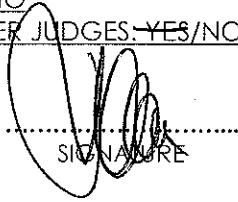


REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 47310/2011

(1)	REPORTABLE: <del>YES</del> / NO
(2)	OF INTEREST TO OTHER JUDGES: <del>YES</del> / NO
(3)	REVISED.
	<u>23/05/2012</u>
	DATE
	
	SIGNATURE

In the matter between:

**WONDERCOAT FRANCHISE HOLDINGS (PTY) LTD**

Applicant

and

**WONDERCOAT WALL AND ROOF COATINGS CC**

Respondent

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**J U D G M E N T**

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**MAKUME, J:**

**INTRODUCTION**

[1] On the 8<sup>th</sup> December 2011 the applicant obtained an Anton Piller order against the respondent on an urgent and *ex parte* basis. That order was executed on the 9<sup>th</sup> December 2011.

[2] The order was couched in the form of a rule *nisi* with the return date being the 7<sup>th</sup> February 2012.

[3] The order granted purported to follow the wording as set out in Annexures "A" and "B" of the Practice Manual of the South Gauteng High Court however in the process the numbering of the paragraphs of the order made it difficult to determine exactly which orders were returnable on the 7<sup>th</sup> February 2012. To demonstrate this paragraph 27 of the order reads as follows:

*"27. That the order in terms of prayers 1 to 12 be issued as a Rule Nisi, returnable on the 7<sup>th</sup> of February 2012."*

[4] Paragraphs 2 up to 14 of the notice of motion is embodied in paragraphs 15 up to 27 of the draft order. What it therefore means is that what appears as paragraph 15 on the draft order should actually read paragraph 2. I am however satisfied despite this confusion that the respondent was not in any manner prejudiced in the preparation of its opposition to have the Anton Piller rule *nisi* order set aside. I will accordingly proceed with the judgment as if the draft order had been correctly numbered. The rule *nisi* order referred to in paragraph 27 of the draft order refers to paragraphs 1 up to 14 of the notice of motion.

[5] The order granted by the court reads thus:

"2. That the Respondent and any other adult person in charge of the premises of the Respondent at 1602 Lynn Road, Strydom Park, Randburg, Gauteng be ordered to grant the sheriff of the above Honourable Court, Mr Ian Davison Fraser (a Director of the Applicant), attorney Petrus Johannes De Jager ('Independent Attorney') and a computer operator nominated by Applicant access to the said premises for the purposes of:

2.1 Searching the premises for the purposes of enabling any of those person to identify and point out to the sheriff originals or copies of or extracts of documentation and/or electronic data contained on computers for the period November 2008 to date hereof pertaining to:

2.1.1 Any and all sales of Wondercoat Paints; and

2.1.2 Contracts with customers for the application of Wondercoat paint products; and

2.1.3 The purchase of any paint products; including but not limited to:

2.1.3.1 E-mail correspondence in respect of such purchases sales and contracts; and

2.1.3.2 Invoices quotations, delivery notes and any source documentation in respect of such purchases, sales and contracts; and

2.2 Searching the premises for the purposes of enabling any of those persons to identify and point out to the sheriff paint products labelled as Wondercoat paint, but not manufactured under licence of the Applicant as well as any labels for such products.

2.3 Examining any item for the purposes of identifying it and deciding whether it is of the nature mentioned in paragraphs 1.1 and 1.2.

2.4 Searching the premises for the purposes of finding any computer disc containing any of the items referred to above."

[6] The balance of the order authorises the Sheriff of the court to attach and remove any document or paint container pointed out to him by any of the persons mentioned in the order. The most important paragraph of the order appears as paragraph 18 of the draft order and reads as follows:

*"18. ... The sheriff is authorised to attach any document and paint container which is pointed out by any of the aforesaid persons and is directed to remove any attached document in respect of which the Applicant's attorney does not give a different instruction. The sheriff is directed to keep each removed item in his custody until the Applicant authorises its release to the Respondent or this Court directs otherwise."*

[7] Paragraph 20.3.1 reads as follows:

*"The sheriff is directed, before this order and this application is served or executed to inform those persons that any interested party may apply to this Court on not less than twenty four (24) hours' notice to the offices of the Applicant's attorney for a variation or setting aside of this order, the court's practices and rules applying unless the court directs otherwise."*

[8] Paragraph 22 of the draft order reads as follows:

*"22. That unless a different direction is obtained from the Court, Applicant and Applicant's attorney will, 4 days after this order is executed, become entitled to inspect any of the removed items in order to assess whether it provides evidence relevant to the present application or to the further legal proceedings envisaged in the application."*

[9] I have singled out and quoted in full the above paragraphs from the draft order read together with the notice of motion as they are crucial in deciding the issues in this matter.

