

SOUTH AFRICA / JUDGMENT

Soares v Retief and Another (2023/082401) [2024] ZAGPJHC 727 (13 August 2024) [2024] ZAGPJHC 727

COURT

South Gauteng High Court, Johannesburg

BEFORE

Barnes AJ

CASE / FILE NUMBER

2023/082401

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FLYNOTES:

CIVIL PROCEDURE – Anton
Piller order – Dispute
over estate funds –
Applicants allege respondents unlawfully dissipated estate funds –
Payments out of estate prima facie unauthorised
– Highly
questionable that all payments can be justified as litigation fees
– Prima facie case established –
Anton Piller order
was only practicable means of protecting applicant's rights
– Requirements established –
Meritless grounds of
opposition – Anton Piller order confirmed.
REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG
DIVISION, JOHANNESBURG
1.
REPORTABLE: NO

	2. OF INTEREST TO OTHER JUDGES: NO 13/08/2024 Case No: 2023-082401
In the matter between:	CAETANO ROGERIO SOARES Applicant and PETRA RETIEF N.O. (in her capacity as the Executrix of Estate Late:
	VIOLET PAMELA MAUD EVANS, estate number 019430/2018) First Respondent PETRA RETIEF Second Respondent

JUDGMENT

BARNES AJ

Introduction and

Background

- [1] This is the return day of an Anton Pillar Order granted in favour of the Applicant on 23 August 2023 and executed against the Respondents on 25 August 2023.
- [2] The Applicant seeks the confirmation of the Anton Pillar Order. The Respondents seek its discharge.
- [3] The dispute between the parties in this matter has a long and acrimonious history. It was triggered, tragically, by the death of one Ms Violet Pamela Maude Evans. Ms Evans passed away of natural causes on 12 August 2018 at the age of 95. Ms Evans left a sizeable estate, but no heirs, only her pets: two dachshunds named Prince William and Prince Harry and two African grey parrots named Charlie and Frankie, to whom Ms Evans was devoted. In her various wills (the validity of which is the subject of bitter dispute between the parties as will become evident below), Ms Evans established a trust for her pets and her sole wish was that they be well cared for by means of her estate funds after her death

- [4] Shortly after Ms Evans passing, on 31 August 2018, her long time neighbour, Mr Caetano Rogerio Soares was appointed as executor of her estate (“the estate”). This was in terms of a will and testament executed by Ms Evans in 2016 (“the 2016 will”). Mr Soares is the Applicant in the present application. The Master of the High Court has issued Letters of Executorship in favour of the Applicant, appointing him as the executor and authorising him to administer the estate.
- [5] In February 2019, Ms Petra Retief, an attorney practising under the name and style of Theron-Retief Attorneys, brought an application, on an ex parte basis, for the removal of the Applicant as the executor of the estate and the appointment of herself as executrix. The application was brought on the basis of Ms Retief’s contention that the 2016 will was invalid, having been superseded by a later will and testament executed by Ms Evans in 2018 (“the 2018 will”) in terms of which Ms Retief was appointed executrix.
- [6] Ms Retief’s application was granted, on an interim basis, by way of a rule nisi, by Judge Opperman, on 26 February 2019 (“the Opperman Order”).
- [7] Ms Retief is both the First and Second Respondents in the present application. She is cited in two capacities – in her official capacity as interim executrix of the estate and in her personal capacity.

