Republic of South Africa

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

Case No. 20968/2021

Before: The Hon. Mr Justice Binns-Ward

Date of hearing: 9 May 2022
Date of judgment: 24 May 2022

In the matter between:

CRATOS CAPITAL (PTY) LTD	Applicant
and	
ZIMRI INVESTMENTS CC	First Respondent
HEIN VOGEL	Second Respondent

JUDGMENT

BINNS-WARD J

[1] The applicant successfully applied on an *ex parte* basis for an Anton Piller order directing the respondents or the person on whom the order was served to

allow the Sheriff, the supervising attorney, the applicant's attorney of record, two persons representing the applicant company and two IT experts engaged by the applicant to immediately enter the premises at an address in Burgundy Estate, Cape Town, being the second respondent's place of residence, 'for the purpose of searching for and delivering into the possession of the Sheriff(s) of the Court all documents and articles which are listed in the schedule set out in Annexure AP1 ("the listed items") hereto, or which any of the aforementioned persons believes to be listed items. The order further provided that that '[i]n the event that any of the listed items exist only in computer and/or cellular phone and/or tablet readable form and/or "the cloud" and/or any other digital storage site, the Respondents or the person referred to in paragraph 1 above are ordered to forthwith provide the Sheriff(s) of the Court with effective access to the computers and/or cellular phones and/or tablets, with all necessary passwords, to enable them to be searched, and cause the listed items to be either printed out or devices cloned, a print out and/or cloned devices is to be given to the Sheriff(s) of the Court or displayed on the device screen so that it may be read and copied by him.'

[2] The 'listed items' were set forth in annexure AP1 to the order as follows:

ANNEXURE AP1

1. For the period 1 January 2017 to date of this order:

    1.1 all documents including emails between the first respondent, Cygne Bleu and/or the Second Respondent, either directly or indirectly

    1.2 all correspondence between Cygne Bleu and or the First Respondent and or the Second Respondent and/or Standard Bank and/or the JSE, including any documents to representatives of Standard Bank and/or the JSE; either directly or indirectly

1.3 all emails between Cygne Bleu, and or the First Respondent and or the Second Respondent, and or the JSE and their representatives; either directly or indirectly

1.4 all documentation relating to the current S417 enquiry in respect of Cygne Bleu (Pty.) Ltd. In Liquidation, including, *inter alia*, transcripts of the hearing, voice recordings and all correspondence with any other party relating to such enquiry either directly or indirectly

[3] It was a further term of the order that the applicant had to institute an action against the respondents 'in which the listed items are concerned' within 30 days of the date of the order and that if it failed, without good reason being shown on the return day, to have done so 'the Sheriff(s) of the Court shall be obliged to return all the listed items immediately to the Respondents and, in such event, the Court, in its discretion, shall make such order as it deems meet'. The applicant had not instituted action by the return date fixed in the order, and by the extended return date had done so only against the first respondent. It explained its failure to have done so against the second respondent as being because he was considered to be 'a man of straw'.

[4] The order was executed in circumstances to be described more fully below. A list was made, in the following terms, of the items seized:

'1 x Black external hard drive with serial number xxx (Transcend)
1 x Black transcend external hard drive with serial number xxx
1 x Sony laptop Black with serial number xxx product name xxx
1 x Sony AC adapter 195V with serial number xxx
1 x Companies Act book
1 x Various of documents named Top The Respondent on Four Pages
1 x Various of documents (Emails) Top right reading JSE Re-Value
1 x Document containing email account and the password Zimri Emails. Top reading Code xxx
1 x Various of documents named in left hand Firefox and Nedbank documents
1 x vVarious documents reading to JS

1 x Zimri Investments CC reading general information
1 x Various of documents named mandate entered
1 x Various of documents reading Top Affidavit
2 x Documents containing handwriting
1 x Document file Top reading Government Gazette 29 March 2019
1 x Document reading confidentiality and disclosure.'

[5] The factual background to the order sought was described somewhat incoherently in the supporting affidavit. Fortunately, however, one of the annexures to the affidavit was a copy of an arbitration award by retired Judge FDJ Brand in related proceedings in respect of a claim of over R25,3 million by the Standard Bank of South Africa Ltd against the applicant. The award gives a lucid exposition of the background events, and it is therefore convenient to borrow from it liberally in this judgment for the purpose of setting out the alleged facts.

