



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

Case no: 2021/50184

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

Signed: **Date:** 23 November

In the reconsideration of the *ex parte* application brought by:

SUPERCART SOUTH AFRICA (PTY) LTD

Applicant

against

VANESCO (PTY) LTD

First Respondent

CASE, KENNETH MARK

Second Respondent

JUDGMENT

This judgment is handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines.

Discovery and inspection — Anton Piller-type orders — Requirements — Principles restated.

Discovery and inspection — Anton Piller orders — “Ordinary” Anton Piller order directed at preserving evidence that would otherwise be lost or destroyed where applicant not claiming real or personal right to possess or view attached items — Requirements — May not incorporate order entitling applicant to inspection and copying of attached items — Reconsideration.

Discovery and inspection — Anton Piller orders — “Ordinary” Anton Piller order directed at preserving evidence that would otherwise be lost or destroyed where applicant not claiming real or personal right to possess or view attached items — Requirements — Unexecuted order entitling applicant to inspection and copying of attached items — Variation upon reconsideration.

Discovery and inspection — Anton Piller-type orders — “Ordinary” Anton Piller order directed at preserving evidence that would otherwise be lost or destroyed where applicant not claiming real or personal right to possess or view attached items — Requirements — May be granted in the course of already-instituted contempt of court proceedings on motion prior to direction under Rule 35(13).

Discovery and inspection — Anton Piller-type orders — Material non-disclosure by applicant in *ex parte* application — Burden of proof upon reconsideration — Respondent to establish that applicant failed to disclose material facts on preponderance of probabilities.

Discovery and inspection — Anton Piller-type orders — “Ordinary” Anton Piller order directed at preserving evidence that would otherwise be lost or destroyed — Requirements — Onus and burden of proof upon reconsideration — Onus on applicant to establish cause of action against the respondent which it intends to pursue on *prima facie* basis.

Discovery and inspection — Anton Piller-type orders — “Ordinary” Anton Piller order directed at preserving evidence that would otherwise be lost or destroyed — Requirements — Onus and burden of proof upon reconsideration — Onus on applicant to establish respondent has in its possession specific or specified classes

of documents or things which constitute vital evidence in substantiation of applicant's cause of action on preponderance of probabilities — Factual disputes — Court required to weigh balance of probabilities on basis of facts established pursuant to and subsequent to execution of Anton Piller order.

Discovery and inspection — Anton Piller-type orders — “Ordinary” Anton Piller order directed at preserving evidence that would otherwise be lost or destroyed — Requirements — Onus and burden of proof upon reconsideration — Onus on applicant to satisfy court of real and well-founded objective apprehension that evidence may be lost or destroyed — Factual disputes — Court required to weigh balance of probabilities on basis of facts established pursuant to and subsequent to execution of Anton Piller order.

Discovery and inspection — Anton Piller-type orders — “Ordinary” Anton Piller order directed at preserving evidence that would otherwise be lost or destroyed — Safeguards — Appointment of “independent assisting attorneys”.

Discovery and inspection — Anton Piller-type orders — “Ordinary” Anton Piller order directed at preserving evidence that would otherwise be lost or destroyed — Safeguards — Authorisation of Police Service to assist.

Discovery and inspection — Anton Piller-type orders — Execution — Burden of proof upon reconsideration — Respondent to show on preponderance of probabilities that execution not in compliance with order so serious as to justify setting aside — Conduct of assisting attorneys.

Discovery and inspection — Anton Piller-type orders — Execution — Burden of proof upon reconsideration — Respondent to show on preponderance of probabilities that execution not in compliance with order so serious as to justify setting aside — Forensic Imaging and subsequent searching of electronic devices.

MOULTRIE AJ

[1] Vanesco and Supercart are commercial competitors in the design, manufacture, and supply of a variety of different trolleys used by supermarkets and retailers. Mr Kenneth Case is Vanesco's sole shareholder and director, whereas Supercart is led by its founder Mr Michael Wolfe.¹ The specific trolley to which this matter relates is a product manufactured and distributed by Vanesco that this judgment shall refer to as the Hybrid 90 litre trolley. Supercart alleges that Vanesco's conduct infringes its rights pursuant to a design it has registered under the Designs Act, 195 of 1993. This is hotly contested by Vanesco, which contends that the design was not novel or original as at the date of its registration, and that it had therefore not been validly registered.

[2] In this application, the respondents seek the reconsideration and setting aside under Rule 6(12)(c) of the Uniform Rules of what both parties refer to as an "Anton Piller order" that Supercart sought on an *ex parte* basis and *in camera* and which was initially granted on 21 October 2021, but amended in a minor respect the following day.² The searches authorised by the Anton Piller order were conducted by ostensibly independent search parties³ under the

¹ Vanesco and Mr Case are cited in the headings and bodies of the various affidavits filed in the reconsideration proceedings as the "first applicant" and "second applicant" respectively, and Supercart is cited as "the respondent". In my view, these appellations are somewhat confusing and potentially misleading. I have thus followed the convention adopted by a full bench of this Division in *Mazetti Management Services (Pty) Ltd and another v Amabhungane Centre for Investigative Journalism NPC and others* 2023 JDR 2338 (GJ) of referring in both the heading and body of this judgment to Supercart, which applied for and obtained the *ex parte* order, as the "applicant", and to Vanesco and Mr Case, who seek its reconsideration, as "the respondents".

² The Anton Piller order as amended is (as may be expected in such matters) extensive, running to more than 15 typescript pages and while it is challenged in its entirety, many of its provisions are uncontroversial in their own right. I therefore do not repeat it *in extenso* in the body of this judgment. The wording of the specific paragraphs that require consideration are quoted below.

³ The respondents allege that certain members of the search parties were not independent. This is considered below.

supervision of independent attorneys at Vanesco's business premises in Roodepoort and Mr Case's residence in Linksfield on 22 and 25 to 27 October 2021. Documents were seized and mirror images that were made of electronic devices during the search were attached by the Sheriffs. During the search and in the days that followed, the seized documents were analysed by the search parties, and copies of items considered to contain the information falling within the scope of the Anton Piller order were attached and inventorised. Copies that had been made of attached items considered by the search parties to fall outside of the scope of the order were destroyed. The search parties searched the attached mirror images using a variety of keywords, and electronic documents considered to fall within the scope of the order were duplicated, stored and inventorised. The original documents and devices were returned to the respondents. The inventories were filed with the Court, as were affidavits containing the reports of the independent supervising attorneys. The attached documents and mirror images remain under attachment and in the custody of the Sheriff for Roodepoort. Although the Anton Piller order obtained by Supercart entitled it to inspect and make copies of the attached items immediately upon service of the Sheriffs' inventories, that part of the order has not yet been executed.

- [3] The Anton Piller order was not, as is ordinarily the case with such orders, sought and granted in anticipation of proceedings by Supercart to enforce its registered design. Instead, it was launched (albeit under a different case number) as an interlocutory application in an already-instituted, initially-urgent and still-pending motion for final relief in which Supercart seeks declarations that Vanesco and Mr Case are in contempt of court, together with orders

imposing criminal sanctions – including sentencing Mr Case to a term of imprisonment and the respondents to a fine calculated on a per-trolley basis. No direction has been sought or given regarding discovery in the contempt application. The contempt application in turn arises from Vanesco's (admitted) breach of an interim interdict that Supercart obtained after it had already instituted design enforcement proceedings (on motion, but which were referred to a trial that remains pending), and to which the interim interdict is interlocutory. Given that there has as-yet been no opportunity to test the veracity of the parties' conflicting factual allegations in any of these proceedings by means of oral evidence, this application is a "riddle wrapped in a mystery, inside an enigma".⁴

[4] In seeking the reconsideration of the Anton Piller order and to have it set aside, the respondents mount a wide-ranging challenge that starts by impugning the application as an abuse of process in its very conception, proceeds to question the completeness of the information that was placed before the Court on an *ex parte* basis, continues by alleging a lack of justification for a number of the substantive and procedural features of the order as sought and granted, and finally extends to the manner in which it was executed. The specific challenges that they pursue before me are identified below.

[5] The differing onuses and evidentiary burdens borne by the parties in relation to the various elements of the respondents' challenge to Anton Piller order has made the establishment, on paper, of the facts (or assumed facts) to

⁴ Winston Churchill, radio broadcast 1 October 1939: "*I cannot forecast to you the action of Russia. It is a riddle, wrapped in a mystery, inside an enigma....*"

which I am required to apply the law relating to Anton Piller orders an especially onerous task. In seeking to apply the correct onuses, standards of proof and legal presumptions, I have sifted the allegations and counter-allegations contained in a multitude of affidavits deposed Messrs Wolfe and Case in four separate applications. My task has been bedevilled by the palpable animosity between these two leaders of industry: the affidavits put before me are replete with emotive language, dramatic descriptions and inadmissible conclusory inferences.⁵

[6] The matter was set down as a special motion. During the initial two-day sitting, and having come across a judgment handed down by Wilson J of this division in the week prior to the hearing,⁶ I expressed concerns regarding the potential impact of the Anton Piller order on the constitutional rights of the respondents not to be compelled to give self-incriminating evidence in the contempt proceedings, in which Supercart is seeking the imposition of criminal sanctions. With the parties' agreement that the issue merited my attention, the hearing was adjourned to allow for delivery of further written and oral submissions on subsequent dates. While I am indebted to counsel and other legal representatives for their assistance in this regard, it has ultimately proven unnecessary for me to decide the issue given the conclusion that I have reached in relation to those aspects of the Anton Piller order that would have entitled Supercart to immediately access the attached items. I also wish to thank the parties for their forbearance during the time that I have taken to distil the relevant factual material, to marshal and analyse the applicable legal

⁵ See *AllPay Cons Inv Holdings (Pty) Ltd v CEO, SASSA* 2013 (4) SA 557 (SCA) para 15.

⁶ Now reported as *MTN (Pty) Ltd v Madzonga and Others* 2023 (5) SA 548 (GJ).

principles and to prepare the judgment.

- [7] Both parties sought to prevail upon me to find a solution that would make a meaningful step in the direction of the final resolution of this litigation saga. Supercart seeks to “cut the Gordian Knot” that binds the parties together in forensic combat, while the respondents wryly observe that that the proliferation of interlocutory proceedings operates to Supercart’s advantage while the interim interdict remains in force. These concerns are both legitimate to some extent. This judgment sets out my reasons for concluding that the only conclusion that may be reached at this stage is to allow the Anton Piller order to stand as granted, save in two material respects regarding the fruits of the execution of the order at Mr Case’s residence and the ability of Supercart to immediately access the remaining attached physical documents and electronic files (the attached items) so as to enable it to unilaterally place them before the Court in the contempt application. The question whether this may be done, and if so under what circumstances, must unfortunately stand over for determination in yet further proceedings.

THE LITIGATION CONTEXT OF THE RECONSIDERATION PROCEEDINGS

- [8] It is necessary to explain in further detail the intricate factual background against which the matter falls to be determined. Where factual disputes have arisen that require resolution by me in accordance with the legal principles that I have found to apply, that exercise is undertaken in the sections of the judgment dealing with each of Vanesco’s challenges.

The enforcement proceedings and the interim interdict

- [9] Supercart launched enforcement proceedings under section 35 of the Designs Act against Vanesco on motion during 2018. In its notice of motion, Supercart sought a final, alternatively interim, interdict prohibiting Vanesco from manufacturing and distributing the Hybrid 90 litre trolley. Related relief was also sought, including orders requiring Vanesco to surrender all infringing Hybrid 90 litre trolleys in its possession to Supercart pursuant to section 35(3)(b) of the Designs Act, and to pay damages or a reasonable royalty in respect of the alleged infringement as contemplated in sections 35(3)(c) and (d) thereof. Supercart further sought an order directing that the amount of the damages or royalty be determined by means of an enquiry conducted in terms of section 35(4) of the Designs Act. Vanesco contests Supercart's allegations of design infringement, contending that its conduct is not unlawful because Supercart's registered design was not novel or original as at the date its registration, and that it had therefore not been validly registered. Vanesco counterclaims for the revocation of the registration of Supercart's design.
- [10] The enforcement application spawned at least two interlocutory skirmishes and court orders. The first was an application by Supercart to compel discovery of documents, pursuant to which Unterhalter J granted an order requiring Vanesco to disclose specified classes of documents for the purposes of the delivery of Supercart's answering affidavit to Vanesco's counterapplication in the motion proceedings.⁷

⁷ The reasons given by Unterhalter J for the order granted by him did not form part of the papers that served before me. I glean from the judgment of Gumbi AJ (below) however, that the order was sought in terms of Rules 35(12) and (14). Whatever the precise relief and basis for granting it may have been (Mr Case describes it as a "novel extension of the law as it had been interpreted up until that time"), it is reasonable to assume that the Court applied the principles applicable to Rule 35(13), and was

[11] Then, after all the remaining affidavits in the motion had been delivered, and shortly before the enforcement application and counterapplication was due to be heard, Supercart launched an interlocutory application seeking orders (i) in terms of Rule 6(5)(g) that both the main application and the counterapplication be referred to trial in which the Uniform Rules of Court dealing with the conduct of trials would apply; and (ii) the grant of an interim interdict immediately restraining Vanesco from “making and/or disposing of” the Hybrid 90 litre trolley (but only within South Africa) pending the outcome of the trial. Gumbi AJ granted the order as sought. Vanesco and Mr Case do not dispute that the order containing the interim interdict was received on 24 May 2021.

The contempt application and Mr Case’s allegedly full disclosure of breaches

[12] During August 2021, Supercart established that Vanesco had disposed of approximately ninety Hybrid 90 litre trolleys in South Africa on or after 24 May 2021 in breach of the interim interdict. The majority of these were deliveries to Roots Butcheries outlets. This discovery prompted Supercart to launch a contempt application. Apart from setting out the breaches of which Supercart was aware, Mr Wolfe stated in his founding affidavit in that application that:

satisfied that Supercart had established exceptional circumstances for the order granted (cf. *STT Sales (Pty) Ltd v Fourie and Others* 2010 (6) SA 272 (GSJ) para 13).

“It is highly possible that further instances of breach of the interdict by Vanesco exist. If information in this regard comes to light, I will place it before the Court. In any event, the relief sought contemplates that Mr Case will make a full disclosure to the Court. That aside, I challenge him to take the Court into his confidence and make a full and candid disclosure in any answering affidavit he chooses to depose to in these proceedings.”

[13] Mr Wolfe’s challenge to Mr Case to make a full and candid disclosure, and the reference to relief seeking “full disclosure” of Vanesco’s breaches is significant. In addition to prayers seeking declarations that Vanesco and Mr Case are in contempt of the interim interdict, and an award of costs on a punitive scale, the formulation of the remaining relief that continues to be sought by Supercart in prayers 5 to 11 of the contempt application is as follows:

- “5. [Mr] Case is sentenced to imprisonment for a period of 30 days, which sentence is subject to paragraphs [8] and [9] below;
6. [Mr] Case is ordered to lodge with the Registrar of the Court, and serve on the Sheriff and on [Supercart], within 5 days of this Order an affidavit:
- a. Detailing completely and in full the quantities of Smartcart Hybrid 90L trolleys manufactured by it or on its behalf subsequent to 24 May 2021;
 - b. Detailing completely and in full the quantities of Smartcart Hybrid 90 litre trolleys disposed of in South Africa by it or on its behalf since 24 May 2021, to whom, and when;
 - c. Evidencing each such disposal referenced in terms of [b] by way of customer order, invoice, proof of delivery, and delivery note to be annexed to such affidavit; and
 - d. Describing, with reference to quantities, the place or places at which the Smartcart Hybrid 90L trolleys manufactured but not disposed of are held, in order to facilitate the Sheriff's compliance with the direction in paragraph [11].

7. [The respondents] are ordered, jointly and severally, the one paying the other to be absolved, to pay at the Registrar of the Court and by no later than 5 days after lodging of the affidavit referred to in paragraph [6] a fine of R2500,00 per trolley manufactured or disposed of as accounted for in the said affidavit;
8. In order to give effect to the sentence imposed in paragraph [5] above, the Registrar of the Court is directed to issue a warrant for the arrest of [Mr Case] which shall be effective in the event of the [the respondents'] failure to comply with the orders in paragraphs [6] and/or [7];
9. The sentence in paragraph [5] and the direction in paragraph [8] above are suspended pending the [the respondents'] compliance with the orders in paragraphs [6] and/or [7];
10. Should [the respondents'] fail to comply with the orders in paragraphs [6] and/or [7], respectively as the case may be, the sentence in paragraph [5] and the direction in paragraph [8] will come into effect immediately;
11. The Sheriff is directed forthwith to place under attachment the Smartcart Hybrid 90L trolleys contemplated in paragraph [6]d pending the outcome of the trial action in [the enforcement proceedings].”

