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

CASE NO: 9796/2015

In the matter between:

QUINDELL BUSINESS PROCESS OUTSOURCING (PTY) LIMITED Applicant

and

BESPOKE BPO (PTY) LIMITED Respondent

ORDER

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[1] The interim order of 18 September 2015 is set aside. The relief in the main application is refused.

[2] All materials and copies seized or made pursuant to such order of 18 September 2015, are to be returned to the respondent's attorneys of record forthwith.

[3] The applicant is directed to pay the costs occasioned by the application including any reserved costs, such costs are to include the costs of Senior Counsel.

JUDGMENT

HENRIQUES J

Introduction

[1] This is an opposed application involving an Anton Pillar type order. The applicant seeks an order essentially confirming the interim relief granted to it *ex parte* on 18 September 2015 and a determination as to whether copies of the computer data and information obtained in terms of the interim order are available for the applicant's further use in instituting an action for damages against the respondent.

Issue

[2] Having regard to the affidavits and the heads or argument filed, the sole issue for determination is whether the applicant is entitled to the relief, or as the respondent contends, whether the form of the order granted vitiated the entire proceedings justifying the order being set aside and the status quo being restored.

[3] To determine this issue a brief background to the application is necessary. The facts that I allude to are not those which form the basis of the application, but rather will focus on the nature of the relief granted. The applicant's notice of motion and the interim order granted on 18 September 2015, incorporated an order directing

the sheriff forthwith at the time of seizure, to make copies of the seized material available to the applicant. The relief sought in the notice of motion on 18 September 2015 was *inter alia* the following:

> '2.2 make two mirror images of the following information from the hard drives of any computers there found, one of which shall be sealed and handed to the Sheriff for safe-keeping pending the conclusion of these proceedings and to provide the other copy to the Applicant for the purposes of preparing further affidavits in these proceedings:'

[4] The order granted by Jeffrey AJ on 18 September 2015 insofar as the *ex parte* relief is concerned reads as follows:

> '1. Authorising the Sheriff of the above Honourable Court, duly assisted by a technician from **Universal Networks CC, Tyron Anthony Hussey**, the Applicant's Attorney **Henning Johannes Du Toit**, the independent supervising attorney and further assisted by **Dean Anderson** of the Applicant, to attend at the business premises of the Respondent at 302 Prince Alfred Street, Pietermaritzburg, KwaZulu-Natal and there to:
>
> 1.1 search the premises for any computer equipment and recordable devices and documentation;
>
> 1.2 make two mirror images of the following information from the hard drives of any computers there found, one of which shall be sealed and handed to the Sheriff for safe-keeping pending the conclusion of these proceedings and to provide the other copy to the Applicant for the purposes of preparing further affidavits in these proceedings:
>
> 1.2.1 all contracts (whether in draft, unsigned or signed) involving customers of the Applicant as set out in annexure "A" hereto (hereinafter referred to as "Applicant's customers");

1.2.2 all voice loggings with any of the Applicant's customers;

1.2.3 hard or soft copies of the Applicant's client file list or data base;

1.2.4 all and any letters of employment and employment contracts between the Respondent or any affiliated entity of the Respondent and with:

1.2.4.1 Karl Lambie
1.2.4.2 Daryl Naidoo
1.2.4.3 Marc Brooker
1.2.4.4 Julia Coetzee
1.2.4.5 Matt Naude
1.2.4.6 Ken Albon
1.2.4.7 Ravi Mohan
1.2.4.8 Korayscha C. Subrathee
1.2.4.9 Ronald Naidoo
1.2.4.10 Dhylan Pillay
1.2.4.11 Tyler Trenam
1.2.4.12 Sharlon Pather.

1.3 make copies of the information set out in paragraphs 1.2.1, 1.2.2, 1.2.3 and 1.2.4 above stored on any recordable devices or documentation found at the Respondent's premises, and to retain any such devices or documentation containing any information belonging to the Applicant or concerning the Applicant's business activities, for safe-keeping pending the conclusion of these proceedings.

