IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case no: **D4460/2023**

In the matter between:

C[…] E[…] A[…] **APPLICANT**

and

M[…] B[…] **RESPONDENT**

Coram: Mossop J

Heard: 17 May 2024

Delivered: 17 May 2024

ORDER

The following order is granted:

1. The respondent is interdicted and restrained from publishing, disseminating, circulating, distributing and in any way disclosing to any third parties, whether directly or indirectly, the video recording, or any portion thereof, or stills thereof, in his possession which was taken in June 2019 and which depicts the applicant engaging in sexual relations with another woman.

2. The respondent shall pay the applicant's costs on the scale as between attorney and client.

JUDGMENT

MOSSOP J:

Introduction

[1] This is an ex tempore judgment.

[2] The Columbian novelist Gabriel Garcia Martinez once observed that all human beings have three lives: public, private and secret.[1] This matter involves a secret part of the applicant's life that she wishes to be kept that way.

[3] The applicant, a woman, was previously married to the respondent, a man. Their marriage failed. Before they divorced, they separated and the applicant remained in the erstwhile matrimonial home while the respondent moved to alternative accommodation. Prior to their separation, for security purposes, they had installed a network of closed circuit television cameras within and without the matrimonial home, with the exception of the master bedroom and the bathrooms which had no cameras in them at all. The television cameras operated continuously and were linked to a hard drive that recorded the footage fed to it from the cameras. The images recorded on the hard drive were preserved on it for seven days and then were recorded over by new incoming images. The footage recorded on the hard drive could be called up and viewed on a television screen in the master bedroom.

The factual matrix

[4] The applicant and the respondent separated either in November or December 2018. There is a dispute over when they did so, but nothing turns on this. However, on an undisclosed date in June 2019, the respondent was permitted by the applicant's domestic assistant to enter the erstwhile matrimonial home in the absence of the applicant. How or why this occurred need not detain us, save to say

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[1] Martin, Gerald (2008), *Gabriel Garcia Marquez: A Life*, London: Penguin.

that it occurred without the consent or knowledge of the applicant. The respondent, once in the house, went to the master bedroom and went through the footage then recorded on the hard drive. Whilst doing so, he came across video footage of the applicant having a sexual encounter with another woman in the lounge of the former matrimonial home (the encounter). He used the camera on his cellular telephone (the handset) to film the encounter displayed on the television set.

[5] On 30 June 2019, the respondent telephoned the applicant and requested an urgent meeting with her. It is safe to assume that the respondent had been in the erstwhile matrimonial home around this date, if not on it. She agreed to the meeting and he went around to the erstwhile matrimonial home immediately. He told her that he had in his possession a video lasting between 45 to 60 minutes depicting the encounter (the video). The applicant wanted to know how the respondent had obtained the video, but he declined to reveal this to her. When she was told this, she said that she felt:

'… humiliated, disgusted, terrified and ashamed.'

[6] The fact that the respondent entered the applicant's home and made the video using his handset is not in dispute. What is disputed is how much of the encounter was filmed by the respondent, to whom he has shown that footage and whether he still possesses it. The respondent states that he filmed approximately three minutes of the encounter. The applicant disputes this and believes that he filmed the entire encounter which, on her understanding, lasted between 45 minutes to an hour. There is a dispute about who the respondent has shown the video to: he appears to deny showing it to anyone, but admits showing a thumbnail image of a scene therefrom to a girlfriend, whereas the applicant believes that he has shown the video to a number of people and has threatened to show it to other people who have not yet seen it. Finally, the respondent appears to claim that he no longer has a copy of the video on his handset an allegation that is questioned by the applicant.

[7] Despite the respondent's disclosure to the applicant that he had the video, nothing further occurred immediately after that disclosure. Approximately a year later, on 3 October 2020, the applicant was out socialising one evening when she

met a man called S[…] C[…] (Mr C[…]), who had been responsible for installing the lighting system at the erstwhile matrimonial home. Mr C[…], unsolicited, informed her that he had seen the video. The applicant states that she was 'mortified' to hear this.

[8] The next day, 4 October 2020, the applicant used the social network platform called 'WhatsApp'[2] to contact the respondent about the revelation she had received the night before from Mr C[…]. The respondent denied showing the video to Mr C[…] and said that he had:

'… got rid of that thing because it disgusted me.'

