IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case no. 8088/2006

IMAN SAID ABDUL AZIZ AL-RAWAS Applicant

v

PEGASUS ENERGY MANAGEMENT SERVICES (PTY) LTD First Respondent

MIDDLE EAST SOUTH AFRICA ENERGY (PTY) LTD Second Respondent

HAROLD ALAN PALMER Third Respondent

JUDGMENT DELIVERED THIS WEDNESDAY, 9 MAY 2007

CLEAVER J

[1] This matter came before me on the return day of a rule *nisi* which authorised the grant of an *Anton Piller* order.

[2] Thamer Said Ahmed Al-Shanfari ("Al-Shanfari") previously participated in a number of business ventures with Sheikh Khalifa Bin Hamed Al-Thani ("Sheikh Khalifa") and Dr Issa Ghanem Al-Kawari ("Dr Al-Kawari"). The ventures included, between 1999 and 2002, the operation of a diamond mine in the Democratic Republic of the Congo through a company known as Oryx Natural Resources Limited ("Oryx") and in 2001 a company known as Pegasus Energy Limited ("Pegasus"). The latter was registered in Mauritius. The business of Pegasus is the trading of oil products within the Southern African region and the United Arab Emirates. Sheikh Khalifa was the Emir of Qatar from 1972 to 1995. Dr Al-Kawari, who was previously head of the Palace, Information Minister and Minister of Diwan Amiri Affairs (the Royal Court) of Qatar continues to advise Sheik Khalifa.

[3] Pegasus was established as an oil trading company upon the proposal of Al-Shanfari and was financed entirely by loan capital supplied by Sheikh Khalifa, initially personally, and thereafter by his companies. Pegasus was dependent on the willingness of Sheikh Khalifa to provide finance in order to continue in business. By March 2003 the loans advanced to Pegasus totalled approximately US$6,5 million. At that stage 102 shares in Pegasus had been issued, these being held as to 34 each by Sheikh Khalifa, Dr

[4] It is common cause that Al-Shanfari's involvement in the management of Oryx was effectively terminated in December 2002 after he was cited in a United Nations report into the illegal exportation of natural resources and other forms of wealth of the Democratic Republic of the Congo. The respondents say that on 10 March 2003 Al-Shanfari was also asked to resign from the board of Pegasus and it is common cause that on that day he did so resign. He also agreed to dispose of his shareholding in Pegasus which he did by transferring his shares to his wife, Iman Said Abdul Aziz Al-Rawas ("Al-Rawas"), the applicant in these proceedings.

[5] Sheikh Khalifa and Dr Al-Kawari were unhappy about Al-Shanfari's wife remaining a shareholder in Pegasus. Al-Shanfari contends that his relationship with Sheikh Khalifa and Dr Al-Kawari had become strained since he had commenced proceedings against Dr Al-Kawari regarding a BMW manufacturing venture in Egypt in which the two of them had been involved.

[6] Because Pegasus did not wish to have Al-Rawas as a shareholder, it consulted its South African and Mauritian lawyers to consider how the interest of Al-Rawas might lawfully be terminated or *"alternatively if this were not possible, how the imbalance caused by Al-Rawas' failure to contribute any expertise or finance to Pegasus might be addressed"*. The advice which Pegasus received was that

> "*a. The existing shareholders' loans made to Pegasus should be called in and steps taken to re-capitalise the company by issuing further shares to which a sufficient value would attach;*

b. These shares should be offered to all existing shareholders in Pegasus. In the event that Al-Rawas accepted and paid for the shares offered to her, she would have invested capital into Pegasus. In the event that she did not accept this offer, these shares might be allocated to either of the other existing shareholders and, upon acceptance, Pegasus would in any event be re-capitalised."

Pursuant to this advice, demands for the repayment of all the loans advanced to Pegasus were made and following notice of these demands, on 7 February 2005 the Board of Pegasus met and agreed to issue 24 966 shares in Pegasus to each

of its existing shareholders at a price of US$120 per share. Although the total amount due in terms the loans had been US$10 505 000, the value of the shares offered was US$8 987 786. The difference was apparently due to the fact that loans totalling some US$2,4 million had been subordinated so that the company could remain solvent. Following the company's resolution, letters were addressed to each of the three shareholders on 7 February 2005 offering them each an allotment of 24 966 shares. A form to indicate the acceptance of the offer was provided which was to be returned by 17h30 on 23 February 2005 after which time it was stated that the offer would be deemed to be declined. No acceptance was forthcoming from Al-Rawas and on 26 February 2005 the Board of Pegasus met and effected two resolutions. By the first of these resolutions Dr Al-Kawari and Sheikh Khalifa accepted the shares offered to them and by the second Sheikh Khalifa accepted also those shares offered to but declined by Al-Rawas. In the result the shareholding in Pegasus became the following:

Sheikh Khalifa	49 966
Dr Al-Kawari	25 000
Mrs Al-Rawas	34
Total	75 000

[7] Al-Shanfari, the deponent in the papers before me, says that he considers the transaction suspect and through his attorneys caused the records of Pegasus to be inspected at the overseas registration agency known as OCRA (Mauritius) Limited ("OCRA") by his attorneys. His attorneys reported that they were not able to locate

any directors' resolutions, minutes of directors' meetings or shareholders' resolutions pertaining to the loans which had been advanced by Sheikh Khalifa to Pegasus. The attorneys were also advised that no accounting records of Pegasus were held by OCRA or held at OCRA.

[8] On 2 August 2006 the applicant successfully applied *ex parte* in this court for an *Anton Piller* order against the respondents. The order authorised the sheriff to enter premises said to be premises of the first respondent for the purposes of searching for and taking delivery and retaining, pending the directions of this court, the following items:

> "*All documents, by which is included reference to documents and information recorded in photographic or electronic form (whether digitally or otherwise):*
>
> *1. relating to the loans allegedly made by HH Sheikh Khalifa Bin Hamed Al-Tani and Beagle Equities Limited, Fermor Investments Limited and Watchhorn Business Corporation, to Pegasus Energy Limited ('*Pegasus*'), which are in the respondents' possession, including board resolutions, loan agreements, correspondence evidencing such loans and requests for repayment,*

2. relating to or evidencing the reason(s) for the decision of the board of Pegasus taken on or around 14 June 2004 to allocate a further 49 266 (or any other number of) additional shares in Pegasus to Sheikh Khalifa and a further 24 966 (or any other number of) additional shares in Pegasus to Dr Issa Ghanem Al-Kawari (Dr Al-Kawari); and

3. relating to Pegasus' decision in or around February 2005 to invite shareholders to subscribe for additional shares at USD120 per share, including documents confirming or illustrating the financial position of Pegasus at that time and/or documents explaining the rationale for pricing those additional shares at that price."

[9] Although Al-Rawas is nominally the applicant, the founding and replying papers

are deposed to by her husband Al-Shanfari and it is clear that he continues to exercise control in respect of the shareholding previously held by him in Pegasus. Significantly, from a legal point of view, Pegasus is not one of the respondents which are:

1. Pegasus Energy Management Services (Pty) Ltd ("PEMS") (the first respondent), a company duly registered as such in terms of the company laws of South Africa having its registered address in Cape Town and its principal place of business in Sandton City, Gauteng.

2. Middle East South Africa Energy (Pty) Ltd ("MESA") (the second respondent), a company duly registered as such in terms of the company laws of South Africa having its registered address in Cape Town and its principal place of business in Sandton City, Gauteng.

3. Harold Alan Palmer (the third respondent) who resides in Cape Town and who is a director of Pegasus and of the first and second respondents.

[10] The return day was initially set for 7 September 2006, but on that day an order was taken by agreement in terms whereof the Rule was extended to 27 February and a timetable for the exchange of further affidavits was provided. The order provided further that copies were to be made of the documents seized from the respondents and that the original documents were to be returned to the respondents with the copied documents to be retained in the possession of the sheriff pending directions by the court. When the matter was argued on 27 February, the respondents sought the discharge of the order.

[11] The founding papers record that the application mirrors similar applications against

related respondents in the English High Court in London and in the Supreme Court of Mauritius. The respective orders granted pursuant to those applications were executed simultaneously two days after the grant of the *Anton Piller* order in this court. The description of the applications in Mauritius as being *Anton Piller* applications is not entirely accurate. In that court the order granted was more of the nature of an order for discovery.

[12] The grounds upon which the respondents seek the discharge of the order are the following:

12.1 The applicants fail to disclose certain material facts to the court when seeking relief on an *ex parte* basis. It was also contended that certain facts were misrepresented by the applicant.

12.2 The requirements for an *Anton Piller* order were not met in that

12.2.1 The applicant had no real, bona fide or reasonable apprehension that the documents listed in her application would be hidden or destroyed or in some manner spirited away.

12.2.2 No cause of action was made out against PEMS or MESA and the asserted cause of action against the third respondent is not bona fide.

