IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 20402/2012

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED:

In the matter between:

ADCOCK INGRAM CRITICAL CARE (PTY) LIMITED **APPLICANT**

and

BATSWADI PHARMACEUTICALS (PTY) LIMITED **FIRST RESPONDENT**

BATDSWADI BIOTECH (PTY) LIMITED **SECOND RESPONDENT**

Coram: WEPENER J

Heard: 12 MARCH 2014

Delivered: 14 MARCH 2014

Summary: Discovery and inspection – Rule 36(6)- inspection and examination of computer on which disputed documents generated – Rule permits such inspection and court has inherent power to order inspection and examination where the interests of justice require such inspection and examination

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JUDGMENT

WEPENER J:

[1] The applicant, who is also the plaintiff in the main action, seeks an order directing the respondents to comply with the applicant's notice in terms or Rule 36(6) of the Uniform Rules of Court (the Rules) by making the items therein described available for inspection and examination by the applicant and it's information technology consultant for a period of ten days. The items referred to in the Rule 36(6) notice are:

> ' i) the personal computers and / or laptops and / or iPads or other similar devices of Christopher Whitfield ('Whitfield") and Hennie Visser ("Visser") and their personal assistants or any other persons whose devices were used to generate the documents detailed below:
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> ii) the server/s of the First and Second Defendants as well as any metadata relating to the documents listed hereunder ('the documents')
>
> iii) any backups of the devices where the documents may have been saved;
>
> for the purposes of inspecting and examining the electronic versions the documents and forensic copies thereof.
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> The documents are as follows –

a) the letter addressed by Whitfield to Visser dated 10 April 2010 (annexure SP3 to the First Defendant's Plea);
b) the letter addressed by Visser to Whitfield dated 11 April 2010 (Annexure SP4 to the First Defendant's Plea),

collectively referred to as the April correspondence;

c) the letter addressed by Whitfield to Visser dated 3 November 2010 (annexure CC10 to the Second Defendant's Plea);
d) the letter addressed by Visser to Whitfield dated 4 November 2010 (Annexure CC11 to the Second Defendant's Plea)'.

collectively referred to as the November correspondence.

[2] The relevance of the letters lies therein that the applicant challenges the authenticity as well as the dates upon which these documents where created.

[3] The background to the application is that the applicant instituted an action which arose out of the return of various pharmaceutical stock products. It is in essence common cause that such products have been returned by the applicant and that the applicant has not received payment therefor. The only real dispute, in addition to a counter-claim institutied by the second respondent, is which of the two respondents is liable therefor.

[4] The parties' various relationships, not only with each other but also with the producer and supplier of the pharmaceutical products, is governed by a series of detailed and complex written agreements. These include a sales agreement, a shareholders' agreement, a distribution agreement, a technical agreement, initial licencing agreements and new licencing agreements.

[5] The first and second respondents are affiliated companies. The deponents to the affidavits are both directors of both companies, either directly or via trusts. They are also shareholders in both companies.

[6] The applicant initially instituted action against the first respondent alone. The claim was met by a defence that first respondent was only acting as the agent of the second respondent. The April correspondence was proffered as proof of such agency agreement.

[7] In pleading to the applicant's original claim, the first respondent also raised a special plea of the non-joinder of the second respondent and in doing so, relied upon and introduced the distribution agreement and technical agreement, which I have referred to. Those agreements contained arbitration provisions, and accordingly, the applicant suggested that all the parties' disputes should be referred to arbitration by agreement. This suggestion was rejected by both the respondents. Despite this, the second respondent subsequently pleaded to the applicant's claim and raised a special plea to the effect that the applicant ought to have invoked those very arbitration provisions.

[8] The applicant thereafter applied, and was granted, the joinder of the second respondent on an unopposed basis and, in fact, by consent. In that application the applicant questioned the authenticity of the April correspondence.

[9] The second respondent, aside from repeating the first respondent's contentions regarding the agency agreement between the two respondents (based on the April correspondence), also initiated various counter-claims, one of which is predicated upon a further alleged agreement between the two respondents being the written portion of which is contained in the November correspondence.

[10] In pleading to that counter-claim the applicant has directly challenged the authenticity of the latter correspondence as well.

