IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN

Case no. 5021/15
Date Heard: 22/10/15
Date Delivered: 3/12/15
Reportable

In the matter between:

Gregory Ernest Harvey **Applicant**

and

Bruce Desmond Niland **First Respondent**

Huntershill Safaris CC **Second Respondent**

Thaba Thala Safaris **Third Respondent**

JUDGMENT

PLASKET, J

[1] The applicant, Mr Gregory Harvey, and the first respondent, Mr Bruce Niland, are the only members of the second respondent, Huntershill Safaris CC (Huntershill), holding members' interests in it of 51 percent and 49 percent respectively. Niland was, until mid-2015, employed as a professional hunter and safari guide by Huntershill. He is now employed as a farm manager at Thaba Thala Safaris, an entity cited as the third respondent but against which no relief is sought.

[2] Harvey has brought this urgent application to interdict Niland from breaching the fiduciary duties, imposed by s 42 of the Close Corporation Act 69 of 1984, that he owes to Huntershill. That section provides:

'(1) Each member of a corporation shall stand in a fiduciary relationship to the corporation.

(2) Without prejudice to the generality of the expression "fiduciary relationship", the provisions of subsection (1) imply that a member-

(a) shall in relation to the corporation act honestly and in good faith, and in particular-

(i) shall exercise such powers as he or she may have to manage or represent the corporation in the interest and for the benefit of the corporation; and

(ii) shall not act without or exceed the powers aforesaid; and

(b) shall avoid any material conflict between his or her own interests and those of the corporation, and in particular-

(i) shall not derive any personal economic benefit to which he or she is not entitled by reason of his or her membership of or service to the corporation, from the corporation or from any other person in circumstances where that benefit is obtained in conflict with the interests of the corporation;

(ii) shall notify every other member, at the earliest opportunity practicable in the circumstances, of the nature and extent of any direct or indirect material interest which he or she may have in any contract of the corporation; and

(iii) shall not compete in any way with the corporation in its business activities.

(3) (a) A member of a corporation whose act or omission has breached any duty arising from his or her fiduciary relationship shall be liable to the corporation for-

(i) any loss suffered as a result thereof by the corporation; or

(ii) any economic benefit derived by the member by reason thereof.

(b) Where a member fails to comply with the provisions of subparagraph (ii) of paragraph (b) of subsection (2) and it becomes known to the corporation that the member has an interest referred to in that subparagraph in any contract of the corporation, the contract in question shall, at the option of the corporation, be voidable: Provided that where the corporation chooses not to be bound a Court may on application by any interested person, if the Court is of the opinion that in the circumstances it is fair to order that such contract shall nevertheless be binding on the parties, give an order to that effect, and may make any further order in respect thereof which it may deem fit.

(4) Except as regards his or her duty referred to in subsection (2) (a) (i), any particular conduct of a member shall not constitute a breach of a duty arising from his or her fiduciary

relationship to the corporation, if such conduct was preceded or followed by the written approval of all the members where such members were or are cognisant of all the material facts.'

[3] Harvey initially sought further relief too but that was not pursued. Niland, for his part, brought a counter-application but his counsel made no submissions with regard to it.

[4] The issues to be decided are crisp. In the first place, I am required to decide the question of urgency. Secondly, if the matter is urgent, I am required to decide whether to strike out annexure 'G' to the founding affidavit which is a print-out of Niland's Facebook communications, as well as various paragraphs of the founding affidavit that relate to it. If I do not strike out annexure 'G' and its related material, I must finally decide whether the material contained in it establishes the basis for the relief claimed by Harvey.

The facts

[5] Harvey and Niland parted company on bad terms. Despite that, Niland remained a member of Huntershill, perhaps to avoid the coming into operation of a restraint of trade provision in clauses 18.1 and 18.2 of the association agreement entered into by Harvey and Niland.

[6] Harvey stated in his founding affidavit that shortly after Niland left, he began to suspect that he 'may have been acting contrary to his fiduciary duties to Huntershill, by actively competing against the business activities of Huntershill, and by attempting to solicit and divert the existing clients of Huntershill to the rival and competing safari and professional hunting activities being conducted or to be conducted at Thaba Thala'.

