

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NUMBER: 12825/2020

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO
2.OF INTEREST TO OTHER JUDGES: NO
3.REVISED NO

12/04/2020


Judge Dippenaar

In the matter between:

HUDACO TRADING (PTY) LTD

APPLICANT

AND

APEX SUPERIOR QUALITY PARTS (PTY) LTD

1st RESPONDENT

CHANTELLE DANTU

2nd RESPONDENT

JUSTIN STONE

3rd RESPONDENT

ZENNET BARNARD

4th RESPONDENT

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 12th April 2021.

DIPPENAAR J:

[1] This is the reconsideration on its extended return date of an Anton Piller order granted *ex parte* and *in camera* on 12 June 2020. The applicant sought confirmation of the rule whereas the respondents sought its discharge together with a punitive costs order.

[2] The application concerns the Partquip business, acquired by the applicant during 2014, which conducts business in the aftermarket replacement automotive parts industry and is housed in a separate division within the applicant. The applicant is part of a listed conglomerate which employs in excess of 400 people with an annual turnover in excess of R700 million. Partquip specialises in the import and distribution of a select range of quality guaranteed aftermarket replacement automotive parts throughout the Southern African region including South Africa, Namibia Botswana and Zimbabwe. Over the past 36 years it had developed a database containing in excess of 19 000 active Partquip part numbers and other relevant information. The applicant based its application on breaches of contractual undertakings not to utilise applicant's confidential information and protection of its copyright.

[3] The first respondent is a new competitor in the market who also supplies aftermarket replacement parts to motor vehicles and industrial bearings. The second respondent, the chief executive officer of the first respondent, left the employment of the applicant in 2017. The third and fourth respondents are employees of the first respondent, respectively employed as sales and customer services manager and sales consultant.

They are also previous employees of the applicant. No contractual restraints of trade were concluded between the applicant and the second to fourth respondents.

[4] The applicant's case was that the respondents were individually and collectively unlawfully competing with the applicant using its confidential and proprietary information and were unlawfully infringing its trade secrets and intellectual property rights. It produced evidence that the respondents had utilised an extract of its Original Equipment Manufacturer ("OEM") cross reference database, which it was contended infringed the applicant's copyright. The applicant intended to institute legal proceedings for *inter alia* interdictory relief, damages and delivery up and destruction in respect of its intellectual property. Such claims would be based on breaches of their contractual confidentiality undertakings, passing off, unlawful competition and infringement of copyright. It contended that the application was aimed at the preservation of evidence necessary and vital to substantiate its claims against the respondents and that the applicant had a real and well-founded apprehension that the respondents, if given notice of the proceedings, may remove or destroy the evidence before it could be inspected or attached or discovered or utilised, given the duplicitous conduct of the respondents.

[5] The respondents' case was that it is a small new start-up business which employs six people, started by the second respondent early in 2019 when an international supplier, Xiamen L& Imp and Co Ltd ("XMLZ"), approached the second respondent looking for a distributor in South Africa for its industrial and automotive loose bearings and bearing kits. The second respondent was also approached by another unidentified supplier who was concerned about the substantial fall off of orders from the applicant and was looking for an alternative distribution route into South Africa. The second respondent saw a business opportunity and spent considerable time and effort from the second half of 2019 to set up the business of the first respondent, which commenced trading in February 2020. The second respondent particularised all the steps taken by her to do so, which do not require repetition here. The first respondent would focus at least initially, on suspensions, bearings and mountings which are all high wear and tear items with a particularly lucrative market.

[6] The respondents admitted that they had used the extract of the OEM cross reference database, which they adapted, to prepare the first respondent's own cross reference database, which, they contended, differed from that of the applicant in various respects. According to the second respondent, the spreadsheet was deleted thereafter during March 2020 as she recognised it should not be used. The applicant's spreadsheet was contained on a flash drive of Mr Stone, the third respondent. There is a dispute on the papers as to whether Mr Stone had been given an empty flash drive or one containing the extract from the OEM cross reference spreadsheet.