The Opperman Order

- [8] The Opperman Order provides, in relevant part, as follows:

“Having read the papers and having heard Counsel for the Applicant, the Court makes the following order:

1. That the Applicant’s non-compliance with the rules of this Court be condoned and that the application be treated as one of urgency....;
2. That leave be granted to hear the application in the above matter ex parte;
3. That a Rule Nisi is hereby issued, returnable on 2 April 2019, for the Respondents to show cause why the following order should not be made final:

3.1 that the First Respondent is ordered to immediately surrender his letters of Executorship, under reference number 019430/2018 issued by the Master of the High Court, Johannesburg on 31 August 2018 in the deceased estate of VIOLET PAMELA MAUD EVANS (“the deceased”), identity number 2605150023186 to the Master of the High Court, Johannesburg; and

3.2 that the First Respondent is immediately interdicted and restrained from

3.2.1 Performing any functions as Executor of the said estate;

3.2.2 Entering and/or accessing the Deceased’s property at 6[...] K[...] Street, B[...]; and/or

3.2.3 Enlisting the services of third parties to gain access or entrance to the Deceased’s property.

3.2.4 Accessing the bank accounts of the Deceased; and

3.2.5 That the Master is hereby instructed to issue Letters of Executorship in the Deceased Estate to the Applicant”

- [9] As is evident from the above, the Opperman Order set the return day for 2 April 2019. The Applicant anticipated the return day and delivered an answering affidavit in which he opposed the confirmation of the rule. Ms Retief failed to deliver her replying affidavit and the matter was subsequently removed from the roll. In the circumstances, the rule nisi lapsed.
- [10] Shortly thereafter, the Applicant launched an application in which he contended that the 2018 will was fraudulent and the 2016 will was valid, and sought an order confirming that he was the executor of the estate. Ms Retief opposed the application and also counter applied for the reinstatement of the rule nisi that had been granted in terms of the Opperman Order.

The Dippenaar Order

- [11] The Applicant’s application, and Ms Retief’s counter application, came before Judge Dippenaar on 7 May 2019, who granted an order in the following terms:
- a. the rule nisi granted in terms of the Opperman Order was revived and the return day was extended to 19 August 2019.
 - b. Ms Retief was appointed as the interim executrix of the estate pending the return day.
 - c. the applications in which Mr Soares and Ms Retief challenged the validity of the 2018 will and the 2016 will, respectively, and sought confirmation of their appointments as executor of the estate, were consolidated to be heard together on the return day; and
 - d. pending the return day, Ms Retief was: interdicted from taking any steps to wind up or dispose of assets in the estate; and granted limited powers to pay certain stipulated costs in respect of the maintenance of the estate and the care of the pets only.
- [12] For convenience, in what follows below, this will be referred to as “the Dippenaar Order”. Given its centrality to the matter, it is necessary to set out the terms of the Dippenaar Order in their entirety. I do so below.

“Having read the documents filed of record, heard counsel and having considered the matter, IT IS ORDERED THAT:

1. Subject to the following paragraphs in this order, the rule nisi granted by Opperman J on 26 February 2019 under case number 6550/2019 is hereby revived and extended to the return date of 19 August 2019 (“return date”).
2. Pending the return day, Petra Retief is the interim executor in respect of the deceased estate of Violet Pamela Maud Evans (“the Deceased”), identity number 2605150023186, with all powers associated therewith.

3. This application and the application under case number 6550/2019 are consolidated and will be heard together on the return date.
4. Pending the return date, the first respondent may not:
 - 4.1 Take any steps to wind up the estate and/or
 - 4.2 Dispose of any assets in the estate, save as provided in paragraph 5 below.
5. Pending the return date, the first respondent shall unfreeze the Estate Account held by STANDARD BANK under account number 1[...] ("Estate Account") and liquidate therefrom the amounts as follows for use only in the expenses of maintaining the Estate:
 - 5.1 In respect of water and lights on the immovable property at 6[...] K[...] Road B[:]: R6000.00 per month;
 - 5.2 In respect of the dachshunds named Prince William Evans and Prince Harry Evans ("the Dachshunds").
 - 5.2.1 Past bills owing to Bedfordview Veterinary Hospital: R6 500.00;
 - 5.2.2 Past bills owing to Bedfordview Rehabilitation and Conditioning Centre: R6 500.00;
 - 5.2.3 Past bills owing to the Fourways Vet: R 1000.00;
 - 5.2.4 10108933855 Future maintenance of the Dachshunds pending the return date - R10 000 per month;
 - 5.3 10108933855 In respect of the two birds in the Estate, future maintenance of the birds payable to Brainy Bird: R1000.00 per month;
 - 5.4 10108933855 In respect of security services for the immovable property:
 - 5.4.1 Outstanding bills owing to P and C Services: R24 000.00;
 - 5.4.2 Outstanding bills owing to T2 Security: R 40 500.00;
 - 5.4.3 Future payment of the security services pending the return date: R22 000.00 per month;
 - 5.5 In respect of external wall: the lowest of three quotes for securing or repairing the wall;
 - 5.6 In respect of the gardening and maintenance of the immovable property: R 1500.00 per month; and
 - 5.7 In respect of Ms Catherine Henry, a once off amount of R50 000.00 in respect of her services provided to the Estate.
6. Standard Bank is hereby ordered to unfreeze the Estate Account under account number 1[...] on instructions of the executor, save that Standard Bank can anticipate this order in terms of Rule 6(12)(c).