[10] On the 11<sup>th</sup> January 2012 the respondent served an application on the applicant in which application the respondent sought the following orders against the applicant:

- (a) That this application be heard as one of urgency and that the non-compliance of the rules in relation to time limits and services be condoned by the Honourable Court in terms of Rule 6(12).
- (b) The order granted by this Honourable Court on 8 December 2011 is hereby set aside.
- (c) The Sheriff is ordered to return to the respondent the items removed by him on 8 December 2011 and which items are contained in the inventory annexed hereto marked "A".
- (d) That the applicant is ordered to pay the costs of this application (including the costs of 8 December 2011) on attorney and client scale.
- (e) Further and alternative relief.

[11] The application referred to in paragraph [10] above was set down for hearing on the 17<sup>th</sup> January 2012. The respondent's founding affidavit in this application also serves as its answering affidavit in the Anton Piller application.

[12] On the 16<sup>th</sup> of January 2012 a day before the hearing of the respondent's reconsideration urgent application the applicant as it was rightly entitled to filed its answering (opposing affidavit) to the urgent reconsideration application and its replying affidavit to the main Anton Piller application. As a result of that the urgent reconsideration application was postponed for hearing to the 7<sup>th</sup> February 2012 which day was also the return date of the Anton Piller rule *nisi*.

[13] What should have happened is for the respondent to then file its replying affidavit to the application and pleadings would then have been closed. This did not happen. What did happen is that the respondent first supplemented its founding affidavit in the reconsideration application prompting the applicant to answer thereto and to make matters worse on the 9<sup>th</sup> February 2012 and apparently due to a common mistake and misunderstanding of the sequence of affidavits filed the applicant was allowed to file a replying affidavit to the respondent's replying affidavit. In that affidavit the applicant introduced new evidence as there was allegations of fraud. This in turn prompted the respondent to answer thereto.

[14] The process of allowing further affidavits than was necessary as required in motion proceedings was a mistake common to all the parties. I accordingly refused the application by the applicant to strike out the respondent's further affidavit filed and served in response to the applicant's replying affidavit. A court may in its discretion permit the filing of further affidavits. In *Parow Municipality v Joyce McGregor Ltd* 1973 (1) SA 937 (CPD) at page 938H to 939A Van Heerden J said the following:

*"In motion proceedings the ordinary rule is that three sets of affidavits are allowed. This is however not an inflexible rule and the court may in its discretion permit the filing of further affidavits. No hard and fast rule has been laid down in what is really a matter of practice but there are certain guidelines which the courts according to various decisions have tried to adhere to. Every case should be determined not only according to its own circumstances but having due regard to the contents of the further affidavits especially whether some reasonable explanation has been given or is apparent for its late filing. If there is an explanation which negatives mala fides and the court can be satisfied that there is no prejudice which cannot be remedied by an award of wasted costs a court should to my mind incline towards allowing a party to put his full case before court."*

[15] In my decision refusing to strike out the entire affidavit I took into consideration what is set out in the *Parow Municipality* matter. It is better to allow the parties to ventilate the dispute fully in their papers where there is no *mala fides*.

#### BACKGROUND

[16] The applicant is the registered owner of certain trademarks in respect of paints, varnishes, lacquers, preservatives against rust and against deterioration of wood. In addition the applicant applied for trademark applications for its Wondercoat trademark.

[17] During or about the 10<sup>th</sup> June 1994 the applicant entered into a written agreement with the respondent's predecessors in terms of which amongst others:

17.1 The respondent would lease a portion of applicant's property situate at 1602 Lynn Road, Strydom Park, Randburg.

17.2 The applicant would lease the use of the Wondercoat name and device to the respondent.

17.3 The respondent would only be entitled to purchase paint products from the applicant and/or its group of companies.

[18] The applicant is wholly-owned by a company called Paints Perfect (Pty) Ltd which company manufactures paints that carried the Wondercoat trademark and device.



