondent is interdicted and restrained from copying, using, sharing, disseminating, distributing and/or publishing the applicants private and confidential information being, Contacts, WhatsApp messages, Instant Messenger, MMS, I-Message, SMS, photographs, videos, and/or audio files emanating and/or downloaded from cellular number […] and/or the […] account"*

is confirmed.

[2] The Respondent is ordered to pay the costs of this Application on the scale as between attorney and client.

JUDGMENT

MILLAR, A J

[1] This 28 July 2020, the Applicant approached the urgent Court *ex parte* and in camera for an order to interdict the use and distribution of certain personal information which had come into the possession of the Respondent.

[2] The Applicant and Respondent were previously married to one another on 2 May 2002 and were divorced on 13 November 2015. The parties have two minor children (one of whom is the biological child of the Respondent – born on 2 November 2005) and in consequence of this, have had to interact with one another in the interests of those children.

[3] At the time the parties divorced, the Applicant's personal email address was hosted as part of the Respondent's "iCloud account" and her cellular telephone paid for by one of the Respondent's companies.

[4] This state of affairs persisted for a number of years without incident. It is not disputed that the Respondent knew that the email address and the contents of

the particular email account were the personal property of the Applicant or that cell phone number and sim card, although paid for by his company, were the personal property of the Applicant.[3]

[5] On 2 September 2019, the Respondent, unbeknown to the Applicant, accessed and copied all the emails in the Applicant's email account. According to the Respondent, he looked at these emails and also distributed these to third parties. The Applicant was never made aware of this although she had at this time opened a new email account because of what she had regarded as suspicious activity on the one she had been using all along.

[6] During November 2019, the parties instituted applications against each other in the maintenance Court, in the case of the Applicant for an increase and payment of arrears and in the case of the Respondent for a reduction.

[7] Notwithstanding the Respondent's possession of the emails and messages since September 2019, it was only on 2 April 2020 that the Respondent disclosed to the Applicant that he was in possession of the emails and messages.

[8] On 2 April 2020, the Applicant's attorney addressed a lengthy 18 page letter, excluding annexures, to the Respondent's attorneys. This letter summarized the history of the disputes between the parties and particularly in regard to the financial issues that had arisen between them. The letter dealt with *inter alia* the failure on the part of the Respondent to pay the minor child's medical aid and medical bills as well as school fees but also with the Respondent's accessing the Applicant's private information. The letter also dealt with various proposals made by the Respondent to resolve the financial impasse.

[9] On the same day, the Respondent attempted to contact the Applicant by obtaining her new cell phone number from the minor. When the minor refused to disclose the Applicant's cell phone number, he then emailed the Applicant attaching various audio and visual messages he had accessed with the message *"Waiting for your call".* This email was sent at 16h59 on that day, presumably

after the letter from the Applicant's attorney to the Respondent's attorney had been received. This email was followed at 18h13 by a second email from the[4] Respondent to the Applicant in which he stated *"S call me to discuss the way forward. Ignoring my attempts to settle the impasse will only cause more damage".*

[10] It was not in dispute between the parties that the extent of the emails, audio files and chats number some 12 209 items. In respect of the minor child, her WhatsApp conversations when printed, fill over some 450 pages of content.

[11] The letter predictably provoked a response the very next day from the Respondent's attorneys on 3 April 2020. It is in this letter that the Respondent's access to both the email and WhatsApp messages and chats on the cell phone accounts of both the Applicant and the minor were disclosed. In the letter, the Respondent sought to justify his accessing of the information on the basis that since the email account was part of his own email account and that since the cell phone accounts were paid for by one of his companies, he was the ostensible owner of the information.

[12] In the relatively short period of time between the accessing of the WhatsApp conversations and images and audio files on 2 April 2020, the Respondent was able by 3 April 2020 to instruct his attorneys to record that:

> *"5. The information on the phone displays extreme prescription medication addiction and abuse, as well as regular recreational drug and benzodiazepine abuse. Your client regularly participates in sordid sexual encounters and orgys with various individuals, including married couples. The exchanges go further detailing the additional income received by your client, the holidays and weekends away enjoyed by her and paid for by her paramour, and the funding of the current litigation, again undertaken by her paramour. Further still, assertions abound of the desire to "take out" our client.*
>
> *6. Notwithstanding the above, our client has now evidenced the various exchanges between your client and A, where she refers to our client as "your asshole father" and other derogatory names. It further becomes*

apparent that your client continually mocks our client and his immediate family members, insinuating multiple negative connotations. It is apparent that your client's conduct and assertions amount to an extreme case of Parental Alienation, and the systematic degradation of our client, in the eyes of the minor child. Your client has done little to uphold the image of our client in A's eyes and has actually done the very opposite thereof.

