

SOUTH AFRICA / JUDGMENT

Viziya Corporation v Collaborit Holdings (Pty) Ltd and Others (1189/17) [2018] ZASCA 189; 2019 (3) SA 173 (SCA) (19 December 2018)

[2018] ZASCA 189

COURT

Supreme Court of Appeal

BEFORE

Wallis, Saldulker, Mathopo, Van der Merwe, Rogers

CASE / FILE NUMBER

1189/17

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1189/17

In the matter between:

VIZIYA CORPORATION APPLICANT

and

COLLABORIT HOLDINGS (PTY) LTD FIRST

RESPONDENT

JANNIE POTGIETER SECOND

RESPONDENT

NICO VAN DER WALT THIRD

RESPONDENT

DOLF MARITZ FOURTH

RESPONDENT

MORNÉ PARSONS FIFTH

RESPONDENT

JOHAN CARSTENS SIXTH

RESPONDENT

WERNER ROESTORF SEVENTH

RESPONDENT

KUBAN NAIDOO EIGHTH

RESPONDENT

Neutral Citation: Viziya Corporation v Collaborit Holdings (Pty) Ltd & others (1189/17) [2018]
ZASCA 189 (19 December 2018)

Coram: Wallis, Saldulker, Mathopo and Van der Merwe JJA and Rogers AJA

Heard: 22 November 2018

Delivered: 19 December 2018

Summary: Anton Piller order – requirements – necessity for evidence of prima facie existence of vital documents and materials – electronic searches – need for specificity in regard to objects of search – purpose of order not to give the applicant access to documents or material or to search for evidence on which to base claim – not to be used to obtain early discovery

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Van Nieuwenhuizen J sitting as court of first instance):

1 The respondent's application to lead further evidence on appeal is dismissed with costs.

2 The application for leave to appeal is dismissed with costs including costs consequent upon the employment of senior counsel.

Mathopo JA (Wallis, Saldulker and Van der Merwe JJA and Rogers AJA concurring):

Introduction

[1] Certain businesses, particularly those operating in the oil and gas and metals and mining industries, employ enormous quantities of plant, equipment and heavy machinery, which require maintenance. Organising their maintenance in an efficient manner and, where

applicable, taking advantage of warranties by the suppliers of the plant, machinery and equipment, requires considerable planning, to minimise or avoid 'downtime' and to limit the extent of, or avoid entirely, plant shutdowns. The applicant, Viziya Corporation (Viziya), develops and sells computer systems and software that assist businesses in performing this task. Its flagship product is referred to as 'WorkAlign'. It claims that this product is unique in the field, very successful and that it took a considerable amount of time and money to develop.

- [2] On 25 August 2014 Viziya concluded an agreement with the first respondent, Collaborit Holdings (Pty) Ltd (Collaborit), in terms of which Collaborit was to facilitate the referral and sale of Viziya products and services. In return for this it would be paid fees in accordance with a formula set out in the agreement. This case revolves around two provisions in clause 5 of that agreement. The first required Collaborit to use all necessary precautions to ensure that disclosure of Viziya's proprietary property would not be made available to a competitor or a suspected competitor of Viziya. The second provided that:

'Other than [Collaborit's] existing Mobility software product, [Collaborit] shall not sell or develop solutions that are competitive

to existing Viziya products.'

- [3] The agreement terminated on 10 January 2016, pursuant to notice given by Collaborit on 10 November 2015. Viziya alleged that during the period of the contract and in breach of the quoted provision of clause 5, Collaborit developed both a work scheduler and a warranty tracker for its own product described as Work Manager Work Bench (WMWB). It alleged that these products did not exist when the agreement was concluded and that Collaborit endeavoured to market this product in competition with Viziya's WorkAlign product. Additionally, Viziya contended that, in developing its own work scheduler and warranty tracker, Collaborit made use of confidential information it had obtained from Viziya pursuant to and during the course of the contract. Lastly, it alleged that in March 2016 Collaborit engaged in unlawful competition with Viziya by sabotaging its endeavours to sell the WorkAlign product to Anglo American. It said that Mr Maritz, the fourth respondent, attended marketing presentations it made to Anglo American on 31 March 2016 and 1 April 2016, representing himself as an employee of Anglo American and taking the opportunity to persuade the representatives of Anglo American not to acquire Viziya's WorkAlign product but to build an appropriate solution in-house.
- [4] Based on these allegations Viziya brought an application for an Anton Piller order in the Gauteng Division of the High Court, Pretoria on 12 May 2016. As is customary with such applications, it was brought ex parte and was heard in chambers by Mabuse J. He granted an order as prayed for by Viziya. After service of the order and its partial execution, Collaborit and second to eighth respondents, who are either directors or employees of Collaborit, applied to set aside Mabuse J's order ('the reconsideration application'). The application was heard by Janse van Nieuwenhuizen J. She handed down judgment on 3 August 2017, setting aside Mabuse J's order. Thereafter she refused leave to appeal. An application for leave to appeal addressed to this court was referred for oral argument in terms of s 17(2)(d) of the Superior Courts Act 10 of 2013 (the Act). That is the matter before us.

