

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the appeal of:

- UNIVERSAL CITY STUDIOS, INC. ..... 1st appellant,
- PARAMOUNT PICTURES CORPORATION..... 2nd appellant,
- COLUMBIA PICTURES INDUSTRIES, INC.... 3rd appellant,
- WARNER BROS. INC...... 4th appellant,
- TWENTIETH CENTURY-FOX FILM CORPORATION ..... 5th appellant,
- MGM/UA ENTERTAINMENT CO...... 6th appellant,
- UNITED ARTISTS CORPORATION..... 7th appellant,
- WALT DISNEY PRODUCTIONS..... 8th appellant,
- ORION PICTURES CORPORATION..... 9th appellant,
- EMBASSY PICTURES..... 10th appellant,

and

NETWORK VIDEO (PROPRIETARY) LIMITED...respondent.

Coram: CORBETT, KOTZÉ, MILLER et BOTHA, JJA, et GALGUT, AJA.

Date of hearing: 15 November 1985.

Date of judgment: 27 February 1986

/ JUDGMENT.....

JUDGMENT

CORBETT, JA:

In recent years the viewing of video tapes of cinematograph films in the home has become a popular pastime in South Africa. The manufacture and supply, either by way of letting or by way of sale, of such video tapes is a fast-growing and, it would seem, profitable industry. As the evidence in this case indicates, manufacturers and suppliers of video tapes are not always very scrupulous about respecting the rights of the owners of the copyright in the films concerned. In fact there is a great deal of trafficking in what are called "pirate" tapes, ie tapes of films produced without authority from the owner of the copyright. That essentially is what this case is about.

The ten appellants are all American corporations who make and distribute cinematograph films. They are

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said to be the major film-producing companies in the United States of America. They constitute the entire membership of an American organisation known as the Motion Picture Association of America, Inc. ("the MPAA"). This association, which has its headquarters in New York City, was formed for the purpose of representing and looking after the interests of motion picture companies based in the United States of America. Among the activities undertaken by the MPAA on behalf of members is the policing and enforcement of copyright in cinematograph films made and/or distributed by members.

In South Africa the MPAA is represented by a company known as Business Information Services (Pty) Limited ("BIS"), which operates from Johannesburg. The proprietor of BIS is a Mr E J Askew. He is assisted in the business by June Askew. The primary activity of BIS, as representative of the MPAA in South Africa.....

Africa, is the policing of the home video market in this country. BIS assists dealers and distributors in the home video market to distinguish between legitimate copies of members' films, ie copies made under licence from the copyright owner, and pirate copies. To this end BIS conducts what are termed "voluntary inspections". A voluntary inspection takes place at the request of the video dealer concerned. A representative of BIS visits the dealer's premises, inspects his stock, identifies any pirate tapes and furnishes the dealer with a list of infringing material. BIS has also on occasion been instrumental in causing the police to take criminal action against persons producing or dealing in pirate video tapes, but in general the police are willing to act only where the copyright in the cinematograph films in question has been registered in terms of the Registration of Copyright in Cinematograph Films Act 62 of 1977.

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On such occasions Askew or a member of the staff of BIS often accompanies the police on raids of the premises of video dealers suspected of dealing in pirate video tapes of registered cinematograph films in order to assist in the identification of offending material.

The respondent is a South African company, with premises on the Foreshore in Cape Town. It carries on business as a maker and distributor of video tape versions of cinematograph films and as a dealer in video tapes for the home video market. None of the appellants has given respondent a licence to reproduce any of its cinematograph films on video tape or to distribute video tapes of its films on the home video market.

Alleging, on grounds which I shall detail later, that respondent had been making and/or selling video tapes which were unauthorized copies of cinematograph films, both registered and unregistered, in respect of which

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appellants owned the copyright and that respondent had thereby been infringing appellants' copyright and had been competing unlawfully with the appellants, appellants made application in the Cape of Good Hope Provincial Division ("the CPD") for certain relief (to be specified shortly).

