

SOUTH AFRICA / JUDGMENT

Impac Underwriting Managers (Pty) Ltd and Another v Du Plooy and Others (41233/2020) [2020] ZAGPPHC 512 (14 September 2020)

[2020] ZAGPPHC 512

COURT

North Gauteng High Court, Pretoria

BEFORE

E van der Schyff

CASE / FILE NUMBER

41233/2020

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REPUBLIC OF SOUTH

AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED: YES/NO

CASE

NO: 41233/2020

In

the matter between:

IMPAC
UNDERWRITING MANAGERS (PTY) LTD
FIRST APPLICANT
IMPAC
CROPSURE (PTY)
LTD
SECOND APPLICANT
and
WILLEM
HENDRIK FREDERIK DU PLOOY
FIRST RESPONDENT
CHANEL
CELESTE DE LA ROCHE-VIVVIERS
SECOND RESPONDENT
WIHAN
GROENEWALD
THIRD RESPONDENT
OOPKOP
(PTY)
LTD
FOURTH RESPONDENT
WILLEM
HENDRIK FREDERIK DU PLOOY
FIFTH RESPONDENT
WWJ
AGRI (PTY)
LTD
SIXTH RESPONDENT

JUDGMENT

Van der Schyff J

Introduction

[1] The applicant obtained an Anton Piller order against the respondents on an ex parte basis on 4 September 2020. The respondents approached the court on an urgent basis for very limited relief, namely the suspension of paragraph 9 of the said order pending the final determination of the Anton Piller order – whether it be on the return date, or having been anticipated in full by the respondents.

[2] Paragraph 9 of the order granted on 4 September 2020 reads as follow:

“That, unless a different direction be obtained from the Court, and within two business days of execution of the Order, the applicants and their attorneys be entitled to inspect all or any of the removed items for preservation in order to assess whether they/it provide/s evidence relevant to the present application or to further legal proceedings envisaged in the application (‘the Envisaged Litigation’).”

The parties' contentions: The respondents' case

[3] In their founding affidavit to the application for interim relief, the respondents state the following:

i. The purpose of the application is to reconsider the ambit of the order granted on 4 September 2020 and specifically to suspend or amend the operation of paragraph 9 thereof pending the return day (or anticipation thereof by the respondents);

ii. Due to the extreme haste with which this application is prepared, the respondents reserve the right to deal comprehensively with the allegations set out in the founding affidavit on the return date;

iii. Without dealing with the subject matter of the application instituted by the applicants, reasonable grounds exist for investigating the ambit of, and challenging the said order and its execution on, inter alia, the following grounds: the order is coached in too wide terms and is unclear as far as the identification of 'so-called'

evidentiary material that need to be preserved is concerned; the manner in which the order was executed on 8 September 2020 goes

beyond the scope of the order and/or the permissible legal entitlements as far as blanket and indiscriminate copying/cloning of

data and the inspection and access to the documents/files/data post execution are concerned; the application is not aimed at preserving

crucial evidence, but had been employed as a fishing expedition to support future court proceedings;

iv. The respondents became aware of the existence of the order on 8 September 2020 when the Sheriff together with the supervising attorneys and computer experts attended to his premise to execute the order;

v. Amongst others, mirror copies were made of the first and fourth respondent's computer devices; documents generated for placing crop insurance with King Price Insurance and in which King Price Insurance has a direct and substantial interest; the first respondent's wife's Dell laptop was cloned – she is employed with Lifestock Registering Federation and no basis existed for searching or cloning her devices; the second respondent was not at home when the search was conducted, but her spouse's laptop was cloned – no basis existed for searching this computer; clones were made of drives of devices belonging to the 5th respondent and the 5th respondent's personal computer was cloned. Fifth Respondent is a consultant in the industry and his laptop contains vast data and files relevant to his work in which a number of clients have an interest.

- [4] The respondent states that, to the best of his knowledge, the computer expert, the Sheriff and the supervising attorneys did not search for or extracted specific documents, data or files, but simply proceeded to clone hard drives for later inspection at their leisure.
- [5] The respondents take issue with paragraph 9 of the order because on a simple reading of the order, it is clear that the applicants in the main application, will have an opportunity to have access to and inspect all the information copied from the various computers before the respondent is provided with an opportunity to contest the granting of the order. The respondents sought an undertaking from the applicants that they will not access the data pending the return day, but the applicants have indicated that they will not desist from inspecting the items attached by the Sheriff unless and until the court order is set aside.
- [6] The applicants and fourth respondent are competitors in the market and the order allows for the applicants to have insight to all information of whatsoever nature pertaining not only to the business of the fourth and sixth respondents but also to the personal information of all the respondents.
- [7] As a result, the respondents seek an amendment of paragraph 9 which allows the applicants and their attorneys to inspect the mirror copies, and data on removed devices before the order is contested on the return date or any anticipated return date.

