

Enterprise Connection Cape (Pty) Ltd and another v Clarotech Consultants and others
[2001] 3 All SA 194 (C)

Division: Cape of Good Hope Provincial Division
Date: 19 March 2001
Case No: 1547/01
Before: Pincus AJ
Sourced by: C Webster and AD Maher
Summarised by: D Harris

. [Editor's Summary](#) . [Cases Referred to](#) . [Judgment](#) .

[1] *Anton Piller orders - Nature of relief - Requirements.*

[2] *Civil procedure - Interim attachment relief - Application for ex parte order - Requirements - Applicants must allege and prove that they have an existing real or personal right in the document; that the respondents have the documents in their possession or that there are*

Page 195 of [2001] 3 All SA 194 (C)

good grounds for believing that they did; that the only way in which the document could be preserved or irreparable harm could be prevented is by the interim attachment thereof; and that the court order would be defeated if notice were given to respondents.

[3] *Interim attachment relief - Application for ex parte order - Requirements - Applicants must allege and prove that they have an existing real or personal right in the document; that the respondents have the documents in their possession or that there are good grounds for believing that they did; that the only way in which the document could be preserved or irreparable harm could be prevented is by the interim attachment thereof; and that the court order would be defeated if notice were given to respondents.*

Editor's Summary

The Applicants sought Anton Piller relief as well as interim attachment relief in the present matter. When the matter appeared before the court *a quo*, the judge issued a rule *nisi* in Applicants' favour. In response, the Respondents argued that the rule should be discharged on the following grounds. Firstly, with regard to the interim attachment relief, it was contended that there was no evidence in any of the Applicants' affidavits that any of the Respondents had possession of the items in which the Applicants claimed a proprietary interest. In addition, it was argued that there had not been compliance with the requirements for an *ex parte* order. These requirements included an allegation that the items in question would be irreparably harmed if not attached *pendente lite* and an allegation that the court order would be defeated if notice was given to the Respondents. With regard to the Anton Piller relief, the Respondents contended that the Applicants had failed to specify the documents which constituted vital evidence. In other words, the order was too widely framed. It was also argued that the Applicants had failed to establish a real and well-founded apprehension that the evidence might be hidden or destroyed by the time the matter went to trial. Finally, it was argued that the Applicants had not discharged the onus of establishing that the evidence could not be obtained from another source.

Held - The interim attachment order formed the first issue addressed by the Court. It was emphasised that an order for the interim attachment of property is not a true Anton Piller order. To obtain such an order on an *ex parte* basis, the Applicants had to allege and prove that they had an existing real or personal right in the document; that the Respondents had the documents in their possession or that there were good grounds for believing that they did; that the only way in which the document could be preserved or irreparable harm could be prevented was by the interim attachment thereof; and that the court order would be defeated if notice was given to Respondents.

The Court held that it was satisfied that the Applicants had established *prima facie* that the First Respondent had possession of a computer system, as the Respondents were soliciting and servicing Applicants' customers. This meant that they must have taken copies of the system when they left the First Applicant's employ. It was pointed out that a court could infer a real or well-grounded apprehension of harm from unlawful conduct on the part of a respondent. In the present instance, the Court was satisfied that such unlawful conduct had been established on a *prima facie* basis. In the premises, the Applicants were entitled to the interim attachment order in respect of the said computer system. This was not the case with respect to the remaining items listed in the schedule pertaining to the application for the interim attachment order. In that regard,

Page 196 of [2001] 3 All SA 194 (C)

the Applicants had not established even on a *prima facie* basis, that any of the Respondents were in possession of the other items. The rule was accordingly discharged in respect of all the remaining documents in the relevant schedule.

The Anton Piller relief was the next issue addressed by the Court. The Court explained that Anton Piller orders are orders granted for the attachment of documents or items to which no right is claimed, except that they should be preserved for the purpose of being produced as evidence at trial.

Due to the unusual nature of Anton Piller orders, they are only granted in a strong case where the circumstances are exceptional.