One of the prayers in the notice of motion was that the usual requirements of service of the application upon the respondent be dispensed with and that the matter be heard in chambers. This prayer was acceded to. On 4 October 1983 the matter came before LAPEGAN J. in chambers and without notice having been given to the respondent. The learned Judge granted an order as prayed. Before setting out this order, I would add that on 13 October 1983 respondent made application for leave to appeal against the order. This was granted on 28 November 1983 and it was directed that the appeal be heard by the Full Court of the CPD. The costs of

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the application were ordered to stand over for determination by the Full Court. The appeal was heard on 14 May 1984. Prior to this, on 26 April 1984, a notice was filed on behalf of the appellants (respondents in the appeal to the Full Court) in which it was indicated that they had abandoned certain portions of the order granted in their favour by LATEGAN J. I now quote in full the text of the order, with those portions which were so abandoned placed in square brackets:

"1. The Deputy Sheriff, Cape Town, is authorized and directed in the company of the attorneys of record of the Applicants and the Deponent EDWARD IRVING ASKEW and/or JUNE ASKEW to enter upon the premises of the Respondent at 4th Floor, Foretrust Building, M Hammerschlag Way, Foreshore, Cape Town, and upon any other premises at which it conducts business and/or stores, maintains or processes materials used in conducting its business, and to attach

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and keep in his possession, pending the final determination of these proceedings:

- 1.1 all video tapes or other copies of the cinematograph films BREAK-HART PASS, FRANKENSTEIN & THE MONSTER, BEAR ISLAND, THE BIG FIX, METEOR, THE UNDEFEATED and DIFFERENT STROKES (hereinafter referred to as 'the original works'), which constitute infringing copies in respect of the copyright in such cinematograph films, in the possession of the Respondent or under its control at the Respondent's aforesaid premises;
- 1.2 all other video tapes or other copies of any other cinematograph films in respect of which the Applicants are the holders of rights under the copyright in the Republic of South Africa, and which are infringing copies of such cinematograph films in the possession of the Respondent or under its control at the Respondent's aforesaid premises;
- [1.3 all video tapes or other copies of the original works and any other cinematograph films released in the Republic of South Africa in the Applicants' names, in or with which the Respondent is competing unlawfully with the Applicants;]

/ All.....



All video tapes or other copies of the  
aforementioned in paragraphs 1.1, 1.2  
[and 1.3] above are collectively re-  
ferred to hereinafter as 'infringing  
video tapes'.

1.4 [All films and/or] master video tape  
copies of any cinematograph films in  
respect of which the Applicants are  
the holders of rights under the copy-  
right in the Republic of South Africa,  
and which [films and/or] master video  
tape copies have been and/or are being  
used by the Respondent to unlawfully  
reproduce infringing video tapes and  
which are in the possession of the  
Respondent or under its control at  
the Respondent's aforesaid premises;

1.5 all printed matter, photographs, nega-  
tives, or plates, depicting scenes  
from the original works or any other  
cinematograph film in respect of which  
the Applicants are the holders of rights  
under the copyright in the Republic  
of South Africa, which were produced  
by infringing copyright in any of  
the said cinematograph films.

(All the aforementioned materials are  
collectively referred to hereinafter as  
'infringing documents'.)

(For the purposes of this Order, the  
Deputy Sheriff shall be entitled to rely

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on the identification of such [films and/or] master video tape copies and/or infringing video tapes and/or cinematograph films in respect of which the Applicants are the copyright owners in the Republic of South Africa and/or infringing documents by the Deponents EDWARD IRVING ASKEW and JUNE ASKEW.)

2. The said Deputy Sheriff, Cape Town, is authorised and directed further to attach as aforesaid all documents and records in the Respondent's possession or under its control relating to the sale or supply by it of any infringing video tapes;
- [3. The Respondent is required within 7 (SEVEN) days of such Order, to make discovery under oath to the Applicants of the name or names of all persons or parties to whom it has supplied infringing video tapes;]
4. The Deputy Sheriff, Cape Town, is authorised and directed to keep in his possession as aforementioned all infringing video tapes, infringing documents and master [films or] video tapes pending the final determination of actions or applications to be instituted by the Applicants  
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within six months of the date of this Order;

5. The costs of this Application are costs in the cause;
6. Should it appear on information placed before this Court by the Respondent that this Order should not have been granted, the Applicants shall notwithstanding this Order be jointly and severally liable for any damages sustained by the Respondent by reason of the execution of this Order. To give effect to this Order the Applicants shall lodge security to and to the satisfaction of the Registrar of the Supreme Court in the amount of R30 000 (THIRTY THOUSAND RAND)."

On 15 June 1984 the Full Court delivered a reserved judgment, in terms whereof the appeal was upheld with costs (including the costs of two counsel), the order of LATEGAN J was set aside and appellants (respondents before the Full Court) were ordered to pay the costs of the application for leave to appeal. No order was speci-

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fically substituted for that of LATEGAN J, but clearly the intention was that it be ordered that the application be dismissed. The judgment of the Full Court has been reported (see Network Video (Pty) Ltd v Universal City Studios Inc. and Others 1984 (4) SA 379 (C) ).

