IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO : 33254/2007

NOT REPORTABLE

20 JUNE 2008

In the matter between:

RESEARCH & DEVELOPMENT [PTY] LTD — FIRST APPLICANT

WARMAN AFRICA [PTY] LTD — SECOND APPLICANT

and

GRAHAM ROBERTSON DOUGALL — FIRST RESPONDENT

PUMP & ABRASION TECHNOLOGIES CC — SECOND RESPONDENT

JUDGEMENT

MAKGOKA AJ

[1] There are two applications before Court: an application by the applicants for variation of an interlocutory order made pursuant to an Anton Piller application as well as an application by the respondents to declare the applicants in contempt of a Court order that the applicants seek to vary.

[2] The first applicant is an Australian company. The second applicant is a subsidiary of the first applicant, and also a licensee of all the first applicant's intellectual property. Both the first and second applicants are members of the CA Warman Pump Group, and are engaged in the manufacturing and distribution of slurry pumps and spare parts.

[3] The first respondent is a former senior employee of the second applicant, whose employment was terminated by the second respondent in January 2005. Subsequent to the termination of his employment, the first respondent set himself up in the slurry pump business, through the second respondent, a close corporation in which he holds the major interest.

[4] The brief factual background to the two applications referred to the above, is the following: in 2007, the second applicant became aware of a rumour that certain of its employees were downloading copies of the confidential information from the applicant's computer data base for purposes unrelated

to the applicants' business. A private investigator was engaged to investigate the veracity of such rumours. The investigation led to an Anton Piller application ["Bond application"] launched against one Robert Frederick Bond in this Court on 1 June 2007. Subsequent and pursuant thereto, an application was launched in this Court against Bond and another entity and two other individuals. In both these applications, the applicants alleged that their confidential information, namely their slurry pump and pump part technological and engineering drawings and manufacturing technology and methodology, and manufacturing specifications, was being infringed.

[5] Subsequent to the execution of the order in the Bond application, Bond provided the applicants with information that he had permitted the first respondent to copy specific parts of the applicants' confidential information. That precipitated an Anton Piller application against the first and second respondents on 25 July 2007, on which date, **SOUTHWOOD J**, granted a standard order in an Anton Piller application as prescribed in the Practice Manual of various jurisdictions. On the return date the rule was extended to 1 October 2007 and came before **BOTHA J**, who made the following order:

"1. *The rule as set out in paragraphs* 19 *and 20* of *the order dated* 25 *July 2007 is confirmed;*

2. *The respondents will be entitled to the return* of *their hard drive after* a *mirror image* of *it has been made under supervision* of *representatives* of *the applicants and the respondents and the mirror image deposited with the sheriff to be dealt with as* a *listed item".*

[6] The confirmed portion of the order of **SOUTHWOOD J** of **25 JULY 2007** provided as follows:

"19.1 *that the applicants, their legal representatives and their appointed experts are granted leave to access, inspect and analyse the listed items attached by the sheriff for the purposes* of *the undermentioned action to be instituted or application to be launched by the applicants against the respondents;*

19.4 *that the applicants are directed within 30 [THIRTY] days* of *the date* of *the order granted pursuant to the return day to institute an action or to launch an application against the respondents in which action* or *application the listed items constitute evidentiary material".*

[7] It is the implementation and effect of the above portion of the order that led to the two applications presently before Court. The applicants argue that certain facts emerged pursuant to the attempted execution of the orders mentioned above, which facts were not known when the Court made its order. On the

other hand, the respondents argue that, by not returning their hard drive to them, the applicants and/or their attorney, have made themselves in contempt of Court.

[8] Perhaps it is convenient at this stage to set out the events after the order of **BOTHA J**, was made: the respondents applied for leave to appeal against the order made by **BOTHA J**, except for paragraphs 2 thereof. This application was dismissed on 13 November 2007, upon which a further application to the Supreme Court of Appeal was made, which was also dismissed. At the time of hearing of these applications, leave to appeal directly to the Constitutional Court was pending. I was informed subsequent to the hearing that leave to the Constitutional Court, had similarly been dismissed.