The Court agreed in this case that the order was too widely framed. It was pointed out that the order should go no further than strictly necessary for the preservation of the evidence sought to be preserved. In attempting to establish a test for deciding whether to discharge a rule where the order was too widely framed, the Court set out the following guidelines. The overall onus of establishing entitlement to the relief claimed lies with the applicant. The wide framing of an order need not be wilful or *mala fide* to result in the rule being discharged. An applicant bears the onus of satisfying the court that there was justification for the attachment of the documents reflected in the court order. Where the order is too wide, an applicant has to establish cogent reasons as to why the order should not be discharged. The court has a discretion to discharge such an order.

According to the Court, the order relating to the documents pertaining to the Anton Piller relief was seriously flawed. It was not accepted that copies of all Respondents' computer records were required for the trial. The Court was therefore unable to exercise its discretion in Applicants' favour. The application was dismissed.

Notes

For Civil Procedure see *LAWSA Reissue* (Vol 3(1), paras 1 - 441)

Cases referred to in judgment

("C" means confirmed; "D" means distinguished; "F" means followed and "R" means reversed. **HN** refers to corresponding headnote number.)

A Becker and Co (Pty) Ltd v Becker and others [1981 \(3\) SA 406](#) (A)

Cerebos Food Corp v Diverse Foods SA [1984 \(4\) SA 149](#) (T)

Dabelstein and others v Hildebrandt and others [\[1996\] 2 All SA 17](#) (C); [1996 \(3\) SA 42](#) (C)

Hall and another v Heyns and others [1991 \(1\) SA 381](#) (C)

Pohlman & others v Van Schalkwyk & others [\[2000\] 4 All SA 265](#) (E); [2001 \(1\) SA 690](#) (E)

R v Blom 1939 AD 188

Roamer Watch Co SA Ltd and another v African Textile Distributors [1980 \(2\) SA 254](#) (W)

S v Hammer and others [1994 \(2\) SACR 496](#) (C)

Schlesinger v Schlesinger [1979 \(4\) SA 342](#) (W)

Shoba v OC, Temporary Police Camp, Wagendrift Dam [1995 \(4\) SA 1](#) (A)

Sun World International Inc v Unifruco Ltd [1998 \(3\) SA 151](#) (C)

Telefund Raisers CC v Isaacs and others [1998 \(1\) SA 521](#) (C)

Universal City Studios Inc v Network Video (Pty) Ltd [1986 \(2\) SA 734](#) (A)

Page 197 of [2001] 3 All SA 194 (C)

Judgment

PINCUS AJ

- [1] The first and second applicants chose to leap "into the dangerous world", to quote William Blake, the famous English poet, that is, "the dangerous world" of Anton Piller. I say "dangerous" because Anton Piller is an extraordinary procedure, draconian in nature and an intrusion of one's privacy. Accordingly, compliance with the requisites must, in my view, be strictly observed. In *Pohlman & others v Van Schalkwyk & others* [2001 \(1\) SA 690](#) (E) at 698D-E, Froneman J pointed out that applicants must be aware that the grant of this remedy "carries its own attendant dangers, the nature of which cannot be minimised . . .". (The underlining has been added.) More of this later.
- [2] The applicants' notice of motion revealed that they sought both Anton Piller relief and interdictory relief. In truth, it was not only Anton Piller and interdictory relief that was sought, but in addition, interim attachment relief.
- [3] On 28 February 2001, the interim attachment relief and the Anton Piller relief were dealt with by my brother, Mjoli AJ, on an *ex parte* basis.
- [4]

- 4.1 The listed items which were to be taken into the possession of the Sheriff, pursuant to the order of court, were as follows:

"Schedule of Listed Items"

Part A

All of Applicant's property, documents, information, computer pro-programmes and templates, including all copies in any form and back-ups of such documents, information, programmes or templates and in particular First Applicant's:-

- (a) Lotus Notes System;
- (b) E-mails;
- (c) Financial accounting packages;
- (d) List of First Applicant's customers and any information relating to them;
- (e) Office documentation including quotes, proposals to clients and client agreements or contracts;
- (f) Microsoft Excel spreadsheets;
- (g) Microsoft Word documents.

Part B

- (a) Copies of all the Respondent's computer records over and above the records and programmes listed in Part A hereof.
- (b) Copies of e-mails and other documents sent to and received from First Respondent's clients."