[14] In his answering affidavit in the contempt application, Mr Case admits that

Vanesco breached the interim interdict, but denies that he or Vanesco are guilty of contempt of court because the breaches were not wilful. He claims that he did not initiate the breaches and was initially unaware of them as he is “not involved directly in every aspect of the day-to-day business” of Vanesco. He says Vanesco is only one of his businesses, which also include two other companies and a close corporation, and that “[I] rely upon my managers within each business to carry out their tasks and follow the instructions that I give them”. Mr Case states that he took steps that he believed were sufficient to ensure compliance with the interim interdict and in particular that he advised Vanesco’s Sales Manager, Clive Botes, of “the fact and content” of the court order at the time that it was issued. However, Mr Botes, who deposed to a confirmatory affidavit, and whom Mr Case describes as “young and relatively inexperienced” had “failed to appreciate the seriousness of the matter” and ...

“... continued to fill pre-existing orders [of the Hybrid 90L trolley that predated the interdict using stock manufactured before it was issued]. He thought, in his own wisdom, that these were not covered by the interdict because the orders had preceded the interdict. He did not think to ask for advice and this shows a lack of judgment on his part. This occurred during June 2021. Between 7 and 14 July 2021, a period of unrest and looting occurred in South Africa. Existing customers phoned Mr Botes and begged him to supply them with “their trolleys”. Mr Botes did not pause to think that this might constitute a breach of the Court Order, but was more concerned with satisfying the needs of his customers and keeping them happy. Accordingly, he supplied further trolleys throughout July and into the start of August.”

[15] Mr Case professes regret and apologises for Vanesco’s admitted breaches of the interim interdict, stating that “I should have taken a more direct role in ensuring that the terms of the order were strictly adhered to”. Mr Botes also apologises and confesses to feeling “sheepish” about his conduct.

[16] Mr Case then goes on to confirm Supercart’s suspicions regarding Vanesco’s further breaches of the interim interdict. He states that on 6 August 2021 he discovered by chance that Vanesco had delivered previously-manufactured Hybrid 90 litre trolleys directly to both customers and distributors within South Africa after the date upon which he became aware of the interim interdict. He states that he put a stop to the deliveries and has taken steps to ensure that breaches will not re-occur. He claims to have conducted an investigation and to have been “appalled” when this showed that 635 Hybrid 90 litre trolleys had

been delivered within South Africa between 24 May 2021 and 5 August 2021, although he states that none have been manufactured by or on behalf of Vanesco after that date. As evidence of this, Mr Case put up a bundle of documents (annexure A3) containing a summary sheet of the 635 deliveries “with the relevant orders, delivery notes and invoices” from which the summary had been extracted.

- [17] Mr Wolfe and Supercart do not believe Mr Case – either in relation to his professed lack of knowledge of the admitted breaches, or in relation to the number of trolleys manufactured and disposed of in South Africa by Vanesco in breach of the interdict.

The relevant provisions of the Anton Piller order

- [18] Instead of delivering a replying affidavit in the contempt application, on about 20 October 2021 Supercart launched the *ex parte* application that resulted in the grant of the Anton Piller order that is the subject of the current reconsideration.

- [19] Paragraphs 4.1 and 5.2 of the Anton Piller order as sought and granted authorised two search parties comprising the relevant Sheriffs, with the assistance of ostensibly independent “assisting attorneys” and digital forensic experts (IT experts), and supervised by independent supervising attorneys, to access Vanesco’s business premises and Mr Case’s residence, and to search “wherever at the premises they require in order to fulfil this Order including but not limited to all areas, places of storage, rooms, motor vehicles, digital storage media (howsoever constituted and based), cupboards, filing systems and files, boxes, records, archives, computers, and the laptop(s) and the

mobile phone(s) used by Mr Case, Mr Stein and Mr Botes” and to attach and remove “relevant evidence” for the purposes of copying.

[20] The “relevant evidence” was specified as follows:

- (a) Whether in hard copy or soft copy: quotations, purchase orders, invoices, credit notes, and delivery notes relating to, referencing or concerning the manufacture and/or disposal (excluding, self-evidently, directly to customers outside of South Africa) of the Smartcart Hybrid 90 litre trolley (howsoever it is identified; it is also known as 'Smartcart 90 litre'; 'Hybrid 90'; 'Vanesco hybrid 90 L'; '90 LT convenient shopper'; '90 Hybrid'; and 'Convenient Shopper 90') subsequent to 23 May 2021;
- (b) Whether in hard copy or soft copy: emails, reports, notes, letters, management accounts, WhatsApp messages, SMS messages, voice notes, minutes of meetings, memoranda, spreadsheets, charts and graphs relating to, referencing or concerning the manufacture and/or disposal (excluding, self-evidently, directly to customers outside of South Africa) of the Smartcart Hybrid 90 litre trolley as from 23 May 2021;
- (c) Any software package, program, module, platform and/or digital application at or from which, or whereby, Mr Kenneth Mark Case, subsequent to 23 May 2021, accessed any email, report, note, letter, management account, WhatsApp message, SMS message, voice note, minutes of a meeting, memorandum, spreadsheet, chart or graph relating to, referencing or concerning the manufacture and/or

disposal (excluding, self-evidently, directly to customers outside of South Africa) Smartcart Hybrid 90 litre trolley, and evidencing such access;

- (d) Whether in hard copy or soft copy: entries, deposits, or other line items in statements for the Standard Bank account [redacted] covering the period 24 May 2021 to 20 September 2021 and referencing in any way the manufacture and/or disposal (excluding, self-evidently, directly to customers outside of South Africa) of the Smartcart Hybrid 90 litre trolley;
- (e) Emails to and/or from [certain specified email addresses and any email addresses within the domains <rootsgroup.co.za> and <trolleyquip.co.za>] relating to, referencing or concerning the manufacture and/or disposal (excluding, self-evidently, directly to customers outside of South Africa) of the Smartcart Hybrid 90 litre trolley subsequent to 23 May 2021 ...;
- (f) WhatsApp and/or SMS messages (whether text, video, or voice) subsequent to 23 May 2021, sent to or from the mobile phones used by Mr Kenneth Mark Case (including number [redacted]), Clive Botes (including number [redacted]), and Mr Justin Stein (including number [redacted]) referencing, relating to or concerning the manufacture and/or disposal (excluding, self-evidently, directly to customers outside of South Africa) of the Smartcart Hybrid 90 litre trolley.

[21] Paragraph 10 of the Anton Piller order required the Sheriffs (assisted by the assisting attorneys) to “do the following in respect of any and all items of

relevant evidence coming to light” pursuant to the search:

- 10.1 to inventorise it comprehensively and in detail;
- 10.2 to attach and remove it for purposes of copying;
- 10.3 to make copies of it;
- 10.4. within 24 hours (or as otherwise arranged with a representative of Vanesco and Mr Case, respectively, as the case may be) to return the relevant evidence so removed;
- 10.5 to keep the copies made of the relevant evidence, duly secured, pending the operation of the further Orders referred to below or as the Court otherwise directs;
- 10.6 within 48 hours to lodge the completed inventory with the Registrar of this Court, and simultaneously to furnish a copy to [Supercart’s] attorneys, the assisting attorneys, the independent supervising attorneys, and to an attorney who notifies the Registrar of his representation of Vanesco and/or Mr Kenneth Mark Case.

[22] Paragraph 4.1.1 of the Anton Piller order specified that the laptops and mobile phones found at Vanesco’s business premises and permitted to be searched for “relevant evidence” were limited to those used by Messrs Case, Stein and Botes. Paragraph 5.2.1 specified that those found at Mr Case’s residence and permitted to be searched for relevant evidence were limited to those used by him. These paragraphs were supplemented by paragraph 12, which *inter alia*

authorised the IT experts as follows:

“12.2. to make and/or to capture images of more than the relevant evidence if that is the only feasible way of being able to make copies of the relevant evidence;

12.3. to download, and/or save on a device, and/or make print-outs of any relevant evidence if that is the only feasible way of being able to make copies of the relevant evidence; and

12.4. In the event that the forensic expert is unable to fulfil their function in terms of this order by the close of business of the day on which execution commences, the Sheriff is authorised and directed to attach and seal the device and/or media in question in order that the forensic investigation as contemplated in this order continue the following business day in the presence of the independent supervising attorney and the Sheriff.”

[23] Paragraph 13 provided *inter alia* that if the occupants of the premises to be searched refused to grant access, the search parties were “authorised and directed to gain access and give effect to the execution of this Order using the least invasive means at their disposal for such purpose, including if necessary summoning the South African Police Service [and] a locksmith”.

[24] Paragraph 14 stipulated that neither any representative of Supercart nor its attorneys should take part in the search. However, it also required that “[e]ither must be available, outside the respective premises, in order to identify documents, records and so forth as being relevant evidence if and when

called upon by any of the search party”.

[25] Of central importance to my determination is the following paragraph, which I shall refer to as “paragraph 15*bis*”:⁸

“Unless a different direction is obtained from the Court, [Supercart] and [its] attorney will, upon service of the Sheriffs inventory referred to in 10.6 above, become entitled to inspect any of the relevant evidence copies of which are in the possession of the Sheriff, and to make copies in order to have them placed before the Court in [the contempt application].”

[26] Paragraph 16*bis*.³⁹ of the Anton Piller order directed the independent supervising attorneys to file affidavits with the Court and to serve copies on the Sheriff within 5 days of conclusion of the execution of the order setting out fully the manner in which the order was executed, annexing inventories that they were required to prepare independently of the Sheriffs “of all relevant evidence which comes to light during the execution” of the order, and “stating whether, in the independent supervising attorney's opinion, there occurred any abuse or breach of any provisions of [the] order”.

The partial execution of the Anton Piller order and the order in the variation application

[27] The seizures, searches and attachments authorised by the Anton Piller order were conducted between 22 October and 2 November 2021.

⁸ This is because the Anton Piller order contains two paragraphs numbered 15.

⁹ The Anton Piller order also contains two paragraphs numbered 16. This is a reference to the second of the two.

[28] Although the Anton Piller order did not provide for a return date,¹⁰ the respondents were of course entitled to apply for its reconsideration in terms of Rules 6(8) and 6(12)(c) in the course of which Supercart's entitlement to the order and the search, seizure, attachment and inspection that it had authorised would be determined. A similar course is also foreshadowed in paragraph 16.5 of the order, which directed that before executing it, the Sheriffs were required to inform the occupants of the two premises and "that [a]ny interested party may apply to this Court on not less than twenty-four (24) hours' notice to [Supercart] for a variation or setting aside of this order". To a more limited extent, the opening words of paragraph 15*bis* also contemplated an application to interrupt the operation of that paragraph. The Sheriff for Roodepoort was initially prevailed upon to refuse to allow Supercart to inspect and copy the attached documents and make copies pending the determination of a reconsideration of the Anton Piller order, which the respondents contend (correctly in my view), they could not have been expected to seek before the delivery of the Sheriffs' inventories and supervising attorneys' affidavits. However, in early November 2021, the Sheriff evidently had a change of heart and indicated that the inspection contemplated in paragraph 15*bis* would indeed be allowed.

[29] This prompted the respondents to launch an urgent application on 2 November 2021 for an order varying paragraph 15*bis* so as to prohibit either party from inspecting the attached documents until such time as "the lawfulness" of (i) the terms of the Anton Piller order; (ii) the granting of it; (iii) "the allegations contained in the founding affidavit"; and (iv) the execution of

¹⁰ As I set out below with reference to the judgment in *Retail Apparel (Pty) Ltd v Ensemble Trading 2243 CC and Others* 2001 (4) SA 228 (T) at 233F, this was not necessary.

the order could be determined. The respondents sought costs in the variation application on the attorney and client scale. Supercart counter-applied for orders permitting it to inspect and copy the attached documents pursuant to paragraph 15*bis*, subject to the imposition of an obligation to keep the information contained therein confidential, “save that information relevant to the contempt proceedings is to be used for that purpose but that purpose only”. In the alternative, Supercart sought an order directing that the attached items be inspected by an independent advocate for the purposes of “confirming the existence or absence of evidence relevant to the contempt proceedings, [and] if the former, assort the evidence relevant to the contempt proceedings into a separately inventorised bundle” and make it available to both parties.

[30] The variation application came before Wright J, who in a judgment delivered on 25 November 2021 declined to make any finding on the merits of either side’s case. However, since he concluded that it would be “unsatisfactory” to allow Supercart to inspect the attached items for any purpose if it were subsequently found that it should not have been entitled to do so, he granted an order prohibiting Supercart and its legal team or anyone acting on their behalf from inspecting or copying the attached items “until either there is written permission from Vanesco and Mr Case or their attorneys or a court orders otherwise”. In the replying affidavit filed by Supercart in the reconsideration, Mr Wolfe requests me to direct that the provisions of the Anton Piller order, including paragraph 15*bis*, be immediately effective. Despite the non-determination of the relief sought in the variation application, it has now been overtaken by the current reconsideration proceedings, and

the only remaining aspect thereof is the question of costs, which were reserved by Wright J, and which I am asked to determine.

Delivery of the Sheriffs' inventories and the supervising attorneys' affidavits

[31] The Sheriffs' inventories and the independent supervising attorneys' affidavits were filed on 4 and 5 November 2021 respectively, during the period that the variation application remained pending. These will be referred to below to the extent necessary in determining the merits of the respondents' challenges to the grant of the Anton Piller order.

The answering affidavit and the request for reconsideration

[32] Despite the fact that the search and seizure provided for in the Anton Piller order had already been executed, and despite the fact that the notice of motion in the Anton Piller application (correctly) did not call upon Vanesco and Mr Case to deliver any answering papers, they delivered what they rightly characterised as their "answering affidavit" in the Anton Piller application on 3 December 2021, together with a notice of motion seeking a reconsideration of the order under Rule 6(12)(c).

ANTON PILLER-TYPE ORDERS AND THEIR REQUIREMENTS

The three threshold requirements at the *ex parte* stage

[33] The availability under South African law of orders obtained *ex parte* and *in camera* for the attachment of documents and other things to which no right is claimed except that they should be preserved for and produced as evidence in intended litigation between the parties was first recognised at the appellate

level in *Universal City Studios*. In that case, the Appellate Division per Corbett JA held (albeit in an *obiter dictum*) that such orders are discretionary remedies that would in principle be available to an applicant who establishes the following three threshold requirements on a *prima facie* basis:

- (a) that the applicant has a cause of action against the respondent which it intends to pursue;
- (b) that the respondent has in its possession specific documents or things which constitute vital evidence in substantiation of the applicant's cause of action (but in respect of which it can claim no real or personal right); and
- (c) that there is a real and well-founded apprehension that this 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.¹¹

[34] While the Court furthermore contemplated that the grant of such an order might be “especially” appropriate “if there is no feasible alternative”,¹² this is not an actual prerequisite of the remedy. When the requirements were subsequently confirmed as part of the *ratio decidendi* in *Shoba*,¹³ Corbett JA indicated that he had used the phrase “vital evidence” in *Universal City Studios* “in the sense of being evidence of great importance to the applicant's case” and that it would be “too stringent” to require an applicant “to show that the evidence was ‘essential’ or ‘absolutely necessary’ in order for him to prove

¹¹ *Universal City Studios Inc. v Network Video* 1986 (2) SA 734 (A) at 751G-H and 754E – 755B.

¹² *Universal City Studios* (above) at 755C.

¹³ *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam, and Another; Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg, and Others* 1995 (4) SA 1 (A) at 15G-I.

his claim and that its non-availability at the trial would result in the administration of justice being defeated.”¹⁴

[35] In *Non-Detonating Solutions*, the SCA observed that the first threshold requirement of a *prima facie* cause of action means that an applicant need show no more than that there is evidence which, if accepted, will establish a cause of action.¹⁵

[36] The judgment in *Shoba* clarified that the reference to “specific documents or things” in the second threshold requirement includes “specified” items. The Supreme Court of Appeal has subsequently confirmed that this could include “specific classes” of items, as long as terms of the order are “delimited appropriately and are not so general and wide as to afford ... access to documents, information and articles to which [the applicant’s] evidence has not shown that [it] is entitled”.¹⁶ In *Viziya*, the SCA confirmed that “considerations of practicality and convenience could render it appropriate to order imaging of hard drives and other storage facilities and subsequent searching thereof by independent persons with the use of keywords”, as long as the scope of the search is carefully limited.¹⁷ Where electronically stored information is sought to be seized and/or attached, it seems to me that what is of central importance is that both the items to be searched for, and the

¹⁴ *Shoba* (above) at 16A.

¹⁵ *Non-Detonating Solutions (Pty) Ltd v Durie* 2016 (3) SA 445 (SCA) para 21.

¹⁶ *Non-Detonating Solutions* (above) para 36, approving *Roamer Watch Co SA and Another v African Textile Distributors also t/a MK Patel Wholesale Merchants and Direct Importers* 1980 (2) SA 254 (W) at 273C–274F.

¹⁷ *Viziya v Collaborit* 2019 (3) SA 173 (SCA) para 39 [emphasis supplied]. The Court recognised that the scope of the search in that case (via 149 keywords) would always need to be comprehensive, but set aside the order for lack of specificity, because the searchers would not be able to identify which of the information obtained as a result of the application of the keywords would be allowed to be extracted: see paras 31 and 32. See also *Van Der Merwe and Others v Van Wyk Auditors and Others* 2022 JDR 2032 (GP) paras 52, 79 and 80.

methods of the search itself should be as accurately and carefully specified as possible so as to avoid indiscriminate searching or attachment. As with the search of physical premises, it is unavoidable that an independent search party undertaking even an appropriately targeted search will come across or access items that are not included within the specification. But every effort should be made in each case to prevent the viewing, seizure or attachment of such items, for example by prohibiting searches in places where there is no basis for believing they are located, or the use of search methodologies that may unnecessarily expose it to view, even by an independent search party.