[7] The respondents contended that the applicant's numbering system has become an industry standard and that the information on that database was readily available, in the public domain and was not confidential. On this basis it was argued that the possession and use of the applicant's OEM cross reference spreadsheet did not constitute unlawful competition, whether springboarding or otherwise.

[8] The respondents further denied that they were unlawfully competing with the applicant and were entitled to utilise information of the automotive industry acquired whilst working for the applicant as it forms part of their own innate knowledge, is in the public domain and is neither confidential nor a trade secret.¹ It was further argued that there was nothing untoward in the second to fourth respondents taking up employment with a competitor of the applicant as they did not sign any restraint of trade undertakings in favour of the applicant.

[9] The respondents' main grounds of opposition were that: (i) no proper case was made out for the granting of the Anton Piller order, (ii) the order obtained was in the broadest and vaguest of terms and did not comply with the law and practice directives; (iii) the process was abused by the applicant with the aim of stifling competition between

¹ Automotive Tooling Systems (Pty) Ltd v Wilkens 2007 (2) SA 271 (SCA)

itself and the first respondent; and (iv) the execution of the order exceeded the law in several respects, justifying its discharge.

[10] The first dispute between the parties was what applicable test was to be applied. The respondents contended that on the opposed return date of an Anton Piller order, the test of prima facie proof was inappropriate² and the ordinary rules concerning the proof of fact in motion proceedings apply, thus the so-called Plascon Evans test must be applied to resolve factual disputes³.

[11] I however agree with the applicant that the application remains one for interim relief⁴ and that upon reconsideration of the *ex parte* order a court must consider whether a prima facie case has been made out on the basis of all the information before court. The respondents argued that, even applying the test pertaining to interim relief⁵, the applicant has not established the requirements for Anton Piller relief.

[12] I turn to consider whether a proper case for Anton Piller relief was made out and whether it constituted an abuse. It is apposite to refer to a few general principles. The requirements of Anton Piller relief is well settled in our law.⁶ The applicant must establish that: (i) it has *prima facie* established a cause of action against the respondents which it intended to pursue; (ii) the respondents have in their possession documents or things which constituted vital evidence in substantiation of the applicant's cause of action (but in respect of which the applicant cannot not claim a real or personal right); and (iii) there is a real and well-founded apprehension that this evidence might be hidden or destroyed or

² *Frangos v Corpcapital Ltd and Others* 2004 (2) SA 643 (T) at 648H-649C

³ *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) 634H-635C; *Friedshel 1509 (Pty) Ltd t/a RTT Group & Others v Kallanji* 2015 (4) SA 163 (GJ) paras [67]-[69]

⁴ *Friedshel 1509 (Pty) Ltd t/a RTT Group and Others v Kallanji* 2015 (4) SA 163 (GJ) –paras 61-69; *Non-Detonating Solutions (Pty) Ltd v Durie and Another* 2016 (3) SA 445 (SCA) (“Non Detonating”) paras 21-26

⁵ *Applying Webster v Mitchell* 1948 (1) SA 1186 (W)

⁶ *Non Detonating* fn 2 *supra*; *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam and Another*; *Maphanga v Officer commanding, South African Police Murder and Robbery Unit, Petermaritzburg and Others* 1995 94) SA 1 (A) (“Shoba”)

in some manner be spirited away by the time the case comes to trial or to the stage of discovery.

[13] An Anton Piller order is not a form of early discovery, nor is it a mechanism for a plaintiff to ascertain whether it may have a cause of action.⁷ It is directed at preserving evidence that would otherwise be lost or destroyed. The cause of action must already exist and the preserved evidence must be identified. I turn to consider the various requirements.

