DR DISH (PRIVATE) LIMITED
versus
ECONET MEDIA LIMITED
and
ECONET KWESE TELEVISION (PRIVATE) LIMITED
and
CASSAVA SMARTECH ZIMBABWE LIMITED

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 22 January 2020 & 11 June 2020

Opposed Application Anton Piller

Mr *T Sibanda,* for the applicant
Mr *T.W. Nyamakura with Mr. Mbuyisa,* for the Respondents

MUSITHU J: Some forty four years ago, LORD DENNING made the following remarks which endure unto this day.

> "Let me say at once that no court in this land has any power to issue a search warrant to enter a man's house so as to see if there are papers or documents there which are of an incriminating nature, whether libels or infringements of copyright or anything else of the kind. No constable or bailiff can knock at the door and demand entry so as to inspect papers or documents. The householder can shut the door in his face and say, 'Get out.' That was established in the leading case of *Entick* v. *Carrington*. None of us would wish to whittle down that principle in the slightest. But the Order sought in this case is not a search warrant. It does not authorise the Plaintiffs' Solicitors or anyone else to enter the Defendant's premises against his will. It does not authorise the breaking down of any doors, nor the slipping in by a back door, nor getting in by an open door or window. It only authorises entry and inspection by the permission of the Defendants. The Plaintiff must get the Defendant's permission. But it does do this: It brings pressure on the Defendants to give permission. It does more. It actually orders him to give permission—with, I suppose, the result that if he does not give permission, he is guilty of contempt of Court"[1].

He was of course talking about Anton Piller. It derives its appellation from the celebrated English case the revered judge presided over. The case dealt with theft of trade secrets. His remarks appositely summarise the circumstances of this case. Applicant seeks respondents' permission to access crucial information that it requires to bring a claim against respondents. Respondents are not so inclined to grant that permission. This court is confronted with the formidable task of determining the lawfulness of applicant's request under the circumstances.

[1] Per Lord Denning describing the nature of the Anton Piller relief in *Anton Piller KG v Manufacturing Processes Limited & Ors* [1976] 1 All ER 779 at page 782.

On 20 February 2019 applicant obtained an *exparte* Anton Piller order against respondents. It seeks the confirmation of that provisional order. Respondents oppose its confirmation. The provisional order granted by MUSHORE J, insofar as it relates to the *exparte* relief reads as follows:

> "….Pending the return day
> IT IS HEREBY ORDERED THAT:
> 1. The 1st, 2nd and 3rd Respondents or the person on whom service of this order is effected is hereby ordered to allow the Applicant's Representatives namely (Nyasha Muzavazi and Ignatius Mutahwarira), the Applicant's legal practitioners namely Ms Estere Chimombe together with Mr Clement Kwirira and Mr Absolom Muchandiona (The supervising attorney) with the assistance of the Sheriff of this Honourable Court, Mr Madega or his lawful deputy to immediately enter the following premises namely, No. 79 Livingstone Avenue, Harare and No.2 Mutare Road, Msasa, Harare and at No. 79 Livingstone Avenue, Harare and No. 20 Northen Close, Northridge, Borrowdale, Harare and No. 1906 Borrowdale Road, Borrowdale, Harare together with any facilities and/or vehicles on such premises for the purposes of searching for and delivering into the possession of the Sheriff all of the documents and articles which are listed hereunder relating to Respondents' broadcasting and television operations carried out in Zimbabwe during the period extending from 19th August 2017 to 30th May 2018:-
>   (i) Statements of receipts for Kwese TV through Ecocash Biller Codes for Kwese TV from Ecocash platform for the period extending from 19th August 2017 to 30th May 2018, or reports from Econet Shops and reports by the 3rd Respondent.
>   (ii) Kwese TV subscriber management system or register or such documents for period extending from 19th August 2017 to 30th May 2018 or reports by the 3rd Respondent on Kwese Management subscriber system for the same period.
>
> 2. The 1st and 2nd Respondents or the person on whom service of this order is effected, is further ordered to permit the persons listed in paragraph (1) above to remain on the premises until the search has been completed and if necessary, re-enter the premises on the same or following day or the other day in order to complete the search.
> 3. The supervising attorney shall together with the Sheriff make a list of all items removed by the Sheriff in terms of the order. A copy of this list shall be handed by the supervising attorney to the Applicant's legal practitioners and to the Respondents or the person referred to in paragraphs 1,2 and 4 herein, if present and the copy shall be retained by the Sheriff.
> 4. In the event that any of the items listed in paragraph 1exist on/in computer readable format in servers or hard drives, the 1st, 2nd and 3rd Respondents or their nominated representative(s) is hereby ordered to forthwith provide the Sheriff with effective access to the computers and or servers, with all necessary passwords to enable them to be searched and cause the listed items to be printed out or copied electronically on hard drives, disks or flashes. A printout of these items is to be given to the Sheriff or his lawful deputy or be displayed on the computer screen so that it may be read and copied by him.
> 5. The listed items or copies thereof taken into the possession by the Sheriff pursuant to this order, shall be retained by him until the court orders otherwise. Save as provided hereinafter, no person shall be entitled to inspect any of the items taken into the possession of the Sheriff nor shall any copies be made of such items. Provided that pending the return day and for the sole purpose of satisfying himself that the inventory correctly reflects the items seized, the Respondents or their attorneys shall be entitled to inspect the items in the Sheriff's possession.
> 6. The Applicant is directed to institute an action against the Respondents in which the listed items are concerned within ten (ten) days of the date of this order and if the Applicants fail to so do without good cause being shown on the return day to have instituted such action

by that date the Sheriff shall be obliged to return all listed items immediately to the Respondents and in such event, the court in its discretion, shall make such order as it deems fit.

7. On the return day, there shall be placed before the court the report of the supervising attorney with proof that a copy thereof has been served on the Applicant's legal practitioners and on the Respondents (or its attorneys) and an affidavit of the Applicants' attorney that the said action has been instituted and if not the reason why this has not been done.
8. The provisions of paragraphs 1, 2 and 4 of this order shall only be carried in the presence and under the supervision of the supervising attorney and the Respondent shall be entitled at its own election during the process to have its representative(s) in attendance….."

BACKGROUND FACTS

The relief sought is easier fathomed from a detailed account of the facts germane to the dispute as gleaned from the papers before me. First respondent is a company incorporated under the laws of Mauritius. It is an affiliate of Econet Wireless Zimbabwe (EWZ), a duly registered Zimbabwean company with affiliates and/or subsidiaries registered in Zimbabwe. Second respondent is a subsidiary and /or affiliate of first respondent through whom first respondent executed part of its agreement with applicant by way of delegation and/or cession and/or assignment. Third respondent is an affiliate of first and second respondents and is responsible for running and managing the Kwese brand subscriber management system. On 15 August 2017, applicant, a holder of a broadcasting licence issued by the Broadcasting Authority of Zimbabwe (BAZ) and first respondent (also referred to in the agreement as Kwese) signed a Content Distribution Agreement (the CDA). In terms of *clause 4* of the agreement, applicant granted first respondent exclusive rights to market and distribute Kwese Services and channels via the Kwese Direct To Home (DTH) Platform, as well as deliver and distribute Kwese Services in Zimbabwe, riding on applicant's broadcasting license. The television channels were controlled by second respondent under the brand name Kwese.

In consideration for the carriage and broadcast of the Kwese TV Channel packages through applicant's broadcasting licence, applicant was entitled to 5% of subscription revenue in the first year of launch, 4% second year and 3% thereafter in respect of each active subscriber. Where revenues were derived from active subscribers, then the fee was to be *"less discounts, subsidies and refunds, that may be defined from time to time on all active DTH subscription customers only, and calculated with reference to those customers who are paid up for the current month at the end of the applicable month"*[2]. Active subscribers were defined

[2] Clause 1 (b) of Annexure 3 to the agreement page 46 of record of proceedings

as all authenticated subscribers who had paid their respective subscription during the applicable accounting period. In terms of *clause 10.3*, first respondent was entitled to set off any liability of applicant to first respondent or its affiliates, whether such liability is present or future, liquidated or not liquidated, and whether or not either liability arose under the agreement, any other agreement between the parties or otherwise. First respondent was also entitled to recoup all monies paid to BAZ on applicant's behalf in respect of arrear regulatory fees against any amount owed by first respondent to the applicant. Further, first respondent was required to deliver to applicant, a statement in respect of each accounting period within seven (7) days after the relevant accounting period. The statement was expected to contain information as agreed and specified for the accounting period in question. Any dispute in terms of the total subscriber fee in any accounting period and any month would be referred to arbitration in terms of *clause 34* of the CDA[3]. In terms of *clause 10.4*, fees were to be paid to applicant monthly in arrears within seven (7) days after receipt by first respondent of applicant's invoice, based on the statement provided for each relevant accounting period. For this purpose, first respondent was required to provide to applicant within seven (7) days after the end of each month a statement for the relevant accounting period setting out the fee. Applicant was expected to issue an invoice thereafter.

Applicant claims that respondents' Kwese TV channels were in terms of the CDA, broadcast from August 2017 to 30 May 2018 on carriage of applicant's broadcasting licence. During that period, second respondent's subscriber base allegedly grew exponentially, leaving applicant anticipating a concomitant increase in fees payable for the usage of its license. Applicant claims that at some point a director of second respondent, one Zachary Wazara came out in the media claiming that the subscriber base as at September 2017 was 40 000. The statement was carried in the Newsday issue of 30 October 2017. Accordingly, based on that trend and at the rate 5% of subscriber fees, applicant asserts that it was entitled a fee of US$58 000.00 for September 2017 alone. Using the September 2017 subscription figure as disclosed by Wazara, applicant raised an invoice for US$58 000.00 for that month. It was not paid. On 8 November 2017, applicant wrote to second respondent requesting the rendering of statements for the period 19 August 2017 to 8 November 2017 in terms of *clause 10.4* of the CDA. The requested statements were not rendered. This prompted applicant to raise invoices for October to December 2017 based on estimates. The estimates were as follows. October US$127,600.00,

[3] Clause 10.4 of the agreement on page 31 of record

November US$696,000.00 and December US$835,200.00. The cumulative total for the four months was US$1,716,800.00. The invoices were forwarded to first respondent. The amounts were not paid. Respondents allegedly continued to utilise applicant's broadcasting licence until May 2018 when second respondent was issued its own licence. Applicant claims it received no payment for the period August 2017 to May 2018.

