IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG

J 1270/08
Reportable

In the matter between:

CORRUSEAL CORRUGATED
GAUTENG (PTY) LTD **FIRST APPLICANT**

CORRUSEAL CORRUGATED
KZN (PTY) LTD **SECOND APPLICANT**

In re-

CORRUSEAL CORRUGATED
(GAUTENG) (PTY) LTD **APPLICANT**

AND

SHAUN VAN NIEKERK **FIRST RESPONDENT**

NEW ERA PACKAGING (PTY) LTD **SECOND RESPONDENT**

JUDGMENT

CELE J

Introduction

1. This application by the first respondent is for the setting aside of an *ex-parte* interim order granted by this court on 8 July 2008 in favour of the

first applicant in the form of the Anton Piller relief. The applicant opposed the application by seeking to have the interim order confirmed.

Background Facts

2. A number of facts have been placed in dispute by the parties in this matter. To the extent that I will be able to, I will attempt to extract those facts that appear to be common cause between them.

3. On 30 May 2005 a company with the name of "Corruseal Packaging Industries (Gauteng) Pty Ltd changed its name by special resolution to the name "Corruseal Corrugated Gauteng (Pty) Ltd". The new name was entered in the register of companies on the same date, 30 May 2005. The company that underwent a name change as herein above described, was therefore the applicant in these proceedings.

4. On 20 June 2005 and at Wadeville, Gauteng the applicant, represented by one of its Chief Executive Officers, a Mr Rajiv Mehta signed a written contract of employment with the first respondent who was acting personally. The first respondent was appointed as Key Account Manager of the applicant. At the time of the signing of the agreement of employment, the applicant was still referred to in its previous name. According to the applicant, the contract of employment signed by the first respondent contained among others, clauses 8-13 which read:

> "8. SECRECY
>
> You shall remain just and faithful to us in the performance of your duties, and shall not divulge or disclose to any person, except insofar as may be absolutely necessary in the usual, ordinary course of our business, any of the business, financial affairs, dealings, secrets, accounts or information whatsoever having

relation or reference to the business. You acknowledge the importance of our proprietary interest, and you must adhere to the obligations contained in this paragraph indefinitely, whether or not you remain in our employ.

9. DOCUMENTS, SAMPLES AND CUSTOMER LISTS

9.1 You shall not, without our written authority, remove from the offices of the company, any document belonging to the company, nor shall you copy or extract information from any such document, save as authorised thereto.

9.2 Upon the termination of your employment, you shall forthwith return to the company all of the company's property including, without prejudice to the generality of the foregoing, any and all documents belonging to the company, any records or extracts from record relating to the company's affairs which were made by or which came into your possession whilst you were in the employment of the company, customers lists, debtor's age analysis schedules, copies of orders, price lists, stationary, standard forms order books and samples.

10. RESTRAINT

10.1 In order to protect the goodwill and the proprietary interest of the Company, it is necessary for the Company to conclude a suitable agreement with you pursuant to which you will be restraint during the period if you are employed by the Company from being associated, directly or indirectly, with a competitor of the Company and for a suitable period after you cease to be so employed, failing to or dealing with any customer of the Company and/or offering employment to any employee of the Company.

10.2 By acknowledging receipt of these terms and conditions of employment, you can acknowledge, you are obliged to declare all information that can be reasonably expected to influence the decision to appoint you, e.g. amongst others, trade restraints, licence endorsements, criminal record, passed disciplinary sanctions etc.

10.3 On termination of your contract with Corruseal Packaging Industries, you will immediately return to Corruseal Packaging Industries all documentation and other property of Corruseal Packaging Industries that may be in your possession, including lists of customers, clients or written information regarding the business of Corruseal Packaging Industries, and you may undertake not to retain or make any copies thereof for any purpose;

10.4 You will not, either before, during or after termination of your employment with Corruseal Packaging Industries, use for your own benefit or that of any person, firm or company any confidential information relating to the affairs of Corruseal Packaging Industries, which may have come into your possession or which you were or become aware of while in the employ of Corruseal Packaging Industries.

