

IN THE HIGH COURT OF SOUTH AFRICA



(GAUTENG LOCAL DIVISION, JOHANNESBURG)

Case Number: **2014/28665**

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

In the matter between:

FRIEDSHELF 1509 (PTY) LIMITED t/a RTT GROUP

First Applicant

THOMAS JAMES ADLAM ERASMUS

Second Applicant

FREDDY MOORE

Third Applicant

NATHANIEL JOHN LESTER BALLAKISTEIN

Forth Applicant

And

HEMAL SHURESCHANDRA KALIANJI

Respondent

JUDGMENT

STRATHERN, AJ

1. This is the extended return day of an Anton Piller order which was obtained ex parte and in camera by the applicants on 7 August 2014. The order permitted

the applicants to search the business and residential premises of the respondent, for the purposes of identifying and pointing out to the sheriff certain Evidence, which was defined in the order as comprising:

"originals or copies of any emails or proof of any other communications between the respondent and any customers and/or competitors and/or employees of the first applicant's business RTT ("RTT") and/or to any members of the public in relation to RTT, dated after 31 January 2014;

originals or copies of or extracts from any confidential documents belonging or pertaining to RTT or any documents containing RTT's confidential information, being all documents (whether in hard copy or electronic form) which are of a confidential or otherwise sensitive nature which are in the respondent's possession and/or under his control".

2. The order also provided in the usual terms for the appointment of supervising attorneys and forensic experts to search and examine all electronic storage media in the possession of the respondent. Neither the applicants nor their attorneys were to be part of the search.
3. The order granted is in line with the type of order that is granted where it is anticipated that the search will be directed primarily at electronically stored information. Clause 3.3 of the order permits the making of copies and/or forensic images and/or mirror images and/or digital images of the hard drives of any digital devices or media located "**once it is determined that such digital devices or media contain the Evidence or part thereof**". The relevance of this emphasis will appear below.
4. Pursuant to the order, the applicants conducted searches at the respondent's residential and business premises.

5. Unlike the order appearing in the Gauteng Local Division practice manual, the applicants' order was subject to a rule *nisi*, in terms of which the respondent was called to show cause on 9 September 2014 as to why the following orders should not be made:
 - (a) the identified items in the custody of the sheriffs which constitute the first applicant's confidential information and in which it has a real or personal proprietary right shall be returned to the applicants forthwith;
 - (b) the identified items in the custody of the sheriffs in which the first applicant does not have a real or personal proprietary right shall be retained by the sheriffs pending the further direction of this court;
 - (c) the applicants are permitted to:
 - (i) make copies of the identified items in the custody of the sheriffs;
 - (j) take possession of the two forensic copies of hard drives of any digital devices or media in the custody of the sheriffs;for the purposes of instituting the further proceedings against the respondent foreshadowed in this application;
 - (d) the respondent is interdicted and restrained from disseminating false and defamatory statements about the applicants.
6. The applicants asked that the costs of the application be reserved for determination in the further proceedings to be instituted as foreshadowed in the application.

7. On 8 September 2014 the respondent delivered an answering affidavit, which necessitated the extension of the rule *nisi* until 10 November 2014 to allow for the delivery of further papers. The costs of the hearing of 9 September 2014 were reserved for argument at the hearing of the application.

The applicant's case

8. The first applicant owns a business known as RTT which conducts its business in the logistics industry in South Africa. The applicant alleges that it offers a range of warehousing and distribution solutions which are distinguished by the use of sophisticated software. The second, third and fourth applicants are members of the first applicant's management team.
9. The respondent was employed by the first applicant from 2010 as a software developer and became its Chief Information Officer. It is common cause that during his employment with the first applicant, the respondent, with the help of the first applicant's senior IT (information technology) manager compiled a list and data base of the first applicant's customers, containing their email addresses. The applicant refers to this list containing the names and email addresses of 11949 of its customers as the "*Christmas List*". According to the applicants the "*Christmas List*" was password protected, where the password was known only to the respondent and one other employee of the first applicant, one Mr. Van Niekerk.
10. It is also common cause that the respondent resigned with effect from 31 January 2014. On termination of his employment the respondent was subject to a restraint of trade agreement, precluding him from doing business with certain of the applicant's customers.

