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**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCIAL DIVISION**

Not Reportable

Case no. 5809/2022

In the matter between:

LUXOR PAINTS (PTY) LTD

Applicant

and

GECKO COATING SA (PTY) LTD

First Respondent

CHEMFARBEN INTERNATIONAL (PTY) LTD

Second Respondent

THEUNES POTGIETER

Third Respondent

Coram: Opperman, J

Heard: 1 June 2023

Delivered: 14 July 2023. This judgment was handed down electronically by circulation to the parties' legal representatives *via* email and release to SAFLII on 14 July 2023. The date and time of hand-down is deemed to be 15h00 on 14 July 2023

Summary: Anton Piller order – confirmation of rule *nisi* – condonation for late filing of replying affidavit – costs order in Anton Piller

ORDER

It is ordered that:

1. Condonation is granted for the late filing of the Replying Affidavit by the applicant; each party to pay their own costs in the application.
2. The order dated 23 November 2022 is confirmed.
3. In terms of paragraph 24 of the order, the identified items in the custody of the Sheriff shall be retained by the Sheriff pending the further direction of this Court and the applicant is permitted to:
 - i. Make copies of the items in the custody of the Sheriff; and
 - ii. take possession of the two forensic copies of the hard drives of any digital devices or media in the custody of the Sheriff for the purposes of instituting the further proceedings against the respondents foreshadowed in this application.
4. The costs of this application are reserved for adjudication in the main action foreshadowed in this application.

JUDGMENT

THE ANTON PILLER APPLICATION

[1] The case centers on the adjudication of an Anton Piller order. As the litigation surrounding the Anton Piller order evolved the issues of an application for condonation for the late filing of a Replying Affidavit by the applicant and the costs of the case; that is for the condonation application and the Anton Piller application, came to the fore.

[2] It is crucial to understand the nature and law of an Anton Piller application and order as backdrop to the reading and understanding of the judgment. After many years and much litigation, it is still every so often misconceived. The phenomenon in our common law, that is the Anton Piller order, is by now trite law in South Africa. The law is of British origin¹ but was developed to comply with the South African Rule of Law.

[3] One of the earliest reported judgments is that of Cilliers, AJ on 6 November 1979 in *Roamer Watch Co SA and another v African Textile Distributors also t/a M K Patel Wholesale Merchants and Direct Importers* 1980 (2) SA 254 (W) and then followed what Erasmus, HJ referred to as the “*The Anton Piller Muddle*” in (1991) 108 SALJ 379. The courts struggled to capture the nature of the relief and the admissibility thereof in the South African law. All the controversy over the years could have been prevented if only it was realized that this common law process in law was developed within the inherent powers of the court to do so and has a purpose to serve. As Cilliers, AJ stated in 1979 on page 271(A-D) in the *Roamer Watch* - case; and that is still the law:

I would suggest that, always keeping in mind that this type of relief is aimed at the preservation of evidence, a plaintiff obtaining such an *ex parte* order, should not be given relief beyond that which is necessary to preserve the evidence relevant to his case, and should not in effect be afforded an opportunity to study and copy

¹ *Anton Piller KG v Manufacturing Processes Ltd and others* [1975] EWCA Civ 12, [1976] 1 All ER 779 (8 December 1975), *Anton Piller KG v Manufacturing Processes and others* (1976) 1 All ER 779, in the judgment of Lord Denning. He stated that:

But the order sought in this case is not a search warrant. It does not authorise the plaintiffs' solicitors or anyone else to enter the defendant's premises against his will. It does not authorise the breaking down of any doors, nor the slipping in by a back door, nor getting in by an open door or window. It only authorises entry and inspection by the permission of the defendant. The plaintiff must get the defendant's permission. But it does do this: It brings pressure on the defendant to give permission. It does more. It actually orders him to give permission - with, I suppose, the result that if he does not give permission, he is guilty of contempt of Court.

documents and other information which may contain trade secrets in respect of which it may ultimately appear that he is not entitled.

But, in principle, the Court should, in my view, be extremely circumspect about allowing the copying of documents and information. It seems to me that, once a plaintiff has been able to identify documents, other information and articles which he seeks to have preserved for their evidential value, and such documents, information and articles have been removed and placed in safe custody until all parties can be heard, the plaintiff should not be given more access to the defendant's documents, information and articles than he can elicit by the ordinary rules of discovery or *other relief which he can obtain by the exercise of the inherent powers of the Court after hearing all parties*. I shall hereinafter make certain suggestions as to the kind of safeguards which may appropriately be applied in this type of order. (My emphasis)

The safeguards stipulated then are still applicable and relevant in 2023.

[4] The attitude to the costs order in the same case likewise still prevails:

6. The costs of this application are reserved for decision in the action referred to in paras 1 and 3 (b) above; provided that, should the applicants fail to institute such action within four weeks from the date hereof, either party may apply to this Court, on notice to the other parties, for an order as to the costs of this application.

[5] In *Universal Studios Inc v Network Video (Pty) Ltd* 1986 (2) SA 734 (A) on page 754 at E to G:

It is probably correct, as so cogently reasoned by the Court in the Cerebos Food case *supra*, that there is no authority for such a procedure in our common law. But, of course, the remedies devised in the Anton Piller case *supra* and other subsequent cases for the preservation of evidence are essentially modern legal

remedies devised to cater for modern problems in the prosecution of commercial suits. (Emphasis added)

[6] The Constitutional decree is served with safeguards incorporated into the order to be observed throughout the granting and the execution of the order.² The application of the Constitutional demand stipulated in the Bill of Rights gives credence to the law.

[7] The development of our law is also related to the expansion of the property susceptible to the search and seizure. The Supreme Court of Appeal recognized that information is to be protected if it possesses the qualities of confidentiality and the applicant for the order can prove at least a quasi - proprietary or legal interest in the information to be protected.³

[8] The milieu of an Anton Piller order is extraordinary and unique. An Anton Piller order is an interlocutory, multi-layered, *sui-generis*, judge-made and constitutionally complicated remedy in our law. It has been described as “a Draconian form of relief” which “should be granted only under exceptional circumstances”. Its use has been labelled as an example of the outer extreme of judicial power.⁴

² *Memory Institute SA CC t/a SA Memory Institute v Hansen and others* 2004 (2) SA 630 (SCA) at [3].

³ *Absa Insurance and Financial Advisers (Pty) Ltd v Moller and others* (20216/2014) [2014] ZAWCHC 176 (21 November 2014) at [9] to [11] and *Gordon Lloyd Page & Associates v Rivera and another* 2001 (1) SA 88 (SCA) at [10].

⁴ Erasmus: *Superior Court Practice* at RS 20, 2022, D8-1 (Juta.co.za) with reference to case law being that in *Rath v Rees* 2007 (1) SA 99 (C) at 107H & 108A, the reasons being that ‘it authorises access to the respondent’s premises for purposes of searching for and seizing documents and material relevant to a proposed action before an action has been instituted against the respondent’ and that ‘the application for such order is brought *ex parte*, without notice to the respondent, while the hearing is frequently *in camera*, with a view to avoiding any form of publicity which might arise should the application be brought in open court’ (at 107H–I). See also *Mathias International Ltd v Baillache* 2015 (2) SA 357 (WCC) at 362E, 363D, 363H–I and the cases there referred to; *Cratos Capital (Pty) Ltd v Zimri Investments CC* (unreported, WCC case no 20968/2021 dated 24 May 2022) at paragraph [17] and the cases there referred to. *Van Der Merwe v Van Wyk Auditors* (unreported, GP case no 48149/2021 dated 18 July 2022) at paragraph [50].

[9] The judicial ethos wherein matters of this nature must be considered was recently aptly engrained in our law in *Cratos Capital (Pty) Ltd v Zimri Investments CC and another* (20968/2021) [2022] ZAWCHC 87 (24 May 2022):⁵

[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

⁵ In *Hudaco Trading (Pty) Ltd v Apex Superior Quality Parts (Pty) Ltd and others* (12825/2020) [2021] ZAGPJHC 166 (12 April 2021) counsel for the applicant *in casu* successfully opposed and had the Anton Piller order discharged and the Sheriff directed to return to the second respondent the material seized in the execution of the provisional order and that the applicant shall be liable to pay the second respondent’s costs of suit. The respondents’ main grounds of opposition were that: (i) no proper case was made out for the granting of the Anton Piller order, (ii) the order obtained was in the broadest and vaguest of terms and did not comply with the law and practice directives; (iii) the process was abused by the applicant with the aim of stifling competition between itself and the first respondent; and (iv) the execution of the order exceeded the law in several respects, justifying its discharge. In *Non-Detonating Solutions (Pty) Ltd v Durie and another* 2016 (3) SA 445 (SCA) the requirement of specificity, i.e., that an applicant had to show that a respondent had in their possession specific (and specified) documents that constituted vital evidence in substantiation of the applicant’s cause of action, did not mean that only individual documents identified by, for example, date or origin; were properly liable to be attached. To so hold would be against established law, which permitted search and seizure orders for specific classes of documents. The evidence sought must be vital. Vital in the sense of being evidence of great importance to the applicant’s case. (Emphasis added)

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.'

[10] Important about the *Anton Piller* order is, *inter alia*, the following:

1. As Harms⁶ with reference to case law stated: "The order is, however, sometimes attached to a rule *nisi* but whereas a rule *nisi* operating as an interim interdict usually seeks to maintain the *status quo ante*, the *Anton Piller* order gives instant relief, subject to the possibility of a later variation or discharge of the order."⁷ (Emphasis added)

⁶ Civil Procedure, *Civil Procedure in the Superior Courts*, Part B High Court, UNIFORM RULE 35 DISCOVERY, INSPECTION AND PRODUCTION OF DOCUMENTS, Excursus *Anton Piller* Orders, Last Updated: February 2023 at B35.31 to B35.37, LexisNexis. Also see Erasmus, *Anton Piller Orders in South African Practice* (1984) 101 SALJ 324; Erasmus, *The Anton Piller Muddle* (1991) 108 SALJ 379 and Herbstein & Von Winsen, *Civil Practice*, 1495–1518, Juta.

⁷ *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam; Mphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg* 1995 (4) SA 1 (A) 15G and 19H. The procedure of granting *ex parte* orders *in camera* is not desirable (*Knox D'Arcy Ltd v Jamieson* 1996 (4) SA 348 (A) 379) but it is permitted if the circumstances justify it, (*Director of Public Prosecutions v Mohamed* NO 2003 (4) SA 1 (CC)).