4.2 Part A related to interim attachment relief, whilst Part B related to Anton Piller relief.

4.3 Mjoli AJ granted interim attachment relief and Anton Piller relief to the applicants, and ordered that the return date be 8 March 2001.

Page 198 of [2001] 3 All SA 194 (C)

- [5] On the return date, namely 8 March 2001, Mr *MacWilliam* SC appeared on behalf of the applicants and moved for confirmation of the rule, sought the interdictory relief envisaged in the notice of motion, as in addition delivery to the applicants of the documents preserved under the interim attachment order ("the delivery relief").
- [6] Mr *Hodes* SC, assisted by Mr *Myburgh*, appeared on behalf of the eight respondents and sought:
 - 6.1 Discharge of the rule; and
 - 6.2 The postponement of the interdictory relief and the delivery relief so as to enable the respondents to be afforded a proper opportunity of filing answering affidavits. (A short affidavit was tendered by the respondents.)
- [7] At the commencement of the hearing I pointed out to Mr *MacWilliam* my strong *prima facie* view that the respondents should be given a proper opportunity of preparing their answering affidavits and that the interdictory relief and the delivery relief should be heard on a later date. I invited counsel to advise me of an arrangement concluded between them if that was possible, failing which I would make an appropriate order.
- [8] Mr *Hodes* argued *in limine* that the rule should be discharged on various grounds. There was some debate before me as to whether Mr *Hodes*' argument was a true point *in limine*, but at the end of the day both parties were given ample opportunity of addressing me and making full submissions. It is accordingly unnecessary for me to decide whether Mr *Hodes*' argument amounted to points *in limine* or not.
- [9] In regard to the interim attachment order, the respondents' contentions were that:
 - 9.1 There was no evidence in the founding affidavit or in the affidavits tendered in support of the founding affidavit, that any of the respondents had possession of any of the items in which the applicants claim a proprietary interest. (In the above connection, Mr *Hodes* referred me to a passage in the founding affidavit to the effect that the respondents "must have the evidence listed in Part A of the schedule . . . in their possession". He argued that whilst it is permissible for a court to draw inferences, it is only permissible to do so when the inference which is sought to be drawn is consistent with all the proved facts. Mr *Hodes* referred me to *R v Blom* 1939 AD 188 at 202/3). (I make no finding as to whether this is the applicable test in civil proceedings); and
 - 9.2 There had not been compliance with the trite requirements for an *ex parte* order, namely an allegation that the items in question would be irreparably harmed if not attached *pendente lite* and an allegation that the court order would be defeated if notice was given to the respondents.
- [10] In regard to the Anton Piller relief, the respondents' contentions were that:
 - 10.1 The applicants had failed to specify the documents or things which constitute vital evidence in substantiation of the cause of action, or to put it another way, that the order was too widely framed;

Page 199 of [2001] 3 All SA 194 (C)

- 10.2 The applicants had failed to establish a real and well founded apprehension that the said evidence may be hidden or destroyed or in some manner spirited away by the time the matter comes to trial or to the stage of discovery;
- 10.3 The applicants had not discharged the onus of establishing that the evidence could not be obtained from another source.
- [11] In adjudicating this matter, I am in duty bound to have regard only to the applicants' founding papers and not to have regard to the short affidavit tendered on behalf of the respondents. Furthermore, I am in duty bound to accept all the allegations contained in the founding papers as being true and correct. See *Sun World International Inc v Unifruco Ltd* [1998 \(3\) SA 151](#) (C) at 166F.
- [12] It is necessary for me to set out certain of the evidence tendered by the applicants, namely:
 - 12.1 On 24 April 1998, the second applicant purchased all the shares in a certain company from certain

persons, three of whom were the second, third and fourth respondents.