12.3 The documents in question belong to Pegasus which has not being joined in these proceedings. Pegasus should have been joined since it clearly has a direct and substantial interest in the proceedings.

12.4 The applicant failed to comply with paragraph 7 of the *Anton Piller* order

which directed her to join PEMS and MESA to the pending substantive proceedings in Mauritius within ten days of the order.

12.5 The applicant did not make out or establish a case for the application to have been brought on an urgent basis.

12.6 The issues identified in paragraph 12.1 and 12.2.1 have been determined in a judgment of the English High Court and are thus *res iudicata*.

[13] The requisites for the grant of an *Anton Piller* application in this country were set out in *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam, and Another*[1]. These are that

13.1 That the applicant has a cause of action against the respondent which he intends to pursue;

13.2 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 applicant can not claim a real or personal right);

13.3 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.

This description has been followed and approved in many cases, including recently in this Division, in *Rath v Rees*[2].

FAILURE TO DISCLOSE MATERIAL FACTS

[14] On behalf of the respondents it was contended that the applicant failed to disclose to the judge who granted the interim order material facts of which she was aware

1 1995 (4) SA 1 (A) 15 H-I
2 2007 (1) SA 99 (C) 109 A-C

IN THE HIGH COURT OF SOUTH AFRICA

relating to

* The loans to Pegasus

* The order granted in Mauritius

* The delays in bringing the application having regard to earlier threats that litigation would be commenced against the respondents.

[15] **THE LOANS TO PEGASUS**:

The case made out by the applicant in the founding affidavit was that the loans made to Pegasus by Sheikh Khalifa were probably bogus. The existence of the loans was repeatedly questioned and this formed the basis of the applicant's submission that Dr Al-Kawari and Sheikh Khalifa had embarked on a fraudulent scheme to defraud the applicant. The following statements appear in the founding affidavit:

* '*"In addition, it is also my belief that the share issue which occurred in February 2005 was part of a fraudulent scheme devised and or negligently participated in by the respondents with the primary purpose of diluting my wife's shareholding in* [Pegasus]*. I refer in particular to the following features of the share issue, which are set out in full in TAS1-P:*

  (a) I am not aware of any commercial reason as to why the loans would have been required;" (emphasis supplied)'

* *'"The lack of information available to support the existence of the loans is I believe suspicious and given* [Pegasus'] *failure to furnish my wife with any particulars to support these matters, she requires the injunction in the terms sought to address these questions" (emphasis supplied)'*

* '*"In addition to the above, I also refer to the respondents' unwillingness to provide my wife with any documentation which would independently verify the existence of the loans in question, and if the loans were indeed advanced, that they were made for a genuine commercial purpose on*

commercial terms." (emphasis supplied)'

* *'"My wife and I had serious misgivings as to whether the loans had ever been made, and if not, whether they were simply a scam to make my wife's shareholding in* [Pegasus] *negligible. If the loans were in fact made (which I seriously doubt), we wondered whether they were made at arms length, what the purpose of the loans and whether they were made purely for the purpose of creating the debt which would 'require' the share issue." (emphasis added)'*

* *"'The matter arises from what I consider to be a deliberate scam and a bogus set of transactions on the part of the respondents… to make my wife's shareholding in the company essentially valueless. I cannot, at this stage, say with certainty that the initial loans themselves were bogus (although I strongly suspect that they were), but I am certain that the repayment of the loans via the share issue and share allocation was in fact a scam. It is in essence a fraud against my wife ….". (emphasis supplied)'*

It is clear from the answering affidavit filed on behalf of the respondents that Al-Shanfari was well aware of the fact that substantial loans had been made to Pegasus by Sheikh Khalifa up to March 2003 when he resigned as a director of Pegasus. There is also documentary evidence to show that he was aware of the existence of the loans made up to that date and in Al-Shanfari's witness statement in the English proceedings his knowledge of the loans is admitted. At the time of Al-Shanfari's resignation from the Pegasus Board, Pegasus' sole source of funding had been loans from Sheikh Khalifa and or his companies and the amount due in terms of those loans stood at US$6 823 000, including interest. After Al-Shanfari's resignation, further loans were made to Pegasus by Sheikh Khalifa's companies and as at February 2005, these totalled US$ 10 405 000.

