IN THE HIGH OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No.: 48149/2021

REPORTABLE: **NO**

OF INTEREST TO OTHER JUDGES: **NO**

REVISED

18 JULY 2022

In the matter between:

PAUL JOHANNES VAN DER MERWE	*1st Applicant*
ESTELLE KATHLEEN VAN DER MERWE	*2nd Applicant*
CORNELIS JANSEN VAN DER MERWE	*3rd Applicant*
ESTELLE KATHLEEN VAN DER MERWE N.O. (In her capacity as trustee of PJS Family Trust)	4th Applicant
ESTELLE KATHLEEN VAN DER MERWE N.O. (In her capacity as trustee of Paul Jan Stoffel Family Trust)	*5th Applicant*
ESTELLE KATHLEEN VAN DER MERWE N.O. (In her capacity as trustee of SJP Family Trust)	*6th Applicant*
PAUL JOHANNES VAN DER MERWE N.O. (In his capacity as trustee of Big Five Family Trust)	*7th Applicant*
STOFFEL VAN DER MERWE N.O.	*8th Applicant*

(In his capacity as trustee of Big Five Family Trust)

ESTELLE KATHLEEN VAN DER MERWE N.O. *9th Applicant*
(In her capacity as trustee of Geluksfontein Besigheids Trust)

ESTELLE KATHLEEN VAN DER MERWE N.O. *10th Applicant*
(In her capacity as trustee of Ina Van Der Merwe Gesins Testamentere Trust)

CORNELIS JANSEN VAN DER MERWE N.O. *11th Applicant*
(In his capacity as trustee of Ina Van Der Merwe Gesins Testamentere Trust)

PAUL JOHANNES VAN DER MERWE N.O. 12th Applicant
(In his capacity as trustee of Ina Van Der Merwe Gesins Testamentere Trust)

STOFFEL VAN DER MERWE N.O. 13th Applicant
(In his capacity as trustee of Ina Van Der Merwe Gesins Testamentere Trust)

JAN VAN DER MERWE N.O. 14th Applicant
(In his capacity as trustee of Ina Van Der Merwe Gesins Testamentere Trust)

ESTELLE KATHLEEN VAN DER MERWE N.O. 15th Applicant
(In her capacity as trustee of Ina Van Der Merwe Familie Trust)

CORNELIS JANSEN VAN DER MERWE N.O. 16th Applicant
(In his capacity as trustee of Ina Van Der Merwe Familie Trust)

PAUL JOHANNES VAN DER MERWE N.O. 17th Applicant
(In his capacity as trustee of Ina Van Der Merwe Familie Trust)

STOFFEL VAN DER MERWE N.O. 18th Applicant
(In his capacity as trustee of Ina Van Der Merwe Familie Trust)

JAN VAN DER MERWE N.O. (In his capacity as trustee of Ina Van Der Merwe Familie Trust)	19th Applicant
LIMPOPO WEST FARMING AND BUSINESS ENTERPRISES (PTY) LTD	20th Applicant
ELLETSE ONDERNEMINGS (PTY) LTD	21st Applicant
AND	
VANWYK AUDITORS	1st Respondent
JUSTUS VANWYK	2nd Respondent
VAN WYK BESTUURSDIENSTE (PTY) LTD (Registraiton Number: 2013/041672/07)	3rd Respondent

JUDGMENT

NEUKIRCHER J:

[1] This is the return day of an Anton Pillar order (AP order) granted in the urgent court on 14 February 2022. The AP order reads, *inter alia,* as follows:

> *"1. That the non-compliance with the rules be condoned and that the matter be heard as urgent in terms of Rule 6(12)(a);*
>
> *2. That the application be heard in camera;*
>
> *3. That the Respondents and any other adult person in charge of the premises of the First Respondent at 462 Grysbok Street, Waterkloof Ridge, Pretoria, grant the Sheriff of this honourable Court, the supervising attorney (Mr Allewyn Grove from Tim du Toit and* Co *Incorporated}, the Applicants' auditor (Mr Jan Erasmus), any partner or professional assistant of JJR Inc. Attorneys ("the Applicants' Attorney'),* and a computer operator (Mr Jean-Pierre Jaume}, access

to the said premises for the purposes or

3.1 searching the premises for the purpose of enabling any of those persons to identify and point out to the sheriff originals or copies of, or extracts from the accounting system entries relating to the Applicants;

3.2 searching the premises for the purposes of finding any computer disc, hard drive and/or any other digital storage device containing any of the accounting system entries to the Applicants.

4. That the Respondents forthwith disclose passwords and procedures required for effective access to the computers and software programs of the Respondents for the purpose of searching on the computers and/or software programs and making a *digital copy, or, if that is not possible,* a *printout of the accounting system entries relating to the Applicants.*

5. That the Respondents permit the sheriff to attach and to remove any document or other item pointed out by a person mentioned in paragraph 3 as being a *document or item covered by paragraph 3.1 or 3.2.*

6. That the sheriff is authorised to attach any document or item which is pointed out by any of the aforesaid persons and is directed to remove any attached document or item in respect of which the Applicants or the Applicants' attorney does not give a *different instruction.*

7. The sheriff is directed to keep each removed document or item in his custody pending the return date of this order and no persons shall be entitled to inspect any of the documents or items taken into possession by the Sheriff, nor shall any copies be made of the documents or items other than provided for in paragraph 9.3.2 hereof.

8. That until completion of the search authorised in the preceding paragraphs the Respondents may not access any computer or any area where documents or items of the class mentioned in paragraph

3.1 may be present except with the leave of the Applicants' attorney or to make telephone calls or send an electronic message to obtain the attendance and advice mentioned in the notice which is handed over immediately prior to execution of this order.

9. The Sheriff is directed, before this order and this application is served or executed, to:

9.1 hand to the respondent or the other person found in charge of the said premises a *copy of* a *notice which accords with annexure "A"* 15.1 of the practice manual;

9.2 explain paragraphs 2, *3 and 4 thereof, and*

9.3 inform those persons of the following:

9.3.1 That any interested party may apply to this court on not less than 24 hours' notice to the office of the Applicants' attorney to anticipate the return day of this order and for a *variation or setting aside of this order, the Court's practices and rules applying unless the Court directs otherwise.*

9.3.2 That the Respondents are entitled to make a *copy of any document or item which the Sheriff intends to remove unless the Sheriff declares that the time involved makes the procedure impractical.*

9.3.3 That the Respondent or his representative is entitled to inspect documents and items in the Sheriffs possession for the purpose of satisfying themselves that the inventory is correct.

10. The Sheriff and the supervising attorney are ordered to immediately make a *detailed inventory of all documents and items attached and to provide the registrar of this court, the Applicants' attorney, and the Respondents with* a *clear copy thereof*

11. The Sheriff is ordered to serve this application on the Respondents and to explain the nature and exigency thereof

12. The Respondents and any other adult person in charge of the premises at which this order is executed are further directed to

disclose to the Sheriff of the above honourable Court the whereabouts of any document or item falling within the categories of documents and items referred to in 3.1 and 3.2 above, whether at the premises at which this order is executed or elsewhere to the extent that the whereabouts are known to such person(s).

13. In the event that any document is disclosed to be at premises other than the premises mentioned in paragraph 3 of this order, the applicant may approach this court ex parte for leave to permit execution of this order at such other premises.