Meanwhile, on 29 November 2018, second respondent instituted proceedings against applicant in this court under HC11018/18 for the recovery of a US$634,400.00 debt. The debt arose from a loan advanced to applicant in terms of a shareholders loan agreement (the loan agreement) between the two parties. In terms of that loan agreement signed on 17 August 2017, second respondent advanced to applicant US$634,400.00, being US$584,400.00 for payment of applicant's Content Distribution service licence with BAZ, and US$50,000.00, as working capital. The loan repayment obligation was tied to the CDA. In terms of *clause 6* of the loan agreement, applicant was to repay the loan *"by means of 60 equal instalments of US$12,195.00 on or before the second business day of each month as provided in the Amortisation Schedule attached hereto as Annexure 1 provided that each monthly repayment shall not amount to more than 60% (sixty percent) of Dr Dish's revenue derived from the Content Distribution Agreement in the same month"*[4]. To enable applicant to discharge its obligations under the loan agreement, there was need for first respondent to reciprocate by complying with *clause 10* of the CDA. *Clause 10* required it to deliver a statement in respect of each accounting period to allow for computation of the subscriber fee due and payable for the particular accounting period. Applicant claims that third respondent as administrator of first and second respondents' subscriber management system also had the required information. It was the repository so to speak. That explains its joinder in this lawsuit.

It is against this background of mistrust, deceit and the alleged refusal by respondents to deliver the requested information that applicant harboured a serious apprehension that service of the application for Anton Piller on respondents would likely incite perverse conduct by them. The relevant information required by applicant, whether manual or electronic could be moved or hidden making it impossible for applicant to ascertain the correct amount due under the CDA. The only way to avert the likely perverse conduct was to approach the court for an Anton Piller order on an *ex parte* basis. Neither part would be prejudiced. The information would be under the custody of the Sheriff pending confirmation or discharge of

[4] Refer to clauses 6.1 and 6.2 of the loan agreement on page 60 of the record.

the provisional order. Applicant believes that second respondent's claim pales into insignificance when compared to what applicant was owed under the CDA. Applicant claims set off against second respondent for fees due under the CDA, meriting the filing of a counterclaim under HC11018/18. Such counterclaim can only be filed if respondents avail the relevant documents and information to enable applicant to determine what it is owed. The two competing claims can be decided simultaneously. To achieve that, applicant requires access to respondents' monthly management accounts for the period 19 August 2017 to 30 May 2018; bank statements for the respondents for the same period; statement of receipts for Kwese TV through Ecocash Biller codes and access to Kwese TV subscriber management system. Also required are passwords to allow for access into the respondents' computers.

In its opposing affidavit, first respondent raises the following *in limine*: deliberate failure by applicant to disclose material facts and absence of a cause of action. I shall deal with these latter on in the judgment. The gist of first respondent's opposition on the merits is that applicant failed to satisfy the requirements for the granting of Anton Piller *exparte*. First respondent sets out the factual matrix as follows. Following the signing of the CDA on 15 August 2017, applicant's licence was revoked by BAZ through a letter of 22 August 2017. I reproduce hereunder the contents of the letter:

> "RE CANCELLATION OF LICENCE No. CD/0004
> We refer to your letter of 16 October 2016, in response to our notice of intention to cancel your Content Distribution licence for MY TV AFRICA Service, dated 12 October 2016.
> We have observed from your submissions, particularly in paragraph 3 of your response of 16 October 2016 that the MY TV Africa Service can no longer be provided in Zimbabwe, due to loss of Content rights by your Partners for the Zimbabwe territory. As you are aware your licence issued on 18 October 2012, was in respect of the provision of the MY TV AFRICA Service (See Clause 1 of Part B of your licence conditions).
> As such and for reasons you acknowledged in your letter mentioned above, the licence can no longer be upheld, as Dr Dish (Pvt) Ltd has ceased to provide the MY TV Africa Service specified in the licence. Therefore in accordance with section 16(1d) of the Broadcasting Services Act [Chapter 12:06], the Authority hereby, effective date of this letter, cancels licence No. CD 0004 for the provision of a Content Distribution Service for the MY TV Africa Service……" (Underlining for emphasis)

The agreement between the parties was premised on applicant holding a valid licence with BAZ. Accordingly, applicant stands accused of violating clause 3 of the agreement.[5] In

[5] Conditions precedent clause on page 26 of the record. It provides as follows:
3.1 The obligations of the parties under the Agreement are conditional upon the satisfaction of the following:
(a) all notifications, consents and approvals of and to BAZ or any Relevant Regulator that are required to permit the sale and delivery of the Kwese Services in the Territory in the manner envisaged by this Agreement having been obtained either unconditionally or subject to such conditions, obligations, undertakings or modifications as shall be acceptable to Kwese;
(b) …….

fact, as at the time of signing the CDA, applicant had not been granted BAZ approval for the variation of the content provider from My TV Africa to first respondent. That the applicant did not have a valid licence as contemplated by the CDA was confirmed by the Supreme Court in SC 62/18[6]. I shall revert to this judgment latter. Respondents contend that applicant cannot expect to receive a fee from an agreement that it breached. Be that as it may, applicant was only entitled to 5% of the net subscription revenue (subscriptions less, subsidy, discounts and commissions), and not 5% of the gross revenue. Respondents further assert that save for ten days in November 2017, services rendered by first respondent were for free partly as a sales gimmick and partly as a result of the litigation between applicant and BAZ. Litigation seriously compromised service provision.

On 8 November 2017, applicant wrote to first respondent requesting a statement of account in terms of *Clause* 10.4 of the CDA for the period 19 August to 8 November 2017. On 10 November 2017, first respondent wrote to applicant through its General Manager Dorothy Zimuto terminating the CDA. The letter reads as follows:

> "….NOTICE OF TERMINATION OF THE CONTENT DISTRIBUTION AGREEMENT SIGND BETWEEN ECONET MEDIA LIMITED AND DR. DISH (PVT) LIMITED DATED 15 AUGUST 2017
>
> This letter serves as notice that:
>
> 1. Econet Media Limited has decided to terminate the Content Distribution Agreement, as well as all related transaction documents signed between Dr. Dish (Pvt) Ltd and Econet Media Limited and EKTV pursuant to the Content Distribution Agreement. The termination is with immediate effect. The reason for the termination are as follows:
>   1.1 Failure by Dr. Dish to fulfil the provisions of Clause 3.1 (a) of the Content Distribution Agreement. The continued litigation between the BAZ and Dr. Dish has created significant uncertainty for both Kwese and its customers, and has long term negative impact on the Kwese Brand.
>   1.2 We consider the refusal and/or failure by Dr. Dish to return the USD300,000 license fees returned by the BAZ to be an event of default in terms of clause 8 of the Loan Agreement. Furthermore, it is a violation of Clause 3.2 (c) of the same Loan Agreement which clearly specifies that the loan the loan must be used for the purpose for which the loan was extended. It is now more than 14days since a request was made to you by Econet to cure this breach by returning the funds, and your letters to us refusing to return the money confirm our concerns.
>   1.3 We have been furnished with the messages which you sent via WhatsApp threatening to take "Econet head on" and that "the battle array was now on". Whilst we do not understand the origins or basis of these threats, our Group has taken the threats as being very serious, and of a nature which makes it impossible for the existing agreements to be continued beyond today.
>   **1.4 During the process of the current legal dispute between Dr. Dish and the BAZ, we have become increasingly uncomfortable at the fact that certain fundamental information was not disclosed to Econet, and only became known through the**

3.2 The conditions set out in 3.1 above shall be satisfied as soon as possible after the date of this Agreement and in any event no later than 30 August 2017.

[6] *Broadcasting Authority of Zimbabwe and Ano v Dr Dish*

courts, in violation of representations and warranties made by Dr. Dish in Clause 14 of the Content Distribution Agreement.

2. Consequently, please be advised that in terms of Clause 8.2 of the Loan Agreement, the loan extended to Dr. Dish is now cancelled forthwith, and all amounts disbursed under the agreements are immediately due.
3. We will be informing the BAZ of this development……"

The letter was on an Econet Media Zimbabwe (Pty) Ltd (Econet Media Zimbabwe) letterhead. It was copied to BAZ. On the same day, Zachary Wazara also wrote to applicant's Chief Executive Officer Nyasha Muzavazi, advising of his resignation from applicant's Board with immediate effect. He cited threats of significant unspecified action made against Econet by Muzavazi as his reason for resigning. Applicant responded to first respondent's termination letter on 28 November 2017. The letter reads:

"….NOTICE OF TERMINATION OF THE CONTENT DISTRIBUTION AGREEMENT SIGNED BETWEEN ECONET MEDIA LIMITED AND DR. DISH (PRIVATE) LIMITED DATED 15 AUGUST 2017

We refer to your letter dated 10 November 2017 received on the 13th of November 2017.

In your letter aforementioned you have purported to cancel the content distribution agreement and "*all related transaction documents"* between the parties on account of four (4) issues raised therein. What is particularly surprising about your purported termination is that it has come without any "*notice"* whatsoever from yourselves indicating any grievances against Dr. Dish (Pvt) as contemplated by all the agreements, bringing into question its *bona fides*. This is made all the more questionable by its timing seeing that it comes soon after we had formally requested for Econet Media Limited to account for the revenue generated thus far.

