Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case number: 20216/2014

Before: The Hon. Mr Justice Binns-Ward

In the matter between:

ABSA INSURANCE AND FINANCIAL ADVISERS (PTY) LTD Applicant

And

CHRISTAAN JOHANNES STEPHANUS MOLLER First Respondent

LIZL GRIFFITHS Second Respondent

SECURTAS SHORT TERM BROKERS (PTY) LTD Third Respondent

JUDGMENT DELIVERED ON 21 NOVEMBER 2014

BINNS-WARD J:

[1] This matter concerns an application by the respondents in terms of Uniform Rule 6(12)(c) for the reconsideration of an order taken against them in their absence in an urgent application. The order was of two-fold effect. In the first part it was a search and seizure order and in the second part a prohibitory interdict. The order was obtained by the applicant pursuant to an application brought without notice to the respondents.

[2] The relevant provisions of the order go as follows:

2. The Sheriff of this Honourable Court is hereby authorised and directed, accompanied by a representative of the Applicant and two information technology experts nominated by the Applicant to enter upon the premises situated at Unit 610 …, as well as the residential address of First Respondent situated at .. and to attach and remove from any such premises, or to remove from any computer electronic storage device situated at any such premises, any document, whether in hard copy or digital format, containing the names, contact details or identity numbers of any of Applicant's clients, or details of policies, policy numbers, policy expiry dates, policy premiums or policy commission structures pertaining to any policies issued to such clients, including any information or files sent by Second Respondent as attachments to any of the emails annexed to the founding affidavit marked "**AH10**" to "**AH25**" ("*Applicant's client information").*

3. Respondents are directed to point out to the Sheriff of this Honourable Court, and to grant the Sheriff access to, by the provision of log in details and passwords, as may be necessary, as any computers and/or external storage devices and/or cloud-based storage system(s) and/or cellular phones and/or iPads in their possession or under their control at any of the premises stipulated in paragraph 2 above which may contain any of Applicant's client information referred to in paragraph 2 above; (sic)

4. The Sheriff of this Honourable Court is hereby authorised and directed. accompanied by a representative of the Applicant and two information technology experts nominated by the Applicant, to search any computers and/or external storage devices and/or cloud-based storage system(s) and/or cellular phones and/or iPads, at any of premises referred to in paragraph 2 above, for purposes of identifying on such devices Applicant's client information, and, upon so identifying, to copy any such information onto an external storage devise / devices and thereafter to permanently delete such information from any of Respondents' computers and/or external storage devices and/or cloud-based storage system(s) and/or cellular phones and/or iPads upon which the information was found: provided that if, on the return day of the rule *nisi* referred to in paragraph 6 below, the Court finds that Applicant is not entitled to retrieve and retain any of the information copied onto the external storage device referred to above, then the Sheriff (who shall retain such devices in safekeeping pending the return day) shall immediately take steps to reinstall such information on the external storage device from which it was retrieved;

5. Before copying any information onto an external storage device, as authorised in paragraph 4 above, the technology experts nominated by the Applicant shall make a full disk copy of the hard drive of any computers and/or storage devices and/or cloud-based systems and/or cellular phones and/or iPads which are searched pursuant to paragraph 4 above;

6. That a rule *nisi* be issued calling upon Respondents to show cause, on 9 December 2014, why an order should not be granted –

6.1 Interdicting and preventing Respondents from utilising, in any manner whatsoever, any information regarding the insurance or investment portfolios, financial needs, analysis,

recommendations or records of advice or current clients of Applicant with whom Respondents dealt, in the last 3 years of their employment with Applicant.

6.2 Directing that Respondent shall forthwith return to Applicant any documents, whether stored electronically or embodied in hardcopy, obtained or generated by First Respondent, while in Applicant's employ, containing lists of Applicant's clients or the personal, insurance or financial details of any such clients.

6.3 ….

6.4 ….

7. Before commencing the execution of this order, the Sheriff shall hand to the Respondents a copy of this order, together with the Notice of Motion and founding affidavits herein.

8. Pending the return day of the aforesaid rule nisi the orders issued in terms of prayers 6.1 and 6.2 above shall operate as an interim order and interdict.

9. The Respondents are advised that Rule 6(12)(c) provides that a person against whom an order was granted in this or her absence in an urgent application may, by notice, set the matter down for reconsideration of the order.