The meaning of this statement was unequivocal as far as the applicant was concerned: the video had been destroyed by the respondent and no longer existed.

[9] The parties were thereafter divorced on 14 October 2020, the divorce action having been settled. The applicant rebuilt her life, remarried and she and her new husband were blessed by the arrival of a baby. The incident concerning the video began to recede into obscurity.

[10] However, on 13 April 2023, the applicant met up with a friend by the name of K[…] F[…] (Ms F[…]) whilst they were taking their respective children for swimming lessons. Ms F[…] passed on information to the applicant that she had been told that another woman that they knew, D[…] L[…] (Ms L[…]) had been shown the video by the respondent, as had the respondent's present girlfriend. Ms L[…] herself was an ex-girlfriend of the respondent.

[11] Based upon what the respondent had previously told her, the applicant believed that he had destroyed the video, but she now had reason to doubt whether this had, indeed, happened. As a consequence of what she was told, the applicant contacted Ms L[…]. Ms L[…] confirmed what Ms F[…] had told the applicant, save

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[2] Cambridge Online Dictionary: https://dictionary.cambridge.org/dictionary/english/whatsapp: WhatsApp is the brand name for a social media service with which two people or a group of people can send messages, photographs, and videos to each other, or can make telephone calls.

that she had only been shown a portion of the video by the respondent. When the present application was ultimately launched, Ms L[…] made an affidavit in which she recorded that in December 2022, more than two years after the respondent claimed to have destroyed the video, she was at his home when he showed her a video clip of the encounter. Ms L[…] recognised the applicant in the video immediately but not the other woman depicted.

[12] In addition, according to Ms L[…], later that month, or early in January 2023, the respondent hosted a social gathering at his home. Most of those who attended were divorced men. From the general tenor of the conversation, Ms L[…] discerned that they had all seen the video. Towards the end of January 2023, the respondent again showed the video to Ms L[…]. He again did not show her the entire video but only a portion thereof and mentioned to her that the entire video was some 40 to 60 minutes long. As justification for his possession of the video, the respondent allegedly told Ms L[…] that the applicant had not wanted to divorce him until he had shown her the video and he had threatened to expose the video if she did not sign a settlement agreement.

The urgent application

[13] The applicant accordingly approached this court on an urgent basis on 3 May 2023. Some notice was given to the respondent, who managed to make an affidavit which he entitled his 'provisional' answering affidavit, indicating that he reserved his right to deliver a more comprehensive answering affidavit at a later stage, if necessary. In the event, he filed no further affidavit.

[14] The order that the applicant sought was a rule nisi claiming the following relief:

'2.1 The respondent is interdicted and restrained from publishing, disseminating, circulating, distributing and in any way disclosing to any third parties, whether directly or indirectly, the video recording, or any portion thereof, or stills thereof, in his possession which was taken in June 2019 and which depicts the applicant engaging in sexual relations with another woman.

2.2 The respondent is directed to forthwith deliver to the applicant the full recording of the video in electronic format, and forthwith delete and destroy all recordings of the said video recording.

2.3 The respondent is directed to pay the costs of this application on the attorney and client scale.'

The answering affidavit

[15] In his provisional answering affidavit, the respondent protested that the application was totally uncalled for, resulting in him having to incur unnecessary costs by hiring attorneys and senior counsel to represent him. He stated that he did not possess the video any longer, but agreed that he had possessed it in 2019. He seemed to reason that because he lived in the matrimonial home when the television cameras and hard drive were installed, he was not invading the applicant's privacy when he entered the master bedroom and browsed through the recordings on the hard drive in her absence. He admitted that he looked at the hard drive and by chance came across the encounter. As he knew the applicant would not easily admit that it had occurred, he videoed the encounter using his handset. He stated that he videoed only about three minutes of the encounter.

