IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case no: 13218/2009

CREDIT TEMPS (PTY) LTD	1st Applicant
DANIEL TERBLANCHE N.O. in his capacity as joint liquidator of CR Solutions Cape Town (Pty) Ltd	2nd Applicant
E A BEDDY N.O. in his capacity as joint liquidator of CR Solutions Cape Town (Pty) Ltd	3rd Applicant
v	
YOUR MOVE PERSONNEL	1st Respondent
WADE NEVILLE JANION	2nd Respondent
HOLLY JANION	3rd Respondent
MISTRAL ANN JANION	4th Respondent
WEB-ACTIVE (PTY) LTD	5th Respondent
PREMIER ATTRACTION 426 CC t/a WEB-ACTIVE	6th Respondent

And

Case no: 14160/2009

CREDIT TEMPS (PTY) LTD	1st Applicant
DANIEL TERBLANCHE N.O. in his capacity as joint liquidator of CR Solutions Cape Town (Pty) Ltd	2nd Applicant
E A BEDDY N.O. in his capacity as joint liquidator of CR Solutions Cape Town (Pty) Ltd	3rd Applicant
CINDY SHAMLEY	4th Applicant
NEIL DORMEHL	5th Applicant
v	
YOUR MOVE PERSONNEL	1st Respondent
WADE NEVILLE JANION	2nd Respondent
HOLLY JANION	3rd Respondent
MISTRAL ANN JANION	4th Respondent
WEB-ACTIVE (PTY) LTD	5th Respondent

PREMIER ATTRACTION 426 CC t/a WEB-ACTIVE 6th Respondent

LEANDRIE LE ROUX 7th Respondent

Court: Acting Judge J I Cloete

Heard: 29 February 2012, 1 and 7 March 2012. Supplementary submissions filed on 26 and 28 March 2012.

Delivered: 17 April 2012

JUDGMENT

CLOETE AJ:

Introduction

[1] This matter involves two inter-related applications. One is the return day of an Anton Piller order. The other is the return day of a rule *nisi* essentially interdicting and restraining the respondents from utilising what the first applicant claims is its trade secrets and/or confidential information, and to prevent the second respondent from disseminating defamatory communications concerning the first, fourth and fifth applicants. Since the second and third applicants in each case have withdrawn the relief claimed I will refer to the remaining applicants as *'the applicants'* unless otherwise indicated. There was no appearance for the seventh respondent in the interdict application and similarly and unless otherwise indicated I will refer to the remaining respondents as *'the respondents'*.

Background

[2] The first applicant has built a successful recruitment business in Johannesburg over a decade or more using the trade name C R Solutions. It invested significant time, effort and money in moving to a paperless office, using information technology.

Its IT provider in this project was Web-Active run initially by second and third respondents and later by sixth respondent.

[3] It is the applicants' case that in 2005 it opened a Cape Town branch pursuant to an agreement reached between the first applicant and the second respondent. The second to fourth respondents would run the Cape Town branch. The first applicant paid set-up costs, furnished ongoing financial support, and introduced the Cape Town branch to its clients who had a Cape Town presence. All clients signed up by the Cape Town branch were contracted directly to the first applicant.

[4] It is also the applicants' case that from 1 March 2006, C R Solutions Cape Town (Pty) Ltd (*'the Cape Town business'*) became the vehicle for the Cape Town branch and from that date had its own VAT number, bank account and separate accounting records. However the agreement was that the first applicant would control all of the administration, finances and even the bank account of the Cape Town business. Only once the Cape Town business became profitable and had repaid the first applicant would it commence contracting with clients and operating its business in its own right. The Cape Town business never reached that stage.

[5] The applicants also say that following a fall out between the first applicant and Web-Active in March 2009 the second to seventh respondents without warning abandoned the premises of the Cape Town business, taking with them staff, office furniture and equipment, computers and the entire data base and confidential information of the first applicant. The second respondent, fourth respondent, seventh respondent and a Ms Carien Klopper tendered their immediate resignations notifying the first applicant in Johannesburg thereof via email. Second to seventh respondents

simultaneously moved to the residential address of the second respondent where a rival recruitment business was subsequently established.

