IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO.: 59644/2020

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHERS JUDGES: NO
(3) REVISED

In the matter between:

ALL G2 G LTD	FIRST APPLICANT
CJ PROFESSIONAL SERVICES	SECOND APPLICANT
MEADOWS SALARY & ADMIN SERVICES (PTY) LTD	THIRD APPLICANT

and

KAREN ELIZABETH JANSE VAN RENSBURG	FIRST RESPONDENT
ELMARIE IBANEZ	SECOND RESPONDENT
CAROL JOUBERT	THIRD RESPONDENT

REASONS FOR ORDER

BASSON, J

[1] The first applicant (a *peregrinus*) ALL G 2 G Ltd, is described as a private company incorporated in terms of legislation in Ireland. The second applicant is CJ Professional Services (Pty) Ltd a company incorporated in South Africa and the third applicant is Meadows Salary and Admin Services (Pty) Ltd. The second applicant is subcontracted to provide the services to clients of the first applicant and the third applicant provides administrative services to the second applicant in providing the services to the first applicant (*"the applicants"*).

[2] The applicants brought an urgent application for an interdict against the first respondent (Ms Karen Elizabeth Janse van Rensburg), the second respondent (Ms Elmarie Ibanez); and the third respondent (Ms Carol Joubert) ordering them to return all documents, information and templates removed from the computers or servers of the third applicant. The applicants further sought an order interdicting the respondents not to communicate with any party whose contact information was illegally obtained from the computers and/or servers of the third applicant. The order in prayer two was to operate as an interim interdict with immediate effect pending finalisation of an action to be instituted against the respondents for damages suffered because of the *"theft"* of and utilisation of information removed from the computers and/or servers of the third applicant.

[3] The manager of all three applicants and a director of both the first and third applicants (Ms Christina van den Berg – *"the manager"*) deposed to the founding affidavit on behalf of all three applicants. She states in the founding affidavit that it came to her attention that the first and/or second and/or third respondent *"unlawfully and with malicious intent, removed personal, sensitive and secret information pertaining to clients of all three of the applicants from the third applicant's computers and/or servers"*. The information so *"stolen"* by the respondents contains information in relation to natural and juristic persons' financial affairs, physical addresses, email

addresses, telephone numbers, tax numbers etcetera. She further states that the attack on the computers was made solely in an attempt to pilfer clients from the applicants which, if allowed to continue, will in future cause great and substantial harm to the applicants.

[4] It is common cause that the first and second respondents were employed by the third applicant and that they both resigned on 11 November 2020. They were (at the time of the application) serving out their notice period without rendering any services to the third applicant. The third respondent was employed by the third applicant but left her employment during February 2020. It was a term of their employment agreements that they undertake "*not to disclose any confidential information to any third party or entity during the duration of this agreement or after its termination*".

Co-ordinated resignations

[5] The manager explains that on 15 November 2020, Mr Herman Boshoff (*"Boshoff"*), the IT Support Consultant employed by the applicants, provided her with a report on the activities of the computers of the second and/or third applicant which were used by them up until their resignations. The report is annexed to the papers ostensibly as annexure "F" (as "F1" – "F48"). According to the report the first and second respondents discussed and coordinated their respective resignations and that they had arranged to meet privately after work. To this effect, the applicants attach email correspondence between them which was found on their computers but subsequently permanently deleted from the server.

[6] The manager then states that the respective resignations were discussed between the first and second respondents and *"coordinated"*. Attached to the papers is the IT report that claims that this is evident from comparing the two resignation letters. I fail to see how this so-called *"coordination"* is relevant having regard to the relief sought in the Notice of Motion.