[6] The applicant was at all material times a trading member of JSE Clear, which is a wholly owned subsidiary and clearing house of the JSE. It traded in derivatives on behalf of its clients on the EDM (previously known as the South African Futures Exchange (SAFEX)). The trading was conducted in terms of a contractual arrangement between the applicant and Standard Bank Clear. Standard Bank Clear is a clearing and trading member of JSE Clear and in respect of its clearing activity acted as an intermediary between the applicant, qua trader, and the JSE.

[7] One of the applicant's clients was Cygne Bleu (Pty) Ltd. Cygne Bleu is alleged in the supporting papers to have been the 'alter ego' of the first respondent in the current application, Zimri Investments CC. The business of the first respondent is alleged to have been conducted by the second respondent from the address at Burgundy Estate at which the Anton Piller search and seizure operation was carried out.

[8] Cygne Bleu had investments in certain derivative instruments. The modus operandi in respect of such investments was that the investor's initial financial commitment when making the investment consisted of a payment known as an 'initial margin'. Depending on movements in the market price of the underlying securities to which the derivative instruments were linked, which were monitored

daily, the investor could be called upon to make additional payments at short notice in response to the ongoing adjustments to the applicable margins determined with regard to assessed risks attached to the derivative instruments in question.

[9] As the arbitrator described:

The relationship between Standard Bank and [the applicant] was regulated in the main by two agreements, a clearing agreement entered into on 3 February 2010 and a service level agreement which was concluded on 6 April 2017. The two agreements were concluded by Standard Bank as a clearing member and the applicant as a trading member with specific reference to the EDM. In these capacities they were linked in the derivative risk management chain of the JSE. All the links in the chain were bound to each other through similar contractual relationships. In this way Standard Bank, as a clearing member, concluded an agreement with the clearing house, JSE Clear, while the applicant concluded a similarly worded agreement with its clients.

The effect of the agreements between the links in the derivative risk management chain is that clearing members undertake to the clearing house that they will maintain margins in respect of every position or contract of any trading member for which they act as clearing member, in accordance with the rules of the JSC and the relevant provisions of section 17 of the Financial Matters Act 19 of 2012. The agreements between the trading members and the clearing members are to the same effect. Trading members undertake to ensure that their clients put up the required margins and that they will make up margins should their clients fall into arrears. The clearing house ultimately guarantees the obligations of the various parties to each other. This ensures the integrity of the market and that an investor trading on the EDM will know for certain that his or her contract will be performed in full. The fact that the clearing members are all major banks, substantially enhances the value of the guarantee.

The clearing and settlement of derivatives present unique risks when compared with other securities. One of the measures employed by JSE Clear to manage these risks is through the forementioned system of margins. These are aimed to ensure that

there are sufficient financial resources to honour derivative trades. At the end of every business day derivative contracts are revalued by JSE Clear through a process called marking-to-market. Depending on the direction of the mark-to-market, the investor's margin is either debited or credited. This is known as a 'variation margin' as distinct from the 'initial margin'.

Variation margins are determined through the mark-to-market process by JSE Clear after the end of every business day. The clearing member is then bound to the clearing house (ie JSE Clear) to pay all debit margins pertaining to the clients of its trading members by no later than 7:00 a.m., ie before the market opens the next day. The required amount is paid by the clearing member (in this case Standard Bank Clear) in one globular payment.

Standard Bank Clear then sorts the information received from the clearing house and a reconciliation report is sent to each of the trading members. The trading member, the applicant in this case, is then bound to pay any amount due in accordance with that report in respect of all its clients to Standard Bank Clear noon on that day.

A number of factors affect the pricing of derivatives such as an option. They include the current price of the underlying security, the strike price of the option and the maturity date of the option. These parameters are either fixed or directly observable in the market. The factor most relevant, however, is the measure of risk associated with the option. In market parlance that measure is termed 'volatility'. The higher the volatility, the higher the option premium. The determination of volatility has a subjective element. Thus, in performing the mark-to-market exercise and determining the volatility limits of the options involved. the employees of JSE Clear employ a certain degree of their own subjective evaluation.