[7] As a result, Harvey's attorneys sent a letter dated 15 July 2015 to Niland. He was informed that he could not, in terms of the association agreement, solicit or engage in business with Huntershill's clients, or be associated or concerned with any entity that carried on business similar to that conducted by Huntershill. He was

warned that if he did so, Harvey would 'seek interim relief from the High Court of South Africa, Eastern Division (sic) to prevent you from doing so, at your cost'. This letter was obviously – and erroneously – referring to the restraint of trade in the association agreement but I accept the submission that the conduct complained of would have fallen foul of the fiduciary obligations imposed upon a member of a close corporation by s 42 of the Close Corporation Act.

[8] On 16 July 2015, Harvey's attorneys wrote to Niland's attorneys stating that they had been informed that Niland had been 'attempting to arrange hunts in contravention of the restraint of trade clause'. They threatened to apply for an interim interdict if this activity did not cease. A reply to this correspondence from Niland's attorneys pointed out that the restraint of trade was not operative because Niland remained a member of Huntershill.

[9] In a response to this letter, dated 21 July 2015, Harvey's attorneys made the point that Niland remained a member of Huntershill and that as such he 'remains in a fiduciary relationship' with it. The letter continued to state:

'7. Your client has engaged in the recent past (and continues to engage) in activities contrary to the terms of the Association Agreement and his fiduciary obligations to the Close Corporation, as member of the Close Corporation. These activities have included:

7.1 the engaging in commercial hunting and safari activities in competition with the Close Corporation; and/or

7.2 the use of confidential business and client related information of the Close Corporation to further his own competing hunting and/or safari related activities and/or the hunting and safari related activities of competing entities; and/or

7.3 he has engaged in the canvasing or attempts to canvas the existing (or prospective) clients of the Close Corporation, on behalf of his own hunting enterprises or the hunting and safari enterprises of competing business entities; and/or

7.4 he has "badmouthed" the hunting and safari activities of the Close Corporation and has disparaged the Close Corporation, in an endeavour to lower the standing of the Close Corporation within the minds of existing and prospective clients of the Close Corporation;

7.5 he has engaged in conduct designed or calculated to damage the business interests and goodwill of the Close Corporation and/or to promote the business activities and interests of business entities which compete with the Close Corporation in the business of hunting and safaris; and/or

7.6 he has breached the implicit restraint of trade which is applicable to him by reason of his membership of the Close Ccorporation, in one or all of the four mentioned respects.
7.7 In the alternative to the breach of his restraint of trade above we are instructed that the accessing of confidential information pertaining to our client's hunting operation is wrongful and unlawful and has been done knowing that it will cause our client loss of customers and an extensive loss of revenue. Your client's infringement of our client's rights in this regard is consequently unjustified and unlawful.'

[10] It was alleged that this conduct was 'designed or calculated to cause financial damage' to Huntershill and to cause 'damage to the goodwill associated' with its hunting and safari operations. The letter proceeded as follows:
'9. Our client, in his capacity as majority member of the Close Corporation and/or on behalf of the Close Corporation, hereby gives notice that your client is required to cease and desist with immediate effect from any and all conduct in breach of the Association Agreement and of his fiduciary obligations to the Close Corporation, as set out above, and that an unequivocal undertaking in writing is required that your client will desist from any such activity, pending the resolution of the present disputes and while your client remains a member of the Close Corporation and subject to the fiduciary and restraint of trade constraints, associated with such membership.
10. Failing the provision as aforesaid of an appropriate undertaking by your client our client will regrettably have no option but to approach the High Court of the Eastern Cape Division for an urgent interim interdict interdicting the unlawful conduct on the part of your client set out above.'

[11] In a letter dated 23 July 2015, Niland's attorneys denied that he had breached his fiduciary duties to Huntershill. In a response to this letter, dated 24 July 2015, Harvey's attorneys repeated the assertion that Niland was acting in violation of his fiduciary duties to Huntershill and stated that Harvey was 'proceeding to seek an order in the High Court of South Africa, Eastern Cape Division for the relief as set out in our prior letters'.

[12] This letter drew a response dated 27 July 2015 from Niland's attorneys. In it the conduct ascribed to Niland was denied but, nonetheless, an undertaking in the following terms was given:

'With respect to the undertakings sought pending the resolution of the dispute between your client and our client and expressly within that framework and context our client gives the following undertaking:
12.1 Our client has not accessed or used any confidential information belonging to the Close Corporation and undertakes not to do so.
12.2 Our client has not engaged in any conduct designed or calculated to harm the Close Corporation and undertakes not to do so.
12.3 Our client has not "bad-mouthed" the Close Corporation and undertakes not to do so.
12.4 Our client has not canvassed any clients belonging to the Close Corporation, nor has he communicated with any persons other than his own personal friends, contacts and acquaintances whose relationships with our client existed and pertain from before the association agreement between our clients. Our client will not canvass any current, present and existing persons or organisations presently contracted to the Close Corporation for hunting and safari activities.'

