IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

NOT REPORTABLE

CASE NUMBER: 15128/2018

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED: ✓

08 May 2018
DATE

SIGNATURE

In the matter between

ENGELBRECHT, ALBERTUS STEFANUS	**Applicant**
And	
BOTHA, GIDIUS ZEEMAN JOSEF	**First Respondent**
LETSOGO, MOSIMANEGAPE ISRAEL	**Second Respondent**
VENOM VOLT PROJECT ENTERPRISES (PTY) LTD	**Third Respondent**

JUDGMENT

COPPIN J:

[1] On 30 April 2018, because of the exigencies of this matter, I gave an order in terms of which I discharged an Anton Piller order and Rule Nisi made on 20 April 2018; directed the Sheriff and the applicant to forthwith return to the respondents' attorney all records, devices and copies seized, or made, pursuant to the orders made on 20 April 2018; and also ordered the applicant to pay the costs of the application on an attorney and client scale. These are the reasons for that order.

Background facts

[2] On 20 April 2018 the applicant obtained on an urgent, ex parte basis, and in camera, an Anton Piller type order from a judge in chambers. On Monday, 23 April 2018 at 10h15 the Sheriff served the order on the first respondent and execution of the order commenced. The respondents approached this court on an urgent basis for a reconsideration of that order at 10h00 on 25 April 2018. The matter stood down to 14h00 on the request of the applicant's counsel in order to allow the applicant to file a response to the affidavit in support of the reconsideration. According to the applicant, the execution was 'duly completed' at 9h30 on 25 April 2018. The respondent's counsel contended in support of the urgency of the reconsideration that the Sheriff had, inter-alia, removed a file from the premises containing source documents of the third respondent and that it required those documents urgently for accounting and VAT purposes.

[3] The respondents contended, in essence, that the order granted on 20 April 2018 should never have been granted and sought the relief that is mirrored in the order that was granted on 30 April.

[4] The respondents rely on several grounds that may be categorised under at least three headings. The main ground is that the order was an unjustifiable invasion of privacy and, in particular, was unjustifiably broad and an abuse. The second is that the application itself was materially defective, and thirdly, that the applicant had failed to make material disclosures to the judge who granted the order on 20 April 2018. I shall deal with these grounds in turn after having sketched a brief background of the facts culminating in the grant of the impugned order.

[5] It is common cause that the applicant holds 24% of the shares in the third respondent, while the first respondent holds 25% and the second respondent holds 51% of the shares. The three parties are also directors of the third respondent, whose main business is electrical maintenance and contracting. It is also not an issue that the first and second respondents had asked the applicant to resign as director following difficulties experienced by the third respondent in raising finance from the bank because of the applicant's personal credit record. When the applicant refused to resign voluntarily the first and second respondents caused a meeting of shareholders to be held on 19 March 2018 to vote on a resolution for his removal as director. These actions inter-alia further soured the relationship between the applicant and his co-directors.

[6] The applicant and the first respondent had exchanged emails that give some insight into their relationship. It is apparent from the applicant's emails to the first and second respondent that he was suspicious about their request that he resign. In substantiation I only need to quote an example from an email which he attached his founding papers in this application. He states: 'I went to see a lawyer as Izzy suggested in the meeting and the lawyer said that the 'credit record' excuse to get me to resign was bullshit since you knew about my credit record before we started this company and I never withheld that information from you guys. You have been excluding me from all workings in the company as well as having meetings without me. You even went behind my back to see a lawyer to try to get rid of me. I know you won't stop there, you guys are busy with something behind my back. I will no longer sit back and take this. This stops now, either you want me in the company not'.

[7] Later in the same email the applicant states: '. . . Where I stand now, I am being completely excluded from the company that I gave my all to help build. If you no longer want me in this company and want to keep excluding me, I will give my lawyer the go-ahead to take things further and we will all sink together. There is no way that I will just walk away from this company and let you guys continue without me. This is also my company, not just yours and with the information my lawyer has, you will not even be able to start another company without me'. Further on he states: 'please respond via email on what you decide as I want it on black and white so that we can either move forward with the company or end it all. . .'