[3] Search and seizure orders authorise very far reaching invasions of the respondent parties' privacy. The embarrassment that their execution can occasion, particularly when carried out at a person's home or on electronic devices such as personal computers, tablets and mobile phones on which, in the modern age, information concerning the most intimate details of a person's life are likely to be recorded, also carries obvious potentially adverse implications for a respondent party's dignity, as well as the privacy and dignity of any other persons with whom such party has been in electronic communication on closely personal matters. It is thus no cause for surprise to read that the grant of such orders – of which Anton Piller orders are but an example – has been described an example of the 'outer-extreme' (or 'absolute extremity') of judicial power.[1]

[4] Owing to the infringing effect of search and seizure orders on the respondent parties' fundamental human rights, their granting is supportable only to the extent that it might be justifiable in the sense contemplated in terms of s 36 of the Constitution; see the discussion in *Mathias International Ltd and Another v Baillache and Others* [2010] ZAWCHC 68 (8 March 2010), with reference to the consideration given by the European Court of Human Rights to the legality of Anton Piller orders in the context of Article 8 of the European

[1] See the reference by Conradie AJ (as he then was) in *Petre & Madco (Pty) Ltd t/a T-Chem v Sanderson-Kasner and Others* 1984 (3) SA 850 (W) at 855A - E to Ormrod LJ's remarks in his concurring judgment in *Anton Piller KG v Manufacturing Processors Ltd and Others* [1976] 1 All ER 779 (CA); see also *Frangos v CorpCapital Ltd* 2004 (2) SA 643 (T) ([2004] 2 All SA 146) at 654C-F (SALR) and the description by Hoffmann J (as he then was) in *Lock International plc v Beswick and Others* [1989] 1 WLR 1268 (Ch) at 1281 of the grant of such an order in respect of domestic premises as being at 'the absolute extremity of the court's powers'.

Convention on Human Rights[2] in *Chappell v The United Kingdom* [1989] ECHR 4; (1990) 12 EHRR 1.

[5] The compatibility of search and seizure orders with the European Convention was upheld in *Chappell* in the main because of the safeguards invariably built in by the courts to ensure an effective measure of protection to the respondents in such matters. It was accepted that the identified safeguards were so generally established as to constitute a body of applicable (albeit judge-made) law.[3] That our law in this regard similarly implies as a requirement for the issue of search and seizure orders the provision of well-established and internationally applied[4] 'built-in protection measures' was affirmed by the Supreme Court of Appeal in *Memory Institute SA CC t/a SA Memory Institute v Hansen and Others* 2004 (2) SA 630 (SCA) at para 3. At the same place Harms JA held that as the judge who had granted the order in issue in that matter had not had regard to the well-established precepts and consequently failed to give effect to their protecting and limiting effect in the formulation of the order, he had in the result 'granted a rule *nisi* he was not empowered to grant and the setting aside of the rule had to follow as a matter of course'.

[6] When Harms JA noted, in para 2 of the judgment in *Memory Institute*, that 'What is permitted and what not for the grant of these orders, considering the number of reported judgments on the matter, should also be common knowledge', the learned judge of appeal was in effect confirming the existence in this country of a body of applicable law. In *Mathias International* supra, it was pointed out that that body of law was 'law of general application' within the meaning of s 36 of the Constitution'[5] and held that '[t]he corollary of the conclusion that Anton Piller orders are made in terms of "law of general application", within the meaning of s 36(1) of the Constitution, is that such orders are competent only when they comply with the requirements of the postulated law'. The court reasoned that the ambit of any judicial discretion to overlook or condone non-compliance and irregularity in relation to the issue of a search and seizure order was thus limited in law because it cannot be exercised to purport to belatedly lend validity to an order granted outside the constraints of the applicable law. This approach is consistent with that reflected in para 3 of the judgment in *Memory Institute* described earlier.

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[2] Article 8 is the provision of the Convention that entrenches the right to privacy.
[3] The Anton Piller procedure in England and Wales is now regulated for by statute, in terms of s 7 of the Civil Procedure Act, 1997
[4] Cf. *Mathias International* supra at para 15 and the comparative law references in the notes thereto.
[5] *Mathias International* supra at para 18.