Special leave having been granted in terms of sec 20(4)(a) of the Supreme Court Act 59 of 1959, as amended, appellants now appeal to this Court against the whole of the judgment and order of the Full Court. The appeal is not opposed by the respondent and there was no appearance on behalf of the respondent. At the hearing of the appeal counsel for appellants told us, in response to enquiries by the Court, that the order of LATEGAN J had originally been partially executed, that the infringement proceedings foreshadowed in par 4 of the order of court had been instituted and settled and that the only outstanding dispute between the parties related to the

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order granted by LATEGAN J, which was set aside by  
the Full Court. Counsel further intimated that appellants  
wished further to amend the order sought by -

- (1) inserting the words "one of" before the words "the  
attorneys of record" in par 1;
- (2) deleting from par 1 the words "and/or stores,  
maintains or processes materials used in conduct-  
ing its business";
- (3) deleting from par 1.1 reference to all cinematograph  
films other than THE BIG FIX;
- (4) altering the words "holders of rights under the copy-  
right" to "owners of copyright" in par 1.2 and 1.5;
- (5) omitting par 1.4 and deleting subsequent references  
to "master video tape copies";
- (6) omitting from par 1.5 the words "printed matter",  
"the original works or" and "other";
- / (7) replacing.....

- (7) replacing the words "as aforesaid" in par 2 with the words "and make an inventory of"; and
- (8) deleting from par 4 the words "as aforementioned all infringing video tapes, infringing documents and master films or video tapes" and substituting "all items attached as aforementioned (save for those referred to in par 2)".

The type of order granted by LATEGAN J is usually characterized by the name Anton Piller, in recognition of the pioneering decision in English law in the case of Anton Piller K G v Manufacturing Processes Ltd and Others [1976]

1 All ER 779. The granting of Anton Piller-type orders has in recent years become a fairly frequent practice in South African courts. In 1984, however, there were reported a series of judgments emanating from courts

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in the Transvaal expressing general disapproval of the practice (see Economic Data Processing (Pty) Ltd v Pentreath 1984 (2) SA 605 (W); Cerebos Food Corporation Ltd v Diverse Foods SA (Pty) Ltd and Another 1984 (4) SA 149 (T); and Trade Fairs and Promotions (Pty) Ltd v Thompson and Another 1984 (4) SA 177 (W) ).

Although the instant case is by now moot, I consider that it is appropriate for this Court to consider certain of the issues raised by it because of the questions of costs which arise in regard to the various stages of the proceedings.

I return now to the facts of this case and in particular to the evidence adduced in support of the appellants' allegation that respondent was dealing in pirate tapes of films of which appellants owned the copyright. The founding affidavit was deposed to by Mr E I

/ Askew.....

Askew and supporting affidavits were made by June Askew and Dora Lees.

In his affidavit E I Askew, after outlining the general position of the appellants and the activities of MPAA and BIS (on behalf of MPAA), as I have described them, went on to point out that "in recent months" (ie prior to 29 September 1983 when the founding affidavit was made) BIS, at the request of MPAA, had formed an association with various legitimate distributors of video tapes in South Africa who dealt in films of producers not belonging to the MPAA. In terms of this arrangement BIS undertook to take the same action in regard to films in respect of which such local associates had obtained rights as it took in the case of films of MPAA members.

Askew further stated that for some time he had been aware that respondent was carrying on an extensive business in the making and distribution of pirate tapes.

/ Respondent.....



Respondent had communicated with BIS on a regular basis to make enquiries as to whether certain specific films were protected by MPAA. BIS responded to these enquiries for a while, but later came to the conclusion that respondent was abusing the information received from BIS and terminated the practice of furnishing it. Askew states that it became apparent that while respondent was careful not to deal in video tapes of registered films, it was producing and supplying its customers with unauthorized copies of unregistered films, including films in respect of which MPAA members and associates owned the copyright. And it did so in respect of certain films despite having been previously informed that the films in question were protected by the MPAA. The reason for distinguishing between registered and unregistered films was, according to Askew, the relative ease with which copyright infringement proceedings, either civil or criminal, could be brought or initiated when the film is registered.

