IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 50920/2019

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

…… ……

SIGNATURE **DATE**

In the matter between:

LUKE JONATHAN ADAMSON **FIRST APPLICANT**

DISCOUNT BOARD SPECIALISTS (PTY) LTD **SECOND APPLICANT**

(Respondents in the *ex parte* Anton Piller application)

and

HOUSTON GROUP (PTY) LTD **RESPONDENT**

In re:

In the *ex parte* application of:

HOUSTON GROUP (PTY) LTD **APPLICANT**

LUKE JONATHAN ADAMSON **FIRST RESPONDENT**

DISCOUNT BOARD SPECIALISTS (PTY) LTD **SECOND RESPONDENT**

JUDGMENT: RECONSIDERATION

BASSON J

Introduction

[1] On 18 July 2019 this Court granted on an urgent basis an *ex parte* Anton Piller order under case number 50920/2019. The applicant in the *ex parte* application is Houston Group (Pty) Ltd ("the applicant"). The first respondent is Mr. Adamson ("Adamson") and the second respondent is Discount Board Specialists (Pty) Ltd ("Discount"). Where applicable, I will refer to Adamson and Discount collectively as "the respondents".

Reconsideration application

[2] This is an application for the reconsideration of the *ex parte* Anton Piller order and for a punitive costs order. The applicants in the reconsideration application are the two respondents in the *ex parte* application.

Papers filed in the reconsideration application

[3] Before I turn to the merits of the reconsideration application, it is necessary to first refer to the manner in which the respondents launched this application. Instead of filing an answering affidavit opposing the application for the Anton Piller order and setting down the matter by way of a mere notice, the respondents (now ostensibly the applicants) opted to launch a further urgent application by filing a founding affidavit (albeit under the same case number) seeking an order that the order granted on 18 July 2019 be reconsidered and set aside.

[4] The applicant (Houston) then filed a replying affidavit (procedurally correctly so) to the respondents' founding affidavit. Why the respondents have opted for this

procedure is unclear except perhaps to try to gain an advantage by filing a new application and somehow acquire the right to file a replying affidavit. In order to avoid confusion created by the process chosen by the respondents, I will continue to refer to the parties as they were in convention in the initial *ex parte* application.

[5] On 30 July 2019 the applicant's attorneys addressed a letter to the respondents' attorneys affording them an opportunity to rectify same. The applicant's attorneys were informed that the papers would not be amended.

Background facts

[6] The facts on which this Court considered the *ex parte* application are set out in fair detail in the founding affidavit deposed to by Mr. Bera ("Bera") – a co-director of the applicant. It is those facts that must be considered in deciding whether the applicant has made out a case for the relief sought in the first place.

[7] By not filing an affidavit opposing the relief sought in the founding affidavit, the respondents have effectively failed to specifically answer to the facts and grounds upon which the *ex parte* Anton Piller application was granted in the first place.[1] Therefore, as the papers stand, the respondents do not seem to contest the merits of the applicant's *ex parte* Anton Piller application as the allegations contained in the founding affidavit stand uncontested. However, what the respondents strongly contest in these proceedings is the manner in which the Anton Piller order was executed.

The case made out in the founding affidavit in the Anton Piller application

[8] Bera explained that the purpose of the application was to preserve evidence in the possession of the respondents with the view of instituting further legal proceedings against them in order to: (i) obtain an interdict to prevent unlawful competition/ spring-boarding and/or to claim damages for the last-mentioned conduct

[1] The court in *McHendry v Greeff and Another* [2015] JOL 34291 (KZD) at para 8.4 explained the purpose of an answering/opposing affidavit: "... the requirements for a respondent's answering affidavit, which deals with the allegations contained in the opponent's founding affidavit, are the same as that for the applicant. If the respondents' affidavit fails to admit or deny, or confess and avoid, allegations in the applicant's affidavit, the Court will for the purposes of the application, accept the applicant's allegations as correct."

and/or, (ii) institute proceedings for theft and/or fraud committed and/or, (iii) claim damages for the theft and/or fraud committed.

[9] The applicant conducts business in the carpentry industry rendering goods and/or services primarily to the emerging middle market. The business mainly consists of cutting and edging wooden sheets to carpenters who do not have the necessary machinery; the selling of whole wooden sheets to customers who do have the necessary machinery to cut same; and the selling of a wide range of cabinet hardware.