The e-mail

[7] The IT specialist (Boshoff) reported that he found an email in the *deleted* folder of the second respondent's computer which she intended to be sent to her private

email address with the subject of JH/Steel-Rock (which is upon perusal of the e-mail is not the correct heading of the e-mail). Boshoff records three things: Firstly, this email was permanently deleted. Secondly, the email had attached to it *"company digital property"*. Thirdly, the IT Specialist, then takes it upon himself - whilst referring to the second respondent as *"suspect 2"*, to draw a conclusion that "*she was busy disclosing the company's Digital Intellectual Property, to be used to their own intent causing enormous damage to the company*". These comments by the IT Specialist, are, to say the least, peculiar. On the one hand Boshoff simply draws the conclusion that she intended to use the information whilst on the other hand he confirms that the email has never been sent. Briefly, this email informs the recipient, *inter alia*, that his *"director fees have substantially diminished over the months due to the fact that companies are put "In Receivership" due to late payments from the client, but you never receive payments retrospectively"*.

[8] The manager concludes somewhat dramatically that the conduct on behalf of the respondents constitutes *"grand scale larceny"* and theft of *"stolen information to the detriment of all three applicants"*. She further refers to this email as *"vindictive propaganda"* and states that the third respondent used information that was provided to her *"resultant from the aforementioned theft"*. She then states that the *"third"* respondent forwarded this email *"to what currently looks like the entirety of the applicants' list"*.

[9] There is simply no basis for this allegation since the email has never been sent and has in fact been permanently deleted. To this end and on 20 November 2020, the respondents' attorneys sent a letter to the applicants' attorneys (attaching a notice of intention to oppose) to specifically advise the applicants' attorneys that the draft email referred to in the founding affidavit has not been sent – something that the applicants in any event knew as they were so informed by the IT Specialist in his report.

[10] The applicants submitted that the mere fact that the respondents are in possession of the information is a serious infringement of their rights and will cause irreparable harm to the reputation of the applicants. Moreover, the respondents' conduct will also attract liability towards clients and the like for breach of confidentiality as personal, secret and protectable information are now out in the open.

The Walker discussion

[11] The manager further claims that the applicants' attorneys received a phone call from a colleague (Mr Walker) informing them that he (Walker) had received a phone call from the third respondent (who was in the presence of the second respondent) and requested certain information pertaining to the applicants *"in order to use in their new business"*. Although the second and third respondents admit that they had a discussion with Walker, they deny that they had requested such information.

[12] On the papers therefore, no case has been made out for the relief sought in the Notice of Motion particularly considered against the allegation made in the Founding Affidavit that the information *"stolen"* relates to *"natural and juristic persons' financial affairs, physical addresses, email addresses, telephone numbers, takes numbers, nationality and business affiliations*." The email had been deleted.

[13] Regarding the relief sought in paragraph 2.1 of the Notice of Motion. None of the respondents have in the possession or under their control the information. In the circumstances the respondents were thus unable to provide the undertaking sought in the Notice of Motion as they were unable to return or utilise information which was not in the possession or under their control. The respondents further undertook that they would not communicate with any party whose contact information emanates from the third applicant and further indicated that they were prepared to provide such an undertaking given the fact that they were not in possession of the information. Accordingly, they also submitted that there was no need for the applicants to have launched the urgent application.

[14] There is also a further reason why the application cannot succeed and that relates to the manner in which the evidence relied upon by the applicants was obtained. In their reply, the applicants deny the hacking attempts and state that the first and second respondents were still logged in on the office computers of the third applicant and therefore the information was obtained by merely having a look thereon. I will return to this issue.

[15] Pursuant to the replying affidavit, the respondents brought a strike out application in respect of allegations contained in the replying affidavit. I will return to this issue where I deal with that application. But before I do so, it is necessary to briefly deal with other ancillary issues raised in the papers.

Peregrinus

[16] I have already referred to the fact that the first applicant is a *peregrinus* and that a notice in terms of rule 47(1) was served on the applicant on 21 November 2020 in which it sought security for costs. An order for security of costs was granted.

Issues raised in the respondents' answering affidavit

[17] The respondents submitted that the application was not urgent and that the applicants have failed to comply with the provisions of rule 6(12)(b) of the Practice Manual; that the respondents have failed to make out a case for the relief sought in the Notice of Motion; that the relief sought in the Notice of Motion constitutes in effect final relief; that the material disputes of fact cannot be resolved on the papers; that the applicants have deliberately omitted to attach annexure F22 – F48 to their papers and that their failure to do so severely prejudiced the respondents in that they are unable to deal with, what the applicants contend to be *"material evidence"*.

