REPORTABLE

Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

In the matter between:

Case No. 23347/09

MATHIAS INTERNATIONAL LIMITED	First Applicant
MI FOODS INTERNATIONAL RSA (PTY) LTD	Second Applicant

and

MONIQUE BAILLACHE	First Respondent
FOB TRADING	Second Respondent
MERLOG FOODS (PTY) LTD	Third Party

JUDGMENT DELIVERED ON 8th MARCH 2010

BINNS-WARD J:

[1] The applicants are a New Zealand based company which trades internationally in frozen food products, especially meat, fish and vegetables, and its South African subsidiary.

[2] At all times material to the matters in issue the first respondent was an executive director of the South African subsidiary and managed the applicants' business in this country.

[3] The second respondent is cited as FOB Trading, allegedly a firm as contemplated in terms of rule 14 of the Uniform Rules of Court. The evidence established the existence of a business by the name FOB which had been established in Argentina by two former employees of the first applicant at its South American branch. For present purposes it can be accepted that no distinction falls to be drawn between FOB, the South American business, and FOB, the alleged Cape Town firm. I shall refer to them indiscriminately as 'the second respondent'.[1] It is common ground that the name of the second respondent is an acronym derived from the surnames of the two former employees in Argentina, Esteban Furlong and Tomas Ortuño, and that of the first respondent, Monique Baillache. Indeed, one of the matters that have to be determined in this judgment is whether the first respondent was already involved in the second respondent's business to the extent that her office at Camden Street, Cape Town, constituted its place of business within the territorial jurisdiction of this court. The first respondent admits that it is her intention to go into business with Furlong and Ortuño, but avers that this was to happen only

[1] It appears that the FOB business is incorporated in an Argentinean company by the name FOB Trading SRL, which has been cited as the third defendant in the action instituted by the first applicant, *qua* plaintiff, in WCC case no. 24483/09, in which damages are claimed in delict for lost 'corporate opportunities'. As to the meaning of 'corporate opportunities' in this context, see e.g. *Da Silva and Others v CH Chemicals (Pty) Ltd* 2008 (6) SA 620 (SCA) at para. [18].

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after the termination of her employment by the second applicant at the end of November 2009.

[4] The third respondent is a South African company to which the applicants had supplied frozen food products in large volumes for a significant period of time. It was one of the applicants' significant customers in South Africa. The relief sought against the third respondent in terms of the notice of motion is to be stood over for later determination and, by agreement between the parties, I made an order to that effect in chambers on 22 February 2010.

[5] The first respondent gave notice at the end of September 2009 of her intention to resign from the second applicant. She made it known at the time to the applicants' management that it was her intention to remain actively involved in the frozen meat business – an area of enterprise in which she had in fact been engaged for many years before she was initially employed by the first applicant in Australia in 2002. It was agreed that her resignation would become effective at the end of November 2009, and that she would assist in an orderly transfer of her functions on behalf of the applicants in the South African market. It seems that the directors of the first applicant were uncertain whether or not it would be necessary to appoint a permanent replacement for the first respondent, or whether the South African business could instead be conducted remotely from outside the country.

[6] As a consequence of what, to it, were disconcerting indications in the marketplace, the first applicant's management decided to investigate the

operation of the Argentinean office in the period surrounding the resignation of Furlong and Ortuño. The computers used by these two former employees were brought to New Zealand and forensically examined. The first applicant obtained the results of this examination on or about 26 October 2009. The information indicated that the two employees had been engaged in setting up and operating the second respondent for several weeks before their resignation. Of more central relevance to the current case, it also indicated that the first respondent had been intimately involved in these endeavours and suggested that she had been party in this regard to the misappropriation by, or for the benefit of the second respondent of corporate opportunities that would otherwise have accrued to, or been available to the first or second applicants; and that there had been a misuse of the applicants' confidential information in this connection.

[7] Email correspondence that was found on the Buenos Aires office computers included material which suggested that the first respondent, in the course of 'packing up the office', had made or intended to make new files and 'spreadsheets of clients' requirements'. The email to Furlong and Ortuña, in which this intention was conveyed, proceeded:

> 'Need from you the template's (sic) for:-
>
> - Costing sheets

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- COS – you will do COP's in Argentina
- Fax / email logo

I am getting my IT guys to come and wipe off all my information before returning all their equipment'

The content of the emails uncovered in the forensic investigation showed on the face of it that the first respondent had been directly party to the correspondence in many instances, either as sender or addressee, and demonstrated her direct involvement in assisting with and furthering the establishment and business of the second respondent.

[8] The applicants instituted motion proceedings in which they claimed (i) an Anton Piller order and (ii) interdictory relief directed at prohibiting unlawful competition by the first and second respondents using the applicants' 'confidential information'. Relief was also sought against the third respondent, as an alleged joint wrongdoer in the acts of unlawful competition alleged by the applicants.

The Anton Piller relief

[9] As ordinarily happens in such matters, the Anton Piller order was sought in an application to a judge in chambers, without notice to the affected respondents. The claim that the applicants alleged that they intended to institute against the first and second respondents, against whom they sought the Anton Piller relief, was described in a somewhat non-committal fashion in the founding affidavit. The action that was in fact later instituted was one for damages for lost

corporate opportunities, and I have therefore assumed that to be the claim that the deponent to the founding affidavit sought to identify in the founding affidavit as the cause of action in respect of which Anton Piller relief was sought. In paragraph 11 of the founding affidavit the deponent confirmed that the purpose of the Anton Piller application was to preserve and protect evidence in the claim that the applicants sought to prosecute. The application was brought as a matter of alleged urgency in terms of rule 6(12).

[10] The purpose of the Anton Piller procedure is to secure the preservation of evidence in proceedings already instituted, or to be instituted by the applicant.[2] In *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam, Maphanga v Officer Commanding, SA Police Murder & Robbery Unit, Pietermaritzburg* 1995 (4) SA 1 (A); [1995] 2 All SA 300 (A) , at 15H-I (SALR), the Appellate Division set out the essential requirements for the establishment of Anton Piller relief. These requirements were stated by Corbett CJ as follows:

> '…what an applicant for such an order, obtained in camera and without notice to the respondent, must *prima facie* establish, is the following:
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> (1) That he, the applicant, has a cause of action against the respondent which he intends to pursue;
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> (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
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> (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.'

[2] See e.g. *Van Niekerk and Another v Van Niekerk and Another* 2008 (1) SA 76 (SCA) at para. [10].

[11] The Anton Piller procedure was not part of the common law.[3] It has been adopted by the superior courts in South Africa in the exercise by the courts of their inherent jurisdiction to regulate their own process in the interests of justice, having regard to 'modern problems in the prosecution of commercial suits'.[4] (The continued existence of that inherent jurisdiction in the constitutional era is confirmed in the provisions of s 173 of the Constitution.) It is a procedure which has draconian and extremely invasive consequences for the respondents who are made subject to it. Its use has been described, in my view with justification, as an example of the outer-extreme of judicial power.[5] The implementation of the search leg of an Anton Piller order is a most manifest intrusion on the subject's right to privacy under s 14 of the Bill of Rights, especially when the search occurs at the subject's home. A limitation of that right can lawfully occur only to the extent permitted in terms of s 36 of the Constitution, which provides:

> '**36 Limitation of rights**
>
> (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and

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[3] See *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam, Maphanga v Officer Commanding, SA Police Murder & Robbery Unit, Pietermaritzburg* 1995 (4) SA 1 (A) at 8G, with reference to the discussion in *Universal City Studios Inc and Others v Network Video (Pty) Ltd* 1986 (2) SA 734 (A) at 754E-F of the observation to that effect by van Dijkhorst J in *Cerebos Food Corporation Ltd v Diverse Foods SA (Pty) Ltd and Another* 1984 (4) SA 149 (T).