- 12.2 The first applicant is a wholly owned subsidiary of the second applicant.
- 12.3 All of the second to eighth respondents worked for the first applicant until recently, and they are all now associated with and employed by the first respondent.
- 12.4 The business of the company purchased by the second applicant, including its goodwill, was transferred to the business of the first applicant.
- 12.5 The respondents acted unlawfully in:
 - 12.5.1 Misappropriating to themselves the goodwill of the business purchased by the second applicant and transferring it to the first respondent, which business they recently commenced;
 - 12.5.2 Using as a springboard the first applicant's confidential information in order to establish the business of the first respondent.
- 12.6 Certain of the confidential information related to the first applicant's Lotus Notes System which had been modified to fit the first applicant's specific requirements, and which contains "details of all the first applicant's customer contacts, every activity undertaken by first applicant in relation to each customer, a complete and detailed customer history, supplier information and first applicant's complete purchasing and pricing history".
- 12.7 By virtue of the fact that the respondents serviced the first applicant's customers exclusively, the respondents have an intimate knowledge of each customer's infrastructure and computer systems in place. "These systems are so complex that as an outside company it would not be possible to simply walk in and start consulting with the customer - you would first have to spend weeks to months to acquire the detailed knowledge necessary to give that

Page 200 of [2001] 3 All SA 194 (C)

customer an equivalent service to that which had been provided by OCT and then the Network Solutions Division of the first applicant. Moreover, all this information is stored on the first applicant's Lotus Notes System which is described in the affidavits of Paul Moses, Deon White and Sharon Peckham, and is central to the entire dispute. By virtue of the facts that the respondents are soliciting and servicing the first applicant's customers, it is inevitable that they must have taken copies of or back-ups of this entire system with them when they left first applicant, and are using it and the information contained in it in their business."

- 12.8 By their unlawful conduct, the respondents intended to incorporate the confidential knowledge acquired by them into the first respondent's business and thereby deprive the first applicant of the entire business and goodwill which the second applicant had purchased.
 - 12.9 The applicants had become aware that certain of the first applicant's customers were terminating their contracts and transferring their business to the second respondent. The respondents were approaching the first applicant's customers, who were receptive to the approaches.
 - 12.10 To the extent that the first applicant has suffered damages as a result of the respondents' conduct, first applicant intended to claim damages suffered by it from the first and second respondents.
 - 12.11 The computerised information referred to in Part B of the schedule of listed items was vital evidence and which needed "to be preserved in order that it could be produced as evidence when the damages action is heard. This is crucial evidence to establish the extent of the first applicant's damages..."
 - 12.12 Apart from the Anton Piller relief sought, there is no other practical means of protecting the applicants' rights.
 - 12.13 By virtue of the manner in which the respondents have been able to start the business of the second respondent, service first applicant's clients and solicit their business, "it is clear that they must have the evidence listed in Part A of the schedule of listed items in their possession".
 - 12.14 If the Anton Piller relief is not obtained *ex parte*, "I have no doubt that the respondents will deny having used any of the first applicant's confidential information, and they will simply remove it from their computer systems and use it surreptitiously as and when they need to. In the light of their conduct, as fully set out herein, I believe that there is no prospect that they will admit to using the first applicant's confidential information, or of returning it to the first applicant without retaining copies thereof."
 - 12.15 The items in the order sought go no further "than are strictly necessary for the preservation of the evidence which the applicants seek to preserve . . ."
- [13] I proceed now to deal with the Part A documentation, namely the interim attachment order.

Page 201 of [2001] 3 All SA 194 (C)

- [14] An order for the interim attachment of property or documents, in which a real or personal right is claimed, is not a true Anton Piller order. See *Cerebos Food Corp v Diverse Foods SA* [1984 \(4\) SA 149](#) (T) at 164C-F.
- [15] To obtain such an interim attachment order, on an *ex parte* basis, an applicant must allege and prove that:
 - 15.1 He has an existing real or personal right in the document or thing;
Cerebos Foods (supra) at 164D).
 - 15.2 The respondent has the relevant document or thing in his possession or that there are good grounds for

believing this to be the case. See *Roamer Watch Co SA Ltd and another v African Textile Distributors* [1980 \(2\) SA 254](#) (W) at 272-3.

15.3 The only way in which that document or thing can be preserved or irreparable harm prevented is by the attachment thereof *pendente lite*, and that the court order would be defeated if notice thereof were to be given to the respondent. See *Cerebos Foods (supra)* at 164E and *Sun World (supra)* at 173F.