Issues

- [5] There is a preliminary issue arising from an application to lead further evidence on appeal. The main issues are whether leave to appeal should be granted and whether the high court exercised its discretion properly when it discharged the Anton Piller order.

Application for leave to appeal

- [6] The high court found that Viziya had satisfied the first two requirements of an Anton Piller order namely that (1) Viziya had *prima facie* established a cause of action against Collaborit which it intended to pursue; (2) Viziya had in its possession documents or things which constituted vital evidence in substantiation of Viziya's cause of action (but in respect of which Viziya could not claim a real or personal right). It, however, held that Collaborit failed to establish that there was a real and well-founded apprehension that this evidence might be hidden or destroyed or in some manner be spirited away by the time the case came to trial or to the stage of discovery. It accordingly discharged the Anton Piller order. Whether leave to appeal should be granted is bound up with the prospects of success and I will deal with the two together.

Application to lead further evidence

- [7] Collaborit brought this application in terms of s 19(b) of the Act. It arose in these circumstances. In terms of the order granted by Mabuse J the hard drives of computers and other devices were to be imaged and searched for relevant documents by the forensic services arm of Price Waterhouse Coopers (PWC). It is common cause that the Anton Piller order was executed on or about 13 May 2017, resulting in the copying of all forms of digital and physical information at the premises of Collaborit by PWC. The aforesaid information included laptops, phones, external hard drives, email accounts, SAP Systems, shared online storage environments, copies of all handwritten notes or documents and even pictures of white board sketches. On 31 May 2017 Fabricius J made an order that no one might access or examine the documents, or copy information that had been preserved, pending the finalisation of the reconsideration of the order.
- [8] During October 2017, Collaborit sought to inspect the preserved information in the care of PWC. Upon inspection of the records in the custody of PWC, it emerged that nine hard drives 'had gone missing' from the custody of PWC. During October 2017 Collaborit's attorneys corresponded with Viziya's attorneys with a view to obtaining access. Permission was granted. However, before the access was actually exercised, PwC advised Collaborit's attorneys that nine hard drives were missing. Collaborit's attorneys then corresponded with PwC attorneys. At first PwC's attorneys refused to grant access. Following an urgent application, which Collaborit issued in late November 2017, PwC's attorneys eventually agreed to allow an inspection by a suitable expert for Collaborit. This inspection took place on 10 April 2018 and was the first occasion on which anyone on Collaborit's behalf inspected the imaged material. By this time Collaborit had known for around five months that nine hard drives were missing. The expert who inspected the remaining material on 10 April 2018

found that some of the material had been accessed subsequent to Fabricius J's order of 31 May 2016, although according to PwC only its own staff ever had access to the material. Disturbed by the loss of the hard drives, Collaborit addressed a letter to PWC requesting information about the hard drives and persons who might have accessed them. PWC, through its attorneys, denied that it had authorised anybody to access the documents and further stated that it became aware of the missing hard drives during the period 25 October 2017 to 5 November 2017. It undertook to allow independent experts to examine when last those hard drives, still in the possession of PWC, were accessed. After examination, the expert concluded that the hard drives had been processed and accessed after 31 May 2017. This is broadly the new evidence that Collaborit sought to have admitted on appeal.