10.5 You shall not be directly or indirectly involved in another business whilst in the Company's employ, unless full disclosure of this has been made, and the Company's written consent has been given. Such business activities shall not be pursued during official

working hours and shall not be in conflict with the interests of the Company's business activities.

10.6 As an employee of Corruseal Packaging Industries, by reason of association and service, you will acquire knowledge of Corruseal Packaging Industries trade secrets, sources of supply, statement of trade, business methods, suppliers and clientele. Such knowledge could be advantageous to the competitors of Corruseal Packaging Industries.

11. You therefore undertake to:

11.1 Not to directly or indirectly report, either as principal employee, be associated with, interest in (which expression includes, *inter alia* the loan or advancement of money to), interest yourself in any firm, company person or group carrying on business in competition with that of Corruseal Packaging Industries and/or any company or firm undertaking which it may now or in the future control, or with which it may become associated;

11.1.2 Not to knowingly solicit, in competition with Corruseal Packaging Industries, a customer or any person who, as at the date of termination of your employment, is or was a customer of Corruseal Packaging Industries;

11.1.3 Not to commence business on your own account, enter into any partnerships, accept a position as director of any group, accept employment with any person, firm, group, partnership or association whatsoever that directly or indirectly competes with

the business of Corruseal packaging Industries and/or carries on business similar to that of Corruseal Packaging Industries;

11.2 The restraint shall endure for a period of 2 (two) years from date of termination of your employment. This restraint is extended to the areas of Gauteng and KwaZulu Natal regions of South Africa.

11.3 You, in acknowledging receipt of this contract of employment, agree that the restraints set out are reasonable in all aspects.

13 COPYRIGHT AND PATENT

During the currency of this agreement:-

13.1 The copyright of any work produced by you:

13.2 The rights in and to any invention or improvement and procedure made or discovered by you, whether or not the same may be registered as a patent;

Shall be vested in and belong to us insofar as may be necessary, in order to achieve such vesting in us, you hereby cede and assign such copyrights and/or the right to such invention or improvement to us and we accept cession and assignment. You further undertake to sign, on request, any documentation required by us at any time in order to secure the register or protect the rights afforded to us in terms of this paragraph."

5. During the first respondent's employment with the first applicant, he became privy to the costing of the end product of the first applicant after he had received some basic training. He attended sales meeting and was

privy to first applicant's customer list so that he could develop customer specific strategies with regard to pricing as well as products. He was the key account manager to the first applicant and as such interacted with its customers and he developed a certain relationship with some of them. He was privy to innovations that the first applicant had developed and was continuing to develop, such as the A-Flute technology used to develop the end product of the first respondent. He had some knowledge of the methodology in regard to estimating the selling price of the first applicant's end product. He was the first applicant's most senior sales representative.

6. In the course of his employment, the first respondent had access to various information of the first applicant in hard copies such as: minutes of sales meetings where strategies had been discussed, hard and soft copies of documents showing the first applicant's cost structures and profit margins, marketing strategies and documents reflective innovations to its customers and customer quotes.

7. On 1 July 2008 the first respondent tendered his written resignation from the employment of the first applicant, effective from the 2nd July 2008 but he undertook to serve a notice until 1 August 2008. He was off sick on 4-6 July 2008.

8. On 7 July 2008 the applicant approached this court on urgent basis seeking to be granted an *ex-parte* application on 8 July 2008 in the following terms:

> "(a) Authorising the Applicant to proceed *ex parte* with the application;
>
> (b)Declaring the application to be urgent and dispensing with the times and services prescribed by the rules of court;

(c) That the first respondent and any other adult person in charge of the premises of the first respondent at 38 Romulus, Percy Steart Street, Range View, Krugersdorp ("the premises") grant (sic) the sheriff of the above Honourable Court, applicant's director (Mr Rajiv Mehtha), attorney A Patel or an attorney employed by the Applicant's attorney of record ("applicant's attorney") and a computer operator nominated by applicant access to the said premises for the purposes of:

1.1 searching the premises for the purposes of enabling any of those persons to identify and point out to the sheriff originals or copies of or extracts from applicant's customer lists, price lists, catalogues, quotes, schedules, spreadsheets, minutes or further documents of the nature described by the applicant in its founding affidavit;

1.2 examining any item for the purpose of identifying it and deciding whether it is of the nature mentioned in the preceding subparagraph;

1.3 searching the premises for the purposes of finding any computer disc containing any of the items referred to above or any hard copy thereof or any soft copy on any computer at the first respondent's premises;

2. That the first respondent forthwith disclose (sic) passwords and procedures required for effective access to the computer for the proposes of searching on the computer and making a disc copy, or, if that is not possible, a printout, of computer documents containing information of the mature which would be expected in a document mentioned in paragraph 1.1 above.