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In substantiation of his allegations Askew referred to a circular letter from respondent to its customers dated August 1983; to sales made by respondent to a company named Dora's Video (Pty) Ltd, which trades as "Dora's Video World" and which hires out video tapes of films to members of the public for the purpose of private home viewing; to a "trap purchase" of a number of video tapes from respondent on 10 August 1983; and to a police inspection of respondent's premises shortly after the trap purchase. It is not necessary to recount this evidence in detail. The circular letter does certainly convey the impression that respondent was only concerned to steer clear of registered films. The affidavit of Dora Lees, the managing director of Dora's Video (Pty) Ltd, shows that on 3 February 1983 the company purchased from respondent a number of video tapes of films, including those entitled BREAKHEART PASS, FRANKENSTEIN & THE MONSTER BEAR ISLAND, THE BIG FIX, METEOR and THE UNDEFEATED.

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Lees stated further in her affidavit that it was made clear to her by an employee of respondent that the tapes supplied by respondent were produced "by themselves without any authority of copyright owners". According to E I Askew the copyright in all these films is held by certain members of the MPAA. And the trap purchase on 10 August 1983, when tapes to the value of R3 000 were purchased by one Cronje, included a large number of films in respect of which members of the MPAA hold copyright and even some registered films.

The police inspection of the respondent's premises, in which June Askew participated, revealed that respondent was conducting a large scale business of recording video tapes and selling the same; and that the video tapes so recorded and sold included private copies of films in respect of which the copyright was held by members of the MPAA. June Askew opined that a thorough inspection of respondent's premises would bring to light further in-

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fringements of appellants' rights.

The founding affidavit further stated that it was the intention of the appellants (originally applicants) to institute copyright infringement proceedings against the respondent, claiming interdicts, damages or alternatively accounts of profits and delivery up of infringing copies of their films. The affidavit proceeded:-

"I believe, however, that if the Respondent becomes aware of the fact that the Applicants have instituted court proceedings in respect of unlawful dealings in their films against it, or even that the Applicants are contemplating instituting such proceedings, the Respondent will remove from its possession or custody all copies of such films and any 'master' copies of the films used for making copies. Furthermore, the Respondent is likely to destroy or remove from its custody or possession all documents relating to the sales of infringing copies of the films in question and the profits which it has made from the sales of infringing.....

fringing copies of the films. My premise for making these statements is the fact that the Respondent is well aware of the unlawfulness of its activities and of the Applicant's difficulties in proving the same."

The apprehension that vital evidence might be lost if conventional court proceedings were instituted was echoed by June Askew who said:-

"By the nature of things, evidence of this nature can be removed or destroyed very easily. I believe, on the strength of my contact with the Respondent and the information which I have obtained in regard to it and its trading activities, that if conventional court proceedings are instituted against it by M.P.A.A. members there is a strong risk that such evidence will be lost/<sup>to</sup>the the M.P.A.A. members and such members may never be able to pursue their claims against the Respondent arising out of copyright infringement to the full or at all."

/The.....

The founding affidavit further contained full details concerning first applicant's copyright in the film THE BIG FIX, including a certified extract from the register of copyright showing that it is a registered film, and concerning the respondent's infringement of this copyright by reproducing and selling pirate copies of THE BIG FIX to Dora's Video World and to Cronje.

It was also alleged in the founding affidavit that respondent used photographs of scenes from cinematograph films to print "inserts", which were incorporated in the containers in which the video tapes were sold. The insert naturally related to a scene from the film packaged in the container. In this way too, so it was alleged, the respondent had infringed the copyright owned by the applicants.

The Anton Piller saga in South African legal practice is an oft-told tale (see the judgments in the

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Economic Data Processing case, supra, and the Cerebos Food case, supra, and the following articles: H J Erasmus in (1984) 101 SALJ 324; A C Beck in (1985) 48 THRHR 203; B R Rutherford in (1984) 6 MBL 149; Esmé du Plessis in (1984) 6 MBL 156; Mr Justice G A Coetzee in (1985) 102 SALJ 634) and I do not propose to recount it again in any detail. I wish merely to highlight certain features.

The original Anton Piller case, supra, related to infringement of copyright and the misuse of confidential information by the agent of the plaintiff and the aim of the order granted was the preservation of certain vital evidence which might otherwise have been destroyed or removed to beyond the jurisdiction of the court. The decision of the Court of Appeal approved and followed an earlier decision of TEMPLEMAN J in Emi Ltd and Others v Pandit [1975] 1 All ER 418, a case concerning infringement of copyright and passing off. Here the purpose of the order granted was the preservation of evidence, the

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seizure and removal of infringing copies which belonged to the plaintiffs under copyright law and the testing of defendant's typewriters in order to confirm or dispel an allegation of forgery. In subsequent cases the Anton Piller order was extended to cases concerning what are termed "bootleggers", ie those who make and sell unauthorized recordings of live performances (Ex parte Island Records Ltd and Others [1978] 3 All ER 824), to cases not concerning what is called industrial or intellectual property (see eg Yousif v Salama [1980] 3 All ER 405) and even to a matrimonial dispute (Emanuel v Emanuel [1982] 2 All ER 342). Also the scope of the order was widened to include a provision whereby the defendant was required, particularly in cases involving the marketing of pirate video and audio tapes, to disclose the names and addresses of suppliers to the defendant and customers of the defendant and in addition other details relevant to the acquisition and sale of the infringing articles. The essence of the Anton Piller order was, of course, the procedural peculiarity that it was

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granted ex parte without notice to the defendant.

