REPUBLIC OF SOUTH AFRICA

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

CASE NO: 26514/17

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

MODIBA J

20 DECEMBER 2018

In the matter between:

CITY OF JOHANNESBURG First Applicant

METROPOLITAN TRADING COMPANY Second Applicant

and

MATEBESE, ZOLANI LOYISO Respondent

J U D G M E N T

MODIBA, J:

[1] On 20 July 2017 Van der Linde J granted an Anton Pillar order *ex parte*, allowing the applicants, the sheriff, the supervising attorney and two

computer experts access to several devises belonging to the respondent for the purpose of making mirror copies of information stored in or to access the said information through those devices. The applicants seek to have that order varied and supplemented. The respondent opposes the application.

[2] Van der Linde J granted the above order being satisfied that the applicants had made out a case for it. His opposition to this application attempts to go behind Van der Linde J's order to mount an opposition to it. Be that as it may, his opposition lacks merit because:

2.1 He did not avail himself of the opportunity he had in terms of Uniform Rule 6 (12) (c) to have the order reconsidered on 24 hours' notice to the applicants.

2.2 He undertook to fully cooperate with the applicant in ensuring that they access information that belongs to them from the devices, essentially abiding by Van der Linde J's order.

2.3 He accepted the designation of Mr Mkhabela in terms of the said order as the independent supervising attorney to oversee the execution of the Anton Pillar order.

2.4 He participated in the execution process which unfolded over a period of approximately 3 months.

2.5 He does not challenge Mr Mkhabela's report on the execution process, filed in terms of paragraph 9 of the Anton Pillar order.

2.6 The reason why he only opposed the application at this stage is not set out in his opposing affidavit. It was advanced by his counsel from the bar. He submitted that he decided to cooperate

> then and not oppose the order because he is an individual, fought an unequal legal battle with one junior advocate facing two senior counsel and a junior counsel representing the applicants. This made the battle insurmountable for him. His counsel further submitted that he cannot continue to fold his arms while the applicants seek to invade his privacy by gaining access to his private information stored on the said devices. This reason is improperly advanced. For that reason, it does not merit the attention of this Court.

[3] The basis for the Anton Pillar order is laid out in the founding affidavit filed in the application that served before Van der Linde J. The two applications are brought under the same case number. In the founding affidavit filed in respect of the variation application, the applicants make reference to the said founding affidavit.

[4] The respondent's opposing affidavit fails to answer to the first founding affidavit. From the bar the respondent's counsel argued that the applicants failed to make out a case in their founding affidavit and only did so in reply. The case for the Anton Pillar order is clearly made out in the first founding affidavit. The second affidavit need not repeat that case. It merely builds on it by setting out allegations relating to the basis for the Anton Pillar order.

[5] In argument, the respondent's counsel made reference to the respondent's Gmail account being alluded to for the first time in reply. This is

not so. The use of the respondent's private email account for official purposes is dealt with extensively in the first founding affidavit. That the respondent used the devices for official purpose is common cause. Pertinently, barely denied the allegation made in paragraph 9 of the second founding affidavit that the devices are likely to contain evidence of wrongdoing relating to the BOT contract and that such information belong to the applicants in terms of the Group Information Communication Technology and Information Management Policies, Standards and Procedures ("*the ITC Policy*").

[6] The circumstances that prevented the applicant from successfully executing the order in the prescribed period are confirmed by the supervising attorney in his interim report attached to the second founding affidavit. The report also sets out the basis on which the applicant would apply for a variation order to allow for the full execution of Van der Linde J's order. The respondent has not challenged this report.

[7] In the premises, I am satisfied that the applicant has made out a case for the variation order to be granted.

[8] The delay in handing down this judgment is profusely regretted. I apologize to the parties for any inconvenience or prejudice this delay may have caused them. In the relevant urgent court week, I dealt with several Anton Pillar applications where I granted orders in the same week. Ordinarily, these applications are urgent. Since they are interlocutory in nature, reasons are rarely furnished. My registrar was on sick leave during the said week and

the reservation of this judgment was not noted by the relief registrar. I laboured under the erroneous impression that I granted the order in the same week as I did in other similar matters. I was only alerted to this error when one of the parties started making enquiries regarding the judgment. My registrar subsequently listened to the record to confirm that I had reserved judgment. Given the time lapse since I heard the application, I had to obtain the record to re-appraise myself of the submissions made on behalf of the parties. I attended to the judgment as soon as I could at the commencement of the end of the year recess.