2. The investigation by the court on the return date is two pronged: i. Whether a proper case for Anton Piller relief in the first instance was established. It is a reconsideration of the relief in the first instance with the luxury of hindsight and the facts that followed the execution of the order. The court sitting on the return date, with all the evidence here and now at its disposal and in retrospection, must decide whether the first stage of the order was just and equitable. Further; ii. Whether the order was lawfully executed and the material of such contents and substance, to justify the handing over of the information obtained to the applicant to be used in the main action. Were any basic constitutional rights infringed during the application for the order, the execution of the order and the obtaining of the evidence and is the information seized relevant to the main action?

3. The process must, as a whole, be measured with the fundamentals in section 36 of the Constitution, 1996. The statement of the applicant *in casu* in paragraph 3 of their Heads of Argument is thus not correct in that:

Information identified in the application and the Order was located and retained by the Sheriff in the course of the execution of the Order. The further events contemplated in the order have occurred and the court is only concerned at this stage with the confirmation of the rule *nisi* in paragraph 24 of the Order and the opposition thereto. Paragraph 24 is an order for the handing over of the material by the Sheriff to the applicant.

4. The order is not a form of early discovery or discovery at all. The point of departure under South African law is that every person should be afforded the opportunity to respond to evidence tendered against them; the so-called *audi alteram partem* rule. Discovery will be a reaction to evidence. The Anton Piller order, to protect the evidence, does the opposite. The respondent is deprived of the *audi alteram partem* constitutional right with an *ex parte*, *in camera* and urgent order. There is also a different procedural process attached to discovery.

5. Harms⁸ correctly found, with reference to case law, that the Anton Piller order does not permit delivery-up. Delivery-up is a statutory remedy found in the Patents, Copyright and Trade Marks Acts. It provides final relief; after a defendant has been found to be infringing the law it commands him to deliver up the infringing articles. An Anton Piller order, on the other hand, is an interim order that aims to preserve evidence. It places the applicant in the position to preserve and protect his right to fair litigation in that the respondent is prevented from destroying evidence. The evidence is to be used in the main action that will follow. Delivery-up is re-active and Anton Piller relief pro-active.

6. A *prima facie* personal or real right to a document or material may not be used as the proverbial smoking gun in legal proceedings launched by the applicant. The purpose of the remedy is not to establish a case against another (i.e., a fishing expedition), but to preserve the evidence to substantiate an already existing case. This will also, as an inevitable consequence, prevent the alleged illegal use of the information pending the finalization of the main action. Courts must be vigilant that interdicts that might be better suited as remedies to the facts of a case, are not warped into Anton Piller applications.

7. The essential requirements for obtaining an Anton Piller order have been codified in our law in the case of *Universal Studios Inc v Network Video (Pty) Ltd* 1986 (2) SA 734 (A) and as repeated in *Shoba v Officer Commanding Temporary Police Camp, Wagendrift Dam and another; Maphanga v Officer Commanding, South Africa Police Murder and Robbery Unit, Pietermaritzburg, and others* [1995] ZASCA 49, [1995] 2 All SA 300 (SCA), 1995 (4) SA 1 (A). The *prima facie* requirements for an applicant's founding papers (to be brought on an *ex parte* basis and *in camera*) for an Anton Piller application are:

- i. A valid cause of action must exist against the respondent(s) and the intention exists to pursue such cause of action;

⁸ *Supra* at B35.32.

- ii. the respondent(s) have possession of the documents or articles that are vital evidence in substantiation of the applicant's cause of action; and
- iii. there is a real and well-founded apprehension that the evidence would be hidden, destroyed or "spirited away" by the time discovery will take place or the case comes to trial.

8. There must be specificity of the quasi - proprietary or legal interest in the information or right to be protected. In *Waste-Tech (Pty) Ltd v Wade Refuse (Pty) Ltd* 1993 (1) SA 833 (W), the court confirmed that the applicant in a search and seizure application must:

- i. Identify the document or article which is to be attached; and
- ii. establish (at least *prima facie*) their right to the document or article, that is, "his right to ownership or right to delivery or statutory intellectual property right in the document". The South African courts have therefore no jurisdiction to grant an order for the attachment of the property of another where no right of the applicant therein exists, merely for the purpose of its production as evidence.

9. Added to the above is that the illegal execution of the order may cause the whole of the order to be set aside on the return date and the dismissal of any further relief. Courts should be careful to ensure that the Anton Piller procedure is not used indiscriminately or as an instrument to harass defendants and litigate them into submission by lawfare.⁹ The court also has the discretion to order any alternative relief it deems fit in the circumstances of the case to protect the constitutional legality and against prejudice.

10. Where the execution of the order is seriously flawed the court ought to show its displeasure by making a punitive costs order and/or by setting the provisional order aside (even if the respondent did not suffer harm). On the other hand, where a

⁹ Harms *supra* at 35.36. *Hudaco Trading (Pty) Ltd v Apex Superior Quality Parts (Pty) Ltd and others* (12825/2020) [2021] ZAGPJHC 166 (12 April 2021).

respondent does not comply with an Anton Piller order the sanction for failure is contempt of court.¹⁰

11. The hearing of an Anton Piller case is not a preliminary mini trial of the merits of the main action.

12. The Anton Piller order, being an extraordinary order, resulted in jurisprudence that developed to order costs to, as a rule, be reserved for determination in the further proceedings. Costs in the Anton Piller application is then at the mercy of the outcome of the main action.

13. The test is not according to the *Plascon Evans* - dictum. There was much debate about the onus in the past.¹¹

14. Harms said it best with reference to case law:¹²

The court has a discretion whether or not to grant an Anton Piller order and if it does, on what terms. In exercising its discretion, the court will have regard to the cogency of the case made out by the applicant and, with reference to the requisites for the order, must weigh the potential harm that will be suffered by the respondent if the order is granted against the potential harm to the applicant if the relief is withheld. The order granted should not be more onerous than is necessary to protect the applicant's interests. Anton-Piller-type orders are, as such, neither contrary to public policy nor unconstitutional. An order may, however, infringe basic rights protected by the Bill of Rights. Any order must constitute a reasonable and justifiable limitation on particularly the right of privacy, which requires that the principle of proportionality be applied.

¹⁰ Harms *supra* at 35.36.

¹¹ See Erasmus *supra* at "4. Discretion of Court" on RS 20, 2022, D8-6 to RS 20, 2022, D8-8.

¹² *Supra* B35.35 "Discretion and constitutionality".

15. The case of *Cheickhart General Sales (Pty) Ltd v B & W Autobody Experts CC T/A Autobody Experts (UM 156/2020) [2021] ZANWHC 22 (18 August 2021)* gave the preferable solution:

[22] In the more recent judgment of *Interpark South Africa (Pty) Limited v Acuity on Point Solutions (Pty) Limited and others (A5073/2018) [2021] ZAGPJHC 15 (2 February 2021)* at paragraph [4], where a Full Court decision, penned by Adams J, in my view concisely stated the correct approach to adopt on the return date of a rule *nisi*:

“[4] The question to be decided in this appeal is whether the court *a quo* had, on the return day of the rule *nisi*, correctly applied the applicable legal principles as enunciated *inter alia* in *Shoba v Officer Commanding Temporary Police Camp, Wagendrift Dam and another* 1995 (4) SA 1 (A) and *Non-Detonating Solutions (Pty) Ltd v Dune* 2016 (3) SA 445 (SCA). The question is whether the appellant, which was the applicant in the court *a quo*, had proven on the return day that at the time of applying for the Anton Piller preservation order: (1) it had a prima facie cause of action; (2) prima facie the respondents were in possession of documents important to that cause of action; and (3) it (the appellant) had a reasonable apprehension that the respondents might not discharge its duty to make full discovery. If those requirements had been met in the appellant’s application, and provided that there were no other grounds to set aside the order, such as serious flaws in its execution, the preservation order should have been allowed to stand.” (My emphasis)

16. The above test flows straight into the condonation application for the late filing of the Replying Affidavit *in casu*.

[11] The adjudication of the condonation application for the late filing of the Replying Affidavit by the applicant must be done with an eye on the *sui generis* test described in Anton Piller applications. New information on the return date of the order is crucial and

inevitable. I revert to give some background on the evolvement of the litigation in the case.

THE EVOLVEMENT OF THE LITIGATION

[12] An action (the “main action”) for and interdict to prevent the use and possession of the formulae of the applicant and damages to the estimated value of R5 000 000.00 arising out of the respondents’ unlawful competition with the applicant (premised on their alleged unlawful use and possession of formulae developed and possessed by the applicant) had already been issued out of this court under case no. 6361/2022 on 14 December 2022 by the applicant. Reginald Hendricks, an industrial chemist was cited as third defendant to Gecko Coating SA (Pty) Ltd and Chemfarben International (Pty) Ltd; the first and second respondents *in casu*. Theunes Potgieter was cited as the fourth respondent.¹³

[13] On 23 November 2022, the applicant that has as its core business the manufacturing of automotive and industrial refinish products, convinced a court to grant an urgent order; *ex parte* and *in camera* (“the order”). The order authorized the searching for and seizure of the applicant’s alleged confidential and proprietary formulae.

[14] The applicant in their Heads of Argument at paragraph 1 suggested that: “...as well as for an order preserving evidence against the respondents of their unlawful use of the said formulae (“the Order”)”. The secondary fall out may indeed be the prevention of the illegal use of the formulae in that the confiscation prevented the illegal use; the formulae were not readily available to misappropriate. But, reading of the order does not indicate any order that interdicts the respondents explicitly so from the use of any material. The statement is thus to be doubted. The purpose and nature of an Anton Piller order is not to cause an interdict, it is to prevent that the evidence would be hidden, destroyed or “spirited away”.

¹³ Pages 518 to 534 of the Bundle: “Urgent Anton Piller Application” dated 16 May 2023 (“the Bundle”. All references will be to documents in the Bundle except if otherwise indicated).

[15] The applicant went forth, in what can be described as a blitzkrieg to, on the 24th of November 2022 as the businesses of the respondents opened; and thereafter on the 25th of November 2022, execute the order. The respondents had no inkling of the application and resultant order. This is the nature of the beast that is an Anton Piller order. This is to protect the evidence and lies at the core of the relief.