11. The applicants allege that subsequent to the termination of his employment, the respondent had motive to harm the applicants, primarily due to the following:
 - (a) - the respondent resigned shortly before he would have been eligible to receive payment of R11 million for his stake in the business of the first applicant and that consequently he lost this benefit.
 - (b) the respondent breached his restraint and was put on notice by the first applicant to abide therewith.
12. The applicants allege that these events left the respondent feeling disgruntled and hard done by. They allege that the respondent had "miscalculated disastrously" by leaving the applicant's employ when he did and deciding to breach his restraint undertakings.
13. On 19 July 2014 an anonymous email from a website known as 5ymail.com was sent to five senior employees of the first applicant, several of its key customers and at least two of its direct competitors. It is not to be disputed that this email was and is highly defamatory of the first applicant and its management team, accusing them of perpetrating a range of fraudulent and unethical practices against the first applicant's customers and investors. It is also not to be disputed that this email has caused the applicants reputational harm and has harmed the competitive position of the first applicant in the industry.
14. The applicants attribute the email to the respondent. In doing so, they allege that he had motive to injure the applicant, as a result of his losing out on the

R11 million payment and that it was necessary for the first applicant to make demand on him to adhere to the terms of the restraint of trade agreement.

15. The applicants allege that the emails were sent to certain customers on the "Christmas List", whose email addresses were not widely available in the public domain. The applicants have excluded Mr. Van Niekerk (who they allege was the only other person with access to the password providing access to the *Christmas List*) as having sent the email and accordingly decided that the likely culprit was the respondent.
16. The applicants had no direct evidence linking the respondent to the email and their case against the respondent is built on inferential reasoning. They rely on the timing of the email, which was sent some two weeks after the first applicant had warned the first respondent that he was in breach of his restraint of trade agreement. They reason that the respondent must have been the sender, as he is the only person with the requisite IT skill and he is familiar with information only available to officials at the level of senior management within the first applicant.
17. The applicants allege that the contents of the anonymous email were "strikingly similar" to a conversation held between the respondent and an employee of one of the first applicant's subsidiaries, one Mr. Kruger, some eight months earlier.
18. Based on this reasoning, the applicants alleged that there was no person with greater reason to resent and wish harm to the first applicant than the respondent.

19. Having concluded that the email must have been written and sent by the respondent, the applicants then made the usual allegations in support of an *ex parte, in camera* and urgent hearing.
20. The applicants then alleged that they have clear causes of action in defamation and unlawful competition against the author of the offending email (i.e. the respondent). They also sought an interim interdict, interdicting and restraining the respondent from disseminating false and defamatory statements about the first applicant.
21. The order granted permitted the applicants to search the business and residential premises of the respondent for the evidence.
22. On the return day the applicants did not seek an order for the return of any documents based on a real or personal proprietary right. The applicants sought the continued preservation of the items sealed, an order permitting them to make copies of the items in the custody of the sheriffs and confirmation of the interdicts. The applicants asked that the costs of the opposed hearing similarly be reserved for determination in the further proceedings foreshadowed in the application.

The searches

23. The applicants simultaneously conducted searches at the business and residential premises of the respondent.
24. The search at the respondent's residential premises took place in the presence of the respondent's wife, in the absence of the respondent. According to the

report of the supervising attorney, the respondent's wife was co-operative and she surrendered her cell phone to the sheriff as well as a Samsung tablet.

