IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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

Date: ***2nd February 2021*** Signature: _____

APPEAL CASE NO: A5073/2018

COURT *A QUO* CASE NO: 12030/2016

DATE: 2nd FEBRUARY 2021

In the matter between:

INTERPARK SOUTH AFRICA (PTY) LIMITED	Appellant
and	
ACUITY ON POINT SOLUTIONS (PTY) LIMITED	First Respondent
COCKBURN, CRAIG RALPH BURNSIDE	Second Respondent
McGILLAVRAY-TEALE, JULES	Third Respondent
WOLFAARDT, KATIE ELIZABETH	Fourth Respondent
KATZ, DAVID MANUEL	Fifth Respondent
FOUCHé, ROMANA IWETT	Sixth Respondent

Coram: Mabuse, Francis *et* Adams JJ

Heard: 2 September 2020 – The 'virtual hearing' of the application was conducted as a videoconference on the *Microsoft Teams* digital platform.

Delivered: 2 February 2021 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GLD and by release to SAFLII. The date and time for hand-down is deemed to be 11H00 on 2 February 2021.

Summary: Search and seizures – *Anton Piller* orders – nature – *Anton Piller* order directed at preserving evidence that would otherwise be lost or destroyed – not a form of early discovery or mechanism for applicant to determine whether it has cause of action –
Appeal against setting aside of Anton Piller order dismissed.

ORDER

On appeal from: The Gauteng Local Division of the High Court, Johannesburg (Matojane J sitting as Court of first instance):

(1) The appellant's appeal against the order of the court *a quo* is dismissed with costs.

(2) The appellant shall pay the costs of the first, second, third, fourth, fifth and sixth respondents, which cost shall include the cost of the application for leave to appeal.

JUDGMENT

Adams J (Mabuse *et* Francis JJ concurring):

[1]. This appeal concerns the lawfulness and the validity of the issue and the execution of an *Anton Piller* order – the type of order which is generally described as a civil procedure for the lawful search, seizure and preservation of evidence. In this process generally the court orders the sheriff to search for, then seize and preserve evidence which is material to a matter. The procedure – often described

as ‘a draconian form of relief which should be granted only under exceptional circumstances’ – is to be employed where the applicant justifiably believes that the respondent may destroy the evidence if no such order is granted. An Anton Piller procedure should never be employed to enable searches to be undertaken to look for evidence to identify or found a case, as distinct from the preservation of evidence for use in an already identified claim – this is a fundamental principle.

[2]. The appellant appeals against the judgment and order dated 12 February 2018 of Matojane J, in terms of which he, on the return day of a *rule nisi*, discharged and set aside an Anton Piller order issued in camera on an urgent *ex parte* basis by Moshidi J on 11 April 2016. Matojane J also ordered the appellant to restore to the respondents all documents and data that had been seized during the execution of the Anton Piller order. The appellant was ordered to pay the costs occasioned by the respondents' opposition to the application.

[3]. Leave to appeal to this Full Court is with the leave of the court *a quo*, same having been granted on 6 July 2018.

[4]. The question to be decided in this appeal is whether the court *a quo* had, on the return day of the *rule nisi*, correctly applied the applicable legal principles as enunciated *inter alia* in *Shoba v Officer Commanding Temporary Police Camp, Wagendrift Dam and Another* 1995 (4) SA 1 (A) and *Non-Detonating Solutions (Pty) Ltd v Dune* 2016 (3) SA 445 (SCA). The question is whether the appellant, which was the applicant in the court *a quo*, had proven on the return day that at the time of applying for the Anton Piller preservation order: (1) it had a *prima facie* cause of action; (2) *prima facie* the respondents were in possession of documents important to that cause of action; and (3) it (the appellant) had a reasonable apprehension that the respondents might not discharge its duty to make full discovery. If those requirements had been met in the appellant’s application, and provided that there were no other grounds to set aside the order, such as serious flaws in its execution, the preservation order should have been allowed to stand.