[16] I am satisfied that the applicants have established *prima facie* that the second respondent has possession of the Lotus Notes System, having regard in particular to the allegation that because the respondents are soliciting and servicing the first applicant's customers (an allegation which I also find to have been established *prima facie*), it is inevitable that they must have taken copies or back-ups of the Lotus Notes System with them when they left the employ of the first applicant and started the new business of the second respondent.

[17] Mr MacWilliam contended, correctly in my view, that a court could infer a real or well-grounded apprehension of harm from unlawful conduct on the part of a respondent. Such unlawful conduct is, in my view, *prima facie* established. See *A Becker and Co (Pty) Ltd v Becker and others* [1981 \(3\) SA 406](#) (A). See also *Telefund Raisers CC v Isaacs and others* [1998 \(1\) SA 521](#) (C).

In the former case, Muller JA, at 414G-415B, said:

"In my opinion the judgment in the English case of *Trego v Hunt (supra)* is correct. If a seller disposes of the goodwill of a business he is not allowed thereafter to act contrary to the sale. In this regard I agree with what is stated by VAN HEERDEN AJA in his separate judgment in these proceedings.

In Corbin on *Contracts* vol 6 A s 1386 the following is stated:

'When a business is sold with its goodwill, but without any express promise not to compete, the seller is privileged to open up a new business in competition with the buyer; but he is under obligation not to solicit his former customers or to conduct his business under such a name and in such a manner as to deprive the buyer of the "goodwill" that he paid for.'

In support of this passage *Corbin* refers (note 26) to the case of *Bergum v Weber* 288 P 2d 623, 136 Cal App 2d 389 (1955), a judgment of the District Court of Appeal, Second District, Division 3, California, and restates the facts of that case as follows:

'The defendant sold his business and goodwill to the plaintiff and promised not to open a competing business within one year. After expiration of the year, the defendant opened a competing business and injured the plaintiff by active solicitation of his former customers. The opening of the competing business was lawful; but the solicitation of former customers was not. One who is paid for his "goodwill" is under a legal duty not to steal it back by

Page 202 of [2001] 3 All SA 194 (C)

solicitation. The court said that there is an "implied promise" not to "deprive the other of the fruits of his bargain", and that this is not negated by or inconsistent with the express promise not to open a competing business for one year. The decision and the reasoning are sound. This is true, whether we use the device of an "implied promise" or not.' "

[18] In the *Telefund* case (*supra*) Thring J said at 523G-J:

"The applicant suspected that, when they left its service, the first, second and third respondents took with them to the fourth respondent copies of certain so-called 'client lists', allegedly the property of the applicant. These are lists on which the applicant's salespersons record certain information about the applicant's customers to whom they have sold baskets. The information includes the name and telephone number of the customer concerned and, very often, also the name of the 'contact person' on the customer's staff with whom the particular salesperson usually deals. As I have said, it is alleged by the applicant that a large proportion of its business consists of repeat orders. Also frequently recorded on the customer lists are the dates or months of previous sales to a particular customer and when that customer is likely to require another basket in the future. The applicant had reason to believe, which belief subsequently turned out to be well-founded, that the information recorded on its customer lists was being used by the first, second and third respondents to generate business for the fourth respondent."

[19] Accordingly, in my view, the applicants satisfied the requisites for an *ex parte* interim attachment order in respect of the Lotus Notes system, in that I am satisfied, on a *prima facie* basis, that:

19.1 The first applicant has a real or personal interest in the said system;

19.2 The second respondent has such system in its possession, alternatively the applicants have good grounds for believing this to be the case; and

19.3 Such system may be removed or deleted from the second respondent's computer system, if notice was given.

[20] In the circumstances, I am not prepared to discharge the rule in regard to the attachment of the Lotus Notes System, as requested by Mr Hodes.

[21] However, I am not satisfied that the applicants have made out a proper case for the interim attachment of any of the other items reflected in Part A of the schedule of listed items. I say this because I am not satisfied, even on a *prima facie* basis, that the applicants have established that any of the respondents are in possession of such other documents or that there are good grounds for believing this to be the case.

[22] In the result, I intend to discharge the rule in regard to all of the documents reflected in Part A of the schedule of listed items, other than the Lotus Notes System.

