

SOUTH AFRICA / JUDGMENT

Cheickhart General Sales (Pty) Ltd v B & W Autobody Experts CC T/A Autobody Experts (UM 156/2020) [2021] ZANWHC 22 (18 August 2021) [2021] ZANWHC 22

COURT

North West High Court, Mafikeng

BEFORE

A H Petersen

CASE / FILE NUMBER

UM 156/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST DIVISION, MAFIKENG

CASE

NO: UM 156/2020

Reportable:

YES / NO

Circulate

to Judges: YES / NO

Circulate

to Magistrates: YES / NO

Circulate

to Regional Magistrates: YES / NO

In

the matter between:

CHEICKHART

GENERAL SALES (PTY) LTD

APPLICANT

And

B

& W AUTOBODY EXPERTS CC

T/A

AUTOBODY

EXPERTS

RESPONDENT

Delivered:

This judgment was handed down electronically by circulation to the parties' representatives by way of e-mail. The date and time of the handing down of judgment is deemed to be 10H00 on 18 August 2021.

ORDER

1.

The rule nisi be confirmed;

2.

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

3.

The applicant is permitted to make copies of the identified items in the custody of the Sheriff; and to have copies made of the two (2) forensic copies of hard drives or any digital devices or media in the custody of the Sheriff, for the purposes of instituting the further proceedings against the respondent foreshadowed in the application;

4.

The respondent is interdicted and restrained from unlawfully competing with the applicant.

5.

The costs of the Anton Pillar application are reserved for determination in the further proceedings to be instituted by the applicant.

JUDGMENT

PETERSEN AJ

Introduction

[1] This opposed application comes before this Court on the return date of an Anton Pillar order granted ex parte on the 13th August 2020 by Mahlangu AJ which was duly executed. It is apposite to appreciate the relief sought on the return date to have regard to the terms of the order granted as aforesaid:

“1. The Respondent and/or any other adult person in charge or control of the Respondent’s premises located at (“the premises”) shall grant the following persons access to the premises and to such motor vehicle(s) and to such “strong room(s)/safes, if any, in the Respondent’s possession or under their control, situated at the premises:

1.1 the Sheriff or Deputy Sheriff of this Court for the district of Klerksdorp; and

1.2 Attorney Lion-Catchet Loxton (“the independent supervising attorney”); and

1.3 Jacques Van Heerden, identity number:, (“the forensic expert”);

1.4 A representative of the Applicant and/or the Applicant’s attorney, who shall not take part in the search referred to below, but may be called upon, by those mentioned in 1.1 to 1.3 above, to identify documents falling within the Evidence referred to in 2.1 below.

2. The Respondent and/or any other adult person in charge or control of the premises must grant access to the premises and to the Respondent’s motor vehicle(s) (“the vehicle(s)”) on the premises, if any and to such “strong room(s)/safe(s) on the premises, if any, to the forensic expert(s), and the Sheriff, as the case may be (collectively, “the search persons”), solely for the purposes of:

2.1 Searching the premises, the vehicle(s) and the “strong rooms” in order to enable any of the search persons to identify and point out to the Sheriffs “the Evidence”, being:

2.1.1 originals or copies of Bank statements of the Respondent for the period April 2018 to July 2020;

2.1.2 originals or copies certificate of good standing for the year 2018 – MIBCO;

2.1.3 originals or copies of the tax clearance certificate for the period 2019 to 2020;

2.1.4 originals or copies of the calibration certificate for the year 2018;

2.1.5 originals or copies of all invoices from Prime Parts;

2.1.6 originals or copies of all invoices from Daly Auto;

2.1.7 originals or copies of all invoices from Oranje Toyota;

2.1.8 originals or copies of all invoices from Westvaal Radiator;

2.1.9 originals or copies of all invoices from Fitment Centre;

2.1.10 originals or copies of all invoices from Canopy Land

2.1.11 originals or copies of all invoices from MBC Parts;