[14] To establish a *prima facie* cause of action, an applicant need do no more than show that there is evidence, which established would establish a cause of action.⁸ It was not disputed by the respondents that the applicant established a *prima facie* case against them based on a copyright infringement pertaining to the applicant's OEM cross reference spreadsheet. The respondents however disputed that a *prima facie* case was made for unlawful competition or the other grounds alleged by the applicant.

[15] They contended that the deponent to the applicant's founding affidavit did not have the necessary personal knowledge as she was not a director and was not involved in the sale of the Partquip business. In my view, this contention lacks merit.

[16] The respondents further contended that the applicant had omitted material information from its founding affidavit and made misrepresentations therein as it did not properly explain or contextualise how the aftermarket spare industry operated and conflated the OEM cross reference database with its password protected catalogue database. The applicant allegedly did not disclose that its part numbering system has become an industry standard or that the design and unique numbering system is

⁷ Van Niekerk and Another v Van Niekerk and Another [2007] ZASCA 116; 2008 (1) SA 76 (SCA) para 10.

⁸ Non Detonating supra para 21

proprietary to the OEM involved and that the information on the OEM spreadsheet is readily available and in the public domain.

[17] There are numerous factual disputes on the issues surrounding unlawful competition, which are not resolvable on the papers. Those disputes will be ventilated in due course in the proposed legal proceedings between the parties. It would not be appropriate to consider the merits of the case at this stage. Suffice it to state that it cannot at this stage be concluded that the order should be discharged on the basis of material non disclosures in its founding papers as argued by the respondents.

[18] Considering the concessions made by the respondents I am persuaded that the applicant has made out a *prima facie* case and has met the first requirement for Anton Piller relief.

[19] The interplay between the second and third requirements was considered by the Supreme Court of Appeal in *Vizyia Corporation Ltd v Collaborit Holdings (Pty) Ltd and Others*⁹ (“Vizyia”), wherein, Mathopo JA stated the position thus:

“In my view identification of vital and specific information is necessary for the preservation of evidence. Its context cannot be widened as Viziya wishes to do. Such information must be measured against what can be obtained through discovery. If a party can obtain information on discovery, then it means that a party does not need an Anton Piller order, unless it shows that what would be discoverable would be concealed or destroyed thereby defeating the purpose of discovery”.

[20] Turning to the second requirement pertaining to specified documents constituting vital evidence, it is necessary to consider the order granted. In terms of the *ex parte* order, the respondents were directed to grant access to the sheriff and the forensic expert for the purposes of “*searching the premises, the vehicles and all electronic equipment on the*

⁹ 2019 (3) SA 173 (SCA) at para [36]

premises in order to enable any of the search persons to identify and point out to the sheriffs “the Evidence”, being the items listed in Schedule 1”.

[21] Schedule 1 listed the items as being:

“1 Regardless if the medium on which it appears or the format in which it appears and in respect of the applicant’s confidential information, trade secrets and copyright, any component thereof or any copy thereof or any adaptation of any or all of the aforesaid:

1.1 the applicant’s Original Engine Manufacturer (“OEM) cross reference database;

1.2 the applicant’s pricelists in respect of any aftermarket products;

1.3 the applicant’s part numbers;

1.4 the applicant’s photographs of any aftermarket products;

1.5 any lists containing the contact details in respect of the applicant’s suppliers, including the business contacts (natural persons) and their contact details;

1.6 any lists containing the contact details in respect of the applicant’s customers, including the business contacts (natural) persons and their contact details;

1.7 the source document(s)(including electronic files) utilised to create the Excel document attached to the emails circulated to the first respondent’s (Apex’s) customers on or about 4 March 2020 as “P. LIST WITH GEN PR AND CONV MARCH 20.xlsx”;

1.8 the source document(s)(including electronic files) utilised to create the Excel document attached to the emails circulated to Apex’s customers on or about 20 February 2020 as “NEW STOCK ARRIVAL 20.02.20.xlsx”;

1.9 all communications (be it through email or otherwise) exchanged between all the respondents and the applicant’s suppliers and third parties;