[10] Until Adamson was removed as a director at a shareholders as well as a directors' meeting in terms of section 71(1) of the Companies Act[2] by way of an ordinary resolution as well as in terms of section 71(3)(b) of the Companies Act, Adamson was a director of the applicant until 3 July 2019. The basis of the removal was that the trust relationship between the directors and the shareholders had broken down with Adamson, subsequent to him making unlawful payments from the applicant's bank account.

[11] A letter dated 20 May 2019 was addressed to Adamson in which it was recorded that Adamson was privy to and in control of the applicant's operations, payroll, financial statements and confidential information. It was further recorded that it came to the attention of the applicant that fraudulent payments were made by the applicant to "DS" without any proof of invoice or substantiation that services and/or goods were rendered by "DS" to the applicant. Adamson was requested to submit proof in respect of the aforementioned payments as well as to allow access to any confidential information including the financial statements of the applicant. Adamson was warned that should he not comply with these requests the applicant will have no option but to approach the High Court on an urgent basis for the appropriate relief. There was no response to this letter.

[12] A further letter was addressed to Adamson on 7 June 2019 reiterating the fact that no proof of the requested invoices had been received. Adamson was, once

[2] 71 of 2008.

again, urged to comply with the request. The attorneys on behalf of Adamson responded insisting that the allegations of fraud and/or unlawful conduct were denied. Despite these emphatic denials, the applicant persisted in its founding affidavit with the allegation that Adamson misappropriated or wasted the applicant's assets and that he acted in a manner that was fraudulent or otherwise illegal.

[13] At the time Adamson was removed as a director on 3 July 2019 for the reasons set out above, he was still an employee and mainly in control of the applicant's operations. As such, Adamson had access to confidential information of the applicant such as all records pertaining to the applicant's clients, employees, bank accounts, financial statements, financial systems and all records pertaining to price lists of goods and/or services rendered by the applicant.

[14] Adamson resigned on 13 June 2019. Bera states in his founding affidavit that he has reason to believe that Adamson is now an employee of Discount and relies on the fact that on 21 June 2019, a document containing a list of 12 employees of the applicant who all resigned on 1 June 2019 was conveyed to the applicant. Following these resignations, a letter of demand dated 8 July 2019 was sent to Adamson. In this letter it is recorded that various employees had resigned at the instance of Adamson. It is further recorded that an entity (with which Adamson is involved with) had already commenced business in direct competition with the applicant. Adamson was requested to provide a written undertaking to the applicant not to remove any property, assets and confidential information from the premises of the applicant and to refrain from competing unlawfully with the applicant by using the applicant's confidential client information and soliciting its clients. Adamson was warned that should such an undertaking not be forthcoming; the applicant would consider pursuing various legal remedies. To date, no reply or undertaking has been forthcoming.

[15] On 11 July 2019 Bera attended to Discount's premises. He noticed various erstwhile employees of the applicant on the premises and also noticed that Discount rendered the same services as the applicant. Bera also made use of a "mystery

shopper" to buy goods from Discount in order to determine how Discount operated. Following receipt of these transactions, Bera determined that Discount directly and unlawfully competed with the applicant. Two of the applicant's clients also confirmed to Bera that Adamson had approached them in an attempt to convince them to transfer their business with the applicant to Discount.

[16] Addressing the requirements of an Anton Piller order, Bera explained to the Court that the applicant intends to apply for an interdict against the respondents to prevent them from competing with it and that, if the necessary evidence can be obtained, to then quantify a claim for damages against the respondents. Bera explained that it is unknown to him which electronic devices were used to solicit clients and whether the applicant's confidential information has been transferred to any other electronic devices. Bera further explained that the applicant entertains a well-founded apprehension that the aforementioned evidence will be destroyed or spirited away if the respondents become aware that such information, if found in their possession, will support the intended legal actions to be instituted by the applicant against them.

[17] In his founding affidavit Bera also addressed the various requirements as set out in the Practice Manual applicable to this division pertaining to, *inter alia*, the hours of execution, the presence of the sheriff, a representative of the applicant (Bera himself), a representative of the applicant's attorney of record, an independent attorney and a computer operator nominated by the applicants.