2.1.12 originals or copies of all invoices from DNH Auto Spares;

2.1.13 originals or copies of the invoices issued on instruction of Adamson as per the e-mail dated 15 November 2018;

2.1.14 originals or copies of the audit information of Old Mutual for the audit of January 2019;

2.1.15 originals or copies of the audit information of Telesure for the audit during 2019;

2.2 Searching the premises, vehicle(s) and “strong room(s) / safes for purposes of finding and thereafter searching and examining any networks, desktop computers, laptop computers, tablet computers, portable information storage devices, external data storage devices, including

external hard drives, flash drives, iPods, shufflers, compact discs (CDs), digital versatile discs (DVDs), stiffy discs, floppy disks, jazz drives, zip drives, data cartridges, memory sticks, mobile phones, SIM cards and electronic devices or media with the capability of storing information and/or data digitally, as well as any data, data storage location or network component (including but not limited to Cloud Hosting, Dropbox, virtual servers or other data hosted locally or internationally) to which the Respondent has access or control over or ownership of by directly, indirectly or

remotely connecting thereto (collectively described as "digital devices or media") on the premises or in the vehicle(s) or in the "strong room(s)", by connecting each of the digital devices or media to forensic computers, for the purpose of identifying it and determining whether it contains the Evidence;

2.3 Permitting and allowing the forensic expert to make 2 (two) disc copies and/or compact disc copies and/or to capture forensic images and/or to make two complete mirror images and/or digital images (for identification purposes) of the hard drives of any digital devices or media located on the premises or in the vehicle(s) or in the "strong room(s)"/safes, or to download or create a data dump of online or hosted data, once it is determined that such digital devices or media contain the Evidence or part thereof;

2.4. Permitting and allowing the forensic experts to make print-outs of any of the Evidence located on any such digital devices or media, if copies of the hard drives cannot be made.

3. The Respondent and/or any other adult person in control of any digital devices or media on the premises or in the vehicle(s) or in the "strong room(s)"/safes, must forthwith disclose to the search persons any passwords and/or procedures required for effective access to such digital devices or media for the purposes of paragraph 2 hereof.
4. In the event that the Respondent and/or any other adult person in charge or control of the premises refuses to grant access to the premises and to the Respondent's vehicle(s) on the premises, or

to the "strong room(s)/safes" on the premises a member of the South African Police Service, assisted, if necessary by a locksmith, may obtain access to the premises and/or vehicle(s) as necessary.

5. Subject to paragraph 13 hereof, the Sheriff is authorised to attach any items pointed out by any of the aforesaid persons and any digital devices or media, and any forensic copies of hard drives of any

digital devices or media, or print-outs of any such items (collectively, 'the identified items').

6. The Sheriff shall keep the identified items in his or her custody until the Applicant authorise their release to the Respondent or this Court directs otherwise.
7. In the event that the forensic experts are unable, for any unforeseen

reason, to fulfil their functions in terms of this order, they are authorised to conduct such forensic investigations as contemplated in this order, in the presence of the independent supervising attorney and the Sheriff, no later than 1 (one) day after the identified items have been taken into custody by the Sheriff.

8. Until completion of the search authorised in the preceding paragraphs

hereof, the Respondent may not access any digital devices or media or any area where documents or items of the class mentioned in paragraphs 2.1 hereof may be present, except with the leave of the independent supervising attorney, or to make telephone calls or send any electronic message to obtain the attendance and advice mentioned in the notice which is handed over immediately prior to execution of this order.

9. The Sheriff shall, before this application is served or this order is executed –

9.1. Hand to the Respondent, or any other person found in charge or control of the premises, a copy of the notice which is annexed hereto as Annexure A; and

9.2. Explain to Respondent, or such person paragraphs 2, 3 and 4 thereof; and

9.3. Inform the Respondent, or such person of the following:

9.3.1 That any interested party may apply to this Court on not less than twenty four (24) hours' notice to the offices of the Applicant's attorney for a variation or setting aside of this order, the Court's practices and rules applying unless the Court directs otherwise;

9.3.2 That the Respondent or their representative is entitled to inspect the items in the Sheriff's custody for the purpose of satisfying themselves that the inventory is correct.