2. Ordering that the order in paragraphs 1.1, 1.2 and 1.3 above operate as an interim order, pending the application for the relief set out in the main application as recorded in the Notice of Motion dated 16th September 2015.

3. Authorising the Respondent to approach this Court if so advised, on 24 hours' notice to the Applicant, to set aside this interim order.

4. That the costs of this application be costs in the main application.'

[5] At paragraph 9 of the founding affidavit deposed to by Ricardo Fabio Simonetti, he says the following:

> 'I seek the issue of the First Order Prayed with interim relief, pending the finalisation of this application. I request that any and all of the documentation copied by the Sheriff remain under seal pending the finalisation of this application, in the event that the Respondent should cry foul regarding this application being launched without notice to it.'

[6] At paragraphs 66 and 70, the deponent indicates that the applicant has decided not to proceed with the enforcement of the restraint of trade agreements against Albon and Lambie, but will proceed with a damages claim based on unlawful competition.

[7] In respect of the aspect of urgency and proceeding *ex parte*, the deponent to the affidavit says the following in his affidavit:

> '72. The Applicant anticipates that in the event of the Respondent receiving notice of this application, the Respondent will destroy, remove or ensure that any evidence in support of the Applicant's intended claim does not fall into the hands of the Applicant.
> 73. My fear is that, if the Respondent is given any notice of this application, the Respondent will do its best to destroy or materially alter the documentation and evidence that the Applicant seeks by way of this application, to the Applicant's detriment.
> 74. I have asked that the documentation and evidence sought be kept under seal

until such time as this application is finalised.

75. The Respondent can clearly claim no prejudice in such an Order being granted, whereas the prejudice to the Applicant is manifest should an interim order be refused and a final Order thereafter be granted, given the reasonable apprehension that the Respondent will do all in its power to ensure that any evidence of its wrongdoing does not fall into the hands of the Applicant.'

[8] It would appear that at paragraph 70, Simonetti indicates that the documents and information currently in possession of the respondent will assist the applicant in proving its anticipated damages claim against the respondent. The documents and information identified by him in such affidavit are the following:

'(i) Contracts (whether in draft, unsigned or signed and whether in writing or oral) involving clients of the Applicant;

(ii) all voice loggings including oral contracts concluded with any of the Applicants' clients;

(iii) hard or soft copies of the Applicant's client file list or database;

(iv) contracts of employment and / or letters of employment with former employees of the Applicant.'[1]

[9] In the report of the supervising attorney dated 27 November 2015,[2] he confirms *inter alia* that the search and seizure was carried out in compliance with the court order and further at paragraph 16 thereof, he states the following:

'Prior to the removable USB flash drive removed from the premises, copies of the list

[1] Index 1, page 36, para 70(a)-(d).
[2] Index 2, pages 122 – 127.

of the recorded items were supplied to the Applicant's attorney and to the Respondent's Marc Brooker as well as the sheriff.'

Anton Piller Orders

[10] An Anton Piller order authorizes the search and seizure of documents and related material relevant to proceedings which an applicant intends to pursue, and is directed at the preservation of evidence. By its very nature, it is an order sought for procedural relief for the preservation of evidence which will ultimately be used to secure substantive relief.[3] Normally such application is an *ex parte* application and is often heard in camera. An applicant must show that notice to the respondent may render the relief nugatory[4] and such order provides instant relief subject to a variation, or discharge of the order at a later date, alternatively, a reconsideration thereof.[5]

[11] An applicant for such relief must satisfy the court *prima facie*, that it has a cause of action against the respondent which it intends to pursue:

[11.1] that the respondent is in possession of specific and specified documents or things that constitute vital evidence to substantiate the applicant's cause of action to which the applicant does not have a real or personal right;

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[3] *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam & another; Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg* 1995 (4) SA 1 (A) at 19E.
[4] *Universal City Studios Inc & others v Network Video (Pty) Ltd* 1986 (2) SA 734 (A) and *National Director of Public Prosecutions and another v Mohamed & others* 2003 (4) SA 1 (CC).
[5] *Shoba supra* at 19.