The Court order

[18] It was on the strength of what is contained in the founding affidavit of Bera that this Court exercised its discretion to grant the Anton Piller order. The order granted follows in broad terms the Practice Manual of the Gauteng Division of the High Court. Of particular relevance to this matter is the following: The order refers to the address as being at 337 Dykor Street, Silverton Pretoria as well as the home address of Adamson. In terms of the order, the respondents shall grant access to the following persons: The Sheriff, Mohammed Ismail Bera (the director of Houston – "Bera"), Mark David Commons (duly appointed assistant agent of Houston –

"Commons"); Norman Werner Loock (the applicant's local correspondent attorney – "Loock"); Lourens Johannes Grobler (independent attorney – "Grobler" – who attended the search at Adamson's house), Ryan Willemse (independent attorney – "Willemse" – who attended the search at Discount) and a computer operator nominated by the applicant.

The urgent application for reconsideration

[19] As already pointed out, instead of filing an answering affidavit responding to the allegations made in the Anton Piller application, the respondents filed an urgent application for a reconsideration of the order.

[20] Apart from denying the allegations of fraud and theft and an attempt by Adamson to explain the allegations of irregular payments, the bulk of the affidavit deals with alleged irregularities conducted during the search. Furthermore, apart from stating that Discount renders the same services and various additional services which the applicant is unable to render, what is not properly addressed in the urgent application are the allegations of unfair competition contained in the applicant's founding affidavit.

Grounds for reconsideration

[21] In essence, the respondents are claiming that the search is tainted by various procedural irregularities to such an extent that the order should be reconsidered and set aside.

General principles

[22] Before I turn to a brief consideration of some of the procedural complaints, it is necessary to briefly restate the principles that inform Anton Piller applications and thereafter consider the merits of this application against this background.

[23] An Anton Piller order derives its name from English law in the matter of *Anton Piller KG v Manufacturing Processes Ltd and Others*.[3] In essence, this order allows

[3] [1976] 1 All ER 779.

the applicant to enter the premises of the respondent for the purposes of inspecting, removing or making copies of documents belonging to the respondent.

[24] The court has the exclusive jurisdiction to grant such an order on an *ex parte* basis in circumstances where there is a real danger that relevant documents and/or property may be removed or that vital evidence may be destroyed.

[25] The object therefore is the preservation or protection of evidence – not the removal of evidence – pending proceedings already instituted or to be instituted.[4] The purpose of the order is not to allow the applicant to embark on a fishing expedition.

[26] The essential requirements for an Anton Piller order have been stated by the Appellate Division (as it then was) in *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam, and Another; Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg, and Others*[5] as follows:

> "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;
> (2) that the respondent has in his possession specific (and specified) documents or things which constitute vital evidence in substantiation of applicant's cause of action (but in respect of which 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."

[27] It goes without saying that, due to the potential "draconian" effect of this order, a court will only grant such an order under strict circumstances and with due

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[4] *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam, and Another; Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg, and Others* 1995 (4) SA 1 (A) at 15F – 16C.
[5] *Ibid* at 15G – I.

provision for certain safeguards against abuse. Such circumspection is required since the granting of an Anton Piller order has enormous potential to harm.

[28] It is therefore accepted by our courts that these types of searches may impact negatively on a person and may also cause inconvenience. But, there must be a balance between the competing interests as pointed out by the court in *Non-Detonating Solutions (Pty) Ltd v Durie and Another*[6] the Supreme Court of Appeal (SCA) –

> "[20] While it must be acknowledged that Anton Piller orders have the potential to impact negatively on the right to privacy guaranteed in s 14 of the Constitution, they are necessary and proportionate to the legitimate aim pursued. Whatever harm or inconvenience might be caused to the respondent can be attenuated by the inherent principle of proportionality which requires a balancing of competing interests and values. This resonates with what Chaskalson P stated in *S v Makwanyane and Another*, that the limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values and ultimately an assessment based on proportionality. Thus Corbett CJ recognised that in exercising its discretion whether or not to grant an Anton Piller order, the court must pay regard to, *inter alia*, the cogency of the *prima facie* case established, and the —
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> > 'potential harm that will be suffered by the respondent if the remedy is granted as compared with, or balanced against, the potential harm to the applicant if the remedy is withheld'."

[29] It is also required that the order must be "meticulously executed" according to the letter of the order. This was emphasised by the court in *Petre & Madco (Pty) Ltd t/a T-Chem v Sanderson-Kasner and Others*:[7]

> "What seems to be obvious, is that if one is to have the type of remedy provided by the *Anton Piller* procedure at all one must see to it that it is meticulously executed according to the letter of the order.