[11] It is with this background that the applicant seeks an inspection and examination of the April and November correspondence. The applicant requires access to the respondents' computers upon which the aforesaid letters were generated so as to enable the applicant to investigate and ascertain whether or not the letters in question are indeed genuine. The applicant's assertions are that they are not.

[12] The respondents contend that Rule 36(6) does not found the applicant's entitlement to the inspection and examination; that the inspection and examination will reveal confidential information and that the applicant's expert agents ought not to be allowed access to the respondents' computers. The latter two issues were not pressed during argument before me.

[13] Rule 36(6) and 36(7) should, in my view, be read together to ascertain its true meaning and the power of the court pursuant thereto and pursuant to the common law. Firstly, there can be no dispute that genuiness and authenticity of the impugned correspondence is directly relevant with regard to the decision in the matter at issue in the action. If the correspondence is contrived, the respondents' defence is baseless and untrue. This relevance, in itself, triggers applicant's entitlement to rely on the provisions on Rule 36(6).

[14] Likewise, the authenticity of those letters and the history as contained on the relevant computers to which the applicant requires access, comprise their state or condition as contemplated in the sub-rule.

[15] Counsel for the respondents argued that the rule is only applicable to property when the party relying on the condition or nature thereof is the claimant in relation to such condition or nature thereof; that only in such circumstances the party so relying on the condition or nature of the property must make it available for inspection.

[16] Rule 36(6) provides:

> '(6) If it appears that the state or condition of any property of any nature whatsoever whether movable or immovable, may be relevant with regard to the decision of any matter at issue in any action, any party may at any stage give notice requiring the party relying upon the existence of such state or condition of such property or having such property in his possession or under his control to make it available for inspection or examination in terms of this sub-rule, and may in such notice require that such property or a fair sample thereof remain available

> for inspection or examination for a period of not more than ten days from the date of receipt of the notice.'

I paraphrase the Rule as follows:

> '…any party may at any stage give notice requiring the party…
> having such property in his possession or under his control to make it available…'

The property referred to is property of which the state or condition of any nature whatsoever whether movable or immovable and which may be relevant with regard to the decision of any matter at issue in any action. The argument by counsel for the respondents that the Rule only applies when the party relying on the existence of such state or condition required to make it available, is consequently not correct as it ignores the word 'or' contained in the Rule. As long as a party has property, relevant to any matter in issue in his or her possession or under his or her control, that party is obliged to make it available.

[17] In so far as I may be wrong in this conclusion and to the extent that the rules may be deficient in this respect, I am persuaded that the order is necessary in the furtherance of the administration of justice – See *House of Jewels and Gems v Gilbert 1983 (4) 824 (W) at 828H* where Coetzee J (as he then was) said:

> 'Hence for the applicants to succeed, these remedies must neither resist at common law, or to the extent that these are purely procedural matters where rights themselves exist, the Court must be persuaded that the Rules of Court are deficient in this respect and that such orders are therefore necessary in futherance of the administration of justice'.

After citing the *Moulded Component's* case, referred to below, Kotze J in *M v A* 1989 (1) SA 416 (O) at 428D held that an order of this nature is not such as to create a cause of action or does not bring about a legal result. It is a mere source of evidence which can assist a court to have the truth prevail and in that sense it is a procedural matter. I agree.

[18] The words of Williamson J in *Brown Brothers Limited v Doise* 1955(1) SA 75 (W) at 77B-D are apposite:

> 'In my view this is a case where the Rules of Court as framed do not provide for one particular set of circumstances which can arise, and I think that the Court has inherent power to read the Rules applicable to the procedure of a Court in a manner which will enable practical justice to be administered and a matter to be handled along practical lines. I propose to apply the remarks of Gardiner JP, in the case of *Ncoweni v Bezuidenhout 1927 CPD 130* where he said:
>
> > "The rules of procedure of this court are devised for the purpose of administering justice and not hampering it, and where the rules are deficient I shall go as far as I can to grant orders which will help to further the administration of justice".
>
> Where I am satisfied, as I am in this case, that notice cannot be given, where I am satisfied that the rule cannot be complied with in the terms in which it is framed, I feel that I am entitled to make an order which will entitle a party to have his bill taxed as is contemplated by the rules'.