[23] This brings me to the relief which was obtained in Part B of the schedule of listed items. This was indeed true Anton Piller relief.

- [24] An Anton Piller order is one which is served on a respondent "out of the blue", and it is intended to be instantly executed. Its prejudicial effects may be irreversible. See *Hall and another v Heyns and others* [1991 \(1\) SA 381](#) (C) at 387D-E).
- [25] Anton Piller orders are granted for the attachment of documents and other things to which no right is claimed except that they should be preserved

Page 203 of [2001] 3 All SA 194 (C)

- for and produced as evidence in an intended court case between the parties. See *Cerebos* case (*supra*) at 164B. See also *Universal City Studios Inc v Network Video (Pty) Ltd* [1986 \(2\) SA 734](#) (A) at 755A-C).
- [26] Anton Piller orders have been referred to as unusual orders to be made in unusual circumstances, that the relief is of a draconian nature and that such orders will only be granted in a strong case where the circumstances are exceptional to the extent that it plainly appears that justice requires the intervention of the court. See *Cerebos* case (*supra*) at 159H-160B. See also the leading case of *Shoba v OC, Temporary Police Camp, Wagendrift Dam* [1995 \(4\) SA 1](#) (A) at 15G-J).
- [27] Notwithstanding Mr *MacWilliam's* contentions to the contrary, I find that on a reading of the founding papers, the items referred to in Part B of the schedule of listed items were regarded as vital evidence "to establish the extent of the first applicant's damages . . .". Furthermore, it was alleged in the founding papers that the items listed in Part B constituted vital evidence which needed to be preserved, and that the items of the order sought went no further than was "strictly necessary for the preservation of the evidence".
- [28] As stated above, Mr *Hodes* contended that Part B was far too widely framed. This was conceded by Mr *MacWilliam*, correctly in my view. It is clear that the applicants were not entitled, for the purpose of computing damages, to copies of all the respondents' computer records which would have included the documents sought in (b) of Part B. It escapes me how it could be contended that all of the respondents' computer records constitute vital evidence, and that the terms of the order go no further than is "strictly necessary for the preservation of evidence".
- [29] Mr *MacWilliam* argued that although the said order was too widely framed, the court should exercise the discretion vested in it in refusing to discharge the rule because there was no prejudice to the respondents. He stated that the terms of the order gave full protection to the respondents, there was no right of inspection of the documents attached and that documents of a personal or private nature would have been inspected in any event by the supervising attorney and the applicants' attorney. Mr *MacWilliam* further argued that there was no intention to adopt an abusive procedure.
- [30] Mr *Hodes* did not contend that the applicants had intentionally adopted an abusive procedure.
- [31] Before setting out what I believe to be the proper approach in a matter of this kind, I wish to refer to certain authorities on this topic.
- [32] It is trite that the order sought should go no further than is strictly necessary for the preservation of the evidence sought to be preserved. See *Herbstein and Van Winsen* The Civil Practice of the Supreme court (4ed) at 1102. See also *Hall's* case (*supra*) at 388C-390C).
- [33] Furthermore, in the latter case, at 387F, Conradie J said:
- "An applicant's legal advisers should in these circumstances be particularly careful to ensure that the draft order which they submit to the Court is clear and does not, . . . go beyond what the decided cases permit . . ."
- [34] Later in the judgment, at 394G, Conradie J took the view that the Anton Piller orders were "seriously flawed".

Page 204 of [2001] 3 All SA 194 (C)