[5]. As regards the lawfulness of the execution of the order, Matojane J, in light of his findings that the order should not have been granted in the first place since the appellant did not comply with the aforementioned requirements, did not deem

it necessary to and in fact did not deal with this aspect of the matter. The appellant therefore contends that, since there is no cross-appeal relating to the issue of the execution, same does not arise in this appeal. The respondents, on the other hand, contend that that issue is still very much alive and is an additional reason why and a ground on which the court *a quo* should have set aside the order. I shall revert to this aspect of the matter later on in the judgment.

[6]. The issues in this appeal are to be decided against the factual backdrop set out in the paragraphs that follow.

[7]. The appellant ('Interpark') is a parking management company. It provides management and operational services relating to paid car parking, including the operation of car parking garages and facilities, gating and access control. Interpark is well-known in the parking of cars space in South Africa and the name 'Interpark' can be seen at most shopping malls, office blocks and airports around the country, as well as in inner cities and business districts where there is a need for paid public car parking.

[8]. Four of the six respondents, including the third respondent ('Ms McGillavray-Teale') and the fourth respondent ('Ms Wolfaardt') who were senior members of staff of the appellant, were previously employed by the appellant. The first respondent ('Acuity') was registered and incorporated on 9 of February 2016, with its main business envisaged, once it was to commence trading, to be in the parking operations market as is the case with the appellant. The second respondent ('Mr Cockburn') is the sole director and majority shareholder of Acuity, and he was previously the Chief Executive Officer of Zeag (SA) (Pty) Ltd ('Zeag'), until his employment terminated on 1 April 2016. In that capacity, Mr Cockburn had limited dealings with Interpark, to whom Zeag supplied ticketing and related IT systems for utilisation in their carpark business. Zeag is a technology-based company and its business includes the installation and maintenance of electronic parking and traffic control systems. It offers specialised software and services to the revenue-generating parking market. Until the termination of her employment on 16 October 2015, Ms McGillavray-Teale, was the Head of the Human

Resources Department of the appellant. Ms Wolfaardt was its Chief Executive Officer until she was effectively retrenched on 2 July 2015.

[9]. On the evidence, Ms McGillavray-Teale was not subject to a restraint of trade agreement in favour of the appellant, whereas Ms Wolfaardt and the sixth respondent, Ms Fouché, were.

[10]. During 2016 the second to sixth respondents got together and decided to go into business together. Numerous discussions were held between them and understandably there was a fair amount of communication to and fro between them during which the proposed structure of the business venture was discussed.

[11]. The case of the appellant is that it was envisaged by the respondents that once it was trading, the first respondent would compete with the appellant. Whilst it acknowledges the right of the respondents to compete with it, the appellant takes issue with the fact that the intention of the respondents was to unlawfully compete with it in addition to the respondents, as a collective, breaching the restraint of trade covenants to which some of them were subject at the time they entered into the business association agreement with each other.

[12]. The respondents deny that the first respondent would be in competition with the appellant. Whilst both entities would be operating in the car parking market, so the respondents contend, the focus of their respective businesses would be different. The appellant is involved on the operational side of the car parking business, such as the operation of car parking garages, access control, ticketing and the management of parking facilities in buildings, whereas it was envisaged that the first respondent would be involved not in operational matters but in the supply, installation and maintenance of electronic parking and traffic control systems. This means, so the respondents contend, that there cannot possibly be a cause of action based on unlawful competition. Similarly, it cannot be said that any of the respondents would be breaching restraint of trade agreements insofar as any such restraint of trade agreements may have been extant at the relevant time.

[13]. All the same, the appellant's case is that the execution of the Anton Piller order at the residence of the second respondent ('Mr Cockburn') revealed that he

had at his premises – also the registered address of the first respondent – computers on which were stored significant quantities of financial and other information, and documents, belonging to the appellant.

[14]. Similarly, so the appellant submits, at the residence of Ms McGillavray-Teale documents and information were found on an Interpark laptop, which, according to the independent supervising attorney, was 'warm to the touch' – the type of warmth a laptop generates after it has been used for a while. The appellant makes much of this fact and the fact that Ms McGillavray-Teale denied that she had been using the laptop at any time shortly before the search and seizure. What is however important is the common cause fact that she was in possession of the laptop and any and all information contained thereon with the consent and full knowledge of the appellant, who gave her the laptop when she left the employ of the appellant.