[6] 2016 (3) SA 445 (SCA) at 453E – 454B.
[7] 1984 (3) SA 850 (W) at 855 A – D.

> This was emphasised in the decision of the Court of Appeal in *Anton Piller KG v Manufacturing Processes Ltd and Others* [1976] 1 All ER 779. The Court was only prepared to permit the procedure in "an extreme case" where it was essential that the plaintiff should have inspection so that justice might not be defeated by the destruction or removal of vital evidence. And then the order might be granted, so it would seem, only if the inspection would do no real harm to the defendant or his case.
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> ORMROD LJ thought that the order sought was "at the extremity of this Court's powers" and stressed that "great responsibility rested on the solicitors for the plaintiff to ensure that the carrying out of such an order is meticulously carefully done".
>
> The order has enormous potential for harm, particularly since it would frequently be granted at the instance of a competitor who would not be astute to see that no harm comes to the respondent.
>
> Severe sanctions are necessary to curb any abuse of stringent remedies. An unruly horse needs to be kept on a tight rein."

[30] In applying for an order on an *ex parte* basis, an applicant has a duty to make full disclosure of any facts that might, not would, affect the decision of the court whether or not to grant the relief sought.[8] In *Non-Detonating Solutions* the court held that –

> "[18] The use of *Anton Piller* orders in our law is now well established. The requirements that must be satisfied for the granting of such an order were summed up by Corbett JA in *Universal City Studios Inc v Network Video (Pty) Ltd*, as follows:
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> > '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), that there is a real and well-founded apprehension that this evidence may be hidden or destroyed or in some manner spirited away by the time the case comes to trial, or at any rate to the stage of discovery, and the applicant asks the Court to make an order designed to preserve the evidence in some way . . . '".[9]

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[8] See *National Director of Public Prosecutions v Basson* 2002 (1) SA 419 (SCA) at para 21; *Frangos v CorpCapital Ltd* 2004 (2) SA 643 (T) at 649C – E and *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 348E-349B.

[9] *Non-Detonating Solutions supra* n 6 at 453B-E.

[31] Regarding the requirement of a *prima facie* case, the court in *Non-Detonating Solutions* explained:

> "[21] The requirement of a *prima facie* cause of action is simply that an applicant should show no more than that there is evidence which, if accepted, will establish a cause of action. In *Bradbury Gretorex Co (Colonial) Ltd v Standard Trading Co (Pty) Ltd,* Steyn J, said the following:
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> > '[T]he requirement of a *prima facie* cause of action . . . is satisfied where there is evidence which, if accepted, will show a cause of action. The mere fact that such evidence is contradicted would not disentitle the applicant to the remedy. Even where the probabilities are against him, the requirement would still be satisfied. It is only where it is quite clear that he has no action, or cannot succeed, that an attachment should be refused or discharged on the ground here in question.'"[10]

[32] Where serious irregularities occur in the execution of an Anton Piller order, such order may render it susceptible to being discharged on a reconsideration of the initial order.[11] The rule will likewise be discharged where it was more onerous or far-reaching than was necessary to protect the interests of the respondent.[12]

[33] I shall now return to the facts of the present matter and the specific complaints raised by the respondents.

The order granted was contrary to practice and the common law and the execution thereof was irregular

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[10] *Ibid* at 454C-E.

[11] *Audio Vehicle Systems v Whitfield and another* 2007 (1) SA 434 (C).

[12] *Ibid* at 443A - D*:* "[21] Such an order may be granted, in appropriate circumstances, *ex parte*. However, it must be borne in mind that, an *ex parte* application by its nature requires the utmost good faith on the part of the applicant. A failure on the part of the applicant to make full and fair disclosure of all material facts may lead the court to set aside the rule *nisi* on that ground alone (*Frangos v CorpCapital Ltd and Others* 2004 (2) SA 643 (T) ([2004] 2 All SA 146) at 649C - G (SA)). In exercising its discretion to grant an Anton Piller order, the Court will also consider whether the terms of the order sought are no more onerous or far-reaching than is necessary to protect the interests of the applicant. Wilfulness or mala fides need not be present to result in the discharge of a rule *nisi* where the original order was too widely framed. In these circumstances it is for the applicant to establish cogent reasons as to why the order should not be discharged. Where the court reconsiders an Anton Piller-type order in terms of Rule 6(12)(c) and it appears that the application was an abuse of the process of Court, the court may in its discretion order the applicant to pay costs on an attorney and own client scale."