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3.1 That the first respondent permit (sic) the sheriff to attach and to remove any document pointed out by a person mentioned in paragraph 1 as being a document covered by paragraph 1.

3.2 That, subject to paragraph 5.2 hereof, the sheriff is authorised to attach any document which is pointed out by any of the aforesaid persons and is directed to remove any attached documents in respect of which the applicant or the applicant's attorney does not give a different instruction. The sheriff is directed to keep each removed item in his custody until the applicant authorises its release to the first respondent or this Court directs otherwise.

4. That until completion of the search authorized in the preceding paragraphs the respondent may not access any computer or any area where documents of the class mentioned in paragraph 1.1 may be present except with the leave of the applicant's 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.

5. The sheriff is directed, before this order and this application is served or executed, to:

5.1 hand to the first respondent or the other person found in charge of the said premises copy of a notice which accords with annexure A1 hereto;

5.2 to explain paragraphs 2, 3 and 4 thereof;

5.3 to inform those persons of he following:

5.3.1 that any interested party may apply to this Court on not less than 24 (twenty four) hours' notice to the offices of the applicant's attorney for a variation or setting aside of this order, the court practices and rules applying unless the court directs otherwise;

5.3.2 that the first respondent or his representative is entitled to inspect item in the sheriff's possession for the purpose of satisfying themselves that the inventory is correct.

6. The sheriff is ordered to immediately make a detailed inventory of all items attached, to provide the Registrar of this court, the applicant's attorney, and the first respondent with a clear copy thereof.

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

8. That the sheriff is ordered to inform the first respondent that the execution of this order does not dispose of all the relief sought by the applicant and to simultaneously serve the notice of motion and explain the nature and exigency thereof.

9. The costs of this application are reserved for determination in the further proceeding foreshadowed in this application save that:

(a) if the applicant does not institute those legal proceedings within three weeks of the date of this

order, either party may, on no less than 96 hours' notice to the other, apply to this Honourable Court for an order determining liability for those costs and determining what must be done about removed items and any copies thereof; and

(b) any other party affected by the grant or execution of this order may on no less than 96 hours' notice apply to this Honourable Court for an order determining liability for the costs of such party and determining what must be done about any item removed from any such party or any copy thereof.

10. The first respondent and any other 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 1.1 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.

11. In the event of any document or item is disclosed to be at premises other than the premises mentioned in paragraph 1.1 of this Order, the applicant may approach this court ex parte for leave to permit execution of this order at such other premises.

12. Costs of suit;

13. Further and/or alternative relief.

Take further notice that the Applicant undertakes to this Court that:

1.1 this order will not be executed outside the hours between 8h00 and 18h00 on a weekday;

1.2 applicant will prevent the disclosure of any information gained during the execution of this order to any party except in the course of obtaining legal advice or pursuing litigation against the respondent;

1.3 applicant will compensate the respondent for any damage caused the first respondent by anyone exceeding the terms of this order;

1.4 applicant will compensate the respondent for any damage caused to the first respondent by reason of the execution of this order should this order subsequently be set aside. "

9. On 15 July 2008 the first applicant filed an urgent application with this court seeking an order in the following terms:

> "(a) Declaring this application to be urgent and condoning the Applicant's non-compliance with the Rules and time periods set out in the Rules of this Honourable Court and permitting this application to be heard in camera.
>
> (b) Declaring that the First Respondent is in breach of the contract of employment marked Annexure "B" to the founding affidavit and ordering the First Respondent to comply with all this (sic) obligations contained therein and in particular but not limiting the generality of the aforegoing to comply with clauses 8,9,10 and 13 of the contract of employment;
>
> (c) Interdicting and restraining the First Respondent from taking up employment with the Second Respondent or any other competitor of the Applicant for a period of two years commencing 1 August 2008;
>
> (d) Interdicting and restraining the First Respondent from disclosing the Applicant's confidential information relating to its customers or

prospective customers lists, (sic) debtor's age analysis, schedules, orders, price lists, business methods and any other information that the Applicant has a proprietary interest in to any third party including but not limited to the Second Respondent;