[15]. As regards Ms Wolfaardt, the fourth respondent, who, as indicated above, was the Chief Executive Officer of the appellant until her retrenchment during July 2015, she, according to the appellant, had clearly indicated her intention to be associated with the first respondent and the other respondents in the business venture in competition with the appellant. She also was party to the respondents' attempt at concealing her involvement with the first respondent as she knew full well, so the appellant contends, that she was under a restraint. On her cell phone, flash disk and laptop found during the execution of the Anton Piller order, so the appellant alleges, was discovered the proprietary confidential information of the appellant.

[16]. The fifth respondent ('Mr Katz') was cited as an interested party, although no relief was sought against him or his premises. For all intents and purposes he takes no part in the proceedings, although there is pertinent evidence which, according to the appellant, relates to Mr Katz.

[17]. The sixth respondent ('Ms Fouché'), who was previously employed by the appellant as a Car Park manager, was also subject to a restraint of trade agreement when she left the employ of the appellant on 31 March 2016, clearly

with the intention to join the first and other respondents in their new business venture.

The Law and its application *in casu*

[18]. The appellant's case in support of its contention that *prima facie* it has a cause of action against the respondents which it intended to pursue, was based to a large extent on an email purportedly from a 'whistle-blower', who went by the name of Avansa Flemming and in respect of whom the details and particulars were singularly scant. In fact, neither the respondents nor the appellant were able to verify the existence of this person or entity and/or the authenticity of the email. The respondents contend that the email was a fabrication by the appellant and the court *a quo* agreed with that submission.

[19]. The email was received on 30 March 2016 by the appellant from Avansa Flemming – supposedly a conflicted third party, possibly a client of the appellant – to whom a presentation had ostensibly been made by the respondents. This is the same day on which the respondents paid a visit to a client of the appellant, namely V & A Watefront, for the purpose, according to the appellant, of soliciting business. Part of the email reads as follows:

'It is clear to me that they have intimate knowledge of your business infrastructure, processes as well as your customer base which they are clearly using. … This is not the way we do business.'

[20]. The email essentially purported to forewarn the appellant of the clandestine operations of the respondents and their endeavours at setting up a company in competition with the appellant. As found by the court *a quo*, the point about this email is that it has very little, if any, probative value – there is no legal or evidential basis on which the allegations made in the email can and should be accepted as evidence. How, for example, would the appellant be able to introduce this evidence during a trial? It is not even hearsay evidence because it would have had to be told to someone by someone else, who will not be giving evidence. It is inconceivable that statements made by phantom persons can be allowed to stand as a basis for a cause of action against the respondents. It cannot therefore

constitute evidence advanced by the appellant in support of its alleged *prima facie* cause of action against the respondents.

[21]. The second ground on which the appellant based its claim that it *prima facie* has a cause of action against the respondent, is the fact that the third to sixth respondents, including Ms McGillavray-Teale, was bound by a contractual restraint of trade which prevented her from joining a competitor. There is no direct evidence in support of the claim that Ms McGillavray-Teale was subject to a restraint of trade agreement. The appellant relies on and urges the court to draw inferences based on certain circumstances in support of this averment.

[22]. As regards the restraint of trade covenant by Ms Fouché, it is so, as correctly pointed out by the respondents, that that agreement was conditional on payment by the appellant to Ms Fouché, which condition was not complied with, rendering the agreement null and void.

[23]. The appellant also relied on evidence proving that the respondents had visited V & A Waterfront, a client of the appellant, on 30 March 2016 to, according to the appellant, solicit business. This averment by the appellant is key to the its allegation that it had a claim against the respondents based on unlawful competition, thus justifying the application for an Anton Piller order. The explanation of the respondents for the visit is simply that they wanted to introduce new products of Zeag to them and also to seek their opinion in relation to their viability for inclusion in the first respondent's business.

[24]. The appellant also contended that the respondents were involved, unlawfully so, in the termination by Dainfern Square of its contract with the appellant. This, so the appellant contended supported the *prima facie* cause of action based on unlawful competition. The evidence before the court *a quo* however showed otherwise. The respondents had nothing whatsoever to do with the termination of the Dainfern Square contract, which resulted from a dissatisfaction by the client with the poor level of service delivery provided by the appellant, which caused the client to move its business to an unrelated third party, namely Karabo Parking.