- [35] In the case of *Dabelstein and others v Hildebrandt and others* [1996 \(3\) SA 42](#) (C), at 69H-I, Farlam J (as he then was) referred to the fact that certain of the documents went "further than is warranted in the circumstances and should be deleted".
- [36] In the case of *Pohlman and others v Van Schalkwyk and others* [2001 \(1\) SA 690](#) (E) at 698J, Froneman J found that "only specified documents or things may be attached, copied or taken into possession", and at 696/7 he stated that the applicants "in my view got too much and they got it too easily".
- [37] In the case of *Sun World* (*supra*) at 162C-H, Van Reenen J referred to *Shoba's* case (*supra*) at 15G-J to the effect that:
- "Prima facie proof is required in respect of the following prerequisites for the granting of an Anton Piller order which entails the entry and search of premises:
- (a) that the applicant has a cause of action against the respondent and intends to pursue it;
 - (b) that the respondent has in his or her possession specific (and specified) documents or things - in respect of which the applicant cannot claim a real or personal right - that constitute vital evidence, in the sense of being of great importance to substantiate the applicant's cause of action; or that ' . . . its non-availability at the trial would result in the administration of justice being defeated'; and
 - (c) that there is a real and well-founded apprehension that such evidence may be hidden, destroyed or in some manner spirited away by the time the case comes to trial or discovery has to be made." (The underlining is added for emphasis.)
- [38] Later in the said judgment Van Reenen J found that the question whether the schedule of listed items was sufficiently delineated for the purpose of compliance with the requirements of Anton Piller relief must be assessed having regard to various factors, one of which was the fact that the documents in question were

required solely for the purpose of computing the quantum of the applicant's claim (see judgment, at 173G-I).

- [39] Furthermore, in the case of *S v Hammer and others* [1994 \(2\) SACR 496](#) (C) at 499e, Farlam J (as he then was) said:

"An untrammelled search for the truth, should be balanced by discretionary measures, for in the words of Knight Bruce VC, 'Truth, like other good things, may be loved unwisely - it may be pursued too keenly - may cost too much'." (The underlining is added for emphasis.)

- [40] No authority was quoted to me by either counsel as to what the test should be in deciding whether to discharge a rule where the order of court was too widely framed and went further than what "the decided cases permit".

- [41] In the case of *Schlesinger v Schlesinger* [1979 \(4\) SA 342](#) (W), Le Roux J was called upon to decide when a court would exercise its discretion in favour of a party who had been remiss in its duty to make a full disclosure in an *ex parte* application. At 349A-B, the learned Judge referred to various authorities and said:

"It appears quite clearly from these authorities that:

- (1) in *ex parte* applications all material facts must be disclosed which *might* influence a Court in coming to a decision;

Page 205 of [2001] 3 All SA 194 (C)

- (2) the non-disclosure or suppression of facts need not be wilful or mala fide to incur the penalty of rescission; and

- (3) the Court, apprised of the true facts, has a discretion to set aside the former order or to preserve it." (The underlining is added for emphasis.)

- [42] At 350B, the learned Judge further found that unless there were "very cogent practical reasons" why an order should not be rescinded, "the Court will always frown on an order obtained *ex parte* on incomplete information and will set it aside . . .

- [43] I would accordingly make the following findings in regard to Anton Piller orders:

43.1 The overall onus of establishing entitlement to relief claimed remains with an applicant. See *Sun World* (*supra*) at 163D.

43.2 The unnecessarily wide framing of an order of court need not be wilful or mala fide to incur the penalty of the discharge of a rule.

43.3 An applicant has the onus of satisfying the court that there was a justification for the attachment of the documents reflected in the court order.

43.4 Where it is found that the order of court has gone too far, the onus is on an applicant to establish very cogent practical reasons as to why such an order should not be discharged. See *Sun World* (*supra*) at 174A.

43.5 The court has a discretion to discharge such an order when the matter is brought up for reconsideration, and in respect of which many factors may play a role, depending upon the facts of the case.

- [44] In my view, the order of court relating to the documents in Part B was "seriously flawed", and it could hardly be contended that "copies of all the respondents' computer records" were required for the computation of the quantum of the claim for damages.

- [45] I do not find that any cogent reasons exist for the manner in which the order of Part B of the schedule of listed items was framed, and I cannot agree with the submission made by Mr MacWilliam that there could be no possible prejudice to the respondents. If, for example, the order of court had been properly framed and the supervising attorney and the applicants' attorney came across matters of a private and personal nature, they would obviously ignore the contents of the particular document and proceed further with their inspection. They are, after all, both officers of the court. The wide framing of the court order allowed the attachment of every conceivable document off the second respondent's computer and there was no attempt to put into place a safeguard for documents of a personal and private nature.

- [46] I accordingly find that there are no cogent reasons nor any justification for the attachment of every conceivable document off the second respondent's computer, and I am accordingly unable to exercise my discretion in favour of the applicants.