(e) Authorising the Applicant to destroy and permanently delete all the information obtained from the execution of the Anton Piller order that the Applicant obtained against the First Respondent on 8 July 2008 and in particular all the information of and concerning the Applicant set out in the Sheriff's inventory and which information is contained on a flash disk or CD Rom of the First Respondent which is presently in possession of the Sheriff;

(f) Permitting the Applicant to retrieve from the sheriff all hard copies of all information obtained from execution of the Anton Piller order from the First Respondent;

(g) Interdicting and restraining the First Respondent from breaching clauses 8, 9 and 10 of the contract of employment;

(h) Interdicting the Second Respondent, or any subsidiary of the Second Respondent, from employing the Applicant for a period of 2 (two) years commencing from 1 August 2008;

(i) Costs;

(j) Further and/or alternative relief

ALTERNATIVELY

1. Insofar as the affidavits reveal disputes of fact between the parties, granting the Applicant interim relief in paragraphs (a) to (h) pending the outcome of an action to be instituted by the Applicant within 15 days of

the granting of this order for final relief in terms of paragraphs (a) to (j) above.

2. Ordering that the interim interdict be immediately effective and remain in effect pending the outcome of the action proceedings to be instituted.

3. Directing the Applicant to institute such action within a period of 15 days failing which the order will lapse;

4. Making such costs order as this Honourable Court deems appropriate."

10. On 9 July 2008, 8 people arrived at the residence of the first respondent which he shared with his girlfriend. They came to carry out a search, attachment and removal in terms of the order of this court dated 8 July 2008. The 8 people were:
    - The Deputy Sheriff of Krugersdorp, Ms Marietta Pienaar;
    - 3 members of the South African Police Services (SAPS)
    - 2 attorneys in the employ of the first applicant's attorney of record;
    - Mr Rajiv Mehta and
    - A computer operator nominated by the first applicant.

11. The search, attachment and removal proceedings were captured and recorded by means of a video camera carried by one of the attorneys in attendance. A laptop computer was brought along and was used in the process. The first respondent was present and he offered no resistance in the search and seizure. In terms of the Deputy Sheriff's inventory, the following items were attached and removed and are being stored by her:
    - 1 x Memorek CIS-R (3115 LI 0ZZ LH 14050) disc
    - Axis 1 GB Flash drive
    - Corruseal I Group Prospects file with documentation
    - 1 x 2HP Laptops

- Business card holder with 62 business cards
- A list of files obtained from Hotmail and Facebook accounts

12. In terms of the order of court of 8 July 2008, the first respondent as an interested party could have applied to this court on not less than 24 hours' notice to the officers of the first applicant's attorney for a variation or setting aside of this order, but he did not until the present application. Up until, at least, the 14th August 2008, the first applicant had not, itself or through it's attorneys, contacted the Deputy Sheriff to inspect any of the removed items executed in terms of the court order.

The Issue

13. The issue before me is whether the order of this court of 8 July 2008 should be confirmed, with the consequence of preserving the evidential material removed or that the order should be discharged.

The Anton Piller relief

14. In *Hall and Another v Heyns and Others 1991 (1) SA 381,* Conradie J described Anton Piller order in the following manner:

> "An *Anton Piller* order is one which is served on a respondent out of the blue and is intended to be instantly executed. Its prejudicial effects may be irreversible…….*Anton Piller* orders are generally complex and are often brought on short notice before a motion Judge who is asked to urgently issue an order. An applicant's legal advisers should in these circumstances be particularly careful to ensure that the draft order which they submit to the Court is clear and does not, without the matter being pertinently raised wit the presiding Judge, go beyond what the decided cases permit. (see Joubert (ed) *Law of South Africa* vol 14 'Legal

Practitioners' para 249; *Schoeman v Thompson* 1927 WLD 282; *Schlesinger v Scheslinger* 1979 (4) SA 342 (W) at 348 E-349E.)