[9] The respondents' contention is that the noting of the said applications for leave to appeal did not affect the implementation of paragraph 2 of the order by **BOTHA J**, as same was not subject of any appeal. The applicants, on the other hand, argue that such applications suspended the whole order inclusive of paragraph 2 thereof, as a result of which the respondents' hard drive could not be returned to the respondents. In my view, paragraph 2 of **BOTHA J's** order should be read, not in isolation, but with the confirmed order of **SOUTHWOOD J.** What **BOTHA J** did was, in addition to the right of the

applicants to access, inspect and analyse the seized hard disk, he further created a right to the respondents to have the said disk returned to the respondent, but only after the said access, inspection and analysis. Such access, inspection and analysis has been impeded among others, by applications for leave to appeal, as well as interpretation of the order by the sheriff.

[10] The respondents' application for leave to appeal, having been dismissed by the Constitutional Court, should then pave the way for implementation of paragraph 19.1 of the confirmed Anton Piller order. In other words, the accessing, inspection and analysis of the listed items attached by the Sheriff, interrupted at various intervals due to applications for leave to appeal, would now continue. However, three issues remain in dispute between the parties, first, whether or not the applicants are entitled to variation of paragraph 19.1 of the confirmed Anton Piller order made on **1 OCTOBER 2007.** Secondly, at what stage and under what circumstances, the respondents are entitled to the return of their hard drive as provided for in paragraph 2 of the order of **BOTHA J**, and thirdly, intrinsically linked to the second, whether or not the applicants are in contempt of Court. I now set out to deal with the above;

[11] Applicants' variation application: paragraph 19.1 of the confirmed Anton Piller order.

11.1 The motivation for the application appears to be as follows from the papers:

After the order of **1 OCTOBER 2007,** the applicants, acting in terms of paragraph 19, commenced with inspection and analysis of the media seized, at the offices of the sheriff. The sheriff, as the court-appointed custodian effectively in charge of the seized goods and investigation, took a view as to the interpretation of paragraph 19.1 of the order and directed that the applicants' experts, were not entitled, in the process of the inspection and analysis of the seized media, to download any detailed analysis of such listed items as were found on the seized media. The applicants contend that, this effectively confined them to the making of only an "expanded index" of the listed items found upon inspection, and futher contended that no proper and full analysis of the media could be undertaken, although the taking of certain notes were permitted.

11.2 0n the other hand, it was argued on behalf of the respondents by Mr. *Wynne* that the order was for preservation of the evidence and the applicants were not entitled to copy.

11.3 Mr. *Bester,* on behalf of the applicants, argued that the sheriff's interpretation of the order, was narrow and incorrect. He argued that

paragraph 19.1, by stating the purpose thereof as being for action to be instituted or application to be launched, anticipated the identification and a cataloguing of listed items for a specific purpose, such as the extraction of evidence. I agree with this proposition, and I am of the view that the proposed variation would provide an amplification of the paragraph and avoid future interpretational difficulties already encountered. In the premises the variation sought in this respect should be granted.

[12] Variation of paragraph 2 of the order dated **1 OCTOBER 2007**.

In this regard the applicants initially sought variation of the said paragraph as follows:

The respondents will be entitled, after the conclusion of the inspection and analysis of the Seagate 160 GB Hard Disk Drive, Serial Number 5 *PT1CZ15 in terms* of *paragraph* 19.1 *[as amended]* of *the judgement* of *the above Honourable Court on* 19 *September 2007, to* a *copy* of *the respondents accounting and personal information digitally stored on that Hard Disk Drive, such copy to be made under the supervision* of *the representatives* of *the applicants and the respondents where after the Hard Disk Drive shall be re-deposited with the Sheriff and shall further be dealt with as* a *listed*

item".