[19] Referring to Rule 36(6) Lewis J said in *Caltex Oil Rhodesia v Perfecto Dry Cleaners* 1970 (2) SA 44 at 47A to 48B as follows:

> 'In this regard it is of some significance that the Courts in South Africa, before the Rules made any provision at all for allowing a pre-trial inspection of property, regarded themselves as having an inherent discretion to order an inspection of immovable property where the interests of justice required that there be such an inspection. See *Danziger v The Worcester Exploration Gold Mining Co. (1890) 2 S.A.R. 126; London and South African Exploration Co. v De Beers Consolidated Mines (1893) 10 S.C. 218.*

In the latter case an action was pending in which the plaintiffs, as lessors of certain property, were seeking a declaration of rights entitling them to the surrender by the defendants, as lessees, of parts of the ground leased in terms of a condition of lease providing for such surrender of any portion of the ground which was discovered to be diamondiferous. The plaintiffs had obtained *prima facie* evidence that certain ground was in fact diamondiferous and they sought the leave of the Court for them to have access to certain parts of the claims to secure proof, for the purpose of the action, of the existence of diamonds there. The defendants opposed the application. DE VILLIERS C.J. in granting the leave sought, said at p. 220:

> "I quite agree with the defendants' counsel that the plaintiffs have no right to go prospecting all over the defendants' ground. But if the plaintiffs have reasonable grounds for believing that any portion of the ground is diamondiferous and can satisfy the Court that there is *prima facie* evidence in support of that belief, I think the Court ought to assist the plaintiff in further proof of that fact. If there were no precedents to justify such a course, the Court would be prepared in the interests of the administration of justice to exercise a power of this kind."

Though it is not specifically mentioned in the report, it seems to me it may fairly be implied that the rights to inspect which was granted in that case necessarily involved some disturbance of the soil in seeking proof, for the purpose of the trial, that the ground was diamondiferous. The decision in that case, and the reasons underlying it, were referred to with approval by the Appellate Division in the case of *Globe & Phoenix Gold Mining Co. Ltd. V. Rhodesia Exploration Co. Ltd.,* 1929 A.D. 434 at p. 440, although the Court held that the decision had no application in the circumstances of that particular case.

The English case *of Bennet v. Griffiths* (1861) 121 E.R. 517, also provides support for the grant of the present application. At that time sec. 58 of the Common Law procedure Act of 1854 simply provided that either party to an action:

> "shall be at liberty to apply to the Court or a Judge for a rule or order for the inspection …of any real or personal property the inspection of which may be material to the proper determination of the question in dispute".

> The Court in that case held that the section gave the Court the same power as the Court of equity possessed, i.e. the power to order the removal of obstructions on the land in order to facilitate inspection, as an ancillary to the power to order inspection, and it rejected the contention that the inspection was confined to mere ocular inspections of the land as it stood without the doing of anything further.
>
> Here again it seems to me the Court felt itself free to act in the matter in the best interests of justice. Mr. *Squires* for the defendant argues that the sole reason for the decision in that case was the suspicion that the defendant had deliberately created the obstruction in the form of a wall for the purpose of concealing his encroachment on to the plaintiff's mine. It seems to me, however, that their Lordships in that case recognised the principle that in certain circumstances a party might be permitted to execute certain works on the other party's land for the purpose of proper inspection and without which the right of inspection would be rendered nugatory, provided that the owner or occupier of the land in question was safeguarded against any loss or damage as a result of the execution of the works in question'.

[20] In *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773, Rumpff JA (as he then was) said at 783 A-B:

> 'In verband met die vraag wat Appellant presies moes gedoen het nadat Respondent sy aansoek gestaak het, is dit wesenlik om te herhaal wat in die algemeen van toepassing is nl. dat die Hof nie vir die Reëls bestaan nie maar die Reëls vir die Hof.

[21] The Appellate Division has recognised that courts should not be powerless to act. In *Universal City Studios Inc. and Others v Network Video (Pty) Ltd* 1986 (2) SA 734 (A) at 755 A-E it said:

> 'In a case where the applicant can establish *prima facie* that he has a cause of action against the respondent which he intends to pursue, that the respondent has in his possession specific documents of things which constitute vital evidence in substantiation of the appellant's cause of action (but in respect of

> which the applicant can claim no real or personal right), that there is a real and well-founded apprehension that this evidence may be hidden or destroyed or in some manner spirited away by the time the case comes to trial, or at any rate to the stage of discovery, and the applicant asked the Court to make an order designed to preserve the evidence in some way, is the Court obliged to adopt a *non possumus* attitude? Especially if there is no feasible alternative? I am inclined to think not. It would certainly expose a grave defect in our system of justice if it were found that in circumstances such as these the Court were powerless to act. Fortunately I am not persuaded that it would be. An order whereby the evidence was in some way recorded, eg. by copying documents or photographing things or even by placing them temporarily, i.e. *pendente lite,* in the custody of a third party would not, in my view, be beyond the inherent powers of the Court.'

