

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 20277/2016

CASE NO: 20278/2016

CASE NO: 20279/2016

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

Date:

WHG VAN DER LINDE

In the matter between:

**CAGEAD TRADING CC
OMNILINK TECHNOLOGIES CC
NORMAN'S CHEMICAL MANUFACTURERS
RICHARD O'FLAHERTY
GERT JACOBUS VAN NIEKERK
CAGEADONE (PTY) LTD t/a AUTO CARE FOURWAYS
OMNILINK TECHNOLOGIES ONE (PTY) LTD
t/a AUTO CARE AUCKLAND PARK
NORMAN'S CHEMICAL MANUFACTURERS ONE (PTY) LTD
t/a AUTO CARE RANDBURG**

**First Applicant
Second Applicant
Third Applicant
Fourth Applicant
Fifth Applicant
Sixth Applicant**

Seventh Applicant

Eighth Applicant

And

**DOVELIGHT TRADING 17 (PTY) LTD
FIRST SHERIFF OF THE HIGH COURT- MIDRAND
SECOND SHERIFF OF THE HIGH COURT – SOUTH WEST
THIRD SHERIFF OF THE HIGH COURT –
JOHANNESBURG NORTH**

**First Respondent
Second Respondent
Third Respondent**

Fourth Respondent

In re: In the matter between: -

DOVELIGHT TRADING 17 (PTY) LTD

Applicant

and

OMNILINK TECHNOLOGIES TECHNOLOGIES CC

First Respondent

GERT JACOBUS VAN NIEKERK

Second Respondent

(Case No. : 20277/2016)

NORMAN'S CHEMICAL MANUFACTURERS CC

First Respondent

GERT JACOBUS VAN NIEKERK

Second Respondent

(Case No. : 20278/2016)

CAGEAD TRADING CC

First Respondent

RICHARD O'FLAHERTY

Second Respondent

(Case No. : 20279/2016)

Judgment

Van der Linde, J:

Introduction

[1] This is an application for the relief pending the reconsideration of an Anton Piller order. It comes before me on the urgent roll. The applicants, except the 6th to 8th applicants, were the respondents in the order, and the order has been executed. I will refer to the parties as they appear in this application. A large quantity of document was attached and is currently under the control of the sheriffs.

[2] The pleadings are not yet closed, not in the main application and not in the interlocutory application. In the main application the 1st respondent's replying affidavit is outstanding, and in the interlocutory application the applicants' replying affidavit is outstanding. On this basis Mr Bester, SC who appeared for the applicants expressly accepted in his practice note and heads of argument that the reconsideration application is not now ripe for hearing.

- [3] The relief now sought by the applicants in this interlocutory application, brought as a matter of urgency, is to join the 6th to 8th applicants as respondents in the main application; to direct the return to the 6th to 8th applicants of all matter seized from them and held by the sheriffs; an order interdicting the 1st respondent from making copies of and conducting forensic audits of all matter seized from all of the applicants; and a punitive costs order. I deal with these aspects in turn, but first offer some background for greater understanding.
- [4] The 1st applicant is beneficially owned by the 4th applicant; the 2nd applicant in equal shares by the 4th and 5th applicants; and the 3rd applicant by the 5th applicant. The 1st, 2nd and 3rd applicants all conducted the same type of business in the retail motor service industry, under the name and get-up of Car Service Centre, at three different premises respectively in Fourways, Auckland Park, and Randburg. This was a franchise of which the 1st respondent was the franchisor in terms of written franchise agreements concluded in all three instances in 2012, with expiry dates in all three instances sometime next year.
- [5] Earlier this year the 1st to 5th applicants took advice and resolved that the franchise agreements were null and void and advised the 1st respondent of their attitude. The 1st respondent disputed their entitlement lawfully to adopt that attitude. The 1st to 5th applicants persisted, and with effect from 1 June 2016 ceased trading as Car Service Centre.
- [6] Instead, the commenced trading from the same premises, in the same type of business, under the name and style of Auto Care, ostensibly also a franchise. It transpired subsequently that the juristic entities trading from these premises are the 6th to 8th applicants. The 1st respondent contends that these three companies are the alter egos of the 1st to 5th applicants.
- [7] The 1st respondent, before it knew of the 6th to 8th applicants, applied urgently and ex parte to this court in three separate but virtually identical applications for Anton Piller orders against the 1st to 5th applicants. These were granted by Van Oosten, J on 20 June 2016. Two weeks later the orders were executed. the 1st respondent has subsequently instituted action

for damages against the 1st to 3rd applicants for breach of contract, and against the 4th and 5th applicants as sureties.

