NOT REPOTABLE

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 09/22543

DATE: 10/11/2010

In the matter between:

JOHN, ALEXANDER JUSTIN	First Applicant/Respondent
SIEGWERK SOUTH AFRICA (PTY) LTD	Second Applicant/Respondent
JOHN, PROBASHNIE	Third Applicant/Respondent
DAVIES, PETER	Fourth Applicant/Respondent
WHITWORTH, EMERSON	Fifth Applicant/Respondent

and

HI-TECH INKS (PTY) LIMITED	First Respondent/Applicant
SECUREDATA SECURITY SERVICES (PTY) LTD	Second Respondent

J U D G M E N T

LAMONT, J:

[1] This is an application brought by the applicant to condone the sixth respondent's failure to timeously file a report and for certain further relief.

[2] During June 2009 the applicant launched an application for what is colloquially known as Anton Piller relief. Pursuant to the application the applicant was afforded relief. Subsequently the order which was made was varied by consent. Under and in terms of the order as amended:

1. The sixth respondent at a point in time was entitled to commence with the inspection and search of original hard drives together with electronic storage devices "*for the purposes of identifying and pointing out any of the items identified in Annexure B to the Anton Piller order*".

2. Within 14 days of the completion of the inspection and search the sixth respondent was to furnish the legal representatives with a report identifying the items, if any, falling within any category listed in Annexure "B" aforesaid.

3. Within 5 days of receipt by the attorneys of such report (during which period the applicants' attorneys were to maintain the report as confidential to themselves and their legal counsel) the respondents would be entitled to deliver a notice in writing to the applicants' attorneys of record identifying such portions of the

report of the sixth respondent as the respondents objected to being disclosed to the applicant on the grounds of confidentiality. Those portions were thereafter not to be disclosed to the applicant other than pursuant to the order of court or by agreement.

4. The sixth respondent was required not to disclose or disseminate any information it found other than as set out in the order.

5. Unless a different direction was obtained from the court the applicant and its attorneys would become entitled to inspect the items identified as forming part of Annexure “B” 7 days after the report had been provided.

[3] Annexure “B” to the original order set out a variety of categories of documents listing various documents in which the applicant would have a proprietary interest and various other documents which were relevant to issues which would be canvassed in the trial and which were to be preserved.

[4] The sixth respondent in due course conducted the search contemplated and produced a report. In the report the sixth respondent referred to various items which it had discovered by a procedure which I will set out below and also in certain circumstances the actual document which had been identified. The documents with which the report primarily was

concerned and which primarily forms. The subject matter of the issue before me were documents in electronic format and the reproduction of the documents is similarly in electronic format.

[5] The report was not timeously filed. The reason the report was not timeously filed was due to the sixth respondent seeking and obtaining legal advice concerning the report which resulted in a delay and also in the sixth respondent producing a different but (common cause between the parties) meaningless non-compliant report.

[6] The second, fourth and fifth respondents (hereafter referred to as the respondent) objected to the method which the sixth respondent had used to identify documents which the sixth respondent identified as forming claimed form part of Annexure “B” and further objected to the fact that in the report the sixth respondent had disclosed the actual documents.

[7] The methodology of the sixth respondent so it was submitted had resulted in documents personal and confidential to the respondent being produced and disclosed to the applicant and had also resulted in inconvenience as a large number of documents had been discovered and been referred to in the report as constituting documents contemplated by Annexure “B”. The sixth respondent employed certain word search criteria in conducting the search for electronically kept documents. The sixth respondent required the computer to produce documents containing words which were believed to be unique to the applicant and so for example there was a search

for the applicants' unique product codes for specified customers, for unique brand names used by the applicant, certain unique words which the applicant believed were specific and particular to it. There was a further limit placed upon the production of data by limiting the period of time over which the search was made to a time when it was anticipated the data would have been transported from the applicant and placed upon the storage devices being inspected. There were also searches for words describing particular types of item which are unique to the applicant and words which the applicant had used incorrectly but which would not be used incorrectly by a person who innocently used them in the context of the documents being sought. The search programme used by the expert employed by the sixth respondent has a 98-99% accuracy. While there may be false hits in the results of search the false hits should be extremely limited and be readily identified. Some 30 000 hits were discovered. A hit is the presence of a word. The number of documents represented by the hits constituted some 3 000 pages.

[8] The respondents complained that a large number of irrelevant items had been discovered and that that was apparent from the number of hits (30 000) and also as certain keywords were generic and/or words not uniquely used by the applicant.

[9] The respondents accordingly attacked the report on the basis that:

(1) the methodology did not produce documents which the sixth respondent would be able to say were documents contemplated by Annexure “B”.

(2) the report contained harmful and confidential information in that original documentation which if inspected would yield data confidential to the respondents.