A reading of your purported termination does not disclose any basis for termination in terms of the agreement. Instead, it only demonstrates that from the onset you were not *bona fide* in seeing the partnership through and given it also follows failed attempts for a takeover of Dr. Dish (Pvt) it becomes apparent other motives are at play. Our agreement with yourselves was clear; summary termination could only follow after failure to rectify an alleged breach duly notified, followed by a failed negotiation process. No notice was ever issued and neither did you request for any negotiation to resolve any perceived grievances. Had it been that you had procured your own licence we would have expected a summary termination as same is clearly agreed to, unless as indicated by your Mr. Wazara to me in previous conversations you have procured *"enabling instruments"* to enable you to operate without a licence something not contemplated by our agreement. In any event, why is termination coming from Econet Media Zimbabwe when same is not a party to the agreement.

We shall ordinarily pursue our remedies as contemplated by the content distribution agreement and fully reserve our rights….." (Underlining for emphasis).

On 12 December 2017, applicant wrote to first respondent asking for a meeting. Key excerpts from the letter read as follows:

"RE: NOTICE FOR NEGOTIATION MEETING
……..

> We refer to your letter cancelling the content distribution agreement and all the related agreements dated 10 November 2017.
> In accordance with Clause 33.4 of the content distribution agreement we hereby formally request a negotiation meeting for the resolution of whatever grievances you may have under the agreement. If you feel the requested meeting will not yield any meaningful results we suggest parties agree to waive the negotiation requirement to enable parties **to expeditiously resolve the current impasse through arbitration as contemplated by the agreement…….." (Underlining for emphasis)**

First respondent responded to the request for a meeting on 13 December 2017. The letter reads:

> "REF: YOUR REQUEST FOR A NEGOTIATION MEETING BETWEEN ECONET MEDIA AND DR.DISH
>
> We refer to your letter dated 12 December 2017 in which you request for "a negotiation meeting for the resolution of whatever grievances" we may have under the terminated Content Distribution Agreement.
> **Our letter to you of 10 November 2017 very clearly articulates the reasons why our Group terminated the Agreement. Since that date (which is almost five weeks ago), you did not indicate at any stage that you refuted the termination, nor did you dispute the termination. On the contrary, your conduct to date has been consistent with a decision by you to accept the termination of the Agreement.**
> We are therefore at a loss as to what issues and/or grievances you would like us to meet and discuss with you."
> ……..(Underlining for emphasis)

Apparently the letter yielded no response.

On 5 January 2018, first respondent delivered a statement to applicant showing what was due by first respondent to applicant. The letter accompanying the statement reads:

> **"…RE: RECEIPT OF INVOICES PURPORTING TO BE CLAIMS FOR COMMISSIONS FROM ECONET MEDIA**
> 1. We make reference to four invoices received from yourselves on the 3rd of January 2018 purporting to be claims for commissions earned by Dr. Dish from Econet Media. We have also been advised by Econet Media Limited that they are also in receipt of the same invoices. As the exclusive managers of the Kwese Subscriber Management Services in Zimbabwe, this letter serves as a response on our own behalf and that of Econet Medial Limited.
> 2. It is important that we re-emphasise that Econet Media stopped operating under the Dr. Dish Content Distribution License with effect from 10 November 2017 when Econet Media terminated the Content Distribution Agreement and all related agreements with Dr. Dish, citing some very serious concerns with the relationship. It is common cause that Dr. Dish has long confirmed its acceptance of the termination as evidenced by its conduct since the termination, including representations through various advertising and press reports and the (re)introduction of BossTV.
> 3. The terminated Content Distribution Agreement between Econet Media and Dr Dish is quite clear on how the carriage fees payable to Dr Dish are computed: 5% of *subscription revenue* is payable to Dr. Dish. For the avoidance of doubt, subscription revenue is that revenue collected when customers pay their Kwese subscription fees. Accordingly, any amounts that may be owing to Dr Dish in respect of the terminated agreements would be calculated on the basis of the terms of the agreements, and can only be up to the 10th of November 2017.

4. Based on the computation of subscription revenue as detailed on the Content Distribution Agreement, please find attached a reconciliation detailing the amount due to Dr Dish from the effective date of the Content Distribution Agreement up until the 10th of November 2017 when the same was terminated. As you are aware, subscription revenue did not accrue for the first three months, since the Kwese service was being offered for free as a result of the litigation between Dr Dish and the Broadcasting Authority of Zimbabwe.
5. We are proceeding to make the payment of USD8.06 (United States Eight Dollars and five cents) as per the attached reconciliation.
6. Please be guided accordingly……" (Underlining for emphasis)

The amounts due to applicant under the CDA were set off against the loan amount due by applicant to first respondent. This position was communicated in first respondent's letter of 15 January 2018 to applicant. For good measure and completeness, I reproduce the letter hereunder:

"SHAREHOLDER AGREEMENT

1. Reference is made to the above agreement which was signed on the 17th August 2017 between Dr Dish (Private) Limited and Econet Kwese Television (Private) Limited. In terms thereof, Econet Kwese Television advanced certain monies to Dr Dish, which monies were supposed to be used for a specific purpose: the payment of Dr Dish license obligations to the Broadcasting Authority of Zimbabwe (BAZ) the government regulator overseeing the operations of broadcasting services in Zimbabwe.
2. In accordance with the Shareholder Loan Agreement, Econet Kwese Television advanced to Dr Dish an amount of USD584,400 for the payment of its (Dr Dish) license obligations as well as USD50,000 to be used for working capital requirements.
3. Subsequent to the advance of these amounts, Dr Dish advised Econet Kwese Television by way of a letter dated 11 October 2017, that the Broadcasting Authority of Zimbabwe had refunded USD300,000 on the basis that the same was not due as they believed that they could not accept the money before the matter in which their cancellation of the Dr Dish content and Distribution License was still being challenged in the courts.
4. It followed then that the money refunded to Dr Dish had not been used for the purpose it was advanced and in the circumstances, Econet Kwese Television proceeded to recall the said amount of USD300,000 from Dr Dish, by way of conversations and email correspondences on 20th October 2017. Dr Dish has hitherto ignored refused or neglected to act upon the request.
5. Econet Kwese Television believes, this refusal by Dr Dish to act on the request amounts to a material event of default entitling Econet Kwese Television to cancel its commitment to avail the loan as per the Shareholders Loan Agreement and immediately call upon all amounts advanced to Dr Dish, to date.
6. We are aware that Econet Media Limited has since terminated the Content Distribution Agreement signed on the 15th of August 2017. As you are aware, the repayment of the monies advanced to Dr Dish are based on the Content Distribution Agreement entered into between Dr Dish and Econet Media Limited. The cancellation of the Content Distribution Agreement therefore does not guarantee the capacity of Dr Dish to repay the loan amount as per the amortisation schedule.
7. In the circumstances and for the avoidance of doubt, Econet Kwese Television hereby cancels its commitment to advance any further monies to Dr Dish being USD634,400 together with interest at the rate of 10% per annum pursuant to the agreement, immediately.
8. This notwithstanding, Econet Kwese Television shall deduct the following amounts from the amounts advanced to Dr Dish:
    a. USD50,036.66 being the balance outstanding on the purchase price of the Sale of Shares as per the Sale of Shares Agreement dated 17th August 2017.

b. USD8.05 being fees payable to Dr Dish in terms of the Content Distribution Agreement dated 15th August 2017, Econet Kwese Television can confirm that Econet Media Limited is agreeable to this arrangement and the same is in line with the provisions of the Content Distribution Agreement.

9. Failure by Dr Dish to make payment of USD584,355.29 being monies due to EKTV after the deductions referred to in 8 above and interest thereon, will leave Econet Kwese Television no option but to institute legal proceedings against Dr Dish for the repayment of the same without any further notice to Dr Dish……..” (Underlying for emphasis)

The letter reaffirmed the cancellation of the CDA; communicated what was due to applicant by way of outstanding fees and demanded payment of what was due by applicant to second respondent under the loan agreement. The contents of this letter were not refuted by applicant. The successful implementation of the CDA was subject to applicant fulfilling the conditions precedent stated in clause 3.1 of the CDA. These were not fulfilled. Respondents contend that the failure by applicant to disclose the letters of 5 and 15 January 2018 is duplicitous. Payment was preceded by certain reconciliations to determine the fee due to applicant. Further, subscriptions were also intended for procurement of hardware and such payments were not part of the CDA. Respondents argue that the claim by applicant for US$1,716,800.00 has no commercial basis. For applicant to earn such fee, first respondent needs to have realised US$34,336,000.00 from subscriptions alone, suggesting a growth of 343,360 in customers. This translates to installations of satellite systems in homes at the rate of 11,445 per day over a 60day period. Respondents contend that such a feat is not achievable under whatever circumstances.

Respondents deny deriving any benefit from applicant’s broadcasting license until May 2018. They contend that applicant’s letter of 7 February 2018 to BAZ confirms that no agreement existed between the parties as at that date. That letter, from applicant’s erstwhile lawyers **MUSHORIWA!PASI**, reads as follows:

> “RE: FORMAL OBJECTION IN TERMS OF SECTION 10(4) OF THE BROADCASTING SERVICES ACT [12:06] TO THE INVITATION FOR LICENSES AND THE APPLICATIONS BY ECONET MEDIA (PRIVATE) LIMITED FOR BROADCASTING SERVICES LICENSES
> We write to you on the instructions of our client, Dr Dish (Private) Limited.
> Our instructions are that on or about 21st January 2018, you issued notices in local newspapers inviting members of the public to apply for various classes of broadcasting services licenses.
> ……
> ……
> More specifically, our instructions are that Econet Media (Private) Limited has, subsequent to your notice, published several notices informing the public that they have applied for Broadcasting Service licenses in respect of the following classes:
> i) Content distribution service;
> ii) Web casting service

iii) Video on demand service

Whilst the Authority has an appointed Chief Executive Officer, he cannot arrogate to himself the powers of the Board and neither can the Minister administering the Act also purport to do so in the absence of the Board. The law is very clear on this point. Whereas the Chief Executive Officer of the Authority is an *ex officio* member of the Board, he cannot act without the sanction and authority of a duly constituted Board. In the circumstances, all the processes for the licensing of Econet Medial Limited and any other applicant, thus far carried out by the Chief Executive Officer and the management are illegal and therefore *ab initio* void. Not even the Board, in the event that it is appointed today, can purport to ratify such an illegality, for one cannot ratify or condone a breach of clear provisions of a statute.