15. In *Universal City Studios Inc v Network Video (Pty) Ltd 1986 (2) SA 734 (A)* court set out essential features which the applicant for such an order ought, *prima facie* to establish. In *Sheba v OC Temporary Police Camp, Wagendrift Dam 1995 (4) SA 1 (AD)* court confirmed the Anton Piller order, directed at the preservation of evidence, to be part of South African practice. It outlined the essential; features as:

> "(1) That he, the applicant, has a cause of action against the respondent which he intends to pursue;
> (2) that the respondent has in his possession specific (and specified) documents or things which constitute vital evidence in substantiation of applicant's cause of action (but in respect of which applicant cannot claim a real or personal right); and
> (3) that there is a real and well-founded apprehension that this evidence may be hidden or destroyed or in some manner be spirited away by the time the case comes to trial or to the stage of discovery."

16. In relation to the degree of diligence and meticulousness with which an Anton Piller order has to be served or executed, and the consequences of a failure to meet that standard, two decided cases provide useful guidance. In *Retail Apparel (Pty) Ltd v Ensemble Trading 2243 CC and others 2001 (4) SA 228*, Van der Westhuizen J had the following, *inter alia,* to say at p233-234:

> "An *Anton Piller* order is a drastic and extreme measure with enormous potential for harm, since it would quite frequently be granted not only *in camera* and in the absence of a respondent but also at the instance of a competitor who would not be astute to see that no harm came to the

respondent. One could add that constitutional considerations, such as respect for the rights to human dignity, privacy and property are also highly relevant. Therefore execution must be meticulous and according to the letter of the order. In appropriate cases a Court can show its displeasure or disapproval by setting aside the order (or previously by the urgent discharge of the rule *nisi*) to restrain the strong temptation which may exist on the part of an applicant to stretch the language of the order. 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."

17. In *Memory Institute SA CC t/a SA Memory Institute v Hansen 2004 (2) SA 630,* court held, *inter alia*, that:

"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 the applicant to ensure that the order applied for does not go beyond what is permitted….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…."

The evidence

1.Taking up employment with second respondent

1.1 First applicant's version

18. Mr Mehta's evidence is that the first respondent, upon tendering his resignation on 1 July 2008, indicated to him that he accepted employment with the second respondent who was regarded by Mr Mehta as a competitor of the first applicant. Mr Hendrick Botha, a Sales Manager of the first applicant filed a confirmatory affidavit to Mr Mehta's replying affidavit confirming that the first respondent also told him that he would take up employment with the second respondent. According to Mr Mehta, the first respondent would be in breach of the restraint of trade agreement he signed when he took up employment with the first applicant. Mr Mehta said that the restraint of trade operated for two years and was restricted to Gauteng and KwaZulu-Natal (KZN), where the first applicant does its business. Mr Mehta's evidence was that the first applicant was concerned that the first respondent would use its trade secrets and confidential information for the benefit of the second respondent. He believed that the applicant had an inherent proprietary interest in protecting its customer strategy which the first respondent was privy to, while the first applicant had already spent a considerable amount of money in procuring such customers.

19. Mr Mehta said that there was a real danger that if the respondent were to be allowed to continue to remain in possession of the first applicant's confidential information the first applicant could lose substantial goodwill and lose the benefits of the investment that it had made over the years to obtain such information which was integral to the survival of its business and to maintain its competitiveness. He said that the first applicant had a reasonable apprehension that such information would land up in the hands of its competitors.