[6] It is also the applicants' case that all of the confidential information of its business comprising its database, data, client lists, candidate employee lists, business documentation and website was removed by the respondents and used in the rival recruitment business which was set up by the respondents or some of them. Members of staff were enticed away to the rival business. The first respondent has now become the vehicle for the competing recruitment business utilising, with the assistance of the other respondents, all of the first applicant's confidential information. The respondents, or some of them, have sold or are attempting to sell the first applicant's website and database to competitors in the recruitment industry.

[7] The gist of the respondents' case on the papers is that the Cape Town operation (being both the "branch" and subsequently the Cape Town business) was an entirely separate and independent entity which was in fact established for the fourth respondent. The Cape Town business had separate directors and shareholders and was financially independent of the first applicant. The respondents accordingly contend on the papers that the confidential information to which the first applicant lays claim belongs not to the first applicant but at worst for the respondents to the Cape Town business which has been placed in final liquidation. Accordingly only the liquidators (the second and third applicants) can lay claim to that confidential information. The respondents in any event deny being in possession of the confidential information claimed by the first applicant, deny that they are using it and deny that they are breaching the first applicant's copyright in using and/or attempting to sell what the first applicant claims is its website and/or database.

[8] The respondents admit that the relationship between the first applicant and Web-Active collapsed in March 2009 and that they effectively abandoned the premises of the Cape Town business. They do not seriously dispute that when they moved to the residential address of the second respondent and set up business there they took with them staff, office furniture and equipment, computers and a database and confidential information. However, as I have said, they contend that they were entitled to do so and that the first applicant has no protectable interest in what it claims is its database and confidential information. The crux of the dispute is accordingly whether the first applicant enjoys a protectable interest to the database and confidential information in the possession of the respondents.

[9] What narrows the dispute is the respondents' concession during argument that what I will loosely term "the confidential information" was undoubtedly initially that of the first applicant. However it was contended (although this was not the case put up by the respondents in their papers) that this information had with the passage of time exclusively become that of the Cape Town business as a consequence of which the first applicant no longer has a protectable interest therein. The respondents failed to explain on what basis they have any entitlement to the confidential information of – on their own version – the Cape Town business.

[10] It was as a result of the first applicant's allegation that the respondents had removed its entire database and confidential information that the applicants sought and obtained an Anton Piller order. This was duly executed and a vast amount of information seized.

[11] The applicants say that the information obtained pursuant to the execution of the Anton Piller order supports their claim that the respondents removed the first applicant's entire database and confidential information. The respondents contend otherwise, averring that, save for certain photographs of employee candidates, none of the information seized during the Anton Piller raid is that of the first applicant. The applicants accept that the Cape Town business may enjoy some right in and to the database found in the possession of the respondents; however they only seek to protect that which they say is first applicant's property.

[12] The respondents initially claimed that the papers as a whole (which are voluminous) reflect "sharp and very real disputes of fact" regarding the core issues which preclude a court from granting the relief sought on motion and call for the applications to be referred to trial. These "core issues" were defined by the respondents as being: (a) whether the Cape Town business was merely a branch (or extension) of the first applicant or whether it was a separate entity; (b) whether the Cape Town business had its own database which belonged to it or whether there was an arrangement whereby the Cape Town business used the information belonging to the first applicant; and (c) whether the respondents were in possession of and therefore "stole" the confidential information of the first applicant.

[13] In light of the respondents' belated concession that the information was undoubtedly initially that of the first applicant, it is my view that what is called for is an examination of the respondents' version on the papers (together with the relevant facts admitted by the applicants per the *Plascon-Evans* rule) as to how and when the first applicant lost its protectable interest therein, if at all. If the respondents have failed to deal satisfactorily with this aspect in their papers no genuine dispute of fact will arise

which would necessitate a referral to oral evidence, and it would be wholly inappropriate to afford the respondents "a second bite at the cherry" to remedy the deficiency.

[14] In addition, and as I understand it, the respondents in argument relied almost exclusively on the nature of the electronic documents seized in the Anton Piller raid to support their contention that none of the information obtained (bar the photographs already mentioned) was that of the first applicant. In order to determine whether there is a genuine dispute of fact on this issue regard must be had, not only to the initial papers filed but also to the supplementary affidavits, in particular those of the second respondent (*'Janion'*) and the fourth applicant (*'Shamley'*).