[9] It is clear that Collaborit knew as early as October 2017 that the hard drives were missing. Viziya's application for leave to appeal to this court is dated 14 November

2017. The opposing affidavit was dated 13 December 2017 and contained a letter from PWC's attorney indicating that his client was withdrawing from performing any function in terms of the Anton Piller order. An earlier letter advised of the missing hard drives. The application to lead further evidence was only brought in July 2018

and related to both the application for leave to appeal and the appeal itself, if leave were to be granted. The only additional

information it provided was that some of the remaining hard drives had apparently been accessed in breach of the order of Fabricius J. Viziya opposed the application on the basis that there was a delay on the part of Collaborit and no proper explanation proffered for bringing the application so late. This is true, although Collaborit didn't know about such illicit access until its expert inspected the material on 10 April 2018. I agree with Viziya that, at the latest, Collaborit should have brought this application much earlier during the application for leave to appeal. More importantly, however, is that the proposed new evidence is not weighty or material. It is not relevant to the question of whether the Anton Piller order was correctly discharged. There is accordingly no merit in this application.

Background facts

[10] Viziya is a company registered and incorporated in Canada. It specialises in developing and selling third party/add-on Enterprise Asset Management (EAM) software solutions for Enterprise Resource Planning (ERP) systems. Specific software solutions that form part of Viziya's WorkAlign Suite of products include a graphical scheduler, a web-based warranty tracker and an analytic tool. The customer base of Viziya consists mostly of asset intensive companies that operate in the natural resources industries. To enable customers to optimise their asset management process Viziya developed and refined its WorkAlign Suite of its products. The WorkAlign Suite comprises the following solutions:

A. A Work scheduler;

B. A pre-packaged Asset Management analytics & cloud analytics suite (an alternative solution compared to the traditional development of Business Warehouse reports);

C. A Maintenance budgeting solution;

D. A Warranty tracker;

E. A Mobile solution (a mobile solution to be used by persons in the field).

[11] Viziya explained that this software is sold as 'bolt-on' products, in the sense that it is compatible with and can be bolted on to any ERP software product. The work scheduler is Viziya's main product and takes an asset-centric approach to planning and scheduling maintenance to enhance each step in the work management process. The WorkAlign scheduler was said to focus on assets using Viziya's patent pending technology. The solution eliminates Preventative Maintenance work order and scheduling surprises and the Preventative Maintenance focus process gives the customer insight into its future needs. Viziya's WorkAlign Suite was said to be unique because of its range of focus and richness in functionality.

[12] Viziya contended that during May 2014, while co-sponsoring the 'Mastering SAP Conference' in South Africa, it became aware of Collaborit, as a consulting company in what it referred to as the asset management space. Later that year it did a presentation and proposal to Anglo Platinum with a view to selling some of its WorkAlign products to Anglo Platinum. It came to the attention of Collaborit that Viziya had made a presentation to Anglo Platinum. Collaborit's Director, Mr Nico van der Walt (Van der Walt), by email offered to assist Viziya with the sale of its product. Van der Walt indicated to Viziya that Collaborit wished to explore the possibility of rendering implementation services for Viziya. In the email sent to Viziya Van der Walt set out Collaborit's proposal as follows:

'We at Collaborit are aware that you have done a presentation to Anglo American (Amplats) in respect of the Viziya products. Since we are intimately involved at Anglo Platinum, at various levels, we may be able to assist this effort of yours with our local presence (if practical). We would also like to explore with you the possibility of rendering the implementation services (with your support) should you have a successful sale of Amplats.'

[13] In another email sent on 5 August 2014 Van der Walt informed Viziya that Collaborit was involved in discussions with another company that was looking to enlist the services of Prometheus, one of Viziya's global rivals. He promised Viziya that he would recommend to the mining company, which later according to the evidence, turned out to be Anglo American, to demonstrate Viziya's products as an alternative to Prometheus.

[14] The discussions between Van der Walt and Viziya led to the signing of a Referral and Sales Agreement on 26 August 2014. In terms of the agreement Viziya would be the vendor and Collaborit would promote the sale of these products (also known as solutions) on the basis that Collaborit would be a consulting agent (ie not a software product vendor). Collaborit agreed to facilitate the referral and sale of Viziya's products on the understanding that Viziya

would retain all of the intellectual property rights in its products. In terms of clause 5 of the agreement Collaborit agreed not to sell or develop solutions that were competitive to Viziya's products but promote them. Collaborit further agreed not to modify, reproduce duplicate or copy Viziya's products or software.