[7] In this division of the High Court express provision is made in the Court's Consolidated Practice Notes for the safeguards that search and seizure orders must contain and the protections that must be afforded in the manner in which they are executed. The practice note does no more than codify the established principles as to what is permitted and not permitted, and which, as Harms JA recorded, should be well-known to legal practitioners.[6] The subheading to the relevant practice note is '"*Anton Piller*" Orders'. When the order obtained in this matter was taken, the explanatory note submitted by the applicant's counsel (different counsel appeared before me in the current proceedings) to the judge stated that the application was not an application for an Anton Piller order. The note read as follows in relevant part:

> Applicant contends that the information misappropriated is its property, and that it is entitled to the return thereof. The relief it seeks in this this application is not an Anton Piller order, but an order for the attachment of Applicant's property. The relief is based on the decision of the Full Bench in *Cerebros Food Corporation Ltd v Diverse Foods SA Ltd* 1984 (4) SA 149 (T) at 164E.

An Anton Piller order, properly so-called, is a search and seizure order directed at authorising and facilitating the search for and seizure of evidence with the object of enabling it to be preserved for use in pending or contemplated litigation; cf. *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). An Anton Piller order, in the true sense, is not a vindicatory remedy.

[8] It seems to me that counsel who appeared for the applicant when the order was taken was misled by the subheading to Practice Note 35. It is quite clear, if proper regard is had to paragraph (1) of the Note, which provides

> In all applications brought *ex parte* for an order to allow the entry and search of premises (an *'Anton Piller' order*), a draft order substantially in accordance with **Form C** in the Schedule hereto (varied or amplified to the extent necessary in particular circumstances) is to be attached.

that it regulates search and seizure orders in general and not just Anton Piller orders properly so-called. The order sought was one that would allow the entry and search of premises. Therefore it was immaterial that the basis for seeking the order in the current matter was apprehended to be vindicatory.

[9] The respondents' counsel argued that the seeking and apparent granting of the order on the grounds that it was a vindicatory or quasi-vindicatory entitlement was legally incompetent and that this in itself afforded a complete and sufficient reason to set the order

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[6] PN 35. The text of the PN is published in Van Loggerenberg et al (ed) *Erasmus, Superior Court Practice* at D3-7-D3-8.

aside. The context of the application was the alleged filching by the respondents of information from the applicant, which the latter claimed to be proprietary. The first respondent had been employed by the applicant as a representative in respect of the marketing of insurance policies. It was alleged that in that context the first respondent was placed in possession of information concerning clients serviced by the applicant, the products purchased by them and the terms on which the policies involved had been procured. This and other related information would be capable of being put to use by the respondents in competition with the applicant. The first respondent's contract of employment with the applicant contained a covenant in restraint of trade. The use by the respondents of the applicant's confidential information for the purpose of competing against it would also, in any event, amount to unlawful competition entitling the applicant in principle to appropriate delictual relief. Relying on the judgment of Serrurier AJ in *Waste-Tech (Pty) Ltd v Wade Refuse (Pty) Ltd* 1993 (1) SA 833 (W), the respondents' counsel argued that so-called proprietary information of the sort which the applicant purported to be entitled to vindicate in the contemplated search and seizure operation was not property in the true sense and thus not legally susceptible to vindicatory relief.

[10] While Serurrier AJ was probably correct, in my respectful opinion, in holding that information is, in general, not property amenable to vindication, I am in agreement with the argument advanced by the applicant's counsel, with reference, amongst other matters, to the full court's judgment in *Cerebros Food Corporation*, that search and seizure relief of the type sought by the applicant in the current case is nevertheless competent if it is shown to be required to protect the applicant against harm that it is able to show that it is likely to suffer as a consequence of the use of the information by the respondents in the context of unlawful competition, or breach of contract. The judgment in *Cerebros Food Corporation* in point of fact serves as authority for the point, if such were required.

[11] I do not think that it matters that the applicant labelled its claim as vindicatory. If the founding papers are read in a businesslike way it is quite evident that the applicant's concern is not to regain possession of any property in the sense of a thing, but rather to enforce its contractual rights in terms of the covenant in restraint of trade and to protect its position against what it alleges have been acts of unlawful competition by the respondents. I am thus not persuaded by the respondents' counsel's argument that search and seizure relief was notionally incompetent on the facts alleged by the applicant. To the extent that the judgment in *Waste-Tech* suggests otherwise, I respectfully disagree with it.