Since the very raison d'être of the order was the apprehension that the defendant, if apprised of the impending legal proceedings, would somehow get rid of the incriminating articles or other evidence which the plaintiff wished to have preserved, absence of notice was an essential part of the procedure. In the Anton Piller case, supra, at p 783 f, Lord DENNING stated:

"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."

The first reported case in South Africa in which an Anton Piller order was granted was Roamer Watch Co SA and Another v African Textile Distributors also t/a M R

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Patel Wholesale Merchants and Direct Importers 1980 (2)

SA 254 (W), a case involving alleged infringement of trade mark and passing off. In that case CILLIERS AJ, on the return day of a rule nisi considered, at some length and with copious reference to the English decisions on the subject, the grant of Anton Piller-type orders by our courts; and he suggested various safeguards which might be employed in order to ensure that the defendant does not suffer undue hardship and that the order is not abused by the plaintiff.

Since the Roamer Watch Co case, supra, there have been a number of reported cases in which orders, varying in detail but falling under the general rubric of Anton Piller, have been granted by South African courts in cases involving the unlawful use of confidential information, infringement of copyright, trade mark and patent, passing off, unlawful competition and restraint of trade

/ (see.....)

(see eg Wilrose Timbers (Pty) Ltd v C E Westergaard (Pty) Ltd and Others 1980 (2) SA 287 (W); Scaw Metals Ltd v Apex Foundry (Pty) Ltd and Another 1982 (2) SA 377 (D); Continental Wholesalers v Fashion Fantasy (Pty) Ltd 1983 (1) SA 683 (D); Easyfind International (SA) (Pty) Ltd v Instaplan Holdings and Another 1983 (3) SA 917 (W); Petre & Madco (Pty) Ltd t/a T-Chem v Sanderson-Kasner and Others 1984 (3) SA 850 (W); Aercrete South Africa (Pty) Ltd and Another v Skema Engineering Co (Pty) Ltd and Others 1984 (4) SA 814 (D) ). It would appear, however, from what is stated in certain judgments (see eg the Economic Data case, supra, at p 606; Cerebos Food case, supra, at pp 161 ff; Trade Fairs case, supra, at p 179, 187) that these judgments represent merely the proverbial tip of the iceberg. In practice the Anton Piller procedure became a very popular one, especially in the Transvaal; that is, until the decisions in the Economic Data, Cerebos Food and Trade Fairs trilogy of cases.

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In the Cerebos Food judgment (subsequently said to be a nullity on the ground that the Full Court of the Transvaal Provincial Division did not have jurisdiction to hear the matter - per COETZEE J in the Trade Fairs case) the components of the Anton Pillar order granted by South African courts were summarized as follows (at p 164 A-C, per VAN DIJKHORST J, BOSHOFF JP and O'DONOVAN J concurring):

- "1. Authorising the search for and attachment of property in the possession of the defendant where the plaintiff has a real or personal right to it.
2. Orders for the disclosure of names of sources and retail outlets of the defendant as they enable the defendant to operate unlawfully, infringing on the plaintiff's rights.
3. Orders for the attachment of documents and other things to which no right is claimed except that they should be preserved for and produced as evidence in an intending Court case between the parties.

/ 4. Orders .....

4. Orders for the production and handing over of a thing to which no right is claimed but as part of an interdict to make the interdict effective, for example by erasure of a trade mark from the defendant's goods."

The Court held that the first of these components, ie the order for the interim attachment of property in which a real or personal right was claimed (including both common law and statutory rights) was not a "true Anton Piller remedy" and that for many years our courts have been granting interim attachment orders where the plaintiff alleged an existing right in a thing and the only way in which that thing could be preserved or irreparable harm prevented was by attachment thereof pendente lite (see judgment p 164 D-F).