…….

A further issue relates to the legal status and corporate structure of Econet Media Limited, Registration number 681/2016. Upon a perusal of the documents lodged by Econet Media Limited with the Registrar of Companies as at the date of Application, Econet Media Limited is disqualified to be licensed on account of its securities being owned 98%by a foreign entity called Econet Media Limited of Mauritius. (See section (8) subsection (1) and subsection (2)). Further, the Act specifically disqualifies or bars the licensing of subsidiary entities and given that 98% of Econet Media Limited's issued shares are held by a Mauritian company, it is therefore contravening section (8)(4)(b) of the Broadcasting Services Act [Chapter 12:06]. Whilst the Act provides for the discretion of the Minister to permit the issuance of a License to a body corporate whose controlling interest is held by persons who are not citizens of Zimbabwe, such discretion must be exercised reasonably, lawfully and impartially.

In this case, Econet Media Limited has been operating outside the law since it does not have a license. Reference is made in this regard to the fact that there is no existing operating agreement between our client and Econet Media Limited (Mauritius) and/or its affiliates. We therefor wish to emphasise that the continued broadcasting of services by Kwese TV is, in fact illegal. Consequently, in the absence of our client's license, Kwese TV does not possess the requisite authority to broadcast any services and is contravention of section 7 of the Act.

……
……..

We hereby formally lodge an objection, on our client's behalf, to the aforementioned applications lodged by Econet Media (Private) Limited……..." **(Underlining for emphasis)**

By virtue of this letter, respondents contend that applicant knew it did not have a valid license from the onset. It lied about this fact, thereby exposing respondents to serious financial prejudice. It was absurd for applicant to assert that respondents benefited from a license that did not exist at the outset. Applicant cannot claim to have rendered performance on the basis of a license that it did not have.

With respect to the claim arising from the loan agreement, respondents submitted that misrepresentations by applicant concerning the validity of its license constituted an event of default under clause 8.1[7] of that agreement. The loan agreement was consummated in order to

[7] "8 Events of Default and Default
8.1 Each of the events or circumstances set out below is an Event of Default:
(i) Dr Dish does not pay on the due date any amount payable pursuant to this Agreement at the place and in the currency in which it is expressed to be payable unless payment is made within (three) Business Days of its due date;

give applicant the financial leverage it needed to operationalize the CDA. It could not expect to benefit from clause 6 of the same agreement it violated through misrepresentations.

Respondents further contend that the Kwese Subscriber Management System belongs to first respondent, with whom applicant signed the CDA. Third respondent has limited access to first respondent's information systems which reside in remote servers outside Zimbabwe. In any case, the fear of perverse conduct on the part of applicant is farfetched. Respondents cannot not destroy information that they are legally obliged to keep. Respondents aver that through its letter of 12 December 2017, applicant instigated the negotiation route as a step towards arbitration in terms of *clause* 33.4 of the CDA. If fear of perverse conduct was well grounded, then this application ought to have been made at that stage. As at 5 January 2018, applicant had been informed not only of the liquidated amount due to it, but the basis upon which it was computed. It did not challenge the computations. It was cajoled into action by second respondent's claim under HC 11018/18.

In reply, the applicant raised a preliminary point. It contends that following the granting of the provisional order and its service, respondents filed a notice and grounds of appeal against the provisional order under SC 92/19 on 25 February 2019. Respondents proceeded to file their notice of opposition to the present application on 8 March 2019. The court was thus constrained from hearing this matter when the appeal was pending. The appeal was only withdrawn on 1 April 2019. For this reason, applicant argued that there is no valid opposition before the court. The application should be treated as unopposed. The objection will be dealt with together with respondents' objections latter in the judgment.

Applicant contends that not all facts require disclosure in an application of this nature. An applicant is obliged to disclose material or relevant facts, which applicant submits it did. First respondent's letter of 5 January 2018 was not disclosed because it is not relevant to applicant's cause of action against respondents. Following first respondent's letter of 5 January 2018, the parties further engaged. At one of point Zachary Wazara, allegedly offered to buy Nyasha Muzavazi's stake in the applicant for US$2,000,000.00. The offer was turned down. In any case, the schedule attached to first respondent's letter of 5 January 2018 showing 38 subscribers is not authentic. Subscribers were well in excess of 38. This was confirmed by Zachary Wazara's media utterances suggesting September 2017 alone had about 40 000

…….

(iii) any representation or statement made or deemed to be made by Dr Dish in this Agreement or any other document delivered by or on behalf of Dr Dish under or in connection with this Agreement is or proves to have been incorrect or misleading in any material respect when made or deemed to be made"

subscribers. There is no way the number of subscribers would drop from 40 000 to 38 in a month. Applicant submitted that the 5 January 2018 letter only helped to prove respondents' mischievousness, and their propensity to mislead and hide information. Placing that letter before the court would not have changed the court's position.

Applicant also contends that respondents failed to provide applicant with monthly statements as required by clause 10 of the CDA. Demands for the information were ignored. Applicant submits that its letter of 8 November 2017 showed the source of its claim as the CDA. The letter required first respondent to render statements to allow for computation of applicant's fees. In that respect, applicant submits that its claim was known long before second respondent issued summons against it. Applicant further avers that the information furnished by first respondent in response to applicant's letter of 8 November 2017 is the doctored information communicated through first respondent's letter of 5 January 2018. To substantiate on the level of respondents' disingenuity, applicant drew the court's attention to the following events. Third respondent resisted service and execution of the provisional order by the Sheriff, prompting the Sheriff to make a police report. While the Sheriff was enforcing the provisional order, respondents were busy making modifications to their shareholding structure at the company registry. The shareholding of EWZ in Econet Media Zimbabwe was altered from 51% to 45%. Prior to the conclusion of the CDA, applicant and Econet Media (Private) Limited had on 16 August 2016 concluded what they termed "heads of agreement". This agreement was between applicant and Econet Media (Private) Limited, a Zimbabwean company. According to applicant, the CDA was supposed to be concluded between applicant and Econet Media (Private) Limited. There is no entity registered as Econet Media Zimbabwe. The registered entity is Econet Media (Private) Limited, a subsidiary of EWZ. In its documents, including its annual report for the year 2018, EWZ referred to Econet Media Zimbabwe, a non-existent entity.

Applicant doubts the existence of first respondent and its Mauritian connection. It asserts so because although all invoices and correspondence were addressed to first respondent, responses were always coming from the Zimbabwean company, *to wit*, Econet Media Zimbabwe. Applicant maintains that there are two separate legal entities namely Econet Media Limited (first respondent), whose directors are presumably the same as those of EWZ and Econet Media (Private) Limited registered in Zimbabwe under registration Number 681/16. Its directors are Zachary Mahara Tapfumanei Wazara and Tawanda Nyambirai. EWZ claims it held a 45% stake in Econet Media (Private) Limited, while the balance is held by Ebenezer

Trust and Dominic Musengi. At the time of registration, the shareholding in Econet Media (Private) Limited was such that EWZ held 2 shares while first respondent held 98 shares. It remained a mystery how Ebenezer Trust and Dominic Musengi ended up shareholders in Econet Media (Private) Limited. Transactions giving rise to these changes were apparently not disclosed to the investing public and shareholders.

Applicant further claims that in its abridged circular to shareholders in 2018, EWZ claimed that it held 51% shareholding in Econet Media (Private) Limited before the proposed transaction, and that it would continue to hold the 51% after the transaction. In the circular published at the time, EWZ claimed it held 45% shareholding in Econet Media (Private) Limited before the proposed transaction and that it would continue to hold 45% shareholding post the transaction. Applicant submits that because of these inconsistencies, first respondent and its sister companies had a propensity to present false and misleading information. It also claims that the relationship between the Econet Wireless Group, Econet Media (Mauritius) and Econet Media Zimbabwe is confusing and misleading. In its annual reports, Econet Wireless Group does not say anything about its relationship with first respondent. While respondents used the letterhead for Econet Media Zimbabwe, the correct legal name of the subsidiary is Econet Media (Pvt) Limited wherein first respondent at all material times held 49%, with EWZ holding 51%. In its 2018 annual report EWZ reported that it generated $225 198 000 from mobile money, TV Subscriptions, life premiums and connected car. The only entity that earned the group TV Subscriptions is Econet Media (Private) Limited through its agreement with applicant. In light of these observations, applicant contends that the argument that it ought to have instituted these proceedings in 2017 is baseless. In any case there is no prescriptive period in matters of this nature.

Applicant further asserts that the outcome of SC 62/18 irrelevant. The disclosure of that judgment would not have made any difference. It would not have influenced the outcome of the *ex parte* application for Anton Piller. In any event, applicant contends, respondents continued to ride on applicant's broadcasting license even before the delivery of the Supreme Court judgment. They only stopped doing so when they secured their own broadcasting license in May 2018. During the pendency of the Supreme Court appeal, applicant was protected by the HUNGWE J judgment, which authorised the continued use of the license. The application for execution pending appeal was handled by respondents' lawyers of record who at the time represented the applicant. They were aware of the legal ramifications of the execution pending

appeal. First respondent's position under the CDA was secure. The same lawyers could not turn tables against their former client to allow respondents to escape liability.

Applicant denies that for the first two months of September and October 2017, no net revenue was generated as suggested by respondents. Applicant claims that on subscription, the amount payable included both subscription and costs of hardware, although for marketing purposes subscribers were made to believe subscription was free for the first month. Applicant avers that there was no free viewership for subscribers, and if ever there was, it had nothing to do with applicant since this was never agreed upon. Respondents could not push their marketing costs to applicant. All costs pertaining to hardware and installations were for first respondent's account in terms of clause 4.7[8] of the CDA. In the premises, the argument that subscribers paid for hardware and no revenue was accrued in the first month was false and calculated to mislead the court. Applicant attached a supporting affidavit from one Moses Meki, an installer with second respondent. He claimed to have made installations to not less than 43 Kwese TV Subscribers in October 2017 alone. All these installations were for paid up subscribers whose details he immediately submitted to Econet's subsidiary, Cumii Zimbabwe, also known as Cassava Smartech, for activation. The 43 names he attached to the supporting affidavit were all captured in the Kwese TV Subscriber Management System for October 2017. This was done through a special Mobile Application which was linked to the Kwese TV Subscriber Management System that he used during his Kwese TV installations.