[25]. The respondents contend that it is clear from the evidence before the court *a quo*, properly considered, that the appellant had failed to meet the first requirement stipulated in *Shoba* supra and *Non-Detonating Solutions* supra, namely to demonstrate *prima facie* that it had a cause of action against the respondents justifying the seeking of invasive and far-reaching relief.

[26]. The causes of action which the appellant contends it has against the respondents are based on some of them allegedly breaching their restraint of trade agreements concluded with the appellant whilst they were still in its employment. Of the four respondents previously employed by the appellants only two had been proven to be subject to restraint of trade agreement, one of which was ineffective due to non-fulfilment of conditions. The remaining respondent, Ms Wolfaardt, confirmed that she had a restraint of trade agreement with the appellant. However, the appellant's assertion that this concession then means that all of the respondents acted in concert to breach this agreement is not sustainable.

[27]. The court *a quo* found that the appellant had failed to demonstrate that *prima facie* it has a cause of action against the respondents. I agree. The evidence in support of this contention is non-existent or of such poor quality that it can and should be disregarded.

[28]. The second requirement for the granting of an Anton Piller order is that the appellant must have demonstrated that *prima facie* the respondents had in their possession specific documentation or information that was of importance to the cause or causes of action of the appellant.

[29]. My reading of the record indicates that the respondents appear to accept that they were found to be in possession of documents belonging to the appellant. However, they contend that there was nothing unlawful about such possession which came about as a result of the relationships between them and the appellant. In any event, so the respondents contend, there is nothing confidential about such information. Again, I am of the view that there is merit in the respondents' contention.

[30]. As regards the third requirement, the respondents submit that the appellant has failed to prove compliance with that requirement. The appellant had failed, so the respondents contend, to demonstrate that they (the respondents) would destroy or spirit away documents such that they could not or would not meet their discovery obligations when the time came.

[31]. The lawfulness of possession of information is a relevant and exculpatory factor as it bears directly on whether or not the respondents would comply with their discovery obligations. If the respondents were in lawful possession of the information of the applicants there is nothing to say that they would not have discovered this information when called upon to do so.

[32]. The lawfulness of possession by the respondents of documents goes to whether or not the actions of the appellant in seeking Anton Piller relief were proportionate and measured. Therefore, so the respondents contend, the fact that the respondents were lawfully in possession of the applicants' documents and information means that this information could simply have been requested or obtained without having to resort to the draconian and highly invasive Anton Piller procedure which culminated in a search of the respondents' homes. I agree with this submission. In all of the circumstances if this matter, I am not persuaded that the appellant's apprehension that the documents would be hidden, destroyed or otherwise spirited away, if they had such, was a reasonable one.

[33]. The respondents also rely for their contention that the respondents would spirit away documents, on an email between the respondents, which inadvertently ended up with the appellant. This email, which was sent by the fifth respondent, Mr Katz, implicated the respondents, so the appellant contends, in the 'creation of a façade' that the fourth respondent, Ms Wolfaardt, was not involved in the business of the first respondent. In the trail of emails there is a request by the third respondent, Ms McGillavray-Teale, that the name and other details of the fourth respondent, Ms Wolfaardt – the one respondent who was subject to a restraint of trade covenant – should not be mentioned in any email exchanges or other forms of communications between them. This, the appellant argues, is a sure indication that the respondents intended to destroy, hide or

otherwise ‘spirit away’ documents or evidence belonging to the appellant. I agree with the submission on behalf of the respondents that this cannot be correct.

[34]. The appellant also relies heavily on the fact that, according to it, Ms McGillavray-Teale, whilst in its employ had destroyed documents. This allegation against Ms McGillivray-Teale was extrapolated and *inter alia* underpinned the appellant's submission that all the respondents were likely to engage in the destruction of documents. How this quantum leap is made is a mystery since no similar allegation was levelled against Mr Cockburn, Ms Wolfaardt, Ms Fouché or Mr Katz that they had or that they intended to engage in the destruction of evidence. Moreover, in my view, the evidence on which the appellant relied for the allegation against Ms McGillavray-Teale was far from convincing.