[16] Having admitted the existence of the loans in the English proceedings and in effect

the amount owing in terms of such loans at the time of his resignation as a director, Al-Shanfari changed tack in his replying papers, contending that he had no knowledge of the loans made after the date of his resignation and that his concern had always been the purpose behind the recall of the loans. Before me, counsel for the applicant supported this latter contention and sought to make something of the difference between the amount said to have been owing in terms of the loans and the amount for which shares were issued. This difference was explained by the respondents, but is in any event not material to the issue of the applicant's non-disclosure of his knowledge of the loans. That the references to supposedly bogus loans must have been an important factor in persuading **Van Zyl** J to grant the interim order is underscored by the following submissions made by the applicant's solicitor in the London proceedings which were embraced in these proceedings.

> "*I would respectfully suggest that individuals who would engage in conduct such as*
>
> *(a) Deliberately setting up loans/loan documentation designed to create a series of debts (or the appearance thereof) owed by the company to a shareholder (Sheikh Khalifa) and entities owned and controlled by him, which could then be called in simultaneously in order to justify a Share Issue taking place without prior warning to Mrs. Al-Rawas alone out of the three shareholders;*

(b) using the requirement on the part of the company to repay those 'loans' as a pretext for requiring the company to find the necessary US$10.4 million cash via a rights issue;

(c) ensuring that the opportunity to subscribe to the rights issue given to Mrs. Al-Rawas alone out of the three shareholders was extremely limited, unreasonably short and remained open for acceptance by that shareholder for less than the 14 day minimum period required by the applicable companies legislation and thus acting in breach of Section 55(2) of the Mauritius Companies Act 2001;

> *would be more than likely to destroy potentially incriminating documentation (relating to such conduct) in order to protect their position in proceedings, unless prevented by an order of the court. I therefore consider that there is a real risk of documents of the sort identified in Schedule B to the draft order proposed by the Applicant being destroyed unless the Search and Seizure Order is granted."*

(I might say that the logic of the conclusion reached on the strength of the averments in (c) is difficult to follow.)

In my view the failure to disclose the applicant's knowledge that Pegasus had been funded by loans by Sheikh Khalifa and of the amounts due in terms of those loans as at March 2003 was material and should have been disclosed to **Van Zyl** J. The manner in which the loans were dealt with was in fact misleading. Counsel for the applicant referred to information contained in the respondents' answering affidavit which detailed the steps taken prior to the resolution being passed in which shareholders were called on to take up additional shares and submitted that such evidence was an indication of misconduct on the part of the shareholders in respect of *"dubious loan accounts"*. Again, stress was laid on the validity of the loans and importantly, the founding papers do not make out a case that the loans could not be called up.

[17] **THE CHARACTERISATION OF THE ORDER GRANTED IN MAURITIUS**

In the founding affidavit Al-Shanfari stated that the application was aimed at *"mirroring the relief already sanctioned by the Supreme Court of Mauritius regarding the documents held by Pegasus in Mauritius".* This statement is not

correct. The application in this court was for an order permitting the applicant's representatives to enter the respective premises of the respondents, to search for documents and for the retention of such documents by the Sheriff pending further court directions. The Supreme Court of Mauritius had not *"already sanctioned"* such an order. In Mauritius Pegasus was merely ordered to furnish copies of certain categories of documents to the applicant's representatives in the presence of a court usher and the order did not permit entry into the premises of Pegasus. The fact is that the applicant had initially sought a search and seizure order in Mauritius, but in the event was not granted such an order and the issue is whether that information and the nature of the relief granted in Mauritius was material to the extent that it might have influenced **Van Zyl** J in coming to a different conclusion. In the light of the view which I take in respect of other issues raised by the respondents, it is not necessary to rule on this aspect.

THE DELAY IN BRINGING THE PROCEEDINGS

[18] The paragraphs in the founding affidavit on which the applicant relied to justify the *ex parte* and urgent approach to the court read as follows:

> "*24. As I have mentioned above, this is not the First time that the Applicant and I have become victims of wrongful non-payment of a shareholding at the apparent instance of Sheikh Khalifa and Dr Al-Kawari.*
>
> *26. I have little doubt that, should either of these two gentlemen (together with the other directors of Pegasus cited as Respondents in Mauritius, including the Third Respondent in these proceedings) be forewarned of this application, they would obtain the destruction,*

> *concealment or spiriting away of whatever documentary evidence exists to prove the Applicant's cause of action in Mauritius. They will most probably also have occasion to create fictitious documentation. I respectfully say that it is implicit in the orders of the Supreme Court of Mauritius (Bankruptcy Division), in granting the "*Anton Piller*" orders there, that the information sought is vital and that there is a well-founded apprehension that the documents would be destroyed, concealed or spirited away in the absence of a preservation order."*

