IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

REPUBLIC OF SOUTH AFRICA

CASE NUMBER: 68405/2014

12/2/2016

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

12.2.2016
DATE **SIGNATURE**

In the matter between:

4D DISTRIBUTION SERVICES (PTY) LTD	Applicant
and	
TRENT LUKE SANDIFORD	First Respondent
CHARMAINE BREYTENBACH	Second Respondent
RELENT (PTY) LTD	Third Respondent
TILLID PROFESSIONAL ACCOUNTING SERVICES CC	Fourth Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

[1] On 16 September 2014, Bertelsmann J issued an Anton Piller order in favour of the applicant. The relevant portions of the order will be referred to infra.

[2] The respondents are opposing the order and have set the matter down for reconsideration. In view of the defences raised by the respondents in their answering affidavit, the respondents pray that the order be set aside with costs.

BACKGROUND

[3] The applicant is a fully owned subsidiary of a company known as 4D Financial Services (Pty) Ltd ("4D Financial Services").

[4] 4D Financial Services is the holding and controlling company of a group of companies referred to as the 4D group. The group specialises in products related to the financial service industry.

[5] During or about June 2012, the 4D Group was interested in expanding its business by supplying new or additional services and products. To this end a meeting was set up with the first respondent.

[6] At the meeting it was resolved that the applicant would be established for the new venture and the first respondent, Mr Kruger, deponent to the founding affidavit and Mr J Ebersohn, were appointed as directors of the applicant . Save for the agreement pertaining to the formation of the applicant, the first respondent also signed a restraint agreement in favour of the applicant and 4D Financial Services.

[7] The second respondent was an employee of the 4D Group for 16 years and held the position of *de facto* General Financial Manager. As such the second respondent was in complete and absolute control of the applicants *SAGEPAY* accounts, which accounts were utilised for the collection of debit orders.

[8] The second respondent resigned during May 2014 and her last day of service was 13 June 2014. Subsequent to the second respondent's resignation, the applicant discovered that the first and second respondents has started to run a parallel business and to this end, has engaged certain of the clients of the applicant. It furthermore appeared that some of the applicant's funds were channelled into the accounts of the first and second respondents.

[9] Upon discovering the aforesaid, the applicant launched the present *Anton Pillar* application pending the institution of an action against the first and second respondents.

EXECUTION OF ORDER

[2] The order was executed in the following manner:

i. In respect of the first respondent:

On 17 September 2014 from 16:05 to 22:15, Mr van Niekerk ("van Niekerk"), an independent attorney appointed in terms of paragraph **B** 1 of the court order, Z v Aardt, the sheriff ("the Sheriff") and Mr Vorster ("Vorster"), a computer operator nominated by the Applicant in terms of paragraph **B** 1 of the court order, executed the order at the premises of the first respondent. In this regard van Niekerk filed a report titled *"REPORT ON EXECUTION OF ANTON PILLER ORDER".*

ii. In respect of the second respondent:

On 17 September 2014 from 16:58 to 20:09, Mr Hills ("Hills"), an independent attorney appointed in terms of paragraph **C** 1 of the court order, Mr H Viljoen, the sheriff and Mr van Deventer ("van Deventer"), a computer operator nominated by the Applicant in terms of paragraph **C** 1 of the court order, executed the order at the premises of the second

respondent. Van Niekerk also filed a report in respect of the execution of the order.

RECONSIDERATION OF ORDER

[4] Although various defences were raised in the respondents' answering affidavits, the respondents confined their opposition of the matter to the manner in which the order was executed.

[5] Mr Vorster, counsel for the applicant, addressed me at length in respect of the principles applicable to the reconsideration of an *Anton Piller* order. In view of the stance the respondents took during argument, I do not deem it necessary to deal with these principles. It is clear that the granting of the order is not in dispute, but rather the execution thereof.

PROCEDURAL IMPROPRIETIES

[8] Mr Zietsman, counsel for the respondents, contended that:

i. the execution of the court order was not in accordance with the order; and

ii. the manner in which the execution was conducted was not in accordance with prevailing case law.

[10] In respect of the execution of the order, the first respondent raises the following procedural improprieties:

i. the order was executed until 22:15, whereas the court order stipulated that the order may only be executed between 8:00 and 20:30;

ii. Vorster is employed by the applicant *alternatively* a company closely associated with the applicant, was therefore not independent, but was actually representing that applicant during the execution of the order;

iii. Vorster made a further copy of the material on the first respondent's laptop and installed a program that caused damage to the programs on the first respondent's laptop.

[11] The second respondent raises the same complaint, contained in para [10] ii *supra*, in respect of van Deventer.