[13] The respondents, in their answering affidavits, made a without-prejudice tender, in terms of which the respondents undertook not to misuse any confidential information, or breach any copyright or pass off any of the applicants' products. The respondents also tendered that such undertaking be made an order of Court. After initial rejection of the offer in the applicants' replying affidavit the tender was accepted on behalf of the applicants in counsel's heads of argument. However applicant's counsel sought an order which in my view, goes much further than that tendered. I am therefore not inclined to accede to the order suggested by Mr. *Bester.*

[14] I turn now to consider the respondents' application for a declaration that the applicants are in contempt of paragraph 2 of **BOTHA J's** order. To answer that question, one must read firstly, paragraphs 19.1 and 19.2 of the order made by **SOUTHWOOD J,** dated **25 JULY 2007**. In the first place, paragraph 19.1 was confirmed in its entity, without any variation. This entails that the leave granted therein to the applicants to access, inspect and analyse the listed items, on confirmation by **BOTHA J,** was not affected at all. Paragraph 19.2 provided for the listed items to be retained by the sheriff pending final resolution of the intended action or application. What **BOTHA J** did, was to create an exception to this paragraph, to allow the respondents' hard drive, to be returned to the

respondents. But that right created in favour of the respondents, to have their hard drive returned to them, is not without further ado. It is conditional upon the fulfillment of paragraph 19.1, namely the access, inspection and analysis referred therein. Put differently, the respondents are entitled to the return of their hard drive, only after the access, inspection and analysis had taken place.

[15] The analysis and inspection was impeded by various applications for leave to appeal launched by the respondents. I have not been placed in possession of such applications for leave to appeal. Mr. *Wynne* on behalf of the respondents, contended that only paragraphs 1, 3, 4, and 5 of the order were appealed against, thus paving the way for implementation of paragraph 2. Mr. *Bester* for the applicants, on the other hand, argued that the notices of appeal were directed at *"the whole judgement",* inclusive of paragraph 2, thus also being affected by rule 49[11] of the uniform rules, which provides for suspension of an order once an appeal is noted. As I have not being placed in possession of the various notices of application for leave to appeal, I will refrain from making a finding on the divergent interpretations accorded to the effect of such notices of appeal, as argued by the parties. What is however common cause, is that the access, inspection and analysis envisaged in paragraph 19.1, was not completed, directly as a result of the noting of applications for leave to appeal by the respondent, as well as the sheriff's interpretation of the order. As indicated above, the respondents are not

entitled to the return of their hard drive until the process of inspection and analysis is completed. Now the question to be answered is whether the applicants and/or their attorney, Dr. Burrell, are in contempt of Court.

[16] The law in this regard was stated by the Supreme Court of Appeal in *Fakie NO v* CC *II Systems [Pty] 2006 [4] SA* 326 *SCA at 338D - E* as *follows:*

> "[0]*nce the prosecution has established [i] the existence* of *the order [ii] its service on the accused, and [iii] non-compliance, if the accused fails to furnish evidence raising* a *reasonable doubt whether non-compliance was wilful and* ***mala fide,*** *the offence will be established beyond reasonable doubt".*

At 338 G - 339 A, **CAMERON JA** declares:

> *"Once the three requisites mentioned have been proved, in the absence of evidence raising* a *reasonable doubt, as to whether the accused acted wilfully and mala fide, all the requisites of the offence will have been established. What has changed is that the accused no longer bears* a *legal burden to disprove wilfulness and mala fides on* a *balance of probabilities, but to avoid conviction need only lead evidence that establishes* a *reasonable doubt".*

[17] In the present case, the respondents being the applicants in the contempt application, premise their case on the following:

> *"His Lordship Mr. Justice Botha made an order on the* ***1st*** of ***OCTOBER 2007*** *['the Order'] in terms* of *which the respondents were compelled to return the hard drive which is required by the second applicant for the conduct* of *its business. The hard drive was impermissably attached during the execution* of *the Anton Piller order made in the main application"* [**paragraph 7, page 3 of the contempt application. Paragraph 10, page 3 proceeds:** *"The respondent have failed to comply with the Order and have frustrated the applicants on* a *continual basis in order to prevent the applicants from obtaining the original* of *the hard drive or even* a *copy thereof. . .".*