[18] The applicants also concede in its reply that various annexures to the application were not attached but claimed that in light of the fact that the respondents have already been in possession thereof they would not be prejudiced. This argument has no merit as the failure to attach documents deprived this court of the opportunity to peruse the annexures as it is entitled to do in preparing for the hearing.

[19] Although there is merit in most of these submissions, I have nonetheless exercised my discretion to regard the matter as urgent and consider the matter. I am not, as already pointed out, persuaded that the applicants have made out a case for the relief sought in the Notice of Motion.

The retrieval of the e-mails from the respondents' computers

[20] Before I turn to the strike out application, it is necessary to briefly set out what transpired after the resignation of the two respondents (on 11 November 2021). The

second respondent states in her answering affidavit that, when she and the first respondent returned from lunch, they were unable to log on to their assigned computers and were informed that the passwords had been changed. They were also informed that they were no longer permitted to use the computers.

[21] Both were also later informed by a Labour Specialist acting on behalf of the third applicant that they would be searched. They were then publicly searched in the presence of all colleagues in the office but no documents or other items were found in their possession.

[22] The second respondent sets out facts that point to suspicious activity on her computer as from 15 to 17 November 2020. She explains that there had been a series of disconcerting and suspicious activities experienced by all the respondents which appear to constitute unlawful attempts by the applicants to gather information and support of this application. For example, on 17 November 2020 the second respondent received the notification from Microsoft alerting her to the fact that there had been *"unlawful sign in-activity"* in relation to her private email account. On 17 November 2020 the first respondent received a similar notification from Yahoo. The first respondent confirms that she was not attempting to sign in on her private account at that time. On 17 November 2020 the third respondent received a similar notification from Dropbox requesting her to verify whether it was her signing in.

[23] The respondents claim that they have every reason to believe that someone employed or contracted by one or more of the applicants attempted to gain access to their personal email accounts and in the case of the third respondent, her Dropbox account.

The strike out application

[24] The respondents filed an application to strike out portions of the applicants' replying affidavit and annexures thereto on the grounds that (i) the evidence is inadmissible and/or was illegally or improperly obtained and is protected by legal professional privilege and/or litigation privilege; (ii) the evidence is inadmissible and/or was illegally or improperly obtained counter to the provisions of sections 11 and/or 15

and/or 18 of the Protection of Personal Information Act[1] and/or (iii) section 2 of the Regulation of Interception of Communications and Provision of Communication-Related Information Act[2] (RICA) and/or (iv) sections 86(1) and/or 86(4) of the Electronic Communications and Transactions Act.[3] The offending paragraphs in the replying affidavit and the annexures thereto relate to (i) the email chain attached as annexure RO1 to the replying affidavit; (ii) paragraphs 5.3, 5.4, 5.5, 5.6, 6.3 and 13 of the replying affidavit; and (iii) the supporting affidavit of Boshoff. The applicants (in the strike out application) also seek the costs of this application.

[25] The deponent to this application is Mr Willans (Willans), an admitted and practising attorney and a director of Werksmans Inc (Werksmans). He is the attorney representing the respondents. He explains that he consulted with certain witnesses including a Mr Hester and a Ms Meister in preparation of the answering affidavit. The trail of emails between Willans (on the letterhead of Werksmans) and the individuals copied therein somehow found their way to the applicants' replying affidavit and is also attached thereto. The applicants also rely on this email for the relief sought in the Notice of Motion.

[26] Boshoff is candid about the fact that he downloaded the email by accessing the respondents' erstwhile work computers. According to him, their email accounts were still logged in and that is how he got access to the respondents' private email accounts. By the applicants' own admission Boshoff thus accessed such legal privileged communication by accessing the first and second respondents' personal email accounts without their knowledge and consent. The fact that Boshoff accessed it from the respondents' erstwhile work computers does not give Boshoff nor the applicants the right to access the respondents' private email accounts and download any email they perceive may assist them in their litigation against the respondents. A private email account is precisely that: It is private.