Order executed outside time line contained in order

[11] The circumstances leading to the order being executed outside the time limit contained in the court order, is explained by van Niekerk in his report, as follows:

> *"15. The battery of the first respondent's laptop died at about 19:25 and at the request of the first respondent, it was agreed that the charger of the first respondent will be collected form his workplace and be brought back to the premises for the copying to restart. The first respondent insisted and agreed to the continuance of the copying of his laptop and waived and/or confirmed that the parties present can continue past 20h30 cut-off time as set out in the court order as he needed his laptop the following day and did not want the sheriff to attach same."*

[8] In a supplementary affidavit deposed to by the first respondent, he emphatically denies that he consented to the execution of the court until 22:30. To this end, he states the following:

> *"4.7 My consent was neither sought nor obtained for the execution to be done until 22:30. To the contrary, I was specifically informed that the Court Order could only be executed until 20:30 which is why I told them to come up with another plan when my laptop's battery went flat. At that stage I was afraid that they would take my laptop with them to complete the collection of the information, which I could not allow by reason of my business trip the next day."*

[9] Curiously, the version of the first respondent corresponds, save for the alleged lack of consent, in all material respects with that of van Niekerk. On his own version and in view of his business appointment the next day, the first respondent was anxious for the cloning process to be completed that evening. In the circumstances, it is more probable that he would have consented to the order being executed outside the time line contained in the order. The parties

involved in the execution of the order had no pressing need to continue until 22:30.

[10] Van Niekerk, was appointed in terms of the court order as an independent attorney. He executed his duties as an officer of court and had nothing to gain from violating the court order. In the premises, I have no hesitation in accepting his version of events.

[9] Mr Zietsman, however, contended that the mere fact that the order was not meticulously executed, still constitutes a fatal flaw in the execution thereof and as a consequence the order should be set aside.

[10] In *Audio Vehicle Systems v Whitfield and Another* 2007 (1) SA 434 C, the court considered the effect of the non-compliance with a court order and held as follows at para [23]:

"[23] Similar rigorous controls apply to the execution of the order. Because of the highly invasive nature of such orders execution thereof must be meticulous and strictly according to the letter thereof. The test in this regard is whether the execution is so seriously flawed that the Court should show its displeasure or disapproval by setting aside the order. [4] A serious flaw would include conduct that could be regarded as blatantly abusive, oppressive or contemptuous, but is not limited to conduct of such extreme nature. The governing principle would appear to be that the more drastic and potentially harmful the remedy may be, the more closely it has to be scrutinised by the Court and the more meticulously it must be applied and executed."

[11] On the facts of this matter, I find it difficult to characterise the willingness of van Niekerk, Vorster and the Sheriff to accommodate the first respondent as conduct that is *"blatantly abusive, oppressive or contemptuous"*.

[12] I invited Mr Zietsman to indicate any prejudice the first respondent could perceivably have suffered as a result of the extended execution of the order. Mr Zietsman could not provide a satisfactory answer. I do not deem the fact that the court order was, at the request of the first respondent, executed

outside the time limit contained in the order, as a flaw so serious that it would justify the setting aside of the order.

[13] In the premises, the first respondent's attack in this regard, must fail.

Vorster and van Deventer closely linked to the applicant

[13] The first and second respondents allege that Vorster and Van Deventer, both IT Specialists, are employees of the applicant *alternatively* employees within the 4D group. In the result, the court order was not executed by independent persons, but by the applicant itself, which is in stark contrast to the terms of the court order and contrary to prevailing case law.

[14] The principal that an applicant may not be present during the execution of an *Anton Piller* order is well established. [See: *Memory Institute CC t/a SA Memory Institute v Hansen and Others* 2004 (2) SA 630 SCA]. The reason for the aforesaid principle is obvious and was explained in *Petre & Madco (Pty) Ltd t/a T-Chem v Sanderson-Kasner* 1984 (3) SA 850 W at 855D:

"The order has enormous potential for harm, particularly since it would frequently be granted at the instance of a competitor who would not be to see no harm comes to the respondent."

[15] The applicant in its replying affidavit pointed out that Vorster and van Deventer are employed by 4D Tech (Pty) Ltd ("4D Tech"), an independent juristic entity that provides computer services to companies in the 4D group as well as to other independent clients.

[16] In response to the aforesaid, the respondents filed further affidavits setting out the structure of the 4D group, the fact that 4D Tech shares the same building and infrastructure as the applicant, that 4D Tech is financially dependent on the 4D Group and that Mr Ebersohn is a director of both the applicant and 4D Tech.

[17] In the premises, the respondents submit that:

"The Applicant and/or the 4D Group were no doubt in a position of power and influence to request and demand from 4D Tech and specifically Vorster and

Van Deventer, to obtain unauthorised information and knowledge about the Respondents during execution of the court order on 15 September 2014."

[18] Both Vorster and van Deventer denied that they executed their duties at the behest of the applicant. Vorster further explained that he was requested in the presence of the Sheriff to perform certain keyword searches to find documents specified in the court order. He denies any impropriety and states as follows:

"I acted as an instrument in the hands of the deputy sheriff and did no more."