[19] Besides Paints Perfect (Pty) Ltd there was also a company known as Wondercoat Paints (Pty) Ltd that manufactured Wondercoat paints. It is this company that sold paint products to the respondent for use to perform contract painting work.

[20] The applicant in its founding affidavit says that in terms of the agreement referred to above it provides a 10 year guarantee on its paints and thus carries the guarantees in respect of paints sold and used by the respondent to its clients.

[21] Mr Ian Davison Fraser in his founding affidavit says that during March 2010 Wondercoat Paints (Pty) Ltd was placed in liquidation as a result the applicant granted the respondent permission for a month to source paints from alternative paint suppliers.

[22] Mr Anthony Paul Middleton who deposed to the answering affidavit on behalf of the respondent takes issue with two aspects. Firstly, in paragraph 12 of his answering affidavit he says that the applicant has failed to disclose to the Honourable Court that an agreement was entered into between Wondercoat Paints (Pty) Ltd and the respondent during the year 2006 and that this agreement superseded the 1994 agreement. Secondly, Mr Middleton says he had no knowledge of the 1994 agreement until it was faxed to his attorney on or about the 7<sup>th</sup> December 2011.

[23] There is thus a dispute as to which agreement regulated the business relationship between the parties. I do not think that it is necessary for me in this matter and on the facts before me to make a ruling as to which of the two agreements regulated the parties' relationship. I have in any case not been asked to do that.

[24] What triggered the Anton Piller application is a series of events as captured in the correspondence attached to the founding as well as the answering affidavits.

[25] It is common cause and not disputed that the respondent has a right to use the name Wondercoat provided it is on products that it the respondent shall have purchased from the applicant or from its group of subsidiaries. One such supplier was Wondercoat Paints (Pty) Ltd.

[26] The company Wondercoat Paints (Pty) Ltd was placed in liquidation. This resulted in the applicant addressing a letter to the respondent dated the 12<sup>th</sup> March 2010 the contents of the letter are as follows:

*"Attention Mr Tony Middleton*

*Wondercoat Wall & Roof Coating CC*

*RE : THE LIQUIDATION OF WONDERCOAT PAINTS (PTY) LTD*

*12 March 2010*

*Dear Tony*

*Further to our conversation with Bryan we would like to confirm that Wondercoat Paints (Pty) Ltd has been placed into liquidation. Whilst we endeavour to recommence the manufacture of Wondercoat products under one of our group of companies we hereby give you temporary permission to continue using the registered Wondercoat Trade Mark and Name even if this means that you have to source products temporarily from another manufacturer. We sincerely hope that this situation will not be protracted and we therefore propose to review the above in one month's time."*

[27] The respondent acting on the strength of this letter placed orders for paint with a company known as Bradford Coatings CC. The respondent placed labels marked Wondercoat on paints manufactured by Bradford Coatings. When this came to the knowledge and notice of the applicant a letter was addressed to the respondent dated the 13<sup>th</sup> August 2010. This was followed by a meeting with Mr Middleton.

[28] The relevant portion of the letter dated the 13<sup>th</sup> August 2010 read as follows:

*"Further I am deeply concerned that you continue to market products as having been manufactured by our company when clearly this is not the case. In this you are not only deliberately misleading your customers but I feel sure that you are deliberately passing off products to your customers as having been manufactured by yourselves. Your disregard for our long working relationship has now put us in a position whereby we must consider the future of our agreement and to this end I have requested that you arrange a meeting between Tony and myself for Wednesday the 18<sup>th</sup> August 2010. In the meantime I have asked that you cease forthwith to make use of any marketing materials which use the Wondercoat Professional Logo or that imply in any way that you are the makers of Wondercoat Paints."*

[29] The respondent in his answering affidavit admitted that it purchased paint elsewhere and not from the applicant and says it was because the applicant or its subsidiaries were unable to comply with the respondent's requirements for paint. The respondent further admitted that it did print labels carrying the Wondercoat Wall and Roof Coating and argues that the letter addressed to it dated the 12<sup>th</sup> March 2010 gave the respondent that right for as long as the applicant was unable to supply paint to the respondent.

[30] The respondent says that on receipt of a letter of complaint during November 2011 from the applicant it had already stopped printing any further labels having sourced advice from their attorneys.