- [47] For these reasons I find that it is unnecessary for me to deal with the question as to whether the applicants had a real or well-founded apprehension of harm in respect of the items referred to in Part B of the schedule of listed items, nor is it necessary for me to decide whether the applicants

Page 206 of [2001] 3 All SA 194 (C)

satisfied the requirements that the documents attached could not have been obtained from another source.

- [48] The applicants did not establish even *prima facie* that they have a cause of action in damages against third to eighth respondents, and it follows that no Anton Piller order should have been granted against any of them. See *Dabelstein's case* (*supra*) at 61A-B.

- [49] In a rather belated request Mr Hodes sought costs on the attorney and client basis against the applicants. I am not satisfied that any basis exists for making such an order.

- [50] On 16 March 2001, I heard further argument on the future conduct of the interdictory relief and the delivery relief. I deal with these matters in the order which I make hereafter.

- [51] In my view, the respondents have been substantially successful in opposing the return day, and the employment of two counsel by the respondents was warranted.
- [52] In all of the circumstances, I make the following orders:
- 52.1 I direct the supervising attorney, assisted by the computer expert Mr Wood and the Sheriff of the above honourable court, to differentiate between all items under attachment other than the Lotus Notes System, and the Lotus Notes System.
 - 52.2 The Lotus Notes System is to remain under the present attachment order, pending the outcome of the application envisaged in paragraph C10.2 of the notice of motion.
 - 52.3 The rule in regard to all other items under attachment is discharged, and the Sheriff is directed to return to the respondents all such items.
 - 52.4 The computer expert, Michael James Wood, is authorised to make a copy of the second respondent's "Lotus Notes Tracking System", a copy of which is presently in the possession of the Sheriff, and to hand same to an independent computer expert to be appointed by the applicants by not later than 12h00 on 19 March 2001. Such expert will be entitled to report to the applicants and their legal advisers on the similarities and differences between the said system and the information therein contained, and the first applicant's Lotus Notes System and the information therein contained, insofar as such similarities and differences may be relevant to the present proceedings, but shall otherwise keep the features of the system and the information therein contained confidential.
 - 52.5 In relation to the documents and records which were requested in the respondents' notices in terms of Rules 35(12) and 35(14) dated 12 March 2001, the applicants are ordered, by 18h00 on 19 March 2001, to deliver a copy, in electronic or magnetic format, of each of the items requested in terms of those notices and which are alleged to be in the possession of the respondents to an independent computer expert to be appointed by the respondents and will at the same time furnish such independent expert with such passwords and instructions as may be necessary in order to enable him to open and examine each document. (The said expert shall be entitled to

Page 207 of [2001] 3 All SA 194 (C)

report to the respondents and their legal advisers on the contents of each such document to the extent that the contents thereof may be relevant to the present matter, but shall otherwise keep the contents thereof confidential.)

- 52.6 The application for interdictory relief envisaged in paragraph C10.1, the delivery relief envisaged in paragraph C10.2 and the further relief referred to in paragraphs C10.3 to C10.5 and C11 of the notice of motion, are postponed for hearing in the Fourth Division on 18 April 2001.
- 52.7 In relation to the relief envisaged in paragraphs C10.1 to C10.5 of the notice of motion:
 - 52.7.1 The respondents are ordered to file their answering affidavits by 27 March 2001.
 - 52.7.2 The applicants are ordered to file their replying affidavits by 3 April 2001.
 - 52.7.3 The applicants are ordered to file their heads of argument by 9 April 2001.
 - 52.7.4 The respondents are ordered to file their heads of argument by 12 April 2001.
- 52.8 The applicants are ordered to pay the costs of the opposition of the respondents, such costs to include the costs occasioned by the employment of two counsel, save that the costs occasioned by the hearing on 16 March 2001 are reserved for the court hearing the interdictory relief and the delivery relief on 18 April 2001.

For the applicants:

RWF McWilliam SC

For the respondents:

Hodes PB SC and G Myburgh

Footnotes

- 1 Also reported at [\[2000\] 4 All SA 265](#) (E) - Ed.
- 2 Also reported at [\[1996\] 2 All SA 17](#) (C) - Ed.