[4] See *Universal City Studios Inc and Others v Network Video (Pty) Ltd* 1986 (2) SA 734 (A) at 754E.

[5] See the reference by Conradie AJ (as he then was) in *Petre & Madco (Pty) Ltd t/a T-Chem v C Sanderson-Kasner and Others* 1984 (3) SA 850 (W) at 855A - E to Ormrod LJ's remarks in the latter's short judgment concurring with that of Lord Denning MR in *Anton Piller KG v Manufacturing Processors Ltd and Others* [1976] 1 All ER 779 (CA); see also *Frangos v CorpCapital Ltd* 2004 (2) SA 643 (T) ([2004] 2 All SA 146) at 654C-F (SALR). First respondent's counsel drew attention to the description by Hoffmann J (as he then was) of the grant of such an order in respect of domestic premises as being at 'the absolute extremity of the court's powers' (*Lock International plc v Beswick and Others* [1989] 1 WLR 1268 (Ch) at 1281).

democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.'

[12] It seems well established that the Anton Piller procedure is one that is reasonable and justifiable in an open and democratic society based on human dignity equality and freedom. The sobriquet 'Anton Piller' derives from the English Court of Appeal's decision in *Anton Piller KG v Manufacturing Processes Ltd & Ors* [1976] 1 All ER 779, [1976] Ch 55. In England the procedure was also introduced in the exercise by the court of its inherent jurisdiction to regulate its own process.[6] Although the United Kingdom does not have its own Bill of Rights, it is a signatory to the European Convention on Human Rights and has given statutory effect to the provisions of the Convention in the Human Rights Act, 1998 (c 42). The Anton Piller procedure in the English context was subject to an unsuccessful challenge before the European Court for Human Rights in *Chappell v The United Kingdom* [1989] ECHR 4; (1990) 12 EHRR 1.

[13] In *Chappell* the applicant, who had been the subject of an Anton Piller procedure, alleged that its implementation had infringed his rights in terms of

[6] The Anton Piller procedure in England and Wales is now provided for by statute, in terms of s 7 of the Civil Procedure Act, 1997.

Article 8 of the ECHR, which in material respects entrenches the rights to privacy entrenched by s 14 of the South African Bill of Rights. Article 8 of the Convention (which in paragraph 2 contains its own limitation provision analogous to that in s 36 of the South African Constitution) provides:

> '1 Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

[14] It is unnecessary to describe the detail of the *Chappell* case. Suffice it to say that the judgment of the European Court describes the English procedure in a manner that makes it clear that it was treated by that court as a procedure equivalent in all its material characteristics to that adopted and applied in this country. It is also relevant to record that the application for and implementation of the procedural remedy in *Chappell* had not in all respects been compliant with the established strict juristic requirements of the court, or the terms of the order granted. The identified defects had nevertheless been held by the English courts to be insufficient to warrant the discharge of the order. In its consideration of whether the procedure was 'necessary in a democratic society…' (within the meaning of Article 8 of the Convention, quoted above), the European Court decided the issue on an assessment of the proportionality of the means the procedure provided to achieve what was accepted to be a legitimate aim against the measure of the resultant infringement of the affected basic human right . The careful safeguards against abuse and excess which characterised the procedure

- the particulars of the order granted being determined in each matter by the judge in his or her discretion, albeit with regard to identified norms[7] - persuaded

[7] At para.s 11-12 of its judgment, the European Court stated in this regard:

'*Over the years, the principles governing the grant and the terms of these orders have been restated and refined in numerous judgments.*

12. An Anton Piller order will normally contain restrictive or mandatory injunctions:

(a) prohibiting the defendant from dealing with materials that are the subject of the action (for example, "pirate" – that is, unlicensed or unauthorized – video tapes);

(b) requiring the defendant to disclose to the person serving the order the whereabouts of all such materials and details of suppliers and customers, and to deliver up the materials to the plaintiff;

(c) requiring the defendant to make within a specified time-limit an affidavit containing all the information to be disclosed by him under the order;

(d) requiring the defendant to permit the plaintiff to enter specified premises for the purpose of searching for and removing specified items.

As regards this last injunction, the court will confine the items specified to documents and materials directly relating to the action. It will also restrict the time of entry (commonly from 9 a.m. to 6 p.m. on weekdays) and the number of persons who are to be permitted to enter (very rarely more than four or five). The latter will include the plaintiff's solicitor, who is an officer of the court (see paragraph 17 in fine below).'

At para. 17, the Court continued:

'*…the court will nevertheless accede to the application only on terms which will be incorporated in its written order, in the form of undertakings given to the court. These are designed to protect the position of the absent defendant, counsel for the plaintiff being under a duty to ensure that the order contains all proper safeguards for this purpose. The court determines in its discretion what undertakings are to be given, there being no invariable rules or practice in this respect. Examples are the following, item (a) being found in all, and items (b), (c) (i) and (c) (ii) in most cases:*

(a) an undertaking by the plaintiff to pay to the defendant any damages sustained by him as a result of the making of the order;

(b) an undertaking by the plaintiff that the order and other relevant documents, such as the affidavit evidence underlying it, the writ instituting the proceedings and the notice of the next hearing, will be served on the defendant by the plaintiff's solicitors;

(c) undertakings by those solicitors:

(i) to offer to explain to the person served, fairly and in everyday language, the meaning and effect of the order, and to inform him that he has the right to obtain legal advice before complying with the order or parts thereof, provided such advice is obtained forthwith;

(ii) to retain in their custody any items taken by or delivered to them pursuant to the order;

(iii) to answer any question from the defendant as to whether an item is within the scope of the order;

(iv) to prepare, before their removal from the premises, a list of the items taken;

(v) to use any information or document obtained under the order only in connection with the civil proceedings in question;

(vi) to ensure that the exercise of rights under the order remains at all times under the control of a solicitor.

The significance of the intervention of a solicitor in this procedure and in the undertakings given is that solicitors are officers of the Supreme Court and, as such, subject to its inherent jurisdiction in disciplinary matters. A failure by a solicitor to comply fully with an undertaking given by him personally to the court in his professional capacity will render him liable to summary proceedings for contempt of court with a potential sanction of imprisonment, a fine or an order to pay compensation or costs. It will also constitute

the court that the procedure satisfied the part of the legality threshold that it be a necessary intrusion on the right to privacy in a democratic society.

[15] Anton Piller orders are granted by the courts in Australia,[8] New Zealand,[9] Canada[10] and India[11], amongst many others, in essentially the same way as in England and South Africa, and subject to similar requirements and safeguards. In most of the jurisdictions in which I have sought comparative references, Anton Piller relief is now regulated either by statute or rules of court.

[16] As far as I am aware it has never expressly been considered whether the Anton Piller remedy, being a procedure not provided for in the common law, or by statute or the rules of court, and having been developed by the court in the exercise of its inherent jurisdiction to regulate its own process, qualifies as 'law of general application' within the meaning of s 36 of the Constitution. The issue was, however, considered in a closely analogous context by the European Court in *Chappell*. That court accepted that the procedure developed by the English courts had become subsumed as part of the law of England and Wales. In this regard the Court approached the matter on the basis of Mr Chappell's contention

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professional misconduct, punishable in professional disciplinary proceedings by striking off the roll, suspension from practice or a financial penalty.'

[8] For recent examples see *Visy Board Pty Ltd & Ors v D'Souza & Ors (No 3)* [2008] VSC 572 (18 December 2008) at para. 1; *Metso Minerals v Kalra* [2007] FCA 2093; *Pathways Employment Services v West* [2004] NSWSC 903; (2004) 212 ALR 140; 186 FLR 330. They are now called 'search and seizure orders' in that jurisdiction. The procedure is in general now governed by the rules of the various courts in Australia.