[37] As to the third threshold requirement, the Supreme Court of Appeal has held that “[t]he test of a reasonable apprehension is an objective one and is based on the view of a reasonable person when confronted with the facts”.¹⁸

“Ordinary” Anton Piller orders differentiated from “Cerebos-type” orders

[38] Although orders directed solely at the preservation of evidence have come to be known as “Anton Piller orders”, this nomenclature arises primarily from the exceptional procedural, as opposed to substantive, features that they derive from their jurisprudential progenitor, *Anton Piller KG v Manufacturing Processes Ltd*.¹⁹ Appropriately, in my view, the Court in *Universal City Studios* referred to orders granted in similar procedural circumstances as “Anton Piller-type orders”.²⁰ In the interests of seeking clarity of terminology, it is helpful to refer to the substantive features of the various different Anton Piller-type orders discussed in the full bench decision of *Cerebos Food*, which the

¹⁸ *Viziya* (above) para 45.

¹⁹ *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch. 55 (EWCA).

²⁰ *Universal City Studios* (above) at 747F and 750G.

Appellate Division subsequently partially overruled in the course of recognising the availability of Anton Piller-type orders in South Africa for the purposes of preserving evidence.²¹ The other Anton Piller-type orders identified by Van Dijkhorst J in *Cerebos Food* were those:

- (a) attaching and allowing immediate delivery up of items, including documents containing intellectual property, where the applicant claims a real or personal right to possess (or at least view) them;²²
- (b) for the disclosure of names of sources and retail outlets who enable the defendant to operate unlawfully, infringing on the claimant's rights;²³ and
- (c) orders for the attachment of a thing to which no right is claimed, but as part of an interdict to make the interdict effective.²⁴

[39] The next occasion upon which an Anton Piller-type order came to be considered by the Supreme Court of Appeal was in *Memory Institute*, where the original *ex parte* order had allowed the seized items to be handed over to

²¹ *Cerebos Food Corporation Ltd v Diverse Foods SA (Pty) Ltd and Another* 1984 (4) SA 149 (T) at 164A-C. The specific type of order approved in *Universal City Studios and Shoba* and the order under reconsideration in this matter was discussed (but rejected) by Van Dijkhorst J at 168B to 173F.

²² *Universal City Studios* (above) at 751E-F and 753G-754B. This was the “first” Anton Piller-type order identified in *Cerebos Food*, and is dealt with in that judgment at 164D-F. Somewhat confusingly to my mind, Van Dijkhorst J stated that this type of order is “not a true *Anton Piller* remedy” – despite that fact that it was exactly the kind of order that had been granted by the Court of Appeal in the original *Anton Piller* case. In his judgment at 160D, Van Dijkhorst J accurately described the order granted in that case as being one “requiring the defendants to permit the plaintiffs to enter the defendants' premises in order to inspect, remove or make copies of documents belonging to the plaintiffs”.

²³ *Universal City Studios* (above) at 751G. This was the “second” Anton Piller-type order dealt with in *Cerebos Food* (above) at 164G to 168A. The availability of such orders was approved by Cilliers AJ in *Roamer Watch* (above) at 277G – 282H and again more recently by Unterhalter J in *Nampak Glass (Pty) Ltd v Vodacom (Pty) Ltd and Others* 2019 (1) SA 257 (GJ). Such relief is sometimes referred to as “*Norwich Pharmacal* relief”, after *Norwich Pharmacal Co and Others v Customs and Excise Commissioners* 1974 AC 133 (HL).

²⁴ *Universal City Studios* (above) at 751H. This was the “fourth” Anton Piller-type order referred to in *Cerebos Food* at 173G to 174A.

the applicant prior to the return day of a *rule nisi*, and this had occurred. The order was set aside on the return day, but the applicant appealed. The opening words of Harms JA's judgment indicated exasperation: "the name of Anton Piller, once again, has been taken in vain", and he considered it unnecessary to identify authorities for the following propositions "since those who care to look can find them easily":

"Anton Piller orders are for the preservation of evidence and are not a substitute for possessory or proprietary claims. They require built-in protection measures such as the appointment of an independent attorney to supervise the execution of the order. An applicant and the own attorney are not to be part of the search party. The goods seized should be kept in the possession of the Sheriff pending the Court's determination. Since it is the duty of an applicant to ensure that the order applied for does not go beyond what is permitted (something that was not done in this case) and since [the judge who heard the ex parte application] granted a rule nisi he was not empowered to grant, the setting aside of the rule had to follow as a matter of course."²⁵

[emphasis supplied]

[40] The basis of the applicant's appeal, however, was its contention that it had been entitled to the order because the claims that it advanced were actually in the nature of real and personal rights to the seized items. Since the SCA's refusal of the appeal was squarely based on its rejection of this contention,²⁶ the underlined portions in the above quote are clear authority for the

²⁵ *Memory Institute SA CC t/a SA Memory Institute v Hansen* 2004 (2) SA 630 (SCA) paras 1 & 3.

²⁶ *Memory Institute* (above) paras 4 to 8.

proposition that where the applicant for an Anton Piller-type order cannot claim the existence of a real or personal right to possess or view the seized and/or attached items, a court is simply not “permitted” or “empowered” to grant an order allowing it to inspect or copy them.²⁷

[41] Remarkably, only three days after *Memory Institute* was handed down, and apparently unaware of the SCA’s judgment, Schwarzmann J reached a similar conclusion in *Kebble*, but his slightly more tentative approach (suggesting that a court might potentially be able to depart from a “general rule” to this effect if the applicant was able to set out “special circumstances”) must be regarded as incorrect in the light of *Memory Institute*.²⁸ To the extent that both *Eiser*²⁹ (which Schwarzman J declined to follow) and *The Reclamation Group*³⁰ allowed inspection in Anton Piller-type orders not involving any claimed right to possess or view the attached items, they must also be regarded as having been overruled in *Memory Institute* – and I have not found any judgment relying on either of them as authority for the proposition that such an order is competent. A line of pre-*Memory Institute* cases in the Cape also held that such orders should not be granted.³¹

[42] The limited purpose of “an Anton Piller order” has most recently been

²⁷ The Anton Piller order subsequently considered by the SCA in *Non-Detonating Solutions* (above) had been obtained in contemplation of litigation in which the applicant was seeking to protect its own “proprietary” information and “confidential” comprising copyrighted material recorded in the attached items, (see paras 6, 7, 17 and 22) the content of which it was of course already well-aware. Unsurprisingly therefore, the Court raised no eyebrow at the fact that the Anton Piller order had allowed it to inspect the attached items.

²⁸ *Kebble & others v Wellesley-Wood & others* 2004 (5) SA 274 (W) at para 9.3 and 9.4. Schwarzman J’s decision was grounded in his observation that “our jurisprudence has developed two types of Anton Piller orders”.

²⁹ *Eiser v Vuna Health Care (Pty) Ltd* 1998 (3) SA 139 (W).

³⁰ *The Reclamation Group (Pty) Ltd v Smit* 2004 (1) SA 215 (SE).

³¹ *Sun World International Inc v Unifruco Ltd* 1998 (3) SA 151 (C) at 171E – 173C and the cases referred to there.

confirmed by the Constitutional Court in *Mkhatshwa* as being to allow “for the search of premises for crucial documentation or material for purposes of preserving important evidence for litigation, so that the documentation or material may be removed and safely kept, pending the ordinary discovery process and trial”.³²

[43] I shall refer in the remainder of this judgment to orders of the type approved in *Universal City Studios*, granted in *Shoba* and described in *Mkhatshwa* as “ordinary Anton Piller orders”.³³ On the other hand, I will refer to Anton Piller-type orders related to possessory or proprietary claims (i.e. of the kind referred to in paragraph above), where the applicant might be granted access to the seized and/or attached items, as “Cerebos-type orders” – since that was the type of order actually granted by the full bench in *Cerebos Food*.

[44] Supercart sought to make out no case in these proceedings that the order it sought and obtained was a Cerebos-type one – nor could it have, even though its ultimate dispute with Vanesco arises from its assertion of intellectual property rights. It therefore bears emphasis that while I have found it necessary to draw a clear distinction between ordinary Anton Piller orders and Cerebos-type orders, this judgment should not be taken as reaching any definitive conclusions on either the general requirements and appropriate safeguards for Cerebos-type orders, or on the nature of the enquiry that needs to be undertaken upon their reconsideration.

³² *Mkhatshwa v Mkhatshwa* 2021 (5) SA 447 (CC), para 1, fn 1.

³³ It may be that there is a better (i.e. both pithier and more accurate) label for this type of order, but I leave that to others to suggest.

Safeguards – the constitutional dimension

[45] It has been observed that an Anton Piller order constitutes procedural relief of an extraordinary kind that requires a court to adopt a cautious and circumspect approach. Should the application be justified, stringent safeguards must be built into the order.³⁴ For these reasons, Corbett JA contemplated in *Universal City Studios* that, in addition to meeting the three threshold requirements, “any such order would have to be hedged in with ... safeguards ... adopted ... in the discretion of the Judge granting the order and would depend on the particular facts of the case under consideration” so as to ensure that the procedure is not abused, including in particular the grant of a rule *nisi*.³⁵

[46] The jurisprudential basis for the need to impose careful safeguards on Anton Piller-type orders and ensure that they are strictly complied with has shifted since the advent of the Constitution. As has been noted on multiple occasions, the procedure almost always infringes the right to privacy (section 14 of the Bill of Rights) and could also potentially infringe the rights to human dignity (section 10) and property (section 25). Given that the attached items in this case are said to be relevant to the contempt application in which Supercart seeks the imposition of criminal sanctions, a further potentially implicated right in the current instance is the fair trial right of accused persons not to be compelled to give self-incriminating evidence (section 35(3)(j)). But the rights in the Bill of Rights are not absolute, and section 7(3) of the Constitution provides that they may be limited if that is justifiable under

³⁴ *Roamer Watch* (above) at 272C - 275B.

³⁵ *Universal City Studios* (above) at 755F-G. This is explained by the fact that Uniform Rule 6(12)(c) did not exist at the time, and Rule 6(8) only applies in the event that a rule *nisi* is granted.

section 36. And it is also now accepted that although the Anton Piller procedure was created by the courts in the exercise of their inherent powers it nevertheless constitutes law of general application and may thus constitute a basis for such justifiable limitations.³⁶

[47] In order to ensure that Anton Piller-type orders are kept within constitutionally acceptable limits, our courts have continued to build on their pre-constitutional foundations. In addition to the three threshold requirements laid down as to when they may be issued, the courts have “fashioned a body of rules determining ... in what form” they may be issued.³⁷ This body of rules identifies safeguards that should generally be contained in such orders, for example (i) undertakings as to confidentiality and damages that must be made on behalf of the applicant; (ii) special rules as to the manner of their service; (iii) notification to the respondents of their rights to obtain legal representation and to seek a reconsideration of the order;³⁸ (iii) a prohibition on the participation of the applicant or its attorneys in the search; and (iv) the appointment of independent supervising attorneys to oversee the execution of the order, make inventories of the attached items and report back to the Court on affidavit.³⁹ It is unnecessary to attempt to enumerate these comprehensively here: the provisions of the model order contained in Annexure B at paragraph 16.29 of this Division’s practice manual contains

³⁶ *Non-Detonating Solutions* (above) para 20; *Mathias International Ltd v Baillache* 2015 (2) SA 357 (WCC) per Binns-Ward J paras 16 and 18; *Dabelstein and Others v Hildebrandt and Others* 1996 (3) SA 42 (C) at 65E.

³⁷ *National Director of Public Prosecutions and Others v Zuma and Another* [2008] 1 All SA 197 (SCA) para 73.

³⁸ The inclusion of this safeguard, combined with the advent of Rule 6(12)(c) pursuant to GN R13653 of 29 November 1991 means that it is no longer essential that a rule *nisi* be issued: *Retail Apparel* (above) at 233F.

³⁹ See Van Loggerenberg et al. Superior Court Practice. Looseleaf RS17 (Juta, 2021) at D8-7.

some of the most important ones. While almost identical model orders are included in the practice manuals of the Gauteng and Limpopo Divisions, the Western Cape practice manual and model order are framed in different terms and contain yet other safeguards.

[48] It is important to recognise, however, that the Gauteng and Limpopo model orders, in particular, must be treated with circumspection. Despite the clear warning sounded by Schwarzman J twenty years ago in relation to a previous iteration,⁴⁰ the current versions continue to include relief that a court is (in view of *Memory Institute*) not permitted to grant in an ordinary Anton Piller order – whether at the outset or upon a return date or application for reconsideration. I refer in this regard to (i) the provision in paragraph 1.4 of the Gauteng model order for the presence of a representative of the applicant and/or the applicant’s attorney who “shall not take part in the search”, “but may be called upon” by the Sheriffs, the independent supervising attorneys and the forensic experts “to identify documents falling within the” scope of the order; and (ii) the process for objection to inspection and copying referred in paragraph 13, combined with the final order contemplated in paragraph 19.2 allowing the applicant to make copies of the identified items and be furnished with forensic copies of electronic devices in the custody of the Sheriff.⁴¹ These features indicate that the Gauteng model order has been drafted with Cerebos-type relief in mind. In addition, even though paragraph 10.1 of this Division’s

⁴⁰ *Kebble & others v Wellesley-Wood & others* 2004 (5) SA 274 (W) paras 9.1 and 9.4.

⁴¹ A further peculiarity here is the reference to the use of the attached items for the purpose of “instituting” (as opposed to adducing evidence in) further proceedings. In *Viziya* (above) para 23, the Supreme Court of Appeal emphasised that Anton Piller orders are not “a mechanism for a plaintiff to ascertain whether it may have a cause of action”. In view of the fact that at least part of the Anton Piller order found by the SCA to have been correctly set aside on reconsideration was Cerebos-type relief, this seems to be a general proposition relating to all Anton Piller-type orders.

practice manual (which is carefully entitled “Anton Piller-type orders”) does remind practitioners and courts that the model order “may be adapted according to circumstances”, its warning that “immediate preserving of evidence does not imply a need to allow the making of copies or other early discovery without the other party having a chance to be heard”, also points in the direction of Cerebos-type relief, given that such orders are not competent at all in ordinary Anton Piller applications – even on the return date or upon reconsideration (i.e. after the respondent has been heard). The Gauteng model order, which is simply titled “Anton Piller order”, thus has the unfortunate potential to cause confusion given that the term “Anton Piller order” has come to be used by our most senior courts to refer specifically to what this judgment refers to as ordinary Anton Piller orders.⁴²

Summary

[49] Our courts have consistently insisted, and must continue to insist, that the requirements for the grant of Anton Piller-type orders and their established built-in safeguards are strictly observed and meticulously applied. The remedy and its requirements are not lightly be trifled with and adjusted in the face of practical problems that may prevent themselves in specific circumstances. Invitations to expand, relax and innovate must be carefully considered and

⁴² Such confusion arose in the current matter. Supercart’s counsel relied extensively on the provisions of the model order, and even annexed a copy to their heads of argument. I am not surprised: I confess that that the performance of my own role was initially bedevilled by confusion arising from the model order, and resulted in my having to redraft large portions of this judgement. It is undesirable that a document evidently benevolently intended to provide useful guidance to practitioners and judicial officers working under pressure, usually in urgent circumstances and without the benefit of opposing counsel, should have this effect. Indeed, given the lack of uniformity across the various divisions of the High Court, I venture to suggest that the issue might merit the consideration of the Rules Board for possible inclusion of one or more suitably framed Rules in the Uniform Rules setting out appropriate (but not rigid) forms of orders that might be granted in different types of Anton Piller applications. This would also have the advantage of placing all Anton Piller-type orders on a firmer constitutional footing.

resisted unless properly justified. The remedy is an “unruly horse needs to be kept on a tight rein”.⁴³ What was undoubtedly true 50 years ago, is even more so in our constitutional democracy:

“The making of an order which affects the intended defendant's rights, in secret, in haste, and without the intended defendant having had any opportunity of being heard is grossly undesirable and contrary to fundamental principles of justice. It can lead to serious abuses and oppressive orders which may prejudice an intended defendant in various ways, including ways that may not be foreseeable.”⁴⁴

APPROACH ON RECONSIDERATION

[50] The aspect that has caused me the most difficulty in determining this matter is the proper approach to be taken in weighing the evidence when reconsidering the Anton Piller order.

[51] While the Cape High Court held in *Sun World* that the grant of an *ex parte* Anton Piller order does “not cast any onus on the respondent that it would not otherwise have had and that the overall onus of establishing its entitlement to the relief claimed remains with the applicant”⁴⁵ and the approach to be taken in a rule 6(12)(c) reconsideration should be no different,⁴⁶ there is a decided lack of clarity in the authorities to which I was referred by the parties’ counsel and which I have consulted regarding the onuses that each party bears in relation to their competing contentions, and the evidential standard to which

⁴³ *Petre & Madco (Pty) Ltd t/a T-Chem v Sanderson-Kasner* 1984 (3) SA 850 (W) at 855B and E.