10. The Respondent and/or any other adult person(s) in charge or control of the premises, must disclose to the Sheriff the whereabouts of any item falling within the categories of items referred to in paragraphs

2.1 hereof, whether at the premises or elsewhere, to the extent that such whereabouts are known to the Respondent or either of them or such person(s).

11. In the event that any item is disclosed to be situated at any other place than the premises or the vehicle(s) or in the "strong room(s)/safes", the Applicant may approach this Court ex parte for leave to permit execution of this order at such other place.

12. The Sheriff shall make a detailed inventory of the identified items immediately after taking custody thereof and shall provide a clear copy of such inventory to the Registrar of this Court, the Applicant's attorney, the independent supervising attorney and the Respondent.

13. In the event of the Respondent raising any contention in law why any of the identified items should not be inspected and/or copied, the Respondents shall, within a period of three (3) court days after the

identified items have been taken into the custody of the Sheriff as provided above, identify on oath the item in respect of which

objection is taken to such inspection and/or copying and state on oath the reasons for the objection and serve such affidavit on

Applicant's attorneys.

14. After the inspection described in the preceding paragraphs hereof, the Sheriff shall retain the identified items pending the outcome of this application.
15. The Sheriff shall inform the Respondent that the execution of this order does not dispose of all the relief sought by the Applicant and shall simultaneously serve the notice of motion and explain the nature and exigency thereof.
16. The independent supervising attorney shall monitor and oversee all aspects of the execution of this order and, together with the Sheriffs, shall make a list of all items removed by the Sheriff in terms of this order, one copy of such list to be handed to the Respondent, if present, or to the person(s) upon whom service is effected as referred to above, and one copy of the such list to be retained by the Sheriff.
17. The independent supervising attorney accompanying the Sheriff, within ten (10) days of the execution of this order, shall cause to be filed an affidavit or affidavits –

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

17.2 Attaching the inventory compiled in terms of this order.

18. This order, including paragraph 19.3 shall, upon proper service on the Respondent, operate as an interim order with immediate effect.”
- [2] The rule nisi issued on the 13th August 2020, which called on the respondent to show cause why the following orders should not be made final was formulated as follows:

“19.1 That the identified items in the custody of the Sheriff shall be retained by the Sheriff pending the further direction of this Court;

19.2 That the Applicant is permitted to:

19.2.1 makes copies of the identified items in custody of the Sheriff;

19.2.2 Take possession of the two (2) forensic copies of hard drives of any

digital devices or media in the custody of the Sheriff, for the purposes of instituting the further proceedings against the Respondent foreshadowed in the application;