The duration of the protectable interest

[15] As part of the comprehensive case presented by the applicants in their founding papers, a lengthy explanation was provided detailing the evolution of the database and its component parts, how it is integral to the business model and *modus operandi* of the first applicant, the involvement of Web-Active in developing that database (as a consequence of which Web-Active was privy thereto), how the first applicant's data was made available to the Cape Town operation and how the first applicant paid all of the development costs of that database.

[16] The fourth respondent (Janion's daughter) – who would have the court believe that she (who was 20 years old when the Cape Town operation commenced and had no formal qualifications) played a central role in the development and success of the Cape Town business, including being exclusively responsible for staff training - furnished no answers to this sizeable portion of the applicants' case.

[17] Janion contented himself with the bald response that the database is owned by the Cape Town business. He did not deny that Web-Active contracted with the first applicant to build its database and website according to the first applicant's exact specifications, nor did he deny that the first applicant paid Web-Active for these services.

[18] It is common cause that the development of the database and website commenced before the Cape Town operation was even established. It is also common cause that none of the respondents had any experience in the recruitment industry (as opposed to the development of a database and website for that industry in accordance with the first applicant's specifications) prior to the commencement of the Cape Town operation.

[19] On the respondents' version the database and website had taken at least two years to develop. The fourth respondent claims that she only decided to start up a new recruitment business at the beginning of May 2009. However just three weeks later (on 22 May 2009) her business had a fully functional website which was virtually identical to that of the first applicant's. The respondents do not allege that the content of the website of the Cape Town business was different from that of the first applicant's in any material respect. Their contentions in this regard instead focused on the technical arrangement which, according to them, resulted in the first applicant and the Cape Town business operating separate sites.

[20] The respondents furnished no explanation for how the first respondent's website was fully developed from scratch in just three weeks. The fourth respondent did not deal with this at all. Janion denied that the first respondent's website had been

slavishly copied from that of the first applicant. He claimed that Web-Active had instructed a developer in the United States of America to design a website and database for the first respondent, and provided email correspondence in an attempt to support this claim. However, Janion appears to have overlooked the fact that the email correspondence only commenced on 24 July 2009, two months after the first respondent had a fully functional website virtually identical to that of the first applicant. Further, the Anton Piller order was executed on 3 and 4 July 2009, about three weeks before the instruction was given to the USA developer.

[21] In an email dated 9 March 2009 Janion informed Shamley that all the digital data of the Cape Town business had been lost when his son removed the server. When threatened by Shamley with criminal prosecution Janion informed her in an email dated 11 March 2009 that he had "located" a full backup of the data. He demanded payment from the first applicant to connect the disk drive which contained it. No explanation was furnished by Janion for why he believed, as late as March 2009, that the first applicant was entitled to the confidential information of what – on the respondents' version – was an entity entirely separate and distinct from that of the first applicant.

[22] Thereafter, and after holding out for payment for the connection of the drive and various communications between the parties' legal representatives, Janion returned some of the data. He informed the applicants through his attorney on 26 March 2009 that no backups had been made of the copy handed over to the applicants and that the respondents had deleted all information concerning the first applicant. Again no explanation was furnished for why Janion believed that he had no outright entitlement

to retain this information. In this regard it is also common cause that the Cape Town business was only placed in liquidation on 9 June 2009.

[23] Following further suspicious activity on the part of the respondents the applicants came to believe that Janion's assurances were devoid of truth and it was at that point that the Anton Piller order was obtained and executed. Some time later (on 28 October 2009) and after the respondents had refused to consent thereto, the applicants obtained a further order granting them access to the information seized and preserved by the sheriff during the execution of the Anton Piller order.

[24] The amount and extent of the information found still to be on the computers of the second to fourth respondents, despite their earlier allegations, was fully set out in the supplementary papers filed.

[25] The respondents in their papers pertinently failed to address both how and when the first applicant lost its protectable interest in its confidential information (there is no dispute that if the information is indeed the first applicant's then it is confidential to the first applicant and the respondents have no right to it). Other glaring omissions in the respondents' version are why the first applicant would have effectively donated its confidential information to the respondents and how, and to what extent, the respondents themselves funded the set-up costs of the Cape Town operation.

[26] During argument the best that the respondents could proffer was that the first applicant lent money to the Cape Town business which the latter then used to finance the acquisition and/or creation of the database. However this submission is contradicted by the respondents' own version on the papers.