20. On 3 July 2008 the first applicant acting through its attorneys, addressed a letter to the first respondent, recording that he was in breach of clauses 8, 9 and 10 of the employment contract. A copy of the letter, incorporating its contents was filed. Paragraphs' 9-11 of the letter read:

> "9. We are instructed to demand that you provide us with the following:
> 9.1 An undertaking that you will not take up employment with a competitor of our client;
> 9.2 Provide us with a list of the documents belonging to our client which you removed or copied;
> 9.3 Provide us with a list of the documents belonging to our client which you forwarded to third parties;
> 9.4 Provide us with the names of third parties to whom you forwarded our clients documents;
> 9.5 Provide us with all our client's documents which are in your possession or under you control;
> 9.6 Provide us with an undertaking that you will not copy any documents belonging to our client.
> 10. We require the above information and undertakings from you by no later than Friday, 4 July 2008 at 17h00.
> 11. In the event that we do not obtain the undertakings and information from you by Friday, 4 July 2008, our client will institute an urgent application in the High Court or Labour Court of South Africa. If it does so, our client may join your new employer as a party to the proceedings…"

21. On 4 July 2008 the first respondent's attorneys issued a letter in response to that of the first applicant with paragraphs 3-8 reading:

> "3. We have not had an opportunity to fully canvassed (sic) issues raised in your letter under reply but write to you briefly as follows:-

3.1 Ad paragraphs 9.2 to 9.6

Please be informed that our client has not removed or copied any documents that belong to your client. Our client has not forwarded any documents which belong to your client to third parties. Our client is not in possession or control of any documents or assets that belong to your client. To this end your client has taken the laptop which our client was using. Please also not further that our client has no intention of copying any documents that belong to your client or forwarding any information to any third parties that belong to your client.

3.2 You are correct in stating that our client is serving his notice period. Please note that our client informs us that your client refuses to allow our client to carry out his duties during this period as a result of which our client is unable to earn a commission for the month of July.

3.3 In this regard please not that should your client persist in its attitude our client will not hesitate to sue for damages that he may suffer as a result of your client's action.

3.4 In connection with the alleged restraint which your client is of the view is lawful, we have advised our client that your client's restraint is in all probability unlawful. However, we would need an opportunity to consult with counsel in this regard. Your client's restraint is also unreasonable.

3.5 Our client is entitled to make a living.

4. Accordingly, our client will present himself at your client's work premises on 7 July 2008 (your client is aware that our client is off sick from 2-4 July 2008 inclusive) and our client demands that he be allowed to carry our his duties during the notice period.

5. Should your client refuse our client to carry out his duties our client will not hesitate to launch the necessary application with the appropriate order, together with costs.

6. You will appreciate that we have taken instruction on an urgent basis and our client's failure to respond fully to your letter under reply must not be construed as an admission of any allegations stated therein.

7. The writer will in due course obtain full instructions and, if necessary, respond to you fully.

8. Our client's rights remain reserved."

22. The first applicant took the position that the first respondent's attorney did not deny that the first respondent intended commencing employment with the second respondent but instead contended that their client was entitled to make a living. The attorney also contended that they viewed the restraint as being "in all probability unlawful", even though they indicated that they needed time to consult with counsel in that regard. The attorney also denied that the first respondent had removed or copied any documents belonging to the first applicant or that he forwarded such documents to third parties.

23. Over the weekend commencing 5 July 2008, Mr Yusuf Olla, the first applicant's IT Manager, acting upon instructions of Mr Mehta, investigated the e-mails sent by the first respondent. It was ascertained that the first respondent had e-mailed a spreadsheet containing customer information to his personal e-mail address on 19 June 2008. The spreadsheet contained details of the value of sales to all customers, tonnages sold, costs and margins.

1.2 First respondent's version

24. The first respondent conceded that he told Mr Mehta that he had an offer of employment from the second respondent but he denied that he had informed him that he had accepted the offer, nor that he intended to take up employment with the second respondent. He has filed a confirmatory affidavit in support of that version, from one Mr Nicholas Gustav Engelbrecht, a Sales Director of the second respondent. The confirmation by Mr Engelbrecht is that:
    - the first respondent had at no stage accepted an offer of employment with the second respondent;
    - the second respondent had not employed the first respondent from 1 August 2008, or at all, and
    - the first respondent would not commence employment with the second respondent upon the termination of his employment with the first applicant.