[16] The Sheriff had to, and did, explain the significance, content, remedies and consequences referred to in the order to the third respondent. The respondents immediately employed the services of an attorney.¹⁴

[17] The respondents did not anticipate the order for which the rule *nisi* was set down on 16 March 2023 to oppose the execution of the order and the search and seizure of the property as they had a right to do.¹⁵ They filed their Notice to Oppose on 5 December 2022.

[18] The execution of the first part of the order was finalized on 25 November 2023. The reports of the Independent Supervising Attorneys, the Independent Forensic Chemist and the Scene Report from the Digital Forensic Laboratory: Cyanre, were filed mid December 2022.

[19] The attorneys for the respondents withdrew from record on 18 January 2023 and Spangenberg Zietsman & Bloem came on record for the respondents on the same date.

[20] The respondents filed their Opposing Affidavit as per the order on 28 February 2023.

¹⁴ Pages 248 and 254.

¹⁵ In terms of clause 12.3.1 of the order: "... any interested party may apply to this Court on not less than twenty-four (24) hours' notice to the offices of the applicant's attorney for a variation or setting aside of this order, the Court's practices and rules applying unless the Court directs otherwise; ..."

[21] The case was due to be heard on 16 March 2023 but had to be postponed because the applicant failed to file their Replying Affidavit timeously.

[22] They only filed on 9 May 2023 and without an alleged proper application for condonation. They were forced into complying with the Uniform Rules of Court by a Notice in terms of Rule 30 from the respondents filed on 19 May 2023. The notice complained that the application for condonation was not substantive and it was also objected to new matter introduced in the Replying Affidavit.

[23] The wasted costs for the 16th of March 2023 were ordered to be paid by the applicant on attorney and own client scale.

[24] The Notice of Motion for Condonation was served on 24 May 2023 and simultaneously with the applicant's Heads of Argument. The application stands opposed by the respondents.

[25] The order was executed on three premises; the business premises of the first and second respondents and the private residence of the third respondent. The order is extreme and invasive. Paragraphs 2 and 3 to 25 of the order illustrate the extent thereof. Safeguards were built in at, *inter alia*, paragraphs 12 and 27; but in the same breath were the respondents forewarned that: "The applicant will seek costs against the respondents, with such costs to include the costs of two counsel where two counsel have been employed."¹⁶

[26] Concurrently with this application, ran a similar case against one Mr Hendricks in the Gauteng Division of the High Court. Mr Hendricks is a key role player in the allegations against the respondents as will be shown later. He was in the employ of the applicant and allegedly leaked information to the respondents and assisted them to produce some products based on the formulae of the applicant. He did not oppose the

¹⁶ See the order depicted at the end of the judgment.

application and admitted some wrongdoing.¹⁷ In this case, with number 049384/2022, the rule *nisi* was confirmed.

[27] The Gauteng case, in broad strokes, confirmed the Anton Piller order and caused an order that the items in the custody of the Sheriff shall be so retained by the Sheriff pending further direction of the court. The applicant was permitted to make copies of the items in the custody of the Sheriff and take possession of two forensic copies of the hard drives of any digital devices or media in the custody of the Sheriff for the purposes of the institution of further proceedings against the respondent.

[28] The costs order in the Gauteng case read that: “There is no order as to costs of this application. The costs specified in paragraph 34 of the rule *nisi* order are reserved until the action referred to in paragraph 36 of the rule *nisi* is finalized.”

[29] I return to the condonation application. The success, or not, of the case for the applicant may turn on it.

CONDONATION APPLICATION: LATE FILING OF THE REPLYING AFFIDAVIT BY THE APPLICANT

[30] Condonation is not to be granted casually. It is however trite that a court is permitted to condone non-compliance with the Uniform Rules of Court to serve the interest of justice. A condonation application must, as a rule in this division, be done with a substantive application and entail the filing of a Founding Affidavit. The affidavit must explain as to how the default came about. The application must express *bona fide* conduct that was not aimed at delaying the case or to, in any manner, sabotage the case. The nonfulfillment of their procedural responsibility may not cause any prejudice

¹⁷ See the quotation later in the judgment extracted from the record of the proceedings in the Gauteng High Court.

to the opposing parties or the administration of justice. It was ruled in *Grootboom v National Prosecuting Authority and another* in the Constitutional Court that:¹⁸

[22] I have read the judgment by my colleague Zondo J. I agree with him that, based on *Brummer* and *Van Wyk*, the standard for considering an application for condonation is the interests of justice. However, the concept 'interests of justice' is so elastic that it is not capable of precise definition. As the two cases demonstrate, it includes: the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success. It is crucial to reiterate that both *Brummer* and *Van Wyk* emphasize that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant.

[23] It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default.

[31] This is the explanation by the applicant and the unrefuted reality:

1. The order obtained in the Johannesburg High Court was confirmed on 1 March 2023 and the applicant struggled to obtain the signed order from the registrar. The information in the order is relevant to the matter in Bloemfontein. The order was only made available on 10 March 2023.

¹⁸ 2014 (2) SA 68 (CC), *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A), *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) and *Smith NO v Brummer NO* 1954 (3) SA 352 (O).

2. The forensic evidence pertaining to the Johannesburg case had to be obtained. The matter was delayed at the Sheriff's office and the material were only finally handed over on 17 March 2023.
3. In total, the hard drives comprised 16 716 items.
4. The forensic copies were discovered to be unreadable because of the fact that the data on the hard drives was preserved not to be modified or altered by anybody.
5. The hard drives had to be unsealed by Cyanre that is the digital forensic expert company also involved in the Johannesburg Anton Piller matter. It took from 29 March 2023 to 13 April 2023 to finalize this task.
6. Specialized software was necessary to download this data.
7. The various religious holidays in April made consultations with relevant parties difficult. The applicant was overseas from 8 to 16 April 2023.
8. The affidavit was at an advanced stage on 16 April 2023 but further consultations had to be conducted with witnesses such as Bergh and Van Dyk based in Bloemfontein. Their input was only available on 26 April 2023.
9. The applicant's attorney was hospitalized from 23 April 2023 to 2 May 2023 and her laptop, on which the data was offloaded, could not be accessed without her being in attendance. This was the state of affairs to protect the confidentiality and veracity of the evidence.
10. There was no prejudice to the respondents. They had the reports and all other information in their possession well in advance.

11. It will be to the prejudice of the administration of justice if all the information contained in the Replying Affidavit does not form part of the case before court to be adjudicated.

12. The argument that new evidence was introduced in the Replying Affidavit was not, substantially, taken further by the respondents. The objection notwithstanding; the *sui generis* nature of an Anton Piller case causes the reality that it is crucial that new evidence in the form of the events during and after the execution of the order, be introduced into court.

13. The extensive attack of the respondents on the merits of the case gave the applicant no choice but to answer thereto and to bring the case into perspective. I must emphasize that in the adjudication of the order the court must be cautious not to delve into the merits of the main action but for to establish the existence of a *prima facie* cause(s) of action.

14. The conduct of the applicant to file an affidavit that was supposed to be filed on 15 March 2023 on 5 May 2023, immediately causes a spontaneous irritation and an impression of a haughty disregard for the Rules of Court, the court, the respondents and the administration of justice in general. The relationship between the applicant and the respondents also tends to give the feeling of a David - and - Goliath scenario.

15. The above is true until the evidence in its entirety and the law is regarded with factual and detached objective perspective. The applicant was nothing but clinical and thorough in their approach to the application. Their papers were detailed and extensive and deal with each particularity in law and fact. They left nothing to chance; hence the delay in filing the Replying Affidavit. It was a mammoth task¹⁹ that now serves the interest of justice.

¹⁹ Eighty-eight pages.

16. As said and added to the above, is the fact that the respondents erroneously attacked and dealt with the merits in the main action in their papers and forced the applicant to reply thereto. Even so; the evidence in reply refuted the perception that the applicant wants to strong-arm the respondents into submission and destroy their businesses to eliminate them as competition in the open market with the order.

17. The allegations of the respondents in opposition are vague, general and not substantiated by corroborating evidence.

[32] The Replying Affidavit of the applicant gives a detailed exposition of the execution of the order and the findings of the experts. It stands unrefuted and is corroborated by detailed sworn statements of the entities ordered to oversee the execution of the order and the witnesses. I will return to it later.

[33] The response of the respondents to the condonation is to rely heavily on the new evidence introduced. They also allege prejudice but do not identify or detail the prejudice or the new evidence. They complain that the applicant has to date not prove ownership of the property seized and “the Respondent does not have access there to in order to consult with its legal representatives.”²⁰

[34] The explanation of the applicants shows good cause, *bona fides* and veracity. The evidence contained in the statement is vital for the adjudication of the case. The respondents have not been prejudiced since the evidence is of no surprise and shows that the ownership of the product confiscated does exist. The scientists attested to that.

[35] The evidence shows that the applicant has made out a case to justify suing and to the enforcement of their legal right against the respondent as they already did in December 2022. The cause of action existed before the Replying Affidavit by, among others, the evidence of Van Dyk and Bergh.

²⁰ Paragraph 10.2 on page 17 of the “Application for Condonation” Bundle.

[36] The application for condonation stands to be granted. Each party to carry their own costs. The respondents had a right to object to the late filing of the affidavit and was not unreasonable in doing so. The applicants did indeed cause a delay in the case but succeeded in their application.

[37] Before the judgment goes into the merits of the legality of the order and the execution thereof some more, and detailed background, is essential. It is, for instance, apposite to understand the identity of the parties and the dichotomy of their relationship.

THE PARTIES

The Applicant

[38] The applicant is Luxor Paints (Pty) Ltd. The applicant was incorporated and registered in 1999 and is a family business. Mr K.Y. Lurie is the managing director and sole shareholder of the applicant. His father is the other director. The family has been involved in the business of manufacturing automotive paints in South Africa since as early as the 1970's.

[39] In his Founding Affidavit the managing director describes that the applicant has a successful business that it carries on throughout South Africa and Southern Africa. Apart from having its head office and manufacturing facility in Boksburg, it also has distribution centers in Bloemfontein, Durban, Port Elizabeth, Polokwane and Cape Town.

[40] The core business of the applicant is the manufacturing of automotive and industrial refinish products. Refinish products are paint, body filler and putties used to repair, repaint or refurbish a motor vehicle, truck or industrial equipment paint or bodywork. The applicant also sells wood finish products and accessory products used in the refinish process.

