**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, JOHANNESBURG**

**CASE NUMBER: 2021/17223**

**DELETE WHICHEVER IS NOT APPLICABLE**

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|---|---|
| 1.REPORTABLE: | NO |
| 2.OF INTEREST TO OTHER JUDGES: | NO |
| 3.REVISED | NO |

**25/10/2021**

**Judge Dippenaar**

In the matter between:

**SAMANCOR CHROME LIMITED** Applicant

and

**TENNANT METALS SOUTH AFRICA (PTY) LTD** Respondent

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**JUDGMENT**

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**Delivered:** This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 11h30 on the 25th of October 2021.

**DIPPENAAR J:**

[1] This is the consideration of an extended return date of an ex parte Anton Piller order granted on 12 April 2021 ("the order") and executed on 19 April 2021. The applicant sought confirmation of the order together with ancillary relief. The respondent opposed the application and sought the discharge of the rule nisi, alternatively an amended order limiting the ambit and scope thereof.

[2] The applicant is the largest of only two producers of ferrochrome in South Africa. The respondent is a commodity trader in, inter alia ferrochrome, which makes up only some 2 % of its sales. The parties are not competitors.

[3] The genesis of the application lies in a theft of some 120 metric tons of the applicant's ferrochrome during September 2020 after certain railway wagons were diverted to the Transnet Belfast station en route to Richards Bay, where two rail wagons were removed from the train, allegedly for repairs. The ferrochrome was loaded onto trucks and transported at the behest of an entity styled Living Waters Logistics (Pty) Ltd ("Living Waters") to Bridgeport, a storage facility in Johannesburg, at the instance of the respondent. The respondent on-sold the ferrochrome at a profit to third parties. This much was common cause between the parties.

[4] The applicant's case was that It was not disputed that high value ferrochrome was not readily available to any customer and was not available in the informal market. It was undisputed that the respondent had purchased the applicant's stolen ferrochrome and had on-sold it at a profit to a third party. The respondent's contention that it did not have knowledge the ferrochrome was stolen and could not have established the ownership of the ferrochrome bought in the Living Waters transaction was thus untenable. The applicant had never engaged the services of Living Waters, Bridgeport or the respondent

in respect of the stolen ferrochrome. Living Waters and its director, Ms Adhip, were instrumental in facilitating the transportation of the stolen ferrochrome from Transnet Belfast to Bridgeport at the instance of the respondent. The applicant had suffered a loss of some R1 441 000[1] in respect of the Living Waters transaction. It had reason to believe that the respondent, together with Living Waters and Bridgeport, were complicit in the theft of the ferrochrome and were part of a syndicate.

[5] The respondent's case was that it had concluded a single transaction with Living Waters on 9 September 2020. It had purchased some of the ferrochrome with a value of some R1.4 million, via its agent, Pharon Metals (Pty) Ltd and its principal Mr Marques, who acts as the respondent's BBBEEE development supplier and from time to time in this capacity promotes, procures, distributes and brokers commodity trades for the respondent. The respondent had sold the ferrochrome to a third party at a profit. The respondent however vehemently denied that it had stolen, participated or was involved in any theft, purported scheme or syndicate in relation to the ferrochrome in question. It disputed that it had any knowledge that the ferrochrome was stolen or that it reasonably could or should have taken any steps to establish the ownership of the ferrochrome before purchasing it. On its version, it had voluntarily provided the applicant with the relevant documentation pertaining to the Living Waters transaction after the execution of the Anton Piller order, which was the first time it had become aware that the ferrochrome was stolen.

[6] The respondent opposed the application on the basis that the applicant had not met any of the requirements for Anton Piller relief and that the order was overly broad. It further contended that the applicant made out no case that the respondent was part of a syndicate and that the application constituted a fishing expedition and an abuse. It argued that if the order was not discharged, it was to be limited to only include documents directly referring to Living Waters.

[1] Or R1 451 231.70 set out in the replying affidavit.