1.10 all communications (be it through email or otherwise) exchanged between all the respondents and the applicant’s customers and third parties;

1.11 *the first respondent's bulk customer mailing lists;*

1.12 *documents;*

1.13 *invoices, quotations, proof of payment;*

1.14 *requests for quotations;*

1.15 *requests for manufacturing;*

1.16 *any evidence of telephone calls and/or Skype calls and/or zoom calls and/or WhatsApp calls and/or WeChat calls between any of the respondents on the one hand and the applicant's suppliers and/or customers and/or manufacturers and/or business contacts on the other hand."*

[22] The respondents took issue with the ambit and generality of the order granted, which they contended was overly broad and constituted a fishing expedition.

[23] The applicant on the other hand contended that the order complied with the requirements of specificity set out by the Supreme Court of Appeal in *Non Detonating Solutions (Pty) Ltd v Durie and Others ("Non-Detonating")*¹⁰ and that it was sufficient to establish classes of documentation¹¹. The applicant further argued that the establishment of key word searches was reasonable and a handy tool to be specific. It was conceded that the use of key word searches was not identified as a method search in the order but it was argued that such search was conducted in a reasonable exercise of the discretion of the attorney and sheriff. It was also pointed out that paragraph 14 of order gave the respondents a remedy to object which they did not pursue.

[24] In *Non Detonating*¹², the Supreme Court of Appeal stated the following:

¹⁰ Fn 4 supra

¹¹ Para [29]

¹² Para [30]-[31]

“It is trite that an applicant must establish that the respondent possesses specific documents or things that constitute vital evidence in substantiation of the applicant’s cause of action. Strict compliance with this requirement is pivotal to the legality of the use of the procedure. The reason for this requirement is obvious. The procedure has, potentially, 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 s 14 of the Constitution as mentioned in para 20 above. Thus as was stated in Shoba,¹³ and as part of the balancing act to be performed by courts based on the principle of proportionality only vital evidence in the sense of evidence of importance to the applicant’s case, must be the subject of the search. The specified documents must constitute vital evidence and a blanket search for unspecified documents or evidence which may exist is not allowed. Binns-Ward J in Mathias International Ltd and Another v Baillache and Others,¹⁴ aptly emphasized the position thus: ‘The impermissibility of the use of the procedure to enable searches to be undertaken to look for evidence to identify or found a case, as distinct from the preservation of evidence, for use in an already identified claim is fundamental. The strict limitation of the use of the procedure to the preservation of the evidence, as distinct from, say, a search for evidence (the so-called fishing expedition), is a feature that is essential to the legality of the procedure within the requirements of s 36(1) of the Constitution. An application for authority to search for evidence in the nature of a fishing expedition should flounder at the first hurdle for want of compliance with the specificity requirement mentioned as the second of the three essential requirements for the grant of the Anton Piller order. . . The specificity requirement is a material factor in accepting that the limitation of basic rights inherent in the Anton Piller procedure is reasonable and justifiable as required by s 36(1) of the Constitution.’ “

[25] In relation to specific categories of documents, it was held:¹⁵

“In my view, this approach is against clearly established law which permits search and seizure orders for specific classes of documents. The test for the identification of documents in Anton Piller orders has been described as follows:

‘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 been 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.’¹⁶

¹³ *Shoba* supra at 15I-16C.

¹⁴ *Mathias International Ltd & Another v Baillache & Others* (“Mathias”) 2015 (2) SA 357 (WCC) para 20.

¹⁵ Para[36]

¹⁶ See *Roamer Watch Co SA & another v African Textile Distributors also t/a M K Patel Wholesale Merchants and Direct Importers* 1980 (2) SA 254 (W) at 273C-274F.