⁴⁴ *Knox D' Arcy Ltd and Others v Jamieson and Others* 1974 (3) SA 700 (W) at 707J-708A.

⁴⁵ *Sun World International Inc v Unifruco Ltd* 1998 (3) SA 151 (C) at 163D.

⁴⁶ *Friedshelf 1509 (Pty) Ltd t/a RTT Group & others v Kalianji* 2015 (4) SA 163 (GJ) para 55.

such onuses must be established.

[52] The respondents' counsel submits that the question of whether the terms of the Anton Piller order as granted were "lawful" is one that "usually" does not involve factual disputes and that no question of an onus therefore arises upon reconsideration. But while that may often be the case, it will not always be so. The full bench in *Mazetti* held that a court undertaking a reconsideration is required to consider any additional factual allegations that have been put up by the respondent in the reconsideration, as well as the material put up by the applicant in reply thereto.⁴⁷ As the current matter demonstrates, this may well throw up factual disputes, and some mechanism is thus necessary to guide the Court in resolving them for the purposes of applying the relevant law to the facts. The question of what that mechanism should be, and in particular whether the well-known *Plascon Evans* rule⁴⁸ should apply, is a question of law that must be answered with reference to the burden of proof that the applicant bears in discharging its overall onus.

[53] It has been held in a number of cases that upon reconsideration, the applicant must establish all three of the threshold requirements laid down in *Shoba* on a preponderance of probabilities in the light of the content of all the affidavits that have been filed, but that the Court retains a discretion to allow the hearing of oral evidence if no such preponderance of probabilities appears from the papers. In my view this is not the correct approach. I can do no better here than to quote the words of Froneman J while still a puisne judge in *The Reclamation Group*, with which I fully align myself:

⁴⁷ *Mazetti* (above) para 14.

⁴⁸ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H – 635C.

“Such a general and undifferentiated approach would not, in my judgment, be appropriate. The 'evidential criteria' to be applied at this stage of reconsideration would depend, to a large extent, on what purpose the three requirements served at the *ex parte* stage; what the purpose of the relief sought at that stage was; what purpose these requirements may still serve at the reconsideration stage; and what relief is sought by the applicant at present. In addition, if (such as in this case) the original order is attacked on the basis that it was obtained in bad faith, considerations of who bears the onus in that regard may well be different from that in respect of the requirements for an Anton Piller order.”⁴⁹

[54] Counsel for both Supercart and the respondents agree that the applicant need only establish the first threshold requirement on a *prima facie* basis. But that is where the consensus ends. The respondents' counsel refers to *Friedshelf* for the proposition that upon reconsideration, the applicant is required to establish the facts it relies upon for both the second and third threshold requirements of an Anton Piller order on a preponderance of probabilities.⁵⁰ On the other hand, Supercart's counsel referred me to various paragraphs of the SCA's judgment in *Non-Detonating Solutions*⁵¹ in support of their submission that upon reconsideration the applicant need only establish the second threshold requirement on a *prima facie* basis, and that in reconsidering the third threshold requirement, the court should ask itself the following question “[a]ssessed on the basis of all the affidavits before the

⁴⁹ *The Reclamation Group* (above) at 221C-D.

⁵⁰ *Friedshelf* (above) para 57.

⁵¹ *Non-Detonating Solutions* (above) paras 28, 42 and 44.

Court ... had there been a reasonable apprehension on the applicant's behalf that the respondent might not discharge its duty to make full discovery?"

Onus and standard of proof of the first threshold requirement upon reconsideration

[55] As indicated, both parties before me agree that, despite *dicta* suggesting the contrary,⁵² and even upon reconsideration, the first threshold requirement needs only to be established on a *prima facie* basis. This was the approach taken by the Supreme Court of Appeal in *Viziya*⁵³ (which was partially an ordinary Anton Piller application and partly a Cerebos-type one) and its adoption is persuasively supported in ordinary Anton Piller applications by the judgment of Froneman J in *The Reclamation Group* on the basis that the determination is interim in nature as it relates to an issue which would have to be adjudicated upon in the forum hearing the main proceedings, and that "there is no need to prejudice that finding further at this stage".⁵⁴

[56] Although the respondents do not dispute that Supercart has established the first threshold requirement to the required standard,⁵⁵ it is nevertheless appropriate, given the central importance of the second sentence of

⁵² *Sun World* (above) at 162I–163C (the observation here appears to have been *obiter*); *Frangos v Corpcapital Ltd and Others* 2004 (2) SA 643 (T) at 648H–649C and 653C (where the Court applied the preponderance of probabilities standard and the *Plascon Evans* rule to all three requirements) and *Direct Channel Holdings (Pty) Limited v Shaik Investment Holdings (Pty) Limited* 2019 JDR 1396 (GJ) para 14.

⁵³ *Viziya* (above) paras 61 – 69. See also *Friedshelf* (above) paras 58 – 69 and *Hudaco Trading (Pty) Ltd v Apex Superior Quality Parts (Pty) Ltd* 2021 JDR 0707 (GJ) paras 14 – 18.

⁵⁴ *The Reclamation Group* (above) at 221H – 222A.

⁵⁵ For this reason, I decline to reach a conclusion as to whether there is, as some authorities including *Friedshelf* have accepted, an additional qualifier (e.g. "extremely strong" or "strong") regarding the nature of the *prima facie* case that has to be made out in an ordinary Anton Piller application, either at the initial stage or upon confirmation. Supercart confidently submitted that it has been authoritatively held by the SCA in both *Non-Detonating Solutions* and *Viziya* (above) that this is not the case. I am not as certain – both of those judgments at least partly involved Cerebos-type orders, as did the judgment of Ormrod LJ in *Anton Piller KG* itself, which is usually cited as the source of this proposition.

paragraph 14 and paragraph 15*bis* of the Anton Piller order granted in this case (and because a similar order had been granted in *The Reclamation Group*), to record my view that the standard of *prima facie* proof upon reconsideration can surely only apply to any of the three requirements insofar as the order in question is solely directed at the preservation of evidence, and does not allow inspection and copying of items in the respondent's possession that it is not otherwise prepared willingly to disclose. This is because an order allowing inspection and copying of such items cannot be considered to be interim in nature. While it may have been sought on an interlocutory basis; have been couched in ostensibly interim terms; and even if it has not been given effect to prior to the reconsideration, its practical consequences whether granted *ex parte* or upon reconsideration would be final in effect.⁵⁶ The “cat would be let out of the bag”, and there would be no putting it back in the event that it were ultimately to be determined that the applicant was not legally entitled to view it.⁵⁷

[57] And an even more fundamental problem arises where orders such as the second sentence of paragraph 14 and 15*bis* have not only been granted in an ordinary Anton Piller application but executed. In such cases there can simply

⁵⁶ *BHT Water Treatment (Pty) Ltd v Leslie* 1993 (1) SA 47 (W) 55A-F; *Cape Tex Engineering Works (Pty) Ltd v SAB Lines (Pty) Ltd* 1968 (2) SA 528 (C) 529G - 530C; *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) para 4.

⁵⁷ It seems to me that same considerations apply to Cerebos-type cases and as such, even where the applicant alleges in the *ex parte* application that it has in fact already seen the seized and/or attached items, it would probably have to be a requirement of the initial *ex parte* relief in such cases that the seized and/or attached items could not be inspected or copied until such time as the order is confirmed on a return date or upon reconsideration and the respondent has been given an opportunity to deliver an answering affidavit. This was the partial basis for the decision in *Air & Allied Technologies CC v Advanced Air Control Technologies (Pty) Ltd* 2020 JDR 0678 (GJ) paras 48 to 55 which (notwithstanding the reference to *Memory Institute*) was a Cerebos-type case. I reiterate that I express no definitive view in the current judgment on either the general requirements or the required safeguards for Cerebos-type orders. Although the SCA held in *Van Niekerk v Van Niekerk* 2008 (1) SA 76 (SCA) that a decision to confirm an Anton Piller order is not final in effect and therefore not appealable, I deduce from paragraph 11 of the judgment (that the order in question related to evidence “to be preserved”) that the order under reconsideration had not permitted inspection.

be no question of onus on reconsideration because those orders were “not competent” in the first place, and they therefore cannot be “confirmed”. *Memory Institute* makes it clear that where such orders are granted in an ordinary Anton Piller application, a court has no choice on reconsideration but to strike them out, with the only question being whether any portion of the remaining relief should be confirmed. I deal with that question below.

Onus and standard of proof of the second threshold requirement upon reconsideration

[58] I can divine no holding in the paragraphs of *Non-Detonating Solutions* referred to by Supercart (or indeed from any other part of the judgment) that the applicant needs to establish the second threshold requirement only on a *prima facie* basis. To the contrary, the section of the judgment dealing with this requirement is introduced by the following blunt statement: “[i]t is trite that an applicant must establish that the respondent possesses specific documents or things that 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”.⁵⁸ Overall, I gain the impression from this passage and the remainder of the SCA’s judgment that it considered that, to the extent that the existence of the second threshold requirement is challenged on reconsideration, it has to be established by the applicant on a preponderance of probabilities.

[59] Although *Non-Detonating Solutions* was a Cerebos-type case, I can think of no reason of principle why the same standard should not apply in both types

⁵⁸ *Non-Detonating Solutions* (above) para 30 [emphasis supplied].

of cases. It has been expressly held in a case involving an order of the ordinary type that the applicant must establish the second threshold requirement on a preponderance of probabilities upon reconsideration,⁵⁹ and I was not referred to any other authority to the contrary. In my view, this approach is correct.

[60] It seems to me that three questions potentially arise for determination when reconsidering the second threshold requirement: (i) whether the order sufficiently specified the items to be attached (the specificity question); (ii) whether the items so specified are “of great importance” to the applicant's case (the importance question); and (iii) whether the items that were in fact found in the respondent's possession and attached meet the specification (the possession question).

[61] I pause here to observe that this formulation of the possession question upon reconsideration differs from its formulation at the *ex parte* stage. While I recognise that this runs contrary to the approach taken upon reconsideration by Froneman J in *The Reclamation Group*,⁶⁰ I respectfully consider that this is appropriate. Not only would it be artificial to ignore the ‘fruits’, or lack thereof, of the search, but it would in my view unduly prejudice the applicant if it were prohibited from referring to them (of course only to the extent that their characteristics have been legitimately exposed in compliance with the terms of the original order, for example by means of the inventories, the reports of the supervising attorneys or by the respondent itself) in view of the standard of proof that Froneman J (correctly in my respectful view) applied to the

⁵⁹ *The Reclamation Group* (above) at 222D.

⁶⁰ *The Reclamation Group* (above) at 222G and 223J-224A.

second threshold requirement at this stage.⁶¹

[62] Material disputes of fact may well arise in relation to these questions (especially the possession question) in ordinary Anton Piller cases where (*ex hypothesi*, in view of the findings made above), the applicant will not have been able to inspect the attached items and will not be able to put them before the Court deciding the issue.

[63] While I recognise that an applicant in an ordinary Anton Piller application may therefore encounter practical difficulties in discharging its onus regarding the possession question on a preponderance of probabilities and in motion proceedings, I don't think that such potential difficulties require the imposition of a less onerous burden of proof that would entitle it to keep its order merely because the attached items might meet the specification in the order. In my view, an applicant must be required to prove that they do meet the specification.

[64] It will be recalled that the requirements and safeguards laid down and adopted by our courts for Anton Piller-type orders perform the critical function of justifying the inherently invasive limitation of constitutional rights that their employment involves. Amongst the factors that section 36 of the Constitution requires courts to consider in ensuring that rights limitations are justifiable in an open and democratic society based on human dignity, equality and freedom, are the importance and purpose of the limitation, the nature and extent of the limitation, the relationship between the limitation and its purpose, and whether there are less restrictive means to achieve that purpose. In my

⁶¹ See also *Van Der Merwe* (above) paras 46 and 47.

view, the purpose of ordinary Anton Piller orders can be achieved by the 'less restrictive' (i.e. less restrictive of the respondent's constitutional rights) means of requiring the applicant to establish the challenged aspects of the second threshold requirement on a preponderance of probabilities.

[65] The practical problems that might potentially be encountered in meeting the required standard of proof relating to the possession question in ordinary Anton Piller orders are reasonably capable of being overcome by an applicant who takes appropriate measures to do so:

- (a) Firstly, the applicant can and should ensure that the items to be searched for and attached are sufficiently specified in the order that it seeks and obtains.
- (b) Secondly, the applicant can and should ensure that the affidavits filed by the independent supervising attorney as a report to the Court (which will effectively form part of the founding papers in any subsequent reconsideration):
 - i. describe in sufficient detail the methods that were employed by the independent persons who conducted the search to determine whether the items that were found met the specification in the order and to ensure that only such items were attached; and
 - ii. state positively that such items and only such items were attached, which will of course stand as sufficient proof unless disputed by the respondent.

- (c) Thirdly, the applicant can and should ensure not only that the inventories prepared by the Sheriff and independent supervising attorney adequately identify the attached items,⁶² but also that the respondent is given an opportunity to inspect the attached items prior to the delivery of its answering affidavit so that it may identify any that do not meet the specification in the order and raise this in its answering papers.
- (d) Fourthly, should the respondent dispute the positive statement of the independent supervising attorney that no non-specified items were attached (substantiated by the description of the methods employed to ensure this), it will not be able to do so by means of bare, speculative or otherwise far-fetched or clearly untenable allegations.⁶³ It will have to cogently explain why any of the inventorised items falls outside the specification – even if it cannot be expected to go so far as attaching the contested evidence to its affidavits.
- (e) Fifthly, when the applicant delivers its replying papers, there is no reason why it could not adduce affidavits deposed to by the members of the search party explaining why the respondent's contention that non-specified items were attached is factually incorrect.
- (f) Finally, if the factual disputes relating to the possession question

⁶² Compare the perspicacious observations in this regard by Strathern AJ in *Friedshelf* (above) para 78.

⁶³ *Plascon-Evans* (above) at 634E-635C

cannot be resolved on the basis of the *Plascon Evans* rule in the light of all the above information, it remains open to the applicant to seek a referral of the issue to oral evidence.

[66] I therefore conclude that the applicant is required in reconsideration proceedings to establish the challenged aspects of the second threshold requirement for an Anton Piller order on a preponderance of probabilities.

Onus and standard of proof of the third threshold requirement upon reconsideration

[67] *Non-Detonating Solutions* does not support Supercart's submission regarding the nature of the enquiry into the third threshold requirement upon reconsideration of an ordinary Anton Piller order in all respects. Apart from the fact that it was a Cerebos-type case, the SCA's finding that the Court *a quo* had correctly found upon reconsideration that there was a real and well-founded apprehension that crucial or vital evidence may be hidden, destroyed or spirited away by the time the case came to trial was made on the basis that "the establishment of an element of dishonesty in the conduct of a respondent must ordinarily give rise to a fear that vital evidence might be concealed or that the respondent might not make full discovery" and that the respondent's conduct was "clearly indicative of duplicity".⁶⁴ However, the case does not provide clear guidance regarding the standard of establishment of facts, as it does not deal expressly with the question, and the factual findings that it made are equally consistent with the view that the relevant facts need only be established on a *prima facie* basis and the view that the standard of a preponderance of probabilities applies.

⁶⁴ *Non-Detonating Solutions* (above) para 28.

[68] In *Viziya*, the Supreme Court of Appeal emphasised that “[t]he test of a reasonable apprehension is an objective one and is based on the view of a reasonable person when confronted with the facts”. While it is apparent from this that either party may seek to establish any facts that may be relevant to the objective enquiry, this judgment also does not expressly indicate the manner in which such relevant facts are to be determined. The Court found that the applicant “failed to show” the required reasonable apprehension on the basis of its own affidavits which “were replete with speculation and conjecture” which “failed to set out any factual basis for an objective conclusion to be reached on the well-founded and reasonable apprehension that evidence would be concealed”. This was especially because the respondent’s contention was that it was entitled to market the products in relation to which the order was sought (and no order had been made that it couldn’t). The Court observed that it would make no sense for the respondent to destroy or conceal its documents in those circumstances and there was thus no objective basis to believe that it would do so. “As regards communications with third parties ... it is inconceivable that they would destroy communications with [the respondent] or not produce them under subpoena *duces tecum*. So there would again be no point in [the respondent] destroying these documents.” Although the applicant had sought to adduce evidence of the respondent’s untrustworthiness and dishonesty, it was found to be “replete with speculation and conjecture”, “flimsy” and that there was no “substantiated case of significant dishonesty”.⁶⁵ As with *Non-Detonating Solutions*, these findings are not clearly indicative of the question regarding

⁶⁵ *Viziya* (above) paras 45 – 47.

the proof of facts, as they are equally consistent with either standard of proof.