[16] The respondent denied showing the video to any person, other than the applicant. He admitted that there was a thumbnail image[3] of a scene from the video on his handset. A girlfriend of his, C[…] S[…] (Ms S[…]) was shown this thumbnail image. It was fervently denied by the respondent that Mr C[…] had ever been shown the video, despite what Mr C[…] had told the applicant. The respondent did not put up a confirmatory affidavit from Mr C[…] confirming that he had not seen the video. Instead, the respondent relied upon a rather equivocal WhatsApp message Mr C[…] sent to him which reads:

'Howzit, just thinking on all that I don't want to be drawn into all this he said she said. I do recall an incident but like 4/5 years ago after one of our green snake golf days I was pissed. But can't recall exactly what we discussed etc. I am happy to sign

[3] A thumbnail image is a miniature computer graphic sometimes linked to a full-size version. Merriam-Webster Online Dictionary - https://www.merriam-webster.com/dictionary/thumbnail

Affidavit stating I have never seen any “video” of her and I have never had access to any CCTV footage. We installed a lighting system that in no way had access to any CCTV. Lekker man’.

That WhatsApp message prompted the following response from the respondent:

‘Awesome that’s all I need thanks my man.’

Mr C[…]’s willingness to deny having seen the video is troubling given the fact that he remembered such an incident as having occurred, albeit it when he was in an inebriated state.

[17] As far as the short video clip of the encounter that he admitted to videoing was concerned, the respondent stated that he had deleted it. He did not say when he had done so. By virtue of the fact that the erstwhile matrimonial home had been sold together with the hard drive, the respondent stated that he no longer had access to the hard drive, which, in any event had long since been recorded over. The inference suggested is that there are no versions of the video, whether the full video or the shortened version, currently in the respondent’s possession. The respondent offered his handset to be inspected ‘by an attorney’ to verify that the video clip was no longer on it.

[18] Attached to the applicant’s founding affidavit were screenshots of WhatsApp communications between herself and the respondent. The respondent further submitted that from these communications it is evident that he never threatened to disclose the video clip to anyone else. Rather than he making allegations about the applicant, she had made allegations against him. Moreover, she was making allegations that he had caught her:

‘… having sex with a <u>man</u> and that I was threatening to use this video footage to try and force her to reconcile with me.’ (underlining as per the answering affidavit)

The respondent appeared to be indignant that the applicant was allegedly falsely denying that the encounter was a woman.

[19] The respondent claimed only to have had a three-minute clip of the video. He denied that he observed the full encounter and that all that he saw was:

'… the two or three minutes which I then filmed on my cellphone'.

Which part of the video those three minutes allegedly comprised, was not stated. He then claimed that he sent the applicant what he had filmed. The applicant denies that she was sent anything by the respondent.

[20] With regard to the applicant's allegation that he had filmed the video in her absence from the erstwhile matrimonial home, the respondent had this to say in his answering affidavit:

'24. I did nothing underhanded. We were married at the time and this had been a matrimonial home.

25. My clothes were still in the house.

26. My son was living in the house.

27. The divorce was an acrimonious one.

28. At the time, I was not being provided with as much access to my son as I wanted. When I had the opportunity of looking at the video footage, I thought I might see something which might assist me in my case insofar as it dealt with the care and custody of our son.'

[21] As to the version of Ms F[…], the respondent took the view that it was hearsay, as Ms F[…] did not put up an affidavit. At that juncture, the point made by the respondent was sound as there was no affidavit made by Ms F[…] attached to the urgent application. However, Ms F[…] put up an affidavit which accompanied the replying affidavit. The respondent has not sought to deal with her allegations by way of a supplementary answering affidavit, which he reserved the right to do.

[22] The respondent admitted that he had shown the thumbnail photograph to his current girlfriend, Ms C[…] S[…], allegedly to allay her suspicions that he still entertained feelings for the applicant. He then made the following statement in his provisional answering affidavit:

'I did not show [Ms S[…]] the full video - let alone the 45 or 60 minutes which had been on the hard drive.'

[23] The respondent then stated that:

'the applicant has exaggerated what in fact happened. I do not have the video footage and I have destroyed the thumbnail.'

[24] Finally, considering the affidavit filed by Ms L[…] in support of the applicant, the respondent said while he told her of the encounter, he had never shown her the video. He dismissed all her evidence as being lies, being 'demonstrably false'. However, out of excessive courtesy to Ms L[…], he would not disclose why she had lied as she had and stated that:

'[t]he less I say about Ms L[…], the better.'