14. On the return day there shall be placed before this Court the report of the supervising attorney with proof that a copy thereof has been served on the Applicants' Attorney and on the respondents (or their attorney).

15. A rule nisi do issue calling upon the respondents to show cause, on 6 April 2022 at 10h00, why an order should not be granted in the following terms:

15.1 that the documents and items in the possession of the Sheriff pursuant to the execution of this order shall be handed by him to the Applicants.

15.2 that the costs of this application, including the costs of the supervising attorney and the computer operator, shall be paid by the respondents."

THE RETURN DATE

[2] In essence, the adjudication of the relief before me involves the following:

2.1 the applicants contend they were entitled to the order of 14 February 2022 ("the order") because of the respondents' failure to comply with the order granted by Davis Jon 5 October 2021;

2.2 the respondents[1] contend that:

2.2.1 the applicants abused the Anton Pillar remedy;

2.2.2 the order is unnecessarily wide;

2.2.3 the applicants failed to make a full disclosure to the court of facts relevant to the Anton Pillar application; and

2.2.4 during the execution of the order, the applicants' representatives went beyond the terms of the order.

BACKGROUND:

[3] This is not the first round of litigation between these parties - this application was preceded by two others[2]. What led to those two orders was the following: during 2011 the second respondent (Van Wyk) was appointed to act as auditor in all financial and tax related matters for the 1st to 21st applicants (the van der Merwe Group). This appointment was subsequently terminated.

[4] On around 1 June 2021 the applicants, through their attorney of record, requested all the source documents relating to the tax affairs and/or financial affairs of the van der Merwe Group so that they could appoint an auditor to attend to and finalise their outstanding tax and financial matters but to no avail.

[5] This failure resulted in an urgent application under case number 30025/2021 in which Tlhapi J granted the following order by agreement between the parties[3] on 29 June 2021:

"2. *The First and Second Respondents are hereby interdicted, from filing any tax returns with the South African Revenue Services for, or on behalf of any of the Applicants.*

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[1] *Consisting of the second respondent (Van Wyk) and his auditing firm (first respondent) and business (third respondent) A reference to "Van Wyk" in this judgment includes a reference to all the respondents.*

[2] *The history between the parties abounds with acrimony and allegations of nefarious conduct by the respondents*

3. The First and Second Respondent are hereby ordered to hand over to the Applicants, all financial statements, tax returns and all supporting documents (including all source documents) relating to the Applicants, within 10 (ten) days from the date of granting the order.

4. The Applicants are hereby ordered to pay an amount of R1,620,856 into the trust account of Willemse, Mill/er and Babinszky Prokureurs with FNB Trust account, Account nr: [....] and branch code 250 655, to be held in trust by such attorneys, pending the finalisation of any proceedings instituted by the Respondents against the Applicants for any outstanding fees, provided that the Respondents institute such proceedings within sixty (60) days from date of this order."[4]

[6] Although the respondents provided certain documents under that order on 13 July 2021, there were many that they failed to provide. This resulted in a second application under case number 48149/2021 where, after hearing the matter[5] Davis J granted the following order[6]:

"2. The Respondents are ordered to hand over, within 7 days from date of this order, to the Applicants copies, in digital and/or hand-copy format, of the following documents:

2.1 All Value Added Tax (VAT) invoices relating to the VAT returns of Limpopo West Farming for the 2019112, 2020102, 2020104, 2020/06, 2020/08, 2020/10 and 2020112 VAT periods;

2.2 All calculations relating to the VAT returns of Limpopo West Farming for the 2019/12, 2020/02, 2020/04, 2020/06, 2020/08, 2020/10 and 2020112 VAT periods;

2.3 The Annual Financial Statements of Limpopo West Farming for the 2019 Financial year,·

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[3] *It is common cause that the respondents did not file an answering affidavit in those proceedings*
[4] *The Tlhapi order*
[5] *Which was opposed by the respondents*

2.4 The trial balance and copies of the accounting system entries relating to Limpopo West Farming for the 2019 Financial year,·

2.5 The Annual Financial Statements of PJS FAM/LIE TRUST for the 2019 Financial year,·

2.6 The trial balance and copies of the accounting system entries relating to PJS FAM/LIE TRUST for the 2019 Financial year;

2.7 *All VAT invoices relating to the VAT returns of SJP FAM/LIE TRUST for the 2019/12, 2020/02, 2020/04, 2020/06, 2020/08, 2020110 and 2020112 VAT periods;*

2.8 All calculations relating to the VAT returns of SJP FAM/LIE TRUST for the 2019/12, 2020/02, 2020/04, 2020/06, *2020/08,*
2020/10 and 2020112 VAT periods;

2.9 *The Annual Financial Sta(ements of SJP FAM/LIE TRUST for the 2019 Financial year;*

2.10 *The trial balance and copies of the accounting system entries* relating to SJP FAMILIE TRUST for the 2019 Financial year;

2.11 *The Annual Financial Statements of INA VAN DER MERWE GESINSTRUST for the 2019 Financial year;*

2.12 *The trial balance and copies of the accounting system entries relating to INA VAN DER MERWE GESJNSTRUST for the 2019 Financial year;*

2.13 The Annual Financial Statements of PJ VAN DER MERWE for the 2019 Financial year;

2.14 The trial balance and copies of the accounting system entries relating to PJ VAN DER MERWE for the 2019 Financial year;

2.15 The ITR12: 2019 relating to PJ VAN DER MERWE;

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[6] *The* "Davis J order"

2.16 The ITA34: 2019 relating to PJ VAN DER MERWE;

2.17 All calculations relating to the VAT returns of PJ VAN DER MERWE for the 2020104 VAT period;

3. The Respondents are ordered to pay the costs of this application.

4. The Respondents are ordered to state under oath, with specificity, which of the documents and/or accounting system entries as set out in prayer 2 are not within their possession and/or cannot be provided to the Applicants."

[7] In compliance with paragraph 4 of the Davis J order, the respondents filed two affidavits: the first was filed on 21 October 2021 and the second on 19 November 2021. The latter came about after the applicants' attorneys informed the respondents that they had not fully complied with the court order and placed them on terms to do so.

[8] But the applicants allege that the respondents have still failed to comply with the Davis J order:

"6.1 In terms of prayer 2.4, 2.6, 2.10, 2.12 and 2.14 of the Court Order, the Respondents were ordered to hand over, to the Applicants, copies of the trial balance and copies of the accounting system entries relating to the various Applicants.

6.2 The Respondents response to prayer 2.4 was the following:

"I confirm that neither I, nor any employees of the First and/or Third Respondents do have any further documentation regarding the trial balance and copies of the accounting system entries relating to LIMPOPO WEST FARMING for the 2019."

6.3 The Respondents response to prayer 2.6 was the following:

"I confirm that neither I, nor any employees of the First and/or Third Respondents do have any further documentation regarding the trial balance and copies of the accounting system entries relating to PJS FAM/LIE TRUST for the 2019 Financial Year other than the documents attached hereto as Annexure

'JVW4' in our possession or under our control."

6.4 Annexure JVW4 is a copy of a trial balance document relating to PJS FAM/LIE TRUST. The trial balance document is a report generated on PASTEL, the accounting system software utilised by the Respondents.