[69] These cases do, however, clarify the following in respect of the third threshold requirement: (i) the apprehension in question must be an objective one, viewed from the position of a reasonable person when confronted by the facts, not from the position of the applicant; (ii) while either party may seek to establish facts in support of the existence or not of the objective apprehension, the applicant bears an overall onus and if no relevant facts are established, then the requirement will not be found to have been met; (iii) one fact that an applicant may seek to establish in support of the objective apprehension is the respondent's dishonesty, but in order to be relevant, it must be "significant dishonesty"; and (iv) there would ordinarily be no basis for an Anton Piller order to be granted in respect of items that could be obtained from disinterested third parties by subpoena because there would be no point in the respondent destroying or hiding such evidence.

[70] Amongst all the other judgments that I was referred to,⁶⁶ or have been able to find, the only one that has grappled with the question of the burden of proving facts relevant to the third threshold requirement in an ordinary Anton Piller application in any detail is *The Reclamation Group*. In that case, Froneman J observed that the third threshold requirement (as with the second) is not an issue to be decided upon in the subsequent proceedings and there is thus no good reason why the normal civil standard of proof on a preponderance of probabilities should not apply to factual disputes.⁶⁷ I agree, and would only

⁶⁶ In *Friedshelf* (above) para 57 (relied upon by Vanesco), the Court made no finding of its own in this regard, but simply proceeded on the basis that both sets of counsel had agreed that proof on a preponderance of probabilities is required: para 57.

⁶⁷ *The Reclamation Group* (above) at 222F–G.

add the further reason set above in relation to the second threshold requirement, namely the need to ensure that the remedy remains constitutionally compliant.⁶⁸

Variation of the order upon reconsideration, as opposed to setting it aside completely

[71] In *Non-Detonating Solutions*, the SCA expressly found that the order that had been sought and obtained “does not in some respects comply with the requirements for Anton Piller orders”. Despite this, it considered that the Court should have upheld the reconsideration “subject to a few amendments which do not alter the substance of the order but further ensure that the forensic search is limited to relevant items”.⁶⁹

[72] Similarly, in *Richards Bay Titanium*, the Court found that the scope of the search was framed in terms that would impermissibly “drag innocent third parties into the fray” but nevertheless did not set it aside in its entirety, and instead amended it to render it legally compliant on the basis that “[s]ince the order is being reconsidered, this court is seized with the application and empowered to vary any aspect of the order granted”.⁷⁰

[73] In my view, this approach is sensible, but each case must be carefully analysed to determine whether the variation will indeed ensure that the process remains within constitutionally acceptable bounds and that it will not be a case of ‘closing the door after the horse has bolted’. For example, while it

⁶⁸ In view of the test as laid down in *Viziya* (above), the applicant is not required to prove the third threshold requirement itself on a preponderance of probabilities – only those facts upon which it seeks to rely for the purposes of establishing the existence of the objectively reasonable apprehension.

⁶⁹ *Non-Detonating Solutions* (above) para 41.

⁷⁰ *Richards Bay Titanium (Pty) Ltd and another v Cosco Shipping Logistics Africa (Pty) Ltd and others* 2023 JDR 2076 (GP) para 82. See also *Dabelstein* (above) at 69H.

would be of little utility to set aside an impermissible immediate inspection order that has been executed and uphold the remainder of the order, if that has not occurred and there is no suggestion that the applicant has been able to access information that it should not have during the course of the search and its aftermath, there is no reason in principle why a court undertaking a reconsideration should not set aside or vary only the offending portions of the order and confirm the other portions that are found to be unexceptionable.

Onus and standard of proof regarding non-disclosure and non-compliant execution

[74] The respondents rightly accept that where the original order is challenged on the basis of absence of good faith or non-disclosure in the founding affidavit, or where the allegation is that the order was not duly executed, the onus will be on respondent to prove the relevant facts on the basis of a preponderance of probabilities.⁷¹

[75] It is trite that an applicant who approaches a court on an *ex parte* basis is required to act with the utmost good faith and must in particular disclose all material facts. The bar of materiality for non-disclosure is set relatively low – it only needs to be shown that disclosure of the facts in question might (not would) have influenced the Court in coming to its decision, and it is unnecessary to demonstrate that the non-disclosure or suppression was wilful or *mala fide*. In exercising its discretion to set aside the order on the grounds of non-disclosure, a court must consider (i) the extent of the non-disclosure; (ii) whether the first court might have been influenced by a proper disclosure;

⁷¹ *The Reclamation Group* (above) at 221F–G. For this reason, in cases where the order is challenged on these grounds, it would be appropriate to allow the respondent a further opportunity to file affidavits after the applicant has filed its replying papers, as occurred in the current matter, but it should be strictly limited to the issues upon which it bears an onus.

(iii) the reasons for the non-disclosure; and (iv) the consequences of setting the order aside.⁷²

[76] As to a failure to execute the order in strict compliance with its terms, “severe sanctions are necessary to curb any abuse of stringent remedies”,⁷³ but setting aside is not the inevitable consequence of every minor non-compliance. Our courts continue to apply the approach adopted by Van der Westhuizen J while still a puisne judge in *Retail Apparel*, and which merits repetition in full:

⁷² *Phillips and Others v National Director of Public Prosecutions* 2003 (6) SA 447 (SCA) at 455 para 29

⁷³ *Petre & Madco* (above) at 855E.

“In appropriate cases a Court can show its displeasure or disapproval by setting aside the order ... to restrain the strong temptation which may exist on the part of an applicant to stretch the language of the order. ... The test seems to be whether the execution is so seriously flawed that the Court should show its displeasure or disapproval by setting aside the order. Obviously a serious flaw would include conduct which could be regarded as blatantly abusive, oppressive or contemptuous, but would not be limited to conduct of such extreme nature. ... It is also possible that non-compliance with the order as far as the execution is concerned may attract a punitive costs order. However, not every flaw seems to be regarded as equally serious and equally relevant by the Courts.”⁷⁴

ABUSE OF PROCESS

[77] I now turn to consider in turn each of the respondents’ specific challenges to the Anton Piller order that Supercart obtained and the execution thereof, as identified in Mr Case’s answering affidavit, and distilled in the respondents’ heads of argument and in the joint practice note filed by the parties prior to the hearing.

[78] The respondents’ first challenge on reconsideration is that Supercart’s Anton Piller application was an abuse of the Court’s process. They advance this argument on the ground that it was improper for Supercart to have brought the Anton Piller application for purposes obtaining evidence for inclusion in its replying affidavit in the contempt application in circumstances where no

⁷⁴ *Retail Apparel* (above) at 234A-C, referring to *Hall v Heyns* 1991 (1) SA 381 (C).

direction regarding the application of discovery procedures in terms of Rule 35(13) had yet been sought or made in that application.

[79] Now, as I noted at the outset, there is no love lost between Supercart and Vanesco, and still less between their respective CEOs. It is clear that they are less than admiring of each other's ethics and deeply suspicious of each other's motives. The parties' affidavits drip with the ink of laconic jibes and insults. For example, Mr Wolfe illogically seeks to characterise Mr Case's criticism of the order of Unterhalter J as evidence of "an arrogant disdain for the sanctity of the Court and its procedures" which he says shows that "Mr Case has little respect for the integrity of the Court" with the result that the "only rational explanation" for the breaches of the interim interdict is that they constituted "brazen contempt". On the other hand, even amidst the 'sackcloth and ashes' of his *mea culpa* in the contempt application (and even though he accepted that "it does not lie in my mouth to make this complaint"), Mr Case could not resist irrelevantly alleging that Supercart's exposure of Vanesco's breaches of the interim interdict was part of an "ultimate strategy" of "embarrassing [Vanesco] in order to extract commercial advantage". He also saw fit to observe that his business success and that of Vanesco "generates a significant amount of envy, jealousy and covetousness" on the part of Mr Wolfe and Supercart.

[80] In my view, the broad-brush argument advanced by Supercart in seeking to meet the respondents' allegation of abuse of process on the narrowly-framed ground identified above is simply a continuation of this unhelpful squabbling. Supercart contends that the "overarching consideration" in relation to an

Anton Piller order is whether it would be “in the interests of justice” to grant it, and that this test would be met if I found that Mr Case has been shown to be dishonest. Essentially, this boils down to a suggestion that Mr Case’s allegedly dishonest conduct means that I need not concern myself too deeply with analysing and applying the detailed requirements and safeguards laid down for the Anton Piller procedure, or pause to weigh its effect upon the respondents’ constitutionally protected rights.

[81] I disagree. Firstly, because the application of the law (even, and perhaps especially, the interests of justice – if that were indeed the legal test to be applied) is not an exercise in moralistic arm-waving, and the Anton Piller process is no exception. Secondly, while it is undoubtedly true that the development and acceptance of the Anton Piller procedure is broadly founded in considerations of justice in view of the practical reality that it seeks to address, and that courts must be wary that the refusal to grant Anton Piller orders “could, in a deserving case, result in a denial of justice”,⁷⁵ that does not mean that the standard of the interests of justice is the test that should be applied to determine whether a particular case is indeed deserving.⁷⁶ To the contrary, our courts consistently emphasise that the requirements laid down in *Universal City Studios* and *Shoba* must be strictly applied.⁷⁷

[82] While I thus decline to accept Supercart’s invitation to embark on an open-textured enquiry into whether the order under reconsideration was in the

⁷⁵ *Non-Detonating Solutions* (above) para 20.

⁷⁶ Compare, for example, *Pienaar v Rabie* 1983 (3) SA 126 (A) at 138H, where the Appellate Division held that while the negligence of the owner may be one of the recognised justifications for the existence of the doctrine acquisitive prescription, it is not one of the substantive requirements for its application.

⁷⁷ See, for example, *Non-Detonating Solutions* (above) para 30.

interests of justice or not, I nevertheless don't think that the respondents' contention that the order should be set aside solely on the grounds that it constituted an abuse of process is sustainable either.

[83] Supercart's application was not *per se* abusive or improper simply because it was launched only after the main proceedings (i.e. the contempt application) were instituted. While Anton Piller applications are commonly launched in advance of the legal proceedings to which the evidence to be preserved is said to be relevant, the respondents refer to no authority for the proposition that this must invariably be the case,⁷⁸ or for the proposition that ordinary Anton Piller orders may not be granted for the purposes of motion proceedings, other than the principle that the purpose of ordinary Anton Piller orders is solely to preserve evidence that may in due course be required to be discovered. Indeed, the very case upon which the respondents rely for the proposition that a Rule 35(13) directive should in general only be made once all the affidavits have been filed was a motion in which an Anton Piller order had been granted in anticipation of the proceedings.⁷⁹

[84] I can see no reason why the Anton Piller order granted in this instance (excluding the aspects allowing immediate access to the attached items, which I conclude below may be set aside while retaining the remainder of the order save in one further material respect) could not have been granted on the basis that Supercart will in due course be required to obtain a direction under Rule 35(13) for the application of discovery procedures to those proceedings. The very purpose of the Anton Piller procedure (i.e. to avoid

⁷⁸ Anton Piller orders have been granted and upheld even for the purposes of enforcing a prior order and where no contempt application has been brought: see *Van Der Merwe* (above) paras 29 – 38.

⁷⁹ *STT Sales* (above) paras 1 and 6.

alerting the party in possession of relevant evidence that the other party may seek to obtain it through discovery) would be undermined if the party seeking preservation of the evidence were to be required to seek and obtain a Rule 35(13) direction in advance. The situation is no different in principle to that which applies where such orders are sought and obtained in anticipation of action proceedings. In actions, discovery is required only upon the delivery of a Rule 35(1) notice or, if discovery is not properly made, pursuant to an order in terms of Rule 35(7). To the extent that it is contended that discovery would involve the disclosure of documents in circumstances where that would infringe the right against self-incrimination (which may or may not be the case in the current circumstances where Supercart seeks to have criminal sanctions imposed in the contempt application),⁸⁰ that would be a matter to be raised when a court considers issuing a Rule 35(13) direction, or is asked to make an order in terms of Rules 35(7), (12) or (14).⁸¹ What is more, a party ordered to discover documents may still object to their admissibility on a range of grounds, including privilege. And the respondents' argument that allowing Anton Piller orders to be granted in the midst of motion proceedings would result in chaos because they would be sought in every application is overstated: the applicant would still have to establish the onerous threshold requirements for such orders.

[85] In describing the doctrine of abuse of process in *Mineral Sands Resources*, the Constitutional Court impliedly accepted the submission that while courts are allowed and required to consider ulterior motive when assessing whether

⁸⁰ In view of the approach that I have taken in relation to the provisions of the order allowing immediate inspection, I conclude that there is no need for me to decide this question now: see *Dabelstein* (above) at 66I-77A.

⁸¹ See *Madzonga* (above).

a litigant has abused court proceedings, the existence of such an ulterior motive will not always be determinative of abuse of process. Furthermore, even where an abuse of process is established, that will only in “a rare instance” result in the dismissal of the claim without any regard to the merits, especially bearing in mind that “abuse of process that impinges upon the court’s integrity is quite distinct from abuse that is designed to cause harm to a party”.⁸² The Constitutional Court also approved⁸³ the SCA’s statement in *Price Waterhouse Coopers*, that “[t]he mere application of a particular court procedure for a purpose other than that for which it was primarily intended is typical, but not complete proof, of *mala fides*” and that “[p]urpose or motive, even a mischievous or malicious motive, is not in general a criterion for unlawfulness or invalidity”.⁸⁴

[86] Although it is clear that Supercart sought the Anton Piller order for purposes that go beyond purely the preservation of evidence, and in circumstances where it was not entitled to obtain immediate access to the attached items in advance of a direction for the application of discovery procedures in motion proceedings, I conclude below that no harm has (or will) in fact eventuate as a result of its conduct in this case. In addition, I do not accept that Supercart was acting *mala fide* when it sought the order: it expressly informed the Court hearing the *ex parte* matter of its intention to refer to the attached items in the replying affidavit in the contempt application. What is more, Supercart and its

⁸² *Mineral Sands Resources (Pty) Ltd v Reddell* 2023 (2) SA 68 (CC) paras 46 to 52. See also *Hudson v Hudson and Another* 1927 AD 259 at 268: “When ... the Court finds an attempt made to use for ulterior purposes machinery devised for the better administration of justice, it is the duty of the Court to prevent such abuse. But it is a power which has to be exercised with great caution, and only in a clear case.”

⁸³ *Mineral Sands Resources* (above) para 74.

⁸⁴ *Price Waterhouse Coopers Inc and Others v National Potato Co-Operative Ltd* 2004 (6) SA 66 (SCA) para 50.

legal representatives evidently took pains to comply with the Gauteng practice manual and the model order which do not clearly differentiate between ordinary Anton Piller applications and Cerebos-type applications. To this, I would add that there appears to be widespread uncertainty amongst South African legal practitioners and courts regarding that difference. Furthermore, it will still be possible to impose a censure in the form of an order for punitive costs against Supercart when the remaining reserved costs of the Anton Piller application are finally determined by the Court in the contempt application should it be found that the Anton Piller order was improperly obtained.⁸⁵

[87] In the circumstances, this is not an appropriate case to set aside the Anton Piller order upon reconsideration without considering the merits of the matter.

ALLOWING IMMEDIATE ACCESS TO THE ATTACHED ITEMS: PARA 14 & 15bis

[88] The respondents challenge paragraph 15bis of the order, which they correctly characterise as allowing for the immediate access to documents upon the filing of the Sheriffs' inventories. Although it is not expressly challenged on this basis, the second sentence of paragraph 14, if invoked to the letter, could in my view have resulted in a similar situation, and indeed it appears from the founding affidavit that this was what was intended.

[89] While I am bound to set aside or vary these aspects of the order upon reconsideration in view of the SCA's decision in *Memory Institute* discussed above,⁸⁶ I do not think it necessary to set aside the Anton Piller order in its

⁸⁵ See, for example, *Ingosstrakh v Global Aviation Investments (Pty) Ltd and Others* 2021 (6) SA 352 (SCA) para 26.

⁸⁶ Paragraph 10.5 of the order must also be altered to make it clear that the attached items must remain preserved in the custody of the Sheriff and may not be inspected or accessed by, or released to, any person until such time as an order is made in the contempt application as to what should

entirety for this reason in the current matter.

[90] As a result of the sensible intervention of Wright J in the variation application, paragraph 15*bis* has not been executed, and Supercart has not been able to inspect or copy the attached items. As for the second sentence in paragraph 14, Mr Case alleges in his answering affidavit that the assisting attorneys “fulfilled the role of a device to extend the arm of [Supercart] and its attorney such that they participated in the search”. He refers in particular to various portions of the affidavits of the supervising attorneys which record instances where Supercart’s attorneys were contacted during the search by the assisting attorneys. Having considered these carefully, I am of the view that none of them shows that any of the contents of the items found in the search (whether attached or not) were disclosed to Supercart’s attorneys – the discussions referred to were about practical matters relating to the manner of the search, not its ‘fruits’. The assisting attorney (who has direct knowledge of what happened) expressly states on affidavit that she “did not disclose the contents of any items found during the course of the execution of the order to any representative of [Supercart]”. The only response that Mr Case has been able to muster in his further affidavit in response to this clear factual allegation is the vague speculation that “no meaningful conversations could have happened without a discussion of what was being looked at and found”. This is insufficient to raise a material dispute of fact. The further allegations in paragraph 39 of Mr Case’s answering affidavit are similarly speculative, and paragraph 40 is unsustainable given that (as I find below) Mr Case makes no allegation that the physical documents attached pursuant to the search at

happen to them.