[35]. I find myself in agreement with the submission on behalf of the respondents that the attempted extrapolation of this allegation to encompass all the respondents is unjustified and amounts to paranoia and vaguely postulated conspiracy theories. This is exactly what Binns-Ward J cautioned against in *Web Call (Pty) Ltd v Botha and Another* (A50/2014) [2014] ZAWCHC 179 (5 December 2014). It is not sufficient to create a real or well-founded apprehension (even prima facie) that the respondents would not comply with their discovery obligations.

[36]. The appellant also attaches significant weight to an email sent by Mr Katz on 1 April 2016 in support of the first and third requirements for the granting of an Anton Piller order. This email inadvertently ended up in the hands of the appellant. The email clearly had as its purpose the appraisal of all of the respondents of steps that Mr Katz had taken or proposed to take in relation to the setting up of a domain name for the emails of Acuity as well as work that he intended to undertake with Ms Fouché in relation to setting up a standard set of documents to be used by Acuity when it entered the market.

[37]. In the trailing emails which followed the suggestion was also made by Ms McGillavray-Teale that they, as a group, should avoid using the name of Ms Wolfaardt in communiqués between them. This, the appellant contends, is

proof that the respondents underhandedly planned on competing unlawfully with it.

[38]. A proper reading of the email does not support this conclusion. There was no suggestion that the documents that were to be created by Mr Katz and Ms Fouché were going to be copied from existing documents of the appellant. The indications were that the documents were to be created from scratch by the respondents and would become the property of Acuity.

[39]. The request by Ms McGillavray-Teale that the email correspondence between the respondents not bear reference to Ms Wolfaardt cannot possibly indicate an intention by the respondents to hide or 'spirit away' evidence. It was not suggested that the email should be deleted simply that reference to Ms Wolfaardt be removed. The respondents submit that if the appellant truly believed as a result of Mr Katz's email that there was a reasonable apprehension that documents would be destroyed or spirited away, one would have expected them to have immediately taken steps to execute the order against Mr Katz. It chose not to do so, which indicates, so the respondents argue, that the appellant truly did not have the apprehension that the respondents would be spiriting away documents. I find myself in agreement with this submission. As with all of the evidence relied upon by the appellant in support of its application for the Anton Piller order, this email does very little to advance the case of the appellant in relation to their alleged apprehension that the respondents were likely to destroy the evidence.

[40]. For the aforegoing reasons I am of the view that the court *a quo* was justified, on account of the appellant's failure in its founding papers to comply with the requirements for the issue of the Anton Piller preservation order, in discharging the Anton Piller order on the return day. That conclusion would, by itself, be enough to result in the dismissal of the appeal. But there were also other aspects of the matter that support that result.

[41]. The court *a quo* also concluded that the appellant sought to 'steal a march' on the first respondent 'in respect of the introduction of new and innovative technology'. In addition, it accepted that the respondents' submissions that the

Anton Piller application was nothing more than a fishing expedition. This, so the respondents contend, is clear from the conversations conducted on the *WhatsApp* social media platform between the participants in the various searches conducted at the respondents' premises. During these discussions Mr Hulley, the deponent to the appellant's founding affidavit, for example encouraged the search teams with the statements like: 'Good hunting guys'. Other participants said things like: 'Haven't hit the jackpot yet' and 'It seems that the exercise will provide what we need.'

[42]. These statements confirm, according to the respondents, that rather than to search for and seize evidence and documents which the applicants knew to be in possession of the respondents, the purpose of the execution of the Anton Piller order was to see if they could find anything incriminating against the respondents in support of their possible causes of action. In fact, so the respondents contend, the very nefarious purpose of the Anton Piller order and its execution was to gain access to and take possession of the confidential information of Acuity, which planned to enter the market with a novel and unique product. The appellant, fearing competition from Acuity, sought to exclude it from the parking management market and to 'steal a march' on Acuity in respect of the introduction of new and innovative technology.

[43]. I find myself in agreement, as did Matojane J, with these submissions on behalf of the respondents. The appellant failed to demonstrate the requirements for the Anton Piller order to secure specific and specified documents in the possession of the respondents which constituted vital evidence to support its cause of action. The execution of the order was nothing more than a fishing expedition. This is another ground on which the order was set aside and the appeal should be dismissed.