6.5 As can be seen from Annexure JVW4 several amounts are listed for various items such as Sales, Rental Income, PFT/Loss on Sale of Non- Current Assets, Bank Charges, Interest Paid etc.

6.6 I am advised by my new auditor that it would have been impossible to general Annexure JVW4 without there being underlying accounting system entries on the PASTEL system of the Respondents ...

6.7 ... Suffice to say that without capturing the transactions relating to a person or entity it would be impossible to generate reports like Annexure JVW4.

6.8 It is accordingly impossible that the Respondents have no copies of the accounting system entries relating to PJS FAM/LIE TRUST for the 2019 Financial Year as alleged in the first affidavit. Significantly, the Respondents did not allege in their two affidavits that the accounting system entries have been lost or destroyed. Should the Respondents oppose the confirmation of the interim order which is sought herein on the return date, they are invited to explain how they managed to generate the Trial Balance reports referred to in this affidavit without having the relevant accounting system entries at their disposal.

6.9 ...

6.10 …

6.11 Similarly, and in response to prayer 2.10, the Respondents state the following:

> *"I confirm that neither I, nor any employees of the First and/or Third Respondents have any further documentation regarding the trial balance and copies of the accounting system entries*

relating to SJP FAM/LIE TRUST for the 2019 Financial Year than the documents attached hereto as Annexure 'JVW7' in our possession or under out control."

6.12 Again, Annexure JVW7 is a copy of a trial balance document relating to SJP FAMILIE TRUST. I repeat the submissions made in relating to Annexure JVW4 supra.

6.13 It is accordingly impossible that the Respondents have no copies of the accounting system entries relating to SJP FAMILIE TRUST for the 2019 Financial Year as alleged in the first affidavit.

6.14 Similarly, and in response to prayer 2.12, the Respondents state the following:

"I confirm that neither I, nor any employees of the First and/or Third Respondents have any further documentation regarding the trial balance and copies of the accounting system entries relating to /NA VAN DER MERWE GESINSTRUST for the 2019 Financial Year than the documents attached hereto as Annexure 'JVW9' in our possession or under our control."

6.15 Again, Annexure JVW9 is a copy of a *trial balance document relating to* INA VAN DER MERWE GESINSTRUST, I repeat the submissions made in relation to Annexure JVW4 supra.

6.16 It is accordingly impossible that the Respondents have no copies of the accounting system entries relating to /NA VAN DER MERWE GESINSTRUST for the 2019 Financial Year as alleged in the first affidavit.

6.17 Similarly, and in response to prayer 2.14, the Respondent state the following in the second affidavit:

"I confirm that neither I, nor any employees of the First and/or Third Respondents have any further documentation regarding the trial balance and copies of the accounting system entries relating PJ VAN DER MERWE for the 2019 Financial Year other than the documents attached hereto as Annexure 'JVW11' in our possession or under our control."

6.18 Again, Annexure JVW11 is a *copy of* a *trial balance document relating* to PJ VAN DER MERWE. I repeat the submissions made in relation to Annexure JVW4 supra.

6.19 It is accordingly impossible that the Respondents have no copies of the accounting system entries relating to PJ VAN DER MERWE for the 2019 Financial Year as alleged in the first affidavit.

6.20 I point out that Annexure JVW11 was generated by the Respondents on 18 November 2021. Accordingly, and as at 18 November 2021, there had to be accounting systems entries on the PASTEL system of the Respondents which enabled them to generate the Trial Balance report.

6.21 The absurdity of the Respondents' statement that there are no accounting system entries relating to PJ VAN DER MERWE for the 2019 Financial Year is self-evident.

6.22 The respondents have clearly displayed their intention of not complying with the Court Order, specifically with prayers 2.4, 2.6, 2.10, 2.12, and 2.14 thereof

6.23 …"

[9] Thus, say the applicants, it is clear that Van Wyk is deliberately thwarting the order of Davis J and that the AP order is required in order to give proper effect to the execution of that order.

[10] The applicants state that, as is clear from Annexure JVW11[7], Van Wyk clearly utilised the accounting system entries on 18 November 2021 in order to generate Annexure JVW11, and that the respondents are intentionally withholding those from the applicants. As a result, the applicants are unable to deal with their tax affairs and given the respondents constant denial that they are in possession of these entries there is "a *real and well-founded apprehension that the accounting system entries may be hidden, destroyed and/or spirited away in order to frustrate the applicants' access thereto in*

[7] *See quoted par 6.20 supra*

accordance with the Court Order..."

[11] The applicants averred that, were the respondents to be given notice of this application they would be able to delete the accounting system entries from their computers which would defeat the purpose of the order.

[12] Based on these facts the AP order was granted *in camera.*

[13] The AP order was executed on 3 March 2022 at the premises of the first respondent at 08h00. The execution was completed at around 17h00.

[14] According to the report of the supervising attorney (Mr Grove)[8], the following people were in attendance:

14.1 Ms Fransu de Klerk and Mr Bryce Kitching of the firm JJR Inc who are the Applicants' attorneys of record;
14.2 the Applicants' auditor, Mr Jan Erasmus;
14.3 a computer operator, Mr Jean-Pierre Jaume ("Jaume");
14.4 Mr MN Gassant of the Sheriff Pretoria South East and his assistant ("the Sheriff');
14.5 Mr Durant Lacante of the firm Lacante Inc who is the attorney for the Respondents ("Lacante");
14.6 the first Respondent's IT Specialist;
14.7 various other employees of the first Respondent.

[15] This is relevant as the respondents allege that unauthorised persons were permitted to be present, thus tainting the execution of the order, the consequence of which they say must lead to its discharge.

[16] The AP order was read out and served by the Sheriff and they waited

[8] *He filed two reports - the second was in reply to allegations made in the answering affidavit*

for the respondents' attorney to arrive before execution of the AP order commenced. The respondents were also permitted to have their IT specialist present in order to assist Jaume. Jaume was given the necessary passwords to access the respondents' computers and software to enable him and Erasmus to procure the documents and information per paragraph 3.1 and 3.2 of the AP order.

[17] Hard copies of the following documents were attached:

17.1 1x1 3198 File 1-2 Limpopo West Farming and Business Enterprises (Pty) Ltd
17.2 1x1 3198 File 2-3 Limpopo West Farming and Business Enterprises (Pty) Ltd
17.3 1x1 3198 File 3- Limpopo West Farming and Business Enterprises (Pty) Ltd 3198
17.4 1x1 File 4482 Elletse Ondernemings

[18] In addition to these, account system entries were located on the first and third respondents' server pertaining to, *inter alia:*

18.1 Mr PJ van der Merwe (the first applicant);
18.2 Mr Conelis Jansen van der Merwe (the third applicant);
18.3 the Ina van der Merwe Gesins Testamentere Trust (the 10th to 14th Applicants);
18.4 the Ina van der Merwe Family Trust (the 15th to 19th Applicants);
18.5 Limpopo West Farming and Business Enterprises (Pty) Ltd (the 20th Applicant).

