IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 2814/2018

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

21.V.19

In the matter between:

NAMPAK GLASS (PTY) LIMITED	**Applicant**
and	
VODACOM (PTY) LIMITED	**First Respondent**
MTN LIMITED	**Second Respondent**
CELL C (PTY) LIMITED	**Third Respondent**
TELKOM SA SOC LIMITED	**Fourth Respondent**

JUDGMENT

UNTERHALTER J:

1. Nampak Glass (Pty) Ltd ("Nampak") brings an urgent application, seeking certain information from a number of cellphone operators. Nampak does so on the basis that access to this information will permit it to identify wrongdoers who robbed Nampak's premises. In essence, the orders that are sought will assist Nampak to investigate who it was that carried out the robbery, and then take appropriate legal action against the perpetrators. The cellphone operators do not oppose the relief sought.

2. This application is somewhat novel. It seeks the assistance of the Courts to gain access to information, held by third parties, in advance of any litigation having been instituted, in order to determine the identity of prospective defendants. An order of this kind does, however, bear a certain family resemblance to the *Anton Piller* order that preserves evidence in advance of the institution of substantive litigation.

3. It would seem a matter of common sense that there may be circumstances in which an applicant needs the assistance of the Courts, not simply to preserve evidence, but to obtain information for the purposes of

determining the identity of wrongdoers so that proceedings may be brought against them. But our Courts have not been inclined to grant orders of this kind. Appeals to procedural pragmatism have not prevailed in the face of the absence of clear authority at common law that such orders may be granted. Nor do the Rules of Court provide for the disclosure of information to identify a defendant in advance of instituting proceedings.

4. In *House of Jewels,*[1] Coetzee J gave a full exposition of the common law. The Learned Judge could find no element of the *interrogatio in jure* or the procedural interrogations of old Dutch Law to be of modern application; nor was the Learned Judge willing to follow a number of cases, of some pedigree, that had recognised the power of the Courts to order the disclosure of names for the purpose of bringing an action.[2] Coetzee J did not consider the relief capable of development under the Court's inherent jurisdiction because the prayers sought were not wholly matters of adjectival law, but must arise, if at all, from claims of substantive rights at common law.[3] Like reasoning was used in *Cerebos,*[4] as the basis for rejecting the adoption of the *Anton Piller* order in our practice, a decision that was not to prevail.

5. In my view, the position adopted in *House of Jewels* should not be perpetuated in our law for the following reasons. First, *House of Jewels*

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[1] *House of Jewels and Gems and Others v Gilbert and Others* 1983 (4) SA 824 (W).
[2] At 833-834.
[3] At 828-829.
[4] *Cerebos Food Corporation Ltd v Diverse Foods SA (Pty) Ltd and Another* 1984 (4) SA 149 (T).

was decided before the Constitution required that the development of the common law must promote the spirit, purport and objects of the Bill of Rights. Among those rights is the right of access to Courts. Section 34 of the Constitution accords everyone the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court. In order to have a dispute resolved by a court, persons must be able to bring that dispute before the Courts. Procedure is the means by which disputes come to court and are resolved in a fair and just way before the Courts.

6. If a person has been harmed by another whose identity is unknown, that harm cannot be remedied by the application of law until the defendant is identified. As a matter of principle, it is hard to see why procedures should not be adopted to assist in identifying the defendant because such procedures serve to make it possible to bring the claim of the injured person before the Courts so as to have the dispute resolved. A procedure that assists the injured person in this way serves the constitutional right of access to the Courts.

7. It is true that a procedure that requires others to assist the injured person by making information available places some burden on them. But that burden is justified. It gives practical assistance to the injured person and encourages the use of the Courts to seek redress. Those upon whom the burden of disclosure rests also have a duty to assist because a functional system of justice is in the interests of all, including the person who is

required to produce the information. So, for example, we require those served with a subpoena to give evidence as part of their civic duty to the Courts and our system of justice. It seems hard to understand why that duty should not extend to circumstances in which the disclosure of information might assist a prospective litigant to identify a wrongdoer so that the dispute might be heard and determined before the Courts.

8. If the common law has not made provision for a disclosure remedy to injured persons, the common law should be developed to reflect the constitutional right of access to the Courts. And I find that the recognition of such a remedy is warranted on this basis.