25. The order does not permit the search or examination of any devices which do not belong to the respondent. The execution of the order against the respondent's wife in these circumstances is irregular. The sheriff should have refused to allow any media belonging to the first respondent's wife to be examined and the supervising attorney should have prevented such examination.
26. It is settled law that serious irregularities in the execution of an Anton Piller order can render it susceptible to being discharged on a reconsideration thereof: (*See Audio Vehicle Systems v Whitfield and Another 2007 (1) SA 434 (C)* at paragraphs 28, 29 and 60).
27. It also appears from the affidavit of the supervising attorney that various drives, which were copied and sealed, had not been identified as containing "*the Evidence*" defined in the order. The supervising attorney's report states that certain devices appeared to have contained information or evidence relating to the first applicant and that it was on this basis that the copies were made. This too amounts to an irregularity in the execution of the order.
28. It also appears that 12 documentary pages were attached although it is unclear what they are or what they contain.
29. The inventory compiled by the sheriff is unhelpful as it does not provide any indication as to what was copied or seized in the search and it refers only in general terms to hard drives and pages. Documents and information are not

identified and there is absolutely no way of ascertaining from the inventory whether any of the **Evidence** was obtained and sealed.

30. As appears from the affidavit of the supervising attorney overseeing the search at the respondent's business premises, certain searches were performed for keywords and when certain keywords were found, which appeared in deleted space, an image of the hard drive was made. From an examination of the respondent's cellphone, there was reference to an email which appeared to relate to the first applicant which gave rise to the copying of the cellphone drive. It does not appear from the affidavit of the supervising attorney that the respective drives were copied only after it had been determined that they contained "*the Evidence or part thereof*", as required by clause 3.3 of the court order.
31. The inventory of items seized and sealed at the respondent's business premises is also of no assistance in identifying any of the documents or information found. It refers in vague and general terms to certain hard disk drives and a file system from a cellular phone.

The respondent's version

32. Whilst the respondent initially disputed the *locus standi* of the first applicant he did not persist with this point. The respondent disputes that he had any motive to harm the applicant. He alleges that he terminated his employment in amicable circumstances and that subsequent thereto he has rendered services for the first applicant, which the applicants failed to disclose in their founding affidavit. The respondent has also identified a number of the first

applicant's staff members who were dismissed and who would have motive to injure the applicant.

33. The respondent also disputes that the sender of the anonymous email required any sophisticated IT skills. He alleges that there was nothing in the email exclusively within the knowledge of an ex-employee and that it is more likely that the information would have emanated from a current employee. He states that he is "not the person" who sent the email.
34. In regard to the so-called "*Christmas List*" the respondent alleges that he had no knowledge of such a list. He also denies that only he and another employee were privy to the password and states that most senior sales team members, marketing persons and executive secretaries had access to client lists. He states that it would be strange indeed if sales teams did not have access to client lists and contact details.
35. The respondent denied that he had conducted a conversation with Mr Kruger regarding anything that may be set out in the email.
36. The respondent's opposition to the application on the extended return day can be summarised as follows:
 - (a) no *prima facie* case was made out in the founding affidavit that the respondent was responsible for the false email and applying the test regarding disputes of fact and contrary versions (as set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)) the applicant must fail on the return day. In this regard, the respondent relies on certain authorities which state that on the return day, the onus

to be discharged by the applicant is not that of a strong *prima facie* case (which is the test at the initial stage when the Anton Pillar order is sought) but on a balance of probabilities. (See *Frangos v Corpcapital Limited and Others* 2004 92) SA 643 T at 648 G to 649 C, which refers to *Sun World International v Unifruco Ltd* 1998 (3) SA 151(C) at 162H – 163C). I shall address this aspect later.

- (b) the applicants failed to make full disclosure of all material facts, in particular that the first applicant sub-contracted the services of the respondent and his company on a consultancy basis subsequent to his resignation from the employment of the first applicant. The respondent alleges that the applicants should have disclosed this information, as it would explain why the respondent would have documentation on his computer which related to the first applicant;
- (c) the applicant executed the order outside its scope by inspecting and copying a laptop computer that belonged to the respondent's company, Last Mile Innovations, and by inspecting the respondent's wife's computer, tablet computer and cellphone and copying her computer;
- (d) Anton Pillar relief is not appropriate for causes of action based on defamation;

37. the restraint of trade covenants which the applicants refer to are unenforceable.