[19] In particular, Grove explains:

"The accounting entries of files referred to above were copied onto a Seagate 4 Terabyte hard drive with serial number NACG850N. A

photo of the said drive is attached hereto marked as ANNEXURE "E". This specific hard drive was also attached by the Sheriff, Mr Jaume, the computer operator, also furnished me with a *list of the files that were copied to the aforesaid hard drive. I* am *not going to attach* a *hard copy of this list to this affidavit under circumstances where the list is in excess of 600 pages and it will make this report unnecessarily voluminous. However, I confirm that I have* a *copy of the said list in my possession and I* am *in* a *position to furnish it to the above Honourable Court in the event that it may become necessary."*

[20] During the course of the attachment, a file was located on the respondents' server titled *"Jacques* SSS". When opened, another file titled *"PJ van der Merwe"* appears (i.e. first applicant) but attempts.to open that file were in vain as all the content had been deleted. According to the first respondent's IT specialist, the computer on which that file had originally been backed up belonged to an erstwhile employee, a Mr Allers. When Allers resigned, the computer was then allocated to a Ms Human i.e. the deleted information was contained on Ms Human's computer.

[21] All was not lost however, as Jaume indicated the deleted information could be recovered but the process would take approximately three days. It was decided that Jaume would take a forensic image of the hard drive to enable the applicants to retrieve the deleted information were the provisional order to be confirmed.

[22] Mr Lacante objected to this as his view was that information of other clients would also be copied (and those clients compromised) in the process. Grove noted the objection in his report but allowed the process under paragraphs 3.2 and paragraph 5 of the AP order. Furthermore, as all documents and information would remain sealed in a box at the Sheriff's offices pending confirmation of the AP order, none of the information could be compromised or accessed by the applicants.

[23] Thus, a forensic image was made of Allers's hard drive and that was copied to a Seagate 4 Terabyte hard drive with serial number NACG84XY. This was then attached by the Sheriff.

[24] All documents and hard drives which were attached were placed in a box and sealed by the Sheriff. This box is in safe-keeping at the office of the Sheriff Pretoria South East. The Sheriff issued an inventory of the documents and items attached which states:

> *"HARD COPY PINK FILES*
> *1 x 1 3198 File 1-2 Limpopo West Farming and Business Enterprises (Pty) Ltd 1 x 1 3198 File 2-3 Limpopo West Farming and Business Enterprises (Pty) Ltd 1 x 1 3198 File 3- Limpopo West Farming and Business Enterprises (Pty) Ltd 1 x 1 File 4482 Elletse Ondernemings*
> *1 x 4 Tera Bite Hard Drive (Seagate) SN: NACG850N*
> *1 x 4 Tera Bite Hard Drive (Seagate) SN: NACG84XY"*

[25] Mr Grove also filed a document titled *"Replying Affidavit of the Supervising Attorney".* This was to dispel certain inferences and to respond to certain allegations made by the respondents in their answering affidavit. In this, Grove explains the following:

> 25.1 that he could not be present everywhere in the building at all times and so the manner in which he would supervise the execution of the order was discussed and agreed to with Lacante;
> 25.2 at no stage were the applicants' representatives ever unaccompanied;
> 25.3 it was agreed that the premises would be searched in the presence of representatives of the respondents, which was done;
> 25.4 the files containing the accounting system entries were located on the server and a list of these was compiled by Jaume. The list is contained in a PDF document and is in excess of 600 pages. The

list is also available in Microsoft Excel format which is approximately 160 pages. It was Lacante's view that, as the list was lengthy, copies should not be made and it was agreed that this list would be forwarded to Grove via email - this was done at 16h20 from the computer of Susan Du Plessis, an employee of the respondents whilst Grove was at the respondents' premises. The respondents are also in possession of this list. (my emphasis)

SHOULD THE RULE NISI BE CONFIRMED?

[26] This being the procedure followed, the question is whether or not the rule should be confirmed and in deciding this, the respondents' case is the following:

26.1 that the AP order should not have been granted as it fails to comply with the requirements set out in ***Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam, and Another; Maphanga v Officer*** **Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg, and Others**[9] ("Shoba");

26.2 that even were it proper for the order to be granted, the terms of the AP order are too broad;

26.3 that the execution of the AP order infringed the terms of the order and its authorised execution, and on this basis the order should be discharged.

The requirements for the grant of an Anton Piller order

[27] In ***Shoba,*** Corbett CJ stated that an Anton Piller order is directed at the preservation of evidence and it is accepted in our law that an applicant must *prima facie* establish the following:

a) that he has a cause of action against this respondent which he intends to pursue;

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[9] *1995(4)SA 1 (AD)*

b) that the respondent has in his possession specific and specified documents or things which constitute vital evidence in substantiation of the applicant's cause of action (but in respect of which the applicants cannot claim a real or personal right); and

c) that there is a 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.[10]

The cause of action argument

[28] The respondents' argument is multi-faceted ad each aspect will be dealt with separately. The first is that the applicants' case falls at the first hurdle as the applicants cannot point to any cause of action which they intend to pursue against the respondents.

[29] In ***Memory Institute SA CC t/a SA Memory Institute v Hansen and Others***[11], Harms JA stated the following:

> *"[2] It should, I venture to suggest, be common knowledge that Anton Piller orders had their origin in a judgment of the Court of Appeal in Anton Piller KG v Manufacturing Processes Ltd and Others. In this country the seed fell initially on rocky ground guarded by prophets of old but eventually took root and the plant grew and prospered. 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. Regrettably it is not.*
>
> *[3] The order granted provided for the removal of goods (such as a computer) by the Sheriff (with the police's assistance if need be - why, we are not told) and the handing over of them to the appellant. Duly armed with the order the Sheriff, Mr Van Vuuren (a member of the appellant) and the attorney proceeded to the Hansen residence and*

[10] Shoba *case at 15H-1*

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

[4] But, says the appellant, it was entitled to rely on a *rei vindicatio, having* alleged that at least some of the goods belonged to it. The problem is that on its own showing the Hansens were in possession of the goods in terms of an agreement with the appellant. The agreement, as counsel seemed to concede, appears to be a partnership agreement. How one partner can claim possession of partnership goods, which by agreement are in the possession of the other, I fail to understand. Even if one assumes that the agreement was something other than a partnership, the Hansens were still entitled to retain possession until the agreement was cancelled, and that had not been done."

[30] The respondents argue that the applicants have used this remedy to enforce compliance of the Davis J order but that, given the draconian and invasive nature[12] of the Anton Piller procedure, this was not only wholly

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[11] *2004(2) SA 630 (SCA) at 633 C-G and 635 G-H*

[12] *Direct Channel Holdings (Pty) limited v Shaik Investment Holdings (Pty) limited* 2019 JDR 1396 (GJ) at paragraph 7:

> *"[7] ... The Anton Piller procedure is a drastic and extreme procedure which requires meticulous scrutiny at the stage both of the granting of the order and its execution"*

inappropriate, but unnecessary - this because the applicants have at their disposal an alternative remedy and that is a contempt application. They argue that not only have the applicants failed to utilise this less drastic procedure, but they also fail to set out a case that the pursuit of the AP order was to preserve evidence for purposes of an eventual remedy. Thus, the order granted was impermissible from the outset.

[31] Mr Vorster places reliance for his relief on ***Dabelstein and Others v* Hildebrandt and Others**[13] where the question was whether the Anton Piller procedure could be used in order to aid in the execution of a judgment.