7. It is denied that our client has attempted to intimidate, blackmail and/or extort your client at any stage and the forwarding of this extremely concerning information to your client, was to discuss the alarming information that has come to his attention. Our client is concerned as to your client's behavior in that she is the Primary Residency parent, and it is our client's belief that it is certainly not in the minor child's best interests to be exposed to the drug and alcohol abuse, and the numerous and various sexual frolics which your client frequently engages. For the avoidance of doubt, our client's email of yesterday, addressed to your client was intended to address your clients parenting abilities, and we are instructed to deny it was in any manner intended to strong arm her into accepting our client's various proposals with regards to maintenance"

[13] In the same letter, the Respondent indicated that he would not be make the cell phone (that had been used by the Applicant) or any of the information contained on it available to the Applicant. The letter from the attorney contained the following:

"15. .....Our client will not disseminate, share or publish the information to any unnecessary third party. However, to the extent that your client proceeds with any action against our client, whether it includes inter alia criminal charges and/or crimen injuria, our client reserves his rights in respect of the relevant content insofar as it is relevant to his defence and/or opposition and/or proceeding with an application for changing A's primary residence and the exercise of the parties respective parental rights and responsibilities, and the current or forthcoming litigation process."

[14] Further correspondence was exchanged between the attorneys as the Applicant attempted to obtain from the Respondent, an unconditional

undertaking that he would not distribute the material that he had accessed.

[15] The Applicant's attempts in this regard met without any success and the approach of the Respondent following on from the undertaking that had been given, was that the information was " *most disturbing"* and that the Respondent was concerned for the wellbeing of the party's minor child in consequence of this.

[16] The Applicant during this period laid criminal charges against the Respondent for contravening Sections 86 and 87 of the Electronic Communications and Transactions Act 25 of 2002. By the time this application was heard on 1 September 2020, the National Prosecuting Authority had considered these charges and had issued a *nolle prosequi.* In the circumstances, nothing further need be said on this aspect. The Applicant also proceeded to issue a Writ of Execution for arrear maintenance in the sum of R1 243 390.43.

[17] Notwithstanding that the Applicant had voiced her objections to the Respondent's accessing, use or distribution of her and the minor child's private information, the Respondent then distributed the information to not only the Headmaster of the school which the minor child attends but also to the ex-wife of one of parties with whom the Applicant had a relationship. It was argued by counsel for the Respondent that the information had been furnished to this third party, ostensibly in the interests of that third party's children also.

[18] On the basis that he was acting in the best interests of the minor, and notwithstanding the various applications and counter applications[1] that the parties were in the process of litigating against each other, on 21 July 2020, the Respondent then sent an email to both the Headmaster at the school which the minor child attends and a medical practitioner that the minor child consults. The annexures to these emails were described by the Applicant in reply as follows:

"18.2.1 two pdf documents (476 pages) containing A's WhatsApp chat

[1] In the period from the time of the signature of the founding affidavit on 25 June 2020 and the hearing of the application, the Respondent proceeded to launch an application in the Children's Court to try and obtain an order that he be granted sole custody of his biological minor child.

history with me from 3 November 2015 to 28 August 2019;

18.2.2 a pdf document (199 pages) containing my WhatsApp chat history with L N;[7]

18.2.3 a pdf document (17 pages) containing my WhatsApp chat history with A N; and

18.2.4 a pdf document (73 pages) containing A's WhatsApp chat history with the Respondent."

[19] The text of the covering email is indicative of the Respondent's intentions. Besides gratuitous remarks regarding the Applicant's private life, he sent all of the above information - 765 pages for the Headmaster of the minor child's school and the medical practitioner for the minor child to "trawl" through so as to *"provide me with an independent opinion as A's wellbeing is my primary concern".*

[20] This was the sequence of events before the granting of the interim order on 28 July 2020. When the application was heard on that day, the Court did not have the benefit of the Respondent's version. The Court, furthermore, in consequence of the Respondent's refusal to make what he had accessed available to the Applicant, was not able to consider or have regard to the totality of the information and its import. It suffices to state that on what was presented to the Court a case was made out[2] for the granting of interim relief. By the time the application on 1 September 2020 was heard, the Respondent's version and a substantial portion of the information was all before the Court.