The first hearing

[25] The urgent application brought by the applicant served before Henriques J on 3 May 2023, who, correctly in my view, regarded the matter as being urgent, despite the protestations by the respondent that it was not.[4] The order granted by Henriques J (the order) was substantially more detailed than the relief framed in the notice of motion. The order appears to be something that had been agreed upon, a fact that the applicant later confirmed in her replying affidavit, although the order itself does not record that it was taken by consent. It is perhaps best to fully narrate the order:

[4] The issue of urgency was fully ventilated in the papers before Henriques J, and I do not intend revisiting this issue. Given the sensitivities of the matter, the allegations concerning the conduct of the respondent and the potential for harm, the application was palpably urgent.

‘1. This application is adjourned sine die.

2. The respondent is directed to deliver his supplementary answering affidavit together with other affidavits in support thereof by 24 May 2023.

3. It is recorded that:

3.1 Although the respondent denies being in possession of any such video recording, recordings or stills he is given, and gives, an undertaking, pending the final determination of these proceedings, not to publish, disseminate, circulate, distribute and in any way disclose to any third parties, whether directly or indirectly, the video recording, or any portion thereof, or stills thereof, in his possession which was taken in June 2019 and which depicts the applicant engaging in sexual relations with another woman.

3.2 The respondent further undertakes, within five days hereof, to request the sheriff of this court to nominate a duly qualified and reputable expert, and thereafter within five days of the nomination, to present the cellular telephone in his possession and forming the subject of these proceedings to interrogate and analyse its contents and determine whether any content as described above is currently contained thereon, whether such content was recently disseminated therefrom, and to whom, and to delete such content if contained thereon, and to report thereon to the legal representatives of both parties.

4. The respondent is further directed, within five days after receipt of the report referred to in paragraph 3.2 hereof, and on good cause shown by the applicant, to present the cellular telephone in his possession and forming the subject of these proceedings to Sean Morrow, employed by and director of Paradigm Forensic Services (Pty) Ltd at Croxton House, Redlands Estate, [...] G[...] M[...] Lane, Wembley, Pietermaritzburg, KwaZulu Natal within a period of five days, to interrogate and analyse its contents and determine whether any content as described above is currently contained thereon, whether such content was recently disseminated therefrom, and to whom, and to delete such content if contained thereon, and to report thereon to the legal representatives of both parties.

5. The costs for the qualified expert referred to in paragraph 3.2 shall be paid by the respondent.

6. The cost for Sean Morrow of Paradigm Forensic Services, if appointed by the applicant, shall be paid by the applicant.

7. Costs are reserved, including the cost of the experts.

8. The Registrar is directed to keep the court file sealed.'

The replying affidavit

[26] After the granting of the order, the respondent did not file a further answering affidavit nor did he direct the sheriff to appoint a qualified and reputable expert to analyse his handset, notwithstanding repeated requests by the applicant's attorneys that he comply with the order. The applicant thus delivered her replying affidavit. It is dated 7 July 2023, more than a month after the granting of the order. It is evident that by the time that she delivered that affidavit, the respondent had not complied with the order and had not had his handset analysed.

[27] In her replying affidavit, the applicant pointed out apparent inconsistencies in the respondent's version. While he denied that he had videoed the entire encounter, he appeared to admit that he had done just that when he had sent the following WhatsApp message to the applicant on 30 June 2019:

'We will sort this out maturely, it's not about my feelings. Because when I watch that 45 minutes over it doesn't affect me.'

The use of the word 'over' appears to suggest a re-watching of a 45-minute-long video.

[28] The respondent's assertion that he had never threatened to reveal what was on the video to anyone was also considered by the applicant in her replying affidavit. She drew attention to the following WhatsApp message from the respondent to her:

‘Then she obviously mentioned how this wouldn’t sit well with your employers too?’

It was submitted that this demonstrated a veiled threat on the part of the respondent to reveal the contents of the video to the applicant’s employer.

[29] Finally, the applicant drew attention to the respondent’s general duplicity. In her founding affidavit, she put up a WhatsApp conversation between herself and the respondent in which she asked him the following question:

‘Did you switch the cameras back on?’