[32] In **Shoba**[14] Corbett CJ stated:

> *"The acceptance of the Anton Piller principle in regard to the preservation of evidence on the basis set forth above means that, to the extent to which they are in conflict with this, the judgments in the Economic Data, Cerebos Food and Trade Fairs* cases *must be taken to be overruled.*
> *It is not necessary in this* case *to decide whether the Anton Piller principle has any scope in our law other than what is indicated above.*
> *The above-stated formulation in regard to the preservation of evidence is in general terms. It* was *submitted, however, by respondent's counsel that the Anton Piller remedy* was *essentially one designed for litigation in the intellectual property field and that it should be limited to those classes of cases. In this connection counsel referred to certain remarks by Lord Wilberforce in the English case of Rank Film Distributors Ltd and Others v Video Information Centre and Others {1981} 2 All ER 76 (HL) at 78g-h to the effect that the Anton Pilfer order* was *designed to deal with situations created by infringements of patents, trademarks and copyright and more*

[13] *1996 (3) SA 42 (C)*

particularly with acts of commercial piracy in these fields. That the Anton Piller procedure originated in this way is beyond question; but the English decisions show that the procedure has been extended to other classes of cases as well. Thus, in Yousif v Salama *[1980] 3 All ER 405 (CA) an Anton Piller order was made for the preservation of documents which were 'the best possible evidence to prove the plaintiff's case' (but which were not the subject matter of the action) in* a *commercial dispute between* a *supplier of goods for resale and his distributor under* a *profit- sharing agreement."* (my emphasis)

[33] The question of whether the English law principle that an AP order may be granted after judgment in order to elicit and preserve documents relating to the defendant's assets and essential to the execution of the judgment per the ***Distributori*** judgment *supra* was left open in ***Shoba.***

[34] In ***Dabe/stein.*** Farlam J stated:

"In the Shoba case (at 160) Corbett CJ said that it was not necessary for the purposes of that case 'to decide whether the Anton Piller principle has any scope in our law other than what is indicated above (ie in the passage quoted in the previous paragraph).'
Reference was made (at 16H) to the English case of Distributori Automatici Italia SpA v Holford General Trading Co *Ltd and Another [1985] 3 All ER 750 (QB), where Leggatt J, in granting an Anton Piller order to assist in the execution of judgment, said (at 756b-c):*

> *'Where there is* a *real risk of justice being thwarted by* a *defendant intent on rendering any judgment nugatory the need for an Anton Piller order may be even greater in aid of execution than of judgment. In my judgment the Court has jurisdiction to make an Anton Piller order after judgment for the purpose of eliciting documents which are essential to execution*

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[14] *At 16 D-J*

and which would otherwise be unjustly denied to the judgment creditor.'

It is necessary to decide in this case whether the principle applied in the Distributori case supra is in accordance with our law. I say this because I agree with Mr Lazarus's submission that the documents and other items sought by the applicants in this case were not 'vital evidence' in the sense in which that expression was used in the passage from Corbett CJ's judgment in the Shoba case which I have quoted. Once the first respondent sent a *telefax message on 29 August 1995 to the applicants' attorneys to say that the third respondent had received the funds from the trust and the third respondent thereafter failed to pay the applicants what it had undertaken to pay, the applicants' cause of action was complete. They accordingly did not require the documents and other items to prove their case. Indeed, as appears from the extracts from Mr Kurz's affidavit quoted above, their main (if not the sole) reason for requiring attachment of the documents is so as to enable them to trace the funds paid by the trust to the third respondent so that they will be able to ensure that the judgment they hope to obtain against the third respondent will be paid.*

In my view, the extension of the Anton Piller principle effected in the Distributori case is in accordance with the principles of our law. In Universal City Studios Inc and Others v Network Video (Pty) Ltd 1986 (2) SA 734 (A) at 754G-755E, Corbett JA based our Court's power to grant Anton Piller relief on the Supreme Court's undoubted 'inherent reservoir of power to regulate its procedures in the interests of the proper administration of justice'. It is clear from the cases cited by Stegmann J in Knox-D'Arcy and Others v Jamieson and Others (supra at 706E-H) that this reservoir of power extends to beyond judgment to cover cases where an order is required (even before a *judgment in* a *case has been given) to ensure that, when* a *creditor obtains* a *judgment, it is not* a *'barren one' and when he goes to the*

debtor's premises with his writ of execution he does not find that he is 'fishing behind the net' - to use phrases employed by Hopley Jin Mcitiki and Another v Maweni 1913 CPD 684 at 687, one of the cases cited by Stegmann J. The principle laid down by Hopley J in the Mcitiki case was that orders could be given prior to judgment to interdict a *respondent from parting with some of his property with the intention of seeing to it that an adverse judgment given against him would not be satisfied and he said that such orders are given 'to protect* a *bona fide plaintiff against* a *defeat of justice'.*

In my view a *Distributori-type order may validly be given in appropriate cases to prevent* 'a *defeat of justice' such as the applicants fear will happen in this case if they are unable to trace the funds transferred by the trust to the third respondent for the purpose, inter alia, of discharging their claims against Harksen."* (my emphasis)

[35] I agree with the view expressed by Farlam J in this regard. In the present application the applicants rely on the respondents' obstinate refusal to comply in full with two court orders and in particular with the Davis J order. Although the documents are not sought to preserve a future/existing (instituted) claim, they are sought to prevent the order of Davis J being rendered nugatory.

[36] Bearing in mind the purpose of this application, it is not necessary in my view for the applicants to establish that they have a *prima facie* right to the documents sought - the order of Davis J establishes that right.

[37] Insofar as the argument is that the applicants should have brought a contempt application, I am of the view that this would not provide the same relief as the AP order - it will not ensure the preservation of the documents allegedly "under threat" stipulated in the Davis J order and in the event it is met with a denial of possession, any contempt order would be rendered

nugatory due to an inability to comply with any order made.[15]

[38] Thus in my view the order is proper and is available to the applicants.

The *"Vital documents"* argument

[39] The argument that the remedy is only available to preserve *"vital evidence"*[16] is similarly not good as Davis J has already ordered the delivery of those documents - they are therefore *"vital evidence"* seen in the context of the Davis J order.

[40] The respondents' argument is that the AP order relates to *"accounting system entries relating to the applicants";* that these accounting system entries are trial balances which the applicants allege remain on the respondents' Pastel accounting records (and which have not been given to them); that the trial balances are extracted from the general ledger on Pastel, which in turn is compiled from source documents; that the applicants do not allege that they do not have these source documents and the only inference to be drawn is that they do have them which begs the question as to why they cannot use them to compile their own general ledger and trial balances.

[41] But this argument is no more than an obfuscation as paragraph 5.5 of the founding affidavit reads as follows:

> "5.5 *JJR Inc. requested van Wyk to surrender and to make available on or before the 4th of June 2021, all the source documents relating to the tax affairs and/or financial affairs of the Applicants."*

[42] Therefore, on these papers, the applicants are not in possession of the source documents and are therefore unable to draw up a general ledger or trial

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[15] *Coetzee v Government of the RSA; Matiso v Commanding Officer, Port Elizabeth Prison 1995 (4) SA 631 (CC)*
[16] *See* Shoba supra

balance sheet.

[43] Seen in the context of the *causa* behind the Davis J order - i.e. that the documentation is required to comply with their tax obligations - it is clear that these
documents would in any event constitute *"vital evidence",* are necessary and must be provided under the Davis J order.