[27] The fourth respondent denied throughout that any monies had been advanced to set up or fund the Cape Town operation. Further, the document (annexure *'A5'*) relied upon during argument does not serve as effective proof of payment for any portion of the database. First, this document reflects payments made prior to March 2006 when the Cape Town business, as opposed to the "branch", commenced operation. Second, the document nowhere reflects payment for the database but rather *'computer expenditure ex Web-Active hosting, monthly domain, etc internet ex Web-Active'*. The substantiating documentation in the pages that follow reflect a range of items from building materials through to administration expenses – not a single entry is to be found regarding the "database", for which it is not disputed the first applicant had paid R720 000.

[28] The respondents disputed that the Cape Town business was not profitable. However it is common cause that the first applicant controlled the finances of the Cape Town operation throughout. The fourth respondent herself claimed that this was a bone of contention between Shamley and Janion. Further, the respondents did not take issue with the annual financial statements for the Cape Town business for the tax years ended 28 February 2007 and 29 February 2008. These statements were attached to their own papers in an effort to support the "separate entity" argument. They reflect an accumulated loss in 2007 of R113 665 and in 2008 of R470 316; a net loss of income of R113 765 in 2007 and R356 651 in 2008; and a loan from the first applicant (held at amortised cost) of R585 012 in 2007 and R1 001 783 in 2008. The financial statements for the year ended 29 February 2008 record that no emoluments were paid to the directors of the Cape Town business during that year and that the Cape Town business was factually insolvent.

[29] Simply put, there is no evidence at all to support the respondents' contention that with the passage of time the first applicant lost its protectable interest in its confidential information. The overwhelming body of evidence suggests exactly the contrary.

[30] Accordingly no dispute of fact exists on this issue which would require a referral for oral evidence. On the trite test to be applied in motion proceedings, I thus find that the first applicant did not divest itself of its protectable interest in its confidential information.

The documents and information seized

[31] I turn to consider whether it can be determined on the papers if included in the documents and information seized in the Anton Piller raid were documents and information which are the property of the first applicant. As I have said the respondents argue that this issue cannot be decided on motion and that it should be referred for the hearing of oral evidence.

[32] In *Minister of Environmental Affairs and Tourism and Another v Scenematic Fourteen (Pty) Ltd* 2005 (6) SA 182 (SCA) at 202E-I Scott JA said:

'In Khumalo v Director-General of Co-operation and Development *[1990] ZASCA 118; 1991 (1) SA 158 (A) at 167G-168A the court cited with approval the conclusions of Kumleben J in* Moosa Bros & Sons (Pty) Ltd v Rajah *1975 (4) SA (D) at 93E-H regarding the approach to be adopted in applications to hear oral evidence in terms of rule 6(5)(g). The passage is worthy of repetition.*

"(a) As a matter of interpretation, there is nothing in the language of rule 6(5)(g) which restricts the discretionary power of the Court to order the cross-examination of a deponent to cases in which a dispute of fact is shown to exist.

(b) *The illustrations of "genuine" disputes of fact given in the* Room Hire *case at 1163 do not – and did not purport to – set out the circumstances in which* cross-examination *under the relevant Transvaal Rule of Court could be authorised. They* a fortiori *do not determine the circumstances in which such relief should be granted in terms of the present rule 6(5)(g).*

(c) *Without attempting to lay down any precise rule, which may have the effect of limiting the wide discretion implicit in this rule, in my view oral evidence in one or other form envisaged by the rule should be allowed if there are reasonable grounds for doubting the correctness of the allegations concerned.*

(d) *In reaching a decision in this regard, facts peculiarly within the knowledge of an applicant, which for that reason cannot be directly contradicted or refuted by the opposite party, are to be carefully scrutinised."*

See also Roman Catholic Church (Klerksdorp Diocese) v Southern Life Association Ltd *1992 (2) SA 807 (A) at 816H-I.'*

[33] This was the authority relied upon by the respondents in support of their application for a referral for oral evidence. *In casu* and on the respondents' own version there are no facts which are peculiarly within the knowledge of the applicants which for that reason cannot be directly contradicted or refuted by the respondents. No such claim is made on the papers. On the contrary, Janion went into great detail in his supplementary affidavit in an attempt to persuade the court that, with reference to specific documents and information seized, and apart from the photographs (which he claimed had inadvertently come into the possession of the respondents) none was the property of the first applicant. This thus leaves me to determine (without of course limiting the court's wide discretion in terms of rule 6(5)(g)) whether there are reasonable grounds for doubting the correctness of Shamley's allegations concerning this documentation and information.