[21] The Respondent opposed the confirmation of the Interim Order and the granting of a Final Interdict. The Respondent argued that the bringing of the *ex*

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[2] The requirements for the granting of an Interim Interdict were set out in in LF Boshoff Investments (Pty) Ltd v Cape Town Municipality as follows:
"Briefly these requisites are that the Applicant for such temporary relief must show -
(a) That the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is prima facie established, though open to some doubt;
(b) that, if the right is only prime facie established, there is a well-grounded apprehension of irreparable harm to the Applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;
(c) that the balance of convenience favours the granting of interim relief·, and
(d) that the Applicant has no other satisfactory remedy."

parte Application on the Urgent Roll was in the present circumstances improper, and that the Applicant had in so doing, failed to make full and proper disclosure of full and relevant facts which she ought to have and that she had sought and obtained the Interim Order by stealth.

[22] The Respondent also argued that the Application by its nature was not urgent, that the information concerned now constitutes *"vital evidence"* in the Children's Court proceedings and that in any event, once the Respondent had distributed the information the proverbial horse had bolted and the Applicant's recourse is to be found in a claim for damages.

[22] I propose dealing with each of grounds raised by the Respondent in turn.

[23] Firstly, it is trite that in bringing an application *ex parte,* the Applicant is required to demonstrate the utmost good faith. In this regard, our Courts have held:

> *"Good faith is a sine qua non in ex parte applications. It extends also to legal representatives. If any material facts are not disclosed, whether they be willfully suppressed or negligently omitted, the Court may on that ground alone dismiss an ex parte application. The Court will also not hold itself bound by any order obtained under the consequent misapprehension of the true position. Among the factors which the Court will take into account in the exercise of its discretion to grant or deny relief to a litigant who has been remiss in his duty to disclose, are: the extent to which the rule has been breached; the reasons for the non- disclosure; the extent to which the first Court might have been influenced by proper disclosure; the consequences, from the point of doing justice between the parties, of denying relief to the Applicant on the ex parte order; and the interest of innocent third parties such as minor children, for whom protection was sought in the ex parte application. The test is objective.*
>
> *Even though partially successful an Applicant may be ordered to pay the costs of the application if he has negligently failed to disclose material facts. In Schlesinger v Schlesinger an order obtained ex parte was set aside with costs on the scale as between attorney and client against the*

original Applicant for displaying a reckless disregard of a litigant's duty to a Court in making a full and frank disclosure of all known facts that might influence the Court in reaching a just conclusion. If the failure to disclose is the fault of the attorney acting for a party, he may be ordered to pay the costs de bonis propriis."[3]

[24] Whether or not the Applicant failed to discharge the obligation upon her to make a full disclosure of all material facts is inextricably intertwined with the issue of urgency. It is self-evident that the disclosure that is required must at all times be material, more so depending on the degree of urgency that is attached to the bringing of the Application.

[25] The Respondent argued that the Applicant had been aware of his possession of the information since at least the beginning of April 2020. It was also argued that the undertaking had been given at an early stage, in the terms that it was given, and that although the Applicant had not accepted the undertaking in the terms preferred, the exchange of correspondence over the period April, May and June 2020 was indicative of the matter not being urgent. Put simply if the matter was urgent, then it was urgent in April 2020 but certainly not by the end of June 2020 at the earliest or the end of July 2020 when the application was heard at the latest.

[26] In addition to challenging the urgency, the Respondent also argued that the Applicant had omitted material information from her Founding Affidavit. While it is so that the Applicant did not attach all the correspondence that had been exchanged between the parties over the three month period, she did attach the letter of 17 April 2020 from the Respondent's attorneys in which all the relevant issues are set out and in particular the Respondent's qualified undertaking as well as his intention to use the information in what he regarded to be the best interests of the minor child.

[27] On a conspectus of all the information that is now before the Court, the

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[3] DE van Loggerenberg Erasmus, Superior Court Practice, Juta, Vol. 2, RS 13, 2019 D1-61, footnotes

omission of the letters that the Respondent points to as indicative of a failure on the part of the Applicant to make a full material disclosure are not in my view[10] material. The Applicant made disclosure of what was in her possession and what was relevant to the relief that she sought. What is clear is that the correspondence that was exchanged between 2 April 2020 and at least the end of June 2020 - on the part of the Applicant was directed primarily at obtaining an undertaking that the information would not be distributed and on the part of the Respondent was directed towards trying to settle the outstanding maintenance and other issues.