Discussion of the various issues

38. Certain of the respondent's contentions can be disposed of without protracted debate.
39. I am of the view that the applicants were not precluded from seeking Anton Piller relief, simply because the cause of action is one based primarily on defamation. The sending of the email also amounts to an unlawful interference with the first applicant's contractual relationships with its customers, competitors and employees and proof of the dispatch of the email, and the recipients thereof would be relevant in a claim for damages based on such unlawful interference. It also may ultimately indicate unlawful competition.
40. I do not believe that this court reconsidering an Anton Piller application is required to assess the merits of a restraint of trade covenant which now appears to be disputed by the respondent. In any event such an exercise is irrelevant to the issues in this case.
41. I have already indicated above that in my view there were irregularities in the execution of the order. The search of the tablet and cell phone belonging to the respondent's wife, whilst comprising an irregularity, is not one which is serious enough to justify the discharge of the *rule nisi*.
42. It is also not open for the respondent to exclude from the search a laptop computer admittedly used by him simply because he uses such laptop computer in the business of a separate legal entity, i.e. "*Last Mile Innovations*".

43. What is of concern is the fact that various hard drives were copied and sealed in circumstances where from the reports of the supervising attorneys it had not first been determined that the drives contained "*the Evidence* or part thereof".
44. The applicants indicated in the order formulated by them that they would only copy and image drives once it had been determined that the drives contained *the Evidence* or part thereof. Having set this as the precondition for copying and imaging, the applicants were not permitted to copy and image drives simply because certain drives "*appeared to have information relevant to the* [first applicant]" as stated by the supervising attorney who oversaw the search at the respondent's residence. The presence of information relevant to the first applicant does not equate to *the Evidence* as defined.
45. Similarly, the reliance of "*traces of certain key words relevant to* [the first applicant]" as occurred in the search of electronic devices at the respondent's business premises is not in accordance with clause 3.3 of the order. The fact that search strings may have been identified on the drives does **not** equate to the drives containing the evidence.
46. It accordingly appears that copying of electronic devices took place without it first having been determined that such devices contained *the Evidence*.
47. These irregularities may justify a discharge of the order. It is however not necessary to make a finding in this regard.

The onus of proof on a reconsideration/return day in respect of the causes of action relied on by the applicants.

48. I now consider the onus of proof resting on the applicants in respect of the cause of action which they have against the respondent, and which they intend to pursue, both as regards the initial *ex parte* application and on the return day thereof.
49. The parties agree (and they are supported by the authorities) that the onus resting on an applicant at the hearing of an *ex-parte* Anton Piller application is a "clear case" or an extremely strong *prima facie* case. (See *Anton Piller KG Manufacturing Processes and Others* (1976) 1 All ER 779, *Roamer Watch Co SA and Another v African Textile distributors* 1980 (2) SA 254 (W).)
50. An Anton Pillar search and seizure is an extremely invasive procedure and there are sound public policy reasons as to why an applicant should be required to demonstrate a strong *prima facie* case (as opposed to a *prima facie* case) at the *ex-parte* stage of the application.
51. In *Roamer* above at 272D Cilliers AJ stated:

"The applicant should make out a clear case against the party against whom the order is sought. I would not necessarily go so far as ORMROD LJ, who stated that 'an extremely strong prima facie case' should be made out by the applicant, but the respondent should not be exposed to attachment and removal of his documents, information and goods, on grounds which are speculative or fail clearly to make out a case for relief against the respondent. In particular, the applicant's case should not be entirely dependent on such evidence as may or may not be found in the respondent's possession: that would amount to a mere 'fishing expedition'" (emphasis added).