Applicant claims it intended to pursue arbitration proceedings against first respondent, but decided against it. This was after it discovered that first respondent continued to use its license notwithstanding the purported termination of the CDA. The purported cancellation was not effectual. First respondent could not abrogate from its responsibilities, while at the same time enjoying the fruits of applicant's license. Applicant claims to have investigated respondents' corporate structure and established that first respondent was a mere sham vehicle used to contract with applicant yet it was a non-existent entity. Applicant submits that the court is not being asked to make a determination of the validity of the cancellation of the CDA. The issues for determination should be confined to the requirements of an Anton Piller order. Be that as it may, at the time of signing the CDA, the parties were satisfied that conditions

[8] Clause 4.7 provides as follows:
"Kwese or its Affiliates shall be responsible for all costs associated with the provision of a Satellite Network for the Kwese DTH Platform in the Territory including but not limited to uplink and downlink of Channel feeds, Set Top Boxes, applicable infrastructure, hardware, software, the appointment of personnel and all legal and regulatory requirements"

precedent had been fulfilled. The alleged non-disclosure of respondents' letter of 15 January 2018 to applicant was immaterial, as the letter was essentially a demand for a loan repayment. It preceded the second respondent's claim under HC11018/18 which applicant defended. The alleged threats against respondents' officials were merely a hint of applicant's desire to seek justice from the courts. They were actuated by respondents' refusal to allow applicant access to their subscriber management system, which was necessary for the determination of revenue due to applicant.

Applicant denies making misrepresentations concerning the validity of its license. The challenges which it encountered were disclosed to respondents. These include non-payment of license fees, which prompted second respondent to advance a loan to applicant. The substitution of the content provider was discussed with respondents. Respondents' lawyers rendered a legal opinion, which culminated in them representing applicant in its legal battles with BAZ.

The records that applicant sought through the provisional order were in the custody of third respondent, and these were recovered upon enforcement of the provisional order. Applicant claims that these reveal the subscriber management system and the subscriptions paid for the relevant period. Applicant avers that its failure to institute proceedings in January 2018 is no barrier for their institution in 2019. It needed to put information together. It satisfied the requirements for an Anton Piller order. It made a compelling case for the confirmation of the provisional order.

PRELIMINARY OBJECTIONS

At the inception of oral addresses counsel agreed to the disposal of both preliminaries and the merits. Respondents took exception with the deliberate failure by applicant to disclose material facts and the absence of a cause of action. Applicant objected to the filing a notice of opposition during the pendency of an appeal to the Supreme Court. Applicant did not address the issue in its heads of argument and neither was it pursued in counsel's oral address. *Mr Nyamakura* did not address it either. I considered the point abandoned. I now turn to the respondents objections.

Deliberate failure by applicant to disclose relevant facts

Respondents argue that applicant deliberately avoided making full and honest disclosure of material facts. It betrayed the trust reposed in an applicant in *ex parte* proceedings. The law demands utmost good faith from a party seeking relief *ex parte*. The court is being petitioned to grant the relief sought without hearing the other party. Had applicant made full

disclosure, then the Court would not have granted the interim relief sought. The non-disclosed material was fatal to the application. Mr *Nyamakura* referred to the following key matters whose disclosure would have immobilised the application in its infancy: failure to disclose that the CDA terminated on 10 November 2017; non-disclosure of the letter of 5 January 2018 from first respondent to applicant; and the non-disclosure of the Supreme Court judgment in the lawsuit between applicant and BAZ. Further, new matters raised in the answering affidavit and the inconceivably voluminous annexures, showed applicant had realised the folly of its diffidence, *albeit* belatedly. Having exercised my mind on these preliminaries, I am convinced they are inextricably tied to the merits of the matter. They are at the heart of Anton Piller. The requirements for Anton Piller were ably set out by MUSHORE J in her judgment granting the provisional order[9]. I find it inopportune to consider the preliminaries in isolation of the merits of the matter. Further, the legal considerations arising from the dispute between the parties justify the deferral of the preliminaries to the merits of the matter.

THE LAW AND THE ARGUMENTS

Anton Piller's journey has not been a rosy one. It was welcomed with trepidation and serious misgivings when it announced its arrival in the South African legal jurisprudence. It prompted VAN DIJKHORST J to remark:

> "…We have to decide whether to prune the vigorous growth of this alien shrub or to eradicate it as a noxious weed"[10]

That Anton Piller is firmly established in Zimbabwean law is beyond debate[11]. Lord DENNING initially set out the test for Anton Piller as follows:

> "It seems to me that such an order can be made by a judge *ex parte*, but it should only be made where it is essential that the plaintiff should have inspection so that justice can be done between the parties; and when if the defendant were forewarned, there is a grave danger that vital evidence will be destroyed, that papers will be burnt or lost or hidden, or taken beyond the jurisdiction, and so the ends of justice be defeated; and when the inspection would do no real harm to the defendant or his case"[12]

In its foundational stages, Anton Piller was exclusively an *ex parte* procedure in intellectual property disputes. By the time most jurisdictions embraced it, its scope had been expanded to non-intellectual property disputes. According to authors *Herbstein & Van*

---

[9] *Dr Dish (Private) Limited v Econet Media Limited and 2 Others* HH 638/19. Page 5 of the judgment.
[10] In *Cerebos Food Corp v Diverse Foods* SA 1984 (4) SA (TPD) 149 at 163 C-D
[11] See Cooper v Leslie 2000 (1) ZLR 14 (H)
[12] At page 783 of the judgment

Winsen[13], Anton Piller first came for determination by the Appellate Division in *Universal City Sudios Inc* v *Network Vedio (Pty) Ltd*[14]. By way of *obiter dictum*, the court reasoned that it had the power in appropriate circumstances, including if necessary in camera, to grant an order *pendete lite* designed to preserve evidence in the possession of a respondent. CORBETT JA delivered the unanimous decision of the court. He 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 or things which constitute vital evidence in substantiation of the applicant's cause of action (but in respect of which the applicant can claim no real or personal right), and 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….and the applicant asks the Court to make an order designed to preserve the evidence in some way"[15]

Further, according to the authors:

> "In the *Universal Studios Inc* matter the Appellate Division made no decision with regard to the competence of the Court to grant orders for the disclosure of sources or for the production and handing over of things in order to render an interdict effective……
> Subsequently, in *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam; Maphanga v Officer Commanding, SA Police Murder & Robbery Unit, Pietermaritzburg*[16], the Appellate Division as part of the *ratio decidendi* of its decision, held that *Anton Piller* orders directed at the preservation of evidence may be granted, even where applied ex parte and in camera, if the requirements set out in the above quotation from *Universal City Studio* case are satisfied…."

South African courts appeared reluctant to take a definitive stance on Anton Piller even after the obiter dictum in the *Universal City Studios'* case. Still in *Jafta* v *Minister of Law and Order & Ors*[17], the Appellate Division did not take a decisive stand on whether Anton Piller was part of South African law. It took the Appellate Division almost five years to mark its seal of approval in *Shoba* v *Officer Commanding, Temporary Police Camp, Wagendrift Dam; Maphanga* v *Officer Commanding, SA Police Murder & Robbery Unit, Pietermaritzburg* (supra). CORBETT CJ who delivered the *obiter dictum* in the *Universal City Studio* case, elegantly articulated the court's position as follows:

> "At this point, it is necessary to give a decision in regard to what was left open in both *Universal City Studios'* case *supra* and *Jafta's* case *supra*, viz whether an Anton Piller order directed at the preservation of evidence should be accepted as part of our practice. In my view, it should; and I would define what an applicant for such an order, obtained *in camera* and without notice to the respondent, must *prima facie* establish, as the following:
> (1) that he, the applicant, has a cause of action against the respondent which he intends to pursue;

[13] The Civil Practice of the High Courts of South Africa, Fifth Edition, Vol 2 at page 1498
[14] 1986 (2) SA 734 (A)
[15] At page 755A-C of the judgment
[16] 1995 (4) SA 1 (A) at 15F-J, 21F-H
[17] 1991 (2) SA 286 (A)

(2) that the respondent has in its possession specific (and specified) documents or things which constitute vital evidence in substantiation of the applicant's cause of action (but in respect of which the applicant cannot claim a real or personal right); and
(3) that there is a real and well founded apprehension that this evidence may be hidden or destroyed or in some manner be spirited away by the time the case comes to trial or to the stage of discovery."

In this latter judgment, the Appellate Division granted an order allowing access to a police station for purposes of identifying and preserving evidence of torture.

The Zimbabwean legal jurisprudence was characterised by a dearth of case law authority on the subject until *Cooper* v *Leslie and Ors*[18]. In that case DEVITTIE J meticulously traced the development of Anton Piller from its native land, England, to its adopted country South Africa, and to the point it traversed the Limpopo into Zimbabwe[19]. He then remarked as follows:

> "In my judgment, an Anton Piller order directed at the preservation of evidence should be accepted as part of our law. The remedy may, if used indiscriminately, become an instrument of oppression, wielded by overzealous litigants. This means that the court must proceed with caution and impose safeguards that are appropriate to protect the rights of the party against whom the relief is sought"[20]

The learned judge dismissed the application on the basis that applicant failed to surmount the first hurdle, being the existence of a cause of action against respondents.

In her judgment, MUSHORE J[21] followed the Appellate Division approach as further endorsed by DEVITTIE J in *Cooper* v *Leslie*. She held that for an Anton Piller award to be granted the following must be established on a *prima facie* basis:

(1) That the applicant has a cause of action against the respondent which he intends to pursue;
(2) That the respondent has in his possession specific (and specified) documents or things which constitute vital evidence in substantiation of the applicant's cause of action (but in respect of which the applicant cannot claim a real or personal right);
(3) That there is a real and well founded apprehension that this evidence may be hidden or destroyed or in some manner may be spirited away by the time that the case comes to trial or to the stage of discovery[22].