[28] The Respondent also argued that the failure of the Applicant to disclose the proceedings instituted by him in the Children's Court in her Founding papers was deliberate. The Founding Affidavit was deposed to on 25 June 2020, before the Children's Court proceedings had been instituted by the Respondent. However, the Respondent's letter of 17 April 2020 which was attached to those Founding papers made plain the Respondent's intention to use the information, ostensibly in the best interest of the minor child. The Children's Court proceedings are separate to the present proceedings and are simply another arrow fired from the bow of the Respondent in his ongoing battle between himself and the Applicant. I am of the view that the failure to specifically refer to the Children's Court application by the Applicant is not material. The application which the Respondent placed before that Court is nothing more than a repetition of what was set out in the correspondence directed to the Applicant.

[29] The Applicant argued that the Respondent accessed the information in both the email account as well as on the WhatsApp platform unlawfully. The Respondent was at pains from the beginning of April 2020 to justify his accessing of the information and his retention of the information. However he came into possession of the information is not relevant for the purpose of determining the present Application - whether or not that information is admissible, relevant or even sufficient to enable him to obtain the relief that he seeks in the Children's Court will not be decided by this Court. This is to be

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omitted

decided by the presiding officer in the Children's Court when that matter is heard which I was informed from the Bar will be on 17 September 2020.

[30] This is however not the end of the enquiry. While the information may have been disclosed to the Children's Court and that Court will rule on the admissibility of what was disclosed, there can be no doubt that there is no lawful basis for the disclosure of the information in respect of either the Applicant or the minor, to the wife of one of the third parties, the school Headmaster or medical practitioner.

[31] The furnishing of the information to all the parties save the Children's Court was done clearly with the purpose of humiliating and bringing into disrepute the Applicant as well as the minor. The Respondent did so under the guise of the "best interests of the child". There is no explanation as to why it was in the best interests of the child for the almost 976 pages of information to be sent to the Headmaster of the school or the medical practitioner.

[32] I do not intend in this judgment to quote the specific exchanges upon which the Respondent relied to come to the conclusions that he did. These were private communications which took place over a period of years between consenting adults. The Applicant in her Founding papers specifically asserted:

> *"It is for this reason that I tell the Court that any of my recreational activities, recorded on my iCloud account that may come to light in an answering affidavit, have not taken place in the residence where A and I reside and never have. I am discrete and keep these activities to myself."*
> *"Further to this I have never and will never expose my children to these activities."*

[33] The Respondent denied this and indicated that he would *"appraise the Court of the transcripts detailing all of the exchanges between L N and the Applicant and the Applicant and A N".*

[34] It bears mentioning that the exchanges between the Applicant and adult third parties, were on her personal email and WhatsApp platforms. From the

information made available to the Court and in particular the minor child's WhatsApp conversation history, I was unable to find nor was counsel for either party able to refer me to anything in the minor child's chat history from which it could be inferred or was apparent that the minor child bore any knowledge whatsoever of the Applicant's private communications with adult third persons in respect of the material from which the Respondent drew his conclusions.

[35] What is apparent from the information is that the Applicant and the minor have a close relationship and communicate freely and honestly with each other on matters - in particular those that affect the minor. The Respondent 's ire at the fact that the Applicant and minor child in their private conversations refer to him in disparaging terms is misplaced. In each instance where the Respondent was referred to in such terms, there is a cause - prevalently because the Respondent attempted to impose his will upon the minor and when she did not acquiesce, he would then, for example threaten to terminate payment for one of the minor's extra mural activities. It is not unreasonable that the minor would be aggrieved at this or that the Applicant would commiserate and be supportive of her given that the Applicant has her own disputes with the Respondent.

[36] Although there are references to medication in single instances over the four- year period that the information spans, most of these relate to prescription medication. In the few instances where the reference in the information is to narcotics - not considered prescription medication, these references were made, on the whole, not by the Applicant but by the third parties.

[37] There is one direct reference in 2018 and some peripheral references through the period by the Applicant. By the very nature of the email and WhatsApp communications, these are not always expositive of the entire discussion between the Applicant and the third parties concerned nor is the context always easily discernable. The emails and messages upon which the Respondent seeks to rely in order to justify his accessing and dissemination of the information do not support the conclusions that he has drawn.