[44]. In the circumstances, I am of the view that the learned Judge *a quo* was correct in in setting aside and discharging the *rule nisi* granted by Moshidi J. The court *a quo* was also correct in ordering that the items seized by the sheriff during the execution of the order be returned to them. In my view there was no misdirection on the part of Matojane J.

[45]. In light of my findings, it is not necessary for me to deal with the other issue raised by the respondents namely the defects complained of by them in relation to the execution of the order. Suffice to say, that we agree with the submissions by the respondents that this issue is still very much alive. It is trite that an appeal lies against the order of a lower court and not against the reasons for its judgment. If the reasons are wrong, but the order is correct, an appeal court is fully entitled and empowered to confirm the order for the right reasons. In other words, if the finding of this court was that the court *a quo* erred in holding that the appellant complied with the requirements for the issue of an Anton Piller order, this court would nevertheless have been entitled to dismiss the appeal on the basis that the execution of the order was unlawful. This is an issue which we however do not believe we need to rule on since the appeal stands to be dismissed on the basis that the appellant did not comply with the requirements for an Anton Piller order.

[46]. In sum, Interpark has not demonstrated that *prima facie* it has a sustainable cause of action against the respondents whether based on breach of restraint of trade agreements or on unlawful competition. Furthermore, on the basis of the evidence before the court *a quo* it cannot be said that the respondents had in their possession documentary or other electronic evidence in support of such cause, which the respondents would destroy or conceal unless an Anton Piller order was issued in respect of such evidence.

[47]. As was said by Mathopo JA in *Viziya Corporation v Collaborit Holdings (Pty) Ltd and Others* 2019 (3) SA 173 (SCA), in every case it is notionally possible that a litigant will, when it comes to the time for discovery, suppress documents which are adverse to its case. This notional possibility is not enough. An Anton Piller order is highly invasive and must be restricted to those cases where, *inter alia*, there is a substantial case for believing that the respondent will not properly honour its discovery duties in due course. This is not such a case.

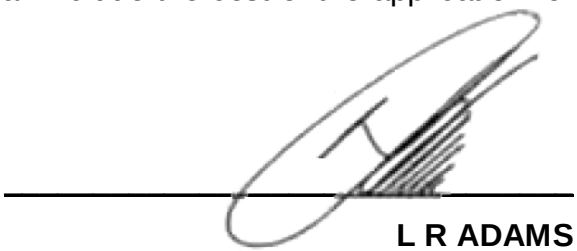
[48]. In the circumstances, we are of the view that the appeal against the order of the High Court should be dismissed.

Order

In the result, the following order is made: -

(1) The appellant's appeal against the order of the court *a quo* is dismissed with costs.

(2) The appellant shall pay the costs of the first, second, third, fourth, fifth and sixth respondents, which cost shall include the cost of the application for leave to appeal.

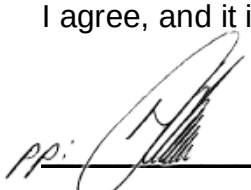


L R ADAMS

Judge of the High Court

Gauteng Local Division, Johannesburg

I agree, and it is so ordered

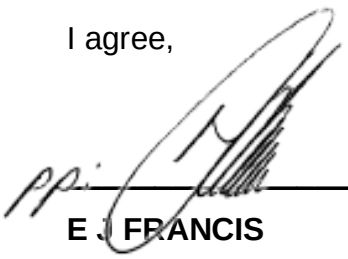


P M MABUSE

Judge of the High Court

Gauteng Local Division, Johannesburg

I agree,



E J FRANCIS

Judge of the High Court

Gauteng Local Division, Johannesburg

HEARD ON:	2nd September 2020 – in a 'virtual hearing' during a videoconference on the *Microsoft Teams* digital platform.
JUDGMENT DATE:	2nd February 2021 – judgment handed down electronically
FOR THE APPLICANT:	Advocate Owen Salmon SC
INSTRUCTED BY:	Schindler Attorneys
FOR THE RESPONDENTS:	Advocate A J S Redding SC, with Advocate P Bosman
INSTRUCTED BY:	Brand Potgieter Incorporated