[11.2] that there is a real and well-founded apprehension that such evidence may be destroyed or in some way be spirited away before discovery or by the time the case comes to trial.[6]

[12] A court has a discretion whether or not to grant an Anton Piller order, and if it does decide to exercise such discretion, may stipulate what terms the form of the order ought to take.

[13] In exercising its discretion, a court must often weigh the potential harm to be suffered by the respondent if an order is granted, as against the potential harm to the applicant if the relief is withheld. Anton Piller orders are often regarded as invasive and potentially harmful and are often seen as being draconian in nature and should be granted only in exceptional circumstances.[7]

[14] In issuing an order, a court must consider that the terms of the order sought are no more onerous than is necessary to protect the interests of the applicant. A wide framing of an order may not be willful or *mala fide* to result in the discharge of a rule *nisi*. If the order is too wide, an applicant must show cogent reasons as to why the order should not be discharged.

[15] In our division, the draft order must prohibit anyone, without the leave of court,

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[6] *Universal City Studios supra*.
[7] *Rath v Reese* 2007 (1) SA 1999 (C) at 107H; *Mathias International Ltd & another v Baillache & others* 2015 (2) SA 357 (WCC) at 362E and 363D.

from disclosing any fact relating to the application and enable the sheriff to enter and search the premises to seize, attach, and remove specified material and retain same in his possession pending the court's direction. A court order may in fact stipulate that the acts to be performed by the sheriff must be done, under the supervision of the applicant's attorney and a supervisory attorney.[8]

[16] It has been repeatedly held that the purpose of an Anton Piller order is to preserve evidence and is not a fishing expedition.[9] It is not designed to enable a prospective litigant to either see or gain access to his adversary's documents.

[17] It is common cause between the parties, alternatively not disputed that:

[17.1] The Anton Piller order was granted *ex parte* an in camera.

[17.2] The notice of motion was not in its usual form, and was not in the form of a rule *nisi* with any return date nor did it make reference to a date by which the contemplated action proceedings would be instituted.[10]

[17.3] Paragraph 3 of such order was to the effect that the relief in paragraphs 2.1, 2.2 and 2.3 would operate as an interim order pending the application for the relief set out in the main application. The respondent could approach the court on 24 hours' notice to the applicant to set aside the interim

[8] *Memory Institute SA CC trading as SA Memory Institute v Hansen & others* 2004 (2) SA 630 (SCA) at 633. *Audio Vehicle Systems v Whitfield & another* 2007(1) SA 434 (C) paras 18 and 24; *Mathias supra* paras 9-10; *Memory Institute supra* para 3.
[10] Index 1, pages 1-7.

order.

[17.4] The main relief in paragraph (b) of the notice of motion[11] essentially orders the respondent to deliver to the applicant any computer data, copies and information obtained in terms of paragraphs 2.2 and 2.3 of the *ex parte* order, and directs the sheriff to hand over to the applicant the copies of the computer data, copies and information obtained in terms of paragraphs 2.2 and 2.3 of the *ex parte* order.

[17.5] The order granted on 18 September 2015, specifically paragraph 1.2 thereof, directs the sheriff to:

> 'provide the other copy to the Applicant for the purposes of preparing further affidavits in these proceedings. . . .'
> (my emphasis)

[17.6] The furnishing of the seized information to the applicant was done prior to the respondent having an opportunity to be heard or resist the order or to re-visit same.

[18] In the answering affidavit,[12] the deponent submits that the order is:

[18.1] contrary to the accepted format of a search and seizure order;

[11] Index 1, page 5.
[12] Index 2, pages 131 – 163.