[8] The applicants say in this interlocutory application that not only should the orders never have been granted in the terms that they were, but their execution was objectionable. They contend on that the orders ought to be set aside on any of these two bases independently.

[9] However, for now, they contend that the sheriff attached large quantities of documents that belong to the 6th to 8th applicants. Since these applicants were not then respondents in terms of the court orders, that attachment was palpably unlawful. So the applicants all apply for the joinder of the 6th to 8th respondents, so that in turn they can claim back the documents that were unlawfully removed from their possession.

[10] The relief in the form of an interim interdict, to prevent the copying of the documents that have been attached, is based on a separate proposition. It is that on the 1st respondent's own answering affidavit in the interlocutory application, the documents were attached in order to examine whether they include documents that would constitute evidence in the intended action for damages for breach of the franchise agreements.

Joinder

[11] The attitude of the 1st respondent to this relief was to abide. It contended that the 6th to 8th applicants are mere alter egos of the 1st to 5th applicants and that therefore it mattered not whether or not they were joined.

[12] In my view the relief sought should be granted. The 6th to 8th applicants say they have assets that have been taken from them, unlawfully. If they are right they, and only they, may claim their return. An appropriate order issues below.

The return of the 6th to 8th applicant's assets

[13] If the 6th to 8th applicants are the only ones who can vindicate their assets, then this relief should, prima facie, follow; prima facie, because the court order does not operate against them, because it does not mention them.

[14]The problem with this ostensibly self-evident denouement is that the 1st respondent disputes that the assets attached belong to the 6th to 8th applicants; and they say that in any event the 6th to 8th applicants are the 1st to 5th applicants in disguise. What is more, it is common cause that these two contentions are to form part of what is yet to be determined down the line when the Anton Piller order is revisited, whether in motion or in trial proceedings. And in that main case the pleadings are not yet closed.

[15]The applicants say however that, for now, and for the purposes of the interim relief they seek, the 1st respondent must at least raise a bona fide and real factual dispute, and not one that can simply be pushed aside on paper. The resolution of this, the second, issue is thus located in the realm of true factual disputes.

[16]The beneficial shareholding of the 6th to 8th applicants was not examined on the affidavits thus far. The general impression that is created, particularly since the 6th to 8th applicants do not distance their ownership from the 1st to 5th applicants, is that because the existing franchise agreements fell to the ground, or never rose from it, the 1st to 5th applicants were free to brush them aside, and to hook up with a new franchisor.

[17]In argument the changing face of a supermarket was used as an illustration of what has happened. In this analogy, if there was a valid contractual restraint against stripping off the original face, then one can see the argument for a Janus-like appearance.

[18] In argument too the issue arose as to whether the 6th to 8th applicants have even identified that which they say is their assets, the 1st respondent arguing that they had not. The answer was that the order sought specifically included a prayer that they, the 6th to 8th applicants, will identify that which they contend belongs to them. But if the material is not patently discernible as belonging to the 6th to 8th respondents, so that the sheriff as a third party could have identified them as such, perhaps the factual dispute raised by the 1st respondent in this regard is not so far-fetched that it may be rejected on the papers.

[19] There is however a more profound difficulty. The intellectual exercise of analysing whether or not the factual disputes on papers may be rejected as not being bona fide, still presupposes that the pleadings are closed. While pleadings remain open, the playing may change, and no court order should issue on uncompleted papers. To be true, the applicants did say that it was their choice as to whether or not they would be filing a replying affidavit. But that is an axiom, not an election. While the parties on both sides were still keeping their powder dry, since none has eschewed filing replying affidavits, there was no scope for an order, which would be final in effect, to issue.

Interdict against copying?

[20] The interdict sought is to operate in favour not only of the 6th to 8th applicants, but all the applicants. As far as the 6th to 8th applicants are concerned, even if the second order issues, they would not want the 1st respondent nonetheless to copy the material before it would have been returned to them.

[21] The 1st respondent's attitude is that they are not copying; they are inventorying. They say that paragraph 6 of the order directs the Sheriff immediately to make a detailed inventory of all items attached and to provide the Registrar of the Court, the 1st respondent's attorney, and the appropriate applicant with a clear copy. Since the Sheriff has failed to do this, they are doing it; all they want to achieve, is to be in a position when comes discovery down the line and the weapon of rule 35(3), then to ensure that they get full and proper discovery of all material that is lawfully discoverable in terms of the rules of court.