7. Subject to the approval of the majority of the trustees of the Pamela Evans pet Trust, same not to be unreasonably withheld, Mr Caetano is permitted to visit and interact with the Dachshunds named Prince William and Prince Harry at Dachshund Haven and the birds at Brainy Bird.
 8. The costs of this application and the costs of the application under case number 6550/2019 to date are to be costs in the estate.” (Emphasis added)
- [13] It bears emphasis that, at best for Ms Retief, the Dippenaar Order appointed her as the interim executrix of the estate pending confirmation of the rule nisi on the return day.
- [14] On the return day, viz 19 August 2019, the rule nisi was extended to 21 October 2019. Thereafter, on 21 October 2019, the matter came before Coppin J and the rule nisi was again extended to 2 December 2019. Costs were reserved on both occasions.

The Windell Order

- [15] On 2 December 2019 the matter came before Judge Windell. Judge Windell made an order in which she:
- a. referred the consolidated application to trial; and
 - b. ordered Mr Soares to pay Ms Retief’s wasted costs arising out of the postponements on 21 October 2019 and 2 December 2019 on the attorney and client scale.
- [16] For convenience this order will be referred to as “the Windell Order”. Again, it is necessary to set out the Windell Order in full. It provides as follows:

“IT IS ORDERED THAT:

1. The matter is referred to trial.
2. The notice of motion stands as a simple summons.
3. The answering affidavit will serve as the notice of intention to defend.
4. The reserved costs before Coppin J are awarded to the Applicant/Plaintiff [Ms Retief] on an attorney and client scale.
5. The wasted costs incurred by the Applicant/Plaintiff on 02/12/2019 are awarded to the Applicant/Plaintiff [Ms Relief] on an attorney and client scale.
6. The wasted costs incurred by the Applicant/Plaintiff on 02/12/2019 shall be paid to the Applicant/Plaintiff [Ms Retief] from the deceased estate and the First Respondent [Mr Soares] shall reimburse such costs to he deceased estate.”

[17] Notably, the Windell Order did not confirm or expressly extend the rule nisi. It is unnecessary for the purposes of this judgment to consider the implications of this, save to say that there is no justification for a contention that Ms Retief became the executrix (as opposed to the interim executrix), pursuant to the Windell Order. At best for her, although I make no final findings in this regard, the rule nisi in terms of the Dippenaar Order was impliedly extended until the conclusion of the trial.

[18] No bills of cost have yet been taxed in respect of the costs orders granted by either Judge Dippenaar or Judge Windell referred to above. Nor has any demand been made to the Applicant in respect of such costs orders. This is undisputed. The significance of

this will become apparent below.

[19] In summary then, as matters presently stand, there is a pending trial action between the parties at which the disputes regarding the validity of Ms Evans' wills and who is entitled to be executor of the estate will be ventilated and determined.

The Applicant's Requests for the Estate Bank Statements

[20] During the period from 2 December 2019 until April 2023, little of substance transpired in terms of the pending trial action. Some attempts were made to convene a pre-trial conference but these did not come to fruition.