On 1 March 2017, the applicant employed Mr Michael Harper, previously an employee of Anglorand. Harper brought with him Cygne Bleu as a client.

On 1 June 2017, the applicant and Cygne Bleu entered into an agreement in terms of which applicant agreed to render trading services to Cygne Bleu. At the time that Cygne Bleu transferred from its previous broker to the applicant, it already had two

positions in SEP19 NPNS put options (as well as two other options that are apparently not relevant to the current matter). The underlying security of the options was Naspers-N-share futures. During September 2017, Naspers unbundled the shares it held in a media company, Novus Holdings Ltd, to its shareholders. As a consequence of the unbundling, the EDM listed new option contracts where the underlying equity instruments were a combination of Naspers-N futures and futures on Novus Holdings. These option contracts were listed on the EDM under the code NNS. JSE Clear employees experienced difficulty from the outset in determining the volatility of NNS options.

The arbitration claim by Standard Bank against the applicant derived from the applicant's failure to provide Standard Bank with payment of additional margins when calls were made on it to do so with reference to Cygne Bleu's trading in NNS options on the EDM. According to the arbitrator's award, the applicant's defences raised in answer to the claim were that Mr Harper and the second respondent in the current matter, together with employees of JSE Clear, had been involved in market manipulation with regard to the aforementioned NNS options and that Standard Bank had been a party to that.

The arbitrator pointed out that the foundation of the applicant's defence in the arbitration was derived mainly with references to, and inferences drawn from, passages in email communications that passed between those directly involved. The arbitrator summarised the evidence concerning the email exchanges starting in March 2018. The email exchanges were between Mr Harper and the second respondent on the one hand, and Mr Mark Randall and Mr Bekithemba Sibanda of the JSE on the other. The import of the emails by Mr Harper and the second respondent evidenced attempts to persuade the two JSE employees to substantially reduce the volatility levels that had been determined by them with reference to the NNS options. They were successful in doing so.

The arbitrator singled out an incident that occurred on 3 April 2018. It started when Mr Harper and the second respondent persuaded Mr Shaun Lanternmans, an employee in the trading division of Standard Bank, referred to as Standard Bank

Trade,[1] to enter into a transaction involving SEP19 NNS options at a volatility level of 21%. At the time, the volatility level of those options had already been fixed by the JSE at 26.5%. On the back of the ensuing transaction, Mr Harper and the second respondent then persuaded the JSE employees to reduce the volatility level of the options from 26.5% to 21%. This, in turn, resulted in a net positive mark-to-market gain on Cygne Bleu's existing SEP19 NNS options of R1 369 900, whereas, prior to the reduction in the volatility level, it would have suffered a net mark-to-market loss of R5 070 400.

An essentially identical incident followed, on 3 May 2018, when the second respondent was again able to persuade the JSE employees to reduce the volatility level of the options involved to 21%. On 4 May 2018 volatility levels of the SEP19 NNS options rose to 26%. This resulted in Standard Bank raising a margin call of R1 489 222 against Cygne Bleu. On the same day Mr Randall emailed the second respondent in response to a telephone call from the letter that the volatility levels of these options had been reduced to the level requested by the second respondent. On the basis of the assurance by Mr Randall, Standard Bank was persuaded to credit Cygne Bleu's account with the amount of the margin call.

On 21 May 2018, Standard Bank again issued a margin call to Cygne Bleu of R2 633 239 000 due to the JSE re-marking the volatility levels upwards. That appeared to have prompted a telephone call from Mr Harper to Mr Sibanda the upshot of which was an email from the latter to the former that '*As per our telephone conversation we have remarked the vols SEP19 21%*'. Mr Harper then forwarded the email to Mr Kylen Green at Standard Bank Clear. Mr Green's response was '*We will fund the R2 633 239 margin call today*'. On the same day Standard Bank then credited Cygne Bleu's call account with that amount.

A pattern developed, which, according to the arbitrator's findings, repeated itself no less than 12 times between May and October 2018. The arbitrator described the pattern as having evolved in the following way: JSE Clear would increase the volatility levels for the NNS options. That would result in a margin call by Standard

[1] Standard Bank conducted both a trading and a clearing business on the EDM.