[27] Willans claims that the contents of the email exchange (attached to the replying affidavit and marked RO1), is protected by legal professional privilege and/or legal

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[1] Act 4 of 2013.
[2] Act 70 of 2002.
[3] Act 25 of 2002.

privilege. By unlawfully accessing the respondents' private email accounts, it would appear that the applicants have been privy to all emails received and sent by the first and second respondents through their personal email accounts since their resignation on 11 November 2020 and in circumstances where the applicants are litigating against the respondents. This undermines the very principle of legal professional privilege and/or litigation privilege and, in addition thereto, is in contravention of the various acts referred to hereinabove.

[28] Willans further explains that on 20 November 2020 he addressed a letter to the applicants' attorneys in which he recorded that the facts now adduced in the replying affidavit was inadmissible and/or illegally or improperly obtained and invited the applicants to retract annexure RO1 to the replying affidavit together with the paragraphs referred to hereinabove and the supporting affidavit by Boshoff. The applicants were further invited to provide the respondents with a list of all communications in their clients' possession that have been accessed from the personal email accounts of the first and second respondents and to immediately seize monitoring and accessing their personal email accounts. The applicants' attorneys failed to respond to the letter.

[29] It was submitted on behalf of the respondents that they would be severely prejudiced if the court does not strike out the offending evidence.

[30] I agree with the submission that these actions undermine the very principle of legal professional privilege and/or litigation privilege. Further, this conduct is unlawful in that it contravenes the legislation referred to herein above. The court cannot ignore the respondents' allegations that shortly prior to the receiving the application, there were a series of suspicious activities of persons attempting to sign in into the first and second respondents' emails and into the third respondent's Dropbox account. The most plausible inference to be drawn from what they state in their answering affidavit is that some person employed or contracted by one or more of the applicants attempted to unlawfully gain access to these accounts. The fact that these attempts were made shortly before the respondents were served with the urgent application certainly supports this inference. Having regard to the emails attached to the replying affidavit, this inference certainly now appears to be correct. The applicants have

unlawfully gained access to the respondents' email accounts. To make matters worse, they downloaded privileged communication between clients and their legal representative.

[31] In its opposing affidavit (to the strike out application), the applicants state that the information sought to be withheld from the public domain is not privileged in that it refutes the allegations made in the opposing affidavit: It shows that the respondents were in fact in possession of the applicants' information. It is further submitted that the communications were not sent in confidence to a client and even if it was, the confidentiality had been lost in that it is now in the possession of third parties. Also, under the prevailing circumstances, it can never be in the interests of justice if a blatant lie cannot be exposed as the respondents have now attempted to do. In the event the applicants submitted that the striking out application stands to be dismissed with costs.

[32] Having regard to the confirmatory affidavit of Boshoff, it is clear that he has been requested to access the computers which was used by the second respondent during their employment. He states that he merely printed the emails and that is *"how I got access to the information used in this Application"*.

[33] Section 2 of the Regulation of Interception of Communications and Provision of Communication-Related Information Act clearly provides as follows:

> *"2 Prohibition of interception of communication*
> *Subject to this Act, no person may intentionally intercept or attempt to intercept, or authorise or procure any other person to intercept or attempt to intercept, at any place in the Republic, any communication in the course of its occurrence or transmission."*

RICA further gives a wide definition of "intercept":

> ***'intercept'** means the aural or other acquisition of the contents of any communication through the use of any means, including an interception device, so as to make some or all of the contents of a communication*

available to a person other than the sender or recipient or intended recipient of that communication, and includes the-

(a) monitoring of any such communication by means of a monitoring device;
(b) viewing, examination or inspection of the contents of any indirect communication; and
(c) diversion of any indirect communication from its intended destination to any other destination, and ***'interception'*** *has a corresponding meaning;"*