[41] To this end, the applicant manufacture paint, body filler and coating products of its own design. In the course of its business the applicant has composed and developed formulae which are “kept confidential and constitute the applicant’s trade secrets, intellectual property and proprietary information.”²¹

[42] The applicant generally sells its products to distributors that are, mostly, independent owned small, medium and micro enterprises (SMME). These include paint shops such as the first respondent, Gecko Coating SA (Pty) Ltd.

[43] The applicant only sells some of its products directly to very large end users such as transport companies that require bulk specialized products. The SMME paint shops, in turn, supply end users such as mechanics, panel beaters and spray painters with the applicant’s products.

[44] According to the managing director, the applicant’s customers may compete with each other and they will then provide certain customers with different brands of the same range of product at their own price and discount to enable them to remain competitive.

[45] The applicant also, in appropriate circumstances, supplies its products in tins containing the branding of the customer. These are called “house brands”. Whilst the applicant’s manufactured products are packed in tins, the tins bear the brand of the SMME/customer.

[46] Importantly, the managing director points out in his statement, that the South African market is extremely varied, with many new and old vehicles on the road. That is the reason for the applicant manufacturing and maintaining a stock of a variety of products and technologies to cater for the entire South African market. “The applicant

²¹ Page 42 at paragraph 10.

has branded its technologies into economical, mid-range and premium product ranges.”²²

[47] In the course of its business, the applicant has composed and developed its formulae which are kept confidential and constitute the applicant’s trade secrets, intellectual property and proprietary information.

[48] The applicant over the last 24 years has made significant investments of its time, money and resources on researching, testing, formulating and producing high quality formulated products that are well priced and suited to the market. This is because the formulation of such paint products from scratch requires paint chemistry expertise which is not widely available in South Africa, along with an investment in research and development and a good knowledge of the raw materials involved and who can supply these.

[49] All of the applicant’s formulae are constantly tweaked and tested and all formulations go through various iterations due to the costs involved in the manufacturing process and the availability of raw materials (which may be limited) and changing market needs.

[50] The applicant has approximately 500 formulae in total (which include variations of formulations and old archived formulae) and as factors such as quality control adjustments, raw material quality and availability changes, there are often several formulations for the same product which are all stored on a computer database at the applicant’s Johannesburg premises called “Compuchem”.

[51] Strict restrictions are in place as to who can access this database. Only the applicant’s senior chemist (Driver), a senior buyer and her assistant Jackie Bakker can access this database. No one else has access to this database.

²² Page 44 at paragraph 18.

[52] Furthermore, as the applicant's director states in his Founding Affidavit, that confidentiality is still maintained throughout the manufacturing process as:

123. By way of an explanation, when a batch of paint is to be manufactured, Jackie will access the Compuchem database and will print a "batch card" off the system which contains the latest formula for the batch which is to be manufactured.

124. This batch card, in turn, is handed to the factory manager or supervisor (based at the applicant's Jet Park head office) who must sign for it. The applicant's technical staff then mixes the raw materials in accordance with the relevant formula (shown on the batch card) which is then tested by the applicant's quality control department.

125. Once the manufacturing process is completed, the batch card is returned to Jackie who closes the batch card and files it in a locked cabinet in her office. I confirm that this process is followed religiously.

[53] Confidentiality is also maintained by the applicant in requiring all of its staff, including those with access to the Compuchem database, to sign restraint of trade and non-disclosure undertakings.²³

[54] It is accordingly manifest that the applicant's confidential and proprietary formulae possess the necessary quality of confidentiality, and that the applicant has at least a quasi-proprietary or legal interest in that information.

[55] The formulae also constitute information that is capable of application in trade or industry and which was kept secret or confidential and which, when objectively viewed, is of economic (business) value to the applicant.

The Respondents and their businesses

[56] The third respondent is the managing director and sole shareholder of the first and second respondents. The first respondent, Gecko Coating SA (Pty) Ltd carries on

²³ Paragraph 126 of the Founding Affidavit on page 69.

business as a paint supplier (automotive paints, body filler, thinners and other types of paints) to the South African market. Its retail business is situated in Bloemfontein as well as Pretoria North, Polokwane and previously George.

[57] The first respondent opened its first store in Bloemfontein in about 2014, its first Pretoria store in September 2018, its store in George that was subsequently sold, in September 2019, its Polokwane store during February 2021 and the second Pretoria store in Pretoria in 2022. The principal place of business of the first respondent is in Bloemfontein.

[58] The core business of the first respondent is to sell paints and related products.

[59] The second respondent is Chemfarben International (Pty) Ltd with its principal place of business registered in Bloemfontein. According to the applicant and undisputed by the third respondent it appears that the second respondent has as its primary business the manufacturing of paints and paint products.

[60] The first and second respondent's businesses premises are physically connected and the second respondent's premises can be entered from the first respondent despite different addresses registered. It is undisputed that both the first and second respondents' use the same premises and it is not possible to distinguish which part of the premises is used by which business.

The relationship between the applicant and the respondents and the factual cause for the litigation

[61] In their Opposing Affidavit filed on 28 February 2023 the third respondent Mr T Potgieter (Potgieter), as managing director of the first and second respondents, described the spark that exploded into the urgent application of 23 November 2022.²⁴

²⁴ Page 328 at paragraph 6 and pages 336 to 337 at paragraph 28.

[62] Potgieter's narrative, that the applicant denies,²⁵ is that the applicant has increased its prices to the first respondent to such an extent over the year preceding the Anton Piller order, that it was impossible for the first respondent to remain in the competitive market. The applicant sold its paint products to the first respondent's competitors at such reduced prices that the first respondent was paying more for the applicant's products than the same products being sold to the public by the first respondent's competitors.

[63] Potgieter did explain his predicament to the applicant. He requested a discount on the so-called "fast mover" products because he serves the "cheap market". He, over an extended period, complained to the applicant (Mr Lurie) that they are forcing him to consider manufacturing his own products as a last resort to survive in the market.

[64] The first and second respondents employed their own experts to develop paint formulae and more than 400 formulae were so developed since 2021. The first and second respondents have invested a lot of time and money in the research and testing of formulae with the assistance of a qualified chemist and people with experience in the field.

[65] The applicant's case is that a material decrease in orders at the end of September 2022 and complaints from two customers received by Mr van Dyk, the branch manager of the applicant in Bloemfontein, caused them to become suspicious of the respondents.

[66] They embarked on investigations and obtained evidence from witnesses that the respondents are unlawfully manufacturing certain products using the applicant's formulae to do so.²⁶ Van Dyk also visited the first respondent's premises on 4 October 2022 and learned that the first respondent was selling a paint called Chemfarben.²⁷ Mr

²⁵ Heads of Argument for the respondent at paragraphs 4.1 to 4.9.

²⁶ Page 73 at paragraph 57 and page 76 at paragraph 76.

²⁷ Pages 58 to 59 at paragraphs 75 and 79.

Lurie was informed by Van Dyk during the week of 3 October 2022 that the second respondent uses Luxor Paints' formulae.²⁸

[67] The witness for the applicant, one Mr Bergh, informed them that during early August 2022 he had obtained Luxor Paints' formulae for its Transline brand of paint, which until then had been packed by Luxor Paint for the first respondent's Ultra-Auto branded tins. Bergh positively identified one Mr Hendricks (the Stig) as the source that supplied the information to Potgieter. Tests that were performed by one Mr Driver confirm that the applicant's confidential and proprietary formulae are being used unlawfully by the first respondent.²⁹

[68] On 8 October 2022 Mr Lurie met with Bergh personally who showed him an e-mail containing an Excel spreadsheet with the applicant's formulae for the "Transline" product. Reginald Hendricks assisted the respondents to manufacture the product on 22 August 2022. Berg also made available to the applicant photographs of the formulations he had access to, which are being kept by the respondents both in hard copy and electronically and which has been saved on a computer at the first respondent's premises. There was also a formulation with handwritten adjustments made by Mr Hendricks on 22 August 2022. They clearly improved the products with the formulae of the applicant.

[69] Hendricks does not have access to the formulae and lists of raw materials used to compose the paint products that are stored on the computer data base of the applicants. He would only have sight of the batch cards that he is involved with as the chemist. Hendricks, allegedly, obtained the information in some underhanded manner and as instigated by the respondents.³⁰

[70] It is the case for the applicant that the first and second respondents are in this manner competing unlawfully with the applicants in the South African market. The

²⁸ Page 62 at paragraph 94.

²⁹ Page 66 at paragraphs 114 and 115.

³⁰ Pages 78 to 79 at paragraphs 136 to 139.

applicant avers that the respondents seek to gain an unfair advantage in the marketplace by eliminating the middleman by manufacturing its own products to sell directly to end users at unreasonably low prices and the applicant needed to protect its customers against this predatory behaviour.³¹

[71] The applicant gave an extensive exposition of their business relationship with the respondents in the Replying Affidavit³² that refutes the allegation of commercial sabotage of the respondents by the applicant.

THE ISSUES AND THE ADJUDICATION THEREOF³³

[72] The issues will be dealt with as it was stated by the respondent. It was determined from the Heads of Argument for the respondents from paragraph 4.6 to paragraph 5.10.

[73] Potgieter vehemently denies that he surreptitiously appropriated the formulae of the applicant in any way and form. He denies using their formulae to manufacture products. He denies that he sold inferior products to clients. Even if Reginald Hendricks did provide the respondents with the applicant's formulae; this was done without the respondents' knowledge and against their instructions. They did not have reason to believe that Hendricks had provided any unlawful formulae. They had no reason to be on their guard to this fact.³⁴ There is and was not a cause or causes for any action.

[74] The objection is dismissed on the following reasons:

- i. On the above the law is clear that a court may not pre-judge and dispose of any issue in the pending action. The parties must not address the merits of the pending action in which they have yet to plead. Discovery in the action has not occurred. As the applicant correctly contended, the action is far from trial. The flipside is that the

³¹ Page 43 at paragraph 16.

³² *Inter alia*, at paragraphs 34 to 35.16 on pages 450 to 454.

³³ Paragraphs 4 and 5 of the Heads of Argument for the respondents.

³⁴ Pages 349 to 352.

search and seizure may not be an investigating to create a cause of action. At the time of the application the cause or causes of action must exist steadfastly and *prima facie*. The merits might play a role in the adjudication of the veracity of the application on this issue to see the existence of a cause of action.