[31] The applicant's Mr Norton visited the premises of Bradford Coatings CC and took photos of drums containing paint which had the label Wondercoat on it. The respondent does not deny this (see paragraph 61 of the respondent's answering affidavit on page 105 of the papers).

[32] As a result of all these events the applicant informed the respondent in a letter dated the 6 December 2011 that it had cancelled the 1994 franchise agreement. The applicant says that because of the continuing operation of the respondent the respondent was creating more contingent liabilities for the applicant as applicant was at risk through the guarantees issued by the respondent on products that the applicant had not manufactured.

[33] It is the applicant's view that respondent is infringing on its registered trademark in respect of the name Wondercoat.

[34] In seeking the Anton Piller order *ex parte* and *in camera* the applicant says it has a cause of action for damages against the respondent which it intends to pursue and that the respondent has in its possession specific documents which constitute vital evidence which substantiate applicant's action.

[35] The applicant further says that there is a real and well-founded apprehension that the documents and things which constitute evidence may be hidden or destroyed or in some manner spirited away before the case comes to trial or to the stage of discovery. Further that the Anton Piller order is the only reasonable and practical means of protecting applicant's rights.

[36] Several objections are raised in the respondent's papers regarding the execution of the order; secondly, that the order ought not to have been granted in view of the trite principles of law relating to Anton Piller type application; thirdly, that the order itself is flawed and impermissible in law in various aspects and lastly that the applicant remains in contempt of the Anton Piller order.

[37] The applicant in answer to the urgent application that seeks to set aside an Anton Piller order has raised a dispute as to whether the urgent application launched on the 11<sup>th</sup> January 2012 by the respondent is in fact a

reconsideration application in terms of Rule 6(12)(c) or whether it is an urgent application in its own right.

[38] The applicant submits that the respondent has not followed the letter of Rule 6(12)(c) which is a simplified form of anticipating the return date of an Anton Piller order and instead chose the cumbersome procedure of an application accompanied by an affidavit when in fact Rule 6(12)(c) only requires a notice to set down the matter for reconsideration. I am not persuaded by this argument that the respondent chose the incorrect procedure. I say this because paragraph 20.3.1 of the order itself reads as follows:

“20.3.1        *That any interested party may apply to this Court on not less than twenty four (24) hours’ notice to the offices of the Applicants for a variation or setting aside of this order, the Court’s practices and rules applying unless the Court directs otherwise.*”

[39] In the matter of *Retail Apparel (Pty) Ltd v Ensemble Trading* 2243 CC and Others 2001 (4) SA (TPD) page 238 the court set aside an Anton Piller order on an urgent application brought by the respondent. In any event paragraph 20.3.1 allows the respondent to apply to court as opposed to “*may by notice set down the matter for reconsideration*”. The use of the word “*may*” in the rule is not peremptory therefore an aggrieved party is accordingly not precluded to proceed by way of an application supported by affidavit.

[40] In this matter the respondent gave the applicant notice in excess of 3 days of its intention to apply on an urgent basis for the setting aside of the Anton Piller order and for the return of the items removed by the Sheriff on the 9<sup>th</sup> December 2011 to the respondent. The applicant has failed to demonstrate in what respects if any it has been prejudiced by the respondent's chosen cause rather than proceed on notice for reconsideration. There was nothing irregular about the respondent's choice of opposition to the order granted against it *in camera* and *ex parte*. In the matter of *Lourenco and Others v Ferela (Pty) Ltd* No. 1 1998 (3) SA 281 (T) at 289-290 Southwood J held that Anton Piller relief is of such a drastic nature that the court should not adopt an unduly strict or technical approach when a respondent seeks to be heard.