[9] See Part 33 of the New Zealand High Court Rules in schedule 2 to the Judicature (High Court Rules) Amendment Act 2008 (New Zealand).

[10] See Jeff Berryman *Recent Developments in the Law of Equitable Remedies: What Canada Can Do For You*, a paper presented at the New Zealand Centre for Public Law, Victoria University of Wellington, on 1 August 2001; published in the Victoria University of Wellington Law Review ([2002] VUWLRev 3).

[11] See *Taj Television & Anr. v. Mahalakshmi Communications & Ors* Suit 242 of 2004.

that the procedure was entirely a judicial creation and accepting, for the purpose of deciding the matter, that it had no basis in statute or the rules of court, as had been contended by the UK Government's counsel.

[17] In dismissing the argument that the remedy was not in accordance with a 'law' in the proper sense of the word, the court held (at para. 56) '…*the relevant texts and case-law were all published, so clearly no problem arises concerning the law's "accessibility", as that expression is understood in the Court's earlier judgments. As regards "foreseeability", as likewise understood, the applicant maintained that the granting of Anton Piller orders and, in particular, their terms were largely matters of discretionary practice and that the state of the law was too "amorphous" for it to constitute "law" for the purposes of paragraph 2 of Article 8 (art. 8-2). The Court does not share this view. Since 1974 a substantial body of case-law has restated and refined the principles followed by the English courts as regards Anton Piller orders (see paragraphs 10-24 above). It is true that some variations may occur as between the content of individual orders. Nevertheless, the basic terms and conditions for the grant of this relief were, at the relevant time, laid down with sufficient precision for the "foreseeability" criterion to be regarded as satisfied*'.

[18] There was no challenge in the current matter to the constitutionality of the court's jurisdiction to make Anton Piller orders; rightly so in my view. Allowing for the difference in the language of the respective provisions, I consider that the analysis by the European Court in *Chappell* on this issue to be of equivalent

pertinence in the context of the application of s 36(1) of the Constitution.[12] I have considered it appropriate to deal in some detail with the issue of constitutionality because it bears on the degree of rigour which I believe it is incumbent on the courts to apply when it comes to deciding whether to make or confirm orders sought or granted in terms of the procedure.[13] The corollary of the conclusion that Anton Piller orders are made in terms of 'law of general application', within the meaning of s 36(1) of the Constitution, is that such orders are competent only when they comply with the requirements of the postulated law. The fact that the decisions to grant or confirm such orders are made in the exercise of judicial discretion should not obfuscate the fact that, notwithstanding that the law in issue is judge-made,[14] such discretion is subject to the underlying constraints of legality, and therefore by no means an unfettered one.

[19] This matter comes before me in accordance with the practice that Anton Piller orders granted *ex parte* are reconsidered after their execution, and with the opportunity of hearing the respondent. This feature of the remedy demonstrates the provisional nature of Anton Piller orders.[15]

[20] One of the first respondent's complaints is that the breadth of the order obtained by the applicants was unduly wide. The effect of this, so it was

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[12] Cf. *President of the RSA v Hugo* 1997 (4) SA 1 (CC) (1997 (1) SACR 567; 1997 (6) BCLR 708) at para.s [95]-[102].
[13] Cf. *Memory Institute SA CC t/a SA Memory Institute v Hansen and others* 2004 (2) SA 630 (SCA) at para.s [3] and [10].
[14] See *Universal City Studios Inc and Others v Network Video (Pty) Ltd* 1986 (2) SA 734 (A) at 754G-755G.
[15] Cf. *Pretoria Portland Cement Co Ltd v Competition Commission* 2003 (2) SA 385 (SCA) at para.s [44]-[47].

contended, was that the procedure was utilised by the applicants in effect as a fishing expedition. The impermissibility of the use of the procedure to enable searches to be undertaken to look for evidence to identify or found a case, as distinct from the preservation of vitally needed evidence for use in an already identified claim is fundamental. The strict limitation of the use of the procedure to the preservation of evidence, as distinct from, say, a search for evidence (the so-called fishing expedition), is a feature that is essential to the legality of the procedure within the requirements of s 36(1) of the Constitution.[16] An application for authority to search for evidence in the nature of a fishing expedition should flounder at the first hurdle for want of compliance with the specificity requirement mentioned as the second of the three essential requirements for the grant of an Anton Piller order in *Shoba*, quoted in paragraph [10], above.[17] The specificity requirement is a material factor in accepting that the limitation of basic rights inherent in the Anton Piller procedure is reasonable and justifiable as required by s 36(1) of the Constitution.

[21] The order made in this case authorised a search at the first respondent's office and home for the documentary material described in annexure A to the order. Annexure A to the order went as follows:

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[16] Cf. also *Universal City Studios Inc and Others v Network Video (Pty) Ltd* 1986 (2) SA 734 (A) at 755H-J.

[17] In *The MV "Urgup": The Owners of the MV "Urgup" v Western Bulk Carriers (Australia) (Pty) Ltd* 1999 (3) SA 500 (C) at 508 I, Thring J expressed, aptly, in my respectful view, albeit *obiter*, the requirement thus: *The object of an Anton Piller order is not to sanction a search for evidence which may or may not exist and which may or may not go to found a cause of action, but to preserve specific evidence which is known to exist, which* prima facie *constitutes vital substantiation of a known cause of action, and whose concealment, loss or destruction is feared by the applicant for the order*.'

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SCHEDULE

1. All and any lists, spreadsheets or other documents recording and/or reflecting all and any details of the applicants' suppliers.

2. All and any lists, spreadsheets or other documents recording and/or reflecting all and any details of the applicants' customers.

3. All and any lists, spreadsheets or other documents recording and/or reflecting all and any details of the second respondent's suppliers.

4. All and any lists, spreadsheets or other documents recording and/or reflecting all and any details of the second respondent's customers.

5. All and any emails, letters, faxes or other written documentation recording and/or reflecting all and any communications between the applicants or either one of them, the first respondent and/or the second respondent with any of: -

   5.1 the applicants' suppliers;

   5.2 the applicants' customers;

   5.3 the second respondent's suppliers; and/or

   5.4 the second respondent's customers.

6. All and any emails, letters, faxes or other written documentation recording and/or reflecting all and any communications between the first respondent and/or the second respondent and any/or all of Messrs Furlong, Ortuno and De Groot.

7. All and any invoices, waybills, receipts, electronic fund transfers, delivery notes, shipping documents and/or other similar documentation recording and reflecting the transaction of business between the applicants or either one of them, the first respondent and/or the second respondent with any of: -

   7.1 the applicants' suppliers.

   7.2 the applicants' customers;

   7.3 the second respondent's suppliers; and/or

   7.4 the second respondent's customers.

8. All and any contracts concluded between the first and/or second respondent and the applicants' suppliers and/or customers and/or the second respondent's suppliers and/or customers.

9. All and any company or close corporation documentation in relation to the second respondent, including but not limited to: -

   9.1 any pre-incorporation contracts or agreements;

   9.2 its memorandum and articles of association;

   9.3 any association and/or shareholder and/or membership agreements;

   9.4 relevant extracts from CIPRO.