METHODOLOGY

[10] The submission was made that the very fact there were 30 000 hits was resultant number of pages were evidence of the failure of the methodology and it constituted an abuse to require the respondent to trawl through so many documents to deal with the issues contemplated by the order.

[11] As to the methodology the evidence of the expert used by the sixth respondent is that the methodology used is the best available methodology, that he used the methodology, considered the documents and formed the opinion contained in the report. The fact that a large number of documents were discovered evidences only the extent of the use of confidential information on the basis of the evidence given by the expert. It is illogical to assume that because a large number of documents were discovered that the search was inappropriate.

[12] It seems to me that it is proper to approach the search on the basis of looking for the least commonly used keywords. Such keywords would be words used particularly by the applicant and less commonly by others. The expert having limited the ambit of the documentation was able to inspect and form his opinion as required. The product of the search would contain at the least all the allegedly offensive documents. By its very nature a search of this nature will yield more than the offensive documents. This feature of the search must give way to the right of the applicant in enforcing the order to obtain every single one of the documents it claims is offensive.

[13] In my view the search was the most effective search which could be conducted in the circumstances and hence must be and is the search contemplated by the order.

ORIGINAL DOCUMENTS

[14] The second complaint is to the fact that the sixth respondent included original documents in the report. It was submitted that the sixth respondent was required to report rather than to produce the documentation. This submission was founded upon an inference dependant in turn upon the manner in which the order was formulated. The order required as a first step that the expert was to inspect electronic devices for the purposes of identifying and pointing out any of the items identified in Annexure “B”. The second step was that the sixth respondent furnish the applicants’ and respondent’s representatives with a report identifying the items falling within

the category listed in Annexure "B". The report was to be kept confidential by the applicant's legal representatives during a period to enable the respondents to deliver a notice identifying portions of the report as they objected to being disclosed on grounds of confidentiality. Those portions were not to be disclosed unless there was further agreement or order of court. Only thereafter would the applicant inspect the items identified.

[15] It was submitted that the procedure was crafted with a view to affording the respondents an opportunity to prevent disclosure of certain documents to which they objected. Hence, so went the argument, the report was objectionable as it itself identified and disclosed items before the respondents had an opportunity of preventing disclosure.

[16] The sixth respondent was not instructed by the order as to the method by which he was to identify items and/or the contents of the report. It was open to the sixth respondent to identify the items in such manner as it wished and to furnish the report in such manner as it wished, subject only to it fulfilling the objective of the activity namely the identification of items falling within Annexure "B". The sixth respondent found it convenient to identify the items by way of producing them in the report. No portion of the order made directing it to furnish the report itself conflicts with that methodology and description.

[17] The form of the order included a direction which enabled the respondents to prevent disclosure of documents to the applicants on the

grounds of confidentiality. The existence of this direction does not warrant the inference that disclosure of all documents could not be made of to the applicant's attorneys. The order is clear that the report is to be kept confidential by the applicants' attorneys until such time as the respondents have had an opportunity to object to the particular documents they wished to object to on the grounds of confidentiality. No disclosure of the documents takes place in these circumstances. Accordingly in my view it cannot be said that the procedure by which the respondents would object to disclosure was rendered nugatory by the identification of the documents by way of producing the document in the report.

[18] Accordingly in my view the sixth respondent was entitled to identify the documents by way of producing the documents as was done.

TRACING

[19] It remains only to consider whether or not the fact that 3 000 documents were discovered imposes an unbearable burden upon the respondents. In my view if the documents discovered are the documents identified by the sixth respondent as being documents referred to in Annexure "B" then the fact that there are many does not affect the obligation of the respondent to deal with them. It may affect the time within which the respondent should be allowed to deal with them.

[20] The applicant has indicated that it is prepared to allow the respondents such additional time as may be necessary to enable the respondent to embark upon the next step in the procedure namely the identification by the respondent of those documents which are not to be disclosed by reason of their confidentiality. I was handed a draft order allowing an additional period of time than that originally contemplated. The additional time appears to be fairly allowed. If it proves insufficient it is a simple matter for a variation to be obtained.

[21] I accordingly make an order in terms of the draft which I have marked "X" as amended by myself.

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C G LAMONT
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

Counsel for First Respondent/Applicant	**:**	**Adv. D.M. Fine SC** **Adv. A.J. Eyles**
Attorneys for Respondent/Applicant	**:**	**Leigh Patterson Attorneys**
Counsel for Second, Fourth and Fifth Respondents	**:**	**Adv. A. Subel SC** **Adv. Giblert**
Attorneys for Second, Fourth and		

Fifth Respondents	**:**	**Allan Levin & Ass**
Date of hearing	**:**	**27 October 2010**
Date of judgment	**:**	