Vanesco's business premises and inventorised by the Sheriff do not constitute "relevant evidence" within what I conclude below to be the legitimate scope of the order.

[91] With regard to the specific relief, paragraph 15*bis* of the Anton Piller order must be set aside. Although it will have little practical effect, it would in my view also be appropriate for the sake of good order to vary the second sentence of paragraph 14 so as to clarify that the availability of Supercart's legal representatives should have been limited to assisting with logistical matters relating to the search when requested through the medium of the supervising attorney, and that under no circumstances should be content of the searched premises or anything found therein by the search party have been disclosed to them.

FAILURE TO DISCLOSE MATERIAL FACTS IN THE *EX PARTE* APPLICATION

[92] Vanesco's contention that the Anton Piller order should be aside because Supercart did not disclose various "common cause facts" in its founding affidavit in the *ex parte* application cannot succeed.

[93] In the first place, a number of the allegedly excluded facts were indeed disclosed. The fact that Supercart and Vanesco are commercial competitors in the manufacture and supply of shopping trolleys used by supermarkets and other retailers is expressly stated in paragraph 5 of the founding affidavit. The fact that the instances of breach of the interim interdict identified by Supercart were augmented by Mr Case's disclosure of the disposal of an additional 635 trolleys is also disclosed in the founding affidavit at paragraphs 61 and 62.

[94] Secondly, the statement that Supercart, having engaged in merger discussions that were rebuffed by Mr Case, is intent on growing its market share by any means and has done so by engaging in a process of lawfare to diminish Vanesco's market share and Case's influence in the market, including by delaying the pursuit of its rights while the interim interdict remains in force pending the conclusion of the enforcement proceedings, is an unproven opinion.⁸⁷ It cannot without further proof be regarded as a fact. Even recognising the low threshold that the respondents need to overcome, it is not sufficiently material for the exercise of my discretion to set the order aside. Had the failed merger talks and the contentions in Vanesco's letters of February 2021 been disclosed, that would in my view have added nothing but "atmosphere" to the Court's consideration. At best, such atmosphere might potentially have been relevant to the consideration of whether there was a real and well-founded apprehension that the relevant evidence might be concealed. But there is no basis to conclude that that might have influenced the court's decision: it would only have served to confirm the animosity and distrust between the parties and contributed to, not detracted from, the conclusion that the third threshold requirement for the Anton Piller order had been established on a *prima facie* basis.⁸⁸

THE SECOND THRESHOLD REQUIREMENT

[95] Predictably, Mr Case and the respondent's counsel in his heads of argument describe the Anton Piller application as a "fishing expedition",⁸⁹ and submit

⁸⁷ I am also not clear as to why the enforcement proceedings (now referred to trial) cannot proceed until such time as the contempt application is resolved.

⁸⁸ Compare *Van der Merwe* (above) para 52.

⁸⁹ In my view, the frequent use of the term "fishing expedition" in this context is unhelpful. Supercart's

that the formulation of the “relevant evidence” set out in paragraph above was “vague and imprecise”. While this would suggest that the burden of Vanesco’s attack in relation to this requirement emphasises the specificity question referred to above, some of its complaints also implicate the importance and possession questions.

Aspects of the order impugned on the basis of the importance question

[96] The respondents’ first complaint regarding the second threshold question is that while Supercart’s professed intention of bringing the Anton Piller application was to preserve evidence for the purposes of the contempt application, it contends that the order as granted permits the search for documents and articles “relating to” four other “sets of proceedings”. This contention is advanced on the basis of:

- (a) paragraph 2 of the preamble to the order and paragraph 8 thereof, which records Supercart’s undertaking and obligation to prevent the disclosure of information obtained during the execution except for the purposes of the “further legal proceedings referred to in the Founding Affidavit” in circumstances where that affidavit “refers to” the contempt application, and four other proceedings (three applications and an action);
- (b) paragraph 16.3 of the order, which requires the Sheriffs to give the occupants of the searched premises “a copy of each of the Bundles

counsel state in their heads of argument that litigants commonly “misunderstand what this means”. The manner in which such enterprises are conducted in real life varies considerably. Whereas personal experience would suggest an almost invariably unsuccessful exercise in blind luck, I understand that modern methods of leisure fishing are far more predictable and fruitful. On the other end of the scale, one wonders whether the marketing of “dolphin friendly” tuna implies that industrial fishing methods are capable of invariably ensuring that the wrong catch is not landed.

referenced in the founding affidavit”, in circumstances where that affidavit “references” bundles relating to the contempt application and the other four proceedings; and

- (c) Paragraph 16.5.d of the order, which requires the Sheriffs to inform the occupants of the searched premises that “[t]he execution of this order does not dispose of all the relief sought by the Applicant.”

[97] Even if I accept that it is inappropriate to seek Anton Piller relief in respect of multiple different proceedings (I was referred to no authority for this proposition), I do not consider this challenge to be justified. The respondents are overinterpreting the terms of the order:

- (a) Firstly, two of the proceedings (the interlocutory application to compel and the application for referral to trial) are already complete. As such, the suggestion that the Supercart’s intention was to utilise the fruits of the Anton Piller order for the purposes of those proceedings is unsustainable.
- (b) Secondly, both of the above applications were interlocutory to the third application, which is the enforcement application that was referred to trial. In view of Vanesco’s defence in that matter (i.e. that its manufacture and distribution of the Hybrid 90L trolley is not unlawful), the only circumstances under which the attached items could ever be used for the purposes of that case would be if it were to be found that Vanesco’s conduct does indeed infringe Supercart’s registered design.

- (c) Thirdly, the same applies even more clearly to the action referred to in the founding affidavit: it has nothing to do with the Hybrid 90 litre trolley, but relates to the Hybrid 180 litre model.
- (d) Fourthly, neither paragraph 16.3 nor 16.5.d of the order purports to specify the purposes for which the attached items may be used. Paragraph 16.3 was self-evidently included as a safeguard to ensure that the respondents were duly furnished with all information that was placed before the Court which granted the Anton Piller order so as to enable them to consider and seek its reconsideration. As for paragraph 16.5.d, I have little doubt that it was included as a standard (albeit not very effectual) assurance to the respondents that the seizure of their documents and devices was not, in itself, the purpose of the order. A similar provision is contained in the model order annexed to the Gauteng Practice Manual referred to above.
- (e) Finally, in his founding affidavit in the Anton Piller application, Mr Wolfe explicitly alleges that its purpose was “to attach and preserve evidence ... so that it can be placed before the Court in the contempt proceedings” and this purpose is also identified in paragraph 15*bis* of the order itself.

[98] Be that as it may, no harm has yet eventuated from any possible confusion that might be caused by these drafting inelegancies, and there is no reason why the potentially confusing references to “further proceedings” in paragraph 2 of the preamble and paragraph 8 of the order should not be removed. An order to that effect will accordingly issue.

[99] The respondents' next ground for reconsideration of the Anton Piller order under the rubric of the importance question is that a range of items included within the definition of "relevant evidence" is not actually relevant to the contempt application.

[100] Supercart contends that the attached items constitute evidence that is relevant to two issues (*facta probanda*) in the contempt application, namely (i) whether there were any additional breaches of the interim interdict on or after 24 May 2021 over and above those relating to the 635 referred to in the answering affidavit, as Supercart contends in those proceedings (the additional breaches issue); and (ii) whether, contrary to the claim in Mr Case's answering affidavit, he was not aware of Vanesco's admitted breaches of the interim interdict and was thus not in wilful breach of the order (the awareness issue).

[101] In order for a party to be found to be in contempt of court in civil proceedings, it must be established on a preponderance of probabilities that (i) an order was granted against it; (ii) it was served with the order or had knowledge of it; and (iii) it failed to comply with the order. Once these elements are established, wilfulness and *mala fides* are presumed, and the alleged contemnor bears an evidentiary burden to either establish a reasonable doubt or establish on a preponderance of probabilities that its non-compliance was not wilful or *mala fide*. Should it fail to discharge this burden, contempt will have been established.⁹⁰ The question of whether the alleged contemnor needs merely to show a reasonable doubt or whether it must go further and

⁹⁰ *Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma* 2021 (5) SA 327 (CC) para 37.

prove absence of wilfulness or *mala fides* on a preponderance of probabilities depends on whether the order sought to be imposed involves “the civil contempt remedies of committal or a fine”.⁹¹ In such cases, it is the criminal standard of proof that applies, and the contemnor need only establish a reasonable doubt about its wilfulness or *mala fides*. It would seem to me from this that whereas Supercart bears the overall onus, and is in particular required to establish any additional breaches on a preponderance of probabilities, the respondents bear no evidential burden in relation to the additional breaches issue, but they do bear an evidentiary burden in relation to the awareness issue. However, that does not mean that Supercart would be precluded from adducing evidence in relation to the awareness issue.

[102] With regard to the items attached pursuant to the portions of the specification referred to in paragraphs and above, the respondents contend that quotations, purchase orders and credit notes and other documents that merely reference or concern the manufacture or disposal of Hybrid 90 litre trolleys on or after 24 May 2021 “cannot conduce to prove” any additional breaches because “it is reasonably foreseeable that there is an innocuous explanation for the existence of [such items]” or because “they would need to demonstrate the making or disposing”. This is not correct. A document will constitute evidence in substantiation of a cause of action and will be discoverable if it is relevant, in the sense that it contains information that may, directly or indirectly, enable the party requiring it to either advance its own case or damage the case of its opponent.⁹² More technically, relevance is

⁹¹ *Matjhabeng Local Municipality v Eskom Holdings Ltd and Others* 2018 (1) SA 1 (CC) para 67. This judgment appears to have partially overruled the earlier decision in *Pheko v Ekurhuleni City* 2015 (5) SA 600 (CC) para 37 which limited this to a sanction of imprisonment.

⁹² *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa*

shown by demonstrating that there is a sufficient nexus, based on “logic and experience”, between the evidence that is sought to be led and one or more *facta probanda* before the adjudicator. This connection is established when the evidence is so related, “according to the common course of events”, to the pertinent *factum probandum* that the establishment of the latter is thereby rendered more or less probable.⁹³ There is no requirement that the evidence in question should on its own actually prove (or “demonstrate”) that *factum probandum* – even on a *prima facie* basis (in the sense that if no contradictory evidence is led then the *factum probandum* will be regarded as having been proved).⁹⁴

[103] In my view, the existence of items attached by the Sheriff pursuant to the formulation set out in paragraphs and in relation to the manufacture or disposal of Hybrid 90 litre trolleys other than the 635 referred to by Mr Case would render the existence of additional breaches more probable based on logic and experience. These items are thus relevant and discoverable.

[104] What is more, this evidence would be of great importance to Supercart: if it is able to demonstrate additional breaches, that will make all the difference to its case of contempt because it will undermine (even potentially nullify) the credibility of the version advanced by Mr Case and Vanesco, with the consequent result of undermining their defence of an absence of wilfulness or *mala fides*. The fact that the respondents suggest that they might be able to

and others 1999 (2) SA 274 (T) at 316E-H, quoting with approval *Rellams (Pty) Ltd v James Brown and Hamer Ltd* 1983 (1) SA 556 (N) at 564A and *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55 at 61 – 62.

⁹³ Schwikkard et al. *Principles of Evidence*. 5 ed. (Juta, 2022) at 5-50.

⁹⁴ See, for example, *Mashinini v MEC For Health, Gauteng* 2023 (5) SA 137 (SCA) paras 10 and 26.

adduce evidence of their own (i.e. an innocuous explanation) which renders the existence of additional breaches less probable does not detract from this conclusion.

[105] With regard to items attached pursuant to the specification set out in paragraph above, the respondents also contend that “the existence of the [software package] or digital application” that it allows to be attached “does not conduce to prove what is required for the purposes of the contempt application”. Again, I disagree. It is not merely the existence of such items that renders them subject to attachment under the Anton Piller order. The order expressly specifies that each attached software package, program, module, platform and/or digital application must not only be one “at or from which, or whereby” Mr Case accessed information relating to, referencing or concerning the manufacture and/or disposal (excluding, self-evidently, directly to customers outside of South Africa) of Hybrid 90 litre trolleys subsequent to 23 May 2021, but must also “evidence such access”. If it does not meet both of these conditions, it may not be attached, and if it does, I cannot see how it would not be directly relevant to an important *factum probandum* in the contempt application, namely that Mr Case was indeed aware of the admitted breaches.

[106] What is more, the question at the stage of discovery (and still less at the stage of the reconsideration of an Anton Piller order) is not whether the relevant evidence sought to be discovered or preserved is inadmissible, either under an exclusionary rule or because it is overwhelmingly prejudicial.⁹⁵ That is a question for the court asked to admit it, and the respondents correctly make

⁹⁵ Schwikkard (above) at 5-49.

no case in that regard before me. In any event, the Courts that may be requested to order discovery or allow admission of evidence could do so in a targeted manner by taking practical steps to ensure that only that portion of the preserved evidence that is both relevant to a *factum probandum* and admissible is discovered and admitted into evidence.⁹⁶

[107] In the circumstances, I conclude that the order is unobjectionable insofar as the respondents' challenges on the importance question are concerned.

Aspects of the order impugned on the basis of the specificity question

[108] The respondents next contend that the items attached pursuant to the formulation of "relevant evidence" in and above "might only contain a passing reference to a 90 litre trolley" and "allow the applicant, a commercial competitor of the first respondent, to see a wealth of information that he is not entitled to see, including customers, discount percentages, volumes of purchase orders, and every aspect of business". This is not correct.

[109] the formulation of neither of the specifications referred to in paragraphs or above allows the attachment of any item simply on the basis that it contains a "passing reference to a 90 litre trolley". Paragraph expressly specifies that an item may only be attached if it "relates to, references or concerns the manufacture and/or disposal (excluding, self-evidently, directly to customers outside of South Africa) of the Smartcart Hybrid 90 litre trolley as from 23 May 2021". If it does not, it may not be attached. Paragraph expressly specifies that each attached software package, program, module, platform and/or digital application must not only be one "at or from which, or whereby" Mr

⁹⁶ See, for example, *Makate v Vodacom (Pty) Ltd* 2014 (1) SA 191 (GSJ) para 39.

Case accessed information relating to, referencing or concerning the manufacture and/or disposal (excluding, self-evidently, directly to customers outside of South Africa) Hybrid 90 litre trolley subsequent to 23 May 2021, but must also evidence such access. If it does not, it may not be attached.

[110] As to the complaint regarding privilege and confidential information, documents containing confidential information are not *per se* protected from discovery unless they are privileged or protected on some other basis,⁹⁷ but as noted above, the Court ordering discovery may do so in a targeted manner to ensure that only that portion of the preserved evidence that is not privileged is discovered and admitted into evidence.

[111] The respondents also submit that the order allowing attachment of text messages as set out in paragraph above is unduly vague, and that this may be demonstrated by the fact that a dispute arose during the execution of the order as to whether the electronic devices of Mrs Case and her daughter could be searched by the search parties. Again, I disagree. In my view, the scope of the paragraph is clear: only messages sent to or from mobile phones “used by” Mr Case, Mr Stein and Mr Botes that related to the additional breaches issue constituted relevant evidence that could be attached pursuant to this paragraph of the order. While it appears from the affidavit of Mr Shoba (one of the supervising attorneys) that this aspect of the order did indeed give rise to some confusion in relation to the mobile phones of Mrs Case and her daughter, this was not because the order was insufficiently precise, but because it was misinterpreted by the search party. Ultimately, the phones in

⁹⁷ The “normal rule is full inspection”: *Crown Cork & Seal Co Inc and Another v Rheem South Africa (Pty) Ltd and Another* 1980 (3) SA 1093 (W) at 1100D; *Unilever v Polagric (Pty) Ltd* 2001 (2) SA 329 (C) at 339 -340G–J and 341B-342A.

question were not searched, and Mr Case makes no clear allegation of non-compliant execution in this regard, an issue in respect of which the respondents bear an onus.

[112] As for the uncertainty regarding the requirements in the order in relation to COVID-19 vaccination and testing of the search parties, even if I accept that the order was not entirely clear, this is not a basis on which it may be found that the second threshold requirement for the Anton Piller order was not met, as there is no relationship between that lack of clarity and the question whether the specification of “relevant evidence” was sufficiently clear to enable the search teams to identify whether any items found during the search should be attached. Again, no complaint is made that the execution of the search was improper in this respect.

[113] In considering all of these allegations, it is in my view significant that Mr Case alleges that the Sheriffs and assisting attorneys were in some instances “corrected” by the supervising attorneys. The fact that the supervising attorneys were able to do this suggests that far from being vague and overbroad, the order was sufficiently specific to be implemented in practice.

[114] I therefore find that the description of the relevant evidence was sufficiently specific and was neither vague nor imprecise in the respects alleged by the respondents.