She asked this of the respondent because she was concerned that when he had entered the erstwhile matrimonial home and videoed the encounter from the television in the master bedroom, he may have switched the television cameras, which at that stage were switched off, back on. The applicant’s concern was that the respondent was now, somehow, observing her in the privacy of her own home. His response was:

‘No I thought you had them disconnected.’

[30] In his answering affidavit, the respondent conceded that this answer was a lie. He had, indeed, switched the cameras back on, despite denying having done so. His response, in full, was the following:

‘I admit that, in the interim, I did switch on the camera. However nothing hangs on this because I have not recorded anything which might have been recorded on the system after June 2019.’

The respondent’s expert report

[31] On 7 July 2023, the respondent finally produced an expert’s report dealing with the forensic analysis of his handset. A copy of the report, unsupported by an affidavit confirming the identity of the author, her qualifications and the methodology employed to analyse the handset’s contents, is attached to the papers. It is a paltry

two pages long. The person who authorised the report, a Ms Amanda Lohner (Ms Lohner), employed by an entity called Cellular Investigations (CI), states that the respondent's handset was handed to a technical team who ascertained that it was:

'clear of any pictures or videos of [the applicant]'.

Who comprised that team is not revealed. Ms Lohner does not say that she formed part of that team, so it is entirely possible that what she confirms is hearsay in its nature.

The applicant's expert report

[32] An altogether more comprehensive report was prepared by the expert appointed by the applicant. Supported by an affidavit of the expert who actually did the analysis, Mr Sean Morrow (Mr Morrow) of Paradigm Forensic Services (Pty) Ltd, it is some 18 pages long. Mr Morrow noted that the respondent had an Apple iPhone Pro 11 handset. His report comes to a different conclusion regarding the presence of photographic images of the applicant on the respondent's handset. Unlike CI, Mr Morrow found 24 photographs of the applicant on that handset. Each photograph found has been printed out and is attached to Mr Morrow's report. Those photographs were uploaded to the handset between 13 October 2019 and 20 February 2023. The photographs had, however, all been taken in 2016 and 2017, so Mr Morrow was advised. The fact that they were uploaded to the handset after the applicant and respondent had separated meant that between the date of their creation and the date upon which they were uploaded to the respondent's handset, they had to have been stored by the respondent somewhere. The issue of storage is relevant, as Mr Morrow later explained in his report.

[33] Mr Morrow stated that he did not find the video on the respondent's handset. He found a WhatsApp message that contained a redacted image that permitted him to still see the words 'Camera 09' and the time as being '17:08'. But of the video, there was no trace on the respondent's handset.

[34] Mr Morrow was not prepared, however, to conclude that the respondent no longer had a copy of the video. His reasoning in this regard was the following:

(a) The handset had previously been signed into an iCloud account by the respondent. Apple utilises that program to automatically secure and preserve the photographs, video files, notes, passwords and other data on a handset in something called 'the cloud'.[5] My understanding from this is that the cloud is akin to a virtual digital data warehouse. Data can be offloaded to the cloud, can then be removed from the handset, and can then later be restored to the handset from its storage place in the cloud;

(b) Apple also makes use of a program on its brand of computers called 'iTunes'. The respondent's handset was configured with a local iTunes backup password. When a handset is connected to the computer it either automatically backs itself up to the computer, or it can be manually instructed to back itself up to the computer; and

(c) Mr Morrow observed that the respondent had signed out of his iCloud account before making his handset available for analysis and concluded as follows:

'The fact that the device was previously signed onto an iCloud account and that the device is configured with an iTunes local backup password means that whatever data was on the device on the date of its last back up to the iCloud account or iTunes local backup continues to be stored on the iCloud cloud account and iTunes local back up even if it is subsequently removed from the device from which the backup was done. As indicated above, the data stored in this manner can be restored to the device or to another device at any time by the user of the iCloud account and iTunes local back up by simply accessing either of the aforesaid data storage methods.'

[35] Because the respondent had signed out of his iCloud, iTunes and WhatsApp accounts, Mr Morrow could not determine when the last back up to iCloud or iTunes had occurred. What this means is that the video may no longer be on the

[5] 'The cloud' is a computer network where files and programs can be stored, especially the internet. Cambridge On-Line Dictionary: https://dictionary.cambridge.org/dictionary/english/cloud

respondent's handset but it may still be in his possession, either in the cloud or backed up to a computer that he controls.