- ii. The answer to the denial of the respondents of any wrongdoing was *prima facie* refuted by the applicant by their affidavits as corroborated by the reports of the experts and the Supporting Affidavits. The summery as depicted in their Heads of Argument from paragraph 37 to paragraph 73 suffices. I will not burden the judgment with a repeat of the evidence.
- iii. The applicant had already filed their action wherein the causes of action were depicted in December 2022.

[75] The respondents maintain that the applicant had all the information they needed to initiate the action. The information could not be destroyed or concealed. Bergh had access to all the respondents' confidential information and he provided the photos to the applicant. There was not any need for the Anton Piller order.

[76] The defense is rejected on the following basis:

- i. The reports of the experts prove that there was information that had to be protected and that the applicants could not legally access it through Bergh.
- ii. The respondents miss the point of the application. This application was aimed solely at recovering and sterilizing the applicant's confidential and proprietary formulae which were believed to be; and were found in the possession of the respondents. It is for the preserving of evidence for the action that was foreshadowed in the application (that would otherwise be lost or destroyed).
- iii. The evidence of Bergh, Van Dyk and Driver as summarized from paragraph 62 to 73 in the Heads of Argument for the applicant shows the need for the protection of the material beyond any doubt.

[77] It is the allegation of the respondents that when the order was executed, it heavily disrupted the respondents' business for a period of two days. It created the impression of police clamping down on the business and searching for some illegal substances. The order was unnecessarily invasive and harmed the reputation of the respondents.

[78] The defense above is dismissed due the evidence of the Independent Supervising Attorneys as supported by the affidavits of the attorneys that assisted them that sketches a clear and more reliable and sincere picture. The attorney of the respondents was on the scene of the execution of the order and did not object or take any action to prevent the search and seizure. The Sheriff confirmed that the respondent was informed of his rights. This is the crux of the report of the Supervising Attorney:³⁵

- i. The third respondent requested the doors to the first premises to remain open with sales continuing but then agreed to close the first premises for the duration of the physical search. Same could be reopened once the search of the electronic devices was underway;
- ii. sales with customers that were present were concluded before the premises were locked;
- iii. customers were permitted to complete transactions before leaving the premises that were to be searched;
- iv. the customers were not physically escorted from the premises;
- v. the respondents agreed to close the premises for the duration of the physical search and to allow the reopening and trading during the digital searches;
- vi. no complete shutdown was suggested for an indefinite period of time;
- vii. the third respondent was afforded an opportunity to obtain legal advice and representation (and did so);
- viii. the search was scheduled in an effort to reduce any harm or interruption to the respondents and it was agreed that trading could resume fully;

³⁵ The reports of the Independent Supervising Attorneys, Hadar are at pages 270 to 288 and 604 to 609. There is also the report of the Independent Supervising Attorney at the third premises, G Southern at pages 257 to 265. The evidence was summarised in the Heads of Argument for the applicant at paragraphs 99 to 104.

- ix. at all times the Independent Supervising Attorneys acted to minimise the disruption to the respondents and to protect their integrity and privacy;
- x. during the second day of the search, the first and second respondents traded throughout the day;
- xi. at most the premises were closed for two and a half hours on the first day;
- xii. every measure was taken to avoid disruption taking into account the content of the order and the interests of protecting all the parties involved.
- xiii. At worst the respondents could not trade for two and a half hours and not two days as they falsely allege.
- xiv. Inevitably electronic devices that store data, such as cell phones, must be searched. This occurred in the least invasive manner possible.

[79] The next objection is that it is unclear which specific paint products are according to the applicant being produced and used by the respondents with the applicant's formulae.³⁶ The specific products were identified by the applicant. The evidence shows that each formula found in the execution of the order was individually considered by the Independent Expert Chemist, Mr Green. The defense that the keywords and search were too wide is rejected.³⁷

- i. According to the applicant (and as confirmed by Dominic Driver the applicant's chemist):

"Despite the applicant manufacturing and supplying its paint products to the first respondent, it is impossible for the first respondent or any other person to reverse engineer the applicant's paint product and discern the formulae used in the manufacture thereof. Similarly, the applicant is unable to determine from analyzing the second respondent's paint products alone whether its confidential and propriety formulae were used in the manufacturing process."

³⁶ Heads of Argument for the respondents at paragraph 5.1.

³⁷ Heads of Argument for the applicant at paragraphs 89 to 98.

and

“The first and second respondents could only manufacture their own quality and cost-effective products if they had invested in research and development using a qualified chemist with paint experience or are in possession of tried and tested formulations along with lists of suppliers of the necessary raw materials, none of which is easily or freely available.”³⁸

- ii. Driver subsequently analyzed and compared the formulae provided by Bergh and it is manifest that the respondent is utilizing (by modifying) the applicant’s confidential formulae. Driver observed that 6 of the provided formulae were based on or direct copies of the applicant’s confidential and proprietary formulae. His findings in respect of each are that:³⁹

“2K S60 HS FILLING PRIMER GREY: This product is clearly based on Luxor’s Transline M.S. Grey formulation. This formulation has been created by “piggy backing” off and modifying Luxor’s formulation of Luxor’s market leading product Transline MS Primer Grey. The percentage of raw materials added are the same. If the formulation was unique, the percentages would differ. The only difference is the use of a slightly different pigment to derive a different product colour which has no bearing on the product’s performance or use. The respondents have also substituted the talc as they may not have been able to access the same raw material as the applicant. The instructions differ, but this can be expected and would be necessary because they have different equipment. The instructions would have to have been changed by someone knowledgeable in paint chemistry.

2K W10 FAST HARDENER: This is a copy of an older formulation of Luxor’s Transline Fast Hardener. The reason the respondents would prefer this older formulation is because it contains a convenient thinners 2k blend. Using a blend is

³⁸ Founding Affidavit page 60 paragraph 87.

³⁹ Founding Affidavit page 137 paragraph 18 and further (FA 11 on pages 133 to 144).

easier to formulate because you don't need to blend different solvents. Luxor decided to blend the thinners itself to save costs. It also contains an intermediate product of the applicant called "INT Thorcat Solution". By way of explanation the applicant routinely adds so called "intermediate products" into other products. Intermediate products are solutions that the applicant manufactures for use in another formulation. All of these intermediate products (solutions) also have their own formulations which are proprietary to the applicant. For the reasons advanced above, it is not likely that this product was independently formulated by the respondents.

NC M1 GREY PRIMER: This is an almost identical copy of an old formulation that was in use between September 2020 and November 2020. This formulation was archived in November 2020. The applicant has not used the current formulation since September 2020. This is a blatant copy of Luxor's formulation. The instructions are identical and don't make sense given that the respondents would have different equipment. This formula also contains an intermediate product of the applicant called "Luxprime Clear" which is a solution that is specially manufactured by the applicant for use in certain Luxprime products based on its proprietary formula. "Luxprime" is proprietary of Luxor paints and proof that the respondent's formula belongs to Luxor Paints.

M36 STONECHIP BLACK: This is an almost identical copy of a current formula of the applicant. Having the identical raw materials, identical order of addition and identical percentage addition of each raw material.

2K J37 GLOSS BLACK: This is an almost identical copy of a current formula of the applicant. Having the identical order of addition of raw materials and identical percentage addition of each raw material.

M36 STONECHIP WHITE: This product is clearly based on Luxor's Stone Chip White formulation. This formulation has been created by "piggy backing" off and

modifying Luxor's formulation. The only difference is a slight increase in water and pigment (titanium dioxide) content. The remaining raw materials are in the same ratio as Luxor's market leading formulation. The raw materials used as well as the order of addition are identical to the applicant". (Own emphasis)

- iii. The respondents seek to challenge Driver's findings through Mnikhaya Patrick Vani of Dumax Paint, a chemist hired by them. Vani could not and did not compare the respondent's formulae to those of the applicant and so, at least at this stage, his views are baseless and unfounded. It was pointed out that it also is irrelevant whether or not the respondents have the facilities to manufacture the product - the fact remains that they are in unlawful possession of the applicable formulae.
- iv. Certain formula also includes proprietary intermediate products such as "INT Thorocat Solution" and "Luxprime Clear" which are confidential to the applicant and there is no other reasonable scenario wherein the respondent would have such products in their formulations.
- v. Driver also logically states that: "Vani must agree that if two formulations have very similar raw materials (if not the same), with the same order of addition and the same quantities then the only conclusion that can be drawn is that that there is only one source. That is, the one must have been copied or modified from the other. This is what I mean when I refer to "piggy-backing". The formula was modified from the original source material".
- vi. To this end the applicant specifically detailed and motivated for each and every keyword that the Court authorized.
- vii. Not all of these keywords were authorized as no case had been made out for 8 keywords not authorized that were omitted from the Order at the instance of the applicant's counsel who brought this to the attention of the Court that granted the Order.
- viii. The Court authorised keywords that related to: the names of the respondent's products, the formula of which Driver tested and concluded are being manufactured using the applicant's formulae; the names of the applicant's products whose formulae were copied by the respondents; the names of the applicant's products whose

formulae may be in the possession of the respondents; brand names unique to the applicant (including toner products, Nitrocellulose (N/C) based paint or product names, and Quick-Drying (QD or Q/D) and Direct To Metal (DTM) product names); the applicant's product names (including product names supplied to the first respondent in the house branded Ultra Auto tins); intermediate products that would be duplicated in copied formulation (these being products made for use in other product formulations and which are only available to the applicant (as Driver explains)); formulation names which are unique to the applicant's Transline and Luxcoat range of products; a raw material unique to the applicant; keywords to identify Hendrick's involvement with the respondents.