[21] During April 2023, the Applicant's attorney, Ms Alice Swanepoel, wrote to Ms Retief and requested the estate's bank statements in respect of its Standard Bank Account, number 1[...], ("the estate account") from 7 May 2019, (the date on which Ms Retief was appointed as interim executrix of the estate in terms of the Dippenaar Order) for trial preparation purposes. Ms Retief refused to provide the bank statements on the basis that they were not relevant for the trial. On 15 May 2023, Ms Swanepoel delivered a Rule 21 Notice, in which the estate's bank statements for the aforesaid period were sought, as well as certain other documentation. Again, Ms Retief refused to provide the bank statements, citing irrelevance.

[22] Thereafter, Ms Swanepoel caused a subpoena duces tecum to be issued against Standard Bank for the estate bank statements. This had the desired effect and during August 2023, the Applicant received the statements in respect of the estate account for the period from 7 May 2019 to 7 May 2023.

The Bank Statements

[23] The Applicant says that upon perusal of the bank statements he became alarmed. This was so because the bank statements revealed the following:

- a. First, Ms Retief had failed to make a number of payments in respect of the maintenance of the immovable property and the care of the pets stipulated in the Dippenaar Order.
- b. Second, it appeared that Ms Retief had made a number payments from the estate bank account not authorised by the Dippenaar Order.

- c. Third, Ms Retief had made a series of large payments to herself and one Advocate Andre Knoetze, a member of Johannesburg Society of Advocates, from the estate bank account, purportedly for litigation fees. In this regard, over the period May 2019 to May 2023, Ms Retief paid a total of R967 596.67 into her trust account and a total of R2 451 400.00 to Advocate Knoetze.

[24] The above is borne out by the bank statements themselves as is set out in the table below. In the table, I have attempted to record all the payments made by Ms Retief to her trust account and to Adv Knoetze over the relevant period. I have however not enumerated every instance of Ms Retief's alleged failure to comply with the Dippenaar Order, but have merely given some illustrative examples of this.

DATE	Retief Payments	Retief Payments	Alleged Failure to comply with Dippenaar Order (not exhaustive)
May 2019	R160 000.00	R160 000.00	June 2019 R20 000.00 R40 000.00 R20 000.00 R200 000.00 Unauthorised payment to C L Watson – R8 942.30
July 2019	R50 000.00	R350 000.00	R20 000.00 Unauthorised payment to Sarsband Solutions- R10 000.00
August 2019	R160 096.67	R232 037.50	R50 000.00 Unauthorised payment to C L Watson – R3 130.00
September 2019	R50 000.00	R182 037.50	October 2019 R200 000.00 Unauthorised payment to C L Meyer – R2290.00
October 2019	R200 000.00		No payment towards maintenance of the dogs
November 2019	R130 000.00		No payment towards maintenance of the dogs or birds
January 2020	R50 000.00	R250 000.00	Unauthorised payment to C L Meyer – R1 575.00
February 2020	R35 000.00	R250 000.00	March 2020 R50 000.00 R250 000.00
May 2020	R193 000.00		April 2020 No payment towards maintenance of the birds
July 2020	Paid R1000.00		towards the birds and no other expenses whatsoever
January 2021	Paid R1000.00		towards the birds, R1200.00 towards security and no other expenses whatsoever
February 2021			April 2021 Paid towards the birds and the security company only.
September 2021	R29 325.00		March 2022 R150 000.00
May 2022	R62 500.00		May 2023 R75 000.00
Total:	R967 596.67	R2 451 400.00	