[34] The respondents, relying on a host of factors, claim that the execution of the Anton Piller order was irregular in that: the applicant used the Anton Piller proceedings to intimidate and humiliate the respondents; the order granted was contrary to practice and common law; the applicant's representatives partook in and led the search; the applicant's representatives video recorded and photographed the search and the documents seized; the search was conducted contrary to the common law and in the most oppressive manner possible; the supervising attorneys not only failed to protect the respondents' rights during the execution of the order, they in turn failed to act independently and failed to stop the patently illegal search; the Sheriffs failed to stop the patently illegal searches; the incorrect address was cited in the application; the search was conducted with the assistance of a locksmith; there was an employee of the applicant on site; the computer experts were not named in the order and were merely described in vaguest of terms; the computer experts mirror imaged devices that were removed during the searches despite the order not authorising same; electronic devices as well as mirror imaging was removed; the search parties inspected various documents and electronic devices at the properties; the applicant seized more than it was entitled to; and the police were summoned to the premises to assist with the search.

[35] Save for the complaint about Commons and Bera having actively participated in the search, none of these complaints have any merit. (I will return to the complaint about Commons in Bera herein below.)

[36] Briefly, regarding the allegation that a locksmith was used, it was conceded on behalf of the respondents that no locks were cut and that access was eventually granted by Mr. Engelbrecht. It was also common cause that the locksmith remained outside of the premises during the search.

[37] Regarding the allegation that the police was present, it is common cause that both parties to this matter requested the presence of the South African Police Service (SAPS). Upon their arrival, the SAPS were informed of the Anton Piller order granted and to be executed. Despite their presence, the SAPS remained outside of the premises and did not partake in the search.

[38] The applicant denies that the computer experts mirror imaged devices that were removed. The applicant admits that mirror images were made on external devices. In this regard Grobler (the independent attorney who was present at the search of Adamson's house) confirmed that he inquired from the computer technician whether any information that was copied on the separate hard drive was also stored in any way on the computer used to create such an image, to which he replied "no". In the written report compiled by Willemse (the independent attorney who was present at the search of Discount), he details the process that was followed. He commences his report by stating that the respondents initially refused access by locking the gate to the premises. The Sheriff then attempted to gain access but was refused access. Only then was the locksmith contacted by the Sheriff. Bera also then attended to the Silverton Police station to require assistance. One of Bera's employees was also grabbed around the throat by an employee of Discount. He was released after bystanders intervened. That same employee of Discount then returned with a short club which he used to point at Bera. Engelbrecht finally granted access to the group. Willemse confirms in his report that numerous documents were attached which reflected the name and details of Houston. A computer hard drive was pointed out and attached. The computer expert then made a forensic copy of the hard drive and the hard drive was removed by the Sheriff. Willemse also states that Bera saw blades in the factory which he (Bera) claimed belonged to Houston. Willemse, however, informed Bera that the blades fell outside of the scope of the order.

[39] The Sheriff completed an inventory of the documents and electronic devices attached. It is apparent from the inventory that the various documents attached and referred to by the Sheriff in the inventory as "quotes etc" reflect the name and details of the applicant. Two evidence bags were also identified containing a desktop computer and a cellphone.

[40] It was common cause that the street number of Discount was incorrectly stated in the Notice of Motion as 337 Dykor Street, Silverton whereas the correct street number is 333. What is not in dispute is the fact that the search was done at the correct premises. The applicant explained, with reference to photographs of the outside of the premises, that although the street number was incorrect, there was

only one business in Dykor Street with the name of the second respondent, Discount, and the premises of Discount were clearly indicated with a signage board. The premises are further described in the founding affidavit in the Anton Piller order as being approximately a 100 meters away from the applicant's premises. Having regard to these facts, I am not persuaded that the complaint about the street number has merit. It is certainly not the allegation that the court order was executed at another or different entity.