Although these remarks were made in an Anton Pillar-type matter, I can see no reason why they cannot be applied in the matter before me.

[22] Prest, in *The Law and Practice of Interdicts* at page 201 says:

> 'A legal system, in its quest for the ascertainment of truth and ensuring that justice is done, must not permit its procedures to become so cumbersome and time-consuming that the end to which the very system is directed is defeated. The lesson of history teaches that the subject of the law is an impatient and restless creature. When a crisis situation presents itself, he seeks expeditious and effective action, at least on an interim basis, until such time as the principal dispute can be resolved. The law, if it is to be effective, must always keep pace with these demands. It is a servant of circumstances, and not the master. It must not give rise to problems; it must provide a solution to such problems as arise out of the requirements of modern commercial and social developments.'

[23] I fully agree with these remarks and indeed find support in reported cases against the respondents' narrow interpretation the ambit of Rule 36(6). In *Moulded Components and Rotomoulding South Africa (Pty) Limited v Coucourakis and Another* 1979 (2) SA 457 (W), Botha J (as he then was) decided a matter

concerning an application to inspect a number of documents and also a number of items of machinery. (See the report at 458D and 459A.)

[24] In considering whether a court can order a party to produce for inspection items of machinery which are objects not being documents, Botha J said at 461F to 462H:

> 'In broader terms, the question relates to the Court's inherent jurisdiction to grant relief not specifically provided for in the Rules. In my opinion there can be no doubt at all that, generally speaking, the Court has such inherent power. The cases relied upon by counsel for the applicant make this quite clear. He referred *inter alia, to the following cases: MacKenzie v Furman & Pratt 1918 WLD 62 at 66: Cohen & Tyfield v Hull Chemical Works 1929 CPD 9 at 10;Van der Merwe v De Villiers and Another 1953 (4) SA 670 (T) at 672; Neal v Neal 1959 (1) SA 828 (N) at 832-833; and, finally, Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd and Others 1974 (4) SA 362 (T) at 368G-H.* Examples of the Court's inherent power to grant relief outside the terms of the Rules of Court afforded by these cases are the ordering of production for inspection of machinery, including allowing the presence at such inspection of an expert of the party desiring the inspection *(MacKenzie's* case *supra)*; the authorisation of the presence at the inspection of documents of experts to assist the party requiring the inspection, such as accountants or other experts (*Cohen & Tyfield's* case *supra*); the ordering of matter to be struck out of an affidavit on grounds other than those specifically mentioned in the Rules of Court, namely vexatious, scandalous, or irrelevant matter (*Titty's Bar & Bottle Store (supra)*).
>
> The argument for the respondents with regard to these cases was that they were distinguishable from the situation in the present case. Counsel for the respondents said that the cases relied upon by the applicant rested on a situation where a gap was found to exist in the Rules of Court, or, in other words, where there was a total hiatus in relation to a certain situation. So, for instance, in *MacKenzie's* case counsel said there was no provision in the Rules for an inspection of objects as opposed to an inspection of documents, and the Court could step in and fill that gap by using its inherent jurisdiction. In the present case, however, counsel said the position was not the same, taking again the

example of the inspection of items of machinery. Counsel relied in this respect on the provisions of Rule 36 (6), which provides for the inspection of objects with an express limitation of the remedy to an action. The Rule refers expressly to "any action", and counsel argued that that showed conclusively that the framers of the Rules could not have contemplated that a similar type of procedure would be possible in the case of an application.