The Anton Pillar Application

- [25] Faced with the estate bank statements, the Applicant launched the Anton Pillar application.
- [26] In his founding affidavit, the Applicant stated that “there is already compelling evidence that the respondents are involved unlawfully and in contravention of the May 2019 Order, in dissipating money from the Late Estate's bank account held with Standard Bank Limited with account number 10108933855, to the value of R3.4 million.”
- [27] The Applicant contended that Ms Retief was not entitled to pay these amounts out of the estate, even if they could legitimately be classified as litigation fees which appeared highly doubtful. Moreover, Ms Retief had written to the Master on 7 June 2021 requesting a directive that litigation fees be paid out of the estate. No such directive was forthcoming. This is undisputed. Notwithstanding this, as the Applicant pointed out, by June 2021 Ms Retief had already paid out approximately R3 million out of the estate, purportedly as litigation fees. As the Applicant pointed out further, nothing of substance transpired in respect of the pending trial action during the period from December 2019 to April 2023 and

yet Ms Retief continued to pay exorbitant amounts to herself and Adv Knoetze over this period.

[28] As far as the costs orders referred to above are concerned, the Applicant contended that, in order to satisfy them, bills of cost were required to be taxed and the taxed costs paid to Ms Retief out of the estate. The Applicant would then be required to reimburse the estate in respect of such taxed costs. As noted above, it is undisputed that no bills of costs have yet been taxed in this regard.

[29] The Applicant contended further that it is evident from the bank statements that Ms Retief is not maintaining the estate or caring for the pets in accordance with the Dippenaar Order.

[30] The Applicant accordingly stated as follows:

“Consequently, I have existing causes of action based on irregular and unlawful payments from the deceased estate, to interdict and remove the first respondent as executrix and to be reinstated as Executor of the Estate Late, thereafter to pursue proceedings both criminally and civilly for the repayment of monies irregularly and unlawfully paid out and if necessary to institute a claim against the fidelity fund, to lay criminal charges against respondents for receiving monies they were not entitled to and to claim legal costs from the respondents.”

[31] The Applicant stated further that:

“In order to do all of this I need the invoices of monies paid from the statements, Retief’s personal bank account, business account and trust account. I also need all communications between her and Adv Knoetze especially about the payments out of the estate.”

[32] Finally, the Applicant contended as follows:

“The respondents are clearly acting in concert and I have a reasonable and objectively sustainable basis for believing that the respondents will have the evidence and information in their possession destroyed or further documents forged in an attempt to render their actions lawful. In this regard, I refer to the evidence set out above relating to Retief’s dissipation of the Estate Late’s

bank accounts.

In the event that the application is not granted I anticipate that I would not be able to find further evidence of Retief’s irregular and unlawful conduct.”

[33] This was the case made out by the Applicant, albeit ex parte, on the basis of which the Anton Pillar Order was granted on 23 August

2023. As stated above, the Anton Pillar Order was executed on 25 August 2023.

The Respondents’ Condonation Application

- [34] The Respondents' answering affidavit in the Anton Pillar application was filed out of time, and condonation is sought. The Applicant opposes the application for condonation and it is accordingly necessary for me to decide it.
- [35] The Respondents' answering affidavit was due on 18 September 2023. It was delivered on 24 October 2023. It was therefore delivered approximately 5 weeks late.
- [36] The Respondents' explanation for the lateness is two fold. First, it is stated that the Respondents were required to oppose an urgent application brought by the Applicant (for the removal of Ms Retief as interim executrix of the estate) on 18 September 2023, the same day on which the answering affidavit was due.[1] Coupled with this, the Respondents state that there was no return date stipulated on the Anton Pillar Order, which caused them to question the validity of the Order and consequently the due date for the answering affidavit.
- [37] There is little merit in the Respondents' second contention. The absence of a stipulated return date on the Order did not bear on the due date for the answering affidavit which was clearly stipulated to be 5 days from the date on which the report of the independent attorney (on the execution of the Anton Pillar Order) was filed, viz 18 September 2023. The first leg of the Respondents' explanation is also less than compelling. Nevertheless, despite the deficiencies in the Respondents' explanation, the delay was not an extensive one and the Applicant has not demonstrated that any prejudice has been occasioned thereby. Furthermore, I am of the view that it is in the interests of justice to decide this application with the benefit of the Respondents' answering affidavit.
- [38] For all these reasons condonation for the late filing of the Respondents' answering affidavit is granted.