As to the second component, it was held that neither in the Roman law nor the Roman-Dutch law nor in our law is there any authority for an order that a res-

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pondent disclose the names or particulars of sources and retail outlets (see judgment p 168 A-B). Likewise the Court held that, in regard to the third component, the South African courts had no jurisdiction to grant an order for the attachment of property of another where no right of the applicant existed therein, merely for the purpose of its production as evidence (see judgment p 173 F); and that, as to the fourth component, the court had no power to order the handing over of property "to make the interdict effective" where no right to that property existed (see judgment p 173 G-I).

At this point I should interpolate that I do not find it necessary to determine whether COETZEE J is correct in regarding the decision in the Cerebos Food case as a nullity. As far as this Court is concerned no question of stare decisis arises. At the same time this carefully researched and reasoned judgment of VAN DIJKHORST J merits serious consideration by this Court,

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whether it be a nullity or not.

In the Trade Fairs case, supra, at p 191 C-D,  
COETZEE J interpreted the Cerebos Food decision thus:

"It is true that VAN DIJKHORST J does not pertinently overrule any of the conflicting decisions which he might have done, in the interests of clarity and certainty. The thrust of this judgment, however, is unmistakably in one direction only, namely that Anton Piller is no part of our law, that only an attachment order (as opposed to a search warrant) can issue in respect of property of the applicant which must be specially and properly specified in the order itself. In other words our well-known legal procedure, as it existed before the advent of Anton Piller, is all that is available. Nothing more."

(This was broadly in conformity with what COETZEE J had himself held in the Economic Data Processing case, supra.)

Procedurally the typical Anton Piller order is very unusual in that it is normally sought ex parte without notice to the other party and in camera.

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Moreover, aspects of the order immediately affect in an adverse manner the rights of the other party without him having been heard in opposition to the order. In addition, there is abundant evidence that in the past Anton Piller orders have been grossly abused by those in whose favour they have been granted at the expense of those against whom they have been granted (see in this regard the judgments in the Easyfind International case, supra, at pp 932 D - 933 E; the Economic Data Processing case, supra, at pp 606-7, 615-6; the Petre & Madco case, supra, at pp 855 I - 857 E; the Trade Fairs case, supra, at pp 189 I - 190 E). Apart from the question as to whether the court has the power to make Anton Piller orders, this evidence of abuse makes understandable the negative reaction of certain Judges to the practice that has evolved in this country of granting such orders.

In the Cerebos Food case the Court did not rule

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out the possibility of applications of this kind being heard in camera, but emphasized that, in terms of sec 16 of the Supreme Court Act 59 of 1959, the court could only do so in special cases. Should the administration of justice be rendered impracticable or materially hampered by the presence of the public, that would constitute a special case as envisaged by the statute. Nevertheless the court should not lightly depart from the general rule that all cases must be heard in open court (see judgment at pp 158 A - 159 C). Nor did the Court reject the concept of an ex parte application without notice to the respondent. VAN DIJKHORST J stated (at p 157 C-D) —

"The procedure whereby an urgent order was moved ex parte without notice to the respondent was justified in this case. In many instances it is the only effective procedure whereby an applicant's rights can be protected and the eventual effectiveness of the Court's order ensured. That such procedure is fraught with danger is evident. It can lead to great abuse and these applications should only be entertained in special circumstances."

/ I return.....

I return now to the present case. As my recital of the facts indicates, LATEGAN J granted what may be typified as an Anton Piller order in a typical kind of case, viz. alleged copyright infringement and unlawful trading. The Full Court set aside the order principally on the ground that it was a fundamental principle of our law that a court will not normally grant an order which may directly affect the rights of a person and involve far-reaching consequences to him without giving that person an opportunity of being heard, with the result that in ex parte applications brought without notice the court orders the issue of a rule nisi where the rights of other persons may be affected by the order; that in the instant case the order granted by LATEGAN J constituted a grave invasion of the rights of the respondent; and that consequently notice of the application, in some form or another, should have been given to the respondent (see judgment

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1984 (4) SA 379 (C) at p 381 E-II). The Court referred to the Anton Piller practice, but concluded (at p 383 C-D)—

"It is unnecessary in my opinion to consider the various cases quoted to us on the subject. It suffices to say that we have not been persuaded that a different practice has grown up and been accepted in the Anton Piller type of case which would justify this Court to depart from the firmly established practice in this Division to insist on notice to a respondent beforehand or to require that a rule nisi be issued where, as in this case, an order is sought which vitally affects the rights of the respondent."