The parties' contentions: The applicants' case

- [8] The applicants filed an answering affidavit which contains the following relevant averments:
- i. The main application and the order primarily seeks to preserve and confiscate evidence comprising of exceptionally valuable, commercially sensitive and secret proprietary confidential information owned by the applicant;
 - ii. The applicant suspected, and now knows, that information was misappropriated from it by some of its previous employees and a consultant associated with it;
 - iii. The main application was brought on the reasonable suspicion that the employees and consultant sought to use and apply the applicants' proprietary information as a springboard to commence training and competing with the applicants after they recently left its employ. The 6th respondent rendered consulting services to the applicants and it is believed to be in possession of the applicants' confidential and proprietary information;
 - iv. The envisaged litigation will comprise steps to

- (a) secure the return of documents and electronic records embodying proprietary information of the applicants unlawfully appropriated by the employees and the consultant which are presently also in the possession of the fourth and sixth respondents; (b) interdict the respondents' unlawful conduct from continuing; (c) establish the nature, extent and effect of the respondent's unlawful conduct; (d) recover the damages sustained as a consequence of the respondent's unlawful conduct.
- v. The applicant opposes the suspension of paragraph 9 of the order and avers that the true and ulterior motive for the application launched by the respondents is to conceal the evidence of their unlawful conduct;
- vi. The purpose of paragraph 9 according to the applicants is to provide the applicants and its legal representative the opportunity to inspect the confiscated information, first for purposes of identifying what portions thereof constitute evidence relevant to the envisaged litigation and what portions do not. Once the relevant evidentiary portions thereof are identified, only those portions of the confiscated information will be retained. The applicants are not interested in the private or irrelevant matter confiscated in pursuance of executing the order. The applicants undertook and tendered to discard, keep confidential and not to use or disclose any relevant matter confiscated in pursuance of executing the order.
- vii. The prosecution of this application had the effect of the paragraph 9 contemplated inspection being put on ice and only a fraction of the information was inspected.
- viii. The applicants, in turn seek an extension of the time period allowed in paragraph 9, for the inspection of the confiscated material to 18 September 2020.
- ix. The applicants take issue with the non-joinder of the relevant sheriffs who were directed to execute the order.
- x. The applicants did not deny that mirror copies were indiscriminately made of certain electronic devices in contradistinction of the copying of only information that meets the criteria set out in Annexure B to the order. They aver, however, that "if the data stored on the devices are irrelevant to the envisaged litigation then it will be kept confidential and disregarded by Impac".

Evaluation

- [9] In order to determine the context in which the relief sought by the respondents is to be considered, it is necessary to consider the content of the order granted by Van der Westhuizen J on 4 September 2020. Such an approach will require a proper interpretation of paragraph 9 of the order granted and this will in turn require a proper reconsideration of the application and the relief granted.
- [10] Paragraphs 5, 6, 7 and 8 of the order deal respectively with different premises where the order was to be executed. The core content of the relief sought in relation to each of the premises is the same.

[11] The order granted provided that:

- i. An independent supervising attorney be appointed to discharge the duties of the supervising attorney as set out in the order, in particular to be present during the execution of the order and to supervise the execution in accordance with the terms of the order, the supervising attorneys shall exercise professional judgment and maintain independence from the applicants and their legal and other representatives.;
- ii. That employees of the Computer Forensic Lab (Pty) Ltd, trading as Cyanre were appointed as computer experts to discharge the duties of computer experts as set out in the order. In discharging such duties, the computer expert shall exercise professional judgment and maintain independence from the applicants and their legal representatives.
- iii. Any adult person present at any of the identified premises were ordered to:
 - 1) grant the Sheriff, the supervising attorneys and the computer expert immediate and unrestricted access to the premises for purposes of –
 - a) accessing, inspecting and searching the premises and any of the described electronic and computer devices and data storage, retrieval and transmission devices for the purposes of identifying any data files, spreadsheets, correspondence, notes, messages, documents or records, directly or indirectly in the possession or under the control of the respondent falling within any category listed or identified in the Schedule (annexure B) (items for preservation);
 - b) examining each item referred to in deciding whether it is an item for preservation
 - 2) disclose the whereabouts of any document or data file falling within the categories listed in annexure “B” whether at the said premises at which the order is executed or elsewhere, as well as all passwords and the procedures required for effective and unrestricted access to any computer device for purposes of searching same and making copies and/or capturing forensic images

and/or taking mirror images of each computer device storing items for preservation, or if that is not possible, printouts of data files or documents falling within any category listed or identified in the schedule;

- 3) to permit the Sheriff to attach and remove any items for preservation.