[34] In *Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd and Another* 2011 (1) SA 8 (SCA) at 13I-14J Shongwe JA said:

'The court a quo approached the matter on the basis that the facts pertaining to the agreement of 5 May 2008 were in dispute and that there had been no request by the appellant that the matter be referred for evidence or trial. It then applied the principle in Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd *1984 (3) SA 623 (A) at 634E–F (where it was held that the court must deal with the matter on the basis of the respondent's version coupled with the admitted facts in applicant's papers). However, in* Truth Verification Testing Centre CC v AE Truth Detection CC and Others *1998 (2) SA 689 (W) Eloff AJ stated at 698H-J:*

"I am also mindful of the fact the so-called 'robust common-sense, approach' which was adopted in cases such as Soffiantini v Mould *1956 (4) SA 150 (E) in relation to the resolution of disputed issues on paper usually relates to situations where a respondent contents himself with bald and hollow denials of factual matter confronting him. There is, however, no reason in logic why it should not be applied in assessing a detailed version which is wholly fanciful and untenable."*

I respectfully agree. The court should be prepared to undertake an objective analysis of such disputes when required to do so. In Wightman (Pty) Ltd t/a JW Construction v Headfour (Pty) Ltd and Another *2008 (3) SA 371 (SCA) ([2008] 2 All SA 512) it was suggested how that might be done in appropriate circumstances. The present case calls for a similar analysis.*

A court must always be cautious about deciding probabilities in the face of conflicts of fact in affidavits. Affidavits are settled by legal advisers with varying degrees of experience, skill and diligence and a litigant should not pay the price for an adviser's shortcomings. Judgment on the credibility of the deponent, absent direct and obvious contradictions, should be left open. Nevertheless, the courts have recognised reasons to take a stronger line to avoid injustice. In Da Mata v Otto NO *1972 (3) SA 858 (A) at 689D–E the following was said:*

"In regard to the appellant's sworn statements alleging the oral agreement, it does not follow that because these allegations were not contradicted – the witness who could have disputed them had died – they should be taken as proof of the facts involved. Wigmore on Evidence, *3rd ed, vol. VII, p.260, states that the mere assertion of any witness does not of itself need to be believed, even though he is unimpeached in any manner, because to require such belief would be to give a quantative and impersonal measure to testimony. The learned author in this connection at p. 262 cites the following passage from a decision quoted:*

> *'It is not infrequently supposed that a sworn statement is necessary proof, and that, if uncontradicted, it established the fact involved. Such is by no means the law. Testimony, regardless of the amount of it, which is contrary to all reasonable*

probabilities or conceded facts--testimony which no sensible man can believe--goes for nothing; while the evidence of a single witness to a fact, there being nothing to throw discredit, cannot be disregarded.'"

Also in Siffman v Kriel *1909 TS 538 Innes CJ says at 543:*

"It does not follow, because evidence is uncontradicted, that therefore it is true . . . The story told by the person on whom the onus *rests may be so improbable as not to discharge it."*

I am satisfied that the court a quo should have adopted this approach when considering the first respondent's defence and version ...'

[35] In *Wightman t/a JW Construction* referred to in *Buffalo Freight Systems* at 375G-376B Heher JA said:

'A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say "generally" because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.'

[36] Shamley furnished a comprehensive description of the first applicant's database and website, the inter-related manner in which they function and how they gave an advantage to the first applicant.

[37] The website, she explained, was a large part of the first applicant's business and was fully functional. On the front end the first applicant is advertised and promoted, it is user-friendly for clients and candidates and attracts them by giving tips on interviewing, labour laws, *curriculum vitae*, etc. On the back end is the extremely powerful database with excellent search capabilities, housing all of the first applicant's information and giving it an advantage because of the functionality in relation to candidates, the first applicant's consultants, its secretaries, its clients, advertisements, assessments and internal processes.

[38] The fourth respondent did not answer these allegations and they were merely noted by Janion.