[7] It is well settled that the purpose of an Anton Piller order is to preserve evidence. The requirements for an Anton Piller order are to establish prima facie[2]: (i) the existence of a prima facie cause of action by the applicant against the respondent; (ii) that the respondent has in its possession specific and specified documents which constitutes vital evidence, in the sense of it being evidence of great importance to the applicant's case in substantiation of its cause of action; and (iii) that there is a real and well-founded apprehension that the evidence may be hidden or destroyed or in some manner spirited away by the time the applicant's action comes to discovery stage or trial.

[8] I turn to consider whether the applicant has made out a prima facie case against the respondent. The test is whether there is evidence, which if accepted, will establish a cause of action.[3]

[9] The applicant relies on three alternative causes of action. The first; a claim against the respondent based on the *actio furtiva* based on the contention that the respondent acquired the stolen ferrochrome knowing it had been stolen, alternatively that it ought to have known it was stolen. The second, a delictual claim under the *lex acquilia*, based on the factual averments made that the applicant suffered a loss as the direct result of the respondent's wrongful and negligent conduct when it bought the stolen ferrochrome knowing it had been stolen alternatively reasonably should have known it was stolen in circumstances where the respondent has a duty of care towards the applicant. Third, a further alternative claim based on the respondent's participation in the theft of the applicant's ferrochrome, together with the other joint wrongdoers, which caused the applicant damage.

[10] It is not necessary at this stage to determine whether the applicant's claim will ultimately be successful. Suffice it to state that, despite the respondent's protestations,

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[2] Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam and Another; Maphanga v Officer Commanding, South African Murder and Robbery Unit, Pietermaritzburg and Others 1995 (4) SA 1 (A) at 15G; Vizya Corporation v Collaborit Holdings (Pty) Ltd and Others 2019 (3) SA 173 (SCA) par 22
[3] Non Detonating Solutions (Pty) Ltd v Durie 2016 (3) SA 445 (SCA) para [21]

considering all the facts set out in the papers, I am satisfied that the applicant has set out evidence, which if accepted will establish a cause of action against the respondent. The respondent's own version that it purchased the stolen ferrochrome and on sold it at a profit substantially supports the applicant's version. I conclude that the applicant has illustrated a prima facie cause of action against the respondent. Proceedings pertaining to the Living Waters transaction have already been instituted by the applicant under case number 41299/2021.

[11] I turn to the second requirement, the existence of specific or specified documents constituting vital evidence.

[12] The order described "the evidence" in the following terms:

> *"3.1 any and all documentation relating to the storage of ferrochrome on behalf of any person (including a juristic person) and/or generally making reference to "ferrochrome", "Samancor", "Tennant", "Tennant Metals", "Living Waters" from 1 January 2020 to date;*
>
> *3.2 any and all digital devices, including but not limited to desktop computers, laptops, digital servers, ("digital devices") of the respondent which contains any correspondence, data, invoices, messages, spreadsheets, or notes relating to "ferrochrome", "Living Waters", "Tennant", "Tennant Metals", "Samancor".*

[13] It is apposite to refer to the relevant principles, enunciated thus by the Supreme Court of Appeal in *Non Detonating Solutions (Pty) Ltd v Durie*[4]*:*

> "*It is trite that an applicant must establish that the respondent possesses specific documents or things that can constitute vital evidence in substantiation of the applicant's cause of action. Strict compliance with this requirement is pivotal to the legality of the use of the procedure. The reason for this requirement is obvious. The procedure has, potentially draconian and extremely invasive consequences for respondents or defendants who are subject to it. The implementation in particular of the search leg of the order can amount to the most manifest intrusion of the respondent's right to privacy guaranteed in s 14 of the Constitution … Thus, as was*

[4] Fn 3 supra at …….