25. According to the first respondent, Mr Mehta, either in his excitement and/or anger, misunderstood his clear oral statement about an offer he said was made to him and that it was infact not the only such offer so made. As regards the breach of the restraint of trade, the first respondent denied the allegations of the first applicant. He denied that he concluded a written agreement of employment, incorporating a restraint of trade with the first applicant on the basis alleged by Mr Mehta. To the extent that such denial relates to the name of the first respondent, I have already found that his employer was, in all probabilities, the first applicant. He said that the numbers attributed by the first applicant to the paragraphs of the restraint of trade agreement do not correspond with contents of the purported agreement and do not accurately set out the contents of the purported agreement. He denied that the first applicant had any

enforceable restraint of trade or confidential information and trade secrets as alleged by the first applicant.

26. As regards his possession of documents and in particular the spread sheet, the first respondent said that he did not have the physical documents in his possession, either when his attorney responded to the first applicant's letter or at the time when the Anton Piller raid was carried out. According to advice given to him, the alleged spreadsheet was not a document but was in electric format and was not found at his home as the one he worked on, on behalf of his employer was thereafter dated as he had no need for it. It was common cause that the spreadsheet traced by Mr Olla was subsequently found in the deleted items of the first respondent's e-mails.

27. The first respondent said that, to the knowledge of his erstwhile employer and with its consent, he regularly worked from home on the employer's business and it was often after business hours, in order to meet deadlines and to generate maximum orders on behalf of his erstwhile employer. In order to do so effectively information in the electronic format was always necessary in order to fully and diligently discharge the functions required of him. His employer had full knowledge and consented to certain information in electronic format being forwarded to his home by other employees so that he could fulfill his functions to his employer. He therefore rejected the innuendo implicit in Mr Mehta's submissions that he acted in an improper manner. He filed a confirmatory affidavit of a Ms Samantha Joanne Newton, an erstwhile Key Account Manager of the first applicant, with whom he worked for the first applicant. Ms Newton said that the first applicant furnished them with laptop computers and that they were encouraged by management to work from home in order to achieve productivity and targets. In relation to laptop computers their hard drives routinely contained, as a matter of course, spread sheets, presentations,

castings tender working documents, progress reports – including client lists and sales data. The information would be e-mailed as and when necessary to encourage productivity at home in the ultimate interests of the first applicant.

2. <u>The execution of the Anton Piller Order</u>

28. At this stage the enquiry turns on the nature of the draft order, the order granted and how execution of the Anton Piller order took place. The duty of the applicant's legal advisor has already been identified - see *Hall's* case. It is that of ensuring that particular care is taken to ensure that the draft order which is presented to court is clear and does not, without the matter being pertinently raised with the presiding Judge, go beyond what the decided cases permit. In this matter the draft order is very similar to the order granted by the court. In terms of paragraph 2 of the court order, the first respondent and any other adult person in charge of the premises of the first, were to grant access to such premises to four people being:
    - The Sheriff;
    - First applicant's Director, Mr Rajiv Mehta;
    - Attorney, Mr A Patel or an attorney employed by the first applicant's attorney of record and
    - A computer operator nominated by the first applicant

29. Two built-in protection measures required in an Anton Piller order were neglected by the first applicant's attorney when preparing a draft order. Firstly, an applicant and the own attorney are not to be part of the search party. Secondly, no independent attorney was appointed to supervise the execution of the court order-see *Memory Institute* case.

30. Paragraphs 3 and 5 of the order make an incorrect reference to paragraph 1.1 of the order. Paragraph 4.1 incorrectly refers to paragraph 1 and paragraph 4.2 incorrectly refers to a none existing paragraph 5.2 of the order. The reason is however clear. Paragraph numbering in the order sought does not correspond to that of the order issued. This could have been avoided when preparing the draft order. Accordingly, first applicant's attorney failed in his duty of care by inducing court to issue an incorrect order.

31. The number of people who carried out the Anton Piller order was 8 instead of the 4 authorised. The disparity in the permitted number to the number of attendees can not reasonably be said to be insignificant. Twice as many of authorized people attended at the house of the first respondent. The supervisory ability of the first respondent, who had not been prepared for the visit, was certainly compromised by the overwhelming number.