[13] Harvey stated that thereafter, on 15 September 2015, an employee told him that she knew the password for Niland's Facebook page. As he suspected that Niland was acting in breach of his fiduciary duties, he instructed his employee to use the password and access it, which she did. Niland's Facebook communications were copied and printed. The result was annexure 'G' to the founding affidavit, the contents of which I shall discuss later.

[14] In his answering affidavit, Niland stated that he never gave his password to anyone and deduced from this that Harvey hacked his Facebook communications unlawfully and contrary to the provisions of the Electronic Communications and Transactions Act 25 of 2002 (the ECT Act).

[15] Mr Ford who, together with Mr Dugmore, appeared for Harvey, conceded that, on the basis of *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*,[1] I must accept as a fact that Niland's Facebook page was indeed hacked unlawfully. It is on this basis that Mr Smuts who, together with Mr De La Harpe, appeared for Niland, argued that annexure 'G' was unlawfully obtained evidence and, along with references to it in the founding affidavit, should be struck out.

[1] *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-I.

[16] Having obtained access to Niland's Facebook communications which, on the face of it, indicated that Niland was acting in a manner contrary to the undertaking he had given, Harvey proceeded to launch his urgent application. The founding papers were filed (and served, I presume) on 23 September 2015, eight days after access to annexure 'G' had been obtained.

[17] The notice of motion required Niland to file a notice of opposition by 25 September 2015 and to file his answering affidavit by 29 September 2015, with the matter to be heard on 1 October 2015. Before dealing with the admissibility of Annexure 'G', it is necessary to consider the question of urgency.

Urgency.

[18] Mr Smuts argued that the matter should be dismissed for want of urgency. Essentially, as I understand his argument, he contended that Harvey abused the process by rushing to court on a week's notice and that the time periods afforded to Niland were unreasonably short.[2]

[19] While it is so that an applicant has the right to determine time periods in urgent applications, and the respondent must simply do the best he or she can to comply with them,[3] the applicant must give proper consideration to those time periods. In *Luna Meubel Vervaardigers (Edms) Bpk v Makin & another (t/a Makin's Furniture Manufacturers)*,[4] Coetzee JP said:

'Practitioners should carefully analyse the facts of each case to determine, for the purposes of setting the case down for hearing, whether a greater or lesser degree of relaxation of the Rules and of the ordinary practice of the Court is required. The degree of relaxation should not be greater than the exigency of the case demands. It must be commensurate therewith.'

[20] Although the founding papers were bulky, running to 247 pages, most of that – 166 pages – is taken up by annexure 'G'. Niland was able to file a comprehensive

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[2] *Caledon Street Restaurants CC v D'Aviera* [1998] JOL 1832 (SE).
[3] Cilliers, Loots and Nel *Herbstein and Van Winsen: The Civil Practice of the High Courts of South Africa* (5 ed) (Vol 1) at 431-432.
[4] *Luna Meubel Vervaardigers (Edms) Bpk v Makin & another (t/a Makin's Furniture Manufacturers* 1977 (4) SA 135 (W) at 137E-F.

answering affidavit of over 50 pages which dealt in detail with a wide range of matter, both relevant and irrelevant, as well as various annexures.

[21] I am satisfied that Harvey acted with expedition after he gained access to annexure ‘G’ and that this made it possible, for the first time, for him to apply for an interdict. I am also satisfied that the matter was sufficiently urgent to warrant the truncation of the time periods concerned.

[22] I accordingly find that a proper case for urgency has been made out. It may, however, be apposite nonetheless to say that an applicant who brings an urgent application should, generally speaking, err on the side of affording a respondent more, rather than less, time. Not only is that fair but it also makes for the smooth running of the matter.