[22] There is, in my judgment, considerable cogency in the first respondent's complaint that the content of annexure A ranged too wide. I find it impossible to conceive that lists, spreadsheets or other documents recording and/or reflecting all and any details of the applicants' suppliers or customers were material – even less, 'vital' - to the claims that the applicants indicated it was their intention to institute based on the alleged misappropriation of corporate opportunities. The interdict application to prohibit the misappropriation of confidential information was already pending, having been instituted simultaneously with, and in the same notice of motion, as the Anton Piller proceedings. There was no indication given in the interdict application papers of any desire by the applicants to obtain discovery – in any event an exceptional procedure in motion proceedings, requiring the leave of the court - and the opportunity to supplement their founding papers on the basis of any such discovery. The first respondent was at the time of the execution of the Anton Piller search an executive director of the second applicant and it would be neither surprising, nor in any way untoward were she to be found in possession of such lists or spreadsheets. Why it should be necessary or important to preserve them for the trial of the applicants' intended claim for damages for lost corporate opportunities is nowhere explained in the

founding papers. The only lists and spreadsheets of relevance on the basis of the founding papers that might have been found would, in the context of the indication given in the email the applicants had in their possession in which the first respondent stated her intention to make copies to retain after the effective termination of her employment, be such as by their nature could be established to have been recently made. Even those would be relevant only to support the interdictory relief sought by the applicants and, on the material which the applicants already had, could hardly be categorised as being vitally important to their claim.

[23] It is also unexplained why lists of the second respondent's suppliers and customers in the first respondent's possession would be necessary evidence in the intended action for lost corporate opportunities. There is also no, or insufficient, basis in the founding papers as to the likely existence of such lists or spreadsheets, or of the need to preserve them.

[24] Paragraph 5 of the schedule to the order is also extremely widely framed. It covers a breadth of material of either no, or only tangential, relevance to the claim the applicants averred they intended to advance. Likewise, the material described in paragraph 6 of the schedule to the order is of an ambit far wider than what would necessarily be relevant or important in the action for lost corporate opportunities. There is moreover a range of matters relating to the first respondent's admitted intention to involve herself in the business of the second respondent that could quite feasibly have been addressed confidentially in

correspondence between herself and Messrs Furlong and Ortuño with no bearing whatsoever on the applicants' claim against the first respondent for damages for lost business opportunities.[18] The same observation can be made about the wide ambit of material described in paragraph 7 of the schedule to the order. I also fail to understand how the documentation referred to in paragraph 9 of the schedule is in any way important, never mind 'vital', to the applicants' damages claim for lost corporate opportunities. One looks in vain in the founding papers for an explanation. Indeed it is apparent on a careful reading thereof that the applicants failed, other than by bland reference to the list quoted in paragraph [21], above, to identify specific evidence in their founding affidavit vital to their claim which required preservation by an Anton Piller order.

[25] The inappropriately widely cast net included in the material described in the schedule to the order resulted in the search authorised by the order granted by the application judge being, in my view, in the nature of an impermissible fishing expedition. It failed materially to comply with the requirements of specificity and central relevance contained in the second of the three requirements described in *Shoba*.[19] Save in regard to paragraph 6 of the schedule, and then only to a limited degree, the applicants' counsel did not concede that the schedule was subject to the criticism to which I have subjected

[18] There would be nothing exceptionable about the first respondent corresponding with Furlong and Ortuño in respect of any number of matters preparatory to her joining them in business after the effective termination of employment with the second applicant; cf *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 (2) SA 173 (T) at 198 fin-199C.

[19] Cf. *Roamer Watch Co SA and Another v African Textile Distributors also t/a MK Patel Wholesale Merchants and Direct Importers* 1980 (2) SA 254 (W) at 273C-G; *Sun World International Inc v Unifruco Ltd* 1998 (3) SA 151 (C) at 174D-F and *Audio Vehicle Systems v Whitfield and Another* 2007 (1) SA 434 (C) at para. [22].

it. They submitted in the alternative that if the court nevertheless held that its content was indeed too wide, the appropriate course at the return date stage would be to trim its breadth, rather than to discharge the order. Counsel submitted that in any event much of the material described in the schedule was 'proprietary to the applicants'. I shall return to this argument presently.

[26] The first respondent also alleged that the service of the order was defective; in particular she alleges that annexure A to the order (the schedule particularising the subject matter of the authorised search and seizure operation) was not drawn to her attention. In my view this allegation does not bear scrutiny.

[27] The service and execution of the Anton Piller order occurred, as is the practice, in the presence of a supervising attorney, being an officer of the court with no connection with the applicants and with no interest in the merits of the dispute. The requirement that there be an independent supervising attorney is one of the in-built protections against abuse of the Anton Piller procedure and is intended to afford a measure of protection to the party who is subject to the invasiveness of a search and seizure order. In the discharge of his/her functions in the Anton Piller procedure a supervising attorney acts solely in the capacity of an officer of the court; and is required to account to the court by way of report. In the current case the supervising attorney was a senior practitioner with 22 years' experience as a litigating attorney, who happened at the time of the hearing before me to be serving as an acting judge of this court.

[28] Annexure A is expressly referred to in paragraph 3 of the notice of motion and in paragraph 2 of the Anton Piller order. Other paragraphs in the notice of motion and the order mentioned '*the listed items*'. It is only by reference to annexure A that the notice of motion identifies the so-called 'listed items', being the articles to be searched for and removed. The notice to respondent which, in terms of the applicable practice note, is required, together with the notice of motion, to be served on a respondent in an Anton Piller order expressly indicated that the search party was authorised by the order to 'search for, examine and remove or copy the articles *specified in the order*'. It is not in issue that the supervising attorney read the notice of motion and the notice to respondent to the first respondent. This would have alerted both of them to the existence of annexure A. The exercise of reading the documents would have been noticeably nonsensical without reference to the annexure. It is also inherently most improbable that the supervising attorney would not have in any event indicated in the course of his explanation to the first respondent what the subject matter of the search comprehended, or that the first respondent would have consented to the search proceeding without enquiring and being informed what it was that was sought. In this regard, although one may accept that the first respondent would have been surprised, and no doubt somewhat flustered by the unexpected intrusion into the privacy of her home, the search did not commence until about three quarters of an hour after the arrival of the search party because of the delay attendant on the first respondent's initial endeavours to obtain the

presence of an attorney to represent her. The first respondent therefore had a considerable time to reflect on the object of the search before it commenced.

[29] The sheriff, who is also an officer of the court with no personal interest in the matter, has made an affidavit confirming that annexure A to the notice of motion was served by him on the first respondent. An attorney from the supervising attorney's office who accompanied the search party to provide a female presence, having regard to the first respondent's gender, has also made an affidavit confirming that the first respondent's attention was drawn to annexure A.

[30] In the circumstances I reject the first respondent's allegation that she was unaware of the content of annexure A to the notice of motion before the search occurred.

[31] The search party authorised by the court to undertake or be present during the search and seizure operation first attended at the first respondent's office in Camden Street, and when being informed by a domestic worker there that the first respondent was not present and probably at her place of residence, it then proceeded to the first respondent's apartment, where the first part of the search operation was carried out. It was only after the completion of the search at the first respondent's apartment that the search party, accompanied by the first respondent herself, returned to the premises where the office was situated and, in the presence of an attorney who had by that stage agreed to represent the first respondent, carried out a further search.

[32] Paragraph 2 of the notice to the respondent served on the first respondent in accordance with the requirements of the applicable practice note stated, insofar as relevant:

> 'When these documents are handed to you, you are entitled, if you are an employee of the respondents or either one of them or in charge of the premises, to contact the respondents or either one of them immediately and you or the respondents or either one of them are entitled to contact an attorney and have him/her come to the premises to advise you. The attorney must be called and must arrive without delay, and the supervising attorney must inform you as to how long the search can be delayed so as to have the attorney present….'