19.3 That the Respondent is interdicted and restrained from unlawfully competing with the Applicant...”

Background

- [3] The background facts sketched by applicant’s counsel in the heads of argument have not been challenged and provide an overall picture of the dispute between the parties. The parties are in direct competition in the panel beating industry and as is customary in the said industry, serve on the panel of various insurance companies. As competitors the parties operate their businesses from adjacent premises.
- [4] On the 19th April 2018, the applicant sought and obtained an order by consent against the respondent, prohibiting the respondent from unlawfully competing with the applicant.
- [5] During July 2020 a former employee of the respondent, identified as Jones and an insurance broker, referred to as Marais provided information to the applicant which suggested that the respondent was in breach of the consent order. In particular, the applicant alleges that it came to its attention that the respondent was conducting its business in unlawful competition with it, in that it had allegedly forged and/or manipulated mandatory industry compliance certificates; forged and/or manipulated supplier invoices which was submitted to insurance companies for payment; and paid bribes to insurance brokers in order to obtain more referral work.
- [6] The applicant relies on documentary evidence and confirmatory affidavits from suppliers which purports to confirm the alleged fabrication and/or manipulation of documents by the Jones and Marais.
- [7] The applicant sought preservation of documents in possession of the respondent with the intention, if proven to be correct on the allegations by Jones and Marais, to pursue two possible civil claims founded on contempt of the consent order and a claim for damages arising from the alleged unlawful competition by the respondent. The applicant has subsequently pursued a civil claim on the latter cause of action.
- [8] The applicant sought the preservation of the documents alleged to be in possession of the respondent as evidentiary material in its intended causes of action against the respondent, premised on what it purported to be a reasonable fear that the respondent would destroy the said documents or would spirit them away.
- [9] The ex parte application was consequently launched in camera and the Anton Piller order as set out supra was accordingly granted and executed. The applicant contends that documents seized pursuant to the order confirm the correctness of the information provided by Jones and Marais, which the respondent challenges in the present application by raising several substantive defences.

The defences raised by the respondent

[10] The respondent raises a number of defences, both substantive and procedural, which on a reading of the answering affidavit may succinctly be set out as follows:

10.1 An attempt by the applicant to eliminate the respondent as a competitor;

10.2 Ulterior motive without any bona fide attempt to exercise any cause of action against the respondent;

10.3 Motive to falsely incriminate the respondent by Rowland Jones, a former employee of the respondent, who presented with several irregularities and disciplinary problems;

10.4 Failure by the applicant to prove the existence of any real and well-founded apprehension that evidence exists which may be destroyed or spirited away by the Respondent;

10.5 No evidence that the respondent has ever competed unlawfully with the applicant;

10.6 No case had been made for the final interdictory relief sought by the applicant;

10.7 A material dispute of fact regarding the applicant's allegations regarding the payment of referral fees; and

10.8 The Anton Piller order sought by the applicant is not competent for any subsequent criminal proceedings.

[11] The defences raised by the respondent are best considered against the legal position applicable to the procedural defences and the evidence on the substantive defences.

The purpose and requirements of an Anton Piller order

[12] The purpose and requirements of an Anton Piller order as stated in *Universal City Studios Inc v Network Video (Pty) Ltd* and repeated in *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam and Another; Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg, and Others* 1995 (4) SA 1 (A), was restated by Mathopo JA in *Viyiza Corporation v Collabarit Holdings (Pty) Ltd and Others* 2019 (3) SA 173 (SCA) at 181A-E (paragraphs [22] and [23]) as follows:

"[22] The requirements for an Anton Piller order was stated by Corbett CJ in Shoba as follows:

'The use of Anton Piller orders in our law is now well established. The requirements that must be satisfied for the granting of such an order were summed up Corbett JA in Universal City Studios Inc v Network Video (Pty) Ltd [1986] ZASCA 3; 1986 (2) SA 734 (A), as follows:

In a case where the applicant can establish prima facie that he has a cause of action against the respondent which he intends to pursue, that the respondent has in his possession specific documents or things which constitute vital evidence in substantiation of the applicant's

cause of action (but in respect of which the applicant can claim no real or personal right), 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 at any rate to the stage of discovery, ...

(Note: This paragraph appears to be paragraph [18] in the judgment of *Non-Detonating Solutions (Pty) Ltd v Durie and another* 2016 (3) SA 445 (SCA))

- [23] An Anton Piller order is directed at preserving evidence that would otherwise be lost or destroyed. It is not a form of early discovery, nor is it a mechanism for a plaintiff to ascertain whether it may have a cause of action. The cause of action must already exist and the preserved evidence must be identified.” (my underlining)
- [13] The requirements can therefore be set out succinctly as follows: (i) the applicant has a cause of action against the respondent which he intends to pursue; (ii) the respondent has in his possession specific documents or things which constitute vital evidence in substantiation of the applicant’s cause of action; (iii) 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 at any rate to the stage of discovery.
- [14] The purpose of an Anton Piller order is ultimately to preserve evidence.