In the exercise of its discretion the court must have regard to the test set out above. I now turn to consider the test in detail.

---

[18] *Supra* at page 14
[19] See also cases of *Microsoft Corp v Zimbabwe Express Airlines (Pvt) Ltd* HH 4053/99 and *Trustees of the Mukono Family Trust and Ano v Karpeg Investments (Private) Limited t/a Kadir Sons and 6 Others HH 358/14*
[20] Page 21F-G
[21] Dr Dish case *supra*
[22] See page 5 of the judgment.

Whether applicant has a cause of action against respondents

Applicant's heads of arguments do not particularise with the required exactitude the material respects in which a cause of action is asserted against respondents. The heads largely focus on recitation of the law. Mr *Sibanda* submitted that applicant is owed millions of dollars by respondents in unpaid fees arising from the CDA. Second respondent used applicant's license to broadcast its services from 19 August 2017 to 30 May 2018. Applicant did not receive a dime from the usage of its license. First respondent refused to render a statement as required by the CDA. Applicant proceeded to raise invoices based on estimates of revenue earned by respondents for the period October to December 2017. The invoiced amount was US$1,716,800.00. It was not paid. Meanwhile second respondent instituted summons for the recovery of US$634,400.00, advanced to applicant under the loan agreement. The repayment of the loan was tied to the revenue streams flowing from the CDA. In its founding affidavit, applicant asserts a set off to the claim by second respondent. It underscored its desire to file a counterclaim in that respect. This position was persisted with further in argument by Mr *Sibanda*. To buttress this point Mr *Sibanda* referred to media reports attributed to Zachary Wazara, which suggested 40 000 subscribers as at September 2017. This number had bizarrely whittled down to 38 in October of the same year, according to first respondent's letter of 5 January 2018. That according to Mr *Sibanda,* clearly showed applicant had a cause of action against respondents.

For the respondents, Mr *Nyamakura* argued that applicant's affidavit did not disclose a cause of action. He referred to what respondents believed constituted incidences of the purported cause of action as deduced from applicant's papers[23]. In paragraphs 29 to 31of the founding affidavit, applicant referred to the summons issued by second respondent for repayment of the loaned amount. It then adds "*this was done notwithstanding the non-payment of revenue due to Applicant in terms of the Content Distribution Agreement".* In paragraph 30 of its affidavit applicant submits *'in any event, if a proper calculation is done, the Applicant is owed in excess of millions of dollars, much more than Respondents' claim".* In paragraph 31 applicant avers *"The Applicant, is entitled to* ***set off*** *against the claim by the 2nd Respondent vis-à-vis the revenue due to the Applicant as is spelt out in the Content Distribution Agreement. In that regard therefore, the Applicant needs to file a counter-claim in respect of case HC11018/18, including a joinder of any interested party"*

[23] Pages 273- 277 of the record

Respondents argued that set off is triggered when two parties are mutually indebted to each other and both debts are liquidated and fully due. In reply to the submission that applicant's claim was based on set off, Mr *Sibanda* made a *volte-face*. While admitting that set off is not a cause of action in this instance, he submitted that applicant never intended to rely on set off as a cause of action. He argued that the counterclaim was found *ex facie* the CDA. He reasserted his earlier submission about the alleged misrepresentations by respondents on the number of subscribers as at November 2018, contrary to the media reports attributed to Zachary Wazara. The media reports ascribed to Zachary Wazara galvanised applicant's cause of action[24]. Reference was made to the 40 000 customers who are alleged to have signed on to the Kwese TV service; the fact that sales trends remained positive; that people from all walks of life were coming through and buying the Kwese product; that over 1200 installers had been recruited. Mr *Sibanda* argued that it was inconceivable 1200 installers would be recruited to deal with just 38 subscribers. This was the fulcrum of the matter, or rather the foundation of the cause of action against respondents. The correct position was that applicant was owed millions by respondents. I pause to note that the alleged media interview was granted on 30 November 2017.

Respondents further argued that applicant's alleged cause of action should be viewed in the context of the serious non-disclosure of material information. The disclosure would have exposed what applicant did not wish to have exposed. That is, the absence of a cause of action. I set out hereunder the alleged material non-disclosures.

Failure to disclose the letter of 10 November 2017 terminating the CDA

Applicant was notified of the termination of the CDA through the letter of 10 November 2017 *(supra).* The termination was with immediate effect. Applicant acknowledged receiving the termination letter through its letter of 28 November 2017. In that letter applicant accused respondents of acting in bad faith and questioning the timing of the termination coming as it did, after applicant had asked second respondent to account for revenue generated thus far. Applicant concluded the letter by stating *"We shall ordinarily pursue our remedies as contemplated by the content distribution agreement and fully reserve our rights".* Respondents contend that the disclosure of the letter of 10 November would have shown that no revenue was generated from 10 November 2017 to 30 May 2018. Yet amazingly, applicant sought information for that period. That the termination of the agreement was accepted by applicant

[24] Annexures ND1 and ND2 on pages 47 and 48 of the record.

is also confirmed by its letter of 7 February 2018 *(supra)* to BAZ. In the penultimate paragraph of that letter it stated: *"In this case, Econet Media Limited has been operating outside the law since it does not have a license. Reference is made in this regard to the fact that there is no existing operating agreement between our client and Econet Media Limited (Mauritius) and/or its affiliates…".*

On its part, applicant asserts that it did not accede to the termination. In any case, up until May 2018, first respondent continued to use its license. The allusion to the cancellation of the agreement was unimportant since first respondent continued to ride on applicant's license. Failure to disclose the two letters would not have changed the complexion of the matter, so the applicant's argument goes. I am not persuaded by the argument that the letter of 10 November 2017 did not warrant disclosure. The letter confirms there were material disputes that occasioned the termination of the CDA. The termination came two days after applicant had written to first respondents requesting the rendering of statements for the period 19 August 2017 to 8 November 2017. The information was not furnished. Following the termination of the CDA, applicant wrote to respondents on 12 December 2017 proposing meetings to discuss the parties' differences. Respondents rebuffed the initiative in their response of 13 December 2017. That letter concludes by saying *"Our letter to you of 10 November 2017 very clearly articulates the reasons why our Group terminated the Agreement. Since that date (which is almost five weeks ago), you did not indicate at any stage that you refuted the termination, nor did you dispute the termination. On the contrary, your conduct to date has been consistent with a decision by you to accept the termination of the Agreement.…..we are therefore at a loss as to what issues and/or grievances you would like us to meet and discuss with you."*

The letter of 10 November 2017 did not just inform applicant of the termination of the CDA. It also demanded repayment of funds advanced to applicant under the loan agreement. As correctly submitted by respondents in their heads of argument, the claim for repayment of the US$634, 400.00 by second respondent is the substratum of applicant's alleged counterclaim. Despite being warned, applicant did not act.

Letter of 5 January 2018

Respondents likewise aver that their letter of 5 January 2018 to applicant was significant. The letter informed applicant that the only revenue due to it was US$8.05. Applicant dismisses the letter as a doctored document. There was no need to disclose it in the application. Instead applicant refers to its letter of 8 November 2017. It submits that the letter

revealed the basis of its claim as the CDA. It required first respondent to provide monthly statements from which applicant could determine its fee. It is critical to note that the letter of 8 November 2017 does not set out any claim by the applicant. It is a request for the rendering of statements in terms of clause 10.4 of the CDA. I agree with respondents' submission that the letter of 5 January 2018 was critical and required disclosure. Crucially so, if the letter is viewed in the context of media statements attributed to Zachary Wazara suggesting the subscriber base stood at 40 000 as at September 2017[25]. The alleged utterances by Zachary Wazara contradicted first respondent's letter of 5 January 2018. Such discrepancies needed pointing out, considering they were at the heart of applicant's cause. In my view, the court needed to be apprised. In asserting the significance of the reconciliations communicated in the letter of 5 January 2018, respondents referred the court to the case of *McWilliams v First Consolidated Holdings (Pty) Ltd*[26], wherein the court said:

> "I accept that 'quiescence is not necessarily acquiescence' *(see Collen v Rietfontein Engineering Works 1948 (1) SA 413 (A) at 422)* and that a party's failure to reply to a letter asserting the existence of an obligation owed by such party to the writer does not always justify an inference that the assertion was accepted as the truth. But in general, when according to ordinary commercial practice and human expectation firm repudiation of such an assertion would be the norm if it was not accepted as correct, such party's silence and inaction, unless satisfactorily explained, may be taken to constitute an admission by him of the truth of the assertion, or at last will be an important factor telling against him in the assessment of the probabilities and in the final determination of the dispute. And an adverse inference will the more readily be drawn when the unchallenged assertion had been preceded by correspondence or negotiations between the parties relative to the subject matter of the assertion"

The dictum is apt. I find it unconceivable that applicant would dismiss the letter of 5 January 2018 as a doctored document, insignificant and not worthy of disclosure. As at December 2017, applicant had raised invoices in excess of US$1,716,800.00 for the period September to December 2017, as its outstanding fees. These were based on estimates following first respondent's failure to render statements for the said period. The invoices were forwarded to respondents but were not paid. As at the time it received the letter of 5 January 2018, applicant had received second respondent's demand for refund of what was advanced under the loan agreement. Significantly, the first paragraph of the letter of 5 January 2018 referred to *"…four invoices received from yourselves on the 3rd of January 2018 purporting to be claims for commissions earned by Dr Dish from Econet Media…"*. To then receive a letter advising that it was only entitled to US$8.05, when according to its own calculations it was owed in

[25] Paragraph 11 of applicant's founding
[26] 1982 (2) SA 1 (A) at 10D-H

excess of US$1,716,800.00, was surely a cause for alarm. It was folly for applicant to treat the letter as some joke, or to use its own words, "doctored". I find the applicant's explanation not only bizarre, but akin to some medieval shaggy-dog story. It is astonishing. That letter could only have been concealed for some hideous motive.