The first respondent contends that the service of the order was not compliant with the provisions of this paragraph because the domestic worker at the office was not afforded the opportunity to contact her. There is no merit in this contention. The provisions of paragraph 2 of the notice would have applied only in the event of the search party having sought to carry out the search at the office in the first respondent's absence. That did not happen.

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[33] Finally, the first respondent contended that the Anton Piller order should be discharged by reason of the failure by the applicants to make full disclosure in the founding papers. It is trite that there is a duty on applicant which applies for relief *ex parte* in circumstances in which notice would ordinarily be given to the affected respondents to make full disclosure of any facts that might, not would, affect the decision of the court whether or not to grant relief.[20] The first respondent alleges that the applicants were remiss in failing to draw attention in

[20] See *Frangos v CorpCapital Ltd* 2004 (2) SA 643 (T) ([2004] 2 All SA 146) at 649C-E (SALR) for an iteration of the principle in the context of applications for Anton Piller orders.

their founding affidavits to the fact that she had openly informed them of her intention to remain in the frozen meat industry after the termination of her employment and that she had arranged to meet the managing director of the first applicant in Melbourne, Australia, in early November 2009 to discuss the handover of management of the applicants' operation in South Africa and possible future business cooperation between the first respondent and the applicants. The first respondent's complaint is not persuasive. The disclosure of the information referred to is unlikely in my view to have influenced the determination of the Anton Piller application at its first stage. The email correspondence to which the first respondent was a party at annexures 56 to 74 to the forensic report obtained by the first applicant on the analysis of the computers from the Argentine office painted a clear picture of the first respondent's involvement in trading by FOB in a manner *prima facie* inconsistent with her fiduciary duties to the applicants. The indication that she had arranged to meet to discuss a future business relationship after the termination of her employment would not detract from this indication of already incurred delictual liability. It also would not have detracted from the case made out in the founding papers of an incentive by the first respondent to conceal the evidence of such wrongdoing. A difficult judgment call often falls to be made in drawing founding papers in applications brought without notice to the respondent. While it is true that they should be drawn erring on the side of greater, rather lesser, disclosure, I find myself in agreement with the submission by the applicants' counsel that the evidence which the first respondent says should have been disclosed was not

material in the relevant sense. I am not satisfied that the application judge might have decided the matter differently had the evidence been included in the founding affidavit.

[34] Accordingly, it is only in respect of the ambit of the order being too wide that a decision must be made as to whether on that account it must be discharged. It will be recalled that one leg of the applicants' counsels' argument on this issue was that the wideness of the ambit was excusable because of the applicants' alleged proprietary interest in much of the material described in the schedule. I am not convinced that the argument bears close analysis, but assuming for present purposes the soundness of counsels' characterisation of the matter described in the schedule as proprietary to the applicant, it does not follow that an Anton Piller order of the ambit obtained was properly sought or granted. Indeed the argument suggests a misunderstanding of the nature and ambit of the Anton Piller remedy. The *sole* purpose of the Anton Piller procedure is the preservation of evidence; it is not a substitute for possessory or proprietary claims (*Memory Institute SA CC t/a SA Memory Institute v Hansen and others* 2004 (2) SA 633 (SCA) at para. [3].)

[35] In *Audio Vehicle Systems v Whitfield and Another* 2007 (1) SA 434 (C) at para. [21], Bozalek J noted that *'[W]ilfulness or mala fides need not be present to result in the discharge of a rule nisi where the original order was too widely framed*.' I agree; as a matter of policy and as a matter of law. 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) at 379E-380B (SALR)). 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.[21] I reiterate that, in my view, the ambit of the court's discretion to overlook or condone non-compliance and irregularity in relation to

[21] Cf *Memory Institute SA CC t/a SA Memory Institute v Hansen and others* 2004 (2) SA 633 (SCA) at para. [3]. In the course of my preparation of this judgment I came across a note suggesting that the practice in some Canadian courts requires that save in cases of special urgency, the application judge before whom an Anton Piller application is brought in chambers must be afforded at least 48 hours to consider the matter before an order is sought. In my view such a practice would be a salutary means to reduce the likelihood of inappropriately framed orders being given.

the Anton Piller order is in any event limited in law because it cannot be exercised to purport to belatedly lend validity to an order granted outside the constraints of the applicable law.

[36] I have nevertheless given consideration to applicants' counsels' request that I should 'trim down' the order to address any overreach in the initially granted relief. In this regard it weighed with me that, with greater attention to the need for the relief to be as narrowly formulated as practical, and with more diligent compliance with the requirement to explain the materiality of the evidence sought to be preserved, the applicants might have been entitled to some, albeit differently framed, relief in terms of the Anton Piller procedure. It also weighed with me that on the basis that recognition of an entitlement by the applicants to Anton Piller relief, albeit on a much narrower basis than that granted, a justifiable invasion of the first respondent's privacy could have resulted, and that it would have occurred in a way not materially different from that which happened in terms of the impermissibly wide order that was obtained. A further consideration that could weigh in favour of condoning the initial non-compliance, subject to a confirmation of the order in restricted terms, is the fact that the applicants did not, at least directly through the Anton Piller order - as distinct from an access order obtained in subsequent proceedings, with which I shall deal later in this judgment - obtain access to any material seized in the search, and that to that extent the first respondent's privacy therefore remains intact and susceptible to protection by a partial discharge of the order. There is furthermore no indication that the

applicants or their representatives acted *mala fide* in seeking or implementing the order.

[37] Against these considerations it is undesirable, as a matter of policy, that the ambit of Anton Piller orders should be materially settled on reconsideration, after the execution of orders initially taken *ex parte* and in chambers in an unjustifiably wide form. I have been impelled to the conclusion, for the reasons discussed earlier, that orders initially taken in a materially non-compliant form are indeed unlawfully obtained; and that they are therefore not susceptible to confirmation on reconsideration. I have emphasised that the scope for the exercise of judicial discretion to condone and appropriately deal with non-compliance with the requirements of the applicable procedural law in a manner short of discharging the order can occur competently 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. In the circumstances I have found that the Anton Piller order must be discharged.

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[38] The discharge of the Anton Piller order will not however result, as would ordinarily be the case, in the release to the first respondent of all the material seized in the search. This is for two reasons. Firstly because the first applicant, by separate application brought on notice to the first respondent, obtained an order for the release to it of an image of a computer hard drive made as a consequence of the execution of the Anton Piller order. The discharge of the

Anton Piller order obviously does not undo the effect of the release order, which was sought and granted without qualification, and which was not opposed by the first respondent. The second reason is that the first respondent's counsel agreed during the hearing before me that seized material that the first respondent accepted was the property of the applicants could be returned to them. (In this regard it bears recalling that by the time the Anton Piller order came up for reconsideration the first respondent was no longer employed by the second applicant and therefore was no longer entitled to retain possession of the applicants' property against their desire for its return.) During argument the first respondent's counsel did not give me a clear indication of what was comprehended by the first respondent's consent in this respect. Through my registrar I requested a detailed list from counsel, which was thereafter provided to me by the first respondent's attorney. The content of the list provided is set out in the annexure to this judgment referred to in the relevant order. Needless to say the definition of the items that may be released to the applicants in no way derogates from their right to assert, by way of vindicatory proceedings, if so advised, title to any material that the first respondent has chosen to retain.

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Service on the second respondent

[39] Turning now to the interdictory relief sought by the applicants against the first and second respondents. The first respondent denies that she is a member of or part of the second respondent. She also denies that her office address in Camden Street, Cape Town, at which service of the application was ostensibly

effected by the sheriff on the second respondent, is the address of the second respondent. Despite the clear indications in the email exchanges between the first respondent and Messrs Furlong and Ortuño that the first respondent intended to join forces with them under the FOB banner and despite the indications in that correspondence that the first respondent may have been party to securing corporate opportunities for the business conducted by Furlong and Ortuño under the name of FOB, I am not satisfied on the papers that an office of FOB has yet been established in Cape Town, or that the first respondent's office address has been established as FOB's business address in this jurisdiction. I am accordingly not satisfied that service of the interdict application has been effected on the second respondent.