[12] In the circumstances the determination of whether the respondents' contention that the search and seizure order should be revoked on reconsideration turns on the question of the effect of the non-compliance with the procedural rules and principles generally applicable to search and seizure order. The degree of non-compliance was extensive.

[13] There was no provision for a 'supervising attorney'. A 'supervising attorney' is an attorney unconnected with the litigants who is appointed to supervise the fairness and propriety of the execution of the order and whose functions include advising the respondent party of his or her rights before the search and seizure order is carried out. Another important function of the 'supervising attorney' is to provide a report to the court on the execution of the order. In ordinary matters a return by the sheriff of the court would suffice, but by establishing the requirement of a report from a qualified and experienced legally qualified professional, the courts have marked their recognition that special safeguards and protections must attend the execution of orders of the draconian and exceptional nature of search and seizure orders.

[14] The order did not make any provision for a list or inventory to be made of matter deleted from the respondents' electronic devices. The absence of any such provision potentially prejudiced an effective reconsideration of the order on the return day. It is trite that search and seizure orders obtained without notice are provisional in nature and subject to confirmation or revision. The respondent party's position is potentially prejudiced if the issue of what has been removed (or in this case deleted) has not been accurately recorded by an independent party who has been charged with keeping such a record for the purpose of the subsequent stage(s) of the proceedings.

[15] The order also made no provision for the respondents to be advised that they were entitled to contact an attorney and have him come to the premises within a reasonable time to advise them and to be informed by the supervising attorney as to how long the search could be delayed so as to have the attorney present. Its terms furthermore failed to state that until the attorney, if called, arrived or until the delay allowed for him to arrive had passed, the respondents need not comply with any part of the order, except to allow the supervising attorney, the sheriff and the other persons named in the order to enter the premises and to take such steps as, in the opinion of the supervising attorney, were reasonably necessary to prevent any prejudice to the further execution of the order.

[16] The respondents' counsel pointed out, with justification in my view, that the order was also very widely worded and embraced information that the respondents might legitimately have on their electronic devices about the applicant's former clients. The

restraint of trade provision in the first respondent's contract of employment did not prohibit him from accepting approaches from former clients provided that such approaches were initiated by the client and not solicited by the respondent.

[17] The extent of the non-provision of the established safeguards and protections required in respect of the issue of search and seizure orders resulted in something that purported to permit an unjustifiable infringement of the respondents' constitutional rights. The granting of an order with that effect was beyond the court's powers and thus unlawful. The applicant's counsel did not argue strongly against that conclusion. In an able and eloquently advanced argument the applicant's counsel however submitted that the order might be suitably amended or pruned down on reconsideration rather than revoked. Acceding to that argument would, in my view, go against the approach indicated in the *Memory Institute* and *Mathias International* judgments, in which it was held that an order that had been beyond the judge's power to grant cannot be salvaged and must be set aside. The matter that is before the court is the reconsideration of an existing order. If it should not have been given in the sense that its granting was outside the judge's powers it should be revoked. It is not amenable to amendment because it was legally void. These considerations certainly apply in respect of the search and seizure order.

[18] Even were the non-compliant features of the order not as flagrant as they are, and their voiding effect consequently perhaps open for argument, it is established policy that the courts look warily at attempts to salvage orders of a highly invasive or oppressive nature taken in secret and in haste without notice to the effected party. In that regard I need do no more than to repeat what I stated in *Mathias International* supra, at para 35:

> In *Audio Vehicle Systems v Whitfield and Another* 2007 (1) SA 434 (C) at para. [21], Bozalek J noted that '[W]ilfulness or mala fides need not be present to result in the discharge of a rule nisi where the original order was too widely framed.' I agree; as a matter of policy and as a matter of law. If there is an insufficiently rigorous enforcement of the requirement that the order should be framed with diligent compliance with the specificity requirement, a tendency will be encouraged for practitioners responsible for drafting applications for Anton Piller relief to frame the material to be searched for too loosely, with the belief that matters can be put right on the return date by requesting the court to reframe the confirmed order and releasing part of the material caught in the initially too widely cast net. An indulgent approach by the courts in this respect would dilute the stringency that should apply in the grant and consideration of this exceptional procedural relief (cf. *Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A) ([1996] 3 All SA 669) at 379E-380B (SALR)). It would result in an inappropriately lax application of the safeguards a court is required to consider in terms of s 36(1) of the Constitution in determining the ambit of the process infringing on a respondent's fundamental rights to privacy and dignity which it is able properly to permit. A strict approach on the

> reconsideration of these orders is also justified having regard to the circumstances in which the initial order is frequently taken; that is as a matter of urgency before an often heavily burdened duty judge in chambers. It is due to this consideration that it has more than once been stressed how onerous is the responsibility on practitioners in framing the application to ensure that there is strict compliance with all the requirements of the procedural remedy. …..(Footnote omitted.)