[39] Shamley went on to explain what she meant by the term "database":

'...a complex and intricate structure which enables C R Solutions to use its website as an active and effective business tool. The C R S database is technically set up with source codes. In a way it is both a storehouse and engine. It receives, allocates and stores a considerable amount of information of crucial importance to C R Solutions' business and at the same time the "engine" component takes in, processes, allocates and produces essential elements of C R Solutions' business in the form of curriculum vitae, candidate details, client requirements and the like.'
[Emphasis supplied]

[40] The fourth respondent did not answer this allegation. Janion agreed with the explanation of the database, adding only that Shamley made it out to be more complex

than it actually is. He stated that it is very simple, there is no magic to it and that it does not differ from other agencies' databases. Suffice it to say that this contention flies directly in the face of the respondents' own version that the first applicant's database took years to develop.

[41] Against this background the argument advanced on behalf of the respondents was focused on a narrow front, namely, only on the data of the Cape Town business found during the execution of the Anton Piller order. What was not addressed in the respondents' supplementary papers was the applicants' central contention that the entire database (as described by Shamley) and the website were taken by the respondents.

[42] Further, I do not agree with the respondents' submission that Shamley failed to reply to a number of allegations made in Janion's supplementary affidavit. At the outset she indicated that each allegation not dealt with was denied. Clearly her affidavit should be read in its entirety and with reference to what she had already set out at length in her founding and replying affidavits. As I have said the papers are voluminous and it would have been unhelpful for Shamley to have to repeat all of the previous allegations made.

[43] I turn to analyse the documents relied upon by the respondents in their supplementary affidavits for the contention that they do not pertain to the first applicant and are destructive of the applicants' case.

[44] The report of the supervising attorney in the Anton Piller application revealed the nature of the documentation and information disclosed by the respondents. The database relating to the first respondent's recruitment business was found on the

computer of the third respondent. The data was found on the computer of the second respondent. Candidate employee lists were found on the computer of the third respondent. Business forms and documents were located on the computer of the second respondent. Correspondence between the first respondent and clients were found on the computer of the fourth respondent. The respondents informed the supervising attorney that the computer programme in use was located on the fourth respondent's hard drive.

[45] The applicants annexed to their founding affidavit copies of the first applicant's company profile, formatted *curriculum vitae*, time sheet, and temporary employee contract documents, along with those of the first respondent. A comparison of these documents reveals that they are either identical or substantially identical.

[46] In his supplementary affidavit Janion admitted that numerous files were found on the respondents' computers but, as I have said, claimed that the only data belonging to the first applicant consisted of certain photographs of first applicant's candidate employees. However, the applicants showed in reply and with reference to two randomly selected candidates that in fact not only the photograph but the entire *curriculum vitae* of the candidate employee concerned formed part of the file.

[47] The applicants also demonstrated with reference to various annexures that three of the candidate employees referred to were in fact contracted to the first applicant.

[48] The respondents claimed that certain files found on their computers are those of clients of the Cape Town business. They did not attach copies of the relevant

contracts in support of this claim. In reply the first applicant annexed copies of its contracts with a number of its clients which the respondents had alleged were clients of the Cape Town business.

[49] The respondents suggested that the software tools seized do not form part of the first applicant's database but are instead files relating to the management of the first applicant's on-line data server.

[50] The respondents claimed that these were the property of the Cape Town business. In reply the applicants produced examples of comprehensive general knowledge and other assessment forms contained in these files which were compiled by or on behalf of and are owned by the first applicant.

[51] As regards the list of employee candidates seized, the respondents alleged that this was merely a "static picture" of applicants applying for positions through either first applicant or the Cape Town business. In reply the applicants produced copies of the files in question. These included contracts and confidential correspondence and documentation relating to clients of the first applicant and candidate employees contracted to the first applicant. They are clearly the first applicant's confidential files.

[52] Regarding other files seized, the respondents claimed that they could not identify the images contained therein. In reply the applicants produced copies of the images reflecting that they included the first applicant's logo and extracts from the first applicant's database or website on which the first applicant's copyright and ownership are specifically designated.

[53] The respondents also denied that the files seized and named *'internet.abuse.doc'* and *'end of assignment (green) 1.xls'* related to the first applicant's database. In reply the applicants produced copies of these specific documents. The first is an agreement forming part of the first applicant's employment contract. The second is a document relating to the first applicant's internal record keeping system.