The striking out application by the first respondent based on the impropriety of the employment by the applicants of evidence obtained pursuant to the release of material seized in the execution of the Anton Piller order

[40] In the circumstances I have entertained the interdict application only insofar as it concerns the first respondent. It is necessary in this connection to refer again at the outset to the application brought by the applicant for the release of the computer hard drive information held by the sheriff consequent upon the execution of the Anton Piller order. The applicants discovered certain email correspondence in the hard drive information which they have employed as new matter in their replying affidavits in the interdict application to further support

the relief sought by them. The first respondent has applied to strike out those parts of the replying papers in which this recently obtained material is utilised.

[41] In an application, brought on one week's notice to the first respondent, the applicants sought an order that the sheriff be authorised and directed to advise the applicants' representatives, with reference to the copies of the hard drives described in annexure A4 to the supervising attorney's report in the Anton Piller proceedings, which copy was a copy of the hard drive on the second applicant's laptop previously in the possession of the first respondent; and authorising the applicants' representatives, under the supervision of the sheriff, to make a copy of and take into possession such copy. This application was brought and determined before the return date of the Anton Piller order, which, by agreement between the parties, had been postponed to suit the first respondent's convenience.

[42] The reason given in the founding affidavit in support of this application for extraordinary access to material seized in the execution of an Anton Piller order was that 'the information stored on such hard drive [was] essential to the conduct of the applicants' business in South Africa and the applicants [would] be severely hampered in the conduct of such business should they have to wait for the release of copies of the hard drives (sic) in February 2010 or later'. The affidavit proceeded to describe at some length, and in great detail, various aspects of the applicants' business operation that would be prejudiced if access to the information were not afforded. The founding affidavit also described how the first

respondent had agreed to return the laptop computer containing the information subject to having first removed her 'personal information'. When the laptop was returned it was discovered, however, that all the information on the drive had been indiscriminately removed. (There were allegations that the information had been deleted with a sinister motive. Why that should have been the case is not apparent to me having regard to the fact that first respondent would presumably have been aware that a mirror image of the entire content of the drive was being retained by the sheriff, but nothing turns on that for present purposes.)

[43] The first respondent did not oppose the application; at least not in a conventional way. She contented herself with the filing of a very brief affidavit, which stated in the material part:

> '4. I confirm…, for the reasons set out in the letter marked "Y", that I do not intend opposing the above application, without prejudice to my rights to deal with the contents of the affidavit and the relief sought therein, in due course when I file my opposing affidavit in the Anton Pillar (sic) application and in the main application.
>
> 5. I accordingly abide by the decision of the above Honourable Court in the current application.'

[44] The letter marked 'Y' referred to in the passage from the first respondent's affidavit just quoted had been addressed by the first respondent's attorney in the Anton Piller proceedings to the applicants' attorneys of record. Its most material part advised as follows:

> '3.3 Our client is prepared to consent to an order in terms of prayer 2 of the Notice of Motion, namely that the Sheriff advise yourselves (and ourselves) which of the

hard drives described in annexure "A4" is the laptop hard drive which was previously in the possession of our client.

3.4 Once this laptop has been identified, our client is furthermore prepared to consent to your client obtaining a printout or taking into its possession in some other manner that information contained on the relevant laptop, which falls under schedule "A" to the Anton Pillar (sic) order, and is the property of your clients, and is indeed urgently required by your clients for purposes of their business, and is information which is not otherwise available to them or in their possession.

3.5 Our client would require the making available of this circumscribed information to be done once again under the auspices of the supervising attorney who supervised the execution of the Anton Pillar (sic) order, or some other Court appointed supervising attorney, and in the presence of the writer.

3.6 In this manner we are of the view that strict compliance with the Anton Pillar (sic) order could still be preserved, while at the same time catering for your clients' alleged needs to have access to their information urgently for the purposes of conducting their business….while ensuring that our client's constitutional right to privacy…are recognised…'

[45] It was badly advised of the first respondent not to expressly draw attention in the body of her affidavit to the content of the passage in the annexed letter that I have highlighted above. It is well established that it is undesirable to expect the court or the other litigant to look for the points that a party intends to rely on in annexures to affidavits. The deponent is required to identify in the body of the affidavit what it is in the annexure on which he or she intends to rely. I was advised by the respondent's counsel from the bar that the application for access to the hard drive came before one of the duty judges on the enlisted motion roll during the first week of the December-January recess. It is apparent from the court file that in addition to the 88 pages of paper in the access application, the papers in the Anton Piller application, which appear at that stage to have run to

more than 850 pages, were also placed before the judge. It seems probable from the fact that the order made by the duty judge in accordance with the draft submitted to her, which had been prepared in accordance with the notice of motion, that the learned judge was not astute to the qualifications to which the first respondent, albeit rather ineptly, had sought to indicate any relief granted should have been made subject. I say this because the qualifications subject to which the first respondent elected not to oppose the application for access were eminently appropriate.[22]

[46] The grant of access to the seized material for purposes other than that intended in terms of the Anton Piller remedy should have been approached with considerable circumspection. The obtaining of unrestrained access in the circumstances to the hard drive material undoubtedly occurred in a piggy-backed manner on the Anton Piller order, even if it is accepted, as I do, that the effect was incidental rather than by design. The result demonstrates how amenable to abuse, in the sense of creating consequences outside the limited ambit of the intended procedural relief, the Anton Piller remedy can be if the utmost care is not taken by all concerned, particularly legal practitioners, to avoid these.

[47] The basis given by the applicants for exceptional access outside the ordinary procedure under the Anton Piller process was to obtain information alleged to be essential for the applicants' business to operate. However,

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[22] I was informed in the applicants' supplementary heads of argument that the first respondent was represented by counsel at the hearing of the application, but it is not apparent in the context of the first respondent's 'non-opposition' what counsel's brief was, or what, if any, submissions, he/she presented to the court.

because of an inappropriately unregulated grant of such access on the basis sought by the applicants some of the information has ended up being used for forensic purposes. Had the applicants given any indication in their application for access that they wished to use the information for the purpose for they did employ it in these proceedings, I have little doubt the application would have been granted only on strictly qualified terms. To allow otherwise would significantly depart from the purpose of the Anton Piller procedure, being the preservation of the evidence seized in the search for use in the action which the applicant intended to institute for damages for lost corporate opportunities.