Litigation history

[15] On 18 November 2015 Collaborit gave notice of its intention to terminate the agreement. Hahn & Hahn Attorneys, on behalf of Viziya, wrote a letter to Collaborit on 11 December 2015 reminding it of its obligations in terms of the agreement, in particular that it should not sell or develop solutions that were competitive with Viziya's products. It was further pointed out to Collaborit that their obligations of confidentiality and undertakings in regards to proprietary information would endure beyond the agreement. A written undertaking to desist from allegedly unlawful conduct and to retain all its records, was met with a denial from Collaborit that it had breached the agreement. Mr Potgieter, the managing director of Collaborit, in his response stated that Collaborit's WMWB product had been in the market for years before the agreement was signed. He also stated that the termination of the agreement came about because Viziya did not adhere to its obligations in terms of the agreement. As a result Collaborit refused to give any

undertaking. Despite threats of litigation Viziya did nothing until six months later in May 2016.

[16] On 7 May 2016 a former employee of Collaborit, later identified as Mr Dreyer (former Operations Manager), informed Mr Visser of Viziya that during the course of 2015, when the contract was still in existence, Collaborit developed a scheduler in breach of the agreement. According to Dreyer, although the scheduler was initially customised to the structure of the SAP user interface, it had features of a user interface similar to Viziya's WorkAlign Scheduler (its web-based graphic scheduler). It was also revealed to Visser that Collaborit had sub-contracted a company based in India, Maventic, to assist them with the development of their web-based interface. Another former employee of Collaborit, one Ferndale, provided Viziya with information that on one occasion when employed there he was prevailed upon by Collaborit's CEO Mr Potgieter (the second respondent) to give his password to Mr Parsons (the fifth respondent, a SAP solution specialist in Collaborit's employ) so that Parsons could examine Prometheus' SAP solution.

[17] As a result of the above information, Viziya formed the view that by advertising its scheduling solution and becoming a product

development or vendor enterprise during the contract period, Collaborit was in breach of the agreement. Once it transpired that

Collaborit was now marketing an EAM BW report pack on its website. Mr Vujicic, the President and Chief Executive Officer of Viziya, the deponent to its founding affidavit, surmised that Collaborit started such development during the currency of the contract.

- [18] Spurred on by this Viziya brought an urgent ex parte application in the Gauteng Division of the High Court, Pretoria in which it sought an Anton Piller order against Collaborit for the preservation of evidence and documents relating to breach of contract and unlawful competition.
- [19] The allegations made in support of the ex parte order appear from the founding affidavit of Mr Vujicic. He averred that whilst the contract was extant, Collaborit developed and sought to sell a rival solution to WorkAlign that was based and dependent on Viziya's confidential and proprietary information. He claimed that Collaborit changed from a consulting and maintenance support business to a product developer. It was Viziya's view that because Collaborit had been privy to their products and all matters incidental thereto, and having changed the nature of their business, Collaborit was unlawfully using their proprietary and confidential information. It considered the conduct of Collaborit be a breach of clause 5 of the agreement.
- [20] Viziya also averred that at a sales and marketing presentation it made to Anglo American on 31 March 2016 and 1 April 2016, an employee of Collaborit, Mr D Maritz (Maritz), was present. He sat in the meetings involving a product demonstration as a representative of Anglo American. Viziya contended that, while being an adviser on the acquisition of Viziya's solution, he was at the same time marketing and selling Collaborit's solutions and that this amounted to unlawful competition. It was contended that Maritz was represented as an employee of Anglo American, when in fact he was not. According to Viziya Maritz gathered information about Viziya's products and wanted to milk information, knowledge and skills from Viziya without promoting their products.
- [21] The Anton Piller order directed Collaborit to grant access to the Deputy Sheriff, two independent attorneys, anyone of the forensic specialists employed by PWC, all of whom were named in the order, to search and seize documents specified in the order, computer equipment or any other storage devices. In terms of the order Collaborit could anticipate the order on 24 hours' notice and seek its reconsideration order. On 31 May 2017 the matter came before Fabricius J for reconsideration. It was postponed to a later date to be arranged with the Deputy Judge President of that court. Fabricius J made an order that no one might access or examine the imaged documents. On 12 April 2017 the reconsideration application came before Van Nieuwenhuizen J, who disposed of it as described above.

An Anton Piller order

- [22] The requirements for an Anton Piller order were stated by Corbett CJ in *Shoba*[1] 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 by Corbett JA in *Universal City Studios Inc. v Network Video (Pty) Ltd*, 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, and the applicant asks the Court to make an order designed to preserve the evidence in some way” ‘

- [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.[2] The cause of action must already exist and the preserved evidence must be identified.