These averments plainly indicate that the respondents had not been alerted to the fact that the applicant intended to bring proceedings against the respondents and why notice ought not to have been given to the respondents. The fact is, however, that as long ago as 21 February 2005, after Al-Rawas had received the communication in which she was given the option to take up 24 966 new ordinary shares, her solicitors addressed a letter to the third respondent in his capacity as Chief Executive Officer of Pegasus in which they recorded that they required full particulars of resolutions passed relating to the *"loans referred to"* and other details regarding the repayment terms and interest, as well as copies of other relevant documents to confirm that the transactions were transacted at arms length. In the letter, the third respondent was advised that unless copies of the documents and correspondence requested were received together with confirmation that the new share issue would be suspended, the applicant would make immediate application to the court for an order protecting her and for injunctive relief preventing the new share issue from being completed. On 23 February 2005 Pegasus replied, stating that after taking advice, the company was not obliged to provide the applicant with the documents or the information requested, but that the applicant was entitled to

inspect *"such documents in accordance with and adhering to the laws and regulations governing the operations of the company".* No response to this invitation was received and no proceedings were instituted. In January 2006, the applicant's present English solicitors inspected Pegasus' registered office in Mauritius in order to inspect such documents as were held there. The solicitors were not permitted to take copies of the documents inspected (in accordance with Pegasus's understanding of Mauritius law) and as a result threatened a court action. No proceedings were instituted.

[19] These letters appear as annexures to the copy of the affidavit filed in support of the petition filed in Mauritius, which was in turn referred to in the founding affidavit. These papers run to some 350 pages and having regard to the importance of the letters, I am of the view that the judge's attention ought to have been drawn to them specifically in the founding affidavit. The respondents would have had ample time to do away with the documents should they have chosen to do so and had the presiding judge been alerted to the fact that so much time had passed since the first threat to take legal action had been made, he might possibly have concluded that the matter was not urgent and/or that it would not be appropriate to hear it *ex parte*. In *National Director of Public Prosecution v Braun and another*[3], the failure to disclose correspondence between the applicant and the respondent prior to the grant of an *ex parte* order granted as a matter of urgency resulted in the order

3 2007 (1) SA 189

being discharged. The applicant explained the delay in taking steps as being due to Al-Shanfari not being possessed of liquid funds with which to prosecute the matter at the time and also to incorrect advice (not explained) being given to her by her solicitors. The explanation for the delay is however not the issue. What is important is that the delay in bringing the application after the respondents had been threatened with proceedings is what should have been brought to the judge's attention.

[20] It is of course trite that in *ex parte* proceedings an applicant is obliged to observe the utmost good faith in placing all material facts before the court and the failure to do so may result in the order being set aside on the grounds of non-disclosure alone. Furthermore,

* In *ex parte* applications all material facts must be placed before the court which might influence a court in coming to a decision;

* the non-disclosure or suppression of facts need not have been wilful or *mala fide* to incur the penalty of rescission; and
* the court, apprised of the true facts, has a discretion to set aside the former order or to preserve it.[4]

The failure to disclose the threats to take legal action against the respondent also plays a role in considering the applicant's averments that she had a real and genuine apprehension that documents would be destroyed, concealed or spirited away and will be dealt with under that heading.

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4 *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 349 A-B;
The National Director of Public Prosecutions v Braun and another 2007 (1) SA 189 (C) at para [22], p196

NO APPREHENSION OF DESTRUCTION OR CONCEALMENT OF DOCUMENTS

[21] The case for the applicant under this heading is extremely thin. After alleging that the respondents have in their possession certain specific documents or things which constitute vital evidence in substantiation of the applicant's cause of action, Al-Shanfari makes the following statement which is unsupported by any factual evidence:

> "*There is a real and well-founded apprehension that this evidence may be hidden or destroyed or in some manner spirited away by the time the case comes to trial or the stage of discovery is reached."*

To this may be added the statements quoted in para [18] and the further anodyne statement that Sheikh Khalifa and Dr Al-Kawari

> "*by virtue of their majority shareholding in Pegasus and, by implication, their control over the board of directors of the First and* (Second) *Respondents (being Pegasus subsidiaries), are in the best position to ensure the disappearance of whatever Pegasus-related documentation may be in the possession of the Respondents at any time."*

These statements do not meet the test that the risk of evidence being hidden or destroyed must be based on more than mere speculation[5].

