

THE LIMITS OF “CONFIDENTIALITY” – WITH A SPECIFIC FOCUS ON LITIGIOUS PROCEEDINGS

Introduction

Confidential information means any information disclosed in however manner that is commercially sensitive. The best way to explain what it is is perhaps to describe what it is not (generally speaking):

- (i) was publicly known and made generally available in the public domain before the time of disclosure by the disclosing party;
- (ii) becomes publicly known and made generally available after disclosure by the disclosing party;
- (iii) is required by law to be disclosed by the receiving party.

Waldeck NO and Others v Land and Agricultural Development Bank of South Africa¹

Facts of the abovementioned case, which illustrate the flawed manner in which the information, if confidential, was handled:

“This is an application in terms of Rule 35(12) of the Uniform Rules of this Court (“the Rules”). The applicants seek an order against the respondent to be provided with copies of the documents listed as items 2 to 12 in its Rule 35(12) notice within 10 days after this Courts’ order, and upon payment of the reasonable costs for such copies, being paid by the applicants.

As stated earlier, it is common cause that the applicants have never done business with the respondents.

The fact that the respondents allowed the applicant’s attorneys to inspect the documentation at their offices, albeit only for an hour, is sufficient to constitute a waiver of the alleged confidential nature of the documents².”

¹ (4013/18) [2019] ZAMPHC 4 (14 October 2019)

² Bank of Lisbon and South African Ltd vs Tandrien Beleggings (Pty) Ltd and Others (2) 1983(2) SA 626 W.

Therefore the fact that the applicant's attorneys were allowed to inspect the documents concerned effectively waived confidentiality. Whether this was indeed the real intention of the parties, remains questionable.

Conclusion

It is important not to lose sight of the nature of records in your possession. If confidential, no inspection or access should be allowed, and that should be the position taken. No limitations on access is an argument of law to retain the status of the information as confidential. Contact SchoemanLaw for any of your litigious needs and to treat your most sensitive information with the respect it deserves, we are ISO 27001 certified and therefore appreciate the value of data to an internationally recognised degree.