Applicant waited until 19 February 2019 to launch the application for the Anton Piller. Even after being served with second respondent's summons in November 2018, it still did not see the need to take any action. In my view, applicant's conduct under the circumstances is consistent with a party acquiescing with the reconciliations in the letter of 5 January 2018. The letter was significant and ought to have been disclosed.

Letter of 8 February 2018

The letter from the applicant's erstwhile legal practitioners Mushoriwa!Pasi to BAZ *(supra)* sought to discredit first respondent's application for a broadcasting license. While applicant does not deny that the letter was written on its behalf, it dismisses the letter on two bases. Firstly that it was not addressed to any of the respondents, but a third party not even involved in this litigation[27]. Secondly that applicant was expressing its concern over the continued use of its license by first respondent who purported to have cancelled their agreement. The non-disclosure of the letter was therefore inconsequential. I find this argument untenable. This is the same applicant that had just received the letter of 5 January 2018 which effectively shot down its invoices. The communication to BAZ which was meant to scuttle respondents' application for a license was obviously made with the respondents' immediate past communication in mind. First respondent had all but denied any liability to applicant. Assuming it continued to utilise applicant's license as alleged, then there was more reason to disclose this letter which essentially confirmed applicant's complaint. The letter merited disclosure.

The effect of the Supreme Court judgment

Mr *Nyamakura* pointed to the effect of the Supreme Court judgment on the alleged cause of action. The judgment was not disclosed. The Supreme Court judgment needs to be read together with BAZ's letter of 22 August 2017 revoking applicant's license. HUNGWE J found that BAZ had irregularly cancelled applicant's license. The cancellation founded a *prima facie* right entitling applicant to an interim interdict pending the final determination of the matter. The order by HUNGWE J was appealed to the Supreme Court. The Supreme Court

[27] See paragraph 12 of applicant's answering affidavit on page 152 of record

found that applicant had failed to establish a *prima facie* case, and it allowed the appeal by BAZ. It found that the BAZ Chief Executive officer had authority to cancel applicant's license. The license was lawfully cancelled through BAZ letter of 22 August 2017. The matter was argued before the Supreme Court on 26 February 2018, and judgment was delivered on 25 October 2018.

The confirmation of the cancellation of applicant's licence calls into question the validity of the CDA. Put differently, the question that arises is whether a cause of action can be founded on this contract as submitted by Mr *Sibanda*. Mr *Nyamakura* argued there was no valid contract between the parties and no cause of action can derive from an invalid contract. Mr *Sibanda* on the other hand argued that HUNGWE J granted applicant leave to continue utilising the license pending the determination of the appeal to the Supreme Court. Respondents allegedly continued riding on applicant's license. The circumstances leading to the signing of the CDA require some exploration. They are well articulated in the Supreme Court judgment[28]. Suffice it for me to summarise them hereunder for the sake of completeness.

Applicant was issued with a Content Distribution Service License by BAZ on 18 October 2012. The license was set to expire on 17 September 2022. In terms of the license applicant was to offer the "My TV AFRICA service", as a continuous service for the duration of the license period, as well as pay the required license fees. Applicant provided the license service (MY TV AFRICA) for two years and stopped. On 23 February 2014, applicant applied for an amendment of its license in terms of section 15 (1)(c) of the Broadcasting Services Act[29]. The amendment was to change the licensed technical standard from MY TV AFRICA to Blue Ocean Satellite Television. On 30 June 2014, BAZ instructed applicant to submit its application in form BS 1 and specify whether or not it was continuing with MY TV AFRICA content. Applicant was also instructed to pay arrear license fees. Applicant did nothing. As a result of applicant's failure to provide the licensed service, and its continued failure to pay arrear and annual license fees, BAZ wrote to applicant on 12 October 2016, inviting it to show cause why its license should not be cancelled in terms of section 16(1)(d) and (e) of the Broadcasting Services Act.

Through its letter of 16 October 2016, applicant notified BAZ of the change in its partnership, advising that its license should not be cancelled since it had secured a new partner, Econet Media (Mauritius), first respondent herein. First respondent would replace MY TV

[28] Pages 118- 120 of record
[29] [*Chapter 12:06*]

AFRICA as service provider. Together they would pay the outstanding license fees and services would resume. In November 2016, BAZ wrote to applicant advising that its letter of 16 October 2016 was under consideration. On 18 August 2017, applicant paid arrear license fees and fees for the current year. This was three days after the signing of the CDA between applicant and first respondent, and a day after the signing of the loan agreement between applicant and second respondent. On 22 August 2017, BAZ wrote two letters to applicant. One acknowledged receipt of US$434,000.00, which was towards the clearance of the arrears, and the other advised applicant that BAZ would calculate outstanding arrears as at 16 October 2016, and receive payment in respect of those and return the balance to applicant. The second letter also advised that applicant's license had been cancelled with effect from 22 August 2017 in terms of section 16(1) (d) of the Act. This is the cancellation that applicant challenged resulting in the order by HUNGWE J.

I have summarised the facts leading to the signing of the agreement between applicant and first respondent to demonstrate two crucial points. Firstly, at the date of termination of its license by BAZ, applicant's application for the amendment of content provider from MY TV AFRICA to first respondent had not been approved by BAZ. Secondly, at the date applicant signed the CDA with first respondent, it could not transfer any rights to first respondent as BAZ had not approved the amendment in the content provider. In its appeal at the Supreme Court, BAZ contented that applicant never sought and was never granted an amendment of its license in terms of section 15 of the Broadcasting Services Act. Instead of complying with the directive given by BAZ or with section 15 of the aforementioned Act, applicant only notified BAZ of its change in the content provider in terms of section 17 of that Act. Having analysed the two sections, the Supreme Court found that:

> "….section 15 authorises the first appellant to amend a license among other things if the licensee requests an amendment or if it considers the amendment necessary to reflect the true nature of the service. The terms and conditions of the respondent's license obliges it to provide service from MY TV AFRICA. The respondent could therefore only change from MY TV AFRICA to any other service provider, if its application to change its service provider in terms of section 15 of the Act had been granted. Instead of proceeding in terms of section 15, the respondent opted to notify the first appellant of changes in terms of s 17 of the Act….."[30]

The court further stated:

> "It is apparent that the respondent sought an order to protect conduct which is clearly contrary to the provisions of the Act. Section 15 of the Act provides the procedure the respondent should have complied with. The respondent should have made an application for an amendment instead of giving the first appellant notice in terms of s 17 of the Act. By providing service from Econet

[30] Pages 128 and 129 of record.

> Media (Mauritius) when the terms and conditions of its license required it to provide services from MY TV AFRICA, the respondent failed to comply with the terms and conditions on which the license was granted. Therefore, the appellants correctly exercised their right in terms of s16 (1)(d) of the Act to cancel the license. Section 16(1)(d) entitles the first appellant to cancel the license if a licensee fails to comply with the terms and conditions of the license or if the licensee has ceased to provide the service specified in the license…."[31].

The finding by the court calls into question the lawfulness of the CDA. Applicant could only grant first respondent exclusive rights that it possessed. The BAZ approval was a condition precedent to any contractual arrangement between applicant and first respondent. No such approval was granted. Consequently, it follows there was no valid contract to speak of[32].

I have already noted that Mr *Sibanda* abandoned the argument that applicant's cause of action is based on set off. He then placed reliance on the CDA. Having found that no valid contract existed between the parties, it stands to reason in my view that no cause of action can arise *ex contractu.* The CDA was void and unenforceable. Consequently, I find that applicant failed to establish a cause of action against the respondents. If applicant purports any other cause of action exists against respondents, then that was not placed before the court.

Whether respondents have in their possession specific (and specified) documents which constitute vital evidence in substantiation of applicant's cause of action

Mr *Sibanda* submitted that first respondent was obliged by clause 10.4 of the CDA, to provide applicant with a statement in respect of each accounting period within seven days after the relevant accounting period[33]. That information was not furnished upon request. The information would have assisted applicant establish what was due to it. Counsel further submitted that applicant was justified in laying claim for the information against the three respondents because they were essentially one unit. The opposing affidavit of DOROTHY

---

[31] Page 130 of record

[32] See *Hativagone & Another v CAG Farms (Private) Limited* SC 42/15 at page 13 and *Sithole v Khumalo & Ors HB* 28/08 at page 5. See also the famous dictum by Lord Denning in *Macfoy v United Africa Company limited* (1961) 3 All ER 1169 (PC) at 1172 where he said:
"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

[33] Clause 10:4 stated: *"For the purposes of this clause 10, with effect from the Kwese Services Launch date, Kwese shall deliver to Dr Dish a statement in respect of each Accounting Period (the Relevant Accounting Period) within seven (7) days after the Relevant Accounting Period. The statement shall contain information as agreed and specified for the Accounting Period in question. Any dispute in terms of the total Subscriber Fee in any Accounting Period and any month shall be referred for Arbitration in terms of clause 34 below"*

ZIMUTO, which she deposed to on behalf of all respondents confirmed this position[34]. For the respondents Mr *Nyamakura* submitted that paragraphs 1, 2 and 4 of the provisional order seek documents and records from all respondents based on a right of set off. He argued that such claim was not competent against second and third respondents who were not parties to the CDA. The alleged claim by applicant arose from the CDA. Further, first respondent was not party to the summons claim by second respondent against applicant. Accordingly, applicant had no claim against second respondent which was not a party to the CDA. The court was referred to the *dictum* in *Non-Detonating Solutions (Pty) Ltd v Durie*[35], where the court said:

> "Strict compliance with this requirement is pivotal to the legality of the use of the procedure. The procedure has, potentially, a draconian and extremely invasive consequences for respondents or defendants who are subject to it. The implementation in particular of the search leg of the order can amount to the most manifest intrusion of the respondents' right to privacy guaranteed in the Constitution"

As regards the test for identification of documents, respondents cited *Roamer Watch Co SA 7 Another v African Textile Distributors t/a M K Patel Wholesale Merchants and Dirct Importers* where the court said:

> "There must be clear evidence that the respondent has such incriminating documents, information, articles and the like in his possession, or that, at least, there are good grounds for believing that this is the case….The applicant should satisfy the court that he has, as best the subject matter in dispute permits him to do, identified the subject matter in respect of which he seeks attachment and/or removal, and that the terms of the order which he seeks have delimited appropriately and are not so general and wide as to afford him access to documents, information and articles to which his evidence has not shown that he is entitled"

The *dictum* in the two authorities above is to the point. The relief sought by applicant does not meet the threshold for specificity. It drags parties who were not privy to the CDA into its legal discordance with first respondent. In any case, applicant abandoned the set off argument. It is also not lost to the court that applicant did not address this point in its heads of argument, save to iterate the law[36]. It was also not canvassed by Mr *Sibanda* in oral submissions. I am persuaded by respondents' submission that applicant failed to discharge the onus on specificity. Applicant failed to show that respondents have in their possession specific and specified documents constituting vital evidence in substantiation of the alleged cause of action.