As I have already indicated, the main thrust of the applicant's case was that the dishonesty imputed to Sheikh Khalifa and Dr Al-Kawari formed the basis for the applicant's belief that the loans made to Pegasus were bogus. In that regard Al-Shanfari has been shown to have had full knowledge of the loans which had been advanced by Sheikh Khalifa's companies up to the time of his resignation as a

5 *Hall & another v Heyns and others* 1991 (1) SA 381 (C) at 390 D

director and also the fact that the sole source of Pegasus' funding had been from such loans. That being so, there can be nothing untoward by further loans being made to Pegasus after his departure as a director.

Absent any grounds for imputing dishonesty to Sheikh Khalifa and Dr Al-Kawari in respect of the loans of which he had knowledge, there is no reason to infer that Sheikh Khalifa, Dr Al-Kawari or the directors of the companies were likely to destroy any documents relating to the loans, or as counsel for the applicant would now have it, the calling up of the loans. It must be remembered that the question as to whether the loans were improperly called up is not the issue before me. The Board of Pegasus may well have followed the procedure which it adopted in order to achieve the ultimate dilution of the applicant's shareholding. However, as is plain from the answering papers and from the documents disclosed therein, that course was followed on the strength of legal advice. The legality of that procedure, including the time afforded the applicant to respond to the offer, will presumably be debated in another court.

[22] When the grant of the *Anton Piller* order was reconsidered in the English court, **Ramsey** J found that in the absence of the ground that the loans had been deliberately or fraudulently set up, there was little left on the case of the destruction of the documents. I share that view.

[23] Counsel for the applicant placed much reliance on the discovery, during the inspection of Pegasus' records in Mauritius in January 2006, of the following resolution which had been passed by the directors on 14 June 2004:

> "*To Issue, at par value, (US$1.00 per share), a further 49,966 shares to HH Sheik Khalifa Bin Hama Al Thani and a further 24,966 to Issa Ghanem Al Kawari, thereby increasing the issued share capital of the Respondent No. 1 to US$75,034"*

The fact that the resolution recorded that the shares were to be issued at par whereas the resolution which was subsequently implemented provided for the shares to be allotted at a premium was an indication, so it was submitted, that the

directors had embarked on a fraudulent scheme to reduce the applicant's shareholding to a meaningless one. In my view, the existence of this resolution, instead of advancing the applicant's case that there existed a real and genuine apprehension that documents relating to the loans or their calling up would be destroyed does just the opposite. Surely that resolution, which clearly could not be enforced and which Al-Shanfari recorded had not been implemented, would have been removed or destroyed had the directors wished to cover their tracks. After all, they had been threatened with a court action in relation to the resolution which was subsequently passed.

[24] Apart from the fact that the Board of Directors would probably have destroyed or concealed the documents once they had received the applicant's threat to apply to court in February 2005 had they intended to do so, the mere fact of such threat suggests that at the time of making the threat and again when it was repeated in February 2006, the applicant did not have a real or genuine belief that the documents would be destroyed.

[25] Furthermore, I agree with the submission by respondents' counsel that since the applicant relied on the hypothesis that those who engage in dishonest conduct [i.e. the fraudulent creation of loans] are likely to destroy or conceal evidence, the opposite holds good, namely that those whose conduct is lawful or at least who honestly believe their conduct to be lawful, are unlikely to destroy or conceal evidence.

[26] Finally, there is the nature of the documents sought by the applicant which must be borne in mind, namely the source documents in respect of the repayment of the

loans, board resolutions and the allotment of shares. It is difficult to conceive why documents of this nature should be concealed or destroyed; one would expect such documents to be preserved in order to reflect the genuineness of transactions, were such transactions to be bogus, as the applicant would have it.

[27] For these reasons I am satisfied that the applicant has failed to establish a genuine apprehension that the documents would be destroyed or concealed. As for the suggestion that the respondents might have manufactured or created new documents, that is not, as far as I am aware, a ground for the granting of an order of the nature in question.

NO CAUSE OF ACTION AGAINST RESPONDENTS AND THE NON-JOINDER OF PEGASUS

[28] All the authorities are to the effect that an applicant for an *Anton Piller* order must make out a cause of action against the party against whom the order is sought[6].

In *Rhino Hotel and Resort v Forbes and Others*[7] the court held that an *Anton Piller* order could not be granted against a respondent cited as a representative of another party against whom the applicant had asserted a cause of action (where relief was not sought against that other party). It is common cause that *"the documents sought to be seized are those of Pegasus, but are in respondents' possession"* (as per Al-Shanfari).