[8] In response the first respondent, essentially, told the applicant that he would respond to the email, but also indicated that the issue will be dealt with in terms of the Companies Act and the law. A more detailed response followed. This elicited a further response from the applicant. He was adamant that he would not resign and that he distrusted the other directors. The calling of the meeting to vote on his resignation seems to have prompted him to issue an application out of this court in which he sought relief setting aside the decisions of the first and second respondents; directing them to acquire his 24% shareholding in the third respondent at fair market value; and, as alternative to that relief, winding-up the third respondent.

[9] In that application, which is attached as an annexure in the application for the Anton Piller order, he essentially avers that there is a deadlock between the parties 'resulting in a complete failure of the business relationship between them', and for that reason it would be just and equitable that the third respondent be wound up. In his affidavit in that application he seeks the buyout of his shareholding as an alternative to the winding up, even though the opposite appears in the notice of motion.

[10] On 17 April 2018 the applicant issued the application for the Anton Piller order. He avers in the founding papers, inter-alia, that the application was brought 'to permit a search for inter-alia cellular phones, laptops, computers, data, documents, bank statements and the like and the attachment thereof or a pointing out to identify such

items'. He also states that the application 'is directed at the preservation in safe keeping of evidence relating to the finalisation of the winding up application, insolvency enquiries and an action' which he intends instituting against the first and second respondents for damages based on corrupt and fraudulent conduct. He alleges in this regard that the first and second respondents were 'stripping' money from the various banking accounts of the third respondent.

[11] The applicant avers there that there is a likelihood that insolvency enquiries 'may well have to be conducted in due course', allegedly because of the conduct of the first and second respondent in relation to the applicant and third respondent. He further, seemingly, tries to motivate using this process to obtain hard copies of bank statements in saying that such copies 'may contain manuscript notes which might well constitute vital evidence'. He elsewhere states that the first and second respondents have in their 'possession data, computers, banking accounts and access thereto, as well as banking statements and the like which constitute vital evidence in substantiation of his 'cause of action'. He submits that he is apprehensive that this evidence may be hidden or destroyed or in some manner spirited away should the Anton Piller order not be granted. To buttress that submission, he states that he is aware that the first respondent has removed data from 'Dropbox', an online information sharing facility.

[12] The applicant goes on to give details of the winding up application. He further states that his attorney had by letter dated 19 March 2018 at a shareholders' meeting requested the following information from the first and second respondents: all statutory documents regarding the company, the memorandum of incorporation, the shareholders' agreement, financial statements since 2016, banking statements of the third respondent since 2016, a balance sheet and trial balance of the third respondent as of the date of the request. The applicant acknowledges that on 26 March 2018 the first respondent handed him a purple file containing documents. He states that the file contained 'certain limited and selective information', but does not spell out exactly what information was contained in that file. From the context it is discernible that the file also contained

bank statements because the applicant states that he 'compiled an extract of transactions' from the bank statements in the file.

[13] The applicant goes on to state that he has always been refused access to the bank account of the third respondent by the first respondent, but that as director he still received SMS messages when transactions were affected on the third respondent's banking account at the First National Bank of South Africa (FNB). Significantly, the applicant states that the Anton Piller application is based on SMS messages which he received from 7 to 11 April 2018 and that the messages show 'a stripping' of large amounts of money from the FNB business cheque account. On 7 April 2018 an amount of R804 329 – 69 was deposited into the account and on 9 April and amount of R 300,000 – 00 was transferred from that account to 'a so-called money on call account' of the third respondent. He states it is not aware what the balance was on that account and complains that the first respondent did not give him access to such balance, but does not say specifically when and how he requested access and when and how such access was refused. (It was pointed out by the respondents in their affidavit in these proceedings that the applicant omitted to draw the court's attention transfers of huge amounts into the third respondents account, inter alia, an amount of about R7 million and of about R500 000, respectively, and also to the fact that the third respondent also had an investment account).