Aspects of the order impugned on the basis of the possession question

[115] Mr Case alleges in paragraph 43 of his answering affidavit that Supercart failed in the founding affidavit in the Anton Piller application to establish (i.e.

even on a *prima facie* basis) that any items specified as relevant evidence were in the possession of the respondents at Vanesco's business premises and Mr Case's residence.

[116] Even if that were correct, it is only potentially relevant to this reconsideration in relation to the question of costs should the search at either premises have proved entirely fruitless. I have concluded above that upon reconsideration of the Anton Piller order, the Court is required to consider all the affidavits and documents that have been filed, including not only the founding affidavit filed by Supercart in the *ex parte* application, but also the affidavits filed pursuant to the execution of the order by the independent supervising attorneys and the inventories prepared by the Sheriffs, as well as the answering affidavit of Mr Case and the replying affidavits of Supercart.

[117] With regard to the attached items found at Vanesco's business premises, Mr Case made no allegation in his answering affidavit that any of them are not covered by what I have already found to be the legitimate scope and specification of "relevant evidence" that the Anton Piller order required to be attached. The absence of such a denial is unsurprising: the supervising attorneys' affidavits, which effectively form part of Supercart's founding papers, contain a multitude of positive allegations evidencing that the physical and electronic documents found there (in the case of the electronic documents, using what are not contended by the respondents to be inappropriate keyword searches of the mirrored devices) were identified by the search party as constituting relevant evidence specified in the order, and that these were the documents that have been copied, attached and

inventorised. These affidavits also demonstrate that physical and electronic documents found by the search party and considered by them not to be relevant information were specifically not attached.

[118] Mr Case made no attempt to dispute these allegations in his answering affidavit – even in the form of a bare denial. It can only be concluded that Supercart has discharged its onus of establishing the respondents' possession of relevant evidence in the form of the attached items found at Vanesco's business premises on a preponderance of possibilities.

[119] However, the opposite applies to the attached items found at Mr Case's residence. Not only do the supervising attorneys affidavits not contain any allegations that any relevant evidence was found on the devices seized at Mr Case's residence (no physical documents appear to have been seized there and attached), the allegation confidently made in paragraph 43.6 of Mr Case's answering affidavit that "not a single document of relevance was found" at his residence is quite simply not disputed by Supercart in reply, even in the form of a bald or vague denial.

[120] Supercart has therefore failed to discharge its onus on this aspect in relation to the attached items found at Mr Case's residence.

Conclusion on the second threshold requirement

[121] For the reasons set out above, I conclude that Supercart has duly established the second threshold requirement in relation to the attached items found at Vanesco's business premises, but has not done so in relation to the attached items found at Mr Case's residence.

[122] In the circumstances, paragraph 5 of the order, which permitted the search at Mr Case's home must be set aside with appropriate provision for costs, which is discussed below. An order will also be issued requiring the Sheriff to destroy or delete any items or copies thereof attached pursuant to that paragraph, or to return them to the persons from whom they were seized.

THE THIRD THRESHOLD REQUIREMENT

[123] For the same reasons that applied in *Viziya* and referred to above, I agree with the respondents' argument that there can be no objective well-founded apprehension that the bank statements specified in the order as referred to in paragraph above would be concealed. Supercart's argument that the bank statements should not be excluded because a subpoena is not available in motion proceedings is unsustainable, as it ignores the principle that Anton Piller orders are aimed at preservation of evidence and are not a means of discovery. The difficulties that Supercart may experience as a result of the procedure that it has chosen to follow in the contempt proceedings is not a reason to relax the requirements for Anton Piller orders. This portion of the order should thus not have been granted, and the paragraph appearing at the fourth bullet point of paragraph 4.1.2 should be set aside. An order will also be issued requiring the Sheriff to destroy or delete any items or copies thereof attached pursuant to this paragraph, or to return them to the persons from whom they were seized.

[124] With the exception of the email address of Mr Case's brother (trolleydoctor@gmail.com), which I consider further below, the same applies to the any emails to or from the third party email addresses referred to

paragraph above that were attached. Supercart made no allegation that might give rise to a reasonable apprehension that the third parties, other than Roots Butcheries, would collude with the respondents to destroy or conceal evidence. Mr Wolfe's allegation of a close personal friendship between Mr Case and the proprietor of Roots Butcheries is not only hearsay but is clearly denied.

[125] These portions of the order should thus also not have been granted, and the paragraph appearing at the fifth bullet point of paragraph 4.1.2 of the order should be adjusted accordingly. An order will furthermore be issued requiring the Sheriff to return, destroy or delete any documents or electronic files attached pursuant to these portions of the order.

[126] For the rest, Supercart bases its case relating to the third threshold requirement on the contention that Mr Case has "markedly" and intentionally "misled the Court" and been deceptive (i.e. dishonest) in his answering affidavit in the contempt application in a number of respects. In evaluating this claim (of which there is no direct evidence), I am required to adopt the standard approach to inferential reasoning.⁹⁸

[127] In my view, the debate over whether Mr Case lied when he made the statement that Mr Botes is "young and experienced" and whether that adequately explains why he breached the court order is insufficient to establish a real and well-founded apprehension that the evidence may be hidden or destroyed is simply a matter of opinion. Even if it were to be accepted that Mr Botes is in his forties as Mr Wolfe alleges (the affidavit of Ms

⁹⁸ *South British Insurance Co Ltd v Unicorn Shipping Lines (Pty) Ltd* 1976 (1) SA 708 (A) at 713E-H.

Bloch, the other supervising attorney, indicates that Mr Botes stated in her presence that he was 31 at the time of the search), it is a truism that youth and experience are not a function of age and that experience, in particular, depends on the kind of experience that is in issue. The only meaningful conclusion that I can draw from the fact that that Mr Botes has been Vanesco's sales manager "for many years" (albeit that the precise number of years is not stated, and is something less than 10) is that he is an experienced sales manager. That tells one little about his experience of the likely content of court orders containing interim interdicts, which is really what is necessary to consider in this instance.

[128] Mr Wolfe furthermore alleges in his founding affidavit in the *Anton Piller* application that Mr Case's account of the trolleys manufactured and disposed of by Vanesco on or after 24 May 2021 is false, as it is "anything but complete and comprehensive". In support of this, he has undertaken what he characterises as an "audit" of Mr Case's bundle of documents (A3).

[129] The bundle contains a "summary sheet" identifying sales between 24 May 2021 and 5 August 2021 totalling 635 Hybrid 90 litre trolleys, which Mr Case describes as having been extracted from "the relevant orders, delivery notes and invoices, suitably redacted", which were also included in the bundle. The facts that Mr Wolfe has gleaned from his "audit", and my conclusions regarding the inferences of dishonesty that he seeks to draw from them are the following:

- (a) Firstly, Mr Wolfe notes that whereas the summary sheet records the delivery by Vanesco to Mega Super Spar of 50 Hybrid 90 litre

trolleys on 5 August 2021 under an invoice and delivery note that both reference a quotation (RP12128, which is not included in the bundle), the bundle does include a quotation (RP12243) issued by Vanesco to Mega Super Spar on 19 July 2021 for 50 Hybrid 90 litre trolleys in respect of which there is no delivery note or invoice, and which does not appear to correspond with any other delivery recorded on the summary sheet. Even though Mr Wolf himself contemplates that there may be an innocent explanation for this, namely that it was a quotation that “was not completed into an order”, he rejects this possibility on the basis that it is unlikely that Mr Case would have included an irrelevant document in the bundle. His conclusion that it is “far more likely” there was a further delivery of 50 trolleys, is a “straw man” argument. It occurs to me that at least two alternative inferences could be drawn that are consistent with quote RP12243 indeed being the relevant document, namely (i) that the inclusion of the reference to quote RP12128 in the invoice and delivery note was a simple administrative error (they appear to have been produced on the same date); or (ii) that two quotations were indeed produced in the course of negotiations, and while the first (RP12128) was rejected, it had been the one recorded in Vanesco’s systems at the outset, whereas the second (RP12243) had not been so recorded by the time that the invoice and delivery note were produced.

- (b) Secondly, Mr Wolfe notes that whereas the bundle includes a purchase order issued by Trolley Quip in August 2020 (i.e. before the interim

interdict was granted) for 2,000 Hybrid 90 litre trolleys the summary sheet only identifies deliveries of 105 such trolleys to Trolley Quip between 24 May 2021 and 5 August 2021. Mr Wolfe's conclusion that this shows that 1,895 trolleys are "not accounted for" is logically unsustainable. Not only does it assume without any basis that despite receiving a such a large order in August 2020, Vanesco had not delivered any trolleys in satisfaction thereof by 24 May 2021, some 9 months later, it seems to me that much depends on the meaning to be ascribed to Mr Case's assertion that "at the start of May 2021, there were many pre-existing orders". There is no reason whatsoever why the word "many" should be interpreted as a reference to the Trolley Quip order. And anyway, Mr Case was not required, nor did he attempt, to "account for" the pre-existing orders. Not only does Mr Wolfe himself acknowledge that this may have an explanation, namely that the August 2020 order from Trolley Quip was not pursued before 5 August 2021, this is not the only one: there is a range of other possibilities, including (i) that the Trolley Quip order had already been mostly fulfilled prior to the grant of the court order; or (ii) that while the "many pre-existing orders" fulfilled after the interim order was granted could have included a portion of its earlier order, the majority of the "many pre-existing orders" were for other customers. Indeed, the fact that Trolley Quip placed additional orders for 725 additional trolleys in June and July would be consistent with this possibility, and Mr Wolfe does not attempt to lay a factual basis to conclude that Vanesco delivered all of these

trolleys.

- (c) Thirdly, Mr Wolfe notes that the delivery by Vanesco to Roots Berea of 40 Hybrid 90 litre trolleys on 26 July 2021 is supported by a quotation that was issued five weeks previously. Although Mr Wolfe accepts that “there could be an innocent explanation” for the five-week delay”, he nevertheless impermissibly seeks to draw the inference that “it is far more probable that the baskets for the trolleys needed to be manufactured” on a date on or after 24 May 2021, solely on the basis that in one other instance around the same time, there was no such lead time. I do not think that such an inference may be drawn.
- (d) Finally, Mr Wolfe notes that although the summary sheet includes “numerous” trolleys delivered to Roots Butcheries, the bundle contains no orders for such trolleys that pre-dated the interim interdict and that Mr Case had stated in his contempt answering affidavit that as a result of the unrest and looting that occurred between 7 and 15 July 2021, “existing customers phoned Mr Botes and begged him to supply them with ‘their trolleys’”. Mr Wolfe’s suspicion (he places his contention no higher) that the trolleys identified in the summary sheet as having been delivered to Roots Butcheries must have been manufactured after the date of the interim interdict is, in my view, far-fetched – especially since Mr Wolfe accepts that it is possible that that Vanesco keeps stock on a speculative basis and Supercart does not claim to have found even

one dispute trolley in the market that bears a mould date stamp after May 2021. He makes no attempt to substantiate his contention that “it is equally probably that the date stamps on the baskets were back-dated” with any facts. Indeed, Mr Wolfe himself considered such stamps as the primary guide (i.e. “more than” the physical condition of a particular trolley) making it “fairly easy to detect whether [it] is new” militates against such a conclusion.

[130] Even though Mr Case makes no attempt whatsoever in his answering affidavit to dispute these factual allegations or dispute the inferences that Mr Wolfe seeks to draw from them, I don’t think that it may be concluded that Mr Case lied on oath or misled the Court in his answering affidavit in the above respects, bearing in mind that a conclusion of dishonesty is not to be lightly inferred.⁹⁹

[131] But proven dishonesty is not the only basis upon which it may be found that a reasonable apprehension exists that the respondents will hide or conceal evidence. In my view, it is indeed reasonable to apprehend that they will do so.

[132] In the first place, while it may not be conclusively found that Mr Case is dishonest, he has shown himself to be economical with the truth, in the sense of having a tendency to avoid giving a full account if that is at all possible. This appears from the following:

- (a) In response to the allegation that he had previously told Mr Wolfe that he was able at any time to remotely access “any operational or

⁹⁹ See *Motswai v RAF* 2014 (6) SA 360 (SCA) para 46 and *Gates v Gates* 1939 AD 150 at 155.

financial data” of Vanesco by means of its electronic management accounting software, and could “see exactly orders, stock rotation, manufacturing, sales, deliveries and so forth”, Mr Case makes the following carefully curated statement: “I deny that I have ever conveyed the words referred to herein to Mr Wolfe. This is simply false”. He avoids pertinently or explicitly denying the real burden of Mr Wolfe’s allegation, namely that he has the ability to access such information in this way, and that he has in fact done so.

- (b) Although Mr Case does not dispute the factual allegations underlying the inferences that Mr Wolfe seeks to draw regarding additional breaches, he makes no attempt to resist those inferences with reference to alternative positive versions of his own. Instead, as will appear from the discussion above, I have been left to speculate as to what the explanations might be.

[133] Secondly, at least one of Mr Wolfe’s inferences (albeit not relating to dishonesty in an affidavit) may legitimately be drawn. In relation to the deliveries referred to on the summary sheet to “The Trolley Doctor CC”, it is not disputed that no entity by the name of The Trolley Doctor is registered in the records of the Companies and Intellectual Property Commission and that the transactions were concluded on behalf of The Trolley Doctor by Mr Case’s brother, Charles. While none of this is sufficient basis to conclude on a preponderance of probabilities that the trolleys in question were manufactured after 22 May 2021, or that the summary sheet is deficient in any way, I consider it significant that Mr Case has not attempted to dispute what I

consider to be Mr Wolfe's legitimate inference that this entity "bears the hallmark of a front". In my view, the absence of a denial in this regard is sufficient to give rise to an objectively well-founded apprehension that Mr Case and Vanesco would conceal evidence relating to their business if given the opportunity.

[134] Thirdly, there are a number of aspects of the papers that give me the impression that Mr Case is not afraid to make unsubstantiated statements when he considers it strategic. One example here is his evidently incorrect statement to the Sheriff at the time that the search party sought to gain entry to his home that there was no domestic worker present. Mr Case makes no attempt to dispute this statement in Mr Shoba's affidavit, and in fact incorporates it by reference in his answering affidavit. Despite this, it is common cause (and his own attorney testified under oath) that a domestic worker was indeed present on the premises and that she denied the Sheriff access.

[135] Finally, it is not inherently improbable that parties in the position of Vanesco and Mr Case would attempt to conceal evidence. In particular, the mere fact that the respondents were aware of the contempt proceedings before the Anton Piller order was granted does not mean that they would not: they were not aware that Supercart would dispute Mr Case's absence of knowledge and the extent of the admitted breaches, and it is unlikely that they contemplated that Supercart would launch an Anton Piller application before seeking an order requiring discovery in the contempt application.

[136] I therefore conclude that the respondent's challenge to the order on the basis

of Supercart's alleged failure to establish the third threshold requirement cannot succeed.

SAFEGUARDS: THE APOINTMENT OF THE "ASSISTING ATTORNEYS"

[137] The respondents contend that paragraphs 2 and 11 of the Anton Piller order should not have provided for the appointment of "assisting attorneys" to assist the Sheriffs in conducting the search and seizure and in inventorising and making copies of the attached items.

[138] I see no reason in principle why the appointment of independent attorneys to assist the Sheriffs to perform their functions (even significant portions thereof) is *per se* objectionable. In my view, the involvement of the assisting attorneys is justified by the nature of the task that the search parties were required to undertake in identifying the 'relevant evidence' in this case. Although I have found that this was sufficiently specified, the functions to be performed by the search parties required the application of legal skills. While I have no doubt that some Sheriffs possess such skills, it is not a requisite for appointment that Sheriffs be legally qualified.¹⁰⁰ The role of an assisting attorney is thus in substance little different from that of an IT expert, who possesses particular skills that the Sheriff may not. Furthermore, attorneys are under specific duties to maintain the highest standard of honesty and integrity, failing which they face severe consequences, "even in some circumstances of putting

¹⁰⁰ The relevant provisions of regulation 2*bis* of the Regulations promulgated under the Sheriffs Act, 90 of 1986 stipulate only that a person may not be appointed as a sheriff unless he or she (i) "is a fit and proper person to hold the office of sheriff"; (ii) demonstrates the requisite financial and other ability to establish and operate an office; (iii) "is competent to conduct the business of sheriff"; and (iv) has at least "an appropriate post Grade 12 qualification", "an understanding of civil law", and "knowledge and understanding of the relevant aspects of" *inter alia* the Constitution, the Superior Courts Act and the Uniform Rules of Court.

[their] professional career in jeopardy”.¹⁰¹

[139] I thus do not think that there is any merit in this challenge to the Anton Piller order.

SAFEGUARDS: INVOLVEMENT OF THE SAPS

[140] The order is next challenged on the basis that there was no justification for that part of paragraph 13 which authorised the search parties to gain entry to the premises “using the least invasive means at their disposal for such purpose, including if necessary summoning the South African Police Service ...”.

[141] Without citing any authority, the respondents impugn the inclusion of this provision in the order *per se* as a “jack-booted approach”, irrespective of the manner in which it was actually invoked. This objection cannot be sustained. It is true that the SCA was dubious about the inclusion of a similar paragraph in the order that it overturned in *Memory Institute*,¹⁰² but I do not read that case as being clear authority for the proposition that it is improper for a court to make such an order, or that such an order cannot be included unless it is specifically motivated for in the founding affidavit.