[19] Vorster stated that he did not and still does not know the full details of the dispute between the applicant and the first respondent. By implication, he states that he would not know what information would be important to the applicant.

[20] Although the applicant and 4D Tech is in the same group of companies, it is clear that their core business and expertise are vastly different.

[21] I am satisfied that neither Vorster nor van Deventer was employees of the applicant during the execution of the order. I am also satisfied that they acted independently and did not represent the applicant during the execution of the order.

Vorster's actions fall outside the scope of the court order

[22] The first respondent's complaint in this regard is twofold:

i. Vorster made a further copy of the material on the first respondent's laptop; and

ii. he installed a program that caused damage to the programs on the first respondent's laptop.

[23] In substantiation of the aforesaid allegations, the first respondent relies firstly on a report obtained from a certain Corrie Theron. The applicant alluded to the fact that the report is not signed and that Theron did not attest to a

confirmatory affidavit. Be that as it may, the report is in any event inconclusive and does not support the first respondent's contentions in this regard.

[24] Secondly, the first respondent relies on a report compiled by a certain Rudolf Pretorius ("Pretorius"), an IT Consultant. Pretorius attested to an affidavit, *inter* alia, confirming the contents of the report. Pretorius concludes the report with the following note:

> *"1. There was no allocated time for a full recovery scan to see what was used/removed or installed, but with further investigation we could see more details."*

[25] Once again, the report does not confirm the first respondent's speculative version.

[26] Pretorius, however, goes further and states the following in respect of Vorster:

> *2.4. Vorster was extremely hesitant and uncomfortable to discuss the matter with me but later admitted that he indeed looked around the computer of the First Respondent as he was instructed to do by the Applicant and that it was furthermore his instructions to obtain information and provide same to the Applicant. Vorster did not confide in me who of the Applicant gave him the aforementioned instructions.*
>
> *2.5 Vorster further admitted that indeed he provided information to the Applicant subsequent to the execution of the court order on 17 September 2014, wherefore I made a conclusion that a further external hard drive was connected to the computer of the First Respondent onto which information was copied and thereafter furnished to the Applicant.*
>
> *2.6 The steps taken by Vorster is quite apparent as he sought to hide his conduct by firstly installing the shredder program at or about 22h10, but for some reason was not able to remove the program before they left the premises of the First Respondent.*

2.7 A shredder program is also utilised to recover data that had been deleted, where such data could be recovered either to the hard drive of the very same computer or to an external hard drive. Such information would then also have been downloaded by Vorster and thereafter, handed to the Applicant.

2.8 I exchanged numerous messages with Vorster in relation to the aforementioned incident, but unfortunately lost my message history in January of 2015 when my telephone had to be formatted. Vorster might still be in possession of our message history, but I doubt whether I will get his co-operation at this stage to again furnish me therewith."

[27] Vorster did rise to the occasion and annexed the messages to his further affidavit. The messages do not confirm Pretorius's version of events. To the contrary and according to the attached messages, Vorster said the following:

"....Ekt net 'n order gevolg en nou prober hy dit uimaak of ek kak op sy laptop gedoen het om hom te incriminate, wat bullshit is."

"Daar was nie tyd nie, na die clone het ek net 'n quick sweep gedoen en als vir die balju uitgewys."

"ja, sy (referring to the sheriff) *was daar toe ek als gedoen het, die balju is daar om sekeer te maak als word legit gedoen en daars nêrens probleme of uitbarstings nie."*

[28] Pretorius's version is clearly devoid of all truth and the first respondent's third ground of opposition must fail.

CONCLUSION

[29] In the premises I am satisfied that the court order was properly executed.

COSTS

[30] Mr Vorster referred to various contradictions in the affidavits deposed to by the first and second respondents. In view of the aforesaid contradictions, he

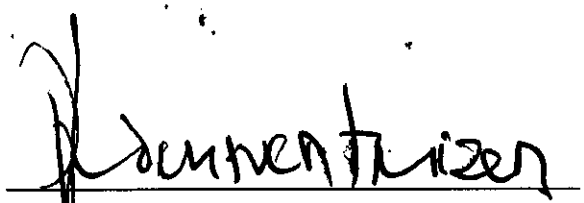
urged me to award a punitive cost order against the first and second respondents.

[31] Having regard to the principles applicable to attorney-and –client cost orders, I am not convinced that the first and second respondent's conduct in the present matter justify such an order.

ORDER

I make the following order:

The application to rescind the order granted on 16 September 2014 is dismissed with costs, such costs to be paid jointly and severally by the first and second respondents.



N JANSE VAN NIEUWENHUIZEN J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Counsel for the Applicant	:	Advocate Vorster
Instructed by	:	Gerber Attorneys
Counsel for the Respondent:		Advocate Zietsman
Instructed by	:	Vermaak Beslaar Attorneys
Date Heard	:	28 January 2016
Date of Judgment	:	