9. The second reason that the holding in *House of Jewels* should not be perpetuated is this. The Rules of Court do not provide for a procedure to require the disclosure of information that might better place an injured person in a position to identify a wrongdoer. The Rules should do so but don't. That is a regrettable omission for the reasons I have referenced as to why a remedy of this kind promotes the constitutional right of access to the Courts. That would appear to me to be a circumstance in which our procedure is inadequate and a mechanism is required to assist an injured person. It is a circumstance in which a court may exercise inherent jurisdiction.[5]

10. The inherent power of the Courts to regulate their own process applies to

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[5] *S v Molaudzi* 2015 (2) SACR 341 (CC) at 33.

adjectival or procedural rights and not substantive rights. The distinction between these kinds of rights is often hard to draw. And for this reason, in *House of Jewels*, the Court found that because the orders sought were not wholly adjectival, inherent power could not be exercised. That puts the test too high. If the order sought is predominantly concerned with regulating procedure then that suffices, as a threshold matter, for a court to consider the exercise of its inherent power.

11. I consider that an order seeking disclosure of information to assist a person wronged to identify the perpetrator is an order going to procedural rights. The order does not settle any question of ultimate duty or wrongfulness. It is simply a means to have the ultimate questions of right and wrong determined by a court. I would therefore recognise a procedure to assist injured persons as a matter of the exercise of inherent power.

12. Lastly, the premise of the Learned Judge's account of the common law in *House of Jewels* is not compelling. It reasons that the procedure of interrogatories described by *Voet*, "is so far removed from anything comparable in our practice and procedure that not an iota thereof can possibly be applicable today" (at 833 A). It is difficult to understand why procedures that were found availing in the legal system of *Voet's* time, have become alien to our modern system of law and lack utility. It would be different if a procedure recognised in the past had become redundant or had fallen away because it lacked any value. But that is not the case. The issue of principle in the development of adjectival law is whether the

adoption or development of a procedure promotes the interests of justice. If a procedure, as the Learned Judge found, is not to be found in our practice that cannot end the enquiry, but rather requires a further enquiry as to why that is so and whether the adoption of the procedure should be recognised to avoid a denial of justice. That is the approach taken by Corbett CJ in *Shoba,*[6] in recognising *Anton Piller* orders, and a similar approach commends itself in determining the orders sought in this case. The orders sought are a practical development of our law.

13. Ultimately, the orders that are sought in these proceedings flow naturally from the practical importance of allowing prospective litigants access to the Courts. Where there is information, not otherwise readily available, that could be of real utility to ascertain the identity of a wrongdoer or other debtor so that proceedings might be brought, the Courts should come to the assistance of the injured person so as to facilitate access to the Courts. This, it seems to me, is a better account of what the common law requires than an antediluvian search for the survival of procedural fragments from a long distant past.

14. It is plain that Nampak did indeed suffer a robbery and is entitled now to seek to pursue an action in law against the wrongdoers if they can ascertain their identity.

15. Orders of the kind sought by Nampak are recognised in English law. Such

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[6] *Shoba v OC Temporary Police Camp, Wagendrift Dam* 1995 (4) SA 1(A) at 17 E-H.

orders are generally referred to in English law as "*Norwich Pharmacal* relief" because they derive from the case of *Norwich Pharmacal Co and others v Commissioners of Customs and Excise* 1974 AC 133 (HL). More recent applications of *Norwich Pharmacal* relief are to be found in the decisions of *Ramilos Trading Ltd v Buyanovsky* 2016 EWHC 3175 and *Miles Smith Broking Ltd v Barclays Bank* PLC 2017 EWHC 3338 (CH).

16. In English law, the requirements for obtaining *Norwich Pharmacal* relief have been summarized as follows:

"The three conditions to be satisfied for the court to exercise the power to order *Norwich Pharmacal* relief are:

(i) A wrong must have been carried out, or arguably carried out, by an ultimate wrongdoer;

(ii) There must be a need for an order to enable action to be brought against the ultimate wrongdoer; and

(iii) The person against whom the order is sought must: (a) be mixed up in so as to have facilitated the wrongdoing; and (b) be able or likely to be able to provide the information necessary to enable the ultimate wrongdoer to be sued."[7]

17. Apart from these requirements, the Court enjoys a discretion, even if the requirements are met, to determine whether an order should be granted, and if so, on what terms.

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[7] *Hollander: Documentary Evidence* 12th edition at 4-01.

18. The third requirement is framed under the somewhat loose language that the person possessed of the information is "mixed up in the events so as to have facilitated the wrongdoing". It may appear from this requirement that the person from whom the information is sought must be a joint tortfeasor. However, the cases indicate that the requirement of being mixed up in the events is not confined to a joint tortfeasor or accessory. To be "mixed up" may include persons who facilitated the wrongdoing, without any wrongdoing on their part.