[18.2] is not interlocutory but final in form in that it provides for information to be handed to the applicant for purposes of preparing further affidavits in these proceedings;

[18.3] is final in that it provides for the applicant to be placed in possession of the respondent's confidential information and thus renders nugatory any application to set aside the order, as the harm has already been caused;

[18.4] amounts to an abuse of court procedure, manifests the failure of the requirements relating to good faith and the obligation to furnish a full disclosure of all relevant facts.[13]

Analysis

[19] I have had regard to the full set of affidavits filed in this matter and I have considered the basis upon which the application was initiated. I have also considered the heads of argument filed by the respective parties. However, for purposes of the judgement, I do not propose to go into the merits of the application or the grounds which informed the order sought only to the extent to which they are relevant to the main challenge to the order granted. What I propose to do is focus on the respondent's main challenge to the order, namely the form of the order sought in the context of the purposes of Anton Piller orders, the rights to privacy as enshrined in the Constitution, the right to access to court and the application of the principles of

[13] Index 2, page 136, para 10.

audi alteram partem.

[20] *Ms Annandale* who appeared for the applicant acknowledged that the order is 'somewhat strange'. However, she agreed that the crux of the issue was whether the form of the order granted vitiated the entire proceedings justifying the order being set aside.

[21] She submitted that having regard to the decision in *Cometal-Mometal SARL v Corlana Enterprises (Pty) Ltd*[14] the following factors ought to be considered by me as was done by Margo J, in deciding whether or not to rescind the order:

> 'It seems to me that, among the factors which the Court will take into account in the exercise of its discretion to grant or deny the relief to a litigant who has breached the *uberrima fides* rule, are the extent to which the rule has been breached, the reasons for the non-disclosure, the extent to which the Court might have been influenced by a proper disclosure in the *ex parte* application, the consequences from the point of doing justice between the parties, of denying relief to the applicant on the *ex parte* order, and the interests of innocent third parties, such as minor children, for whom protection as sought in the *ex parte* application.'[15]

[22] In this matter the main complaints of the respondent are the following:

> [22.1] that it was deprived of the *audi alteram partem* rule in that a final decision was made before it was given an opportunity to deal with the relief obtained;

[14] 1981 (2) SA 412 (W).
[15] At 414 G-H.

[22.2] its rights to privacy as guaranteed in s 14[16] of the Constitution as well as the rights of access to court as guaranteed by s 34[17] of the Constitution have been rendered nugatory by the relief granted;

[22.3] the applicant has abused the Anton Piller process.

[23] *Ms Annadale* submitted that having regard to the factors set out in the *Cometal* decision I ought not to set aside the order. She submitted that if one has regard to the founding affidavit, the intent was to have the evidence preserved. This is borne out by the allegations in the founding affidavit referred to earlier in this judgment. The tenor of the affidavit records that the evidence be kept under seal pending the main application and seeks non-disclosure of the evidence.

[24] In addition, she submits that the respondent does not indicate that confidential information was obtained which prejudices it or that execution occurred outside the parameters of the order granted. The third factor she acknowledged posed a problem for the applicant as no explanation is offered by the applicant as to the extent to which the court might have been influenced by proper disclosure. She submits that the fourth factor is the one which weighs heavily in the applicant's favour against setting aside the order, namely doing justice between the parties. In

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[16] Section 14 of the Constitution reads as follows:
'Everyone has a 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.'

[17] Section 34 of the Constitution reads as follows:
'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

support of this she alluded to the fact that the execution of the order has revealed evidence of unlawful competition by the respondent, employees being solicited and employed by the respondent, clientele of the applicant being solicited and also signed up, and intellectual property of the applicant being found in the possession of the respondent.

[25] She submits that all that has occurred is that the applicant has obtained the documents and data sooner than anticipated. She submits that as the end result would have been the same even if the order was in the usual form, this court ought not to set aside the order.