Analysis

[36] Given the fact that the respondent agreed to hand over his handset for examination, it is passing strange that he would sign out of these programs mentioned above and thus prohibit a full and proper investigation into whether he continues to possess the video to occur. Had he truly destroyed it, he would surely have permitted a complete investigation to occur that would vindicate his assertion in this regard.

[37] The overall defence proposed by the respondent makes for disturbing reading. While he states at one stage in his answering affidavit that he is not proud of this situation or the way that he has handled things, without specifying what troubles him about his own conduct, he still appears to adhere to the view that he has not done anything wrong. The first vestige of his attitude appears early in his answering affidavit when he makes the following statement:

'so, to the extent that the applicant has implied that I was invading her privacy or behaving with impropriety by looking at whatever was recorded on the security system hard drive in June 2019, she is incorrect;'

That he believed he was entitled to do what he did is gravely disturbing.

[38] The respondent's logic is unsound. He previously acknowledged that the house at which the applicant resided 'had' previously been the matrimonial home. It was no longer the matrimonial home. It was no longer his home and he had no rights to it. He had no right whatsoever to inspect the contents of the hard drive. The fact that his clothes were in that house, as he alleges, and that his son lived there endowed him with no right to do any of the things that he did.

[39] Two witnesses have stated under oath that the respondent showed him a portion of the video. There is no basis to disbelieve them. The respondent's denial

that he did so cannot be accepted. Indeed, that conduct is in itself now a criminal offence.[6]

[40] Demonstrating his indifference to the applicant, the respondent claims that she has 'exaggerated' what happened. I do not see it that way. It is he who has not seen his own conduct for what it is: offensive and despicable. The applicant may do whatever she wishes in the confines of her own residence. It is not against the law to do what she did during the encounter. The respondent, on the other hand, has no right to know what she did, let alone tell others what happened or show them what she did.

[41] Our Constitution deals comprehensively with the right to privacy. Section 14 thereof states that:

'Everyone has the right to privacy, which includes the right not to have –

(a) their person or home searched;

(b) their property searched;

(c) their possessions seized; or

(d) the privacy of their communications infringed.'

[42] There can be no doubt that the applicant's rights to privacy have been seriously compromised by the respondent's conduct. The right to privacy forms part

[6] Section 24E of the Films and Publications Act 65 of 1996 was inserted with effect from 1 March 2022 and reads as follows:
'(1) Any person who knowingly distributes private sexual photographs and films in any medium including the internet and social media, without prior consent of the individual or individuals in the said sexual photographs and films with the intention to cause the said individual harm shall be guilty of an offence and liable upon conviction, to a fine not exceeding R150 000 or to imprisonment for a period not exceeding two years or to both a fine and such imprisonment.
(2) Any person who knowingly distributes private sexual photographs and films in any medium including through the internet, without prior consent of the individual or individuals and where the individual or individuals in the photographs or films is identified or identifiable in the said photographs and films, shall be guilty of an offence and liable upon conviction, to a fine not exceeding R300 000 or to imprisonment for a period not exceeding four years or to both a fine and such imprisonment.'

of the bundle of rights that constitute a person's *dignitas*.[7] Those rights are absolute rights that do not arise from any form of contract. Privacy is an individual condition of life characterised by seclusion from the public and publicity.[8] In *Financial Mail (Pty) Ltd v Sage Holdings Ltd*,[9] it was held that a breach of privacy could occur either by way of an unlawful intrusion into the personal privacy of another, or by way of an unlawful disclosure of private facts about a person. Both these aggressions are present in this matter. Whether an act of aggression against a person's privacy is to be regarded as unlawful is assessed in the light of society's contemporary *boni mores* and the general sense of justice of the community as interpreted by the court hearing the matter. Thus a wrongful intrusion into a private dwelling[10] and the disclosure of private facts acquired by such a wrongful intrusion,[11] have previously been found to be invasions of a complainant's privacy.

[43] I am confident that all right thinking members of the community would deplore the respondent's conduct in invading the applicant's private living space and would regard his conduct as being both offensive and contrary to the community's sense of justice.