[14] The applicant then relates how he became aware through the SMS messages of amounts that were being paid from the third respondent's FNB account to Mosesi Trading Projects (Pty) Ltd (Mosesi): on 9 April a total amount of R440,002 – 55 was paid to Mosesi in two tranches of R265148 – 55 and R174857 – 00, respectively. Significantly, the applicant does not say how he became aware of the payment of the amount of about R2 .9 million to Mosesi. Presumably this knowledge was gathered from the very bank statements that he had been given. The applicant also relates how one, Sello Edwin Kgobudi (Kgobudi) was linked to Mosesi and to Thusanang Consulting Engineers. He states that Kgobudi was also an employee of Thusanang and that he uses Mosesi to receive kickbacks

from the third respondent and possibly the second respondent. The applicant goes on to submit, rather startlingly, that all the payments made to Mosesi 'are kickbacks and are made solely to procure business from the main contractor via Kgobudi'. The applicant, however, does not explain that if that is indeed so, how it was 'in fraud' of the third respondent, how it came about that he had such knowledge, when he acquired the knowledge and what he did about it.

[15] The applicant goes on to relate how scrutiny, of what is supposed to be, an annexure to his founding papers marked 'F8', made him aware of what withdrawals (for cash and personal use in a total amount of R682607 – 00) were made from the third respondent's FNB account. In addition to making allegations that the first and second respondents were operating the third respondent in a 'renegade' and 'delinquent' manner, the applicant accused them of stripping the third respondent's banking accounts. The main discernible theme in his founding papers is that he has no access to the third respondent's various banking accounts, that he is being deliberately excluded from such access and that he has a right to have access to such information. He ascribes his alleged exclusion to the first and second respondent's (alleged) desire to enrich themselves at his expense and at that of the third respondent. He states that 'all the information and documents' refer to in his founding papers are either stored in hardcopy or on computers or laptops' of the first and/or second respondent and that he (as director) he's entitled to be privy to such information and documents.

[16] The respondents denied these contentions and submitted that all these payments and transactions were legitimate and that if the applicant just asked for the source documents he would have been provided with the same, but he never did so, and, instead, brought the Anton Piller application. The applicant responds as follows to those contentions in his replying affidavit: 'The contents of paragraph 42 are derived from the bank statements in the purple file. I persist that these transactions are suspicious as I did not receive any benefit from those transactions. From the bank statements in the purple file I noticed that all subcontractors were paid by way of EFT. I have no knowledge of any cash payments to any subcontractor'.

[17] On 20 April all the relief sought by the applicant, as foreshadowed in its notice of motion, was granted, save that in respect of paragraph 2.1 of the order subparagraph 2.1.2 was amended to read: 'computers, laptops and all electronic devices and the data are there on relating to banking accounts of the third respondent and pertaining to payments, withdrawals and money transfers', and a further subparagraph, namely 2.1.3 was added which did not appear in the original notice of motion. Its effect was to include, as subject for the search and attachment, all correspondence and documentation between the respondents and Kgobudi and/or Mosesi relating to the third respondent. Mosesi and Kgobudi were not joined as parties in the application.

[18] In its preamble the draft order deals with urgency and secrecy and undertakings. For purposes of this judgement it is necessary to quote the latter section. It reads:

'2. This order will not be executed outside the hours between 08h00 and 18h00 on a weekday.

3. The applicant will prevent the disclosure of any information gained during the execution of this order to any party except in the course of obtaining legal advice or pursuing litigation against the respondents.

4. The applicant will compensate the respondents for any damage caused to the respondents by any person exceeding the terms of this order.

5. The applicant will compensate the respondents for any damage caused to the respondents by reason of the execution of this order should this order subsequently be set aside.'

[19] As regards the remainder of the order, for the purposes of discussion I need only quote paragraphs 1 to 3 thereof. Those paragraphs of the order read as follows:

1. ' The first and/or second respondent (referred to jointly as 'the respondents') and/or any other adult person in charge or control of the respondents business premises situated next to substation 3 and 4, entrance 9, undercover parking, Cresta Shopping Centre, Republic Road, Randburg and/or 29 Lillian Ave, Lillianton, Boksburg ('the premises') shall grant to the following persons access to the premises and to such motor vehicle(s), if any, in the respondents' possession or under their control, situated at the premises: –

1.1 the sheriff or deputy sheriff of this court for the district of Randburg south-west ('the sheriff)

1.2 attorney Anja Louw and /or Chene Alice Thessner ('the independent supervising attorney");

1.3 Charl Louw, ('the forensic expert');

1.4 A representative of the applicant and/or the applicant's attorney, we shall not take part in the search referred to below, but may be called upon by those mentioned in 1.1 to 1.3 above to identify documents falling within the evidence referred to in 2.1 below.