[54] Shamley said that as a result of the Anton Piller raid it was revealed that the respondents had in their possession in excess of 18 000 Word documents, 10 000 Excel spreadsheets as well as hundreds of php and sql files, Johannesburg and Cape Town pst (email) files and in excess of 2000 other business and database files that refer explicitly to the first applicant's business operations. However only a small selection of the material harvested during the execution of the Anton Piller order was referred to by the respondents in the supplementary affidavits. And it cannot be overlooked that the respondents initially denied that they had any of this data.

[55] During argument the respondents sought to persuade me that, due to certain dates appearing on a limited number of documents produced by the applicants in reply, they could not have been documents seized in the Anton Piller raid and that this in turn raised a real question as to Shamley's credibility.

[56] The first batch of the questioned documents is to be found at annexures *'SA 36'* to *'SA 39'* of Shamley's replying affidavit in the supplementary papers. All bear the words *'Copyright 2011 Credit Temps (Pty) Ltd'.* The respondents argued that since the Anton Piller raid took place in July 2009 it was not possible that these documents could have been seized in that raid and claimed that Shamley had specifically alleged that those particular documents had been seized. However Shamley did not claim this

to be the case. What she said is that the contents of those annexures are clearly extracts from the first applicant's database or website on which the first applicant's copyright and ownership are designated. The respondents' argument is thus not persuasive.

[57] Similar arguments were advanced by the respondents in relation to annexures *'SA 43'* and *'SA 45'* to Shamley's replying affidavit. Annexure *'SA 43'* is a draft contract (to which I referred earlier) which forms part of the first applicant's contract of employment with its staff. It relates to the use of computers, the internet, email and games and stipulates that computers, email and the internet are to be used for the first applicant's business purposes only. At the foot of this document is an entry reflecting that it was updated on 18 January 2010. Janion had alleged that this was a document that formed part of the employment contract of staff at the Cape Town business. It was in response thereto that Shamley produced the document to show that it in fact belonged to the first applicant. She did not say that the specific document annexed to her affidavit was found in the raid. Annexure *'SA 45'*, being the first and last pages of the first applicant's contract with MTN, bears the date of 17 December 2009 (thus again after the Anton Piller raid). Janion had alleged that the document found in the possession of the respondents was an Excel spreadsheet containing details of the temporary staff placed by the Cape Town business with MTN. In annexing the extracts from the contract, Shamley claimed that it was in fact an agreement entered into between the first applicant and MTN. She said that Janion's statement that the file contained an Excel spreadsheet was nonsense. That statement must be seen in its proper context.

[58] It is common cause that when the Cape Town operation commenced the first applicant introduced the Cape Town staff to first applicant's existing clients who had a Cape Town presence. The applicants contend that even after the Cape Town business commenced operation in March 2006, all clients, including those signed up by staff of the Cape Town branch, were contracted directly to the first applicant. The fourth respondent did not answer this allegation. Janion simply furnished a bald denial. In their replying affidavits filed prior to the supplementary papers, the first applicant produced Cape Town client contracts spanning the period November 2006 until July 2008 which showed that these clients were in fact contracted with the first applicant. It is against this background that Shamley produced the first applicant's agreement with MTN in order to show that MTN was indeed a client, not of the Cape Town business, but of the first applicant. Whilst Shamley may be criticised for not stating her reason for doing so in these specific terms, I do not believe that her failure casts doubt on her credibility as claimed by the respondents.

[59] The points raised in relation to the dates on the very limited number of documents attacked by the respondents are swept away by the sheer weight of the evidence to the contrary in the papers.

[60] In my view the respondents have not advanced any reasonable grounds which lead me to doubt the correctness of Shamley's allegations concerning the documentation and information and certainly none which give rise to a genuine dispute of fact which would call for a referral to oral evidence, even on a limited issue.

[61] Again applying the *Plascon-Evans* rule I am satisfied that the applicants are entitled to the relief sought on this issue.