Bank. Mr Harper and/or the second respondent then telephoned or sent an email to Mr Randall and/or Mr Sibanda urging them to remark the volatility levels. Randall or Sibanda responded with an email that the request had been acceded to. These emails were then forwarded to Standard Bank Clear, mostly Mr Green, who then funded the debit occasioned by the margin call by crediting the call account with the amount of the margin call. The next morning Standard Bank Clear would withdraw the funds from the call account as the variation margin would be paid back to Standard Bank Clear by JSE Clear through the netting of the day's trades and the correction of the volatilities on the relevant account. On occasion the margin calls that were funded overnight in this way were substantial. On one occasion it amounted to R12 million and on another to R17 million.

The practice came to an end when there were trades in SEP 19 NNS options involving other counterparties who insisted that the JSE accurately reflect the volatility measure. Mr Harper had a nervous breakdown and confessed in writing to the directors of the applicant what had been going on. He apologised for any loss that might be suffered by the applicant and expressed the hope that it would be covered by insurance.

Cygne Bleu owed the applicant over R26 million in respect of variation margins for which the applicant had to account on its behalf to Standard Bank Clear. Cygne Bleu failed to pay the applicant and was consequently liquidated at the applicant's instance.

An enquiry into the affairs of Cygne Bleu in terms of ss 417 and 418 of the Companies Act, 1973, was conducted before a commissioner appointed by the Master. The enquiry was conducted at hearings held in Cape Town and Johannesburg during the period 21 April 2021 to 21 October 2021. It was alleged in the supporting affidavit in the current matter that Mr Billy Ausker, the sole director of Cygne Bleu, had admitted at the enquiry that Cygne Bleu was the alter ego of the first respondent and that the second respondent had been the person responsible for its trading and business activities.

According to the applicant, the evidence at the enquiry established that Cygne Bleu, the first respondent and the Vogel Family Trust were entities used by the second respondent's father Dr Hein Vogel to evade the payment of taxes in his personal capacity and to avoid any personal liability with regard to the debts incurred by Cygne Bleu and the first respondent.

The applicant alleged that the corporate personalities of Cygne Bleu and the first respondent were misused by Dr Vogel, with the assistance of the second respondent and Mr Ausker, in an endeavour to protect him from personal liability for the fraudulent trading in derivatives conducted as aforementioned through Cygne Bleu. The applicant indicated its intention to claim from the first respondent and Dr Vogel, as the knowing beneficiaries of the alleged fraud, the amount it had been ordered by the arbitrator to pay to Standard Bank Clear. It is evident from the supporting affidavit that the applicant intends to support its claim by introducing communications between Mr Harper and the second respondent and the employees of Standard Bank and the JSE upon which it relied in its defence in the arbitration proceedings brought against it in the arbitration proceedings.

[10] In terms of the practice in this Division, a notice in the terms set out in Annexure D to the Western Cape Division Practice Notes was served on the second respondent - who was the only person present at the target address - together with the order. The notice is directed at advising the recipient of an Anton Piller order of his or her right to have the search delayed until his or her attorney arrived. In relevant part, it states:

> '1. The order being served on you requires you to allow the persons named there in to enter the premises described in this order and to search for, examine and remove or copy the articles specified in the order. You are also required to hand over any of the specified articles on the premises or under your control to the sheriff.
>
> 2. When these documents are handed to you, you are entitled .... to contact an attorney and have him 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. Until the attorney, if called, arrives or until the time has passed for him to arrive, you need not comply with any part of this order, except that you must allow the supervising attorney, the sheriff and the other persons named in the order to enter the premises and to take such steps as, in the opinion of the supervising attorney, are reasonably necessary to prevent any prejudice to the further execution of this order.'

[11] 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.

[12] The supervising attorney, as he was required to do, duly submitted a report concerning the conduct of the authorised search and seizure exercise. The report indicates that the supervising attorney communicated the nature of the order to the second respondent's attorney over the telephone and proceeds as follows: '[The second respondent's] attorney inquired whether we would be amenable to waiting for her to arrive before commencing with the searching of the premises. I inquired as to the attorney's location as at that specific time, to which she advised that she was in Hout Bay. I advised that it would likely take her at least 30 min, without traffic, to get to the premises and that such a delay would simply serve to defeat the purpose of the order by affording [the second respondent] an opportunity to tamper and/or further destroy evidence. I accordingly, advised that I would not be agreeing to delaying the searching of the premises. I did however advise that I had no issue with her arriving at the premises at her earliest convenience'. The search was therefore commenced without awaiting the second respondent's attorney's arrival.