[48] I consider in any event that a proper consideration of the content of the founding affidavit in the access application, assessed with regard to the latter's context in the uncompleted Anton Piller process, shows that the deponent gave the court an implied undertaking by the applicant not to use the information obtained in terms of the order for any other purpose than that for which it was averred to be sought. The effect is that the applicants were not entitled to use the material in the manner in which they did without first obtaining the leave of the court. Compare the line of English judgments, summarised in *Crest Homes plc v Marks* [1987] 1 A.C. 829 ([1987] 2 All E.R.1074 (HL)) at 853-854 (1078 All ER), confirming the rule that a party which obtains documents through discovery from another party should not use them for any collateral or ulterior purpose other than the proper conduct of the action in the course of which discovery was given. (*Crest Homes* concerned a matter in which the plaintiff sought to use in an action documents which had been obtained by it pursuant to

the execution of an Anton Piller order in relation to a different action.). Lord Oliver of Aylmerton, whose speech set out the conclusions of the House of Lords, observed:

> 'The purpose of an Anton Piller order is primarily, the preservation of evidence which might otherwise be removed, destroyed or concealed but it operates, of course, also as an order for discovery in advance of pleadings. It is clearly established and has recently been affirmed in this House that a solicitor who, in the course of discovery in an action, obtains possession of copies of documents belonging to his client's adversary gives an implied undertaking to the court not to use that material nor to allow it to be used for any purpose other than the proper conduct of that action on behalf of his client (see *Home Office –v- Harman* [1982] 1 All ER 532, [1983] 1 A.C. 280). It must not be used for any "collateral or ulterior" purpose, to use the words of Jenkins J. in *Alterskye –v- Scott* [1948] 1 All ER 469, approved and adopted by Lord Diplock in *Harman's case*, p. 302. Thus, for instance, to use a document obtained on discovery in one action as the foundation for a claim in a different and wholly unrelated proceeding would be a clear breach of the implied undertaking: see *Riddick –v- Thames Board Mills Ltd* [1977] QB 881. It has recently been held by Scott J. in *Sybron Corporation –v- Barclays Bank Plc* [1985] Ch 299 – and this must, in my judgment, clearly be right – that the implied undertaking applies not merely to the documents discovered themselves but also to information derived from those documents whether it be embodied in a copy or stored in the mind. But the implied undertaking is one which is given to the court ordering discovery and it is clear and is not disputed by the appellants that it can, in appropriate circumstances, be released or modified by the court.'

The basis of the rule is an implied undertaking to the court to that effect. It is therefore accepted that in appropriate circumstances the court may release the party receiving discovery from its implied undertaking or modify the extent of the undertaking.

[49] The evidence to which the first respondent objects in the replying affidavits cannot be said to have been unlawfully obtained. However, for the reason given,

it was impermissibly employed in support of the application for interdictory relief. The applicants' counsel submitted, however, that, at worst for the applicants, the admission of the evidence should nevertheless be countenanced on the same basis as a court might, in the exercise of its discretion, decide to admit evidence that had been unlawfully obtained (cf. e.g. *Protea Technology and Another v Wainer and Others* 1997 (9) BCLR 1225 (W) ([1997] 3 All SA 594 (W) and *Fedics Group (Pty) Ltd v Matus; Fedics Group (Pty) Ltd v Murphy* 1998 (2) SA 617 (C)). I do not agree. It is not apparent to me what relevance the court's discretion to admit unlawfully obtained evidence is to the admissibility of evidence that was lawfully obtained, but subject to an implied constraint on its use.

[50] The proper enquiry, in my view, is whether it would be appropriate for the court to condone the applicants' failure first to seek the court's permission to use the evidence; in other words whether to grant the required permission *ex post facto*. No doubt the court can in its discretion grant such condonation in an appropriate case, but the underlying principle bound up in what I have chosen to call the deploying party's 'implied undertaking' would be rendered nugatory if condonation were granted in any but an exceptional case. I do not regard this as such a case; on the contrary, I consider that to grant condonation in this matter would be to send entirely the wrong message on important issues incidental to the implementation of Anton Piller orders. A further consideration that weighs against condoning the breach of the implied undertaking is that the documentation which the applicants have employed in their replying affidavits, while they would be discoverable in the pending delictual action for damages for

lost opportunities, would not ordinarily have been so discoverable in the interdict proceedings being prosecuted on motion.

[51] The other basis on which the applicants' counsel argued that the evidence obtained from the hard drive should be admitted was because it was proprietary to the applicants, or information in respect of which the first respondent had in any event been bound to account to the second applicant, as her employer. That might be so; but the constraints applicable as a result of the means of obtaining the evidence are the more pressing consideration in the context that I have just described.

[52] I am acutely conscious that by excluding the evidence, which on the face of it is damning of the first respondent's conduct, I am perhaps allowing what may appear to be procedural formality to stand in the way of getting to the truth of the matters in issue. In my judgment, however, the importance, as a matter of policy, of strictly regulating procedure in regard to Anton Piller orders and matters closely incidental thereto must, as a matter of general principle, prevail. (It should be clear from what I have said earlier that there is no reason why the applicants should not be able to apply, notwithstanding the discharge of the Anton Piller order, for leave to employ the evidence in the pending delictual action, should the first respondent not make discovery thereof in the ordinary course in those proceedings.)

[53] The result is that the first respondent's application to strike out succeeds to the extent to be set out in the order made at the end of this judgment.

Interdictory relief against the first respondent

[54] Returning then to the interdictory relief that is sought. The order was eventually sought[23] in the following terms:

> That the first and second respondents be interdicted and restrained from, in any way, either directly or indirectly, utilising, copying, distributing or in any other way disseminating the applicants' confidential information being:
>
> 1. Lists of the applicants' customers, their contact details and/or their requirements;
> 2. Lists of the applicants' suppliers, their contact details and/or their requirements.

[55] It is well established that, absent an enforceable restraint of trade agreement, it is unexceptionable for an employee after the termination of his/her employment to compete with his/her erstwhile employer and in that regard to utilise the business knowledge and experience gained during the period of the previous employment. The erstwhile employee is also, in general, permitted to canvas business from the customers and connections of the erstwhile employer. The erstwhile employee is not, however, permitted to compete unlawfully with his/her former employer. Using the former employer's confidential information for the purpose of competing in business with him/her would constitute unlawful competition; and the former employer would be entitled to obtain an interdict prohibiting such conduct.

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[23] In terms of a draft order handed up by the applicants' counsel during argument, which in some respects differed from the terms of the relief presaged in the notice of motion.

[56] What is comprehended by 'confidential information' has been discussed in a number of well-known judgments (see e.g. *Dunn and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd* 1968 (1) SA 209 (C); *Meter Systems Holdings Ltd v Venter and Another* 1993 (1) SA 409 (W) at 428-430 and *Van Castricum v Theunissen and Another* 1993 (2) SA 726 (T) at 731-2) and it is therefore not necessary in that regard to go back in this judgment over well-trodden ground. Suffice it to say that lists of customers and suppliers maintained by a business are regarded as proprietary to it, and ordinarily treated as being of a confidential nature in that they are considered to be specially compiled information that any owner of a business would quite reasonably not wish to fall into the hands of a competitor. The taking away in his/her head by an erstwhile employee of information that might be apparent in such list is unexceptionable, but the taking away of the list itself, or even the special committing to memory of the content of the list for the purpose of recreating it for use in competition with the erstwhile employer is regarded as wrongful.

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[57] I am satisfied on the papers that the applicants have established a reasonable apprehension that the first respondent may use their customer and supplier lists for the purposes of competing with them.

[58] I referred in paragraph [6], above, to an email in which the first respondent informed Mr Furlong of her intention to make new files and 'spreadsheets of clients' requirements' in the context of packing up her office in the lead up to her departure from the second applicant's employ. The first respondent denied that

the email in question reflected any intention by her to misappropriate information.

The relevant passage of her answering affidavit went as follows:

"268. To this end I indicated to Furlong that I would need to start packing up the office (Applicants having already informed me that they would be moving the office of second Applicant to new premises in Liesbeeck Park.)

269. The new files I intended making up were for M-Trade [a close corporation of first respondent] to use in its business once it had started trading. These files were intended to provide for M-Trade's business licences, permits, SARS documentation, my registration as an employee of M-Trade etc.

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270. This was done on the expectation that MIL could have accepted my resignation with immediate effect at the time.

271. I thought of doing a spreadsheet of clients' requirements which M-Trade could have used going forward and communicated this intention to Furlong. I however never proceeded with this.

272. I indicated in the e-mail of 1 October 2009 that *"my IT guys"* would be coming to "wipe off" all my information before returning all their equipment (being that of MIL) to them (i.e. to MIL).