[38] The Respondent had the Applicant 's email in his possession from

September 2019 and the WhatsApp messages from 2 April 2020 and yet only instituted the Children's Court application on 3 July 2020 when it became clear[13] that the Applicant was not going to settle her disputes with him.

[39] The Respondent relies on Section 28(1)(d) and Section 28(2) of the Constitution of the Republic which respectively provide that *"Every child has the right to be protected from maltreatment, neglect, abuse or degradation"* and " *A child's best interests are of paramount importance in every matter concerning the child".* If the Respondent is indeed acting on this basis then there is no explanation as to why he delayed bringing the Children's Court application from either September 2019 or April 2020 respectively.

[40] On the probabilities, I find that the Respondent knew that his accessing of the Applicant and minor's private communications were an infringement of their rights and once it was apparent that there would be no settlement and that the proverbial battle would be joined, he then moved to institute the Children's Court application in order to justify *ex post facto* his conduct in accessing the information.

[41] The dissemination of the information to the Headmaster and the medical practitioner on 21 July 2020 was done for no other reason than to try and engender a cognitive bias in the minds of those persons against the Applicant and possibly also the minor child. The Respondent was well aware that he had instituted the Children's Court application and that this was the correct forum for the consideration of the matter and a finding as to the veracity of the conclusions drawn by him. It is self-evident that besides the invasion of the privacy of the Applicant and the minor child so too was the adult third party's privacy invaded.

[42] Even if it were to be argued that the Application by the Applicant was not urgent at the time that the Founding Affidavit was deposed to because of the undertaking given by the Respondent, on 21 July 2020 when the Respondent distributed the information, to my mind the urgency was then firmly established and the fears of the Applicant as set out in the Founding Affidavit were realized. It is the conduct of the Respondent in refusing to disclose to the Applicant what

information he had appropriated and then distributing the information that leads me to the conclusion that the Respondent's argument that the Application is not urgent is without merit and that in the circumstances of the case, the Applicant made sufficient proper disclosure of all relevant facts to the Court.[14]

[43] Turning now to whether or not the interim interdict should be confirmed and made final. It was held in Liberty Group LTD and Others v Mall Space Management CC[4]:

> *"[22] The law in regard to the grant of a final interdict is settled. An Applicant for an interdict must show a clear right; an injury actually committed or reasonably apprehended; and the absence of similar protection by any other remedy. It was held by this Court in Hotz v University of Cape Town that, once the Applicant has established the three requisite elements for the grant of an interdict, the scope, if any, for refusing relief is limited and that there is no general discretion to refuse relief."*

[44] The Applicant relies, for the interdict that she seeks, on her rights contained in Sections 10 and 14(d) of the Constitution. These sections frame these rights as follows:

> *"10. Human Dignity*
> *Everyone has inherent dignity and the right to have their dignity respected and protected" and*
> *14 Privacy*
> *Everyone has the right to privacy, which includes the right not to have-*
> *(a) …*
> *(b) …*
> *(c) …*
> *(d) the privacy of their communications infringed."*

[45] These rights may only be limited in terms of Section 36 of the Constitution[5]. To my mind, the best interest of a minor child and having regard to

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[4] 2020 (1) SA 30 (SCA) at paragraph [22], footnotes omitted.
[5] National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others 1999 (1) SA 6 (CC) at paragraph [28] - "the right to dignity is a cornerstone of our Constitution. Its

the minor child's rights as set out in Section 28(1)(d) or 28 (2) of the Constitution, would as a matter of common sense be valid grounds to derogate from the Applicant's right to dignity and privacy. Having regard to the consideration of the facts and circumstances giving rise to the present Application, as well as a consideration of what the Respondent considered to be incriminatory material, I find that for purposes of this Application, the Respondent has failed to demonstrate any rational basis for the conclusions that he has drawn and on which this Court as the upper guardian of the minor would, in her best interests, sanction a derogation of the Applicant's rights.

[46] The Applicant has a clear right but has she suffered an injury in consequence of the Respondent's distribution of the information? It seems to me that once a constitutional right is breached and the holder of that right seeks to enforce it, that *ipso facto* for so long as the breach persists or may persist then this requirement is met. To hold otherwise would render the right to privacy nugatory as the Applicant would have to "give up" that right in order to enforce it![6]

[47] It was argued on behalf of the Respondent that even if the Applicant establishes the first two requirements for the granting of a final interdict, that, in consequence of the Respondent's dissemination of the information to the Children's Court, the Headmaster and the medical practitioner - the proverbial horse has already bolted and that the Applicant's remedy lies in a claim for damages and for this reason the Application should fail.