[41] Mr Bester who appeared for the respondent argues mainly that the requirements for the relief sought and granted on the 8<sup>th</sup> December 2011 set out in *SHOBA v Officer Commanding Temporary Police Camp Wagendrift Dam and Another* 1995 (4) SA 1 (A) as well as in *Universal Studios Inc and Others v Network Video (Pty) Ltd* 1986 (2) SA 734 (A) had not been satisfied. At paragraph 15F to 16C of the *SHOBA* judgment Corbett J said the following:

"[15F] At this point it is necessary to give a decision in regard to what was left open in both the *Universal Studios* case *supra* and *Jafta's* case *supra* viz whether an Anton Piller order directed at the preservation of evidence should be accepted as part of our practice. In my view it should, and I would define what an applicant for such an order obtained *in camera* and without notice to the respondent must *prima facie* establish, as the following:

- (1) That he the applicant has a cause of action against the respondent which he intends to pursue;

- (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 spirited away by the time the case comes to trial or to the stage of discovery. I have used the words 'vital evidence' in the sense of being evidence of great importance to the applicant's case. In the case of Ex Parte Matshini and Others 1986 (3) SA 605 (E) it was held that in order to obtain an Anton Piller order the applicant would have to show that the evidence was 'essential' or 'absolutely necessary' in order for him to prove his claim and that its non-availability at the trial would result in the administration of justice being defeated (at 613A-C). As I have suggested in Jafta's case (at 294A), this poses too stringent a test.*

*The court to which application is made for such an Anton Piller order has a discretion whether to grant the remedy or not and if it does, upon what terms. In exercising this discretion the court will pay regard inter alia to the cogency of the prima facie case established with reference to the matters listed in (1), (2) and (3) above. The 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, and whether the terms of the order sought are no more onerous than is necessary to protect the interest of the applicant."*

### PRIMA FACIE CAUSE OF ACTION

[42] The applicant must show a *prima facie* cause of action and must demonstrate that the respondent has in his possession specific documents or things which constitute vital evidence in substantiation of the applicant's case. In dealing with this requirement the respondent firstly says in paragraphs 13 and 14 of the answering affidavit that the respondent concluded an agreement with a company called Wondercoat Paints (Pty) Ltd in the year 2006 and that it is that agreement which governs their relationship. This argument implies



that the applicant lacks the necessary *locus standi*. If it is proved that the applicant does have the necessary *locus standi* then it failed to disclose the existence of a new agreement. This Court is satisfied that Wondercoat Paints (Pty) Ltd is one of the group of companies in the applicant's stable and because the cause of action is the alleged infringement of the trademark rights held by the applicant then applicant does have the necessary *locus standi*. The negotiations as evidenced by the correspondence between the respondent and Wondercoat Paints (Pty) Ltd were more of operational issues regarding supply and quality of the paint products it had nothing to do with ownership and infringement of the trademark right in respect of the name Wondercoat.

[43] The applicant's version is that between the period August 2010 to November 2011 the respondent sporadically infringed the trademark, photos of drums or tins of paints were taken and were in possession of the applicant prior to date of cancellation of the agreement. In November 2011 both the respondent and its paint supplier Bradford had indicated that they had ceased making use of the labels. It must be remembered also that it was applicant that granted the respondent the right to continue using the Wondercoat name "*even if this means that you have to source products temporarily from another manufacturer*". This therefore means that for as long as the applicant was unable to supply or meet the requirements of the respondent therefore the respondent could not be said to have been infringing the trademark. There is a dispute whether applicant was or was not able to supply the respondent with paint. This Court is unable to make a finding as to where the truth lies on that

aspect perhaps another forum will deal with that. It is not sufficient for the applicant to say that the respondent should prove lack of supplies to it by producing proof of orders it placed with the applicant which were not met. This Court also takes cognisance of the correspondence exchanged between the years 2006 to 2009. The gist of that correspondence is about the unsatisfactory quality and quantity of paint supplied by Wondercoat (Pty) Ltd to the respondent.

[44] I am not persuaded that the applicant has demonstrated a clear cause of action. It is at best doubtful and may depend on which of the two agreements will be found to have regulated the business relationship between applicant and the respondent.

[45] The applicant was already in possession of photos as well as evidence it was not necessary to proceed with the Anton Piller application. In paragraph 32 of the founding affidavit Mr Ian Davison Fraser says the following:

*"According to the Applicant the problem was resolved as Mr Middleton indicated that he would not source paints from suppliers other than the Applicant and present such paints as Wondercoat Paints."*

[46] The applicant was also in possession of records of trade sales between itself and the respondent wherein it stated that sales of paint dropped from R914 751,08 to R297 350,00 over a period of 12 months. There was thus sufficient evidence to found a cause of action. It was therefore not necessary to proceed with an application for an Anton Piller. It must be remembered that

the purpose of an Anton Piller is to preserve evidence which is not in the possession of the applicant at that time.