[12] The execution of the order entails more than the mere identification of computer and electronic storage devices in possession of the respondents. It entails the identification of items meeting the criteria set out in annexure B of the order stored on those devices. The supervising attorney’s responsibilities thus do not come to an end when mirror images are made of electronic

devices, but extends to the analyses of those devices and the identification of the items listed in annexure B that are found to be present on the devices.

[13] In reconsidering the Anton Piller application within the limited ambit requested by the respondents, I take into account the highly competitive environment within which all the parties function. I also take into account the fact that it has been explained by Schwartzman J in *Kebble and Others v Wellesley-Wood and Others* 2004 (5) SA 274 (W) that in execution of an Anton Piller order, the Sheriff will often find it difficult to identify the documents or other articles to be attached by him, and to overcome

these difficulties, an applicant or its attorney and a computer expert are often allowed to be present at the search and to assist in the identification of what is to be attached.

[14] Within the limited scope of the reconsideration application before me, it is not necessary to differentiate between the two types of Anton Piller orders that has developed in South African jurisprudence, and the relevance thereof for this Anton Piller application. Those are issues that will fully be dealt with and canvassed on the return date.

[15] The question that I need to deal with is whether it is fair and just, at this time of the proceedings and in light of the fact that mirror copies have been made of electronic devices and computers that might contain information not falling within the ambit of the boundaries set up by criteria set out in annexure B, to allow the applicants and their legal representatives to inspect the items removed for preservation in order to assess whether it provides evidence relevant to the present application or envisaged litigation.

[16] The applicants argue that in casu they assert a proprietary interest in the confiscated material and as such are entitled to an order that exceeds the normal boundaries of preservation alone. To the extent that the applicants are correct, a fact that needs not be determined now, their rights extend only toward the items identified in annexure B of the order, and to date, no inspection has been done by the computer experts in the presence of the supervising attorney to determine which of the information cloned and contained in the mirror images, falls within the categories of information stipulated in annexure B. As such, although the devices and mirror images of electronic and computer devices were confiscated, the order has not yet been executed in full in that a body of information has been identified by the independent computer expert and supervising attorneys who must maintain their independence from the applicants and examine each item for the purpose of deciding whether it is an item for preservation. The order will only be fully executed when the identified material has been examined and specific items that meet the criteria set out in annexure B to the order identified.

[17] The applicants and respondents are competitors in a very specialised industry. The applicants' input is vital in determining whether a specific item meets the criteria set out in annexure B, and needs to be preserved. This input, may however, not be provided outside the scope of the order granted, specifically as far as the protection of the respondents rights are concerned. The presence of a supervising attorney is a mechanism specifically crafted to this end.

[18] The applicants requested an extension of the time period within which paragraph 9 of the order is to be executed. Encrypted data could not be accessed and in order to access this data an electronic lab had to be set up at the Sheriff's offices. The computer specialists advised that they would need until at least 18 September 2020 to facilitate an inspection of such data. In addition, the applicants halted the process of inspection for the confiscated material when this application was launched.

ORDER

In the result, the following order is made:

1. Paragraph 9 of the Anton Pillar order granted by Van der Westhuizen J on 4 September 2020 is amended to read as follows:

“That, unless a different direction is obtained from the Court, and until 20 September 2020, the applicants’ attorney(s), in the presence of a supervising attorney, are entitled to inspect all or any of the removed items for preservation in order to assess whether they/it provide/s evidence relevant to the present application or to further legal proceedings envisaged in the application (“the Envisaged Litigation”).

2. The costs of this application are reserved.

E van der Schyff

Judge of the High Court, Gauteng, Pretoria

Counsel for the applicants:

Adv P Lourens

Instructed by:

PIETER TALJAARD ATTORNEYS

Counsel for the respondent:

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Date of the hearing:

11 September 2020

Delivered:

14 September 2020

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