[41] Regarding the search at Adamson's house, the independent attorney, Grobler, filed a report detailing the manner in which the search was conducted. Grobler notes that he did enquire from Adamson whether he wished his attorney to be present whereafter Adamson indicated that he did not want to wait and that the search may continue. Grobler then details the search process as well as the manner in which the boxes containing the evidence were sealed and marked. He notes that Adamson expressed his satisfaction with the manner in which the boxes were sealed and marked. Grobler also confirms that an image was made of Adamson's personal computer (a laptop). Grobler confirms that Adamson requested that his personal computer and phone be copied but that the computer and his phone should remain on the premises. Grobler communicated with Adamson's attorney (Mr. McLaughlin) and explained to him why the computer and the cellphone had to be removed. Before his cellphone was sealed, Adamson was allowed to use the cellphone and take down emergency contact numbers and the contact information of persons with whom he was negotiating a housing contract in Mozambique.

[42] The applicant denies the allegation that video recordings were made or that photographs were taken during the execution. This is also confirmed by the Sheriff in his confirmatory affidavit.

Presence of an attorney

[43] One of the built in protections against the abuse of an Anton Piller order in light of the invasiveness of this type of order is the requirement that there must be an independent attorney present to supervise the execution process. The supervising

attorney acts as an officer of the court and is required to account to the court on the process that was followed.[13]

[44] The appointed Sheriff is likewise an officer of the court with no personal interest in the matter. It is therefore similarly important to have regard to the contents of the affidavits filed by the Sheriff in respect of the execution process that was followed.

[45] One of the complaints raised in Court in argument was to the effect that the applicant's (own) attorney may not be present during the search. It was argued that the applicant's attorney (Loock) was however present during the search.

[46] The respondents based their argument principally on the decision of the SCA in *Memory Institute SA CC t/a SA Memory Institute v Hansen and Others* where the role of attorneys is, *inter alia*, discussed:

> "[3] The order granted provided for the removal of goods (such as a computer) by the Sheriff (with the police's assistance if need be - why, we are not told) and the handing over of them to the appellant. Duly armed with the order the Sheriff, Mr Van Vuuren (a member of the appellant) and the attorney proceeded to the Hansen residence and took what they wanted. I shall deal with this in a few words without references since those who care to look can find them easily. *Anton Piller* orders are for the preservation of evidence and are not a substitute for possessory or proprietary claims. They require built-in protection measures such as the appointment of an independent attorney to supervise the execution of the order. An applicant and the own attorney are not to be part of the search party. The goods seized should be kept in the possession of the Sheriff pending the Court's determination. Since it is the duty of an applicant to ensure that the order applied for does not go beyond what is permitted (something that was not done in this case) and since Musi J granted a rule *nisi* he was not empowered to grant, the setting aside of the rule had to follow as a matter of course (as happened when Van Coller J discharged the rule)."[14]

[13] *Mathias International Ltd and Another v Baillache and Others* 2015 (2) SA 357 (WCC) at para 27.
[14] 2004 (2) SA 630 (SCA) at 633D - G.

[47] I am in agreement with what the SCA held in respect of an applicant's own attorneys not being allowed to participate in the search. The reason for that is sound: It can hardly be said that a search is legal if a supervising attorney actively takes part in the search. However, I do not read the judgment in *Memory Institute SA CC* to say that the applicant's attorneys may not be present as submitted on behalf of the respondents. The court held that they may not be "part of the search party". The court did not hold that they may not be present or not allowed access.

[48] I have also perused the Practice Manual of both the Gauteng Division, Pretoria and that of the Gauteng Local Division, Johannesburg. The latter is more comprehensive in that the duties of the independent supervising attorney are more detailed than what is contained in the Practice Manual of the Gauteng Division, Pretoria. If regard is had to the Practice Manual of the Gauteng Local Division, Johannesburg, it provides that the following persons shall be granted access to the premises: (i) the sheriff; (ii) the independent supervising attorney; (iii) the forensic expert and (iv) a representative of the applicant and/or the applicant's attorney who shall not take part in the search, but may be called upon by those mentioned in (i) – (iii) to identify the documents falling within the evidence referred to in the order. Only when an applicant's own attorney is requested to assist, may he or she be requested to identify a document.

[49] Therefore, although the applicant's own attorney may be present as set out in the Practice Manual, the principle that the applicant's attorney may not participate in the search for the reasons set out in the *Memory Institute SA CC* matter, remains intact.