[34] There was some debate about whether the judgment in *South African Airways Soc v Bdfm Publishers (Pty) Ltd and others*[4] (SAA) finds application. Although I agree with the exposition of the legal principles pertaining to legal privilege (more in particular legal advice privilege), the facts of that matter are completely distinguishable from the facts in the present matter. In *SAA* the applicant claimed legal advice privilege in circumstances where the document relied upon was already in the public domain by virtue of having been published on the internet. The court quite aptly remarked: "*Once confidentiality shattered, like Humpty Dumpty, it cannot be put back together again*".[5]

[35] Mr Botes argued on behalf of the applicants that the document is now in the public domain and in the hands of third parties and therefore that legal privilege cannot be claimed in respect of the attached emails. Although it is accepted that the information in a document that is privileged may become lost, this is not one of those instances where, in my view, the world has come to know of the information contained therein. The email was unlawfully retrieved from a private email account and very soon thereafter attached to the replying affidavit. The respondents' attorney immediately reacted to the attachment and proclaimed their right to privilege. Having regard to the manner in which the emails were obtained and the fact that confidentiality has been claimed immediately upon receiving the replying affidavit and the fact that the court papers are disseminated to the immediate parties to the litigation only, it cannot, in my view, be said that the information contained in the email is now somehow in the public domain. The court in *SAA* deals with the issue of legal privilege in detail, I will suffice with the following quote from the judgment:

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[4] 2016 (2) SA 561 (GJ).
[5] *Ibid* ad para 39.

"[45] The point of departure is to identify exactly what is meant by the concept of 'privilege' in the context of the taking of legal advice. With the possible exception of s 201 in the Criminal Procedure Act 51 of 1977, the idea of a legal right to the confidentiality of communications between a client and a legal advisor is judge-made law. As such the rationale for the idea of privilege has evolved over time in response to judicial perceptions and evolving social mores about how court proceedings might appropriately be conducted. In our era it is incontrovertible that the 'right' vests in the client. Also, it is clearly recognised that there are two subspecies of this right. One is called legal professional privilege, or legal advice privilege. I prefer the label of legal advice privilege on the grounds that this phrase actually tells one what it is about, whilst the former phrase demands further explanation. The other subspecies is litigation privilege, which label too is self-explanatory. What SAA claims is legal advice privilege."

[36] The applicants also make the point in their opposing affidavit that somehow it is not in the interest of justice to grant protection to the status of the email if it exposes a *"blatant lie"*. I do not agree that it is now somehow in the interests of justice that the information contained in the email that has been illegally obtained, could now be used.

[37] Also, the emails relied upon, clearly constitute correspondence between an attorney and clients / individuals copied into the email. In this email Willans gives legal advice to the recipients of the email in that he points out that certain issues must be clarified before considering whether the matter should be taken forward. The correspondence also deals with the issue whether an affidavit will have to be deposed to by a Ms Supra, and if so, whether she would be prepared to do so. It is also discussed that they will have to consider in respect of Ms Supra whether she in fact has knowledge and information about the hacking of the computers. This line of correspondence, at the very least, discusses the legal approach that must be considered in the midst of litigation between the parties. In fact, Willans specifically states in one of the emails that their strategy and way forward will have to be worked out. I am therefore persuaded that privilege whether it is termed legal professional privilege or litigation privilege or legal advice privilege satisfies the test of being *"(1)*

legal advice; (2) given by legal adviser; (3) in confidence to the client and (4) is claimed".[6]

[38] In the event, the striking application as per the prayers contained in the Notice of Motion is granted. The application to strike out is therefore dismissed with costs, such costs to include the costs occasioned by the employment of senior counsel.

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AC BASSON
JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA
Electronically generated and therefor unsigned

Delivered: This judgment (reasons for the order) 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 25 June 2021.

APPEARANCES

For the 1st, 2nd & 3rd Applicant:	ADV. F BOTES SC
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Instructed by:	WERKSMANS ATTORNEYS
Date of hearing:	25 November 2020 (virtual hearing)

[6] *Ibid ad para 46.3.*