*stated in Shoba, and as part of the balancing act to be performed by cours based on the principle of proportionality, only vital evidence, in the sense of evidence of importance to the applicants case, must be the subject of the search. The specified documents must constitute vital evidence, and a blanket search for unspecified documents or evidence which may exist is not allowed".*

[14] It is thus important that the applicant must make out a proper case that the documents or evidence on which its case is based, exists. There must be clear evidence that the respondent has such incriminating documents and information in its possession, or, that at least there are good grounds for believing that this is the case.

[15] The respondent contended that the order was sought and granted in overly broad terms and that the order was to be read adjunctively, rather than conjunctively. It argued that the order allowed the applicant access to its sensitive, confidential and proprietary information. The averment was made in broad terms and no particularity or primary facts were provided in support of this contention, other than to state that the references to Tennant and Tennant Metals necessarily implied that access to all the respondent's documents could be obtained.

[16] The applicant alleged the opposite and emphasized that the manner in which the order was phrased and implemented was based on a conjunctive reading of what constituted "the evidence" so that the order did not include all the respondent's own documents, which were not linked to the sale of ferrochrome.

[17] Even if the order is to be read conjunctively and thus does not include all the respondent's documents, the central issue is whether the applicant is entitled to access all the respondent's documents pertaining to ferrochrome and thus whether the applicant had made out a case that the respondent was involved in a syndicate involved in the theft of ferrochrome.

[18] The applicant's case was stated thus in the founding affidavit:

*"Moreover, the applicant believes that the theft in question is not an isolated incident and forms part of a larger syndicate which deals in the theft and resale of ferrochrome. To this end, the applicant potentially suffered a far greater loss. It is for this reason that the applicant not only sought information in relation to the Living Waters transaction, but any and all transactions relating to ferrochrome".*

[19] It is trite that an Anton Piller order is not to be used as a fishing expedition to obtain evidence which may found a cause of action or as a blanket search for unspecified documents or evidence[5] which may or may not exist. It is also trite that a respondent should not be exposed to attachment and removal of his documents on grounds that are speculative or fail clearly to make out a case for relief. Importantly, the applicant's case should not be entirely dependent on such evidence as may or may not be found in the respondent's possession.[6]

[20] In its founding affidavit, no facts were produced by the applicant supporting its belief that the respondent was involved in syndicate activities or other untoward ferrochrome transactions. There is also a measure of inconsistency in the applicant's various affidavits pertaining to the respondent being involved in a syndicate. The case made out in the founding affidavit on this issue is in my view speculative and based on inferential reasoning not borne out by primary facts.

[21] In reply, the applicant stated in response to respondent's contention that the order was overly broad:

"*This requirement must be considered in the context in circumstances in which the applicant launched the Anton Piller order, being: 1. the applicant is an outsider, with limited knowledge of the dealings of the respondent; 2. At the time of the application of the Anton Piller, the applicant had limited facts available to it, being: 2.1 that its ferrochrome had been stolen; 2.2 that the stolen ferrochrome was sold to a third party; and 2.3 that the third party stored with the stolen ferrochrome at a spot designated to the respondent*".

[5] Vizyia Corporation supra, para [37] and [40]; Non Detonating supra para [30]
[6] Roamer Watch Co SA v African Textile Distributors 1980 (2) SA 254 (W) at 272-273

[22] This argument was repeated at the hearing. In my view this exacerbates the deficiencies in the applicant's case. The principle that the applicant cannot embark on a fishing expedition to establish its claim must be strictly adhered to and cannot be watered down to accommodate parties with limited knowledge of another entities business operations. In many, if not most cases, that would be the position.

[23] In relation to the reference in the order to "Living Waters", there was a limited dispute between the parties. The respondent contended that it was unnecessary for the applicant to have sought the order and it had co-operated with the applicant and had provided the relevant documentation after the execution of the order. The applicant disputed this and pointed out that the inventory contained various documents pertaining to the Living Waters transaction which had not been provided by the respondent, as referred to in its answering affidavit.