Annexure ‘G’

[23] On 14 July 2015 Niland placed a message on his Facebook wall to the effect that he had decided to leave Huntershill and was ‘going on to bigger thinking’. On 15 July 2015, he stated that he would be ‘hunting with a company not far from here’. In a communication with Candice Syndercombe, who was not a client but, it would appear, a friend of Niland’s, he told her, with reference to his move to Thaba Thala that he had been asked ‘to make a big hunting place’ and that he was ‘going to try’. It is apparent that she was in the United Kingdom. In one communication, he asked her to sell hunts there for him.

[24] Annexure ‘G’ records a number of communications with people who are identified by Harvey as clients of Huntershill. I do not intend dealing with all of these communications but will confine myself to a sample.

[25] On 15 July 2015 Niland informed one William Nelson, described by Harvey as an important client and hunting agent, that Thaba Thala Safaris ‘is my new home’, that Nelson is ‘welcome to join me, but please keep quiet’, that he will start there in 15 days and that it had not been hunted for three years.

[26] Niland asked Nelson whether he had booked at Huntershill to which Nelson answered in the affirmative – 'because I cannot change the expectations everyone going with me have' – and then added: 'Let me get through this hunt, and we'll move forward'. Nelson also sent a message to Niland in which he asked him to tell 'me before I send everyone's deposits' whether there was a problem with Huntershill.

[27] Wayne Pourciau is described by Harvey as a 'valued existing client of Huntershill who has hunted at Huntershill three times previously, and had already committed to return to hunt at Huntershill'.

[28] In his exchanges with Pourciau, Niland, with obvious reference to Thaba Thala, stated that it 'will be huge areas to hunt' to which Pourciau asked for information as to where Thaba Thala is and 'what we can shoot'. When Pourciau offered to 'get the word out around here', Niland told him that he still needed two more weeks as he was 'sorting the prices and packages out'.

[29] With reference to Huntershill, Niland said that he was 'busy with legal battle' and that he did not intend selling his 'shares' in Huntershill as he wanted it 'dissolved'. The reason for this was given later:

'If I sell my shares I have 3 year restrained (sic) of trade no hunting so I can't afford too (sic) do that.'

[30] After a Huntershill advertisement of special offers was sent to him by Pourciau, Niland, with obvious reference to Harvey, stated that he had heard that he was 'desperate for clients'. Niland, in one communication with Pourciau, said that he 'must come and hunt new place'.

[31] It is clear from the communications between Jackie and Steve Makin that they were clients of Huntershill. Harvey said in his affidavit that they had committed to coming to Huntershill to hunt in March 2016. In a communication with Niland, Jackie Makin said that she was sorry to hear that he was moving. She asked whether he was still hunting. She told him that they had booked air tickets for 'next March' and asked if it would be possible 'for you to consider us hunting with you'. Niland answered that 'you guys are always welcome to hunt with me'.

[32] Later, Steve Makin stated that they had ‘provisionally booked with Greg for 10 March for 7-10 days flexible’ and wondered what Niland’s situation was and ‘what deals have you got for that time’. Niland replied that he would send them his hunting packages in the next two days and that he would ‘love to hunt with you guys’.

[33] Chris Smith, who had hunted with Niland at Huntershill for three years, according to one of his communications, contacted Niland when he heard that he was leaving Huntershill. He said that he had ‘flights booked but would rather jump ship and hunt with you’. Niland’s response was that he ‘will organise just give me 15 days then I am out of here’.

[34] On 1 August 2015, Smith informed Niland of the type of package he was interested in and stated that ‘Greg quoted us 4.5k all in for me and Carole’ and expressed the hope that ‘you can come as near as poss. to this’. Niland’s response was ‘Ok done will sort out’. On 6 August 2015, in response to a query from Smith, Niland said:

‘Hi smitty send me your email address so you can look at package I put together for you I think you are going to like it.’

Smith must have received an e-mail containing the details because on 11 August 2015 he told Niland that he was ‘looking forward to next trip’ and that the ‘package is great’.

[35] Galen Logan, described by Harvey as a ‘repeat customer of Huntershill who also acts as a hunting agent’ communicated with Niland to say that if Niland was ‘going to continue guiding I’ll have 4-5 new customers for ya’. Niland’s response was to thank him and give him his e-mail address. On 24 July 2015, Logan spoke of a person wanting to ‘come with us next year’ but having paid a deposit to Huntershill. Niland’s response was ‘just give me 2 weeks busy moving Greg not making it easy’.