This appears on the face of it to be an attractive argument, but I am nevertheless unable to accede to it. I do not consider that if justice demands such a course in appropriate circumstances, the Court would decline to come to the assistance of a party where that party requires inspection of an object referred to in the opposing party's affidavits, simply because Rule 36 (6) is limited by its wording to actions and does not expressly include within its ambit applications. If justice requires an inspection of an object, in application proceedings, I consider that the Court will exercise an inherent jurisdiction to order production for such inspection. I should add, however, that I have no doubt that such a situation would be an unusual one and that this is a power that the Court would exercise very sparingly. The point is, however, that I believe that it is something that can be done. The cases referred to earlier support my conclusion, in my view. In *Neal's* case *supra*, for instance, the Court was prepared to grant relief to a *peregrinus* to bring an application *in forma pauperis* although the Court accepted, in the part of the judgment relevant for present purposes, that the Rule in question did not apply to a *peregrinus.* In other words, the Court was prepared to grant relief in spite of the fact that the Rule did not cover the situation and that the Rule in question was limited to another type of situation. The other case to which I would refer in this regard is the case of *Titty's Bar & Bottle Store (supra*). In that case, too, the Court was not deterred from granting relief on a ground not specifically mentioned in the Rule in question, but on a ground outside the terms of the Rule.'

[25] The precedent for allowing an applicant access to the real evidence, computers in this case, has consequently been in place since 1979. The passage referred to in the *Moulded Component's* case has been referred to with apparent approval in *Universal City Studios Inc. and Others v Network Video (Pty) Ltd* 1986 (2) SA 734 (A) at 754H.

[26] A statement about the importance of disclosure in court proceedings was made by Moseneke DCJ in *Independent Newspapers (Pty) Ltd v Minister of Intelligence Services: in Re Masetlha v President of the Republic of South Africa and Another* 2008 (5) SA 31CC at paragraph 25:

> 'Ordinarily courts would look favourably on claim of a litigant to gain access to documents or other information reasonably required to assert or protect a threatened right or to advance a cause of action. This is so because courts take seriously the valid interests of a litigant to be placed in a position to present its case fully during the course of litigation. Whilst weighing meticulously where the interests of justice lie, courts strive to afford a party a reasonable opportunity to achieve its purpose in advancing its case. After all, an adequate opportunity to prepare and present ones case is a time-honoured part of a litigating party's right to a fair trial.' (own underlining)

[27] It appears from the wording from Rule 36(7) that the court, when considering an application of this nature, has a wide discretion and is empowered to make an order '…as to him seems meet'. In the exercise of a judicial discretion, I am of the view that the entitlement of the applicant to inspect the computers, is paramount. The respondents have shown no grounds or reason why they would be prejudiced by such an inspection, save the grounds not further pursued in argument before me. I am consequently of the view that an order allowing immediate inspection is not only permissible, but also required in this matter.

[28] Section 173 of the Constitution provides:

> 'The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law taking into account the interests of justice.'

[29] In my view, the interests of justice, whether its origin be in the Rules, common law, the cases referred to in this matter or the Constitution, require that the authenticity of the correspondence be established.

[30] Although the respondents did not persist with the argument, they also opposed the relief based on the confidentiality of the information. This fear can be addressed by inserting safeguards in the order which a court issues. This ground of opposition is also, significantly, weakened by the fact that on the respondents' version the applicant's holding company is a 45 percent shareholder of the second respondent which would entitle the applicant, through its holding company, to access the information sought by the applicant. Logic dictates that the applicant needs experts to analyse the contents of the computers and the safeguards regarding confidential information will also bind the applicant's experts.

[31] Having come to the conclusion herein, I am of the view that the applicant should be entitled to establish the authenticity of the documents relied upon by the respondents, by also having access to the computers on which they were generated.

[32] I issue an order in the following terms:

32.1. The respondents are immediately to comply with the applicant's notice in terms of Rule 36(6) dated 14 October 2013 by making the items more fully described therein available for inspection and examination by the applicant and its information technology consultant, Cyanre the Computer Forensic Lab, for a period of ten days after the date of granting of the order herein.

32.2. The applicant and its representatives and agents are to treat and regard all commercially sensitive information which may be revealed or disclosed as part of such investigation and examination as strictly confidential, and are not to utilise any such information for any purpose other than that which is legitimately and necessarily required for purpose of the litigation in this matter.

32.3. The respondents are, jointly and severally, liable to pay the costs of this application, the one paying the other to be absolved.

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Wepener J

Counsel for Appellant: Adv. B. Berridge SC

Counsel for Respondent: Adv. A.J. Daniels

Attorneys for Appellant: Read Hope Phillips Thomas & Cadman Inc.

Attorneys for Respondent: Baker & McKenzie