2. The first and/or second respondent and/or any other adult person in charge or control of the premises must grant access to the premises and to the respondents' vehicle(s) on the premises, if any ('the vehicle(s)'), to the forensic expert, and the sheriff, as the case may be (collectively,' the search persons'), solely for the purposes of: –

2.1 searching the premises and the vehicles in order to enable any of the search persons to identify and point out to the sheriff "the evidence", being:

2.1.1 originals or copies of all banking statements pertaining to the third respondent;

2.1.2 computers, laptops and/or electronic devices and the data thereon relating to to banking accounts of third respondent and pertaining to payments, withdrawals and money transfers;

2.1.3 all correspondence and documentation between the respondents and Sello Edwin Kgobodi and/or Masesi Trading and Projects (Pty) Ltd. (2014/026433/07) relating to the third respondent.

2.2 searching the premises and vehicles for purposes of finding and there after searching and examining any networks, desktop computers, tablet computers, portable information storage devices, external data storage devices, including external hard drives, flash drives, iPods, shufflers, compact discs (CDs), digital versatile discs (DVDs), stuffy discs, floppy disks, jazz drives, zip drives, data cartridges, memory sticks, mobile phones, SIM cards and electronic devices or media with the capability of storing information and/or data digitally, as well as any data, data storage location or network component (including but not limited to Cloud Hosting, Dropbox, virtual servers or other data hosted locally or internationally) to which the respondent/defendant has access or control over or ownership of by directly, indirectly or remotely connecting thereto (collectively described as "digital devices or media") on the premises or in the vehicle(s), by connecting each of the

digital devices or media to forensic computers, for the purpose of identifying it and determining whether it contains the evidence:

2.3 committing and allowing the forensic expert to make two disc copies and/or compact disc copies and/or to capture forensic images and/or to make two complete mirror images and/or digital images (for identification purposes) of the hard drives of any digital devices or media located on the premises or in the vehicle(s), or to download or create a data dump of online or hosted data, once it is determined that such digital devices or media contain evidence or part thereof;

2.4 permitting and allowing the forensic expert to make printouts of any of the evidence located on any such digital devices or media, if copies of the hard drives cannot be made.

3. The first and/or second respondent and/or any other adult person in control of any digital devices or media on the premises or in the vehicle(s), must forthwith disclose to the search persons any passwords and/or procedures required for effective access to such digital devices or media for the purposes of paragraph 2 hereof.'

[20] The balance of the order essentially follows the example in the Practice Manual of this court and I shall only refer to it where necessary.

Legal position

[21] Anton Piller orders are for the preservation of vital evidence in substantiation of the applicant's specified cause of action and are not a substitute for possessory or proprietary claims. They require built-in protection measures such as the appointment of an independent attorney to supervise the execution of the order. The applicant and the own attorney are not to be part of the search party. Once the evidence that is to be preserved is identified and seized it should also not be handed over to them, but must be kept in the custody of the Sheriff pending the court's determination once all the parties have been heard. It is also the duty of an applicant for such an order to ensure that the order is justified and does not go beyond what is permitted in our law[1].

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[1] See, inter alia, *Memory Institute v Hansen* 2004 (2) SA 630 at 633 par 3; *Non-Detonating Solutions (Pty) Ltd v Durie and Another* 2016 (3) SA 445 (SCA) paras 18-20.

[22] Although this kind of order has been described as a method of anticipatory discovery, it is not a discovery order and is purely aimed at the preservation of evidence that is in danger of being destroyed or concealed. The applicant is not to be given more access to the documents and information than that which he is able to obtain by ordinary discovery envisaged in the rules of court. It is clearly an abuse if the procedure is used to facilitate a 'fishing expedition', to see whether there are any documents or other material which the applicant believes to be relevant to some action which he may yet institute.

[23] Anton Piller orders, generally, are necessary, but because they limit, inter alia, the rights to privacy and dignity guaranteed, respectively, in terms of sections 10 and 14 of the Constitution, they need to be justified on a case-by-case basis. What may be justifiable in one situation is not, necessarily justifiable in a different situation. One of the requirements of section 36 of the Constitution is proportionality and, central to compliance with this requirement, is specificity. The documents sought to be protected must be specified and must be vital evidence in substantiation of the applicant's cause of action. Blanket searches for unspecified, or vaguely specified documents or evidence, which may or may not exist, is not permissible[2].