[26] I accept that there is no complaint by the respondent that what was seized was of a confidential nature or fell outside the ambit of the order granted. However, no explanation is provided by the applicant as to whether the court might have been influenced by full disclosure. To simply say that 'this court granted an order like this before' does not suffice. I am of the view that the possibility exists that had the applicant disclosed that it wanted access before seeking the relief in the main application, the court, in the exercise of its discretion, may have required more to be placed before it to justify such an order being granted or may have refused to grant such an order.

[27] Of great concern to me, is that there are no allegations in the papers which draw the court's attention to the fact that such an order will be sought. In fact, quite the contrary impression is created, especially as the allegations are in respect of

preserving and not disclosing the evidence. Whether this is deliberate or *mala fide*, I cannot conclude on these papers.

[28] I agree with the submission that having regard to the allegations in the founding affidavit, there is no factual basis for the order granted. In addition, in the absence of any explanation, I have no alternative but to conclude that this was done in breach of the rule of disclosure in *ex parte* applications and the duty of good faith. The fact that the end result may be the same does not in my view justify not setting aside the order. The decision in *Cometal* was pre-Constitution. Here one has a breach of ss 14 and 34 of the Constitution, in addition to the duty of good faith in *ex parte* applications and the *audi altem partem* rule. Given the nature of the breaches, it does not, in my view, behove an applicant to say well the end result would have been the same and we simply had access sooner rather than later.

[29] Given the purpose of Anton Pillar orders and the constitutionally entrenched rights which have to be given recognition to, theis conduct by the applicant cannot be countenanced. I agree with the submission of *Mr Hunt* who appeared for the respondent, that considerations of equity do not come into play where the breach is so fundamental. Here one is not dealing with a reconsideration of the order granted- the respondent cannot be clothed with rights *ex post facto* it was entitled to exercise before access to the data and information was allowed.

[30] Section 172(1) of the Constitution provides that once conduct is inconsistent with the Constitution, a court must declare such conduct invalid to the extent of such

inconsistency and make an order that is just and equitable. It must thus follow that the order must be set aside and the status quo restored.

[31] In *Memory Institute SA t/a South African Memory Institute v Hansen & others*,[18] Harms JA stated the following insofar as Anton Piller orders are concerned:

> '*Anton Piller* orders are for the preservation of evidence and are not a substitute for possessory or proprietary claims. They require built-in protection measures. . .The goods seized should be kept in the possession of the Sheriff pending the Court's determination. Since it is the duty of an applicant to ensure that the order applied for does not go beyond what is permitted (something that was not done in this case) and since Musi J granted a rule *nisi* he was not empowered to grant, the setting aside of the rule had to follow as a matter of course. . . .'[19]

[32] At 625 G-H he held:

> 'Another reason for disposing of the case on the appellant's version is to illustrate another point and that is that interim orders and rules *nisi* are not to be had simply for the asking. Courts should satisfy themselves that a proper case has been made out, more so if the subject is technical. The fact that a respondent may approach the Court for a reconsideration of the Rule (Rule 6(12)(c) of the Uniform Rules of Court) and that it may be set aside on the return day should serve neither as a sop nor as a soporific'.

[33] When exercising its discretion to grant an Anton Piller order, a court must consider whether the terms of the orders sought are no more onerous or far-fetching than is necessary to protect the interests of the applicant. Willfulness or *mala fides*

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[18] 2004 (2) SA 630 (SCA).
[19] At 633 E–G.

does not need to be present or to be found in the discharge of a rule *nisi* or an interim order, where the order was too widely framed. The applicant bears the onus to establish why the order should not be discharged, where in fact, as in this instance, it went too wide.[20]

[34] I agree with the submission that the terms of an Anton Piller order must not ordinarily be so wide as to give the applicant access to documents which the evidence does not show him or her to be entitled to nor should it go further than strictly necessary for the preservation of critical evidence.[21]

[35] In this instance, the order allowed the applicant to access material taken from the respondent's hard drive, where no case had been made out for that relief and in circumstances where the terms of the order went far wider than preserving evidence pending the outcome of proposed litigation. Consequently, in my view, this justifies the setting aside of the order in question.[22]