ORDER

1. The order granted by the Honourable Mr Justice Van der Linde on 20 July 2017, under case number 2017/26514 ("*the Order*") is varied and supplemented in the respects set out hereunder.

2. Riaan Bellingan ("*Bellingan*"), of Dynamdre Innovative Solutions (a provider of expert digital forensics services), alternatively failing him, an expert or experts nominated by the applicants, is authorised to:

    2.1 inspect those devices and any copies of the data thereon, or accessed by means thereof (such as data hosted in the cloud, on virtual servers, email applications or any other data hosted locally or intentionally which the respondent accessed by and/or had control of by means

of the devices), which devices are held by the sheriff in terms of the Order;

2.2 carry out such procedures on the devices and copies of the data thereon, or accessed by means thereof, as may be necessary to:

2.2.1 make the requisite forensic copies of all of the data on or accessed by means of the devices; and

2.2.2 ensure access to such forensic copies of all of the data on or accessed by means of the devices for purposes of the analysis thereof, in terms of paragraph 6 below.

2.3 provide forensic copies of the evidence (as "*evidence*" is defined in paragraph 6 below) on or accessed by means of the devices to:

2.3.1 the attorneys of the respondent (one copy);

2.3.2 the attorneys of the applicants (one copy);

2.3.3 the supervising attorney appointed in terms of the Order, Mr Leslie Mkhabela, alternatively an attorney nominated by him, in the employ of

Mkhabela, Huntley Attorneys Incorporated ("*the independent attorney*") (two copies);

3. Bellingan shall conduct the above processes in the presence of:

3.1 the respondent, his attorney and/or a cyber forensic expert appointed on his behalf,

3.2 the sheriff,

3.3 the independent attorney,

at the office of Dymandre (Pty) Ltd, situated at Room 160, First Floor, Building 16, CSIR, 627 Meiring Naude Road, Brummeria, Pretoria on a date to be agreed between the parties, but in any event before 30 January 2019.

4. Bellingan is allowed to access the devices, the data thereon or accessed by means thereof, and any copies of the data thereon or accessed by means thereof, to execute the mandate given to him in terms of paragraph 2 above, as the searching and sifting of copies of all of the data on or accessed by means of the devices will be conducted in accordance with paragraph 6 below.

5. The respondent is directed forthwith, and in any event by no later than 21 December 2018 to return to the independent attorney the Apple iPhone 6S, Serial Number F17QHAWPGRYG, IMEI no 35331307248542 for purposes of it, similar to the other devices, being dealt with by Bellingan in terms of this order (specifically those procedures set out in paras 2 and 6 below).

6. On a date to be agreed between the parties, alternatively failing such agreement, a date designated by the Registrar of this Court, the representatives of the applicants, with the assistance of Bellingan and/or other cyber forensic experts appointed by the applicants, in the presence of the independent attorney, the respondent or his representative, and such cyber forensic expert/s appointed by the respondent, shall be entitled to attend the searching and sifting through all of the forensic copies of all of the data on or accessed by means of the devices seized in terms of the Order, including the cellphone specified in paragraph 5 above, for the purposes of accessing and identifying the data:

6.1 belonging to the applicants;

6.2 relevant to identifying defendants, other than the respondent, in an action for damages suffered by the

applicant in consequence of the unlawful award of the tender to Ericsson and the re-appointment of Ericsson to the contract ("*the impugned contracts*") referred to in the founding affidavit of Shadrack Mongo Sibiya, filed in support of the order and this application ("*the damages action*");

6.3 relevant to an action for damages against the respondent for damages suffered by virtue of the impugned contracts;

6.4 relevant to the review application/s for the review and setting aside of the impugned contracts, ("*the evidence*").

7. The final determination of what constitutes the evidence shall be made by the supervising attorney, and any materials which do not constitute the evidence shall be returned to the respondent.

8. The applicants are directed to institute the damages action and any other legal proceedings, including a review application to set aside the impugned contracts, within 60 days after the date of the completion of the analysis.

L T MODIBA

JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARENCES:

Applicant's Counsel:	R. Solomon SC
	K. Tsatsawane SC
	M. Williams
Instructed by:	Mothle Jooma Sabdia Incorporated
Respondent's Counsel:	A Nirelaw
Instructed by:	Clifford Levin Incorporated
Date delivered:	20 December 2018