The Respondents' Answering Affidavit

- [39] In her answering affidavit, Ms Retief disputes that she is only "interim executrix" of the estate. She contends that this is a "misnomer" and maintains that she was appointed as executrix of the estate in terms of the Opperman Order on 26 February 2019. As far as the Dippenaar Order is concerned, Ms Retief contends that this "lapsed" when the consolidated application was referred to trial in terms of the Windell Order.
- [40] Ms Retief contends that, while she was not permitted to wind up the estate, there were no other limitations on her powers as executrix. She contends as follows:
- "I was, due to the pending disputes with the applicant, not empowered to wind up the estate. I was however also not limited or prohibited from paying for the legal fees incurred or to incur expenses that was reasonable for the estate's assets and its beneficiaries to be maintained."*
- [41] Ms Retief admits that she made the payments reflected in the bank statements and recorded in the table above, including those made from the estate to herself and to Adv Knoetze. She maintains that she was entitled to do so.

- [42] Ms Retief asserts that she is accountable in respect of the maintenance and winding up of the estate only to the Master and not to the Applicant, or anyone else.
- [43] For the rest, Ms Retief makes a number of allegations of impropriety against the Applicant, which while serious, are not directly relevant to the Anton Pillar application. Ultimately, Ms Retief contends that the Applicant has failed to satisfy the requirements for an Anton Pillar Order and that the rule accordingly stands to be discharged.
- [44] Ms Retief is incorrect in her assertion that she is executrix of the estate by virtue of the Opperman Order of 26 February 2019. It will be recalled that the Opperman Order was granted on an interim ex parte basis, by way of a rule nisi with a return day. The rule nisi lapsed but was revived, on application by Ms Retief, by the Dippenaar Order. The Dippenaar Order consolidated the applications to be heard on the return day which was initially set for 19 August 2019 but extended several times. The Dippenaar Order appointed Ms Retief interim executrix, with limited powers and functions, pending the outcome of the consolidated application. The fact that the consolidated application will now be dealt with by way of a trial action in accordance with the Windell Order, does not mean that Ms Retief became the appointed executrix.
- [45] Nevertheless, as noted above, it is not necessary for me to make a final decision on which of the parties could lawfully act as the executor after the Windell Order. Suffice to say that there is simply no justification for Ms Retief's assertion that she has been appointed as the executrix of the estate by virtue of either the Opperman Order or the Windell Order. At best for her, she remains interim executrix of the estate, with the limited powers and functions set out in the Dippenaar Order pending the outcome of the trial.

The Requirements for an Anton Pillar Order

- [46] It is well established that in order to obtain an Anton Pillar Order, an Applicant bears the onus to establish the following:
- a. First, that the applicant has a prima facie case against the respondent.
 - b. Second, the remedy must be the only practicable means of protecting the applicant's rights.
 - c. Third, the evidence to be attached must be material to the applicant's case.
 - d. Fourth, it must be clear that the incriminating evidence is in the possession of the respondent.
 - e. Fifth, reasons must be given for the belief that the evidence may be removed or destroyed.
- [2]

The Respondents' Arguments

- [47] The Respondents oppose the confirmation of the Anton Pillar Order on two bases.

- a. First, the Respondents dispute that the Anton Pillar Order was the only practicable means of protecting the Applicant's rights.
- b. Second, the Respondents contend that the Applicant failed to set out sufficient reasons for the belief that the evidence may be removed or destroyed.

Discussion

[48] In support of the first ground of opposition, the Respondents cite, correctly, the well established principle that "if the applicant can obtain the same evidence in some other way, without undue hardship, the procedure of attachment without notice should not be followed."^[3]

[49] The Respondents then contend as follows:

"The applicant's only real complaint against the respondents is the payment of legal fees from the estate late."

"Remarkably, all such expenses are shown in the bank statements in possession of the applicant (and even annexed to the Anton Pillar application)."