Defamation

[62] On 5 June and 23 June 2009 Janion, through his attorney of record, disseminated to first applicant's clients letters and an email which were highly defamatory of Shamley and the fifth applicant (Dormehl, Shamley's co-shareholder in the first applicant). It was not explained how Janion came to be in possession of these client details in light of his claim that same were not in the respondents' possession at any stage. These communications contained statements that: (a) Shamley and Dormehl had been requested to explain certain account anomalies in the Cape Town business; (b) the trust relationship between Janion, Shamley and Dormehl had broken down – Janion had requested investigation by the South African Police who had opened a dossier and Janion had also requested the Department of Trade and Industry to investigate the business dealings of Shamley and Dormehl; and (c) bluntly claimed that Shamley and Dormehl were guilty of misappropriation of monies from the Cape Town business and that absent such misappropriation the Cape Town business would have operated successfully and profitably.

[63] Janion did not deny having made these communications through his attorney, claiming only that they were sent to clients of the Cape Town business. The overwhelming weight of evidence is that these were not clients of the Cape Town business but those of the first applicant. In any event, the identity of the recipients does not detract from the unlawful publication of defamatory material. The letters were widely published and any ordinary reader would have understood the clear import of what was stated therein. In addition, Janion did not even attempt to make out a defence to the allegation that he had defamed Shamley and Dormehl.

[64] In these circumstances the applicants are certainly entitled to the relief sought in respect of the defamation claim (*Hix Networking Technologies CC v System Publishers (Pty) Ltd* 1997 (1) SA 391 (SCA)).

Costs

[65] The applicants submit that in light of the conduct of the respondents a costs order on the scale as between attorney and client is justified.

[66] It is trite that special considerations must be present arising either from the circumstances of the matter or from the conduct of the losing party before an order of attorney and client costs is made. In *Nel v Waterberg Landbouwers Ko-operatieve Vereniging* 1946 AD 597 at 607 Tindall JA said:

'The true explanation of awards of attorney and client costs not expressly authorised by Statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation.'

[67] Circumstances where such an order is appropriate include where a litigant has acted vexatiously, recklessly or maliciously, or where his conduct has been unworthy, reprehensible or blameworthy. See Joubert: The Law of South Africa, 2ed Vol 3 (2) at paragraph 323.

[68] It is my view that in the particular circumstances of this matter an award of attorney and client costs is justified and I exercise my discretion accordingly.

[71] **In the result I make the following order:**

1. **The rule *nisi* issued on 2 July 2009 under case number 13218/2009 in the Anton Piller proceedings is made final. It is directed that the sheriff shall retain all of the information and documentation seized until he destroys it as he deems fit.**

2. **The first to seventh respondents are interdicted and restrained from acquiring in any way and/or utilising the first applicant's trade secrets and/or confidential information comprising its data, database, computer programmes, client lists, candidate employee lists, training manuals, application responses, contracts, booklets, business forms and documentation ("the confidential information").**

3. **The fourth and seventh respondents are interdicted and restrained from breaching the confidentiality provisions contained in clause 6 of their respective employment contracts entered into between the first applicant and the fourth respondent on 15 August 2007 and the first applicant and the seventh respondent on 27 July 2007.**

4. **The fourth and seventh respondents are interdicted and restrained from divulging or disclosing to the first respondent and/or any other party any of the first applicant's trade secrets and/or confidential information.**

5. **The first to seventh respondents are ordered to deliver forthwith all copies of first applicant's trade secrets and/or confidential information comprising its data, database, computer programmes, client lists, candidate employee lists, training manuals, application responses,**

contracts, booklets, business forms and documentation which they may still have in their possession to the applicants' attorneys of record.

6. **The first, fifth and sixth respondents are interdicted and restrained from breaching first applicant's copyright in relation to the computer programme in use by the first applicant in its personnel recruitment business by the reproduction, adaptation, rental, distribution or sale of such computer programme and from holding out in any way that they are entitled to reproduce, adapt, rent out, distribute or sell such computer programme.**

7. **The second respondent is interdicted and restrained from disseminating any communication relating to the first and/or fourth and/or fifth applicants whether in writing or otherwise carrying the meaning or suggesting that the first and/or fourth and/or fifth applicants are guilty of or have engaged in theft, fraud, misappropriation of funds or unethical business practices, or otherwise defaming the first and/or fourth and/or fifth applicants.**

8. **Save as set out in paragraph 9 below, the respondents shall bear the costs of these applications (including the application for access to the confidential information seized) on the scale as between attorney and client, including all reserved costs, and the costs of two counsel where used.**

9. **The first, fourth and fifth applicants shall bear the costs occassioned by the postponement on 23 November 2010 on the scale as between party and party.**

J I CLOETE