[26] Although at first blush, the present order is in materially similar terms as the order sanctioned by the Supreme Court of Appeal in *Non-Detonating*, every case must be determined on its own facts. In *Non-Detonating*, the qualification to the order was limited to a very specific and identified item, being: “a self-stemming cartridge substantially identical to the AutoStem cartridge”. In the present instance, the qualification in the *ex parte* order, designed to limit the broad categories specified in paragraphs 1.1 to 1.16 of Schedule 1, was phrased in much broader terms as being “applicant’s confidential information, trade secrets and copyright, any component thereof or any copy thereof or any adaptation of any or all of the aforesaid”. Each of these elements is open to interpretation.

[27] The items listed in *Non Detonating*, are the same as those listed in paragraphs 1.1 to 1.1 of Schedule 1. The ambit of the present order is thus much wider than that in *Non Detonating*, despite the similarities in wording. The order did not identify what would constitute the applicant’s confidential information, trade secrets and copyright and included broad categories of documents in paragraphs 1.9 to 1.16 of the order.

[28] This broad categorization left a broad discretion for the independent attorney and the forensic expert to determine what fell within the ambit of the order and did not identify with any degree of specificity what such categories of documents would comprise of. This lack of specificity constitutes a material point of distinction between the present order and the order granted in *Non-Detonating*. It also had a material impact on how the order was executed and how the “searching persons” exercised the discretion afforded.

[29] As held in *Vizyia*, considerations of practicality and convenience could render it appropriate for a court to order imaging of hard drives and other storage facilities and subsequent searching thereof by independent persons with the use of keywords. But this must be carefully limited to discovery and preservation of specific and specified

documents and information or categories thereof that constitutes vital evidence for the applicant.¹⁷

[30] The *ex parte* order did not however sanction the imaging or mirroring of hard drives or the copying of information in bulk. It also did not authorise the use of any key words, nor did it specify or authorise any such keywords to identify “the Evidence”. These facts are relevant in considering how the order was executed.

[31] In terms of the order it was left to the discretion of the “search persons”, being the independent attorney and the forensic expert to determine whether any documents fell within the ambit of “the Evidence”. The order further authorised a representative of the applicant or its attorney to be called upon to identify documents falling within the evidence, although not permitted to take part in the search. In reply, the applicant stated that the evidence was identified by means of the use of keywords, such as “XMLZ”. I later return to this aspect when considering how the order was executed.

[32] The case made out in its founding affidavit was that the documentary evidence sought to be preserved, consisted of: (i) the OEM cross-reference database or extracts therefrom; (ii) the SYSPRO system or extracts therefrom, containing business and contact details of applicant’s customers; (iii) the Impact software system or extracts therefrom and an “LO4202 report” pertaining to information of applicant’s suppliers and parts and (iv) pricelists or extracts therefrom. These limitations pertaining to the documentary evidence sought to be preserved by and large did not find their way into the order. Instead, the categories of documents in the order are broad and general in their terms, specifically in paragraphs 1.9 to 1.16 of the order.

[33] The applicant in its founding papers alleged that XMLZ was one of its four international suppliers who were contacted by the second respondent to supply aftermarket parts to the first respondent. In its answering papers, the respondents averred

¹⁷ Para [39]

that XMLZ is the first respondent's loose bearing and bearing kit supplier, based in China. They further produced evidence that the applicant, via the deponent to the founding papers, Ms Rogers, had terminated the applicant's relationship with XMLZ as a supplier in a summary fashion during 2018¹⁸, the year before the present application was launched. Considering the tone of the correspondence attached by the respondents, from September 2018 there was and would be no further business relationship between the applicant and XMLZ. The applicant did not dispute this in reply, but contended that these facts were irrelevant. I disagree with that contention.

[34] Not only was this allegation illustrated to be false, but the admitted use of the name of XMLZ as a search word by the forensic expert in the execution of the order, meant that a substantial amount of documents to which the applicant had no entitlement and which constituted information central to the first respondents' business operations were copied. This issue is relevant in the context of whether the order falls to be discharged as a result of how it was executed, an issue to which I later return.