It is, however, of the essence of the Anton Piller procedure that notice is not given to the other party; the reason being that it is apprehended that the giving of notice will defeat the purpose of the order: will cause the horse to bolt, as it has been put. If, therefore, the procedure is a proper one in our law, a point which the Full Court appeared to leave open, and the case under consideration justifies the granting

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of an Anton Pillar order, then no prior notice of the application need be given.

By now, of course, the original order granted by LATEGAN J has been whittled down considerably by the appellants. Appellants' counsel explained in argument that the reason for confining the provisions of par 1.1 of the order to the film, THE BIG FIX, was that copyright in the other films named had not been properly established: the evidence seeking to establish such copyright was based on hearsay evidence. In the case of THE BIG FIX, however, there was a certified extract from the register of copyright showing that first appellant was the owner of the copyright therein for the Republic of South Africa and in terms of sec 29 of Act 62 of 1977 this constituted prima facie evidence of first appellant's rights. Counsel indicated, however, that the appellants were more concerned about establishing in this Court that they

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were entitled to par. 1.2 and 1.5 of the order granted by LATEGAN J (par. 1.3 and 1.4 having been abandoned). In fact counsel conceded that if only par. 1.1 (as confined to THE BIG FIX) survived the appeal and this Court refused to reinstate par. 1.2 particularly, appellants would not be entitled to the costs of appeal. Since the appeal is fundamentally about costs this concession focuses attention mainly on par. 1.2.

As I have shown, it was accepted in the Cerebos Food case that an order for the interim attachment for the purpose of preservation of property in which a real or personal right (including both common law and statutory rights) was claimed by the applicant was competent. And in this regard it was suggested that such statutory rights could include those created by sec 24(1) of the Copyright Act 98 of 1978, which provides that in an action for infringement of copyright the copyright owner / is.....

is entitled, inter alia, "to all such relief by way of delivery of infringing copies .... as is available in any corresponding proceedings in respect of infringements of other proprietary rights." Whether the Court regarded this power to grant an interim attachment as an instance of the inherent jurisdiction of the Supreme Court or as being founded on an extended form of the actio ad exhibendum (cf. the Economic Data Processing case, supra, at pp 617-8) is not clear to me.

I accept the correctness of the general principle that for the purpose of preserving it the court may order the interim attachment of property in respect of which the applicant claims a real or personal right (common law or statutory). However, in view of counsel's concession in regard to costs and since the matter is now moot, I do not find it necessary or appropriate to determine precisely what rights to relief by way of

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delivery up a plaintiff has under sec. 24(1) of the Copyright Act (in Video Rent (Pty) Ltd and Another v Flamingo Film Hire 1981 (3) SA 42 (C) the Court found difficulty in interpreting sec. 24(1) - see pp 51-2) or whether such rights fall within the ambit of the above-stated principle.

I now turn to par. 1.2 of the order. In response to questions from the Bench, appellants' counsel made it clear that what was originally sought by this order, read in conjunction with the words in parenthesis immediately prior to par. 2 of the order, was an authorization to the Deputy Sheriff, assisted by Mr Askew and June Askew, to search the respondent's premises in order to find evidence of infringements of copyright upon which to found causes of action; and then to attach and keep in his possession any video tapes constituting infringing copies of films in respect of which any of the appellants held the copyright. Presumably it was intended that the Askews would point out what they considered to be infringing.....

fringing material and the Deputy Sheriff would be the arbiter of what should be attached. Par. 1.5 of the order fell into the same general category. The question is whether the Court of first instance had the power to grant such orders.

Now, I am by no means convinced that in appropriate circumstances the court does not have the power to grant ex parte and without notice to the other party, i.e. the respondent (and even, if necessary, in camera) an order designed pendente lite to preserve evidence in the possession of the respondent. It is probably correct, as so cogently reasoned by the Court in the Cerebos Food case, supra, that there is no authority for such a procedure in our common law. But, of course, the remedies devised in the Anton Piller case, supra, and other subsequent cases for the preservation of evidence are essentially modern legal

/ remedies.....



remedies devised to cater for modern problems in the prosecution of commercial suits.

There is no doubt that the Supreme Court possesses an inherent reservoir of power to regulate its procedures in the interests of the proper administration of justice (see Stuart v Ismail 1942 AD 327; Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk 1972 (1) SA 773 (A), at p 783 A-G; also Ex parte Millsite Investment Co (Pty) Ltd 1965 (2) SA 582 (T), at p 585-6; Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis and Another 1979 (2) SA 457 (W), at pp 461 F - 462 H).