[36] In *The Reclamation Group (Pty) Ltd v Smit & others*, Froneman J (as he then was) held the following:[23]

> 'The fact that access to the premises of the respondents was obtained, that these premises were searched for documents, that documents were identified, examined and removed, and that an inventory was made of the documents, cannot be

[20] *Erasmus*: *Superior Court Practice* (2 Ed), volume 2 at D825.
[21] *Audio Vehicle Systems v Whitfield & another* 2007 (1) SA 434 (C) para 22; *Sun World International Inc. v Unifruco Ltd.* 1998 (3) SA (C) 151 at 174D-E.
[22] *Audio Vehicle Systems supra* paras 38 - 39.
[23] 2004 (1) SA 215 (SE) 218F-H.

undone. The effect of the original order in respect of those aspects is final in nature. What thus remains for "reconsideration" are the following:

(1) Whether the applicant used the extraordinary *Anton Piller* procedure for a proper legitimate purpose and whether the order should originally have been granted. If it appears that the applicant used the procedure improperly or that the order should not have been granted originally all that can be done in reconsideration is to order that the documents be returned to the respondent and to penalize the applicant for its improper behavior via an appropriate costs order…'

[37] In my view, even though the respondent was allowed to anticipate the interim order on 24 hours' notice, the effect thereof was to render its rights in this regard, nugatory as the applicant was already in possession of a copy of the documents and data seized. It would not have served any purpose for the respondent to anticipate the interim relief nor to apply for reconsideration of the order. The appropriate course of action was, as it has happened in this matter, to apply for the order to be set aside.

[38] In light of the fact that the applicant has obtained copies of the documentation, and the order I propose to grant, it is only appropriate that it be coupled with an order that the applicant and the sheriff hand over to the respondent's attorneys of records, all documents, data copied and retrieved pursuant to the execution of the order on 21September 2015.

Costs

[39] It is trite that the normal rule in relation to costs is that a successful party is entitled to its costs. There are facts placed before me in terms of which I can depart from the normal rule relating to costs, and consequently, should the applicant be unsuccessful, then it should be directed to pay the costs occasioned by the application. In addition, unlike the facts in the *Audio Vehicle* case, I find insufficient basis to issue a punitive costs order, although the conduct of the applicant is questionable.

[40] At the hearing of the matter both parties briefed senior counsel to argue the application when it served before me on the opposed motion court roll. Given the nature of the matter and the fact that Anton Piller orders are by their very nature complex and given the fact that constitutional issues were involved and were raised, it is my view that the facts of this matter and certainly the basis upon which it was opposed justify the briefing of senior counsel.

[41] In the premises for the reasons set out hereinbefore the orders I issue are the following:-

[41.1] The interim order of 18 September 2015 is set aside. The relief in the main application is refused.

[41.2] All materials and copies seized or made pursuant to such order of 18 September 2015, are to be returned to the respondent's attorneys of record

forthwith.

[41.3] The applicant is directed to pay the costs occasioned by the application including any reserved costs, such costs are to include the costs of Senior Counsel.

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HENRIQUES J

Case Information

Date of hearing	:	13 February 2017
Date of judgment	:	22 March 2017

Appearances

Counsel for Applicant	:	Adv. A. Annandale SC
Instructed by	:	Tate, Nolan & Knight 15 Enninsdale Drive Broadway Durban North (T) 031-563 1874 (F) 031-563 3920 (E) charmaine@tnk.co.za Ref: C Schwenn/PN/SQ007001
Counsel for Respondent	:	Adv. C.P. Hunt SC
Instructed by	:	Hay & Scott Attorneys c/o NSG Attorneys 2nd Floor, Clifton Place 19 Hurst Grove Musgrave Durban (T) 031-202 9751 (F) 031-202 0451 (E) tarryn@nsg.co.za Ref: T. Lombard