- [50] The Respondents contend that since the Applicant was already in possession of the bank statements, he did not need the evidence obtained in terms of the Anton Pillar Order for the further proceedings foreshadowed in the application. In other words, the Respondents contend that the evidence sought by the Applicant through the Anton Pillar Order is not necessary for the protection of his rights.
- [51] The Respondents, however, fundamentally misconceive the Applicant's case. The Applicant's case is that the Respondents have unlawfully, and in violation of the Dippenaar Order, dissipated the estate funds, to the tune of over 3 million rand. The Applicant accordingly seeks to institute proceedings to interdict Ms Retief from dealing further with the estate and to recover monies that may be found to have been unlawfully paid out of the estate.
- [52] As stated above, there is no basis for Ms Retief's contention that she is the executrix of the estate. Notably, if as contended by Ms Retief, the rule nisi revived by the Dippenaar Order lapsed by virtue of the Windell Order, then the status quo prior to the Opperman Order would be restored, in other words it would be the Applicant and not Ms Retief who would be the executor of the estate. It is a matter of grave concern that Ms Retief, an attorney of this Honourable Court, can contend that she is the executrix of the estate in these circumstances. Also a matter of grave concern is that enormous sums of money have been paid by Ms Retief to herself and Adv Knoetze, out of the estate, over an extended period. I note that even on Ms Retief's own version, namely that she became the lawful executrix of the estate following the Windell Order in December 2019, large sums of money were paid to Ms Retief and Adv Knoetze, in apparent contravention of the Dippenaar Order, between 7 May 2019 and 2 December 2019. Not only are Ms Retief's payments out of the estate prima facie unauthorised, but the Applicant is correct that it appears to be highly questionable,

given the limited litigation between the parties thus far, that all these payments can be justified as litigation fees.

- [53] It is of course not necessary for me to make any definitive findings in this regard and I decline to do so. I need only be satisfied that the Applicant has a prima facie case against the Respondents. For the reasons given above, I am so satisfied. The first requirement for an Anton Piller Order is accordingly met.
- [54] In order to pursue proceedings against the Respondents, the Applicant requires not just the bank statements, but the documents underlying the suspicious transactions revealed therein, namely, the invoices pertaining to monies paid out of the estate, relevant communications between Mr Retief and Adv Knoetze and the like. This is the evidence which was the target of the Anton Pillar Order. The Respondents appear to fail to appreciate this.
- [55] This evidence (which is potentially incriminating) is both material to the Applicant's case and in the possession of the Respondents. The third and fourth requirements for an Anton Pillar Order are accordingly met.
- [56] In this case it is the (prima facie) unlawfulness of Ms Retief's conduct and the fact that she appears to be acting in violation of the Dippenaar Order (even on her own version that she became the executrix on 2 December 2019) that give rise to the belief that the evidence may be removed or destroyed. I am satisfied that this belief is reasonable in the circumstances and that it has been sufficiently pleaded by the Applicant. The fifth requirement for an Anton Pillar Order has accordingly been met.
- [57] The requirement that an Anton Pillar Order must be the only practicable means of protecting the Applicant's rights must be understood in conjunction with the requirement that there be a reasonably held belief that the evidence may be removed or destroyed.
- [58] The Respondents suggest that the Applicant should have used the normal discovery processes to obtain the evidence sought or simply awaited Ms Retief's liquidation and distribution account. Given the Applicant's reasonably held belief that the evidence may be removed or destroyed, neither of these options would have adequate and I am satisfied that the Anton Pillar Order was, in the circumstances of this case, the only practicable means of protecting the Applicant's rights. The second requirement for an Anton Pillar Order is therefore met.
- [59] In the result I am satisfied that the Applicant has established all the requirements for an Anton Pillar Order and that the Respondents' grounds of opposition are without merit.