[13] The second respondent opposes the confirmation of the Anton Piller order. His main grounds for doing so were that the applicant had not made full and proper disclosure of all the relevant facts when making the application for the order *ex parte*

and that the application had failed to comply with the specificity requirement that is an essential element of any application for an Anton Piller order. The second respondent also took issue with the allegations that he had indicated at the enquiry in terms of the Companies Act that he intended to destroy relevant documents and that he had refused to produce documents at the enquiry. He also complained about the inclusion of unnecessarily personal remarks about the tidiness of his house in the supervising attorney's report.

[14] The first mentioned ground of opposition arose from the applicant's failure to expressly point out in the supporting affidavit that the validity or genuineness of the notice by the Master convening the enquiry under the Companies Act was under investigation. The notice in question was an unsigned document bearing the stamp of the Master's Office and purportedly issued during the hard Covid-19 lockdown period. It was followed by a signed document to the same effect as the first document. The signed document was issued approximately a month later. The apparent irregularity attending the issuance of the first-mentioned document was under investigation by the Master at the time the Anton Piller application was brought. Nothing clear appears to have emerged from the Master's investigation, and there is nothing to suggest that the enquiry was not validly convened when the second respondent testified before it. The supporting affidavit did make mention that unspecified allegations of irregularity had been raised concerning the enquiry, but I incline to agree with the second respondent that the application could, and should, have provided greater particularity.

[15] It is well-established that there is a stringent duty of disclosure on applicants who move for relief on an *ex parte* basis. A failure to comply fully with the duty can result in a dismissal of the application irrespective of the merits of the case and the absence of mala fides on the part of the applicant; see *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 348E-350C. The court is, however, vested with a discretion not to rescind an order obtained *ex parte* where there has not been full disclosure. In the current matter it is not manifest that full disclosure of the alleged irregularity would have affected the duty judge's determination of the application and, as there are sound reasons on the merits of the application to rescind the order in any event, I

prefer not to accept the invitation to decide the application on the basis of this somewhat nuanced issue.

[16] In *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam and Another; Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg, and Others* [1995] ZASCA 49, [1995] 2 All SA 300 (SCA), 1995 (4) SA 1 (A), Corbett CJ stated the essential requirements for the obtaining of an Anton Piller order as follows, at 15H-I (SALR):

> 'What an applicant for such an order, obtained in camera and without notice to the respondent, must prima facie establish, is the following:
>
> 1. That he, the applicant, has a cause of action against the respondent which he intends to pursue;
>
> 2. that the respondent has in his possession specific (and specified) documents for things which constitute vital evidence in substantiation of applicant's cause of action (but in respect of which applicant cannot claim a real or personal right); and
>
> 3. that there is a real and well-founded apprehension that this evidence may be hidden or destroyed, or in some manner be spirited away by the time the case comes to trial or to the stage of discovery.'

[17] It has been acknowledged by the courts in this country, and also by those in other free and open societies, that the Anton Piller procedure, which is a judge-made remedy – although it has in more recent times been statutorily regulated in many countries – has draconian and extremely invasive consequences for those on the receiving end of the search and seizure orders that are made under it. Attention is often drawn in that regard to the description of it by Hoffmann J (later Lord Hoffmann), in *Lock International plc v Beswick* [1989] 3 All ER 373 (Ch), as an instance of 'the absolute extremity of the court's powers'. It has nevertheless withstood scrutiny as a procedure that is a justifiable impingement on the basic human rights of privacy and dignity. In other words, in the South African constitutional context, the procedure has passed the test of justifiability stipulated in s 36(1) of the Constitution. But that has been so only because of the body of law established in the judgments that make it clear that courts will apply strict limitations

to ensure that the procedure is used only when absolutely necessary and, even then, strictly to the extent that the case in issue vitally requires.