An ex-parte application for and re-consideration of an Anton Piller order

- [15] An Anton Piller, may as in this case be granted, on an ex parte basis and on the return date of the rule nisi, the Court is enjoined in the reconsideration of the order, to have regard to the evidence and whether or not the order granted on an ex parte basis should remain in force until trial or at the earliest, discovery stage.
- [16] The approach to the reconsideration of the Anton Piller order granted ex parte, addressed by Counsel for the respondent under the heading onus to be discharged, with reliance on *Frangos v Corp Capital Ltd and Others* 2004 (2) SA 643 (T) is at variance with the decision in *Friedshelf 1509 (Pty) Ltd t/a RTT Group and Others v Kalianji* 2015 (4) SA 163 (GJ), on which Counsel for the applicant relies. I align myself with the reasoning in *Friedshelf* at paragraphs [53] to [69] where Strathern AJ dealt extensively with the question which arises as to how to approach the onus on a return day or a reconsideration of the application with due regard to, inter alia, the *Frangos* decision.
- [17] In *Friedshelf 1509*, Strathern AJ found that the essence of the further hearing remains the same. The approach is straightforward, should the initial order granted remain in force pending the discovery process in the intended action to which the Anton Piller order relates, or should the order be set aside or discharged. In respect of whether a cause of action exists or not, Froneman J as he then was stated in the *The Reclamation Group (Pty) Ltd v Smit and Others* 2004 (1) SA 215 (SE) at 221H – 222A, that:

‘The requirement of a prima facie cause of action, in the sense of an applicant showing no more than that there is evidence, which, if accepted, will establish a cause of action (per Botha JA in *Cargo Laden and Lately Laden on Board the MV Thalassini Avgi v MV Dimitris* 1989

(3) SA 820 (A) at 831H – I) needs no adaptation at the reconsideration stage. This requirement relates to an issue which would have to be adjudicated upon in the forum hearing the main action to which these proceedings are merely a precursor (compare the *Thalassini* case, above, at 832C, and similar reasoning in the *Bocimar NV* case, above, at 581A –B). There is no need to prejudice that finding further at this stage’. (emphasis added)

[18] The onus of proof on a balance of probabilities in an Anton Piller application, on reconsideration, applies only to the requirements that, (i) the respondent has in his possession specific documents or things which constitute vital evidence in substantiation of the applicant’s cause of action; and (ii) 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 at any rate to the stage of discovery.

[19] As in the present application, counsel for the respondent in *Friedshelf* relying on *Frangos*, submitted that the onus to be discharged by the applicant on the return day in respect of a cause of action is on a balance of probabilities and that the ordinary rules relating to the proof of facts in motion proceedings ought to apply.

[20] Strathern AJ, however disagreed with the reasoning and findings in *Frangos* that the applicants must prove their causes of action on a balance of probabilities on the return day in an Anton Piller application. In this regard, he correctly in my view made the point that the applicants were not seeking “final relief on the return day, as argued by the respondent, and reliance on the notion that the confirmation of an order on the return day amounts to the granting of ‘final Anton Piller relief’ is in my view unsound.” He stated further that an Anton Piller order remains interlocutory in nature and its purpose is to preserve evidence for use at a subsequent trial, regardless of whether it is being considered at the ex parte stage or the return day. He ultimately found at paragraphs [67] to [69]:

“[67] In my view the test at the opposed return day or reconsideration of an Anton Piller order is whether, after considering the competing allegations and submissions on the affidavits, the applicants still make out a strong prima facie case. In this regard the court would not be bound to determine the matter on the basis of facts alleged by the respondent which cannot be rejected on paper, as argued in this matter by the respondent’s counsel.