52. As to the meaning of a *prima facie* case, this test is satisfied where a party adduces evidence of a fact which if unchallenged by the other side becomes conclusive proof of that fact. See *Marine & Trade Insurance Co Ltd v Van Der Schyff* 1972 (1) SA 26 (A) At 37-38. A strong *prima facie* case is shown where the *prima facie* evidence is particularly persuasive.
53. I am of the view that in their founding affidavit the applicants did establish a strong *prima facie* case. The applicants adduced evidence that by a process of elimination, the only person that could have sent the email was the respondent. This evidence requires a response from the respondent. The reasoning and conclusions in the founding affidavit are persuasive.
54. The question arises as to how to approach the *onus* on a return day or a reconsideration of the application.
55. The Practice Manual does not require an Anton Piller application to be subject to a return day. The rights of a respondent subject to an Anton Pillar application are protected by the provisions of uniform rules of court 6(8), which allows respondent to anticipate the return day and 6(12) (c), which allows respondent to apply for a reconsideration of that order.
56. In my view there is no distinction to be drawn between the rehearing of an Anton Pillar application on the return day where a *rule nisi* has been granted, or reconsideration thereof, in the absence of a *rule nisi*. The essence of the further hearing remains the same, and that is whether the initial order granted should remain in force pending the discovery process in the intended action to which the Anton Piller order relates, or whether the order should be set aside or discharged.

57. The applicants' counsel argued that on the return day, the test in respect of the cause of action remains that of *prima facie* proof. In support of this submission they relied on **The Reclamation Group (Pty) Limited v Smith and Others 2004 (1) SA 215 (SE)**, where Froneman J stated (at 221-222);

"The requirement of a prima facie cause of action, in the sense of an applicant showing 'no more than that there is evidence, which, if accepted, will establish a cause of action' (per Botha JA in Cargo Laden and Lately Laden on Board the MV Thalassini Avgi v MV Dimitris 1989 (3) SA 820 (A) at 831H - I) needs no adaptation at the reconsideration stage. This requirement relates to an issue which would have to be adjudicated upon in the forum hearing the main action to which these proceedings are merely a precursor (compare the Thalassini case, above, at 832C, and similar reasoning in the Bocimar NV case, above, at 581A - B). There is no need to prejudice that finding further at this stage".

58. Both sets of counsel are agreed that proof of a balance of probabilities is required in respect of the remaining requirements for an Anton Piller order, ie:
- (a) the respondent has in his possession specific documents or things that constitute vital evidence and substantiation of the applicants' cause of action; and
 - (b) there is real and founded apprehension that evidence might be hidden or destroyed.

59. The respondent's counsel, relying on **Frangos** and **Sun World** *supra* argued that the onus to be discharged by the applicants on the return day in respect of the causes of action is on a balance of probabilities and that the ordinary rules relating to the proof of facts in motion proceedings ought to apply.

60. In this regard they referred me to the following passage in **Frangos** (at 648 to 649:

However, it appears that when the matter is opposed on the return day (such as the case in casu), the test of mere prima facie proof in disposing of the applicant's onus may be inappropriate and that the ordinary rules relating to the proof of facts in motion proceedings ought to apply. See the apposite judgment of Van Reenen J in Sun World International Inc v Unifruco Ltd 1998 (3) SA 151 (C) at 162H - 163C: (T)he evidential criterion for the above-mentioned three prerequisites is prima facie proof. If it is borne in mind that Corbett CJ in Shoba's case confined the evidential criterion for Anton Piller orders brought ex parte, the inference is justified that the concept of prima facie proof was used in the sense of, as yet, unrefuted evidence which, if accepted, constitutes proof of the required facta probanda (see Kalil v Decotex (Pty) Ltd and Another 1988 (1) SA 943 (A) at 976G - H; Butler v Banimar Shipping Co SA 1978 (4) SA 753 (SE) at 757E; Cargo Laden and Lately Laden on Board the MV Thalassini Avgi v MV Dimitris 1989 (3) SA 820 (A) at 823B; Schmidt Bewysreg 3rd ed at 2). If an identical criterion were to be applied on the return day of an Anton Piller order it would mean that factual issues in the affidavits will have to be resolved without regard to a respondent's rebutting evidence. Such an approach will clearly be inappropriate (cf Kalil v Decotex (Pty) Ltd and Another (supra at 976I)). And I am accordingly inclined to the view that the usual evidential criteria should apply in those circumstances.' (My emphasis.) See also at 163A. See also Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) where the usual approach to disputes of facts on the full papers is set out." counsel referred me to that passage which reads as follows:

"However, it appears that when the matter is opposed on the return day (such as the case in casu), the test of mere prima facie truth in disposing of the applicant's onus may be inappropriate and that the ordinary rules relating to the proof of facts in motion proceedings ought to apply..."

61. Counsel for the respondent argued that I am bound to follow the reasoning and findings in *Frangos* and *Sun World* unless I find the decisions are incorrect in this regard.
62. As I shall attempt to justify below, I intend to depart from such reasoning and findings. I do not agree that the applicants must prove their causes of action on a balance of probabilities on the return day in an Anton Piller application.
63. The applicants are not seeking final relief on the return day, as argued by the respondent, and reliance on the notion that the confirmation of an order on the return day amounts to the granting of “*final Anton Piller relief*” is in my view unsound.
64. Basson J correctly stated in ***Frangos*** (at p 647) that “*an Anton Piller order is directed at the preservation of evidence*”, which has been accepted as the basis for such an order ever since the decision 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 (4) SA 1 (A)
65. An Anton Pillar order accordingly remains interlocutory in nature and its purpose is to preserve evidence for use at a subsequent trial, regardless of whether it is being considered at the *ex parte* stage or the return day stage. Employing analogous reasoning, when an interim interdict is sought and obtained *ex-parte* and is reconsidered by court at the instance of a respondent after service of the order, the court hearing the reconsidered application is still hearing an interim interdict, where the test remains a *prima facie* right open to some doubt. It is only where the substance of the relief

changes on the return day (e.g. a provisional versus a final sequestration order) that the onus changes.

66. In my respectful view, Basson J did not take into account the fact that an applicant on the reconsideration or return day of an Anton Piller order is seeking the same order originally obtained, i.e. an interlocutory preservation order. It is apparent that Basson J accepted the reasoning in *Sun World* without further ado.
67. I also must also respectfully disagree with the reasoning of Van Reenen J in *Sun World* i.e. "*If an identical criterion were to be applied on the return day of an Anton Piller order, it would mean that factual issues in the affidavits will have to be resolved without regard to a respondent's rebutting evidence*". Whilst Van Reenen J was able to dispose of the matter in *Sun World* without having to decide disputes of fact, he too in my respectful view did not take into account the fact that Anton Piller orders remain interlocutory in nature.
68. In my view the test at the opposed return day or reconsideration of an Anton Piller order is whether, after considering the competing allegations and submissions on the affidavits, the applicants still make out a strong *prima facie* case. In this regard the court would not be bound to determine the matter on the basis of facts alleged by the respondent which cannot be rejected on paper, as argued in this matter by the respondent's counsel.
69. To saddle an applicant with the burden of proving the cause of action on a balance of probabilities on the return day of an Anton Piller hearing would doom most Anton Piller applications to failure: - All that would then be required of a respondent in order to defeat the application on the return day and

obtain the return of the documents seized would be to put up a version which cannot be rejected on affidavit. It would also unduly fetter the discretion of a judge to order the continued seizure of documents, even where the competing contentions are unconvincing but cannot be rejected.

70. I accordingly conclude that the test for proof of the existence of the cause of action on the return day or at the reconsideration stage remains a strong *prima facie* case.