- ix. Driver who stated: "I suggest, based on the tests I have conducted, that insofar as the keywords to be used by the digital forensic experts are concerned, that the names of the applicant's intermediate products (solutions) be searched for as well as the names of the applicant's 2k products (two stage products), Nitrocellulose based paint or product names (or abbreviated as N/C or NC products) and Quick-Drying (abbreviated as QD or Q/D) and Direct to metal (DTM) products be searched for. This is because the respondents also have QD and 2K formulations (as seen above) and may also manufacture NC and DTM products".
- x. The Court, having sight of the curriculum vitae of Philip Green, appointed him as the Independent Forensic Chemist. The Independent Forensic Chemist, in turn, compared the formulae found at the searched premises with those belonging to the applicant to determine whether they were the same or substantially similar to those of the applicant's formula (in the case of there being a modification thereto). The Independent Forensic Chemist accordingly applied his knowledge and expertise to each, and every formula sought to be mirror imaged and forensically scrubbed. His report states:⁴⁰

"The first area/computer that we went to was in the Paint Production Area where there were very simple Machines (High Speed Mixers/Blenders) for making Paint type products. The computer we found was in the laboratory (no Paint test

⁴⁰ Report of the Independent Forensic Chemist at pages 290 to 294 & 602 to 603.

equipment was found) and apparently the computer is used by the Paint Production Supervisor (who was not present) for receiving formulations and printing labels. When MM opened up the computer the first 3 e-mails, we found were from the 3rd Respondent to the Supervisor, which had originally come from Reginald Hendricks (RH) from his G-Mail account to the 3rd Respondent and were 3 Paint Formulations -all the names of which not only were on the list of search words but were found in my Paint Chemist expert opinion to be **identical** to the Luxor Product formulations on the lap top provided for my sole use. It was then decided by JR/MM to copy the hard drives of the computer and then start the Key Word Search function (221 Key words). I was later informed that the search function failed several times, and it was agreed, by the 3rd Respondent that the computer could Wiped except for the Print Drivers and this was done by JR/MM under Supervision (FE)

We then moved on to the PC in the 3rd Respondents office -we immediately found examples of formulations on this PC so JR copied the Drives and started the search function for 221 key words after this process was completed JR and I started to look at each document or e-mail one by one where one of the 221 key words were picked up -mostly the documents picked up were invoices or quotations , however several formulations were found , mostly on e-mails to the 3rd Respondent from Reginald Hendricks G-Mail account – then using my Paint Chemistry knowledge and experience , plus access to the Provided Luxor Formulations/Lap top I was able to determine whether the found Formulations were very similar to the Luxor ones -some were identical -with the same raw materials and quantities, Some were at different Batch sizes so I had to mentally recalculate them and found them to be similar . Some were Identical for the amounts of raw materials used but in some cases 1 or 2 raw materials had been changed -but from my Technical Experience and knowledge the Changed, Raw materials were those that carried out exactly the same function but from different suppliers. So, these formulations were also Deleted. We also found and deleted quite a few e-mails where, Reginald Hendricks was supplying the 3rd Respondent

with information on either alternative sources of raw materials and equipment or providing Information where Luxor obtained certain specific raw materials. These documents were also deleted. This process took 4.5 Hours and JR took note, Copies of all documents that were deleted – The 3rd Respondent via his lawyer felt that certain formulations /documents were actually pertaining to formulations that he had developed himself from Generic formulations either provided by equipment supplier or from raw material suppliers -therefore we reviewed these documents /formulations -and using my Paint Technology expertise I decided whether the 3rd Correspondent was correct or not -if correct the Documents were restored and if not deleted .

We arrived at circa 08h15 and found that the search program had completed its run we then started to look at the E-mail portion and found 33 E-mails that contained Formulations or information from Reginald Hendrick's G-Mail Account these were deleted by GS...

During this period 2 Draw downs and formulations were found on the 3rd Respondent's Desk but from what I could see that did not relate to any of the Luxor Formulations – so were left”.

[80] The respondents find it unclear as to how Hendricks could have obtained the formulae. It is only speculated as to how he came into possession. This question is to be answered in the main action. It is not disputed by Hendricks that he had the formulae and the evidence of Bergh and Van Dyk supports his possession thereof.

[81] The applicant did not provide proof of ownership of the formulae. The answer lies in the following and the argument is dismissed:⁴¹

⁴¹ I acknowledge the summary of the evidence in the Heads of Argument for the applicant that is correct and that aligns with the evidence in the affidavits and reports submitted.

- i. In the course of its business, the applicant has composed and developed its formulae which are kept confidential and constitute the applicant's trade secrets, intellectual property and proprietary information.⁴²
- ii. The applicant over the last 24 years has made significant investments of its time, money and resources on researching, testing, formulating and producing high quality formulated products that are well priced and suited to the market. This is because the formulation of such paint products from scratch requires paint chemistry expertise which is not widely available in South Africa, along with an investment in research and development and a good knowledge of the raw materials involved and who can supply these.⁴³
- iii. All of the applicant's formulae are constantly tweaked and tested and all formulations go through various iterations due to the costs involved in the manufacturing process and the availability of raw materials (which may be limited) and changing market needs.⁴⁴
- iv. The applicant has approximately 500 formulae in total (which include variations of formulations and old archived formulae and as factors such as quality control adjustments, raw material quality and availability changes, there are often several formulations for the same product)⁴⁵ which are all stored on a computer database at the applicant's Johannesburg premises called "Compuchem".⁴⁶
- v. Strict restrictions are in place as to who can access this database. Only the applicant's senior chemist (Driver), a senior buyer and her assistant Jackie Bakker can access this database. No one else has access to this database.⁴⁷
- vi. Furthermore, as the applicant's director states in his Founding Affidavit, that confidentiality is still maintained throughout the manufacturing process as:⁴⁸

By way of an explanation, when a batch of paint is to be manufactured, Jackie will access the Compuchem database and will print a "batch card" off the system

⁴² Founding Affidavit page 42 paragraph 10.

⁴³ Founding Affidavit page 67 paragraph 116.

⁴⁴ Founding Affidavit page 67 paragraph 117.

⁴⁵ Founding Affidavit page 68 paragraph 121.

⁴⁶ Founding Affidavit page 67 paragraph 120.

⁴⁷ Founding Affidavit page 68 paragraph 122.

⁴⁸ Founding Affidavit page 68 paragraph 123 to 126.

which contains the latest formula for the batch which is to be manufactured. This batch card, in turn, is handed to the factory manager or supervisor (based at the applicant's Jet Park head office) who must sign for it. The applicant's technical staff then mix the raw materials in accordance with the relevant formula (shown on the batch card) which is then tested by the applicant's quality control department. Once the manufacturing process is completed, the batch card is returned to Jackie who closes the batch card and files it in a locked cabinet in her office. I confirm that this process is followed religiously.

- vii. Confidentiality is also maintained by the applicant in requiring all of its staff, including those with access to the Compuchem database, to sign restraint of trade and non-disclosure undertakings.⁴⁹
- viii. It is accordingly manifest that the applicant's confidential and proprietary formulae possess the necessary quality of confidentiality, and that the applicant has at least a quasi-proprietary or legal interest in that information.⁵⁰
- ix. The formulae also constitute information that is capable of application in trade or industry and which was kept secret or confidential and which, when objectively viewed, is of economic (business) value to the applicant.⁵¹

⁴⁹ Founding Affidavit page 69 paragraph 126.

⁵⁰ *Gordon Lloyd Page & Associates v Rivera and another* 2001 (1) SA 88 (SCA) at [10].

⁵¹ *Alum-Phos (Pty) Ltd v Spatz and another* [1997] 1 All SA 616 (W) at 623g–624a:

In order to qualify as confidential information, the information concerned must comply with three requirements. First, it must involve and be capable of application in trade or industry: i.e., it must be useful (*Van Heerden & Neethling, Unlawful competition* at 225). Second, it must not be public knowledge and public property: i.e. objectively determined it must be known only to a restricted number of people or to a closed circle (*Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* [1948] 65 RPC 203 (CA) at 211 and 215; *Harvey Tiling Co (Pty) Ltd v Rodomac (Pty) Ltd* 1977 (1) SA 316 (T) at 321G-H; *Van Castricum v Theunissen and another* 1993 (2) SA 726 (T) at 731C-E and the cases there cited). Third, the information objectively determined must be of economic value to the person seeking to protect it (*Coolair Ventilator Co (SA) (Pty) Limited v Liebenberg* 1967 (1) SA 686 (W) at 691B-C; *Van Castricum v Theunissen supra* at 732A-F). The nature of the information is irrelevant. If it complies with the requirements stated it will be confidential (*SA Historical Mint (Pty) Ltd v Sutcliffe and another* 1983 (2) SA 84 (C) at 89H-90D; *Meter Systems Holdings Limited v Venter* 1993 (1) SA 409 (W) at 428A-430H). Ordinary general information about a business does not become confidential because the proprietor chooses to call it confidential (*SA Historical Mint (Pty) Ltd v Sutcliffe and another supra* at 89H). Whether or not what appears to be a commonplace piece of business information is confidential will depend on all the relevant circumstances.

- x. Even the respondents concede that the development of paint products from scratch requires expertise along with investment, research and development as well as a good knowledge of the raw materials involved and the suppliers thereof.⁵²
- xi. The respondents however have provided no evidence, not even confirmatory affidavits from the experts that the respondents allegedly approached, to support their assertions that the third respondent has invested significant amounts of money in research and development.⁵³
- xii. Ironically, Steven Dixon who is one of the listed experts and now working at the applicant stated that the third respondent approached him for the applicant's formulae and that he did not know same or even the raw materials used therein.⁵⁴

[82] The relief claimed is confusing to the respondents; they state that on the one hand the applicant wants for the preservation of the evidence and on the other hand they want to "scrub" and "delete" the documents. The respondents misunderstand the terms used and as applied in practice. The scrubbing and deleting of the documents are from the storage facilities of the respondents; it was copied and preserved by the experts for the applicant before it was removed from the storage of the respondents.⁵⁵

[83] The last recognizable defense of the respondents is that the applicant was required to give the respondents proper notice of the application and should not have proceeded on an *ex parte* basis. The defense cannot be maintained in light of the nature of the relief and the reality that prevailed at the time of the application and now. It is dismissed.

- i. I repeat; this is the nature of the beast. The Anton Piller has as its core purpose the denial of the *audi alteram partem* dictum. The rationale is that should the

⁵² Answering Affidavit page 350 paragraph 60.

⁵³ Replying Affidavit page 447 at paragraph 62 (Compare to the allegations made in the Answering Affidavit on page 342 paragraph 41).

⁵⁴ Replying Affidavit page 478 paragraph 62.6.

⁵⁵ Scene Report: Johan Roux pages 295 to 319 and explanations given in court during the hearing of the application.

respondent be notified and forewarned, the evidence might be destroyed or hidden and the administration of justice will be defeated.