19. In that sense, a person may have information because they innocently became a means by which a wrong was perpetrated, without in any way committing a criminal act or other civil wrong. I am inclined to think that the criterion of facilitation should be flexibly applied and where an innocent person has information which relates to the manner in which the wrongdoing was committed, or is otherwise closely connected to it. In these circumstances there is a sufficient connection between the wrongdoing, the wrongdoer, and the information possessed by the third party to warrant the kind of relief sought by way of *Norwich Pharmacal* relief.

20. I should caution that these observations both as to the English law and its adoption in our law are matters that come before me in the urgent court. But I am satisfied that *Norwich Pharmacal* relief should be recognised. It is an appropriate development of our law and the requirements of English

law, suitably adapted, serve well enough to provide an effective remedy.

21. I should caution further, however, that since orders of this kind can be intrusive, it is necessary that, not only should the requirements for the grant of the order be met, but the interests of those burdened by the order and those having an interest in the information that is sought should be carefully considered and weighed.

22. In the first place, the impositions that might be placed upon the third parties who have information must be considered. The order must not be so burdensome as to require the third parties expense, time and trouble of a kind unwarranted in relation to the value of the information.

23. The second category of persons affected by the order, at least in respect of the information sought in this case, are persons who may have been contacted or be referenced in the cellphone calls to which access is sought. Plainly, there are issues of confidentiality that arise when the information sought concerns access to cellphones records across the networks of the respondents.

24. In considering the relief that is sought in this case, I have given consideration both to the interest of the respondents, the cellphone operators, and the kind of information that may be procured so as to ensure that third party confidentiality is not unduly compromised. These, it seems to me, are important considerations in deciding whether to grant

the application and on what terms.

25. In this case, the respondents have been given notice of the application and they have either chosen to abide the orders that I propose to make or have offered no opposition.

26. In formulating the order, limitations have been introduced by way of protection, both in respect of the methodology utilised to gain access to the information, as also the type of information that can be accessed.

27. Thus, there are limitations both as to the time periods over which production of information may be sought, and also the type of information that must be disclosed. As to the second matter, it is not the contents of the communications that have passed over the cell networks that may be accessed, but rather markers of the identities of those who made the calls and the places at which calls were uplinked and received.

28. Turning then to the requirements that I have set out. I am satisfied that sufficient evidence has been placed before me that a robbery was perpetrated at the premises of Nampak and that items of considerable value were stolen.

29. Nampak has also been able to identify a number of evidential matters relevant to the enquiry it intends to pursue for the purposes of identifying the wrongdoers. In these circumstances there is a need for an order so as

to be able to track down the persons who carried out the robbery. From the evidence placed before me, it is sufficient to indicate that the investigation that is to take place, with the disclosure of the information sought, may well be fruitful to identify the wrongdoers and that the information is not otherwise available to Nampak.

30. As to the position of the cellphone operators, the respondents before this court, Nampak made it plain that there is no suggestion that these operators have in any way made themselves party to the wrongdoing that occurred. They are entirely innocent. But it is clear from the papers that those who did carry out the robbery utilised their cellphones across cellphone networks and in that sense, there was use of cellular telephony to facilitate the wrongdoing.

31. The respondents were not "mixed up", to use the English terminology, as perpetrators or as accessories to the crime, but their networks, (or one or other of their networks), were utilised in the course of the robbery, as captured on CCTV footage. In this sense, the networks helped to facilitate the robbery. I am also satisfied that the information that might be yielded from the order that I intend to make has a likelihood of providing information to identify the wrongdoers, so that they might be sued by Nampak.

32. The order as I have indicated, seeks to circumscribe both the content of the information that may be disclosed and also the rights that Nampak may

enjoy of access to the information. These protections have been put in place so as to ensure, as best I can, that the access that is to be granted is not unduly burdensome to the respondents and is also of a kind that will not give rise to gratuitous harms to other third parties who may have been utilising the cell networks at the relevant time when the wrongdoing was carried out at the premises of Nampak.

In the result, I make the following order:

1 The respondents and/or their resellers are ordered to provide, in comma separated values ("CSV") format or Excel spreadsheet, the following information (specifically excluding all content data, i.e. data concerning the substance, purport or meaning of the communications), to the extent that the information is in their possession, by providing access to their cellphone towers servicing the area where the applicant is situated, i.e. at the corner of Emmanual and Smith Road, Roodekop, Germiston ("the Property"), and during the 61-minute period from 8 January 2018 at 23:41 to 9 January 2018 at 00:42 ("the Period"):

1.1 access details and account information, including customer information and contact details, of the user account/s that were used to grant access to the cellphone towers of the respondents and/or their resellers in the vicinity of the Property and during the Period;