[18] At the outset, it is an incorrect conceptualization of the order of BOTHA J, to state that in terms thereof, the applicants were compelled to return the hard drive. First, there was no compelling of any sort in the said order. Secondly, the hard drive was not and has never been in the possession of the applicants. It is also not correct to assert that the hard disk was *"impermissably"* attached. That argument was proffered before **BOTHA J,** and in his judgement, the learned judge said:

"The dispute as to what the first respondent said was on the hard disk is not important. The evidence is that listed items were found on the hard disk. In argument Mr. *Wynne contended that the hard drive was attached without any prior scanning* of *its contents. He relied for this submission on an interpretation* of *the Sheriff's return. If they are read with Mr. Judin's report and the affidavits* of *Mr. Judin, Mr Du Randt and Mr Van't Wout, it is clear, however, that the drive was accessed and the presence* of *the listed items verified.*

[19] From the above, it appears that there is no basis to the contention that the disk was impermissably attached.

[20] As to whether the applicants are in contempt of the order, depends upon a proper interpretation of the said order. I have outlined such an interpretation above. It is also the interpretation which informed the view taken by the applicants. The respondents took a narrow view which led to an interpretation of the said paragraph in isolation, and out of context of paragraph 19.1 of the order of **25 JULY 2007.** As a result I am unable to find any willfulness or *mala fides* on the part of the applicants. On this basis, the application should fail. With regard to costs, I am of the view that, although the applicants achieved substantial success in their variation applications, I am further mindful that the need for variation, was partly caused by the sheriff's narrow construction of

the terms of the order of 25 JULY 2007. Although the respondents opposed the variation applications, I have decided not to make any costs order in this regard. As to the costs of the contempt application, I am of the view that the application was not well considered, and the respondents have to bear the costs. *Mr. Bester* for the applicants urged me to make a punitive costs order against the respondents for what he characterized as *"scurilous remarks"* and *"unconsciounable attacks"* on the applicants and their attorney. After careful consideration of this aspect, I have decided against awarding a punitive costs order. In the premises I make the following order:

21.1 Paragraph 19.1 and 19.4 of the order granted on **25 JULY 2007,** as confirmed in paragraph 1 of the order granted on **1 OCTOBER 2007,** are respectively varied to read as follows:

"19.1 *that the applicants, their legal representatives and their appointed experts are granted leave to access, inspect an analyse the listed items attached by the sheriff for the purposes* of *the undermentioned action to be instituted or application to be launched by the applicants against the respondents, to extract from the listed items seized under this order, information and material for the preparation of copies of forensic analysis summaries and reports and to download and make copies of the listed items, the mentioned information and material, the forensic*

analysis summaries and the reports for removal and use by the applicants, for the formulation, preparation and compilation of *the pleadings and/or affidavits in the mentioned action or application;*

19.4 *directing the applicants within* 30 *days* of *the date* of *the judgement in the respondents' for leave to appeal in the Constitutional Court of South Africa, to institute an action or to launch an application in which action or application the listed items constitute evidentiary material.*

21.2 Paragraph 2 of the order granted in the judgement of this Court on **1 OCTOBER 2007,** is varied to read:

"2. *Upon conclusion* of *the inspection and analysis referred to in paragraph* 19. 1 *of the order dated* **25 *JULY 2007***, a *mirror image* of *the respondents' Seagate 160* GB *Hard Disk Drive, serial number 5PT1 CZ15*, *shall be made under supervision* of *the representatives of the applicants and the respondents, which mirror image shall then be deposited with the sheriff to be dealt with as* a *listed item. The said hard disk drive shall then be returned to the respondents;*

21.3 The respondents are interdicted from misusing any confidential information, breaching any copyright or passing-of any of the applicants'

products;

20.4 No order as to costs is made;

20.5 The respondents' application in terms of Rule 6 [11] ["the contempt application"] is dismissed with costs.

TM MAKGOKA

ACTING JUDGE OF THE HIGH COURT