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6 *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam, and Another* 1995 (4) SA 1 (A) 15 G-I/J and also
Roamer Watch Co SA and another v African Textile Distributors also t/a M K Patel Wholesale Merchants and Direct Importers 1980 (2) SA 254 (W) at 272 D-G
Universal City Studios Inc and others v Network Video (Pty) Ltd 1986 (2) SA 734 (A) at 755 A-B
Hall and another v Heyns and others 1999 (1) SA 381 (C) at 388 F-389 G
Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam, and Another 1995 (4) SA 1 (A) 15 G-I/J

7 2000 (1) SA 1180 (W) at 1183 A-H

[29] The relief is sought against the first respondent on the basis, according to Al-Shanfari, that most of Pegasus' day to day management decisions were generally made in South Africa, although higher level policy decisions were generally made in London *"from its representative office in South Africa".*

The third respondent lives in Cape Town and is according to Al-Shanfari is believed to work between his home and the respondents' offices in South Africa. The following further averments are made by Al-Shanfari:

> "*I respectfully submit that, given the role of the First and Second Respondents in Pegasus' operations, and the involvement of the Third Respondent in particular, it is most probable that the absence of the documents in question from Pegasus' registered office in Mauritius may be explained by their existence at the Respondents' premises in South Africa."*

Interestingly, the letterhead of Pegasus, on which the applicant relies, reflects its address in Mauritius and the wording *"Representative office in South Africa for correspondence Pegasus Energy Management Services (Pty) Ltd"* and an address at the V & A Waterfront in Cape Town (with a telephone number as well as an address in Bryanston, Gauteng, with a telephone number). Having regard to the address for the second respondent as furnished by the applicant, neither of the addresses on the letterhead appears to be that of the second respondent.

[30] Recognising that the applicant had not made out a cause of action against Pegasus, counsel for the applicant shifted the emphasis of his submission, asserting that the applicant was entitled to the order which had been granted

because she had a serious cause of action against Pegasus in another court and that the documents in question were necessary for that cause of action. The thrust of the application was said to be that of an interlocutory nature in order to preserve evidence, even though the party against whom the cause of action existed was not before the court. Counsel conceded that as yet there appears to be no authority to support the submission that an *Anton Piller* order can be granted in these circumstances, but submitted that there was room for the ambit of the order to be expanded, as had been done in terms of the initial order. In the *Shoba* case, **Corbett** CJ held that it was not necessary to decide whether the *Anton Piller* principle had any scope in our law other than that indicated in the judgment[8]. With this as his starting point and relying on the fact that the remedy in *Shoba* was sought against the officer who had custody of the equipment in question, counsel for the applicant moved to Voet[9] in which it was explained that the court in which a thing is situated would have jurisdiction to entertain an action in *rem* for the ownership or possession of the thing. The submission was that an *Anton Piller* application is equivalent to an action in *rem.* In order to deal with the problem that Pegasus is not before the court, he referred to *Brown v MacDonald*[10] in which both the applicant and the respondents were *peregrini.* The applicant was granted an order restraining the sale of a horse which had been hypothecated to him, pending an action to be brought against the respondent in a competent court.

8 Shoba p16 D
9 Commentary on the Pandects Book V.76 (Gayne's translation)
10 1911 EDC 423

Finally, counsel referred to *Pohlman and others v Van Schalkwyk and others*[11] in which the court, in listing the common features of an *Anton Piller* application, recorded one such feature as *"It is alleged that the respondent or others closely associated with the respondent in some way threatened that interest of the applicant".*

Significantly, however, in both *Shoba* and *Pohlman*, the parties against whom the applicants' causes of action lay were cited as respondents. In my view the argument advanced on behalf of the applicant is contrived. The reference to Voet clearly relates to an action in *rem* and the relief sought in *Brown v MacDonald* bears no resemblance to the relief sought in an *Anton Piller* application which has been tailored to meet specific circumstances.

There may well be room for the principle, although I make no such finding, that an *Anton Piller* order may be issued against a respondent which is not the party against whom the cause of action is made out if it can be shown that the respondent is the privy of or so closely connected with the party against whom the cause of action lies as to justify the granting of the order. Such a decision would depend on the particular circumstances of the case and might be justified on the interlocutory nature of the order to preserve documents which might otherwise be done away with. However, such a decision would in my view have to be subject to the ryder that the court granting the order would have jurisdiction over the party against whom the cause of action lies. To confirm the order in the present case would be to permit ancillary and interlocutory procedural relief in this court to be utilised in another court against a party not subject to the jurisdiction of this court. Having regard to the need to use this particular form of relief sparingly, there is in my view no basis for extending the relief in the manner sought by the respondents and no basis for not following the decision in the *Rhino Hotel* case.