REASONS MUST BE GIVEN FOR THE BELIEF THAT THE EVIDENCE WILL  
BE REMOVED OR DESTROYED

[47] In *Hall and Another v Heyns and Others* 1991 (1) SA page 381 (CPD) at page 390D Conradie J said the following:

*"The next point on which the applicant in my view falls down is the real apprehension that evidence might be secreted or destroyed. The fear of destruction must not be flimsy. The cases speak of a 'grave danger' and a real possibility that documents will be destroyed."*

[48] The applicant says in paragraphs 68 and 69 of its affidavit that because a Mr Combrink of Bradford Coatings is aware that applicant is collecting evidence to support a claim against the respondent therefore the possibilities are great that the respondent might now quickly remove all infringing labels from containers and destroy all the records.

[49] I have difficulty with this argument. Firstly, long before the applicant deposed to this affidavit it was already in possession of photos showing the infringing labels which means their removal would not help the respondent in any way. Secondly, Mr Middleton in his own words concedes that they had placed the labels and had agreed to remove them. Mr Combrink of Bradford Coatings does not dispute that also.

[50] The applicant has failed to present evidence of any conduct by the respondent indicating a guilty conduct on their part. It must be remembered that the respondent conducts business from the same premises as the applicant (see paragraphs 20 to 23 of the founding affidavit on page 11). In paragraph 39 the following is said:

*"I further also annexed as Annexure 'WC10' a further photograph that was taken by Mr Norton on the 7<sup>th</sup> of November 2011 at the Respondent's side of the premises with drums of paint visible on one of the Respondent's contracting vehicles clearly displaying the labels."*

I think if the respondent had any intention or attempted to destroy or hide any evidential material the applicant who was already investigating would have noticed that. It is inconceivable that respondent would destroy its trade documents otherwise how would they collect what is due to them or how would they compile their financial and tax records.

[51] The applicant has failed to set out cogent reasons for believing that there is a real danger that the infringing labels and purchase records from Bradford Coatings CC would be destroyed. The applicant's basis is merely speculative and not real.

THE REMEDY MUST BE THE ONLY PRACTICABLE MEANS OF  
PROTECTING APPLICANT'S RIGHT

[52] If the applicant can obtain the same evidence in some other way without undue hardship, then this procedure of an Anton Piller should not be

permitted. An applicant should exclude the possibility that the required information cannot be obtained from other sources by means of subpoenas *duces tecum* (see *Sun World International Incorporated v Unifruco Ltd* 1998 (3) SA 151 (C) at 169.

[53] The applicant became aware that the respondent was now placing orders and purchases with a company called Bradford Coatings CC. It would have been permissible to at an appropriate opportunity or time subpoena that company to produce records of their sales with the respondent over the relevant period.

#### THE EXECUTION OF THE ORDER

[54] Anton Piller orders have enormous potential for harm and must accordingly be meticulously executed according to the letter of the order. Conradie J in *Petre and Madco Ltd v Sanderson Kasner and Others* 1984 (3) SA 850 at page 855D said the following:

*"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 right rein."*

[55] Paragraph 15.1 of the order authorises the persons mentioned in the order namely Mr Ian Davison Fraser, attorney Petrus Johannes de Jager and a computer operator to point out to the Sheriff original or copies of extracts of

documents and/or electronic data contained on computers for the period November 2008 to date. The dispute regarding the trademarks infringement arose in and around August 2010 shortly after the placing into liquidation of Wondercoat Paints (Pty) Ltd. It is not clear and no reasons have been given why documents falling outside the alleged period of infringement should be attached and removed. It is therefore not surprising that the Sheriff attached and removed bulk working documents of the respondent which had nothing to do with the issue. The respondent was during that period after the documents had been removed prejudiced in the further conduct of its business.

[56] Counsel for the respondent further submits that the search and seizure was irregular in that Mr Ian Davison Fraser a director of the applicant conducted a search of the premises unsupervised by the independent attorney. The Supreme Court of Appeal in the matter of *Memory Institute SA CC t/a SA Memory Institute v Hansen* 2004 (2) SA 630 at paragraph E warned against the presence of an applicant when the search is conducted. Harms JA said the following at page 630E:

*"Since it is the duty 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)."*

THE UNAUTHORISED COPYING AND REMOVAL OF COPIES OF  
DOCUMENTS ATTACHED

[57] It is trite law that the purpose of granting an Anton Piller order is to preserve evidence and was never meant to disadvantage one party in the subsequent action which is what happened in this matter and on that score alone this rule *nisi* order falls to be set aside as it has gone beyond what was intended by it.