The *"real threat"* argument

[44] This is the argument that there was no reasonable apprehension that documents would be spirited away, hidden or destroyed.

[45] I am of the view that the applicants have, insofar as is necessary, established the untrustworthiness of the respondents as regards the documents sought:

> 45.1 although Tlhapi J issued her order on 29 June 2021, non-compliance with its terms necessitated another urgent application before Davis J and that order on 5 October 2021;
>
> 45.2 and the continuous non-compliance with that order is evidenced by the two affidavits filed by the respondents[17] and allegations made by the applicants in their founding affidavit.

[46] As it turns out, it does appear that certain information has in fact been deleted - this is made clear by Grove in his report.[18]

[47] As this is not a reconsideration under Rule 6(12)(c) but rather an argument that the *rule nisi* granted should not be confirmed[19], I am entitled to view the entirety of the allegations before me and not just the facts founding

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[17] *See paragraph 9 supra*
[18] *See paragraph 21*supra
[19] *On a return day, applicants must demonstrate possession and apprehension on a balance of probabilities and make out a* strong prima facie *case for their cause of action:* Friedshelf 1509 *(Pty) Ltd TIA RTT Group and Others* v Kalianji 2015 *(4) SA 163 (GJ)*

the application[20] - thus the issue of these missing records are relevant to the case at hand.

[48] I am therefore of the view that there are *"cogent reasons ...fully set out for believing that there is a real danger that the documents, information or items will be removed or destroyed and the ends of justice defeated ...".*[21]

[49] The argument presented by the respondents was that if they were inclined to hide, destroy or spirit away documents, they have had ample time to do so since 29 June 2021 - that is indeed so and the proof of that is in the pudding that is the deleted file found on the hard drive.

The full disclosure argument

[50] It is trite that in all applications where an order of court is sought *ex parte,* the application must display *uberrima fides*[22]*.* This holds even more true in Anton Piller applications where the relief sought is draconian and invasive and where, if the applicants have not been forthright, the order may be dismissed on that basis alone.[23]

[51] The respondents argue that the applicants have failed to chronicle the full extent of the parties' history which includes:

51.1 a protection order granted in favour of Van Wyk against the third applicant, which third applicant has allegedly breached on several occasions;

51.2 that this had led to the arrest of the third applicant at the time that the AP order was granted;[24]

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[20] *Which in my view are in any event sufficient to found the order granted*
[21] *Audio Vehicle Systems v Whitfield and Another 2007 (I) SA 434 (C) at paragraphs 49 and 50 - which although it goes to the issue of notice, is relevant regarding the prerequisites of the order*
[22] *MV Rizcun Trader (4); MV Rizcun Trader v Manley Appledore Shipping Ltd 2000 (3) SA 776 (C) at 794; Schlesinger v Schlesinger 1979 (4) SA 342 (W) at 349*
[23] *Frangos v Corpcapital Ltd and Others 2004 (2) SA 643 (T) at 649 C-E*
[24] *He was released on bail. The protection order prevented the third applicant from entering the respondents' premises*

51.3 the first applicant had lodged a complaint of harassment against Van Wyk;

51.4 the applicants had lodged a complaint against the respondents with the Independent Regulatory Board for Auditors ("IRBA").

[52] The above information does no more than provide atmosphere to the matter and it simply provides further confirmation of the animosity and distrust between the parties, which is, in any event, evident on the papers. In my view, this information provides no relevance other than the background to the Tlhapi *J* and Davis *J* orders.

The scope of the order argument

[53] This argument is based on the following: prayer 3 of the AP order provides not only for the presence of Grove and the Sheriff, but also allows for the presence of the applicants' auditor, of any partner or professional assistant of the applicants' attorney and Jaume and to assist in conducting the search for the accounting system entries.[25]

[54] In ***Rath v Rees[26],*** Van Zyl *J* stated:

> *"[36] The Court of course retains its discretion whether or not to grant such order. In exercising its discretion, it will take into account the cogency of the prima facie case established by the applicant, with reference to the requirements set forth in the Shoba case (para [33] above). In addition, it will have regard to the potential harm that the respondent will suffer should the order be granted, as against the potential harm to the applicant should the order not be granted. If an order should be granted, the court will ensure that its terms are not more onerous or wide-ranging than is necessary to protect the interests of the applicant. See the Shoba case (supra) at 168* - C."

[25] *See paragraph 1* supra

[55] In ***Memory Institute SA***[27] the Constitutional Court however stated:

> *"[4] But, says the appellant, it was entitled to rely on* a *rei vindicatio, having alleged that at least some of the goods belonged to it. The problem is that on its own showing the Hansens were in possession of the goods in terms of an agreement with the appellant. The agreement, as counsel seemed to concede, appears to be* a *partnership agreement. How one partner can claim possession of partnership goods, which by agreement are in the possession of the other, I fail to understand. Even if one assumes that the agreement was something other than* a *partnership, the Hansens were still entitled to retain possession until the agreement* was *cancelled, and that had not been done."*

[56] But this is unsurprising given the context in which the ***Memory Institute SA*** order was executed - there the appellant, a close corporation, obtained an Anton Piller order. One of its members, the attorney representing it and the Sheriff then executed the order and took *"what they wanted".*[28]

[57] Naturally given the invasive nature of these orders there must be some form of independent oversight as regards their execution - this prevents an abuse of the terms of the order and envisages that a sweeping seizure of goods, not covered by the terms of the order, will be prevented.

[58] In ***Audio Vehicle Systems v Whitfield and Another***[29]***,*** a number of irregularities occurred during the execution of the Anton Piller order: the order had limited the search party to the applicants' attorney, the supervising attorney, a computer expert and the Sheriff. A member of

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[26] *2007 (I) SA 99 (C) at para 36*
[27] Supra *at para 4*
[28] *At para [3] of* Memory Institute
[29] *2007(1) SA 434 (C)*

the applicants, one Segal, however not only went inside the respondents' premises during the execution process, but he actively participated therein. This, held the court, went too far.

[59] And in ***Mathias International Ltd and Another v Bail/ache and Others***[30] it was stated:

> "*... 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; [1996) ZASCA 58) at 379E - 3808. 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. I reiterate that, in my view, the ambit of the court's*

[30] *2015(2) SA 357 (WCC)*

discretion to overlook or condone non-compliance and irregularity in relation to the Anton Piller order is in any event limited in Jaw because it cannot be exercised to purport to belatedly lend validity to an order granted outside the constraints of the applicable law."

[60] But even where the net is cast too widely the court will retain a discretion to condone non-compliance but *"only within the framework of the law itself, that is, only if there has been substantial compliance by the applicant with the requirements of the procedure and only if the content of the order initially obtained did not materially exceed what the law permitted".*[31]

[61] Where the argument is that neither the applicants, nor their attorney nor their experts were entitled to be present during the execution of the AP order, that argument must fail as the AP order itself makes provision for their presence.

[62] The AP order also makes provision for a supervising attorney to oversee the execution.