[35] The applicant further did not refute or meaningfully deal with the respondent's evidence that on 5 March 2020, its procurement manager, Mr Reddy, contacted Ms Lin of XMLZ, attacking her for conducting business with the first respondent and after she refused to cease doing business, offered XMLZ a large order if she agreed to stop supplying the first respondent. XMLZ refused. These facts were not disclosed in the applicant's founding papers. There is merit in the respondents' contention that the applicant's conduct including its purpose of the Anton Piller order was to stifle competition.

[36] In reply, the applicant also did not meaningfully deal with the respondents' detailed complaints regarding the wide ambit of the order and how it was executed. In argument the applicant contended that it could not address the respondent's complaints as it had not had access to the documents and the discussion was one sided and contrary to the *audi alteram partem* rule. The applicant's attempt to circumvent dealing with the issue,

¹⁸ Having been a supplier for three years

does not bear scrutiny. Leaving aside a detailed analysis of the documents obtained in execution of the order, it is still necessary to consider the ambit of the order. The applicant further had access to the forensic expert and the independent attorney and could have obtained affidavits from them responding to the respondents' complaints or at the very least, explaining how the discretion was exercised in the execution of the order. It did not avail itself of that opportunity but rather professed ignorance on what was attached.

[37] Moreover, the applicant's case was largely based on inferential reasoning and speculation that the second to fourth respondents had access to and had copied its confidential information on the SYSPRO and Impact systems and its 2020 pricelists. These allegations were disputed by the various respondents, who produced evidence refuting the conclusions sought to be drawn by the applicant¹⁹. The respondents' version that the customers in the market constituted a finite pool and that the applicant's main suppliers were published on its website and both were well known to the respondents by virtue of their innate knowledge of the industry, was not refuted in reply.

[38] Reference was made to the applicant's confidential database, the subject matter of the factual disputes already alluded to and a password protected SYSPRO system containing specific information about the applicant's customers, their business details and business contacts, to which the fourth respondent, Ms Barnard, allegedly had access. The applicant contended it had reason to believe she copied the customer information when she left its employ because certain customer information found its way into a credit application prepared by Ms Barnard for the first respondent. The respondents denied that either Ms Barnard or Mr Stone had access to the catalogue database and explained the circumstances surrounding the credit applications, pointing out that the credit applications were sent by a group retailer, Autobarn and were completed by the clients. These averments were not disputed in reply.

¹⁹ Applying the principles in *Webster v Mitchell* supra as qualified in *Gool v Minister of Justice and Another* 1055 (2) SA 682 (C) at 688D-E

[39] Reference was also made by the applicant to an Impact software system and an LO4202 report pertaining to information of Partquip's suppliers and parts to which the second respondent, Ms Dantu had access. It was alleged by the applicant that it had reason to believe that Ms Dantu exported the supplier and aftermarket parts information into an excel spreadsheet and copied this electronic information when she left the employ of Partquip because the first respondent utilised the same suppliers as Partquip. It was further alleged that Mr Stone and Ms Dantu were both able to view and export from either the SYSPRO system or Impact system the pricing and costing information for each of the Partquip aftermarket parts. Ms Dantu denied that she had access to any databases in her last three years of employment with Partquip and contended that in her 13 years in the industry she acquired sufficient knowledge to deal with suppliers, customers and movement of parts. The respondents disputed that they had access or had copied any electronic information.

[40] The applicant averred that the first respondent had undercut its pricing by at least 35% and that the only inference to be drawn is that the respondents were in possession of the applicant's 2020 pricelists, which the fourth respondent must have copied before the left the applicant's employ. The respondents' version that first respondent bases its prices on a mark-up on its landed costs entirely independent of the applicant's pricing, was not disputed in reply.