[36] On 3 August 2015, Niland informed Logan that ‘most prices stay the same as hh just grysbuck and Vaal reedbuck go up a little’ and that ‘this company has properties that have never been hunted’. In an apparent reference to the person who had paid a deposit to Huntershill, Logan posted that he had informed him that ‘HH

had a cancellation policy'. Niland wrote that this person was 'mad to go back there Harvey has hired young British guys as phs to hunt Africa!!!' His advice for this person was that he 'just tell Harvey that because I left he does not want to hunt anymore and needs deposit to take Tracy on a cruise'.

[37] For the rest, Niland, in his communications with various clients of Huntershill, invited their business by giving his contact details and in some instances also undertook to provide prices. What emerges clearly from annexure 'G' is that Niland had set up a hunting business in opposition with Huntershill, had actively sought to entice clients of Huntershill to hunt with him, had provided them with prices and packages, had, in one instance provided advice as to how a client should cancel his hunt with Huntershill and get his deposit back, and had, on more than one occasion, been disparaging of Huntershill and Harvey.

The admissibility of annexure 'G'

[38] At common law, 'all relevant evidence which was not rendered inadmissible by an exclusionary rule was admissible in a civil court irrespective of how it was obtained'.[5] That rule is not absolute: it is subject to a discretion to exclude unlawfully obtained evidence.[6]

[39] Section 14(d) of the Constitution provides that everyone enjoys a fundamental right to privacy which includes the right not to have 'the privacy of their communications infringed'. In order to give this right teeth, s 86(1) of the ECT Act provides that, 'a person who intentionally accesses or intercepts any data without authority or permission to do so, is guilty of an offence'.

[40] It has been argued by Mr Smuts that annexure 'G' should be struck out because the accessing of Niland's Facebook communications was an infringement

[5] *Protea Technology Limited & another v Wainer & others* [1997] 3 All SA 594 (W) at 604b-c; *Waste Products Utilisation (Pty) Ltd v Wilkes & another* 2003 (2) SA 515 (W) at 549J.
[6] *Motor Industry Fund Administrators (Pty) Ltd & another v Janit* 1994 (3) SA 56 (W) at 64A-B; *Shell SA (Edms) Bpk & andere v Voorsitter, Dorperaad van die Oranje-Vrystaat & andere* 1992 (1) SA 906 (O) at 916H-I; *Lenco Holdings (Pty) Ltd & others v Eckstein & others* 1996 (2) SA 693 (N) at 702F-G; 704B-C.

of his fundamental right to privacy and constituted a criminal offence as well. In other words, annexure 'G' is evidence that was unlawfully obtained.

[41] In the *Protea Technology* case,[7] it was argued that, with the possible exception of what were termed by counsel 'extreme cases', the criminalisation of telephone-tapping (by s 2 of the Interception and Monitoring Prohibition Act 127 of 1992) had the result that a court had no choice but to exclude evidence obtained from the unlawful tapping of a person's telephone.[8] Heher J rejected this approach. He held:[9]

'It was also well established that the creation of a criminal offence with its concomitant penalty need not of itself be decisive of the voidness of an act performed in contravention of a statute; relevant considerations include the purpose of the legislation, the evil which the legislation intends to combat, a decision as to whether achievement of the legislative purpose demands the voidness of the Act or whether the imposition of the sanction is sufficient fully to answer that purpose, and the degree of inconvenience and impropriety which could result from avoiding the Act.

In the face of this knowledge the legislature surely intimated its intention by omitting from the Act any indication that information gathered in contravention of its provisions was thereby to be rendered inadmissible in legal proceedings.'

His conclusion was that 'the statute does not expressly or by necessary inference render the production of recordings made in contravention of its terms inadmissible in evidence before a court trying a civil dispute'.[10]

[42] In the *Waste Products Utilisation* case,[11] Lewis J, with reference to what was said in *Protea Technology* and other similar matters, stated that it was emphasised that 'our courts retain a discretion to admit tape recordings into evidence notwithstanding the commission of an offence or the infringement of a constitutional right in obtaining the recording'.[12]

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[7] Note 5.
[8] At 602d-e.
[9] At 604d-f.
[10] At 606e-f.
[11] Note 5.
[12] At 550F.