[24] In *Non-Detonating Solutions (Pty) Ltd v Durie and Another*[3] the Supreme Court of Appeal quoted and referred[4] with approval to the test for the identification of documents in Anton Piller orders formulated in *Roamer Watch Co SA and another v African Textile Distributors*[5] (*Roamer Watch*), namely: 'there must be clear evidence that the respondent has such incriminating documents, information, articles and the like in his possession, or that, at least, there are good grounds for believing that this is the case. The applicant should satisfy the court that he has, as best the subject – matter in dispute permits him to do, identified the subject matter in respect

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[2] See *Non-Detonating Solutions* (above) para 30 and *Mathias International Ltd and Another v Baillache and Others* 2015 (2) SA 357 (WCC) para 20.
[3] See above.
[4] See para 36.
[5] *Roamer Watch Co SA and another v African Textile Distributors also t/a M K Patel Wholesale Merchants and Direct Importers* 1980 (2) SA 254 (W).

of which he seeks attachment and/or removal, and that the terms of the order which he seeks have been delineated appropriately and are not so general and wide as to afford him access to documents, information and articles to which his evidence has not shown that he is entitled"[6].

[25] In summary, a court has a discretion to grant the Anton Piller order, and on such terms as it may determine. The applicant for such an order must prima facie establish the following: (a) that he has a cause of action against the respondent that he intends to pursue; (b) that the respondent has in its possession specific (and specified) documents or material which constitutes vital evidence in substantiation of the applicant's cause of action; (c) that there is a real and well-founded apprehension that the evidence will be removed or destroyed by the time of trial, or before the discovery stage; (d) that the order is the only reasonable and practicable means of protecting his rights[7].

Consideration

[26] In my view there is merit in the respondents' contention that the Anton Piller order granted in this case was not only too broad, but not justified and that both, the application for the order, and its execution, constituted an abuse.

[27] Dealing with the execution of the order. The respondents, inter-alia, complain that the third respondent's business was taken over by those executing it and, as at the date of the affidavit for consideration, the business of the third respondent was effectively closed down. In terms of the order about five people identified in paragraph 1 of the order were authorised to access the third respondent's premises and all vehicles in the possession or control of the respondents that were at the premises, for the purposes of the search. In paragraph 1.4 of the order, a representative of the applicant and/or the applicant's attorney, who were not to take part in the search, were also to be given access to the premises and vehicles, to assist in identifying documents. Significantly, the applicant was not authorised to be present at the search, but he states in his replying affidavit that

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[6] See above at 273C-274F.
[7] See Erasmus *Superior Court Practice* (Juta) Vol.2 at D8-3 to D8-4.

he was present during the execution process and it appears from his replying affidavit that he has more than just perfunctory knowledge of the process. He does not state what his role there was and why it was necessary for him to be there in addition to the persons identified in paragraph 1.4 of the order.

[28] The applicant does not motivate in his founding papers why it was necessary to authorise all of the persons that were authorised in terms of paragraph 1.4 of the order. The mere fact that this order was reproduced from the sample contained in the Practice Manual of this court, does not mean that an applicant for Anton Piller relief is absolved from his obligation to make out a case in his founding affidavit for the relief that he seeks.

[29] In his founding papers the applicant laid emphasis on the banking statements of the third respondent which he claimed he was denied access to. In the relief sought in his notice of motion and his original draft orders he only refers in paragraph 2.1 thereof to banking statements and computer laptops and electronic devices and the data thereon as the evidence that had to be searched for and attached. It is only in the draft order that was made an order of court that an attempt is made to further specify this evidence. In paragraph 2.1.1 of the order the banking statements are specified as relating to the third respondent. In paragraph 2.1.2 the computers, et cetera, are stated to relate 'to the banking accounts of the third respondent' – and the evidence is also described as 'pertaining to payments, withdrawals and money transfers'. A further category of evidence which was not at all sought by the applicant in its original founding papers and draft orders is added in the final order as paragraph 2.1.3. It is a broad list and refers to 'all correspondence and documentation' between the respondents and Kgobudi an/or Mosesi relating to the third respondent.