[41] The applicant's reasoning was not supported by primary facts, other than in respect of the OEM cross reference spreadsheet, an issue already referred to in this judgment. The applicant had the information pertaining to the OEM cross reference spreadsheet prior to launching the application and referred to it in its founding affidavit. The applicant could have obtained the necessary information through the discovery process.²⁰

²⁰ Vizyia para [36]. Para 19 supra

[42] It cannot be concluded that the applicant has established good grounds for believing that the respondents have the documents or information on its SYSPRO and Impact systems or its 2020 pricelists in their possession. The applicant further did not establish that its search was limited to specific documents constituting vital evidence. Considering the wide ambit of the limitation section of the order, it did not specify or identify exactly what information was requested²¹ and entailed an impermissible blanket search for documents²².

[43] It is trite that a fishing expedition to search for evidence to found a case, is not permitted²³. In its founding papers, the applicant illustrated that it already had evidence of the first respondent breaching its copyright. In relation to its search for evidence substantiating its claim based on unlawful competition, the procedure can best be described as an impermissible fishing expedition to seek documentation which could establish a claim.

[44] I conclude that the Anton Piller order sought and obtained was not justified by evidence of the existence of specific vital documents. I further conclude that the order did not identify the documentation to be seized with the necessary specificity. It follows that the applicant falls at this hurdle and that the ex parte order must be discharged. In light of this conclusion it is not necessary to consider the third requirement in any detail.

[45] Even if I had not reached this conclusion, in my view the order falls to be discharged as its execution was fatally flawed by exceeding the law and numerous irregularities occurred²⁴ in the execution process.

²¹ Vizyia supra paras [33] and [36]

²² Roamer Watch Company supra para [9]

²³ Matthias International Ltd and Another v Baillache and Others 2015(2) SA 357 (WCC) para [20], quoted with approval in Non Detonating.

²⁴ Friedshelf supra para [26] [75]

[46] As held in *Petre & Madco (Pty) Ltd t/a T-Chem v Sanderson-Kasner and Others*²⁵, an Anton Piller order must be meticulously executed according to the letter of the order and the abuse of such stringent remedies must be sanctioned.

[47] In its answering papers, the respondents particularised various irregularities and conduct not sanctioned by the order granted occurring during the execution of the order. The respondents' complaints were that: (i) the applicant abused the remedy so as to obtain the first respondent's own confidential information and did so during the execution of the order; (ii) the appointed forensic expert and the applicant's attorneys did not properly perform their functions; (iii) the appointed supervising attorney failed to properly perform his functions; (iv) the applicant's attorney of record performed the search; (v) the applicant's attorneys of record took photographs during the search despite such conduct not being authorised by the order; and (vi) a person who was never nominated in the Anton Piller order participated in the execution thereof, to wit Ms Jones an associate of the independent attorney, Mr Beyl.

[48] The independent attorney's affidavit is contradicted in various respects by those of the respondents and their attorney. The affidavit filed by the independent attorney is contradictory to the respondents' evidence and silent on various salient aspects. By way of example, no mention was made of the use of any key words used in the conducting of the search of the respondents' devices. The identification of the documents was made by the sheriff in consultation with the forensic expert and Mr Beyl. The basis on which they exercised their discretion to copy certain information was not disclosed nor to what extent input was obtained regarding relevance from the applicant's attorney. There is nothing to gainsay respondent's version that documents were batched and grouped and removed in bulk.

[49] The applicant complained that it was at a disadvantage by respondent's reliance on an analysis of what documents were and were not found during the search in support

²⁵ 1984 (3) SA 850 (W) at 855A-F

of their contention that the search was unsuccessful. It is in my view not necessary to determine whether the search was successful. What must be considered is whether the order was meticulously executed in its terms, as required at law²⁶.

[50] In reply, the applicant did not deal meaningfully with the complaints raised by the respondents but rather sought to dismiss them in bald and broad terms or labelling them as irrelevant. It further placed reliance on prayer 14 of the order pertaining to legal objections against inspection of identified items and respondents' failure to exercise that remedy. The existence of paragraph 14 in the order does not in my view bar the respondents from raising all their objections in the present proceedings.