[18] It is in that connection that the requirement of specificity identified by the learned chief justice in *Shoba* supra, fulfils a vital function. I had occasion to discuss this in *Mathias International Ltd and Another v Baillache and Others* [2010] ZAWCHC 68 (8 March 2010), 2015 (2) SA 357 (WCC), where, in para 20, I noted that '(t)he 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 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. 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*, … . 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.'

[19] In my respectful opinion the application in the current matter is an example of a case that should have floundered at the first hurdle for want of compliance with the specificity requirement. The nature of the documentation subject to seizure in the search in terms of paragraphs 1.1 to 1.3 of annexure AP1 to the order was far too widely stated. It was not even limited to documentation pertaining to trading in the relevant options. It embraced any communications of whatsoever nature between the parties named. Furthermore, the order left it to any member of the searching party the unlimited authority to determine whether any item fell within the ambit of the authorised search and seizure operation. That is wholly unacceptable, and, indeed, one of the things that requisite specificity is intended to avoid.

[20] The applicant's counsel sought to defend the wide ambit of the provisions of the order obtained by relying on the judgment of the appeal court in *Non-Detonating*

Solutions (Pty) Ltd v Durie [2015] ZASCA 154 (2 October 2015), [2015] 4 All SA 630 (SCA); 2016 (3) SA 445 (SCA), in which it was confirmed that it was not a requirement that each and every document subject of the search had to be individually specified, and that identification by class of document sought will generally suffice. As the judgment notes, that is indeed in conformity with common practice. But the practice does not, and cannot legally, derogate from the essence of the requirement of specificity; cf. the appeal court's more recent judgment in *Viziya Corporation v Collaborit Holdings (Pty) Ltd and Others* [2018] ZASCA 189 (19 December 2018); 2019 (3) SA 173 (SCA), especially at para 31-41. Properly read, the judgment in *Non-Detonating Solutions* itself confirms as much. In para 36 of the judgment, the appeal court endorsed the following remarks in *Roamer Watch Co SA & another v African Textile Distributors also t/a M K Patel Wholesale Merchants and Direct Importers* 1980 (2) SA 254 (W): 'The applicant should satisfy the court that he has, as best the subject-matter in dispute permits him to do, identified the subject matter in respect of which he seeks attachment and/or removal, and that the terms of the order which he seeks have been delimited appropriately and are not so general and wide as to afford him access to documents, information and articles to which his evidence has not shown that he is entitled.' (Underlining supplied.)

[21] The import of those observations was emphasised in *Viziya* supra, in para 32, where Mathopo JA stated: 'Counsel submitted that 'things had moved on' since Corbett JA laid down as a requirement for an Anton Piller order that the applicant show a prima facie case of the existence of specific, or specified, documents or things that were vital and required preservation. That is a proposition that must be firmly dispelled. The law has not changed in that regard and this is still a requirement for obtaining an Anton Piller order. This requirement serves the important purpose of balancing the rights of the respective parties and enables the court to assess whether there is a reasonable likelihood that without an order they may be destroyed'.

[22] In *Non-Detonating Solutions* the apparently open-ended description of the items described in items 1-16 of schedule A to the Anton Piller order in that matter was saved by the limiting effect of the introductory phrase that preceded it: 'Regardless of the medium on which it appears or the format in which it appears and in respect of a self stemming cartridge identical or similar to the AutoStem cartridge or any component thereof; or based on the concept or idea of the AutoStem

cartridge, any component thereof or any adaptation of any or all of the aforesaid'. (Underlining supplied.) The significance of the qualifying effect of those opening words was expressly acknowledged in para 37 of the judgment. By contrast, in the current case there is no equivalent limitation. It is no cause for surprise in the circumstances that it is difficult to reconcile the description of many of the items seized in the search, as per the return quoted in paragraph [4] above, with that in respect of which a search was ostensibly authorised. The inclusion in the articles seized of a 'Companies Act book' and a copy of a Government Gazette' exemplify the point I seek to demonstrate.

[23] The unacceptable ambit of the description of the items in para 1.1 to 1.3 of the schedule to the order in the current case was exacerbated by the peculiar extension of its already patent limitlessness by the tacking on of the phrase 'directly or indirectly'. When pressed, counsel was unable to explain the intended import of the supplementary wording. While its intended meaning remains unclear, its implication was obviously to somehow extend, rather than circumscribe, the already very wide (unacceptably so) wording that preceded it.

