

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 46614/2013

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

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DATE

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SIGNATURE

In the matter between:

ABDULHAY MOHAMED MAYET

Applicant

And

**HAROON YUSUF LAHER
BERNARD S FOURIE
BVZ ATTORNEYS
Aka BEZUIDENHOUT VAN ZYL INC.
CITIBANK N.A.**

First Respondent
Second Respondent

Third Respondent
Fourth Respondent

J U D G M E N T

MPHAHLELE, J:

[1] On 09 January 2014 the court granted the anton piller order against all four respondents. The order granted runs to six pages. The order empowered the sheriff and the applicant's supervising attorney to search the premises of the respondents to execute the terms of the order. The order provides for the search of office files, contemporaneous notes made by the respondents in any diary in matters relating to the applicant and the respondents as well as the original settlement agreement between the applicant and the fourth respondent.

[2] The order made provision for a rule *nisi* returnable on Tuesday, 04 February 2014. The order does not disclose or identify what relief the applicant sought to make final on the return date but nevertheless directs the applicant to institute legal proceedings within three weeks from the date of the order and if the applicant fails in the aforementioned regard either party may, not on less than 96 hours' notice to the other party apply to this court for an order determining what must be done about the removed items and copies thereof.

[3] The application was never set down for a hearing on the return date and there was no explanation for such a failure. On 19 May 2014 the first respondent sought an order setting aside the order granted on 09 January 2014 together with ancillary relief. On the date of the hearing of this

application the applicant requested the court to confirm the rule that applicant is entitled to be placed in possession of the original settlement agreement.

[4] The applicant for an anton piller order directed at the preservation of evidence obtained without notice to the respondent, must *prima facie* establish the following:-

- a) that he has a cause of action against the respondent which he intends to pursue;
- b) that the respondent has in his possession specific (and specified) documents or things which constitutes vital evidence in substantiation of the applicant's cause of action (but in respect of which the applicant cannot claim a real or personal right); and
- c) that there is a real and well-founded apprehension that this evidence may be hidden or destroyed or in some manner be spirited away by the time the case comes to trial or to the stage of discovery.

[5] I will now consider whether or not the applicant has established these elements.

1. The cause of action which the applicant intends to pursue against the respondents

[6] The applicant's claim is based upon the first respondent's breach of his mandate in that he (the first respondent) was negligent in the performance of his duties. The first respondent acted as an attorney for the applicant and the Mayet group (the plaintiffs) in a damages claim against Citibank N.A., the fourth respondent. Citibank was represented by the second respondent at the time a director of the third respondent. The parties concluded a settlement agreement which was eventually made an order of court. In terms of the settlement agreement, the fourth respondent undertook to pay the applicant an amount of R25 000-00 in full and final settlement of all claims, including interest and legal costs. It was further agreed that the original settlement agreement would be retained by the third respondent, the then attorneys for the fourth respondent and the first respondent was authorised to retain only one copy of the agreement. It is this settlement agreement and the contemporaneous file notes made by the respondents in matters relating to the applicant and the respondents which form the subject matter of this application. The applicant maintains that the first respondent misled him when signing the settlement agreement.

[7] The damages action against the first respondent was set down for hearing from 30 July 2013 and on 31 July 2013, as per the request of the plaintiff's (who is the applicant in this matter) counsel, Claassen J made the following order:-

- a) The plaintiffs withdraw the action
- b) The plaintiffs tender the defendant's (the first respondent in this matter) taxed or agreed party and party costs up to today including the costs of two counsels on the high court scale, jointly and severally.

[8] The applicant settled the taxed bill of costs on 31 January 2014 in compliance with the court order. The applicant stated that the original settlement agreement will provide evidence against the respondents in the application for leave to appeal Claassen J's order. The claim before Claassen J was instituted against the first respondent only, therefore the second, third and fourth respondents could not have been part of the application for leave to appeal proceedings. Claassen J dismissed the application for leave to appeal on 13 March 2014. The applicant submitted that the applicant still has an option to either petition the Supreme Court of Appeal or bring an application for rescission of Claassen J's order.

- 2. The respondents are in possession of vital information in substantiation of the applicant's claim

[9] The document to be preserved is the original settlement agreement between the applicant and Citibank (the fourth respondent). On reading of the particulars of claim in the damages claim before Claassen J, the claim was

not based on issues relating to the contents of the deed of settlement *per se*, as alleged by the applicant. The claim was for damages in respect of legal fees incurred as a result of the first respondent's alleged breach of mandate. A further claim was for damages paid by the applicant in settlement of a defamation claim in favour of the second respondent. The deed of settlement was not necessary in proving the applicant's claim.

3. Apprehension that the document may be destroyed

[10] As already stated in paragraph 6 *supra*, it was agreed between the applicant and Citibank that the original settlement agreement will be retained by the third respondent. The applicant's attorneys did inspect the settlement agreement at the offices of the third respondent on 29 July 2013. Further the applicant was served with a copy of the settlement agreement on 29 July 2013, a day prior to the commencement of the trial before Claassen J. The applicant does not challenge the veracity of the settlement agreement in its possession. The applicant has failed to show the requisite of apprehension, there is no reason advanced why the applicant should fear that the document would be destroyed.

[11] The applicant conceded that its previous legal representatives have failed to follow due process to obtain the document sought before the

commencement of the trial before Claassen J. But he maintained that, the legal representative's failure does not disentitle him to obtain the document as sought in the present application. This argument cannot be correct. Anton piller orders are for the preservation of evidence and not a substitute for possessory or proprietary claims. (See *memory Institute SA cc t/a SA Memory Institute v Hansen and Others* 2004 (2) SA 630 (SCA) at 633)

[13] The applicant has clearly failed to meet the requirements for an anton piller order.

[14] Finally, an *ex parte* application by its very nature requires the utmost good faith on the part of the applicant. Of importance, the applicant failed to disclose that the claim before Claassen J was against the first respondent only. Further he failed to disclose that he withdrew the claim before Claassen J and tendered the costs. These are crucial facts that might reasonably have influenced the court in whether or not to grant the interim relief.

[15] In the circumstances, the application stands to be dismissed.

[25] I accordingly make the following order:

1. The anton piller dated 09 January 2014 is set aside;

2. The applicant is liable for the costs of this application and those of the counter-application, including the costs consequent upon the employment of two counsels.

S S MPHAHLELE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Counsel for the Applicant: Mr. J. Bauer

Instructed by: Symes Inc.

Counsel for Respondent: Mr. John Suttner, SC

Ms. Paola Cirone

Instructed by: Bowman Gilfillan Inc.

Date of hearing: 19 May 2014

Date of judgment: 02 July 2014