[24] The respondent further conceded in the alternative that if the order was not set aside, the order should be limited to documentation including a direct reference to "Living Waters". It proposed that the order be amended to provide:

> *"[3.1.1] any documentation making direct reference to "Living Waters from 01 September 2020 to date;*
> *[3.1.2] the contents of any digital devices, including but not limited to desktop computers, laptops, digital servers ("digital devices") of the respondent , but only to the extent that such content is in any correspondence , data, invoices, messages, spreadsheets or notes which directly relates to "Living Waters from 01 September 2020 to date".*

[25] I am satisfied that the applicant has identified that the evidence pertaining to the Living Waters transaction is specific and vital and that this requirement has been met. The ambit of the respondent's proposed amendment to the order is however too limited and the amendment should relate to the entire Living Waters transaction and the ferrochrome dealt with it in terms of that transaction.

[26] Turning to the third requirement, it must be considered whether there are reasonable grounds for the applicant's suspicion that the documents may be destroyed.

[27] It is trite that the applicant must set out cogent reasons for believing that there is a real danger that the documents or information will be destroyed[7]. Without a substantial case of significant dishonesty, there cannot be a reasonable apprehension that a party will conceal or destroy evidence.[8]

[28] There is merit in the applicant's contention that the respondent was blowing hot and cold in relation to its disclosures and its alleged cooperation with it in relation to the Living Waters transaction.

[29] The applicant contended that the respondent was mala fides by objecting to an inspection of the seized documents in terms of paragraph 14 of the order. I am not persuaded that the objection can be elevated to the level of mala fides, although the objection to all documentation relating to Living Waters is curious, considering the stance adopted by the respondent that it was cooperating with the applicant. From a comparison between the documentation attached to the respondent's answering affidavit, as constituting the documents voluntarily tendered by the respondent, and the documents listed on the inventory pertaining to the Living Waters transaction, it appears that not all the relevant documents were voluntarily been provided by the respondent. The documents primarily constituted invoices which cannot be seen in isolation and do not constitute all the documentation pertaining to the transaction.

[30] Considering all the relevant facts, I am persuaded that the applicant has met the relevant threshold and it can be concluded prima facie that there are reasonable grounds for the applicant's apprehension that the documents may be destroyed in light of the respondent's failure to disclose all relevant documents pertaining to the Living Waters

[7] Roamer Watch co supra 173
[8] Vizyia supra at para [47]

transaction in its possession. Having represented to the applicant that it was disclosing all the relevant documents voluntarily, the respondent did not do so but only provided selective documentation which did not fully disclose all the relevant information. As this prima facie conclusion may be disturbed at the trial proceedings, provision will be made to cater for such eventuality by the reservation of costs.

[31] I turn to the way in which the order was executed. The respondent did not raise substantial issues pertaining to how the order was executed. In terms of paragraph 14 of the order, the respondent delivered an affidavit objecting to the production of all the documents contained in the inventory. This included an objection to the hard drive and cellphone records obtained from Mr Marques of Pheron Metals.

[32] During the execution of the order Mr Marques attended at the respondent's offices, where he has an office and voluntarily provided access to his laptop and cellphone. It is common cause that Mr Marques is not employed by the respondent. Mr Marques is legally represented by separate attorneys, but did not object to the production of the documents obtained from him, nor has he opposed the application. The respondent's objection to the information taken off the electronic devices of Mr Marques does not pass muster.

[33] In its objection the respondent objected to all the documents seized and itemized on the inventory on the basis that it was not allowed to inspect the inventory in the context of not having been given access to the hard drives contained on the order to see what was contained on them. In broad terms it was alleged that respondents' confidential, sensitive commercial information had been taken as well as its proprietary documents which are irrelevant to the Living Waters transaction. It must be borne in mind that confidentiality per se is not a ground to object to the production of documents which are relevant to the proceedings[9]. The order allowed for the respondent to inspect the inventory to confirm that it was correct. I am not persuaded that what the order envisaged is for the respondent to consider all the documents which had been taken and so to go

[9] SA Neon Advertising (Pty) Ltd v Claude Neon Lights (SA) (Pty) Ltd 1968 (3) SA 381 (W) at 385B-C; Unilever plc and Another v Polagric (Pty) Ltd 2001 (2) SA 329 (C)at 339I

beyond simply considering the inventory. It was not disputed that that the Mr Omarjee of the respondent had been given a copy of the inventory at the time of the execution of the order.