[44] The respondent has not been an honest litigant. He has admitted some of his lies. He admitted lying to the applicant about whether he had switched the cameras back on in her home. He has also lied about what he saw when he searched through the hard drive on that day in June 2019. He claimed that he did not watch the entirety of the encounter recorded on the hard drive but only videoed the three minutes that he claims to have watched. If that was true, how was he able to make the already mentioned statement that:

'I did not show [Ms S[…]] the full video - let alone the 45 or 60 minutes which had been on the hard drive.'

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[7] *O'Keeffe v Argus Printing and Publishing Co Ltd* 1954 3 SA 244 (C) 247F-249D.
[8] *Bernstein and Others v Bester NO and others* (CCT23/95) [1996] ZACC 2; 1996 (4) BCLR 449; 1996 (2) SA 751 (27 March 1996) para 68.
[9] *Financial Mail (Pty) Ltd v Sage Holdings Ltd* [1993] ZASCA 3; 1993 (2) SA 451 (A) 462F.
[10] *S v I* 1976 (1) SA 781 (RA); *S v Boshoff* 1981 (1) SA 393 (T) 396.
[11] *Financial Mail* supra note 96 at 463.

How could he know the length of the recording on the hard drive if he had only watched three minutes of it? He also requires the court to accept that he videoed the first three minutes that he watched. Given his manipulative conduct, it seems likely that he would video the most explicit part of the encounter and that would require him to watch the entire video. His reason for showing the video to Ms S[…], referred to above, also beggars belief. He did so, so he claims, to allay fears that she might have had that he still entertained feelings for the applicant. How would showing her the video douse those suspicions? The existence of the video may well have served to reinforce any suspicions that Ms S[…] had for she may have questioned why the respondent continued to have the video on his handset if he did not feel something still for the applicant?

[45] The respondent's assertion that he destroyed the video does not have the ring of truth to it. At one stage he stated in his answering affidavit that:

'I do not have the video footage and I have destroyed the thumbnail.'

He does not state that he destroyed the video footage, merely that he had destroyed the thumbnail. When that statement is weighed up with the observations of the applicant's expert, Mr Morrow, that statement may well be true: the thumbnail may have been destroyed and the respondent may not have the video because it is presently stored in the cloud at the moment. There is thus the possibility that the video yet exists.

[46] At the end of his answering affidavit the respondent posed a rhetorical question as follows:

'Why would I keep a video of whatever duration (be it three minutes or forty to sixty minutes) in order to threaten my wife to sign a divorce settlement agreement in circumstances where we were divorced more than two years previously?'

Of course, the only person that can answer that question is the respondent himself. He went part of the way to doing so when he stated that:

‘When I had the opportunity of looking at the video footage, I thought I might see something which might assist me in my case insofar as it dealt with the care and custody of our son.’

That may have been the original motivation for making the video. Indeed, it probably was. But once a settlement acceptable to the respondent had been achieved, that did not mean that the video lost meaning or its reason to exist. It was now a trophy that he could show to his friends and a tool that he could still employ to control the applicant in the future.

[47] The respondent’s conduct is worthy only of censure. His conduct in delaying the handing over of his handset and then prohibiting a full and thorough investigation of whether the video continues to exist casts grave doubt on his assertions that the video does not exist. His conduct towards the applicant has been designed to cause her embarrassment and to humiliate her and the consequences for the applicant may be catastrophic if he attempted to do the same in the future. He may well attempt this behaviour in the future. The applicant is entitled to an interdict as claimed.

Costs

[48] As far as costs are concerned, it cannot be denied that the respondent has behaved in a disgraceful manner towards the mother of his child. He has lied repeatedly and has caused the events that compelled her to seek the assistance of this court. As a sign of censure for this conduct he must bear her costs on a punitive scale.

The order

[49] I accordingly grant the following order:

1. The respondent is interdicted and restrained from publishing, disseminating, circulating, distributing and in any way disclosing to any third parties, whether directly or indirectly, the video recording, or any portion thereof, or stills thereof, in his possession which was taken in June 2019 and which depicts the applicant engaging in sexual relations with another woman.

2. The respondent shall pay the applicant's costs on the scale as between attorney and client.

MOSSOP J

APPEARANCES

Counsel for the applicant	:	Mr S I Humphrey
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