A prima facie case.

- [24] It will be recalled that Viziya's claims against Collaborit were based on breach of contract and unlawful competition. The claim in contract was based on a breach of clause 5 of the agreement concluded between the parties. The case for Viziya is primarily based on two alleged breaches of the agreement between the parties namely, the development and sales of a solution competitive to existing products of Viziya, and the use of confidential and proprietary information. The cornerstone of Viziya's case was that because Collaborit had developed a workplace scheduler and a warranty tracker, it must have developed them during the contract period and must have used the proprietary and confidential information of Viziya.
- [25] The claim based on unlawful competition arose from the allegation that Mr D Maritz of Collaborit and Mr Van der Walt by Webex, attended the demonstration of Viziya’s product to Anglo American on 31 March and 1 April 2016 without disclosing that he was an employee of Collaborit.
- [26] Before us it was submitted by Collaborit that it was never the intention of the parties that it would cease its core business of development of products and solutions, because what it was expected to receive in terms of the agreement was very little by way of compensation. It said that it was clearly not intended that it would cease its own business activities. The argument advanced was that Collaborit’s solutions were developed prior to the conclusion of the contract and independently of Viziya's products and materially differed in nature and functionality with the products of Viziya. Denying any breach of contract on its part, it relied on the affidavit of Potgieter when he stated as follows:

’40. The First Respondent’s solutions are integrated SAP solutions. This means that the First Respondent’s products can effectively be thought of as forming part of the client’s version of the SAP program or framework itself. The First Respondent’s

programs access SAP databases to amend, store or display information internally of the SAP program. It can be described as injecting

computer coding into the clients' version of the SAP program to add specific functionality or refine it.

41. The Applicant's WorkAlign suite of solutions are entirely "bolt on" solutions. This means that the solutions or programs run completely independent of the SAP program and have to access information stored in SAP databases through an interface. An easy way to explain it is that the bolt on program "talks" to the SAP program to do tasks (Two separate and distinct running in isolation, but able to communicate with each other). The bolt on solutions do not amend or extend the core code of the client's version of the SAP program but add functionality.'

[27] Collaborit contended that in terms of the agreement the limitation pertained to competing directly with Viziya's bolt-on

solutions. It was submitted that its solutions and products were developed prior to the conclusion of the agreement. The contention of Viziya that Collaborit was bound by the terms of the agreement not to do any work in competition with Viziya must be analysed against the evidence of Collaborit. In view of the fact that the agreement was limited to a small commission in respect of the sale of Viziya's products, it is difficult to comprehend that Collaborit was expected to cease its business operation in the circumstances. So, while it may be so that Collaborit would not have understood the agreement as precluding it from marketing its WMWB, it is hotly contested that the pre-existing WMWB was seriously competitive to Viziya's WorkAlign product. There was clear and unchallenged evidence that its WMWB solution existed before the relationship with Viziya. It is certainly improbable that it would have been willing to abandon this in favour of a possible modest commission.

[28] On the other hand, the evidence of Mr Dreyer, although produced at a late stage of the proceedings, is direct evidence of efforts to develop elements of the WMWB solution that overlapped clearly with the WorkAlign product. Bearing in mind the low hurdle that has to be cleared in showing a prima facie case and given the fairly clear language of clause 5 of the agreement it seems to me that a prima facie case has been made that Collaborit breached the provisions of its contract. Whether that case can be sustained at trial is a different matter with which we do not need to concern ourselves.

[29] Insofar as the case based upon use of Viziya's confidential information is concerned it suffers from the deficiency that Viziya never identified what was confidential about its WorkAlign solution. Nor did it identify precisely what confidential information it provided to Collaborit.[3] The only document it identified was a sales introduction letter, which had nothing confidential in it and was in fact sent to clients from which Viziya wished to solicit business. There was no evidence of Collaborit and its employees being given any information about the product that could be classified as confidential. It was not suggested that it had been given any information concerning the underlying computer code or anything that would enable it to manufacture a competing product. Mere knowledge that Viziya had such a product – a fact widely advertised on its website – is not sufficient to make

a case of use of confidential information. On this aspect of its case Viziya did not make a prima facie case

