

**THE REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG HIGH COURT DIVISION, PRETORIA**

Case No: 21365/2022

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE **23 NOVEMBER 2023**

SIGNATURE

In the matter between:

ANDRIES HURCULES PUTTER

First Applicant

TYRON STUART CROOK

Second Applicant

And

ARIOGENIX (PTY) LTD

First Respondent

LOUS JACOBUS HEYNS

Second Respondent

J U D G M E N T

MAKHOBHA, J

- [1] This is an application to find the respondents in contempt of the court order given by Kuney J on 8 March 2022. The applicants seek to have second respondent imprisoned for 30 days.

- [2] In the two urgent *ex parte* in camera Anton Pillar applications under case number 74902/2018 and 75276/2018 the applicant's files, data and information were removed by the first respondent.
- [3] Kuney J set aside the two Anton Pillar orders and ordered the first respondent to return all files, data and information to the applicants forthwith.
- [4] The first applicant used to be employed by the first respondent. The first applicant and the second respondent are shareholders in the first respondent.
- [5] The second applicant is Tyron Stuart Crook, he is cited as respondent in the Anton Pillar application in case no: 75279/2018.
- [6] The first respondent is Ariogenix (Pty) Ltd a private company with registered address at 3[...] V[...] Road, Route 2[...] B[...] P[...], Centurion. The second respondent is Dr Louis Jacobus Heyns the managing director of the first respondent.
- [7] The applicants submit that the first respondent did not return any of the deleted items to the applicant.
- [8] It is submitted further that the first respondent should have returned all forensic images of all the storage devices that was made, and the first respondent's IT expert should have returned the deleted files and data to their original position on the said devices.
- [9] The main issue in this matter is that the applicants are adamant that all forensic images with the applicant's data, documents and information were not returned, and some 20885 file remains deleted, which is also confirmed by the inventory lists, reports filed by independent attorneys and the sheriff's return of service.

- [10] According to the applicants most of the files on the hard disc they received are corrupted and cannot be opened and various information was deleted from the devices.
- [11] Counsel for the applicants argued that the second respondent as the director of the first respondent should have ensured that the first respondent complies with the court order which he did not do. The applicant asked for cost on a punitive scale.
- [12] It is submitted on behalf of the respondents that the answering affidavit comprehensively dealt with the fact that it had complied with the March order and that the Court cannot find that there was non-compliance with the order and, even if it is so found willfulness and *mala fides* are absent.
- [13] It is further submitted that a new case is advanced in the replying affidavit and the allegations raised were not advanced in the applicant's founding affidavit at all and the court should not allow the new matter raised therein.
- [14] Counsel for the respondents argued that the second respondent is neither mentioned nor obligated to perform any action in the court order. Therefore, initiating contempt proceedings against the second respondent is legally incompetent.
- [15] It is argued that should this court find that there is contempt, the court should dismiss the application because there is no proof of willful and *mala fide* conduct on the part of the first respondent.
- [16] It was contended by the respondent that, the relief sought by the applicant in that the respondent instruct an IT specialist to restore and upload the data onto their electronic devices is not contained in Kuny J's order.

[17] The respondents filed their answering affidavit out of time, in my view failure to condone the late filing might lead to the incarceration of the second respondent which is not in the interest of justice¹.

[18] Paragraphs 2 and 3 of the order by Kuny J date 4 March 2022 reads as follows;

“ 2.1 The Anton Pillar order granted by this Honourable Court against the first applicant herein on 15 October under Case Number 74903/2018, is hereby set aside.

2.2 The first respondent is ordered forthwith to return all files, data and information taken from the first applicant pursuant to the execution of the aforesaid Anton Pillar order.

2.3 The first respondent is ordered to pay the first applicant's cost relating to obtaining of the aforesaid order to be taxed on an attorney and client scale.

3

3.1 The Anton Pillar order granted by this Honourable Court against the second applicant herein on 15 October 2018 under Case Number 75279/2018, is hereby set aside.

3.2 The first respondent is ordered forthwith to return all files, data and information taken from the second applicant herein pursuant to the execution of the aforesaid Anton Pillar order.

3.3 The first respondent is ordered to pay the second applicant's cost relating to the obtaining of the Anton Pillar order, to be taxed on an attorney and client scale.

¹ Grootboom v National Prosecuting Authority and another 2014 I BCLR 65 CC.

4 The first respondent is ordered to pay the cost of this application on an attorney and client scale.”

[19] The wording of the order clearly orders the first respondent to comply with the order. The second respondent in this matter before me was never cited and was not before court.

[20] A party who was not cited before obtaining the court order cannot be held to be in contempt of the order granted in his absence.²

[21] In my view the mere fact that the second respondent is a director of the first respondent cannot make him guilty of contempt of court if he was not cited in the order of Kuny J.

[22] The founding affidavit of the applicant together with the inventory lists, reports filed by the independent attorneys and the sheriff’s return of service shows clearly that the first respondent did not return some of the deleted items to the applicants.

[23] The question that arises is whether the conduct of the first respondent meets the requisites of contempt as set out in *Matjhabeng Local Municipality v Eskom Holdings Ltd and others. Shadrack Shivumba Humo Mkhonto and others v Compensation Solution (Pty) Ltd*.³

[24] It is further my view that the first respondent did not properly ensure that all the forensic images, deleted files and data are returned.

[25] The first respondent was not obliged to provide and pay for the services of an IT Specialist, I am satisfied that the first respondent should have ensured that the order was properly complied with. In my view the first respondent was willful and *mala fide* in not complying fully with the order of Kuny J.

² Vereeniging Abattoir (Pty) Ltd v Food and Allied Workers Union and others (J2151/13) [2014] ZALLC JHB 249

(11 July 2014) par 6.

³ 2017 CC para 35.

[26] The court does not order the costs of another litigant on the basis of attorney and client unless some special grounds are present.

[27] Failure to comply fully with the order of Kuny J has led to a protracted litigation against the respondent and unfairly prejudiced the applicants. In my view this conduct warrants a punitive costs order.

[28] I make the following order:

28.1 The first respondent is held to be in contempt of the court order granted on 8 March 2022 in case number 36692/2021 (by Kuny J) and the first and second respondents are ordered to within 30 days from granting of the order to restore and upload the information and files deleted from, the first and second applicants electronic devices, from the mirror images made from the said devices, and stored on the four hard drives mentioned in the inventory of the sheriff in case number 74901/18,27527/18 and 749031.

28.2 The first and/or second respondent and after execution of prayer 1 supra are ordered to return the four hard drives as set out in Annexure CRN 8 to the applicants, and the notebook and papers, as mentioned in the said inventory of the sheriff.

28.3 The first respondent is ordered to pay the costs of this application on an attorney and own client scale.

MAKHOB A J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD AND RESERVED JUDGMENT: 16 OCTOBER 2023

JUDGMENT HANDED DOWN ON: 23 NOVEMBER 2023

Appearances:

For the Applicant: Adv R F De Villiers (instructed by) Deneys Zeederberg Attorneys

For the First and Second Respondents: Adv L Kotze (instructed by) GMI Attorneys