273. This was intended to refer to my personal information, such as photographs and private correspondence as well as business information of M-Trade, which was on the lap top and all other computer devices.

274. I point out that I was permitted to use the lap top for personal purposes.

275. After my resignation, I was still under the impression that the Acer lap top (the one I personally used) belonged to me (alternatively M-Trade). I recall that the insurance policy, although a business one, was in my name. This is despite whether or not MIL paid for the premiums of the insurance policy. Having this doubt, I requested from MIL an asset register for the business in South Africa. To date I have not received one.

276. Having resigned, and on the basis that I would be required to hand back my lap top to MIL on termination of my services, (if it was proven that the said lap top was indeed MILs) I intended taking steps to delete my personal information from the lap top, and other computer devices and handing same back to my employer with the employer's information however still on it.

277. This was also not done – as late as 5 November 2009, more than a month after the e-mail was sent, when Applicants obtained and served their Anton Piller order this had still not been done.

278. I asked Furlong for templates for the various documents he would require were M-Trade to do work for him. This was also done on the basis of my not being required to work out the notice period which I had tendered.

279. Once again, this was not proceeded with."

[59] In my judgment the explanation offered by the first respondent does not bear scrutiny and is so untenable that it may safely be rejected on the papers. The correspondence discovered on the computers uplifted from Buenos Aires clearly demonstrates, when read together, the intention of the first respondent to join Furlong and Ortuño in business in competition with the applicants. The correspondence clearly indicates an intention that the parties with whom the individuals concerned had been used to doing business should be persuaded that it would be business as usual, just under a different label. The correspondence also reflects a certain animus by the first respondent against the applicants. I have been left in no doubt that in making or intending to make the files referred to, the first respondent intended to copy or draw on documents and information that the applicants could legitimately regard as confidential and containing information concerning their suppliers and customers.

[60] The first respondent says that she carries much of this information in her head (and I have no reason to doubt her on that score), and that all of it is publically available. But if it were *all* in her head, or readily available, she would have no reason to spend time on the exercise she made mention of in the email.

She also claims that the information with regard to the requirements of suppliers and customers is constantly changing and that anything she might take away with her would be of only ephemeral benefit to her in competing with the applicants. If that is so there is little for her to fear in the effect of an interdict prohibiting her from using the lists in question. It does not detract from the right of the applicants to protect their confidential information to the extent they consider necessary. The opportunity for copying any such information has probably now passed, but the applicants are nevertheless entitled to an interdict framed with regard to the circumstances that obtained when the application for the interdict was instituted (cf. *Philip Morris Inc v Marlboro Shirt Co SA Ltd* 1991 (2) SA 720 (A) at 735B-C).

[61] The first respondent contends that the interdict sought is too widely framed and that it will have the effect of preventing her from exercising her right to compete fairly with the applicants. I disagree. The ambit of the interdict prevents her from competing using the applicants' lists of suppliers and customers and the information appearing on such lists. It does not prohibit her from trading using information carried away in her head in the sense mentioned earlier. I did raise with the applicants' counsel the effectiveness of such an interdict; bearing in mind that the first respondent could quite legitimately trade with customers and suppliers on the lists without reference to the lists, but drawing on her long standing knowledge of and dealing with them during, and even before, her employment by the first, and then latterly, the second applicants. Counsel conceded that difficulties might arise in proving any breach

of the interdict, but pointed out that interdicts in like terms had been awarded in other matters. Counsel submitted that the disincentive presented by the prospect of committal for contempt should a breach of the interdict be proven was reason enough for the applicants to press for the relief sought. I have therefore been persuaded to grant the interdict against the first respondent in the terms sought.

Costs

[62] In view of the mixed success with which the various applications before the court have been prosecuted and opposed, it is desirable that some guidance be given for the assistance of the taxing master in relation to the costs orders that are to be made. In respect of the hearing on 18 February 2010, I consider that it would be reasonable to apportion time spent as to 40 per cent on the Anton Piller order; 40 per cent on the interdict application and 20 per cent on the striking out application. In regard to the preparation of heads of argument, I consider that it would be reasonable to apportion the fees allowed in the same proportions.

[63] In the result the following orders will issue:

(i) The Anton Piller order made on 5 November 2009 is discharged and, subject to the provisions of paragraph (ii) of this order, the Sheriff is directed to return to the first respondent the material seized in the execution of the provisional order.

(ii) Notwithstanding the discharge of the Anton Piller order, the Sheriff is authorised to release to the applicants' attorneys of record those of the items seized in the execution of the Anton Piller order which are listed in annexure A to this judgment.

(iii) It is recorded that the discharge of the Anton Piller order shall not affect the applicants' entitlement to retain the information obtained by them in terms of the order made by this court on 15 December 2009 in the application brought by them under case no. 25726/09, subject thereto that they shall not use such information for any purpose other than for which it was sought in such application without the leave of the court first being sought and obtained.

(iv) The costs incurred by the first respondent in opposing the confirmation of the Anton Piller order are to be paid by the applicants; liability in respect thereof being joint and several, the one paying the other being absolved.

(v) The following paragraphs of the applicants' replying affidavit (deposed to by Peter Houlker) are struck out, with costs:

Para.s 7-8; para. 11; para.s 13-16; para.s 18-34; para.s 36-40; para.s 43-46; para.s 49-58; para.s 60-81; para. 91.3; and para. 132.6.

(vi) The first respondent is interdicted and restrained from utilising, copying, distributing, or in any way disseminating any of the applicants' lists setting out the names of the applicants' customers, the customers' contact details and/or the customers' requirements, or those setting out the names of the applicants' suppliers, the suppliers' contact details and/or the suppliers' requirements.

(vii) The first respondent is ordered to pay the applicants' costs of suit in the interdict application, including the costs of two counsel, where such were employed.

A.G. BINNS-WARD

Judge of the High Court

ANNEXURE A

1.1 Box 1 – Annexure "A1" of the supervising attorney's report

1.1.1. **All items** except for item 2 dealing with:

1.1.1.1. *"travel*

1.1.1.2. *credit card statements*

was personal and will return to MB".

1.2 Box 2 – Annexure "A2" of the supervising attorney's report

1.2.1 **All items contained herein** except the following:

1.2.1.1. Item 12 – *fax dated 26 June 2007 – Merchantile Logistics* (x19 pages);

1.2.1.2. Item 13 – *black business card holder;*

1.2.1.3. Item 18 – *email Fortuno to Monique dated 30 April 2009;*

1.3 Box 2 continued – annexure "A3" of supervising attorney's report

1.3.1. **All items save for**

1.3.2. Item 3 – *hot pink plastic binder containing various invoices;*

1.3.3. Item 4 – *scrap paper retrieved from bin at residence headed "1. laptop";*

1.3.4. Item 5 – *hotmail message Geoff Knight to First Respondent – 18 December 2001;*

1.3.5. Item 6 – *email First Respondent dated 20 December 2001;*

1.3.6. Item 8 – *email Furtuno to First Respondent dated 4 November 2009;*

1.3.7. Item 9 – *email Farrand to First Respondent dated 3 November 2009;*

1.3.8 Item 10 – *letter First Respondent to Geoff Knight dated 30 November 2001.*

1.3.9. Item 12 – *binder M Trade Consultancy for presentation to Mathias International;*

1.3.10. Item 13 – *email dated 20 October 2006;*

1.3.11. Item 14 – *email first Respondent to Farrand – 27 October 2006;*

1.4 Box 3 – annexure "A4" of the supervising attorney's report

1.4.1. **All documents may be returned.**

1.4.2. The copies of the hard drives may be released by the Sheriff after the first respondent has deleted any information thereon considered by her to be personal to her.