[58] Paragraph 22 of the order reads as follows:

*"22. That unless a different direction is obtained from the Court, Applicant and Applicant's attorney will 4 days after this order is executed become entitled to inspect any of the removed items in order to assess whether it provides evidence relevant to the present application or to the further legal proceedings envisaged in the application."*

[59] The order as in paragraph 22 does not say that the respondent or its representatives need to be present at the inspection by the applicant. What we do know is that in terms of paragraph 20.3.3 the respondent is entitled to inspect items in the Sheriff's possession for purposes of satisfying themselves that the inventory compiled by the Sheriff is correct.

[60] Clearly inspection of the attached items takes place at different times or instances in the absence of the opposing party and it is for this reason as

was expressed in the matter of *Hall and Another v Heyns and Others* 1991 (1)

SA 381 at 392I to 3993A by Conradie J as follows:

*"The first applicant himself assisted by his secretary was also permitted to make Photostat copies of seized documents. This was contrary to the terms of the order and really hangs together with the plaintiff's attitude that they were entitled to inspect the documents as soon as they had been attached and to use them to build up a case against first respondent. The reason that the deputy sheriff is required to copy documents is generally speaking that once a document has been identified as relevant it may be copied in order to preserve it but an applicant is not entitled to an opportunity to study it. Permitting an applicant himself to copy documents of this kind really places an intolerable strain on his integrity and should in my view generally in the interests of a proper execution of these orders not be permitted."*

[61] On the 5<sup>th</sup> and 6<sup>th</sup> January 2012 which was more than 4 days after the order had been executed two of applicant's directors accompanied by a candidate attorney from their attorneys' offices not only inspected the attached documents but proceeded to make copies of such documents and took same away with them. It is significant to record that in doing so they sought no directive from the court as provided in paragraph 22 of the order. All that Norton says is that they asked the receptionist at the offices of the Sheriff if they are permitted to make copies and when the answer was positive they proceeded to make copies which are at this stage in the possession of the applicant and/or its attorneys. This is not what an Anton Piller order was meant to achieve.




[62] The applicant has not only breached the court order by making copies of the attached documents but has gained an advantage over the respondent in the action to be instituted. The applicant has indeed build his suspicions into a provable case by having in his possession the respondent's documents before trial.

[63] In this case there has been a departure from the defined rules regulating under Anton Piller applications as stated in the case of *SHOBA* and subsequent decisions thereto. Evidence indicates that the application was brought not to preserve evidence but to boost applicant's suspicions and enable the applicant to formulate its claims against the respondent. I am accordingly satisfied that the order should not have been granted.

[64] I make the following orders:

1. The order made by my brother Wepener J on the 8<sup>th</sup> December 2011 in this matter is set aside.
2. The applicants are ordered forthwith to return to the respondents at the premises from which they were seized all documents and other items which were seized in the course of the execution of the order of Wepener J as are in the applicants' possession or under the applicants' control.

3. The Sheriff and/or his deputy are ordered forthwith to return to the respondent at the premises from which they were seized all documents and other items which were seized in the course of the execution of the order of Wepener J.
  
4. The applicants are ordered to pay respondents' taxed or agreed costs of the Anton Piller application and the respondents' application for the reconsideration on a party and party scale including the costs of two counsel.


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**M. MAKUME**  
**JUDGE OF THE SOUTH GAUTENG**  
**HIGH COURT, JOHANNESBURG**

COUNSEL FOR APPLICANTS	A R VAN DER MERWE
INSTRUCTED BY	MESSRS SCHOLTZ ATTORNEYS c/o MARK-ANTHONY BEYL ATTORNEYS 4 <sup>th</sup> FLOOR, SCHREINER CHAMBERS 94 PRITCHARD STREET JOHANNESBURG
COUNSEL FOR RESPONDENTS	A J BESTER SC AND P VAN ZYL BOOYSEN
INSTRUCTED BY	MESSRS COETZEE & JANSEN VAN RENSBURG 1 <sup>st</sup> FLOOR, CORAL HOUSE BRYANSTON