[22] The Anton Piller orders granted, following as they do the form of order suggested in the Practice Manual, do not permit of copying. They allow only searching for, examining of, inspecting of, and inventorying of, the material to be attached and consequently in fact attached; and all of this by the Sheriff. For the rest, the Sheriff is obliged to keep the material in his custody until the 1st respondent authorises its release to the appropriate applicant (from whom it was taken), or until a court directs otherwise.

[23]The applicants argue too that the order goes further than the case law permits; all that is attachable is material that is identifiable and identified, if not by specific description then by class categorisation.¹ Here the class of attachable documents includes the 1st respondent's documents; the 1st respondent's intellectual property; software re-engineered by using the 1st respondent's intellectual property or software; all computer records relating to the relevant applicant's turnover; and finally all invoices generated by the relevant applicant.

[24] The applicants argued that within this description one does not find "confidential information"; one finds document belonging to the 1st respondent (for which an Anton Piller order was not needed); one finds "intellectual property" without elucidation; and then one finds documents relating to turnover. They say that clearly this Anton Piller application was not about the preservation of evidence, the non-property of the 1st respondent, that is about to be secreted; rather, it is about fishing for evidence to sustain a suspected case.

[25] There is much force in these submissions. But in my view they stray into the field of revisiting the order, a topic not now on the table. For now, it seems to me that unless some injustice is illustrated, the first business of this court should be to protect the integrity of the Anton Piller order, in its terms, and to leave it to the final Anton Piller court, after pleadings will have closed and upon revisiting of the order, to decide whether the order should be changed or confirmed.

[26]So there are two immediate issues: should an interdict be issued against the 1st respondent preventing it from copying the attached material? And should the 1st respondent (and not the sheriff) be permitted to continue inventorying? In my view the issues are related, in this way: the applicants say the 1st respondent is failing to comply with the court order by copying; the 1st respondent's defence is, in effect, a denial that it is breaching the court order in the manner alleged, by asserting what amounts to a breach of the court order in a different manner.

¹ Compare *Non-Detonating Solutions (Pty) Ltd v Durie and Another*, 2016 (3) SA 445 (SCA) at [37], [40].

[27] There is an added consideration. The documents that are discoverable in terms of rule 35 are not to be equated, without more, with the documents that are required to be preserved in an Anton Piller context. The former is, by definition, much wider than the latter. What is required to be preserved are documents which, if not preserved, will result in the applicant for preservation losing his/her case. What is required to be discovered are all documents relating to any matter in question in the action. Viewed from the opposite perspective, an Anton Piller application is not a method to secure completeness of discovery at an early stage, before close of pleadings, in the matter.

[28] In the affidavits the 1st respondent denies copying; but there certainly was a measure at least of that, in the form of the manuscript notes by the 1st respondent's attorney, and if truth be told, the line between inventorying and copying must be fine indeed. At this stage, when the 1st respondent denies copying but can suffer no prejudice if it were temporarily interdicted from doing it, and the converse position could potentially be highly detrimental to the applicants, the balance of convenience favours an interim order.

[29] In these circumstances the applicants are in my view entitled to an interim interdict prohibiting the copying of the attached material. I will not issue an interdict prohibiting the 1st respondent from inventorying, since such an order was not asked; however, in my view the 1st respondent is not entitled to do it, even if the sheriff must be appropriately resourced to be able to comply with the court order.

Punitive costs

[30] Both parties asked for punitive orders. In my view that is not justified. The applicant has been partially successful; it obtained the joinder of the 6th to 8th applicants in the face of a 1st respondent who did not agree to it (but did not oppose it vigorously), and it obtained an interdict prohibiting the copying of the material (albeit that the 1st respondent denied copying).

[31] Despite this, I am disinclined to issue any costs order now, again because the pleadings have not yet closed. The final Anton Piller court will be in a better position to judge whether the current application was really necessary.

Conclusion

[32] In the result I make the following order:

- (a) The 6th, 7th and 8th applicants each is joined as 3rd respondent in respectively case numbers 20279/2016, 20277/2016, and 20278/2016 in this court;
- (b) The 1st respondent is interdicted from copying any of the material attached pursuant to the ex parte orders granted against the 1st to 5th applicants;
- (c) The costs of the application are reserved.

WHG van der Linde
Judge, High Court
Johannesburg

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Date argued: 10 August 2016

Date of judgement: 17 August 2016