- ii. The applicant is, however, required to demonstrate that there is a real and well-founded apprehension that evidence may be hidden or destroyed or in some manner spirited away by the time the case comes to trial or to the stage of discovery. This fear must not be flimsy.
- iii. As detailed above no evidence has been put forward by the respondents to demonstrate that the third respondent invested any amounts of money in research and development. On the contrary, Driver has confirmed that the respondents are in possession of identical and modified formulations belonging to the applicant. This was specifically confirmed during the execution of the order by the Independent Forensic Chemist.
- iv. It is also common cause that Hendricks supplied the respondents with formulae on a digital Excel spreadsheet.
- v. As the formulae were kept in both hardcopy and in digital format (as confirmed by Bergh), there was a real risk that such information could be, by its very nature destroyed or further distributed easily. Each day that passed, there was a substantial risk that the information would be concealed, disseminated or unlawfully utilized by the respondents.
- vi. The collusion between Hendricks and the third respondent was further revealed in Court when Hendricks admitted his collusion with the respondents to the Court when the Johannesburg Anton Piller against him were confirmed by Judge Vally. Hendricks stated in Court:

“MR HENDRICKS: So, there are things that they found, which like I cannot dispute it is there and there were reasons for that, and that was the Anton Piller. There is also the lawsuit in Bloemfontein that is also taking place as well”.

“MR HENDRICKS: Correct. So, there is from my side and my lack of minimal understanding of the law, I cannot dispute anything...”

"COURT: They also said you broke certain of your conditions, which involved tampering with confidential information, et cetera. They are suing you for that.

MR HENDRICKS: Correct".

"MR HENDRICKS: So, there were hardcopies that were found, that is the first thing, which is not uncommon because we bring work home. The other thing was that on the hard drive I did presentations to the owner of Luxor in terms of cost and formulations which was done from my personal PC. So of course, there were things that would have been found on the PC.

There was on the emails there were five formulations which I did assist Theunes Potgieter in Bloemfontein and in terms of when they confiscated those documents in Bloemfontein, the chemist Luxor said it was similar but not the same. So, they are disputing that on their side in Bloemfontein. So, none of the stuff was used.

The emails they found, there was five formulations that were typed out on a spreadsheet and that are forwarding to Theunes [the third respondent]. So, I can confirm that, Your Worship". (Own emphasis)

- vii. Furthermore, it has been ascertained that Hendricks had in his possession substantial formulae, including formulae for automotive products, and batch cards which he had no basis to be in possession of (especially at his home which was searched).
- viii. Hendricks, as an employee of the applicant, owed the applicant a fiduciary duty to maintain the confidentiality of the formulae. This is over and above the undertaking made by Hendricks in his employment contract and separate confidentiality undertakings towards the applicant (which expressly lists the applicant's raw materials, formulations, batch cards, work processes, production schedules and information stored on the Compuchem database).

- ix. The secretive manner by which the respondents were dealing with Hendricks, calling him “the Stig” to hide his true identity and in working with him after hours and proposing to do so during the applicant’s December shutdown, and also inducing Hendricks to breach his undertakings to the applicant, all is supportive of the real and well-founded apprehension on the part of the applicant that the formulae and other relevant attached documents would be hidden from the applicant or in some manner spirited away not only to avoid detection and preservation, but for further illicit use by the respondents.
- x. It is absurd to believe that in approaching one of the applicant’s chemists for formulae, the respondents would not believe that same belonged to the applicant.

THE ANTON PILLER ORDER ITSELF

[84] Lastly, the order speaks for itself. It is detailed with several safeguards to attempt misuse and create relief for the respondents. It cannot be faulted.⁵⁶

IT IS ORDERED THAT:

1. This application is:

- 1.1. heard as one of urgency in terms of Rule 6(12), the requirements of the Rules of Court in respect of notice and service being dispensed with and the applicant’s departure therefrom are condoned;
- 1.2. heard *in camera*;
- 1.3. not be made public until the service and execution of the order set out below.

UNDERTAKINGS: -

⁵⁶ Harms *supra* at 35.34 with reference to *Hall v Heyns* 1991 (1) SA 381 (C) 387; *Cerebos Food Corporation Ltd v Diverse Food SA (Pty) Ltd* 1984 (4) SA 149 (T) at 174. Because of the drastic nature of the order, it follows that safeguards ought to be built into the order itself: *Roamer Watch Co SA v African Textile Distributors also t/a MK Patel Wholesale Merchants and Direct Importers* 1980 (2) SA 254 (W) 273. *Pohlman v Van Schalkwyk* [2000] 2 All SA 265 (E) deals with the dangers of applying for and obtaining an over-broad Anton Piller order.

2. This order is made on the basis that the applicant undertakes to this Court that:

- 2.1. this order will not be executed outside the hours between 08h00 and 18h00 on a weekday;
- 2.2. the applicant will prevent the disclosure of any information gained during the execution of this order to any party except in the course of obtaining legal advice or pursuing litigation against the respondent(s);
- 2.3. the applicant will compensate the respondents for any damage caused to the respondents by any person exceeding the terms of this order;
- 2.4. the applicant will compensate the respondents for any damage caused to the respondents by reason of the execution of this order should this order subsequently be set aside.

IT IS ORDERED THAT: -

3. The first, second and third respondent (referred to jointly as “the respondents”) and/or any other adult person in charge or control of the first respondents’ premises located at 17 Piet Human Street, Hamilton, Bloemfontein, Free State and the second respondent’s premises at 3 George Lubbe Street, Hamilton, Bloemfontein, Free State shall grant access to the premises and to such motor vehicle(s) (if any) in the possession or under the control of the respondents and situated at the premises to the following persons:

- 3.1. the Sheriff or at least two Deputy Sheriffs of the High Court for the district of Sheriff Bloemfontein East (“the Sheriff”);
- 3.2. any two of the following individuals, attorney LIAD HADAR (Identity number 8[....]3) and/or attorney GERALDINE SOUTHERN (Identity number 9[....]82) and/or attorney FARAH EINSTEIN (9[....]2) and/or attorney JAYSON JUNKOON (Identity number 9[....]87) and/or attorney NADIA SHAIK (Identity number 9[....]82) and/or candidate attorney MAKAZIWE MSIBI (Identity number 9[....]85) and/or

candidate attorney LOTANANG THABA (identity number 9[....]89) and/or candidate attorney DOUGLAS KABUZI (Identity number 9[....]84) and/or candidate attorney GABRIEL LIDCHI (Identity number 9[....]88) of HADAR INCORPORATED ATTORNEYS (“the independent Supervising Attorney”); and

3.3. forensic chemist PHILLIP GREEN (identify number 5[....]87) (“the independent forensic Chemist”);

3.4. any one, two or three of the following individuals, JOHANNES ROUX (identity number: 7[....]80), and/or PETRUS JACOBUS ENGELBRECHT (identity number: 7[....]87) and/or DANIEL JACOBUS OOSTHUIZEN (identity number: 9[...].86) and/or DANIEL CHRISTOFFEL MYBURGH (identity number: 7[....]87); and/or NATASHA TALJAARD (Identity number: 8[....]85); and/or MARIOUS OLIVIER MYBURGH (Identity number: 7[....]80); and/or GEORGE SKOSANA (Identity number: 9[....]83); and/or THANYANI MABUDA (Identity number: 8[....]82); and/or JACQUES VAN RENSBURG (Identity number: 6[....]88); and/or BAREND JAKOBUS LABUSCHAGNE (Identity number: 7[....]84); and/or CHARL LOUW (Identity number: 7[....]89) of CYANRE (PTY) LTD, who will act as the digital forensic expert(s) in the matter.

4. The third respondent and/or other adult person(s) in charge or control of the third respondent’s residential premises located at 26 Puzzle Bush Boulevard, Wild Olive Estate, Bloemfontein, Free State (“the third premises”) shall grant the following persons access to the third respondent’s premises and to such motor vehicle(s) (if any) in the third respondents’ possession or under their control, situated at the third respondent’s premises:

4.1 the sheriff or the deputy sheriff of this Court for the district of Sheriff Bloemfontein West (also referred to as “the Sheriff”);

4.2 any two of the following individuals, attorney LIAD HADAR (Identity number 8[....]3) and/or attorney GERALDINE SOUTHERN (Identity number 9[....]82) and/or attorney FARAH EINSTEIN (9[....]2) and/or attorney JAYSON JUNKOON (Identity number 9[...].87) and/or attorney NADIA SHAIK (Identity number 9[....]82)

and/or candidate attorney MAKAZIWE MSIBI (Identity number 9[....]85) and/or candidate attorney LOTANANG THABA (identity number 9[....]89) and/or candidate attorney DOUGLAS KABUZI (Identity number 9[....]84) and/or candidate attorney GABRIEL LIDCHI (Identity number 9[....]88) of HADAR INCORPORATED ATTORNEYS (“the independent Supervising Attorney”); and

4.3 forensic chemist PHILLIP GREEN (identify number 5[....]87) (“the independent forensic Chemist” as detailed above);

4.4 any one, two or three of the following individuals, JOHANNES ROUX (identity number: 7[....]80), and/or PETRUS JACOBUS ENGELBRECHT (identity number: 7[....]87) and/or DANIEL JACOBUS OOSTHUIZEN (identity number: 9[...86) and/or DANIEL CHRISTOFFEL MYBURGH (identity number: 7[....]87); and/or NATASHA TALJAARD (Identity number: 8[....]85); and/or MARIOUS OLIVIER MYBURGH (Identity number: 7[....]80); and/or GEORGE SKOSANA (Identity number: 9[....]83); and/or THANYANI MABUDA (Identity number: 8[....]82); and/or JACQUES VAN RENSBURG (Identity number: 6[....]88); and/or BAREND JAKOBUS LABUSCHAGNE (Identity number: 7[....]84); and/or CHARL LOUW (Identity number: 7[....]89) of CYANRE (PTY) LTD, who will act as the digital forensic expert(s) in the matter.