[30] In his replying affidavit the applicant states that he sought the Anton Piller order 'to secure and preserve evidence to prove the corrupt relationship between the respondents and Kgobudi'. It is not clear at all what cause of action such evidence would be substantiating. In any event, if that was the case then the evidence sought ought to have been limited to documents and material that

would substantiate that cause of action, assuming there was one, and not be so broad as to include 'all banking statements' as envisaged in paragraph 2.1.1 of the order, and all 'computers, laptops and all electronic devices and the data thereon relating to the banking accounts of the third respondent', and more seriously, 'pertaining to payments, withdrawals and money transfers' generally, as envisaged in paragraph 2.1.2 of the order. Authorising such searches in the light of the facts of this case was nothing short of allowing a fishing expedition. The case made out by the applicant is speculative and not clear at all.

[31] The applicant did not make out a case that all the banking statements were vital evidence in the cause of action that he was pursuing, or yet to pursue. Further, he made out no case that unless the banking statements were preserved this evidence would forever be lost. An Anton Piller order was most certainly not the only practical means of securing those documents and therefore ought not to have been utilized for that purpose. The contentions of the applicant, that there might be banking statements with manuscript notes that would serve to substantiate his causes of action, is not based on fact. There is no clear evidence of their existence, or that the respondents are in possession of such material at the premises, or at all and there are no good grounds for believing that to be the case.

[32] Paragraph 2.1.3 of the order, which was not contained in the original notice of motion, is speculative in the extreme. It relates generally to all correspondence between Kgobudi and/or Mosesi and the respondent relating to the third respondent, and is not limited to what the applicant may yet want to prove, and is not limited to any cause of action. The applicant has not established, but for stating that it was evident from the third respondent's bank statements that Mosesi was paid specific amounts, that the payments were not legitimate. He never bothered to first ask the third respondent for the source documents. The Anton Piller order could most certainly in our law not be used as a mechanism to search the premises for any possible evidence of wrongdoing. That would be an abuse of the remedy.

[33] Paragraph 2.2 of the order is similarly unjustifiably invasive and oppressive. The only justification that counsel for the applicant gave for this overbroad order was that it was reproduced from the sample order of this court's practice manual. This is no justification at all. The sample was never intended to be reproduced as is, but is intended to serve as a guide and to be adapted by parties to fit their facts and circumstances. The order in paragraph 2.2 is not only confined to the networks, computers, et cetera of the third respondent, but refers to 'any' of such. No case had been made out to justify such a relief.

[34] Other factors that militate against the grant of the order are the following. The relief in paragraph 2.1.3 of the order pertains to Kgobudi and Mosesi who have not been joined in these proceedings. In essence, every document and every device in the business of the third respondent that are related to any payment, withdrawal or transfer of money is subject to attachment. Further, no clear case at all has been made why an Anton Piller order was the only practical order for the preservation of the material sought to be attached. The orders requiring the respondents to give the identified 'forensic expert' access to banking and computer passwords and other confidential information, is not made subject to confidentiality. There is no proof that any of the persons that have been given access to the premises and authorised to search, had committed themselves to confidentiality in writing of any sort. The 'undertakings' referred to in the order itself, are not effective, or 'undertakings' in the true sense of the word.

[35] In fact it is inconceivable how any of the numerous persons, who were given search and other powers to execute the order, did not give written undertakings, which ought to be essential for the grant of the order. The order does not oblige the applicant to pursue any specific proceedings. In any event, but for the winding-up proceedings, which have already been instituted and are opposed by the respondents, the other supposed causes of action, which the applicant, on his version, is to yet pursue, are spurious, vague and undefined.

[36] There are no facts on the application that enable one to judge the expertise of Mr Louw, or to establish the objective independence of the proposed 'independent'

attorneys, who were given powers in terms of the order without first hearing the applicant on those matters. The applicant makes no case in the papers to justify why it was necessary to authorise more than one person to represent the applicant, why it was necessary to authorise a representative for the applicant, in addition to the applicant's attorney, and why it was necessary to authorise more than one 'independent' attorney to be part of the search party. At the very least, the applicant should have placed facts before the court that would have enabled it to make those assessments, albeit prima facie. There is no security furnished for breach of undertakings by any of the search party or the applicant. And the recording in the preamble of the order of an undertaking that the applicant will compensate the respondents for any damage caused to the respondents by any person exceeding the terms of the order, has no substance to it. In *Roamer Watch* it was held that in addition to such an undertaking the applicant for Anton Piller relief should provide evidence of his financial ability to pay such damages, and where his position to do so appears precarious, the court may require him to furnish an acceptable guarantee from a reputable financial institution[8].