[30] I now consider Viziya's claim based on unlawful competition. As I have said this case was founded on the allegations that Mr D Maritz (Maritz), an employee of Collaborit and Van der Walt via Webex, attended the meeting organised by Anglo American on 31 March and 1 April 2016 without disclosing that he was an employee of Collaborit. Relying on the notes prepared by Vujicic it was submitted on behalf of Viziya that the conduct of Maritz amounted to unlawful competition in breach of the agreement. The high court disagreed with Viziya and held that it was aware that Maritz attended the sales pitch and that what was given was not confidential information about the sales pitch. That finding cannot be faulted. A reading of Vujicic's notes does not indicate that any confidential information was shared. Mr Jordaan of Viziya was aware that Mr Maritz was an employee of Collaborit. It is plain that

he was there at the invitation of Anglo American and there was no objection to his presence. The notes indicate that this was a

presentation to a group of people who asked technical questions about how Viziya's product would work in the light of their own technical experience. In my view Viziya failed to satisfy the requirements for an Anton Piller order in respect of this claim.

Specific (and specified) documents or things constituting vital evidence?

[31] When the Anton Piller order was executed about 28 storage devices of Collaborit were copied. They included laptops, phones, external hard drives, email accounts, SAP system shared on line storage environments, copies of all written notes or documents, even pictures of white board sketches. Viziya proposed that 149 keywords be used to comb through this vast trove of information in order to locate what might be relevant to its case. The nature of the keywords entailed a broad and general search.[4] Collaborit's complaint was that because of its general nature it was highly possible that information that did not relate to Viziya's case may be disclosed. It was submitted that the keyword search constituted a risk that the confidential proprietary information belonging to it might be disclosed because of the broad and general nature thereof. To demonstrate the risk in the search engine proposed by Viziya, Collaborit put up by way of an example its client, Sasol. One of the keywords was its name and that would produce multiple systems and process design documents, which in the ordinary course of business should not come into the hands of Viziya.

[32] The major flaw in Viziya's case was not so much the scope of the search, which would always need to be comprehensive, but the failure in its affidavits to identify or specify which vital information was in possession of Collaborit that needed to be preserved. As this court held in para 30 of Non-Detonating Solutions, a blanket search for unspecified documents or evidence, which may or may not exist, is not permitted. Viziya was obliged to identify the documents it sought to preserve with the necessary degree of specificity, possibly by category as occurred in Non-Detonating Solutions. Counsel submitted that 'things have

moved on' since Corbett JA laid down as a requirement for an Anton Piller order that the applicant show a prima facie case of the existence of specific, or specified, documents or things that were vital and required preservation. That is a proposition that must be firmly dispelled. The law has not changed in that regard and this is still a requirement for obtaining an Anton Piller order. This requirement serves the important purpose of balancing the rights of the respective parties and enables the court to assess whether there is a reasonable likelihood that without an order they may be destroyed.

[33] Because the documents and material being sought were not properly identified, PWC and the supervising attorney would be allowed access to all documents defined in broad categories. The ex parte order in para 5 and 6 was wide and expansive. It encompassed more than could possibly have been required to protect Viziya's interest. It granted access to Collaborit's entire business operation to the potential detriment of it and its clients. Once one accepts that there is a prima facie case that Collaborit breached its obligations under clause 5 by developing a competing product, it is logical to infer that there would be evidence of the development of the competing product on the computers and other devices of Collaborit and its employees. But there was no endeavour in the affidavits to identify these items or to confine the scope of the application or the search to that class of documents. Viziya would presumably know what technical documents would have been prepared in that process, especially as it had access to 'inside' information from Mr Dreyer. Yet it did not attempt to identify them or to explain how the list of key words that were to be used to search the whole of Collaborit's data base would serve to confine the outcome of the search appropriately.

[34] Para 5.1.2 of the order provided authority to search for any documents relating directly or indirectly to Collaborit using or deploying any of Viziya's confidential information as defined in the sales agreement. Reference to that agreement showed that it had a very specific and detailed definition of 'confidential information'. First it had to have been disclosed by Viziya to Collaborit. Second it had to relate to 'patents, patent applications, research, product plans, products, developments,

inventions, processes, designs, drawings, engineering, formulae, markets, software, computer programs, algorithms, business plans,

Agreements with Third Parties or the services, customers, marketing or finances' of Viziya.