[68] To saddle an applicant with the burden of proving the cause of action on a balance of probabilities on the return day of an Anton Piller hearing would doom most Anton Piller applications to failure: All that would then be required of a respondent in order to defeat the application on the return day and obtain the return of the documents seized would be to put up a version which cannot be rejected on affidavit. It would also C unduly

fetter the discretion of a judge to order the continued seizure of documents, even where the competing contentions are unconvincing but cannot be rejected.

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

[21] The approach adopted in *Friedshelf 1509* was relied on in *Air and Allied Technologies CC and Others v Advanced Air Control Technologies (Pty) Ltd and Another* (25911/2017) [2020] ZAGPJHC 71 (28 February 2020), where Adams J stated at paragraph [40] that:

“[40] On the return day the test remains a strong prima facie case in respect of the cause of action and possession and apprehension on a balance of probabilities. (See Friedshelf 1509 (Pty) Ltd t/a RTT Group and Others v Kalianji supra)...”

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

“[4] The question to be decided in this appeal is whether the court a quo had, on the return day of the rule nisi, correctly applied the applicable legal principles as enunciated inter alia in Shoba v Officer Commanding Temporary Police Camp, Wagendrift Dam and Another 1995

(4) SA 1 (A) and *Non-Detonating Solutions (Pty) Ltd v Dune* 2016

(3) SA 445 (SCA). The question is whether the appellant, which was the applicant in the court a quo, had proven on the return day that at the time of applying for the Anton Piller preservation order: (1) it had a *prima facie* cause of action; (2) *prima facie* the respondents were in possession of documents important to that cause of action; and (3) it (the appellant) had a reasonable apprehension that the respondents might not discharge its duty to make full discovery. If those requirements had been met in the appellant’s application, and provided that there were no other grounds to set aside the order, such as serious flaws in its execution, the preservation order should have been allowed to stand.” (my emphasis)

The defences

[23] The defence that the Anton Piller order cannot be used to sustain a criminal prosecution may safely be disposed with brevity. The applicant does not intend to seek a criminal prosecution against the respondent but requires the preserved evidence for a civil action which it intends pursuing.

[24] In respect of the defence that the applicant is seeking final relief, I align myself with the reasoning in *Friedshelf supra*. The reference in *Friedshelf* to *The Reclamation Group (Pty) Ltd v Smit* is clear, the preservation of evidence remains interim pending the action, until the discovery stage, at the very least.

The bribes

- [25] The respondent submits that a material dispute of fact exists regarding the two amounts of R500.00 paid to Marais. The crux of the defence is that two amounts of R500.00 each paid to Marais were amounts deducted at the behest of Jones from his salary to pay Marais who was a relative. On Marais' version the amounts were paid to her to manipulate the rotational system implemented by the insurance companies to ensure referral of more work to the respondent. It is telling that Jones' bank statement does not reflect the deduction of any amounts of R500.00 and in addition the last of the two R500.00 amounts was made by the respondent to Marais on the 25th February 2020, five (5) days after Jones had left its employ. The applicant contends that Jones and Marais are in fact not related. For purposes of the reconsideration of the Anton Piller order, this evidence in my view does not constitute a material dispute of fact, but provides rather *prima facie* proof of the matters so alleged by Marais and Jones.
- [26] The substantive defences must be considered against the backdrop that it is common cause or not disputed that pursuant to the interim order, the search and seizure conducted at the premises of the respondent resulted in, inter alia, the discovery of certificates from SARS and MIBCO, calibration certificates and supplier invoices. The respondent annexed to its answering affidavit what purports to be certificates from SARS and MIBCO and calibration certificates and attempted to adduce a further calibration certificate through the heads of argument of counsel. The said certificates are attached with letters from the respondent's auditors and MIBCO, purporting tax compliance and good standing of the respondent with MIBCO.