The absence of a strong *prima facie* case

71. On a consideration of all the competing allegations and contentions in this matter, I am of the view that the applicant has not shown a strong *prima facie* case. I say this for amongst others, the following reasons:

- (a) the applicants failed to disclose in their founding papers that subsequent to the termination of the respondent's employment the respondent had done work for the first applicant which would explain the respondent's possession of certain documents relating to the first applicant. Whilst the applicants in reply have sought to downplay the extent of the business relationship between the respondent and the first applicant, the mere existence of such a relationship is something which should have been disclosed upfront, as this fact militates against the notion that the respondent had reason to harm the first applicant.
- (b) whilst the applicants put up a convincing case in the founding affidavit that the email could only have been sent by the

respondent, he has adduced evidence identifying a number of disgruntled ex-employees who had greater motive to harm the first applicant. These persons also had access to the confidential information enabling them to send the email. In considering this I also take into account that the applicants do not expressly state that the identity of the recipient email addresses was only available from the *Christmas List*. Once it is established that the email could plausibly have come from persons other than the respondent, the strength of the applicant's strong *prima facie* case weakens considerably.

- (c) the respondent has stated that in order to send bulk emails from the anonymous website it would be necessary for the sender to be registered. He stated that he was not so registered and that the applicant had taken no steps to ascertain whether he was so registered or not. This aspect was not addressed in the founding affidavit.

72. The applicants' counsel in reply urged me to find that because the respondent had used the 5ymail.com website, this supported the applicants' case. The allegation relied on is that one of the applicants' computer operators, one Mr. Jordaan asked the respondent if he had used the 5ymail.com website, to which the respondent allegedly replied that he sometimes used it for business purposes. I have considered this aspect and take into account that the respondent had disclosed in his answering affidavit that he has visited the website in response to becoming aware of the existence of the false email. I cannot elevate the tenuous connection between the respondent and

5ymail.com into a basis for finding a strong *prima facie* case that the respondent sent the email.

73. As there is no evidence linking the respondent to the sending of the email, I must guard against continued seizure of documents and information where, to allow the applicant access to it in the hope that there is something there which incriminates the respondent, would be to sanction a fishing expedition.
74. Having found that the applicants have not shown a strong *prima facie* case on the return day it is unnecessary for me to address the other issues that arose in the matter.

Discussion

75. There are some aspects however that I feel duty bound to address.
76. In the draft order the applicants sought permission to make copies and/or forensic copies and/or mirror images of electronic media storage devices. Although the respondent did not take issue with this type of order, in my view it should be required of an applicant to at least make out some case as to why it is necessary to make a copy of an entire drive as opposed to only a folder or a file containing the relevant information. If it is to guard against subsequent possibilities that the drive has been tampered with or altered, or that there may be files hidden or contained in deleted directories, an applicant should say so. There can be no reason for the copying of folders which clearly fall outside the categories of documents or evidence sought, and which may be personal to the respondent who is the subject of the search order. The founding affidavit sets out no facts in support of the extraordinary relief sought in this regard.

77. A difficulty which arises in this matter and no doubt in many other matters is the fact that these days, evidence which is attached and seized in Anton Piller applications is primarily contained in electronic storage media devices. Accordingly when attachments are made, hard drives are sealed and kept in the possession of the sheriff. Most often an applicant has no way of knowing precisely what is contained on the hard drive.

78. In *Kebble and Others V Wellesley-Wood and Others* 2004 (5) SA 274 (W) 2004 (5) SA 274 (W), it was held that a distinction is to be drawn between documents and evidence in which the applicant has a real or proprietary right and in respect of which it has no such right. Schwartzman J had the following to say:

[9.1] *What the Practice Manual and the Eiser judgment (1998 (3) SA 139 (W) overlook is that our jurisprudence has developed two types of Anton Piller orders. The one has to do with an attachment where the applicant seeks the preservation of documentary evidence in which it has no proprietary interest (Universal City Studios (supra at 755A - D)). The other has to do with an attachment where the applicant seeks to assert a real or personal right in what is being attached (Cerebos Food Corporation Ltd v Diverse Foods SA (Pty) Ltd and Another 1984 (4) SA 149 (T) at 150G - H).*