Third, it had to have been marked

'confidential', 'proprietary' or in some other way to indicate its confidential nature, or to have been

identified as confidential within thirty days of disclosure or by its content or the nature of the circumstances in which it was disclosed ought in good faith to have been dealt with as confidential. Viziya made no attempt to identify the confidential material it had furnished to Collaborit during the course of their relationship that fell within these categories. It did not even say that any information of this character had been disclosed to Viziya. That was the least that could have been expected of it.

[35] It was rightly contended that the proposed keyword search was invasive and a trawling expedition through every aspect of Collaborit's business. In simpler terms it was submitted that because of the general nature of the Anton Piller order, Viziya would potentially secure all the information relating to Collaborit's business, much of which it could not conceivably be entitled to.

[36] In my view identification of vital and specific information is necessary for the preservation of evidence. Its context cannot be widened as Viziya wishes to do. Such information must be measured against what can be obtained through discovery. If a party can obtain information on discovery, then it means that a party does not need an Anton Piller order, unless it shows that what would be discoverable would be concealed or destroyed thereby defeating the purpose of discovery.

[37] The high court erred in categorising the information sought by Viziya as vital and specific. Properly understood it seems to me that the execution of the order was nothing but a fishing expedition. The net effect of the order was that PWC and the supervising attorney would trawl through all documents of Collaborit by means of keywords, with only a very general idea of what they were looking for. It can hardly be denied that the majority of the keywords were simply generic and not limited to the business that Collaborit conducts, but would include any modern business enterprise. That this was a fishing expedition was apparent from the terms of clause 13 of the order, which in material part read:

'The representatives of the applicant and the applicant's attorney, after this Order is executed, are entitled to inspect the documents (or copies thereof) obtained in terms of paragraph 5.1 above, and to inspect the electronic image or printed version of documents or material imaged in terms of paragraph 5.2 above, to assess whether it indeed provides evidence relevant to the present application and to further legal proceedings contemplated by applicant ...' (Emphasis added)

It was unclear whether this is part of a standard order being used in some courts in applications of this type. It bears some resemblance

to the opening paragraphs of the order in *Non-Detonating Solutions*, but nothing in that judgment suggests that this was a disputed issue. It involves a departure from the basic premise upon which Anton Piller orders are granted, namely that they are to preserve evidence, not search for it. An order in those terms should not ordinarily form part of an Anton Piller order and if it is to be sought there must be evidence justifying its inclusion.

- [38] In this case, the breadth of clause 13 reinforced the point that Viziya made no attempt to identify the vital documents that it feared Collaborit might destroy. I accept that there may be instances where the applicant identifies a wider category of documents as vital than the evidence supports, or seeks an order that is broader than the evidence would justify, and that in those circumstances the court may confine the order to that which is supported by the evidence. But an applicant cannot, as occurred in this case make no attempt to identify the documents that it regards as vital and hope that the court will come to their aid by fashioning an order by way of inference and guesswork.
- [39] Considerations of practicality and convenience could render it appropriate for a court to order imaging of hard drives and other storage facilities and subsequent searching thereof by independent persons with the use of keywords. But this must be carefully limited to discovery and preservation of specific and specified documents and information or categories thereof that constitutes vital evidence for the applicant.
- [40] I agree with Collaborit that in the current matter the keywords were cast in the broadest terms and were capable of placing sensitive, confidential and proprietary material of Collaborit and its clients into the hands of Viziya. What is telling about Viziya's case is that it stated in the founding affidavit that it needed to inspect Collaborit's information and documents in order to obtain evidence. In its replying affidavit it stated that the purpose of the application was based on an alleged entitlement 'to see what they were doing during this period'. It was not permissible for Viziya to obtain an Anton Piller order and seize documents in the hope that there was something that would incriminate Collaborit.
- [41] I conclude that the Anton Piller order that was sought and initially obtained was not justified by any evidence of the existence of specific vital documents or material. It materially prejudiced Collaborit by unlawfully exposing its core business and proprietary information. Fortunately for Collaborit the order was discharged albeit for different reasons to which I turn in the next section of the judgment. In view of that it is unnecessary to engage in a painstaking analysis of the order and to compare it with what was granted on a far more specific basis in *Non-Detonating Solutions*.

A reasonable apprehension that Collaborit would destroy or hide evidence.

- [42] As stated earlier the high court discharged the Anton Piller order on the basis that the requisites of the third requirement were not met. To fully appreciate the high court's finding I think it is appropriate that certain facts be put in their proper perspective.