The relief

- [60] In the Applicant's Notice of Motion, the relief sought on the return day was the following:

1. The order of 23 August 2023 is confirmed against the first and second respondents in the following terms:

1.1 that the identified items pertaining to the search at the premises of the first and second respondents, in the custody of the sheriff as set forth in the sheriff's inventory, annexed hereto as "A", shall be retained by the sheriff pending the further direction of the Court;

1.2 the applicant is permitted to:

1.2.1 make copies of the identified items in the custody of the sheriff; and

1.2.2 take possession of the two forensic copies of hard drives of any digital devices or media in the custody of the sheriff, for the purposes of instituting further proceedings against the respondents foreshadowed in this application.

1.3 the applicant is directed to institute proceedings against the first and/or second respondents within sixty (60) days of the confirmation of the 23 August 2023 order.

1.4 The costs of this application are reserved for determination in the further proceedings to be instituted by the Applicant foreshadowed in this application, save that:

1.4.1 if no proceedings are instituted within sixty (60) days of the confirmation of the Rule Nisi, either party may, on no less than 96 hours notice to the other, apply to this Court for an order determining liability for such costs and determining what must be done about the identified items and any copies thereof;

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

[61] Despite the aforesaid, at the hearing of the application, the Applicant sought the costs of the Anton Pillar application against Ms Retief personally.

[62] Counsel for the Respondents, Mr Fouche, contended that this was not competent. He pointed out that we are dealing here with a rule nisi in which the Court has already made an order reserving costs in accordance with the Notice of Motion. Moreover, the rule nisi served to define the parameters of the case that the Respondents had been called upon to meet. Therefore, on the return day, submitted Adv Fouche, the Court should merely confirm or discharge the rule, and was not at liberty to amend the terms thereof.

[63] I am in agreement with Mr Fouche's submissions in this regard. I intend to confirm the rule.

[64] In the circumstances, I make the following order:

Order

1. Condonation for the late filing of the Respondents' Answering Affidavit is granted.

2. The order of 23 August 2023 is confirmed against the First and Second Respondents in the following terms:
 - a. the identified items pertaining to the search at the premises of the First and Second Respondents, in the custody of the Sheriff as set forth in the Sheriff's inventory, annexed hereto as "A", shall be retained by the sheriff pending the further direction of the Court;
 - b. the Applicant is permitted to:
 - i. make copies of the identified items in the custody of the Sheriff; and
 - ii. take possession of the two forensic copies of hard drives of any digital devices or media in the custody of the Sheriff, for the purposes of instituting further proceedings against the Respondents foreshadowed in this application.
 - c. the Applicant is directed to institute proceedings against the First and/or Second Respondents within sixty (60) days of the confirmation of the 23 August 2023 order.
 - d. The costs of this application are reserved for determination in the further proceedings to be instituted by the Applicant foreshadowed in this application, save that:
 - i. if no proceedings are instituted within sixty (60) days of this order, either party may, on no less than 96 hours notice to the other, apply to this Court for an order determining liability for such costs and determining what must be done about the identified items and any copies thereof;
 - ii. any other person affected by the grant or execution of this order may, on no less than 96 hours notice to the parties hereto, apply to this Court for an order determining liability for the costs of such person and determining what must be done about any of the identified items pertaining to such person or any copy thereof.

JUDGE OF THE HIGH COURT

JOHANNESBURG

Date of Hearing: 14 February 2024

Date of Judgment: 13 August 2024

Appearances:

For the Applicant: L Grobler instructed by Alice Swanepoel Attorneys

For the Respondents: G v R Fouche instructed by Gerhard Botha Attorneys

- [1] This application was struck from the roll for lack of urgency.
- [2] Supercart SA (Pty) Ltd v Vanesco (Pty) Ltd and Another [2024] 1 All SA 455 (GJ).
- [3] See for example: Roamer Watch Co SA and Another v African Textile Distributors also t/a MK Patel Wholesale Merchant and Direct Importers 1980

(2) SA 254 (W) at 272H.

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Prepared on 8 October 2026 · Esheria