[50] In the present matter the allegation is not that the supervising attorneys partook in the search. What the respondents are saying is that the supervising attorney (Grobler) failed to protect their rights and failed to stop a patently illegal search. This is denied by the applicant. From the detailed report by Grobler, there is no evidence substantiating the allegation that he partook in the search and/or that he failed to protect the rights of Adamson. In fact, he explains in his report that Adamson had contacted his attorney (Mr. McLauglin). The phone was handed to him (Grobler) whereafter he informed McLauglin that he was the appointed independent

attorney. After he had explained to McLauglin what was contained in the order, the phone was handed back to Adamson. After Adamson had concluded his conversation with his attorney, he unlocked the gate and gave access to Grobler, Commons, Loock, Mr. Dewald Jansen (the computer technician) and Deputy-Sheriff Steven. Grobler specifically asked Adamson whether he wished to wait for his attorney to be present whereupon he said that he did not want to wait for his attorney and that that the search may continue. Grobler further explains in some detail how the electronic devices were examined and how images of Adamson's computer were made and stored. I have already referred to the report by Willemse.

Allegation that Commons and Beira took part in the search

[51] Various allegations are made in respect of the active participation of both Commons and Bera in the search. Some of the allegations are the following:

a) Commons personally searched Adamson's home and was in fact leading the search. The fact that Commons and Bera partook in the search is not denied by the applicant. All that is denied is that he was leading the search. Bera states the following:

> "Save to admit that Mr Commons and I partook in the search as authorised by the court order, it is denied that we led the search for whatever that may portray".

b) Commons was handed lever arch files at Adamson's house. The allegation further is that Commons sat perusing each file for a substantial period of time. These allegations are not denied by the applicant.

c) Commons also directed to the Sheriff what was to be attached. This allegation is not denied. In fact, the applicant states that all persons mentioned in the order were authorised to search, to examine and identify documents and that the Sheriff was authorised to attach and remove any document or device pointed out by the aforesaid authorised persons.

d) Bera identified certain boxes to Commons and stated to him that same contained job cards of wood cuttings. The applicant merely notes these allegations and persists with the contention that all persons were authorised to execute the court order and act in terms of the parameters of the court order granted.

e) Bera entered the premises of Discount and went into the offices and started searching. The allegation is also made that Bera searched the offices of MLC Accountants who were also on the premises. Bera was unaccompanied by the Sheriff or the supervising attorney. These allegations are not denied by the applicant. It is merely reiterated that the persons authorised in the court order were permitted to execute the order.

[52] I reiterate what I have already indicated. It is primarily the task of the Sheriff to search and attach the documents or devices identified in the order. This is however not what happened here and the principle as laid down by the SCA in *Memory Institute SA CC* that "[a]n applicant and the own attorney are not to be part of the search party" was therefore not adhered to.

[53] The mere fact that an order allows for certain individuals to be granted access to a property for the purpose of having access to documents or evidence necessary to be preserved does not mean that the order gives *carte blanche* to everyone to embark on a fishing expedition and actively partakes in the search. An *Anton Piller* order should be meticulously executed and the execution thereof should not go further than strictly necessary for the preservation of the critical evidence. The reason for this is evident: "Because of the highly invasive nature of such orders execution thereof must be meticulous and strictly according to the letter thereof."[15]

[54] Although I am satisfied that the applicant has made out a case for the granting of the Anton Piller order, the execution of the order, in my, was so flawed that it warrants the setting aside of the order: Bera and Commons overstepped the

[15] *Audio Vehicle Systems supra* n 11 at para 23.

boundaries when they embarked on a frolic of their own. As already pointed out, the mere fact that they were allowed to be present during the search did not entitle them to usurp the powers of the Sheriff. The supervising attorneys should not have allowed Common and Bera to have acted in the way that they did. In this regard I am in agreement with what the court in *Audio Vehicle Systems* stated:

> *"*[23] The governing principle would appear to be that the more drastic and potentially harmful the remedy may be, the more closely it has to be scrutinised by the court and the more meticulously it must be applied and executed."[16]

[55] The order granted therefore falls to be set aside. Despite the irregularities, I am not persuaded that a costs order on a punitive scale is warranted.

Order

[56] In the result the following order is made:

1. The order granted on 18 July 2019 is set aside.
2. The applicant (Houston Group (Pty) Ltd) to pay the costs of the application.

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A.C. BASSON

JUDGE OF THE GAUTENG DIVISION, PRETORIA

Appearances

For Applicant

[16] *Ibid* at 443G.

in *ex parte* application:	Adv. M Bronkhorst
Instructed by:	Westly McLaughlin Attorneys
For Respondents	
in *ex parte* application:	Adv. D Block
Instructed by:	Jassat Attorneys
Date of Judgment:	17 February 2020