[63] Importantly, the AP order accords not only substantially with Annexure "B" 15.1 of the Practice Manual[32], but also substantially with the order in ***Dabelstein.***[33]

[64] In my view, there is no impropriety in allowing the applicants' attorney, auditor and computer expert to be present during the execution: in fact, it makes complete sense as the auditor must point to those documents he requires for the execution of his duties[34] and specifically those documents he knows would form the basis of the accounting system entries specific to the affairs of the applicants. In my view, it would be nonsensical for someone

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[31] Mathias International *at para 37*
[32] *Practice Manual of the North Gauteng High Court (Effective date 25/7/2011)*
[33] Supra *at page 53C to 58D*
[34] *i.e_.so that the applicants' can fulfil their accounting and tax obligations*

unfamiliar with the applicants' tax and business affairs to assist[35] - vital documents authorised under the Davis J order may be overlooked in this process.

[65] Insofar as the order makes provision for the necessary safeguards that have been crystalized in our jurisprudence over the past 17 years since ***Shoba,*** it is not too widely framed.

The Execution of the AP Order argument

[66] The respondents' complaint is the following:

66.1 that Grove allowed a candidate attorney employed at JJR Inc to participate in the execution of the order;

66.2 that photographs and a video were taken, which is not provided for in the order;

66.3 that Grove allowed the applicants' attorneys and computer expert to spearhead the search and seizure;

66.4 that the applicants' attorneys were allowed to *"wander around"* the respondents' premises without supervision;

66.5 that Grove delegated his duties to those of the respondents' employees who remained behind to assist in the process to ensure that the AP order was executed with as little interference in the respondents' business as possible.

[67] There are also two further issues which the respondents raise as regards to the execution:

67.1 that Jaume loaded a software programme onto the respondents' computer system to enable him to conduct a search - the AP order does not authorise this;

67.2 the search was conducted using key words for example

[35] *This was the respondents' argument*

"Merwe", "Ina" and "LWF" which are very wide and could result in third parties' information being seized in the search;[36]

67.3 the Sheriff's inventory does not detail the entire list of files copied onto the external hard drives.

[68] The argument is that, given the multitude of failings present in the execution of the AP order and the clear breach of the terms of that order, the AP order should be discharged and the Sheriff directed to return all material seized in the execution of that order.

[69] The test applied to the issue of whether an order should be discharged, is the following:

> *"It could be improper to hold that an applicant can abuse the considerable power which the order gives, without facing a penalty for doing so other than a possible claim for damages.*
>
> *The test seems to be whether the execution is so seriously flawed that the Court should show its displeasure or disapproval by setting aside the order. Obviously a serious flaw would include conduct which could be regarded as blatantly abusive, oppressive or contemptuous, but would not be limited to conduct of such extreme nature. I respectfully agree with these guidelines, by which I regard myself as bound in any event. Far from being unwilling to grant drastic remedies, provided for by the law, the more drastic and potentially harmful a remedy may be, the more closely it has to be scrutinised by a court, and the more meticulously it must be applied and executed by all involved. It is also possible that non-compliance with the order as far as the execution is concerned may attract a punitive costs order.*
>
> *However, not every flaw seems to be regarded as equally serious and equally relevant by the Courts. For example, in the abovementioned Hall case Conradie J stated at 392G - H that he did not wish to place too*

[36] *As the entire hard drive of a specific computer was copied onto an external hard drive*

much emphasis on a *certain lapse in terms of the order which he describes in that judgment."*[37]

[70] But not every failure is regarded as serious: in ***Hall and Another v Heyns and Others***[38] similar transgressions of the order took place in that a) two candidate attorneys from the firm of the supervising attorney entered the respondents' premises; b) a police officer, the applicant and one other person were also permitted to enter and assist; c) the Sheriff was not present during the entire period of execution; d) the applicant, assisted by his secretary was permitted to make copies of the seized documents; and e) the first applicant entered the fourth respondent's premises at midnight and removed not only those documents he may have had a right to remove, but also personal documents belonging to the fourth respondent to which he had no right and which had nothing to do with the dispute between the parties.

[71] As to a) and b) Conradie J stated that he preferred *"not to place too much emphasis on this lapse of from the terms of the order"* but that had the candidate attorneys been actively involved in the execution of the AP orders, this would have been more serious. As to c), he noted that the absence of the Sheriff was by agreement and he *"let this pass".* But the failures set out in d) and e) were considered serious enough to set aside the AP order.

[72] In the matter to hand, the complaints set out in a) and c) of ***Hall*** *(supra)* are raised. In addition, the complaint is that the applicants' attorney should not have been allowed to be present. The latter argument is fallacious given the case law and the provisions of the Practice Manual of this Division. The presence of the candidate attorney is likewise not serious enough to constitute a breach of the order, more especially as the respondents' attorney and IT specialist were not only present throughout, but access to the respondents' premises was only achieved after they had arrived at the

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[37] Retail Apparel (Pty) ltd v Ensemble Trading 2243 CC and Others *200 I (4) SA 228 (T); Also* Audio Vehicle Systems (supra) *at paragraph 23*
[38] *1991(1) SA 381(C)*

premises, been handed the order and been given an opportunity to consider its terms and to voice any objections they had.

[73] As stated in Grove's report, the only objection voiced by the respondents' attorney was to a forensic image being made of the respondents' hard drive. For the remainder, the execution methodology employed was by consent, and Grove states:[39]

> *"As a matter of fact and as the Respondents have indicated in paragraph 81 of* their opposing affidavit, none of the Applicants' representatives were ever unaccompanied. The arrangement as to the manner in which I would supervise was also discussed and agreed with the attorney for the Respondents. There was no complaint ever raised, during the execution of the order or shortly thereafter, to the effect that I did not properly supervise the premises. I was at the 1st and 3rd Respondents' premises the whole day and continuously in discussions with the Respondents legal representative and employees.
>
> …
>
> *I supervised the entire process. I can obviously not be at more than one place at a time. As indicated I specifically agreed with the Respondents' attorney that the representatives of the Applicants be entitled to search the premises as we did in the presence of the representatives of the Respondents. There was no objection. The parties wanted to finalize the process as quickly and effectively as possible and this was the manner and means as to how it could be done. Once again there was no objection and in fact there was an arrangement to this effect."*

[74] As to the video and photographs taken by the candidate attorney - the video recording is of the Sheriff reading out the order. This simply records compliance with paragraph 9 of the order and was taken prior to the entry to the

respondents' premises. I cannot find that any breach of the respondents' rights took place. As to the photographs, these appear to be of the location where documents were seized and of the evidence bag and the sealed box marked "Seagate 4 Terabyte Hard drive x 2 SN: NACG850N, SN: NACG84XY, PINK FILES X 4". The lid of the box bearing this handwritten identification note regarding its content also has seven signatures on it. I cannot find that these photographs constitute a serious enough breach of the terms of the order to justify its setting side.

[75] As to the presence (or rather absence) of the Sheriff during, there is no proof that he was absent during the search.

[76] Thus, I cannot find that any of the respondents' complaints constitute a serious enough breach of the terms of the AP order to warrant its discharge.

Re: Methodology of the computer search argument

[77] This complaint goes to the fact that Jaume loaded a software program on the respondents' computer system to enable him to conduct a search - this is not provided for in the court order. Furthermore, the search was conducted using general key words such as "Merwe", "Ina" and "LWF" and all records forming part of the results of the search were copied onto the external hard drive.