[51] In reply, the applicant conceded that certain key words were used as a search method, including XMLZ. It contended:

"It is reasonable to accept that the information attached and copied were considered to be relevant to the allegations made in the founding affidavit and that those who exercised their discretion in so deciding, acted reasonably".

[52] That conclusion cannot be sustained absent cogent primary facts, objectively justifying such conclusion. First, the use of key words was not sanctioned in the order, as already alluded to. Second, no evidence was presented by the applicant pertaining to how the independent attorney and the forensic expert exercised their discretion or on what basis documents were determined to be "relevant". Third, it is apparent from the inventories, specifically the second inventory, that the majority of the documentation seized pertained to communications concerning XMLZ.

[53] As stated earlier, the respondents established that the allegation in the founding affidavit that XMLZ was a supplier of the applicant, was false. The applicant had no entitlement to attach any documents pertaining to XMLZ. It was further not disputed that groups and batches of unidentified documents and communications concerning the day

²⁶ CB Prest The Law and Practice of Interdicts, p173; Shoba supra

to day conducting of the first respondent's business activities were attached, including first respondent's confidential and proprietary documents, rather than any of the applicant's documents as stated in the order. The limitations imposed in the *ex parte* order were ignored and documentation was taken which exceeded its ambit.

[54] It does not appear that proper searches were conducted to determine whether or not the contents of the information seized fell within the ambit of the order and no evidence was presented regarding such searches. No evidence was presented that proper identification of relevant documents took place²⁷.

[55] There are however further also undisputed transgressions of the order, illustrating that it was not meticulously executed. First, there is the unsanctioned presence of Ms Jones ostensibly as representative of the independent supervising attorney, Mr Beyl, whilst she was not appointed in terms of the order. Second, the taking of photographs, a method of copying information²⁸, by a representative of the applicant's attorneys, Mr Abdul, during the execution, was not sanctioned and impermissibly involved the applicant's attorneys in the search²⁹. Moreover, it was not disputed that none of the photographs taken were taken into the custody of the sheriff

[56] From the undisputed evidence it is thus apparent that the order was not meticulously executed in its terms. These irregularities constitute sufficient grounds to discharge the *ex parte* order granted on 12 June 2020. Considering how the order was executed, the process can in my view be characterised as an abuse worthy of censure.

[57] The abuse of the process would also justify the granting of an appropriate costs order. The normal principle is that costs follow the result. For the reasons already stated,

²⁷ Friedshelf *supra* para [75]

²⁸ University City Studios Inc and Others v Network Video (Pty) Ltd 1986 (2) SA 734 (A) at 755C-F

²⁹ Memory Institute SA CC t/a SA Memory Institute v Hansen and Others 2004 (2) SA 630 (SCA) at para [3]

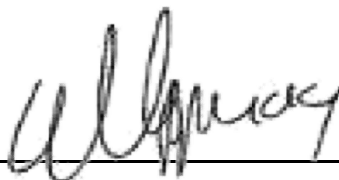
a punitive costs order is warranted. I am satisfied, considering the complexities of the matter, that the employment of two counsel was justified.

[58] I grant the following order:

[1] The ex parte order granted on 12 June 2020 is discharged;

[2] The applicant is directed to pay the costs of the application on the scale as between attorney and client, including the costs of two counsel where employed.

[3] All the information attached during the execution of the ex parte order and particularised in the inventory, including the mirror drive copies of the respondent's electronic devices are to be released the respondents forthwith.



**EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG**

APPEARANCES

DATE OF HEARING	: 22 February 2021
DATE OF JUDGMENT	: 12 April 2021
APPLICANT'S COUNSEL	: Adv. MvR Potgieter SC
APPLICANT'S ATTORNEYS	: Senekal Simonds Inc Mr JH Senekal

RESPONDENT'S COUNSEL

: Adv I Miltz SC
: Adv D Block

RESPONDENT'S ATTORNEYS

: Webber Wentzel
: Mr C Holfeld