[31] Having come to this conclusion it was not necessary to deal with the submissions that no case has been made out against the respondents.

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11 2001 (1) SA 690 (E) at 697 I

IN THE HIGH COURT OF SOUTH AFRICA

THE DEFENCE OF RES IUDICATA

[32] In my view this defence also succeeds. I have found in para [21] that the applicant failed to establish a genuine apprehension that the documents forming the subject matter of the application would be destroyed or concealed. That that was also the basis for the English court discharging the order which had been granted there, as appears from the following extract from the judgment of **Ramsey** J at para 76

> "*In the absence of that ground, there is little left on the case on the destruction of documents. In addition, the claimant delayed from February 2005 to July 2006 in relation to the application, and the fact that documents clearly were not destroyed in that period negates such a conclusion. In addition, the documents show that the defendants were keen to have on record all the documentation to show that the share transaction was legitimate. I do not consider that, in the absence of the loans allegation, the claimant can properly say that there was clear evidence that the defendants would destroy documentation before an inter partes hearing could take place."*

In the English proceedings it had also been contended that the applicant's failure to disclose her husband's knowledge of the loans had been material. In that regard the court held at para 91

> "*In such circumstances, I need not go on to consider the question of non-disclosure. However, I have come to the conclusion that the evidence provided by Mr Al-Shanfari contained a central and material non-disclosure in relation to the loans. I do not consider that the non-disclosure can be described as innocent, or limited to knowledge of the loans made after March 2006."*

[33] On behalf of the applicant it was contended that these two issues were not *res iudicata* as between the parties to the application and for the following grounds:

1) The judgment of **Ramsey** J was not final and was under appeal.
2) The judgment was not between the same parties as in the application before me in that neither PEMS nor MESA were party to the English proceedings.
3) The test for the grant of *Anton Piller* relief is stricter in English law than in South African law.

[34] As regards the finality of the appeal, it was held in *Liley v Johannesburg Turf Club*[12] that the noting of an appeal does not suspend the finality of a judgment for the purposes of the application of the *res iudicata* doctrine. What is suspended is the execution thereof and the judgment itself stands until set aside. At the time of the hearing of this application, leave to appeal against the judgment of **Ramsey** J had been refused and before delivering this judgment I was notified that a renewed application for permission to appeal against the order of **Ramsey** J had been refused by the Court of Appeal.

[35] It is so that neither PEMS nor MESA were cited in the English proceedings. However, it is clear that these two respondents were cited in this court as being representatives of Pegasus. P J Rabie, writing in Lawsa, records the following:

> "*The words 'same persons' do not mean only the identical individuals who were parties to the proceedings in which the judgment which is raised as* res iudicata *was given, for they include persons who are in law identified with those who were parties to the proceedings."*[13]

12 1983 (4) SA 548 at 552 C *in fine*
13 Second Edition, Vol 9, para 637

A number of examples are then given. In the *Liley* case the court regarded two turf clubs as being the *"privies"* of the Jockey Club of South Africa for the purposes of adjudicating on a plea of *res iudicata*. In the present case I am of the view that, having regard to the basis for citing the two companies, they are sufficiently identified with Pegasus for the purposes of the *exceptio rei iudicatae.*

[36] Whatever the differences between the English law and the South African law may be in respect of proof of a cause of action for the granting of *Anton Piller* relief, it was not suggested on behalf of the applicant that there was any difference in the approach to the requirement of an apprehension of the destruction or concealment of evidence or the issue of a material non-disclosure.

[37] For these reasons the plea of *res iudicata* is in my view also fatal to the application.

[38] Because of the various findings which I have made, it is not necessary to deal with the remaining ground of opposition which was to the effect that the applicant had failed to comply with terms of the South African order.

[39] One other issue remains to be dealt with, namely an application to strike out certain portions of the respondents' answering affidavit. While the passages which have been challenged do reflect the opinion of the deponent Palmer concerning Sheikh Khalifa's reluctance to provide further funding to Pegasus and the wish of Sheikh Khalifa and Dr Al-Kawari to regularise the position by the implementation of

the special resolution, the opinions expressed are based on facts which are not controversial. The passages are not disputed and can be said to be the inferences drawn from facts which are not in dispute. In any event, the three short passages are insignificant in relation to the application and the facts placed on record. In the circumstances the striking out of the passages need not follow.

[40] For the reasons which I have given, I conclude that the respondents must succeed and I accordingly make the following order:

The order granted in this court on 2 August 2006 is discharged with costs, which costs are to include the costs attendant upon the employment of two counsel.

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R B CLEAVER