1.2 all access details, including but not limited to any subscriber information, such as customer information, contact details and any

associated identifying particulars, retained by the respondents and/or their resellers, and which pertain to the user account/s that were used to grant access to the cellphone towers of the respondents and/or their resellers in the vicinity of the Property and during the Period;

1.3 all URL information regarding webpages visited and all data traffic information in respect of the user account/s that were used to grant access to the cellphone towers of the respondents and/or their resellers in the vicinity of the Property and during the Period;

1.4 The unedited and un-redacted logs, in raw format, of all calls and Internet access by the cellular phones used to grant access to the cellphone towers of the respondents and/or their resellers in the vicinity of the Property and during the Period. These logs are to include at least the following:

1.4.1 account information, including customer information and contact details of the account/s.

1.4.2 device information including media access control ("MAC") addresses, international mobile equipment identity ("IMEI") numbers, international mobile subscriber identity ("IMSI") numbers, Mobile Equipment Identifier ("MEID"), device make and model numbers, type of device, subscriber identification module ("SIM") card number, mobile number;

1.4.3 date, duration and time of all calls made and received;

1.4.4 a list of Mobile Originated Call ("MOC") calls from the SIM card;

1.4.5 a list of Mobile Terminated Call (MTC) calls made from the SIM card;

1.4.6 a list of MTC calls received from the IMEI (handset);

1.4.7 a list of incoming Short Message Service (SMS) transactions;

1.4.8 a list of outgoing SMS transactions;

1.4.9 the identification of the telephone exchange or equipment writing the record;

1.4.10 the unique sequence number identifying the record;

1.4.11 additional digits on the called number used to route or charge the call;

1.4.12 the disposition or the results of the call, indicating, for example, whether or not the call was connected;

1.4.13 the route by which the call left the exchange;

1.4.14 call type (voice, SMS, data);

1.4.15 any fault condition encountered;

1.4.16 infrastructure information by means of which the device was linked to its network (such as cellphone towers, Access Point Names (APN's);

1.4.17 geolocation information of the device when it was used (by analysing their logs and using triangulation techniques to determine the general location of the device at the time of the call); and

1.4.18 all URL information regarding webpages visited and all data traffic information in respect of the relevant mobile device.

2 In the event that the information sought in paragraph 1 above, provides a call record, which connected to one of the following numbers set out below (and which, in turn connected to one or more of the respondents' respective cellphone towers servicing the area of the Premises and also at 98 Bloubok Avenue, Roodepoort, Germiston), during the Period;

(the numbers are then set out)

2.1.1 then the respondents are ordered to provide the geolocation information of the device when it was used (by analysing their

logs and using triangulation techniques to determine the general location of the device at the time of the call), from 8 January 2018 at 23:41 until the date of the application of this order.

3 The respondents are ordered not to disclose:

3.1 the fact that this order has been granted or served;

3.2 the contents of this order; and

3.3 the contents of this application

to any natural or juristic person associated with the relevant cellular phone numbers, for a period of 3 months after having been served with this order.

4 The respondents are ordered and directed to preserve the information to be provided in terms of this order in terms of generally accepted forensic practice and the provisions of the Electronic Communications and Transactions Act, 2002, with specific reference to section 15 thereof, subject to 5 below.

5 The order of preservation of information referred to in para 4 above shall remain binding until the later of:

5.1 for two years from the date hereof; or

5.2 until the date on which any action, foreshadowed in the founding affidavit, which the applicant has instituted against the perpetrators within the two-year period, is finally determined (including appeals).

6 The applicant is ordered to only use the information provided for the purposes of:

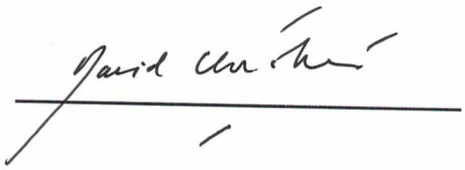
6.1 identifying the wrongdoers;

6.2 preventing further harm against the applicant and its employees; and

6.3 Furthering its investigation to perfect and prosecute its cause of action.

7 The applicant is furthermore ordered to destroy the information provided in terms of this order should it no longer be required for purposes of para 6 above.

8 If this order needs to be brought to the attention of any of the respondents' resellers and such resellers wish to object to complying with this order, such resellers must approach this court, papers to be filed on an urgent basis, on the first Thursday after having been notified of this order, for hearing on the next Tuesday.



David Unterhalter

Judge of the High Court

Gauteng Local Division: Johannesburg

Date of Hearing: 31 January 2018

Judgment Delivered: 31 January 2018

Appearances:

Advocate for the Applicant: Adv A Nieman instructed by Fairbridges Wertheim Becker.