---

[34] See page 81 of record.
[35] 2016 (3) SA 445 (SCA)
[36] See pages 250-252 of the record.

Real and well founded apprehension that evidence may be hidden/destroyed/spirited away.

Applicant submitted that the fear that vital evidence could be spirited away or destroyed was well grounded. It pointed to the following incidences. The production of what it called a doctored statement claiming there were 38 subscribers as at October 2017, when Zachary Wazara spoke of 40 000 subscribers as at September 2017 alone. Third respondent resisted service of the provisional order, prompting the Sheriff to make a police report. As the Sheriff was serving and enforcing the provisional order, respondents were busy making alterations in their documentation filed with the Registrar of Companies. EWZ's shareholding in Econet Media Zimbabwe was altered to 51%. Also significant was the alleged suspicious conduct of respondents prior to the conclusion of CDA. Applicant and Econet Media (Private) Limited, a Zimbabwean company concluded what they termed Heads of Agreement on 16 August 2016[37]. It was the forerunner to the CDA. It follows the CDA was supposed to be between applicant and Econet Media (Private) Limited, a subsidiary of EWZ. In its documents, which include the 2018 annual report, EWZ referred to Econet Media Zimbabwe, a non-existent company. Applicant doubts the existence of first respondent, and its alleged roots in Mauritius. In short, the level of misinformation by respondents is such that they cannot be trusted. The relationship between Econet Wireless Group, Econet Media (Mauritius) and Econet Media Zimbabwe was deliberately misleading. Applicant further submitted that the filing of the notice of appeal against the provisional order by HUNGWE J was a ploy to frustrate applicant. Because of these *mala fide* acts by respondents, applicant submitted that it had made a case for confirmation of the provisional order.

Mr Nyamakura countered, arguing that the volume of attachments to applicant's answering affidavits is revealing. Applicant seemed to be developing its case as it progressed. The alleged misrepresentations concerning the respondents' shareholding were based on documentation in applicant's possession when it filed the application. Counsel submitted that an application must stand or fall on the founding affidavit. He referred to the case of *Mangwiza v Ziumbe NO & Ano*[38]. He further submitted that there was no real and well founded apprehension that crucial evidence would be hidden or destroyed considering respondents had more than 13 months to take remedial action, if they so minded. Counsel urged the court to consider that; as far back as 10 November 2017, applicant was aware of the termination of the CDA. Through its letter of 28 November 2017, applicant warned it would pursue its remedies

[37] Pages 177-188 of record.
[38] 2000 (2) ZLR 489 (SC)

under the CDA. In its letter of 12 December 2017, applicant suggested an expeditious resolution of the matter through arbitration. First respondent's response of an even date was firm. First respondent denied the existence of any grievances warranting further engagements. By letter of 5 January 2018, first respondent informed applicant that its reconciliations showed applicant was only owed US$8.05. Through its letter of 15 January 2018, first respondent reiterated its position as communicated in the 5 January 2018 letter. The letter went on to demand a refund of US$584,355.29 advanced to applicant under the loan agreement. Still the applicant did not take action, even after being served with second respondent's claim under HC11018/18.

I am convinced applicant's conduct is not consistent with a party that harboured any apprehension that evidence could be destroyed or spirited away. It would have reacted swiftly had that been the case. It did not intimate as much. As was pointed out by CONRADIE J in *Hall and Another v Heyns and Others*[39]:

> "The next point on which the applicants, in my view fall down is the real apprehension that evidence might be secreted or destroyed. The fear of destruction must not be flimsy. The cases speak of a grave danger and a real possibility that documents will be destroyed……" (Underlining for emphasis)

I fully associate myself with these sentiments. The same cannot be said of applicant. It seemed unsure of what course of action to take. Applicant was aware a dispute existed some 13 months earlier. The alleged misrepresentations by respondents were already known. The requested statements had not been furnished. Only documents, allegedly doctored, had been furnished. Invoices forwarded to respondents for payment were rebuffed. Respondents flatly denied liability. If some present and immediate danger provoked applicant to act some 13 months later, then it was not disclosed.

The same ought to be said of applicant's failure to fully set out its case in the founding affidavit. The answering affidavit is replete with fresh allegations. It exudes more energy and intent than the founding affidavit. Applicant goes to the extent of claiming it was hoodwinked into signing the CDA with first respondent instead of Econet Media (Private) Limited. It claims so because it signed a Heads of Agreement with Econet Media (Private) Limited. Applicant even doubts the existence of first respondent. It is not just the allegations which sound rather preposterous and comical, but the point at which they were made which is of serious concern.

[39] 1991 (1) SA 381 (C) at 390

The law is clear on that point. The practice of raising new matters in an answering affidavit was slammed by SANDURA JA in *Mangwiza v Ziumbe (supra),* when he said:

> "It is well-established that in application proceedings the cause of action should be fully set out in the founding affidavit, and that new matters should not be raised in an answering affidavit. That principle was laid down many years ago in cases such as *Coffee, Tea and Chokolate Co Ltd v Cape Trading Company* 1930 CPD 81. At p82. GARDNER JP said:
>
> > "A very bad practice and one by no means uncommon is that of keeping evidence on affidavit until the replying stage, instead of putting it in support of the affidavit filed upon the notice of motion, the result of this practice is either that a fourth set of affidavits has to be allowed or that the respondent has not an opportunity of replying. Now these affidavits of Barnes, Turnbull, Lee Gardner and Lang should in my opinion properly have been put in support of the notice of motion. They are not a reply to what has been said by the respondent, and I am not prepared to allow them to be put in at this stage"

I need say no more. Applicant conveniently chose to be reticent thereby misleading the court when it filed the *exparte* application. It sought to build its case, surreptitiously through the answering affidavit. The importance of disclosure is central to applications of this nature. See per NDOU J in *Anabas Services (Pvt) Limited v Minister of Health N.O. and 3 Ors*[40]. *Ex parte* applications invariably place judges in an invidious position. They have to strike a balance between the need to preserve respondents' constitutional right to privacy and the applicant's right of access to the courts and to be heard[41]. It is a delicate balance which demands extreme caution. It is for that reason that the Anton Piller relief is granted sparingly. At that stage the judge relies on the evidence of one litigant. The judge relies on the *bona fides* of the applicant in the exercise of discretion. For this reason utmost good faith is required of an applicant. There must be absolute disclosure of all relevant material in the founding affidavit to allow the judge to properly exercise his/her discretion judiciously. Applicant unluckily miscalculated. That which it ought to have disclosed in the founding affidavit, the law will not allow its disclosure in the answering affidavit. Further the law accords respondents an opportunity to oppose the confirmation of Anton Piller. The court gets an opportunity to see

---

[40] HB 88/03 at pages 7-8. The learned judge said:
"The applicant deliberately painted a gloomy picture of its operations in order to justify an *ex parte* or urgent remedy. It is trite that in urgent applications of this kind, utmost good faith must be shown by the applicant. It is the duty of the applicant to lay all relevant facts before the court, so that it may have full knowledge of all the circumstances of the case before making its order. ……
Although I directed that the application be served on the respondents the fact remains that because of the nature of the application the service was at a very short notice. I dispensed with forms and service generally provided for in the rules of this court. Such a short notice given to a respondent in an urgent application is a major constrain in the preparation of opposition. The respondent is denied sufficient time to be heard from an informed position. An urgent application is an exception to the general rule and as such the applicant is expected to disclose fully and fairly all material facts known to him"

[41] See sections 57 and 69 of the Constitution.

the fuller picture. I am convinced that applicant had no real and well founded apprehension that respondents posed any threat of hiding or destroying evidence as postulated.

In the final analysis, I find that applicant failed to discharge the onus for the granting of an Anton Piller.

COSTS

Respondents sought the dismissal of the application with costs on the attorney and client scale. They argue that applicant abused Anton Piller. Respondent's counsel cited material non-disclosures that resulted in MUSHORE J granting a provisional order, which ought not to have been granted but for the non-disclosure. On its part, applicant prayed for confirmation of the provisional order with costs on the attorney and client scale. I agree with counsel for respondents that the level of non-disclosure was grave. It offends the true spirit of Anton Piller. It is the sort of conduct which ordinarily invites an order of costs on the higher scale. In the exercise of my discretion, I have considered that cases involving Anton Piller are by nature complex and critical to the development of Zimbabwe's jurisprudence in that area. It was for this reason that I was encouraged to explore all the Anton Piller requirements in the disposal of this matter, even though I would have discharged the provisional order thanks to applicant's failure to surmount the first rung. For the forgoing reasons, I am dissuaded from making an award of costs on the higher scale.

DISPOSITION

Accordingly it is ordered that:

1. The provisional order granted on 20 February 2019 be and it is hereby discharged.
2. All materials and copies of documents seized from respondents by the Sheriff pursuant to the order of 20 February 2019, shall be returned to the respondents' legal practitioners on service of the order.
3. Applicant shall pay costs of suit including any costs occasioned by the execution of the Anton Piller order.

Magwaliba and Kwirira, applicant's legal practitioners
Mtetwa & Nyambirai, Respondents' legal practitioners