5. The respondents and/or any other adult person in charge or control of the first, second and/or third premises, must grant access to the premises and to vehicle(s) in their possession or under their control on the premises, if any, to the independent supervising attorney, the independent forensic chemist, the digital forensic expert(s), and the sheriffs (collectively, "the search persons"), solely for the purposes of:

5.1 searching the premises and/or aforesaid vehicles in order to enable any of the search persons to identify and point out “the evidence” to the sheriff, being:

5.1.1 the applicant’s confidential information being the applicant’s confidential and proprietary formulae for the manufacture of paint products and/or formulae which, in the opinion of the independent forensic chemist are substantially

similar to those of the applicant's confidential and proprietary formulae for the manufacture of paint products ("the formulae");

5.1.2 originals or copies (whether in hard copy or electronic form) of documents and/or correspondence concerning the respondent's unlawful competition with the applicant including, but not limited to, copies of:

5.1.2.1 emails, WhatsApp messages or other correspondence bearing any of the below-mentioned keywords concerning the use of the formulae;

5.1.2.2 emails, WhatsApp messages or other correspondence bearing any of the below-mentioned keywords concerning and/or relating to the inducement of REGINALD HENDRICKS to breach his confidentiality and restraint of trade undertakings to the applicant;

5.2 searching the premises for purposes of finding and thereafter searching and examining any networks, desktop computers, laptop computers, tablet computers, portable information storage devices, external data storage devices, including external hard drives, flash drives, iPods, iPhones, iPads, smart phones, electronic tablets, shufflers, compact discs (CDs), digital versatile discs (DVDs), stiffy discs, floppy disks, jazz drives, data cartridges, zip drives, memory sticks, mobile phones, SIM cards and electronic devices or media with the capability of storing information and/or data digitally, as well as any data, data storage location or network component (including but not limited to Cloud Hosting, Dropbox, virtual servers or other data hosted locally or internationally) to which the respondents have access or control over or ownership of by directly, indirectly or remotely connecting thereto (collectively described as "digital devices or media") on the premises or in the vehicle(s), by connecting each of the digital devices or media to forensic computers, for the purpose of identifying it and determining whether it contains the formulae;

5.3 In carrying out the search at the premises and associated vehicles, the digital forensic expert(s) are to conduct search strings on the digital devices or media

designed to locate the evidence containing the following key words: (the order contains 221 key words)

5.4 permitting and allowing the digital forensic expert(s) to:

5.4.1 make a disk copy and/or compact disc copies and/or to capture forensic images and/or to make two complete mirror images and/or digital images (for identification purposes) of the hard drives of any digital devices or media located on the premises concerned or in the vehicle(s), or to download or create a data dump of online or hosted data, once it is determined that such digital devices or media contain the evidence or part thereof;

5.4.2 make print-outs of any of the formulae located on any such digital devices or media, if copies of the hard drives cannot be made; and

5.4.3 permanently delete the formulae from all such digital devices or media found to have contained the formulae including by over-writing the data with random data so as to prevent data recovery of the deleted data (forensic scrubbing) provided a mirror image of such formulae is made (as detailed above).

6. The respondents and/or any adult person in control of any of the digital devices or media on the premises concerned or in the vehicles, must forthwith disclose to the search persons any passwords and/or procedures required for the effective access to such digital devices or media for the purposes of paragraph 5 above;

7. In the event that the respondents and/or any other adult person in charge or control of the premises refuses to grant access to the premises and to the respondents' vehicle(s) on the premises concerned and/or any safe at the first and second respondent's premises, a locksmith (assisted by a member of the South African Police Service, if necessary), may obtain access to the premises and/or vehicle(s) and/or safe(s) as necessary.

8. Subject to paragraph 16 hereof, the sheriff is authorized to attach any items pointed out by any of the aforesaid persons and any digital devices or media, and any forensic copies of hard drives of any digital devices or media storage, or print-outs of any such items (collectively, "the identified items").

9. The sheriff shall keep the identified items in their custody until the applicant authorizes their release to the respondent or this Court directs otherwise.

10. In the event that the digital forensic expert(s) are unable, for any unforeseen reason, to fulfil their functions in terms of this order, they are authorized to conduct such forensic investigations as contemplated in this order, in the presence of the independent supervising attorneys and the sheriff, no later than two days after the identified items have been taken into custody by the sheriff.

11. Until completion of the search authorized in the preceding paragraphs hereof, the respondents may not access any digital devices or media storage or any area where documents or items of the class mentioned in paragraph 5.1 hereof may be present, except with the leave of the independent supervising attorney, or to make telephone calls or send any electronic message to obtain the attendance and advice mentioned in the notice which is handed over immediately prior to execution of this order.

12. The sheriff shall before this application is served or this order is executed –

12.1 hand to the respondents, or any other person found in charge or control of the premises, a copy of the notice which is annexed hereto as Annexure A; and

12.2 explain to the respondents or such person, paragraphs 2, 3 and 4 thereof; and

12.3 inform the respondents or such person of the following:

12.3.1 that any interested party may apply to this Court on not less than twenty-four (24) hours' notice to the offices of the applicant's attorney for a

variation or setting aside of this order, the Court's practices and rules applying unless the Court directs otherwise;

12.3.2 that the respondent or their legal representative is entitled to inspect the items in the sheriff's custody for the purpose of satisfying themselves that the inventory is correct.

13. The respondents, and/or any other adult person(s) in charge or control of the first and/or second premises or the third premises, must disclose to the Sheriff the whereabouts of any item falling within the category of items mentioned in paragraph 5.1 hereof, whether at the premises or elsewhere, to the extent that such whereabouts are known to the respondents or either of them or such person(s).

14. In the event that any item is disclosed to be situated at any other place than the premises or the vehicle(s), the applicant may approach this Court ex parte for leave to permit execution of this order at such other place.

15. Should the applicant's other confidential information be found by the search party during the execution of this order, the applicant is granted leave to supplement its application and to approach this Court ex parte for leave to permit the seizure and/or mirror-imaging and/or forensic scrubbing (as the case may be) of such material in the manner specified in this order or such other manner as the Court might permit.

16. The sheriff shall make a detailed inventory of the identified items immediately after taking custody thereof, and shall provide a clear copy of such inventory to the Registrar of this Court, the applicant's attorney, the independent supervising attorney and the respondents.

17. In the event of the respondents or any of them raising any contention in law why any of the identified items should not be inspected and/or copied, such respondent(s) shall, within a period of three (3) court days after the identified items have been taken into the custody of the sheriff as provided above, identify on oath the item in respect

of which objection is taken to such inspection and/or copying and state on oath the reasons for the objection and serve such affidavit on applicant's attorneys.

18. After the inspection described in the preceding paragraphs hereof, the sheriff shall retain the identified items pending the outcome of this application.

19. The sheriff shall inform the respondent that the execution of this order does not dispose of all the relief sought by the applicant and shall simultaneously serve the notice of motion and explain the nature and exigency thereof.

20. The independent supervising attorney shall monitor and oversee all aspects of the execution of this order and, together with the sheriff, shall make a list of all items removed by the sheriff in terms of this order, one copy of such list to be handed to the respondent(s), if present, or to the person(s) upon whom service is effected as referred to above, and one copy of the such list to be retained by the sheriff.

21. The independent supervising attorney accompanying the sheriff at the premises identified above shall, within ten (10) days of the execution of this order, cause to be delivered an affidavit or affidavits:

21.1 setting out fully the manner in which the order was executed at the premises and stating whether, in the independent supervising attorney's opinion, there occurred any abuse or breach of any provisions of this order; and

21.2 attaching the inventory compiled in terms of this order.

22. The independent forensic chemist accompanying the sheriff at the premises identified above shall, within ten (10) days of the execution of this order, cause to be delivered a report setting out the manner by which the chemical formulae found at the premises were identified to fall within the definition of "the formulae" (as detailed above).

23. This order shall upon proper service on the respondents, operate as an interim order with immediate effect.

RULE NISI

24. The respondents are called upon to show cause before this Court, on 16 MARCH 2023 at 10h00 or so soon thereafter as the matter may be heard, why an order in the following terms shall not be made final in the following terms:

24.1 that the identified items in the custody of the Sheriff shall be retained by the Sheriff pending the further direction of this Court;

24.2 that the applicant is permitted to:

24.2.1 make copies of the items in the custody of the Sheriff; and

24.2.2 take possession of the two forensic copies of the hard drives of any digital devices or media in the custody of the Sheriff; for the purposes of instituting the further proceedings against the respondents foreshadowed in this application;

25. Should any of the respondents wish to oppose the relief, they shall deliver their answering affidavit(s), if any, or a notice envisaged in terms of Uniform Rule 6(5)(d)(iii) on or before 28 February 2023.

COSTS

26. The costs of this application are reserved for determination on the return date. The applicant will seek costs against the respondents, with such costs to include the costs of two counsel where two counsel have been employed.

27. If the proceedings foreshadowed in this application are not instituted within 30 (thirty) days after the execution of this order, either party may, on no less than 96

hours' notice to the other party, apply to the above Honorable Court for an order determining liability for such costs and determining what must be done about the identified items and any copies thereof;

28. Any person affected by the grant or execution of this order may, on no less than 96 hours' notice to the parties hereto, apply to this Court for an order determining liability for the costs of such person and determining what must be done about any of the identified items pertaining to such person or any copy thereof.⁵⁷

CONCLUSION

[85] The applicant has proven that a valid cause of action exists against the respondent(s) and they did indeed already institute action to pursue the cause(s) of action; the respondent(s) had possession of the documents or articles that are vital evidence in substantiation of the applicant's cause of action; and there existed a real and well-founded apprehension that the evidence would be hidden, destroyed or "spirited away". The evidence showed that the material in issue was legally appropriately identified and specified and that the applicant has a *prima facie* right to the protection of the evidence. The confirmation of the order and the granting of the relief in paragraph 24 will serve the interest of justice. The "harm" done to the rights of the respondent that were affected; such as the non-compliance to the *audi alteram partem* dictum, the invasion of the privacy of the respondents and seizure of property, is in balance to the relief granted and the purpose therefore. The principle of proportionality as decreed in the Constitution was maintained.

[86] ORDER

It is ordered that:

⁵⁷ Also see Annexure A to the order at pages 37 to 39.

1. Condonation is granted for the late filing of the Replying Affidavit by the applicant; each party to pay their own costs in the application.
2. The order dated 23 November 2022 is confirmed.
3. In terms of paragraph 24 of the order, the identified items in the custody of the Sheriff shall be retained by the Sheriff pending the further direction of this Court and the applicant is permitted to:
 - i. Make copies of the items in the custody of the Sheriff; and
 - ii. take possession of the two forensic copies of the hard drives of any digital devices or media in the custody of the Sheriff for the purposes of instituting the further proceedings against the respondents foreshadowed in this application.
4. The costs of this application are reserved for adjudication in the main action foreshadowed in this application.

M OPPERMAN, J

APPEARANCES

For the applicant:

Instructed by:

I MILTZ SC & D BLOCK

Ian Levitt Attorneys

SANDTON

For the first to third respondents:

Instructed by:

S GROBLER SC & MDJ STEENKAMP

Spangenberg Zietsman & Bloem Attorneys

BLOEMFONTEIN