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The Admissibility of Evidence Obtained as a Violation of Constitutional Rights

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Fedics Group (Pty) Ltd and Another v Matus and Others 1997 (9) BCLR 1199 (C)

INTRODUCTION

Generally, all relevant evidence is admissible in civil and criminal proceedings. However, as a matter of public policy, when evidence was unlawfully obtained, the Court has a discretion to exclude it[1]. The Court in the case of *Fedics Group (Pty) Ltd and Another v Matus and Others*[2] ('Fedics') was asked to exercise such discretion.

FEDICS
BACKGROUND

The Applicants in the matter, a catering company, sought to interdict their former employees from engaging in work prohibited under a restraint of trade, as well as from engaging in unfair competition.

The former employees sought to declare certain evidence relied upon by the Applicants as inadmissible. The employees argued that the evidence - documents related to the former employees' competing business seized during a search of the former employee's office and statements of the former employee after the search ('the tainted documents') - were obtained in an unlawful manner that violated the former employees' constitutional rights to dignity and privacy.

The former employees relied on the *Motloutsi*[3] principle. This principle, in criminal proceedings, holds that when evidence has been obtained by means of a deliberate and conscious violation of the constitutional rights of an accused, such evidence should be excluded unless extraordinary excusing circumstances exist.

Thus, the three legal issues before the Court were: whether the rule applied in the *Motloutsi* case could be accepted in civil proceedings; whether the search amounted to a violation of constitutional rights; and if so, whether such violation was deliberate and conscious.

ANALYSIS

In determining whether the principles applied in the *Motloutsi* case were applicable to civil proceedings, the Court considered one of the fundamental differences between criminal and civil proceedings. Criminal proceedings are defined by the accused's right to remain silent. An accused is under no duty to disclose his defence or documents which might strengthen the State's case against him. However, in civil cases, the litigant is obliged to both disclose his case as well as discover documents which are detrimental to his case, or which advance his opposition's case.

The Court also emphasized the purpose of the *Anton Piller* order, which allows a Court to order the preservation of evidence when it is reasonably apprehended that such evidence may be hidden or destroyed.

The Court held that where evidence is obtained through a deliberate violation of constitutional rights, the litigant seeking to rely on it must explain why the ordinary procedures available, including the *Anton Piller* procedure, would be inadequate in achieving justice.

In exercising its discretion, the Court will also consider whether the evidence is the type which is not discoverable, such as privileged communications, or whether it is evidence that would eventually be obtained through lawful means. In the latter instance, the Court should be more inclined to exercise its discretion in favour of the litigant who seeks to introduce such evidence than in cases of the former.

In ascertaining whether the search amounted to a violation of constitutional rights, the Court considered the fact that the search was conducted at the former employee's office provided by the Applicants. This office was also used as the former employee's personal property, and she thus had a legitimate expectation of privacy. Furthermore, the Applicants' attorney forcibly removed the telephone from the former employee when she tried to make a call just before the search and stated the search would occur with or without the former employee's consent. Furthermore, the statement-taking amounted to interrogation and pressure.

Thus, the Court found that the search indeed constituted a violation of the former employee's constitutional rights to privacy and dignity.

However, the Court found that such violation was nevertheless neither conscious nor deliberate. Ultimately, the Court took note of the blatant dishonest conduct of the former employees, the fact that the tainted documents were found in an office that formed part of the company's place of business and were not of a personal nature, the Applicants' reasonable belief that they were required to conduct a search urgently and did not require special authority to conduct same, and the fact that the documents were in any case discoverable and would have been obtained at some point of the proceedings. The means of acquiring the tainted documents proved to be a mere procedural advantage and did not prejudice the former employees' case. Thus, the Court exercised its discretion in favour of the Applicants to admit the tainted documents.

CONCLUSION

The underlying principles of the rule applied in the *Motloutsi* case are applicable in a civil context. However, the courts retain a discretion in determining whether unlawfully obtained evidence is admissible or not. The court will take into account all circumstances including the type of evidence involved, whether it could have been obtained through lawful means or whether it is the type of evidence which could never be lawfully obtained, and the explanation by the party seeking to introduce it as to why ordinary procedures would have been inadequate to achieve justice.

[1] *Motor Industry Fund Administrators (Pty) Ltd and Another v Janit and Another* [1994] 4 All SA 428 (W) page 434.
[2] 1997 (9) BCLR 1199 (C)
[3] *S v Motloutsi* 1996 (2) BCLR 220 (C)

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