[9.2] *The Eiser decision had to do with Anton Piller relief in which the applicant was asserting a real right in that it was alleged that the respondents were making use of its confidential information for the purpose of the respondents' business (at 141D - F). In such a case, where a real right is being asserted, it is conceivable that there could be a case in which an applicant may need to make copies of attached documents for the purpose of annexing them to its summons or founding affidavit in an action to establish the unlawful use of its property. If such right is to be sought, the reason or need to copy the documents should be set out in the applicant's founding affidavit. It is*

unfortunate that the Eiser judgment does not set out the facts or reasons for the Judge of first instance granting an Anton Piller order that entitled the applicant to what is, in effect, a second bite at the cherry.

[9.3] Proceedings to assert or protect a real or personal right in what is being attached are a far cry from proceedings in which an applicant seeks the preservation of evidence in which no proprietary right is asserted. This is Anton Piller relief in its original form. When a non-proprietary right is asserted, all that the applicant is entitled to is an order that will preserve evidence that would otherwise be lost. After attachment, such an applicant is not entitled to look at or copy such evidence, nor is it entitled to use such evidence to frame a cause of action or support a cause of action (see *Roamer Watch Co SA and Another v African Textile Distributors also t/a M K Patel Wholesale Merchants and Direct H Importers* 1980 (2) SA 254 (W) at 271A - E, 273C and 274D - F; *Universal City Studios (supra at 755H - J); Hall and Another v Heyns and Others* 1991 (1) SA 381 (C) at 385G - 390C and 391B - 393D; *Sun World International Inc v Unifruco Ltd* 1998 (3) SA 151 (C) at 171D - 173C). Having stated the general rule in applications where a non-proprietary right is being asserted, special circumstances would have to be set out to justify any departure from this rule.

79. A difficulty that would have arisen in this case is that the inventories prepared by the sheriffs pursuant to the attachments fail to identify (even in the most general terms) the nature of the information attached. As was more prevalent previously, where a physical document is attached and listed, the description of such document in an inventory will often identify it and indicate whether it demonstrates a proprietary right in favour of the party at whose instance the attachment is made. This is not the case when an inventory only lists an electronic drive without identifying any of the information contained on it. In

this case the applicants have no way of showing any entitlement to inspect any of the documents.

80. In my view the practice needs to be developed in order to overcome such difficulties and to allow for a subsequent inspection by the supervising attorney and the computer expert, aimed at properly identifying electronically stored documents.

Conclusion and order

81. As a result of the conclusion reached by me in this matter it is not necessary for me to deal with the allegations in support of an *ex parte*, *in camera* and urgent hearing aspects any further.
82. It follows from the absence of a strong *prima facie* case that the applicant is not entitled to the interdict which forms part of the *rule nisi*.
83. The parties did not argue the issue of the costs reserved on 9 September 2014. These costs are insignificant and were incurred to afford the applicants an opportunity to reply, and to set time periods for the preparation of heads of argument. I see no reason why they should not follow the result.
84. The respondent's counsel urged me to dismiss the application with punitive costs. In the exercise of my discretion I do not intend awarding punitive costs, notwithstanding the inherent flaws in the applicants' case and the irregularities in the execution of the order.
85. I make the following order.
- (a) The extended rule *nisi* is discharged;

- (b) The applicants are ordered to restore to the respondent all documents and data seized from him;
- (iii) The applicants are to pay the costs occasioned by the respondent's opposition to the application, including the reserved costs of the hearing on 9 September 2014, such costs to include the costs consequent upon the employment of two counsel.

STRATHERN AJ

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Respondent's Attorneys: Jurgens Bekker

Date of hearing: 14 November 2014

Date of Judgment: 16 February 2015