Although those remarks were made in the context of an Anton Piller matter properly so called, they apply equally in respect of any search and seizure order obtained without notice to the respondent party.

[19] In the context of what I consider to be the indicated stringent approach to enforcing propriety in these matters it is not necessary for me to consider the suggestion by the applicant's counsel that I should weigh calling for evidence on affidavit to inform me whether, and if so, how, the order might have been executed so as to determine the degree to which the respondents may or may not in fact have been prejudiced. It would not make any difference to the result. I doubt in any event that, save in exceptional circumstances, an applicant should be permitted after the event to repair the damage when it has overreached itself in obtaining relief of this nature.

[20] The applicant's counsel further contended that even were the search and seizure order revoked, the court should not revoke the rule *nisi* acting as an interim interdict in terms of paragraphs 6.1 and 6.2 of the order. He justifiably distinguished that part of the order from the search and seizure relief. He also quite correctly conceded, however, that there had been no justification in proceeding for the interdictal relief on an *ex parte* basis. The rule *nisi* procedure should only be used in matters in which immediate interdictal relief is required if the applicant is not to suffer irremediable harm. I had occasion, quite recently, to rehearse the applicable principles in *Arvum Exports (Pty) Ltd and Others v Costa NO* [2013] ZAWCHC 176 (20 November 2013). As pointed out in that judgment, the proper course in a case like this in which it is alleged that relief is required urgently is to avail of the procedure described in *Gallagher v Norman's Transport Lines (Pty) Ltd* 1992 (3) SA 500 (W), which, to a material extent was informed by the approach stated in *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A) at 781H - 782G. That that should have been the approach adopted by the applicant is confirmed in the terms of Practice Note 34(2) of this Court.

[21] While I accept that a different approach might be taken on reconsideration to the second part of the order, I am not persuaded in the exercise of my discretion to do so. The entire order is reflective of the misdirected approach taken by the applicant to the institution

of these proceedings. A firm line is necessary in order to encourage proper compliance with the indicated procedures. Those procedures are in place in the interests of justice and the more efficient operation of the courts. Litigants should be aware that non-compliance with them will not lightly be condoned. The respondents should have been afforded an opportunity, even on truncated time limits, to put up an answer before interdictal relief was considered. I am thus not persuaded to allow what I have called the second part of the order to stand.

[22] The respondents sought a punitive costs order. I would be inclined to make such an order only if persuaded that the procedures of which the applicant availed had been resorted to *mala fide*. That was not the case in my view. It seems clear to me from the terms of the explanatory note presented to the duty judge who made the order that the applicant's legal representatives allowed themselves to be misled into understanding that the nature of the search and seizure order sought by the applicant put the matter outside the reach of the principles applicable in respect of Anton Piller orders and believed that what they contended to be the vindicatory nature of the application excluded the necessity for the safeguards and protections ordinarily required for search and seizure orders to be put in place. In this regard they were badly misdirected. I consider it to be punishment enough that the order be revoked and the applicant ordered to pay the respondents' costs incurred in the rule 6(12)(c) application.

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

1. The order made *ex parte* in case no. 20216/14 on 11 November 2014 is revoked.
2. The applicant is ordered to pay the respondents' costs of suit in the application in terms of rule 6(12(c), including the costs of two counsel.

A.G. BINNS-WARD

Judge of the High Court

Date of hearing:	**20 November 2014**
Date of judgment:	**21 November 2014**
Applicant's counsel:	**A. Freund SC**
Applicant's attorneys:	**Cliffe Dekker Hofmeyr Inc. (Cape Town)**
Respondents' counsel	**M. Janisch**
	A. Morrissey
Respondents' attorneys	**Bowman Gilfillan Inc. (Cape Town)**