[37] The respondents raised other technical points relating to the founding papers of the applicant which they argue rendered the application defective. I will traverse those briefly. It is apparent from the founding document, purporting to be an affidavit, that it was not attested in compliance with Regulation 4(2)(a) and (b) of the regulations governing the administration of an oath or affirmation. The person who purported to sign as Commissioner of Oaths did not print his/her full name and business address below his/her signature as required by that regulation. The person also did not state his or her designation and the area for which he/she holds the appointment or the office held by him or her if he/she holds such an appointment ex officio. The regulation is peremptory and failure to comply with it renders the document fundamentally defective. The applicant's counsel purported to remedy this defect when the matter came before me for reconsideration by seeking to hand up founding papers commissioned before a

[88] See at 274G-275A. see also *Aercrete SA (Pty) Ltd and Another v Skema Engineering co (Pty) Ltd and Others* 1984 (\$) SA 814 (D) at 825F-826A.

different person. Counsel was not able to explain why an affidavit could not be obtained from the person who originally signed as Commissioner of Oaths explaining why the regulation had not been complied with. The point is that if this defect had been pointed out to the court on 20 April it is more than probable that it would not have granted the order unless the founding papers were properly commissioned.

[38] The respondents' counsel also contended that in the notice of motion an address, at which the applicant would accept notice and service of all process in the proceedings, as contemplated in rule 6(5)(b) of the Uniform Rules, is not furnished. In my view, nothing substantial turns on this point. The notice of motion dated 16 April 2018 indicates that 'the applicant has appointed MJK attorneys, at the address set out hereunder, at which he will accept notice and service of all process in these proceedings'. No physical address appears anywhere on the document, but a telephone and fax number, as well as an email address of the attorneys is provided and the respondents did not suffer any prejudice as a result.

[39] Counsel for the respondents also argued that the applicant had failed to make a material disclosure to the court, in that he had failed to bring to the attention of the court the answering affidavit that had been filed by the respondents in response to the applicant's winding-up application. The applicant gives a rather strange answer to this point, he states in his replying affidavit, or the affidavit in response to the reconsideration affidavit, that he did not deem it necessary to attach the answering affidavit 'since it deals with the merits of the winding up application and not the preservation of evidence as in the Anton Piller application'. However, he does not explain why it was necessary for him to attach his founding papers in the winding-up application, which also just deals with the merits of that application and not with the preservation of evidence. It was argued persuasively on behalf of the respondents that it would have been evident from the answering affidavit that the winding-up application was spurious and lacked merit. The applicant could not show that there was or could be a deadlock, that

the third respondent is not insolvent and, in any event, that the respondents were prepared to buy out the applicant. It was further argued that it would have become clear from that affidavit that the applicant's financial position was precarious, that he was motivated by spite and was intent on destroying the third respondent as he had threatened. The disclosure of the answering affidavit might well have influenced the court in the exercise of its discretion. Good faith is an essential requirement of ex parte applications. The rule requires that all material facts which might influence a court in coming to a decision be disclosed. If it appears that material facts were not disclosed, either intentionally or negligently, the court has a discretion to set aside the order, granted ex parte, with costs, on the ground of non-disclosure[9].

[40] Taking all of the above into account, as well as everything that had been stated in the affidavits filed by both sides in these proceedings, I concluded that the application was an abuse and granted the relief sought by the respondents.

P COPPIN
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION

APPEARANCES:

[9] See, inter alia, *Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions* 2009 (1) SA 1 (CC) at 115A-E para 296.

For the Applicant:	Mr CJC Nel
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For the Respondents:	Mr DP de Villiers SC
Instructed by:	DMO INC Attorneys
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Order made:	30 April 2018
Written reasons handed down:	08 May 2018