[24] The question whether the applicant established that it strictly needed an Anton Piller order to obtain the documentation it sought to obtain by means of the search is a another matter that requires consideration. It will have been apparent from the description given above of the nature of the applicant's intended claim that the applicant was already in possession through the arbitration proceedings of correspondence that had passed between Mr Harper and the second respondent and various employees of Standard Bank and the JSE. The applicant did not in its application explain how it had come by such documentation and why its source(s) for that evidence would not suffice to give it all the material it needed to pursue its claim against Dr Vogel and the first respondent. There is, for example, nothing to indicate that the Standard Bank and the JSE would not comply with subpoenas to produce their records of such correspondence. I am not satisfied that the applicant established that resort to the extremity of Anton Piller relief was necessary in this case.

[25] The indication that the applicants failed to show the necessity for a search and seizure operation is highlighted by the subject matter identified in para 1.4 of the schedule to the order; viz. 'all documentation relating to the current S417 enquiry in respect of Cygne Bleu (Pty.) Ltd. In Liquidation, including, *inter alia*, transcripts of the hearing, voice recordings and all correspondence with any other party relating to such enquiry either directly or indirectly'. The applicants did not explain why such documentation, which should have been readily available to them through the conventional channels, should be obtained by the proposed search and seizure operation.

[26] The nature and extent of the applicant's non-compliance with the requirements for Anton Piller relief are such that the appropriate measure on the return day is to discharge the order. As Bozalek J observed in *Audio Vehicle Systems v Whitfield and Another* 2007 (1) SA 434 (C) at para. [21], '(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 reiterate my endorsement of those remarks in *Mathias International* supra, at para. 35, where I held '(i)f 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] ZASCA 58; 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.'

[27] The applicant's counsel sought to make something of the fact that the second respondent, in seeking the discharge of the order, had not distinguished his property in the material that was seized from that of the first respondent. The first respondent did not appear to oppose the confirmation of the order. The argument was misdirected in my view. Anton Piller relief is not possessory in character. It is procedural. The issue is whether the procedure was appropriately availed of in the current case. For the reasons I have given, I have concluded that it was not.

[28] Although the second respondent's counsel did not make much of the issue in argument, I cannot let the matter pass without remarking that it was, to say the least, regrettable that the supervising attorney permitted the search to commence before the arrival of the second respondent's attorney. It is evident from the supervising attorney's report that the second respondent wished to have the assistance and support of his attorney. The well-established rules relating to the execution of Anton Piller orders provide that that should have been allowed unless the attendant delay in getting an attorney to the scene would be unreasonable. There is nothing in the substantive content of the supervising attorney's report that leads me to understand that a delay of up to an hour to await the arrival of the second respondent's attorney would have frustrated the search or thwarted the proper execution of the order. There was nothing to stop the supervising attorney from keeping an eye on the second respondent while they waited. It would not be unusual in a city the size of Cape Town that one's attorney might be more than half an hour's drive away. It can hardly be expected that the recipient of an Anton Piller order should be able to have their attorney arrive immediately, as opposed to expeditiously. Attorneys will generally be busy with other matters when the unexpected call to attend at the scene of a search comes through. Supervising attorneys should be cognisant of that and make reasonable allowance for the practical exigencies of a respondent's attorney's ability to respond to an emergency call to attend at a search. I consider that the supervising attorney in the current matter was remiss in that respect.

[29] The second respondent asked that the order be discharged with a punitive order as to costs. I am not persuaded that such an order would be appropriate. It seems to me that the applicant was misdirected in its application, not mala fide. I am not inclined to a punitive approach in the circumstances.

[30] An order will issue in the following terms:

1. The Anton Piller order is discharged and the Sheriff is directed to return to the second respondent the material seized in the execution of the provisional order.

2. The applicant shall be liable to pay the second respondent's costs of suit.

A.G. BINNS-WARD
Judge of the High Court

APPEARANCES

Applicant's counsel:	**N. Riley**
Applicant's attorneys:	**Snaid Morris Attorneys Inc.** **Johannesburg** **Lamprecht Attorneys** **Cape Town**
Second Respondent's counsel:	**Tony Crookes**
Second Respondent's attorneys:	**Vreugde Attorneys** **Cape Town**