32. The attendance of three members of the SAPS had not been authorized by the court order. Mr Mehta said that they attended at the instance of the Deputy Sheriff. The Deputy Sheriff filed an affidavit in this matter but did not own up to having invited the SAPS members, nor did she explain there being any need or reason for the police to be in attendance. In the *Memory Institute* case the court order permitted the Sheriff to police assistance, if need be. The now Supreme Court of Appeal queried the authorisation as it had not been explained. In the present case, as already pointed out, no such authorisation was given by this court. The absence of an independent supervising attorney was clearly felt in this regard. The first respondent can not be held to blame for not taking an exception to this conduct. He could reasonable have laboured under a wrong impression that the SAPS members were sent by this court to execute its order. Their presence was under the circumstances undesirable.

33. While access to a computer at the residence of the first respondent was authorized by paragraph 3 of the order, no computer might have been found at the time, for what ever reason. Paragraph 2.3 of the order authorized searching for any computer disc containing any of the items referred to, for instance in paragraph 2.1 of the order. For this purpose, a laptop computer could have been brought along provided the usage of it was subjected to supervision by an independent attorney. Otherwise it could be impossible to determine the contents of any computer disc.

34. A video camera was utilized to capture and record the proceedings at the first respondent's house. No authorisation for its use was obtained. A video camera in the hands of an independent supervising attorney could prove to be useful and to provide a reliable record of the events. In the hands of an interested party, a video camera could be used by such party to see documents which that party may not be entitled to see and could therefore facilitate the fishing expedition.

Evaluation

35. A court considering or reconsidering an Anton Piller order has a discretion whether to grant or confirm the remedy or not. If it grants or confirms it, court may stipulate the terms under which it grants or confirms the order. In exercising its discretion court will be guided *inter alia* by the cogency of the *prima facie* case established with reference to the three essential features as drawn from the *Shoba* case, the potential harm that will be suffered by the respondent if the remedy is granted as compared to or balanced against, the potential harm to the applicant if the remedy is withheld and whether the terms of the order sought are no more onerous than is necessary to protect the interests of the applicants – see the *Shoba* case page 16.

36. The first applicant has shown that it has a cause of action based on the restraint of trade against the first respondent which it intends to pursue in the main application. The first respondent was still in the employ of the first applicant on 9 July 2008. The first applicant had supplied him with a laptop computer to use in the execution of his duties. A laptop as opposed to a desktop is known to be used very often away from the office. The first respondent's evidence has been well supported by his previous colleague that they were allowed to do their work away from their offices and at their homes. These were senior personnel of the first applicant. The version of the first respondent is favoured by the probabilities of this case in this regard. After the first respondent had tendered his resignation, it was open to the first applicant to excuse him from serving a notice and to allow him to return all tools of trade that had legitimately been given to him with which to execute his duties. The first applicant chose not to adopt that approach in protection of whatever rights it might have. As such, the possession of the first respondent of any of the items or documents identified in paragraphs 2.1, 2.2, and 2.3 of the order of this court, does not, in my view, constitute vital evidence in substantiation of the first applicant's cause of action. It can not therefore be reasonably said that there is a real and well-founded apprehension that such items or documents might be hidden or destroyed in some manner or be spirited away by the time the case comes to trial or to the stage of discovery. The first applicant was very concerned about the spread sheet that was e-mailed to the first respondent's home e-mail address. Yet this, according to the version of the first applicant, was found in the deleted items, thus negating any suspicion that the first respondent wanted to use it in competition with the first applicant. There is also the evidence of Mr Engelbrecht that the second respondent had not employed the first respondent from 1 August 2008 or at all. When the matter was argued before me, the first respondent had not commenced employment with the

second respondent. The apprehension of the first applicant has consequently no basis.

37. In conclusion, the negligence of the first applicant's attorney in preparing the draft order, the numerous material discrepancies exhibited in the execution of the Anton Piller order and those factors which an applicant must *prima facie* establish to succeed in being granted the Anton Piller order all together inform me that the order of this court of 8 July 2008 in this matter should not stand.

38. In this case, it will be fair in the circumstances if the costs should follow the results. Accordingly, the following order will issue:

    1. The order of this court dated 8 July 2008 in this matter is discharged.
    2. The first applicant is to pay costs on the attorney and client scale.

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Cele J

Date: 11 May 2009

Appearances:

For the Applicant: Adv F.A Boda
For the Respondent: Adv T Ohannessian and Adv N Lombard (Ms)