[43] It was argued by Mr Smuts, however, that the legislation applicable to this case, the ECT Act, is a 'game-changer'. I am not persuaded that it is. It creates, like the legislation in issue in the cases dealt with above, an offence – of accessing data without authority or permission – and it is silent on whether evidence obtained in contravention of s 86(1) is inadmissible. I am of the view that, far from being a 'game-changer', the ECT Act, by its silence on the issue, allows for the admission of unlawfully obtained evidence subject to its exclusion in the discretion of the court. I hold, in other words, that the approach followed by Heher J in *Protea Technology* and Lewis J in *Waste Products Utilisation* holds good in relation to evidence obtained in contravention of s 86(1) of the ECT Act.

[44] How then does a court decide whether to exclude unlawfully obtained evidence or to admit it?

[45] In *Fedics Group (Pty) Ltd & another v Matus & others; Fedics Group (Pty) Ltd & another v Murphy & others*,[13] Brand J considered whether the same considerations apply to unlawfully obtained evidence in the criminal and civil contexts. He made the point that, while in criminal proceedings, an accused has a right against self-incrimination and to silence, is not obliged to disclose his or her defence or to assist the State to prove its case, and is under no obligation to provide the State with any documents that may strengthen its case, the position is quite different in civil proceedings: a party in civil proceedings 'is not only obliged to disclose his case, he is also obliged to discover all documents which may damage his own case or which may directly or indirectly enable his adversary to advance his case'.

[46] He spelt out the implications of this for the way in which the discretion to allow or disallow unlawfully obtained evidence is to be exercised when he stated:[14]

'Without trying to formulate principles of general validity or rules of general application, the implications of these differences between criminal and civil proceedings in the present context are, in my view, twofold. On the one hand, the litigant who seeks to introduce evidence which was obtained through a deliberate violation of constitutional rights will have

[13] *Fedics Group (Pty) Ltd & another v Matus & others; Fedics Group (Pty) Ltd & another v Murphy & others* 1998 (2) SA 617 (C), para 90.
[14] Para 92.

to explain why he could not achieve justice by following the ordinary procedure, including the Anton Piller procedure, available to him. On the other hand, the Court will, in the exercise of its discretion, have regard to the type of evidence which was in fact obtained. Is it the type of evidence which could never be lawfully obtained and/or introduced without the opponent's co-operation, such as privileged communications, or the recording of a tapped telephone conversation, or is it the type of evidence involved in this case, namely documents and information which the litigant would or should eventually have obtained through lawful means? In the latter case, the Court should, I think, be more inclined to exercise its discretion in favour of the litigant who seeks to introduce the evidence than it would be in the case of the former. It goes without saying that the Court will, in any event, have regard to all the other circumstances of the particular case.'

[47] It is clear from the case law that I have considered that in the exercise of the discretion to exclude unlawfully obtained evidence, all relevant factors must be considered. These include the extent to which, and the manner in which, one party's right to privacy (or other right) has been infringed, the nature and content of the evidence concerned, whether the party seeking to rely on the unlawfully obtained evidence attempted to obtain it by lawful means and the idea that 'while the pursuit of truth and the exposure of all that tends to veil it is cardinal in working true justice, the courts cannot countenance and the Constitution does not permit unrestrained reliance on the philosophy that the end justifies the means'.[15]

[48] I accept for purposes of this matter that, in accessing Niland's Facebook communications, Harvey acted unlawfully. I accept too that this act, apart from probably constituting criminal conduct also constituted a violation of Niland's right to privacy. That right must, however, be viewed in its proper context. In *Gaertner & others v Minister of Finance & others*[16] Madlanga J held:

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

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[15] *Protea Technology* (note 5) at 608e-f.
[16] *Gaertner & others v Minister of Finance & others* 2014 (1) BCLR 38 (CC), para 49.

[49] It is so that the hacking of Niland's Facebook communications would have produced both information that was relevant to the business of Huntershill and Niland's fiduciary duties to it, and information that was irrelevant to those issues and entirely private. The relevant material that was accessed, however, established that Niland had been conducting himself in a duplicitous manner contrary to the fiduciary duties he owed to Huntershill. That duplicity was compounded by the fact that he had denied that he was acting in this way and had also undertaken not to do so. In these circumstances, his claim to privacy rings rather hollow.

[50] I turn now to whether Harvey had available to him other lawful means of obtaining the evidence contained in annexure 'G'. On the face of it, he could have instituted an action against Niland for damages arising from the breach of his fiduciary duties. He would have been entitled to discovery of annexure 'G' in due course. If he was concerned that the evidence may disappear, he may have been able to launch an application for an Anton Piller order in order to preserve it pending the institution of the action. A third possibility would have been to launch an application such as the present without annexure 'G'.