[142] In my view, the inclusion of this kind of provision in an Anton Piller-type order as a matter of course¹⁰³ is a salutary practice and an important safeguard of

¹⁰¹ Code of Conduct for Legal Practitioners (GenN 168 published in GG 42337 of 29 March 2019 as amended) para 3.1; *Chappell v United Kingdom* [1990] 12 EHRR para 61. The additional contention that, even if the appointment of assisting attorneys is found to be unobjectionable in principle, the specific persons appointed in that capacity in this instance did not in fact perform their role with sufficient independence and were no more than the agents of Supercart, is one relating to the execution of the order, and upon which the respondents bear the onus. It is dealt with below.

¹⁰² *Memory Institute* (above) para 3.

¹⁰³ The wording employed in the order is not dissimilar to paragraph 4 of the model order annexed to

the rule of law. Common sense suggests that searches and seizures, even if court-ordered and conducted by the Sheriff under the control of an independent supervising attorney, are potentially fraught with conflict. The occupants of the searched premises are taken by surprise by design with an implied accusation of future wrongdoing (i.e. concealing evidence). The sense of invasion could be overwhelming and stressful for many people and cause them to act in unpredictable ways. While attorneys and sheriffs (who are often not formally attired)¹⁰⁴ are officers of the Court, my experience is that are not universally recognised by lay people in South Africa as officials that are entitled to command compliance, even when holding what appears to be a duly issued stamped court order. On the other hand, while there are undoubtedly exceptions, members of the Police Services, especially when in uniform, are almost universally understood to have such powers. Members of the public readily understand that when a uniformed and on-duty police official who is able to furnish their name, rank and some basic evidence of their credentials¹⁰⁵ requests entry to premises on the basis of what they contend to be a valid court order, they are acting under strictly enforced rules of discipline, and that it is not only unlikely that they would be acting without due authority, but that there would be serious consequences and the possibility of redress should the requirements of the law not be observed. In my view, the summoning of the SAPS is also less invasive than the alternative means of gaining entry provided for in the order, such as forced entry using a locksmith.

the Gauteng Practice Manual.

¹⁰⁴ Neither the Sheriffs Act nor the regulations thereunder contain any provisions regarding the attire of sheriffs or the means by which they should demonstrate their authority when performing their functions.

¹⁰⁵ Compare *Loureiro v iMvula Quality Protection (Pty) Ltd* 2014 (3) SA 394 (CC) para 63.

[143] What is more, Mr Case's reference to the contents of the affidavit of Mr Shoba shows that the SAPS actually played no role in the execution of the Anton Piller order. It appears from this affidavit that the Sheriff, the assisting attorney and the supervising attorney first rang the intercom bell at Mr Case's residence at approximately 12h50 on 22 October 2021 and that, despite the fact that a domestic worker was present at the residence, they were not afforded entry.¹⁰⁶ After the Sheriff unsuccessfully attempted to summon the SAPS and Vanesco's attorney telephonically at approximately 13h30, he was able to speak on the telephone to Mr Case himself at 13h51, who informed him that there was no one at his home and that he himself was not in Gauteng and would only be returning the following week. The Sheriff informed Mr Case that he intended to enter the premises in the absence of Mr Case. Members of the SAPS then arrived at 13h55 and a discussion ensued as to whether they should assist the search party in gaining access to the premises. Shortly after this, however, Mr Case advised the Sheriff that his wife would be returning to the premises by about 14h40. In the circumstances, the Sheriff indicated to the SAPS that their presence was no longer necessary, and they left. Mrs Case then returned to the property and the search party was allowed to enter. I fail to detect any impropriety in this sequence of events, especially bearing in mind that this is a matter of due execution of the order, in relation to which the respondents bear the onus.

[144] I thus conclude that there is no merit in this challenge to the Anton Piller order under reconsideration.

¹⁰⁶ This is confirmed in the founding affidavit deposed to by Vanesco's attorney in the variation application.

EXECUTION: THE CONDUCT OF THE ASSISTING ATTORNEYS

[145] Although the respondents seek to make out no case that the supervising attorneys failed to act appropriately during the search,¹⁰⁷ Mr Case alleges in his answering affidavit that in this instance the assisting attorneys did not act independently and that Supercart and its attorneys “were steering the proceedings from outside the premises”.

[146] In my view, (apart from not demonstrating that the assisting attorneys disclosed the content of anything found during the search, as I have found above) the factual allegations put up by Mr Case in his answering affidavit are not sufficient to establish the onus borne by the respondents to show on a preponderance of probabilities that the Anton Piller order was executed in a manner that did not comply with its terms. The instances where the assisting attorneys allegedly indicated that they needed to communicate with Supercart’s attorneys did not all involve the assisting attorneys taking “instructions” from Supercart’s attorneys as Mr Case seeks to characterise them, but rather simply obtaining information such as “whether ... bundles referred to in paragraph 16.3 of the Court Order and referenced in the founding affidavit of Mr Michael Wolfe were furnished to the respondents”. In other instances, while there are allegations that the assisting attorneys indicated that they would have to take instructions from Supercart’s attorneys (for example in relation to the two CDs found in a drawer in Mrs Case’s daughter’s cousin’s room), there is no allegation that such instructions were in

¹⁰⁷ Mr Case tendentiously alleges in his answering affidavit that one of the supervising attorneys “showed herself not to be independent in that she checks [the assisting attorney’s] and the sheriff’s work and corrects them when they have overstepped the mark”. The respondents’ counsel wisely sought to make out no case in this regard: after all, this is precisely why supervising attorneys are appointed.

fact sought or given. For the rest, the assisting attorneys' communications with Supercart's attorneys appear to have been part of processes undertaken under the control of the supervising attorneys to resolve disputes by facilitating agreements between the parties' attorneys, the Sheriff and representatives of the respondents themselves, including Mr Case, with regard to the manner in which the order should be interpreted in relation to logistical matters such as the requirement to produce COVID-19 vaccination certificates, whether the mobile phones of Mrs Case and her daughter could be searched, whether mobile phones could be sealed while the extraction process was being undertaken, how the process of searching electronic devices should be undertaken by the IT experts, and how the devices should be secured. All of these disputes appear to have been resolved either by agreement between the parties or by the supervising attorneys themselves, which was their role.

[147] While I have indicated above that it would have been more appropriate for the order to have required these communications to have been undertaken entirely through the intermediation of the supervising attorneys, I do not consider that they resulted in a breach of the order as granted, or the search being so seriously flawed as to justify setting it aside as an unjustifiable breach of the respondents' constitutional rights.

[148] As for the allegation in paragraph 40 of Mr Case's further affidavit that the assisting attorneys inappropriately commented in their affidavits on the relevance of the information that had been found (i.e. that it constituted "relevant evidence"), I have already concluded that this was part of their

legitimate role in the search, and there is no reason why they should not be called upon to account for the performance of it in an affidavit in the reconsideration proceedings.

[149] I thus conclude that there is no merit in this challenge to the Anton Piller order under reconsideration.

EXECUTION: BREACH OF THE ORDER IN RELATION TO “MIRRORING”

[150] In relation to the electronic devices that were allowed to be searched, paragraph 12.2 of the Anton Piller order authorised the IT experts to “make and/or capture images of more than the relevant evidence if that is the only feasible way of being able to make copies of the relevant evidence”.

[151] The respondents submit that “the scheme of the order” is that the authority provided for in these paragraphs could only be invoked “if an objective determination is made that there is no feasible way to copy the relevant evidence”.

[152] In seeking to make out a case of non-compliance with the order in this respect, Mr Case appears to have ignored the explanation given by Ms Bloch that the provisions of paragraph 7.2 were invoked because the IT expert advised that it would not be practicable to search on live devices due to time constraints. This statement is graphically supported by the remainder of Ms Bloch’s affidavit and that of Mr Shoba relating the time-consuming nature of the exercise that had to be undertaken in searching the mirror images over a number of days.

[153] Despite this, Mr Case alleges that the search party “simply ... proceeded to

make mirror images of what was on the digital devices. No effort was made to first determine whether every one of the devices had any relevant evidence on them at all, and then to extract that particular piece of evidence and create it in either a hard copy or digital format as the order mandated. No determination was made that there was no feasible way to copy the relevant evidence without copying more than that relevant evidence. None of the search party even attempted to observe this requirement of the order". He also alleges that that the information that was copied in this manner included "potentially privileged information, regardless of the level of privacy, confidentiality or relevance to the subject matter of what was being searched for" (i.e. the "relevant evidence" as defined).

[154] The respondents' counsel 'cut and paste' these factual allegations into his heads of argument without reference to any authority that the search parties' non-compliance with the requirement that imaging may only be undertaken if that is the only feasible way of making copies (if indeed it constituted non-compliance) is of such a serious nature as to justify the Anton Piller being set aside – whether only in relation to items attached as a result of the process that was followed, or in its entirety.

[155] In *Viziya*, the SCA impliedly approved the process that was followed by the search party, simply on the basis of "practicality or convenience". Furthermore, the possibility that this might have resulted in Supercart accessing the respondent's privileged information in the current instance is nullified by the fact that the inspection order was not executed and has been set aside upon reconsideration, together with the protections that would be

available to the respondents against discovery and admission of such information.

[156] In the circumstances, even if Mr Case's allegations as to the procedure actually followed had stood undisputed and could prevail despite the onus that the respondents bear, and even if I were to accept that that process adopted in this respect did not comply with the Anton Piller order, I am of the view that such non-compliance was so serious to justify its setting aside, especially since there is no allegation in the current matter that the search party comprising independent assisting attorneys and IT experts failed to comply with the requirement to attach only "relevant evidence" at Vanesco's business premises.

[157] I conclude that the respondents have failed to discharge their onus of demonstrating the order should be set aside on the basis of this conduct.

CONCLUSION AND COSTS

[158] In the result, I am of the view that the Anton Piller order must be allowed to stand as granted in all significant respects save in relation to (i) Supercart's entitlement to inspect and copy the attached items, which is a matter that falls to be determined pursuant to a procedure suitable to that end in the contempt proceedings; and (ii) the execution of the order at Mr Case's residence and the attachment of items pursuant thereto. A number of further, but less significant, amendments are appropriate, for the reasons set out above.

[159] As to costs, whereas it is clear that the respondents have failed in their main goal of setting aside the search and seizure in its entirety upon

reconsideration, they have succeeded to some extent, and in the process have (at least for the moment) thwarted what was undoubtedly Supercart's primary goal in launching the Anton Piller application, namely to secure access to the attached items so that they could be referred to without further ado in its replying affidavit in the contempt application. While the achievement of Supercart's secondary goal of preserving the attached items remains unaffected in relation to items found at Vanesco's business premises, it remains to be seen whether that will prove to be of any value to Supercart (i.e. whether it succeeds in having the documents discovered and admitted in the contempt application and, if so, what the consequences of that may be). Since that is an evaluation that can only be made by the Court that ultimately decides the contempt application, I consider the most appropriate costs order would be to retain paragraph 17 of the order reserving the costs of the Anton Piller application for determination in the contempt application, and extending it to this application, save in relation to the aspects discussed in the following paragraphs.

[160] Even on the most charitable reading, Mr Wolfe's founding affidavit contained not even the vaguest allegation in support of a *prima facie* conclusion that any of the relevant evidence was located at Mr Case's residence. The allegations made by Mr Wolfe in reply that "it was entirely reasonable to assume that Mr Case would, from time to time, work from home ... given the pandemic and the restrictions that have been put in place by the Government as a consequence" are expressly presumptuous, and only serve to show not only that no *prima facie* had been made out in this regard, but that none in fact existed. As for the statement that "Mr Case does not deny that he does work

from home” (presumably with reference to his answering affidavit), that is beside the point, which is whether Supercart made out a *prima facie* case in its founding papers that any relevant evidence was located at his residence. In any event, there is no allegation in Mr Wolfe’s founding affidavit or in those of either of the supervising attorneys’ affidavits that would call for such a denial. To the contrary, the affidavit of Mr Shoba stated that Mr Case’s daughter “advised that Case does not work from his residence”.

[161] In the circumstances, it is readily apparent at this stage that Supercart should not be awarded its costs in relation to the execution of the order at Mr Case’s residence, and the reservation of costs provided for in paragraph 17 of the order should therefore not stand in relation to those costs. On the other hand, Vanesco and Mr Case should be awarded their costs in this respect on a punitive scale. It is also necessary to further adjust paragraph 17 to set aside the portions reflecting an assumption that the attached items will in fact be utilized in the replying affidavit, which remains open to question.

[162] There is one final issue. Supercart sought the implementation of paragraph 15*bis* of the Anton Piller order even before the respondents could reasonably have been expected to seek an order for its reconsideration. This left the respondents with no alternative but to launch the urgent variation application before Wright J that paragraph 15*bis* itself contemplated. What is more, Supercart did not content itself merely in opposing the variation application, but launched a counterapplication seeking either the immediate implementation of paragraph 15*bis* in its terms, or its variation to a slightly less invasive version thereof. While Wright J expressly made no finding on the

merits of either party's case in granting the order that he did, and reserved the costs, I have in this application found that paragraph 15*bis* should never have been sought by Supercart in the first place. In those circumstances, it is appropriate that Vanesco and Mr Case be awarded their costs in the variation application. Furthermore, even if I had found that paragraph 15*bis* should be retained, the evidence was preserved, and any urgency that may have accompanied the contempt application had long since dissipated. There was no reason to doubt that the respondents would seek a reconsideration of the Anton Piller order as soon as reasonably possible after the Sheriffs' inventories and the supervising attorneys' reports were available. There was thus no justification for Supercart's precipitate conduct, and I consider it appropriate to mark this Court's disapproval thereof by means of a punitive costs order in the variation application.

[163] The following order is issued:

1. The *ex parte* Anton Piller order granted on 21 October 2021, as varied on 22 October 2021 (the Anton Piller order), is reconsidered and varied in the following respects:
 - a. the words "and the further legal proceedings referred to in the founding affidavit by Michael Wolfe" in paragraph 2 of the preamble thereof are set aside and replaced with the following words "under case number 21/40545";
 - b. the paragraph appearing at the fourth bullet point of paragraph 4.1.2 thereof is set aside in its entirety;

c. the paragraph appearing at the fifth bullet point of paragraph 4.1.2 thereof is set aside and replaced with the following paragraph:

- Emails to and/or from the following addresses set out hereunder relating to, referencing or concerning the manufacture and/or disposal (excluding, self-evidently, directly to customers outside of South Africa) of the Smartcart Hybrid 90 litre trolley subsequent to 23 May 2021:

trolley@vanesco.co.za

vanesco@icon.co.za

sales@vanesco.co.za

hybrid@vanesco.co.za

trolleydoctor@gmail.com;

d. paragraph 5 thereof is set aside in its entirety;

e. the words “and the further legal proceedings as referred to in the founding affidavit by Michael Wolfe” in paragraph 8 thereof are set aside and replaced with the words “under case number 21/40545”;

f. paragraph 10.5 thereof is set aside and replaced with the following paragraph:

“10.5. to keep the copies made of the relevant evidence duly secured and to prevent any person from inspecting or accessing them pending the making of an order in case number 21/40545 directing that they, or copies thereof, be released to any person;”

- g. the second sentence in paragraph 14 thereof is set aside and replaced with the following sentence:

“The Applicant’s legal representative must be available outside the respective premises in order to assist if called upon by the search party, solely through the intermediation of the independent supervising attorney, with logistical matters relating to the search, but under no circumstances should be content of the respective premises or anything found therein by the search party be disclosed in any manner to any representative of the Applicant or its legal representatives.”;

- h. paragraph 15*bis* thereof (being the paragraph commencing with the words “Unless a different direction is obtained from the Court ...” is set aside in its entirety; and

- i. paragraph 17 thereof is set aside and replaced with the following paragraph:

“17. Save for the Applicant’s costs in relation to the execution of this order at the residence of Mr Case (which costs are not reserved and in respect of which no order is made) and save as provided for in paragraph of the order granted in the reconsideration proceedings, the costs of this application are reserved for determination in Case Number 21/40545;”

2. The Sheriff/s with custody of any of the items excluded from the scope of

the Anton Piller order pursuant to the variations referred to in paragraphs , and above but attached pursuant thereto, are ordered to destroy or delete such items and/or copies thereof or return them to the persons from whom they were seized.

3. Save as set out in paragraphs and above, the reconsideration sought by Vanesco and Mr Case is dismissed.
4. Supercart is directed to pay the costs of Vanesco and Mr Case associated with:
 - a. the execution of the Anton Piller order at the residence of Mr Case;
and
 - b. the urgent application launched by Vanesco and Mr Case on 2 November 2021, including the costs of the counterapplication therein
on the attorney and client scale.

RJ MOULTRIE AJ

Acting Judge of the High Court
Gauteng Division, Johannesburg

DATE HEARD: 13 & 14 March and 6 April 2023
JUDGMENT: 23 November 2023

APPEARANCES

For the applicant (Supercart):

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For the respondents (Vanesco and Mr Case):

D Vetten instructed by Martini-
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