[78] Erasmus[40] states that he has not had access to the files copied and attached since the execution of the order and that he "...*can however confirm that the documents copied by the computer operator, together with the hard copy files related to one or more of the applicants, both in electronic- and hardcopy-format which I have never seen before, and which have not been provided to* me *before".*

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[39] *In paragraph 6 of an affidavit he terms* "Replying Affidavit of Supervising Attorney"

[79] Ms Joubert submits that the use of keywords in searches of this nature is not only wholly inappropriate but impermissible. Thus, she submits, is clear from a reading of ***Viziya Corporation v Col/aborit Holdings (Pty) Ltd and Others***[41]***:***

> *"[35] It was rightly contended that the proposed keyword search was invasive and a trawling expedition through every aspect of Collaborit's business. In simpler terms it was submitted that, because of the general nature of the Anton Piller order, Viziya would potentially secure all the information relating to Collaborit's business, much of which it could not conceivably be entitled to.*
>
> *[40] I agree with Collaborit that in the current matter the keywords were cast in the broadest terms and were capable of placing sensitive, confidential and proprietary material of Collaborit and its clients into the hands of Viziya. What is telling about Viziya's case is that it stated in the founding affidavit that it needed to inspect Collaborit's information and documents in order to obtain evidence. In its replying affidavit it stated that the purpose of the application was based on an alleged entitlement 'to see what they were doing during this period'. It was not permissible for Viziya to obtain an Anton Piller order and seize documents in the hope that there was something that would incriminate Collaborit."*

[80] But the fundamental difference is that in ***Viziya Corporation,*** 147 keywords were used and thus the search constituted what was described as a *"trawling expedition through every aspect of Collaborit's business".* That is not what occurred here.

[81] Ms Joubert also submits that it was impermissible to copy the entire hard drive of Allers' computer. In ***Direct Channel Holdings (Pty) Limited v***

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[40] *Applicants' auditor*

Shaik Investment Holdings (Pty) Limited[42] the following occurred:

> *"[80] The Anton Piller order was executed at Hurlingham and items 1, 2 and 9 on Schedule A were identified on the basis of the information set out under the heading DATA in Schedule B (i.e. Pastel Finance Data, Co/Play application and PBX dialer). No search was conducted to identify any information either on these servers or at all as belonging to the First Applicant. The computer expert copied all the information from the hard drives of these items onto three new hard drives.*
>
> *[81] The computer expert found the virtual server which is not included on Schedule B and which belongs to the Activation Agency. He copied the information on it onto one of these three new hard drives since the word EXCOM came up. The implications of this are serious since one may ask how the computer expert came to do this. The answer must be that he was independently instructed to do it."*

[82] That is not what occurred in the matter at hand. In fact, I am of the view that the methodology employed was in furtherance of the objectives of paragraphs 3 and 4 of the AP order.

<u>The Sheriffs Inventory argument</u>

[83] The last hurrah of the respondents' case is that a) the AP order directs the Sheriff and the supervising attorney *"to immediately make* a *detailed inventory of all documents and items attached and to provide the registrar of this court, the applicants' attorney, and the Respondents with* a *clear copy thereof";* b) the inventory compiled only identifies the documentation seized as that indicated in paragraph 24 supra; c) that the inventory does not provide a list of the files copied onto the external hard drives and that this list was only provided by Grove in this replying affidavit; and d) that this is not

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[41] *2019 (3) SA 173 (SCA)*

permitted and constitutes a serious irregularity in the execution of the AP order such that it should be discharged.[43]

[84] But this contention is incorrect as is clear from paragraph 24 as read with paragraph 25.4 *supra.* There is thus no merit in this argument.

The respondents' entitlement into an enquiry into damages argument

[85] Given that I am of the view that the AP order should be confirmed, there is no necessity to comment on this submission.

COSTS

[86] Mr Vorster has submitted that punitive costs should be awarded against the respondents. He does so on the following bases:

86.1 in the run-up to the launching of the present application, the respondents had attempted to extort monies from the applicants and had, in order to frustrate the execution of two court orders, falsely stated under oath that they were not in possession of any of the relevant information;

86.2 it transpired during the execution of the order that the respondents had deleted relevant information;

86.3 the respondents annexed almost 200 pages of irrelevant material to the answering affidavit;

86.4 in their answering affidavit, the respondents impugned the competence and/or integrity of a judge of this court;

86.5 the respondents' opposition has been palpably without merit.

[87] On the issue of 86.4 *supra,* the respondents complain that if one has regard to the audit trail of this matter on Caselines it does not appear that Sasson J was granted access to the Caselines profile of this matter at any

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[42] *2019 JDR 1396 (GJ)*

stage - it was only her secretary and applicants' counsel who were granted access. The respondents state:

> *"53. Mr van der Merwe states in his affidavit (paragraph 5.1 thereof) that a "copy of the complete set of papers in the main urgent application to which this application relates will be placed in the Court file and has been uploaded onto CaseLines". However, as I understand it, in accordance with the Practice Directive 1 of 2020, cases handled on the CaseLine system are dealt with only in electronic format, with no hard copies of court* files *being kept or, at the very least, made available to theJudge or the parties.*
>
> *54. If the CaseLines audit* is *to be trusted (and I* am *unaware of any reason why it should not be trusted), it appears that the honourable Justice* Basson *had* access *to neither the main application nor the Anton Piller application on CaseLines* as *at the date that the Anton Piller order* was granted.
>
> 55. *It* is *not clear therefore, what the honourable Justice* Basson *had regard to upon considering the Anton Piller application, but it* seems *unlikely that the honourable Court would have had occasion to peruse both the main application and the Anton Piller application, even if hard copies had been placed before it (contrary to the practice directives)."*

[88] The clear inference is that Basson J had no regard to the original application before she granted the AP order and therefore that the order was granted *in vacuo* and irregularly. This, in my view, constitutes a very serious attack on the integrity and reputation of the judge concerned. Attacks of this nature are unwarranted and unacceptable and litigants should think very carefully before they make such allegations.

[89] In this case this attack is not only scurrilous, but unwarranted: as the matter was heard *in camera,* a hard copy file was given to Basson J and this the applicants make clear in their replying affidavit. Thus the order was

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[43] Friedshelf 1509 (Pty) lid t/a R7T Group and Others v Kalianji *2015 (4) SA 163 (GJ)*

considered and the judge exercised an informed discretion when she granted the order.

[90] I am of the view that, given the reasons for this application in the first place, the fact that the opposition is unsuccessful, that it is clear that the respondents has deleted files and that the respondents have, without justification, impugned the competence and integrity of a judge of this court, a punitive costs order is warranted, as are costs of two counsel.

THE ORDER

[91] Thus the order I grant is the following:

1. The *rule nisi* issued on 14 February 2022 is confirmed.
2. The documents and items in the possession of the Sheriff pursuant to the execution of the Anton Piller order, shall be handed by him to the applicants.
3. The costs of the application including the costs consequent upon the employment of two counsel, the costs of the supervising attorney and the costs of the computer operator, shall be paid by the respondents on the attorney and client scale.

NEUKIRCHER J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 18 July 2022.

Appearances:

For the applicants	:	Adv JP Vorster SC
		Adv JF van der Merwe
Instructed by	:	Jarvis Jacobs Raubenheimer Inc
For the respondent	:	Adv I Joubert SC
Instructed by	:	Lacante Inc
Date of hearing	:	31 May 2022