[51] In my view, these courses of action would not have availed Harvey and are, from a practical perspective, more apparent than real. Without annexure 'G', Harvey had no case and so could neither institute an action or launch an application. All he had was a suspicion but, without annexure 'G', he had no evidence of Niland's wrongdoing. An application for an Anton Piller order would have floundered too. It would have been seen as nothing but a fishing expedition and the suspicions that he had would not have constituted the prima facie case he would have had to make out in order to meet the first requirement for this relief.

[52] Like Heher J in *Protea Technology*,[17] it seems to me that right-thinking members of society would believe that Niland's conduct, particularly in the light of his denials and the undertakings that he gave, ought to be exposed and that he ought

[17] Note 5 at 612f-i.

not to be allowed to hide behind his expectation of privacy: it has only been invoked, it seems to me, because he had something to hide.

[53] In these circumstances, I am of the view that annexure ‘G’ is admissible and the application to strike it out must fail.

[54] Section 42(1) of the Close Corporation Act provides that every member of a close corporation stands in a fiduciary relationship to it. Section 42(2), without prejudice to the generality of the concept, includes as part of a member’s fiduciary duties, acting honestly and in good faith in relation to the close corporation and the avoidance of material conflicts between the interests of the member and the close corporation. The avoidance of conflicts of interest contemplates in particular that the member ‘shall not compete in any way with the corporation in its business activities’.[18]

[55] It is clear from annexure ‘G’ that Niland breached his fiduciary duties to Huntershill by seeking to undermine its business in his dealings with its existing clients and by himself competing with it.

[56] On the strength of annexure ‘G’, Harvey has established a clear right on the part of Huntershill, a violation of that right and an apprehension of on-going harm as well as the absence of any suitable alternative remedy. He has thus established an entitlement to an interdict. Some of the specific relief claimed by him in paragraph 2 of the notice of motion is, however, far too broad and open-ended. I have trimmed that relief to what I consider to be appropriate.

[57] As a final interdict will be granted there is no need for the relief claimed in paragraphs 3 and 4 of the notice of motion, and that was abandoned as a result. Mr Smuts made no submissions with regard to Niland’s counter-application. There is no merit in it and it must fail. The costs will follow the result, and the costs of two counsel is warranted.

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[18] Section 42(2)(b)(iii).

The order

[58] I make the following order.

(a) The application to strike out annexure ‘G’ and related matter is dismissed with costs, including the costs of two counsel.

(b) The first respondent’s counter-application is dismissed with costs, including the costs of two counsel.

(c) The first respondent, for as long as he remains a member of the second respondent, is interdicted from:

(i) breaching his fiduciary duties to the second respondent as contemplated by s 42 of the Close Corporation Act 69 of 1984;

(ii) competing with the business interests of the second respondent, whether directly or indirectly;

(iii) marketing or promoting the professional hunting and safari activities or services of Thaba Thala Safaris or any other rival or competing professional hunting or safari outfitter;

(iv) disparaging the second respondent or any member or employee of the second respondent;

(v) disparaging the business activities or professional hunting and safari activities or business of the second respondent;

(vi) utilising in any manner whatsoever, and either directly or indirectly, the personal client base data of any clients of the second respondent, or any person who has hunted with or at the second respondent since 2010;

(vii) canvassing, soliciting or diverting, or attempting so to do, any existing client of the second respondent or any person who has hunted at or with the second respondent since 2010;

(viii) any conduct which will have the effect of damaging the goodwill or client or business relationships of the second respondent;

(ix) copying, transmitting or transcribing, or rendering in usable form, any existing client data relating to existing clients of the second respondent, or any person who has hunted at or with the second respondent since 2010;

(x) making available to any other party or entity, whether in digital form or otherwise, any client data or contact information relating to existing clients of

the second respondent, or any person who has hunted at or with the second respondent since 2010.

(d) The first respondent is directed to pay the costs of the application, including the costs of two counsel.

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C Plasket

Judge of the High Court

APPEARANCES

For the applicant: B Ford SC and G Dugmore, instructed by Borman and Botha

For the first respondent: I Smuts SC and D De La Harpe instructed by Wheeldon Rushmere and Cole