The calibration certificates

- [27] The respondent contends in limine that calibration certificates are not a statutory requirement but only required by insurers premised on a contractual relationship with the respondent. On this basis the submission is that this contractual relationship cannot vest the applicant with a cause of action against the respondent. In amplification the respondent contends that the new torque wrench referred to in annexure "BA22" is certified for one year, as indicated in script on the invoice.
- [28] The applicant, however, contends that, on Jones evidence, he (Jones) was requested by Ilza Adamson to change and amend the dates on a calibration certificate. The applicants highlights that the respondent counters this evidence by stating that "It could only be Jones that had manipulated the same for purposes of an audit because he did not do his job in obtaining the same timeously", implying thus that the calibration certificate did not exist at the time of the audit. The applicant submits that this begs the question whether the calibration certificate existed or not. Mr. Barry Reynolds of Torque Tool (Pty) Ltd confirms that the calibration certificate attached to the respondents answering affidavit as "BA20", with certificate number C956412, does not exist on the records of Torque Tool (Pty) Ltd. The applicant further demonstrates through the evidence of Midas Klerksdorp that a torque wrench is not issued with a calibration certificate, which gainsays the evidence of the respondent that upon the purchase of a

new torque wrench, it is sold with a calibration certificate.

MIBCO certificates

- [29] The respondent disputes that Jones changed the date on the MIBCO certificates and submits that compliance with the said certificates concerns only a contractual relationship between it and the insurer and cannot vest the applicant with any cause of action against the respondent. The respondent further relies on an e-mail received from a senior agent of MIBCO, Deon Smith confirming compliance since 2016 and submits that there is no factual basis to dispute this.
- [30] The applicant, contends that on Jones evidence he was requested by Adamson in 2018 to change the date of issue of the MIBCO certificate. According to the applicant, MIBCO certificates of good standing are only valid for a period 6 (six) months and the assertion that the broad assertion that the respondent has been compliant since 2016 to August 2019 cannot be correct. The applicant submits that the respondent therefore did not have valid MIBCO certificates between 2016 and August 2019 and that the MIBCO certificate of good standing for 2018 was in fact forged and/or manipulated as alleged by Jones,

on the instruction of Adamson.

SARS certificates

- [31] The respondent contends, similar to the MIBCO certificates, that compliance in respect of tax clearance only concerns the contractual relationship between the respondent and the insurer and cannot vest the applicant with any cause of action against it.
- [32] The respondent submits that Jones has a motive to falsely incriminate it. This submits the respondent is well illustrated by the fact that, on Jones allegation he was instructed in 2019 by the respondent to change the dates on the certificate, being 11 March 2019 to 11 March 2020, which makes no sense as it leaves a gap from 5 February 2019 to 11 March 2019. The respondent raises concerns about the gap which the “fabrication” of Jones, it submits should have addressed. The respondent submits that its attachment of the original tax certificate for the relevant period is fatal to Jones credibility. The tax certificates from 2017 to 12 March 2021 having been attached by respondent to its affidavit and said to be confirmed by its

accountant, Dekker Boekhouers, cannot be rejected according to the respondent.

- [33] The applicant maintains that, on the evidence of Jones, he was requested by Adamson to change and amend the dates of the tax clearance certificate from SARS for the tax period 2018 to 2019 at the end of February 2019. This was predicated by Chevrolet/Opel conducting an audit on the respondent, whilst it did not have a valid tax certificate at the time. The applicant by way of comparison of the documents manipulated by Jones and the tax clearance certificates adduced by the respondent submits, inter alia, that the said tax clearance certificate was sent to the respondent’s accounting officer on the same date the tax clearance certificate was approved, being the 11th March 2019, under a cover note with a

caption “verval 2020 – 03/11.pdf” and that the accounting officer specifically informed the respondent that the tax clearance certificate expires on the 11th March 2020. The applicant submits that the date of the 11th March 2020 is highly relevant when one compares it to the certificate annexed by the respondent, which reflects the expiry date as the 05th February 2019. So submits the applicant, the discrepancy points to the respondent not having been in possession of a valid tax

certificate for the period 05 February 2019 to 10 March 2019. The applicant further points to discrepancies in the use of the logo of SARS, which on the original reads “SARS at your service” which appears in capital letters on the original tax certificate but not on the fabricated certificate.