It is probably true that, as remarked in the Cerebos Food case (at p 173 E), the court does not have an inherent power to create substantive law, but the dividing line between substantive and adjectival law is not always an easy one to draw (cf Minister of the Interior & Another

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v Harris and Others 1952 (4) SA 769 (A), at p 781 C-H;

Botes v Van Deventer 1966 (3) SA 182 (A), at p 198 H;

Yew Bon Tew v Kenderaan Bas Mara [1982] 3 All ER 833

(PC), at p 836 B; Salmond, Jurisprudence, 11 ed,

pp 503-4; Paton, Jurisprudence, 4ed, par 127).

Salmond, op cit, at p 504 states that —

"Substantive law is concerned with the ends which the administration of justice seeks; procedural law deals with the means and instruments by which those ends are to be attained."

It is difficult to compose a closer definition of the distinction than this.

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 .....

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, is the court obliged to adopt a non possumus attitude? Especially if there is no feasible alternative? I am inclined to think not. It would certainly expose a grave defect in our system of justice if it were to be found that in circumstances such as these the court were powerless to act. Fortunately I am not persuaded that it would be. An order whereby the evidence was in some way recorded, eg by copying documents or photographing things or even by placing them temporarily, ie pendente lite, in the custody of a third / party.....

party would not, in my view, be beyond the inherent powers of the court. Nor do I perceive any difficulty in permitting such an order to be applied for ex parte and without notice and in camera, provided that the applicant can show the real possibility that the evidence will be lost to him if the respondent gets wind of the application. And in regard to the in camera procedure I would endorse the view expressed in the Cerebos Food case, supra, at p 159 E-H.

Naturally, any such order would have to be hedged in with the kind of safeguards that have been discussed in the cases. What particular safeguards are adopted would be in the discretion of the Judge granting the order and would depend on the particular facts of the case under consideration. It seems to me, however, that the potential harm to the respondent inherent in the ex parte and in camera procedure could largely be obviated

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in cases where real and documentary evidence was attached and taken into possession if the court included in its order a rule nisi giving the opportunity to the respondent to come to court and to show cause why the attached evidence should not be retained pendente lite and, in an appropriate case, giving leave to the respondent to anticipate the return day. This seems preferable to the somewhat cumbersome procedure envisaged by par. 6 of the order granted by LATEGAN J.

It is not necessary, however, in this case to pronounce finally on these matters for the order sought and initially obtained by appellants in terms of par. 1.2 and 1.5 of the order of court is a far cry from an order designed merely to preserve specific evidence for trial. In fact par. 1.2 and 1.5, as explained by appellants' counsel are designed to give authority for a search for, and attachment of, evidence in order to found a cause,  
/ or causes,.....

or causes, of action. This is a proposed procedure for which there is a considerable body of judicial disapproval in our law (see the Cerebos Food case, supra, at pp 169 H - 170 F and the cases there cited). In my opinion, it is not a procedure to which this Court can or should give the stamp of its approval. If there is a deficiency in our law in this respect, then the remedy must be sought in appropriate legislation and/or amendment of the Uniform Rules of Court.

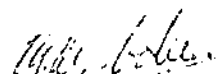
Nor is this Court called upon to decide in this case whether the other components of an Anton Piller order referred to by the Court in the Cerebos Food judgment, ie orders for the disclosure of sources and retail outlets (component 2) and orders for the production and handing over of things in order to make an interdict effective (component 4) can competently be granted.

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In the result (and bearing in mind what has been abandoned by appellants) the only substantive part of the order granted by LATEGAN J which, in my opinion, ought to have been granted is par. 1.1 (in regard to THE BIG FIX and in favour of first appellant only, as the holder of the copyright therein); but at this stage all that we are concerned with is the question of costs. There is no point now in making a formal order in favour of the first appellant in terms of par. 1.1. LATEGAN J ordered the costs of the application to be costs in the cause. We do not know whether these costs were catered for in the settlement of the action, but in any event, bearing in mind the limited success achieved and the attitude of appellants' counsel to the question of costs in this Court, we would not make any order in regard to the costs of the application to LATEGAN J. This too is the effect of the order of the Court a quo. Obviously the respondent achieved,

/ and.....

and was entitled to achieve, substantial success on appeal to the Full Court and was entitled, as ordered by the Full Court, to the costs of appeal and the costs of the application for leave to appeal. Appellants have conceded that the very limited success achieved in this Court would not carry the costs of appeal. There being at this stage no point in a formal amendment of the order of the Court a quo, the appeal is dismissed with costs.



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M M CORBETT

KOTZÉ, JA)  
MILLER, JA) CONCUR.  
BOTHA, JA)  
GALGUT, AJA)