[34] Despite having access to the devices of which copies had been made, the respondent had not inspected same in order to provide detailed facts as to what documents comprised its sensitive confidential or proprietary documents which had been seized. As such all that is on the papers is the respondent's *ipse dixit* for the legal conclusions drawn, rather than any primary facts.

[35] On the available facts, it cannot be concluded that the order was executed irregularly or outside the parameters authorized by the court order.

[36] Lastly, I turn to costs. Considering the complexities involved in the matter, I am persuaded that the employment of two counsel was justified, where so employed. For reasons already provided it would be appropriate to direct the costs of the application to be costs in the pending proceedings under case number 41299/2021. As judgment was reserved, the rule nisi was extended to 10 January 2022. That order is no longer required.

[37] I grant the following order:

[1] Paragraphs 3.1.1 and 3.1.2 of the order of 12 April 2021 are amended by their deletion and substitution with the following paragraphs:

> "3.1.1 any and all documentation relating to the storage of the ferrochrome sold in terms of the Living Waters transaction and/or generally making reference Living Waters and the Living Waters transaction, from 1 January 2020 to date;
>
> 3.1.2 any and all digital devices, including but not limited to desktop computers, laptops, digital servers, ("digital devices") of the respondent which contains any correspondence, data, invoices, messages, spreadsheets, or notes relating to the

> Living Waters transaction and the ferrochrome sold in terms of the Living Waters transaction".

[2] The identified items of the respondent in the custody of the sheriff which conform with the amended order in [1] above are to be retained by the sheriff pending the further direction of this Court;

[3] The identified items in the custody of the sheriff pertaining to the information taken from the electronic devices of Mr Marques are to be retained by the sheriff pending the further direction of this Court;

[4] The applicant is permitted to:

[4.1] make copies of the identified items in the custody of the sheriff referred to in [1], [2] and [3] above in the presence of the respondent's legal representatives; and

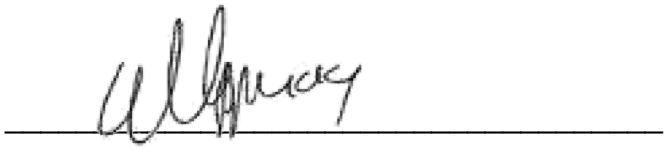
[4.2] take possession of the two forensic copies of hard drives of any digital devices or digital media of Mr Marques in the custody of the sheriff in the presence of his legal representatives and the legal representatives of the respondent, for the purposes of instituting the further proceedings against the respondent foreshadowed in this application.

[4.3] Copies of the documentation of which possession is taken are to be provided to the respondent's legal representatives;

[5] The remaining documents in possession of the sheriff are to be returned to the respondent forthwith;

[6] The costs of this application are reserved for determination in the proceedings pending under case number 41299/2021, save that any other person affected by the grant or execution of this order may 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.

[7] The order extending the rule nisi to 10 January 2022 is set aside.



**EF DIPPENAAR**
**JUDGE OF THE HIGH COURT**
**JOHANNESBURG**

**APPEARANCES**

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|---|---|
| **DATE OF HEARING** | : 11 October 2021 |
| **DATE OF JUDGMENT** | : 25 October 2021 |
| **APPLICANT'S COUNSEL** | : Adv. M.R. Hellens SC<br>Adv. L. Acker |
| **APPLICANT'S ATTORNEYS** | : Stein Scop Attorneys Inc.<br>Mr A Van der Weele |
| **RESPONDENT'S COUNSEL** | : Adv HWS Martin |
| **RESPONDENT'S ATTORNEYS** | : Baker & McKenzie Inc.<br>Mr J Bell |