[48] In considering whether or not an award for damages is an appropriate alternative remedy, regard must be had to what the Applicant seeks to protect in

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importance is further emphasised by the role accorded to it in s 36 of the Constitution which provides that:
'The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom…" Dignity is a difficult concept to capture in precise terms. At its least, it is clear that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society."

[6] supra at paragraph [32] - " Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy."

interdicting the Respondent. The Applicant seeks to protect personal rights that are peculiar and specific to each individual. These rights are so prized by our society that they are given the status of fundamental rights in the Bill of Rights in the Constitution. While the rights are expressed in general terms in the Constitution, each individual will have a personal understanding of their own rights in this regard.

[49] Dignity is defined as *"true worth"*[7] and privacy as being *"being alone and undisturbed"*[8]. Both of these relate to the state of being of an individual and are not as a matter of course, readily capable of being reduced to mere financial value.

[50] In Minister of Safety and Security v Tyulu[9] the purpose of an award for damages was expressed as follows:

> *"the primary purpose is not to enrich the aggrieved party but to offer him or her some much needed solatium for his or her injured feelings"*

[51] In Minister of Safety and Security v Seymour[10] it was held in regard to the quantification of awards for damages that:

> *"the assessment of awards of general damages with reference to awards made in previous cases is fraught with difficulty. The facts of the case need to be looked at as a whole and few cases are directly comparable."*

[52] An award of damages would be an appropriate remedy were the infringement of the rights of the Applicant to have occurred in the past. In circumstances where an infringement has occurred on one or more occasions in the past but has ceased and will not occur in the future, it seems to be that an award for damages would be an appropriate alternative remedy. The present case is however distinguishable in that the Respondent has made plain through the undertaking that he has given that he wishes to retain for himself, to be used and distributed as and when he sees fit, the personal and private information of both the Applicant and the minor child. The Respondent acts in his own interests

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[7] The Concise Oxford Dictionary of Current English, 7th Edition, Clarendon Press at page 268
[8] supra at page 818
[9] 2009 (5) SA 85 (SCA) at paragraph [26].

and appears to be "indifferent to the harm" that the pursuit of his interests visits upon either the Applicant or the minor child. In such circumstances, the bringing of an action for damages would serve no purpose other than to mire the parties in further litigation. I am persuaded that this would be the case in light of the present situation that persists between the parties.

[53] An action for damages is in the present circumstances inappropriate and would not stop the Respondent's use or dissemination of the information. The only appropriate remedy available to the Applicant is the order that is sought.

[54] In the ordinary course of litigation, costs follow the result. In the present application both the Applicant and Respondent argued for an award in their favour of a punitive order for costs against the other.

[55] The present litigation is but one of the skirmishes in an ongoing battle between the Applicant and the Respondent. The Respondent was forewarned that the Applicant would approach the Court if he did not remove the qualification to his undertaking. Notwithstanding this, the Respondent then proceeded to institute proceedings in the Children's Court as well as to disseminate the information to third parties.

[56] The present application was entirely avoidable had the Respondent properly considered his position and conducted himself accordingly. On consideration of the matter as a whole, I am of the view that a punitive order for costs is warranted and it is for this reason, that I intend to make the Order that I do.

[57] In the circumstances, I make the following Order:

[57.1] Paragraph 3 of the Order granted on 28 July 2020 reading:

> *"3. The respondent is interdicted and restrained from copying, using, sharing, disseminating, distributing and/or publishing the applicants private and confidential information being, Contacts, WhatsApp messages, Instant Messenger, MMS, I-Message, SMS,*

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[10] 2006 (6) SA 320 (SCA) at paragraph [17].

photographs, videos, and/or audio files emanating and/or downloaded from cellular number […] and/or the […] account"

is confirmed.

[57.2] The Respondent is ordered to pay the costs of this Application, on the scale as between attorney and client.

A MILLAR
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

HEARD ON: 01 SEPTEMBER 2020
JUDGMENT DELIVERED ON: 11 SEPTEMBER 2020
COUNSEL FOR THE APPLICANT: ADV. N STRATHERN
INSTRUCTED BY: ULRICH ROUX & ASSOCIATES
REFERENCE: MS. G ERASMUS
COUNSEL FOR THE FIRST RESPONDENT: ADV. J BRETT SC
ADV. R BOSMAN
INSTRUCTED BY: DI SIENA ATTORNEYS
REFERENCE: MS. A SHARDLOW