Irregular invoices

- [34] The respondent contends that the applicant fails to demonstrate how any irregular invoices could vest it with any cause of action against the respondent as this would at best be an issue between it and the insurers premised on their contractual relationship. The respondent in nutshell disputes the contention that the manipulation of the invoices by Jones was done on its instruction and lays claim to an absolute lack of knowledge thereof.
- [35] The applicant in this regards essentially submits that the respondent’s claim that it had no knowledge of the fabrication of the invoices which Jones embarked upon on a frolic of his own, are unconvincing and patently false. It contends that the documentation was forged in 2018, two (2) years prior to Jones disciplinary hearing and his joining the employment of the applicant. The manipulation by Jones was of the accounting systems and source documents of the respondent. It is highly improbable, submits the applicant, that the management of the respondent or its auditors did not become aware of the manipulation of the respondent’s accounting systems and accounting records.

Discussion

- [36] With the aforementioned evidence in mind, the question as formulated in *Interpark supra* provides a good basis to consider whether the applicant has demonstrated that it had a prima facie cause of action when it applied for the Anton Piller order; that prima facie, the respondents were in possession of documents important to that cause of action; and that it was justified in harbouring a reasonable apprehension that the respondent might not discharge its duty to make full discovery of documents.
- [37] Notwithstanding the respondents attempts to shy away from the fact that the applicant at the time of the initial application in 2020 was already in possession of an order in its favour, interdicting any unlawful competition against it by the respondent, it is good starting point to consider whether or not the applicant had a prima facie cause of action. When the applicant came to be in possession of the evidence of Jones and Marais, it pointed prima facie to the respondent perpetuating its conduct of operating in competition with the applicant. An inescapable fact that cannot and was correctly not gainsaid by the respondent is that on its own version documents which were seized from it are in fact either forged

or manipulated. The respondent's case in this regard is essentially that the said documents are the product of Jones who is motivated to falsely incriminate the respondent. Ultimately in the circumstances whatever weight may be attached to those documents in determining the applicant's cause of action against the respondent is a matter best left for the trial Court. The applicant,

in my view, with the answer by the respondent to the allegations against it, has demonstrated prima facie, that it has a cause of action against the respondent. The applicant was further justified in its apprehension that the respondent may spirit away evidence, particularly when one has regard to the fact that the documents appear at the very least at face value to have been manipulated at the behest of the respondent in respect of its contractual relationship with the insurers and car dealerships. This in itself speaks to the respondent having an unfair advantage over its competitors.

Conclusion

[38] On a reconsideration of the evidence as a whole, I am satisfied that the applicant has made a case for the confirmation of the rule nisi in respect of the relief sought at paragraphs 19.1, 19.2 and 19.3 of the Notice of Motion.

Costs

[39] In my view, the respondent was entitled to challenge the confirmation of the rule nisi, when one had regard to the extraordinary nature of an Anton Piller order. The preservation of the evidence as stated supra is of an interim nature pending the action and its ultimate evidential weight will have to be considered by the trial Court. The applicant seeks costs against the respondent in accordance with the Notice of Motion. In light of this Court's finding, counsel for the respondent in anticipation, submits in his heads of argument, that the costs of the Anton Piller application be reserved for determination in the further proceedings. The Anton Piller order being an extraordinary order, I am inclined to accede to the submission of counsel for the respondent.

Order

[40] Consequently, it is ordered that:

1. The rule nisi be and is hereby confirmed;

A H PETERSEN

JUDGE OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG

APPEARANCES:

DATE OF HEARING

: 15 APRIL 2021

DATE OF

JUDGMENT

: 18 AUGUST 2021

(ELECTRONICALLY)

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