- [43] To recap, Viziya and Collaborit concluded an agreement on 26 August

2014. On 18 May 2015 Collaborit sought to terminate the agreement but the notice was ineffective. This led to an exchange of correspondence between the parties. During November 2015 Collaborit lawfully terminated the agreement. In response Viziya's attorneys wrote a letter to Collaborit on 11 December 2015 alleging that Collaborit had breached the agreement and were unlawfully competing with Viziya. Certain undertakings

were sought from Collaborit inter alia to desist from any unlawful conduct and retain all its records. Collaborit did not furnish the undertaking and denied that it had breached the agreement. Notwithstanding its suspicions as set out in the attorney's letter Viziya did not launch any application. It was only after a period of six months that it launched and obtained an ex parte order on urgent basis.

- [44] Before us, Viziya submitted that it was only after it obtained information from Collaborit's former employees, Dreyer and Ferndale, that its suspicions were confirmed. In the replying affidavit Dreyer stated that Collaborit was a consulting firm, but had been involved in product development during the currency of the agreement. Ferndale also confirmed that during the contract period Collaborit had embarked on the development of a scheduler in breach of clause 5 of the agreement. Ferndale further stated that Collaborit's scheduler was now web-based and competitive with Viziya's WorkAlign Scheduler with the same functionality. He also stated that Collaborit adopted Prometheus products and that he was requested by Mr Potgieter of Collaborit to access Prometheus

software. The sum total of Viziya's submission is that Collaborit and its officials were untrustworthy and dishonest.

- [45] In my view Viziya failed to show that Collaborit was untrustworthy or dishonest. That does not follow from the evidence of Ferndale and Dreyer, or the SMS sent to Dreyer by Potgieter. Properly considered the SMS invited Dreyer to a meeting with Collaborit (Potgieter) to be accompanied by his representative if need be. I fail to see how the SMS can be construed as intimidatory. In a similar vein the events surrounding the Anglo American sales pitch during March and April 2016 cannot give rise to any reasonable apprehension that evidence may be destroyed or hidden by Collaborit. Similarly Ferndale's allegation also cannot pass muster. Ferndale did not explain why he was asked to use his password to access Prometheus software whilst still in the employ of Collaborit. It is clear that the affidavits filed in support of Viziya's case were replete with speculation and conjecture. The test of a reasonable apprehension is an objective one and is based on the view of a reasonable person when confronted with the facts. Viziya failed to set out any factual basis for an objective conclusion to be reached of the well-founded and reasonable apprehension that evidence

would be concealed.

- [46] In argument counsel had no answer to questions from the bench regarding why Collaborit would destroy or conceal information, whilst continuing to market its rival products. Collaborit never denied that it had developed a work scheduler and a warranty tracker. Its attitude was that it was entitled to do so and it marketed these products quite openly. In the circumstances it would make no sense for Collaborit to destroy its documents relating to the development and marketing of these products and objectively there is no reason to believe that it would do so. The product itself, including its coding, could be investigated by an expert on Viziya's behalf (if necessary under terms of confidentiality) to determine to what extent it was copied from Viziya's product. As regards communications with third parties

such as Anglo American or Sasol, being two of the entities mentioned in the key word search, it is inconceivable that they would destroy communications with Collaborit or not produce them under sub-poena duces tecum. So there would again be no point in Collaborit destroying these documents. It follows that the finding of the high court cannot be faulted and that the Anton Piller order was correctly discharged. The merits of Viziya's case are so poor that I agree with the high court that this was not a case where leave to appeal should have been granted.

[47] In short, Viziya's evidence of dishonesty on Collaborit's part was flimsy. Without a substantiated case of significant

dishonesty, there cannot be a reasonable apprehension that a party will destroy or conceal evidence. In every case it is notionally

possible that a litigant will, when it comes to the time for discovery, suppress documents which are adverse to its case. This

notional possibility is not enough. An Anton Piller order is highly invasive and must be restricted to those cases where, inter alia, there is a substantial case for believing that the respondent will not properly honour its discovery duties in due course.

[48] I therefore make the following order:

R S Mathopo

Judge of Appeal

APPEARANCES:

For appellant: D Williams SC

Instructed by:

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Matsepes Inc, Bloemfontein

[1] 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 15F-J. See also Non-Detonating Solutions v Durie 2016 (3) SA 445 (SCA).

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- [2] Van Niekerk and another v Van Niekerk and another [2007] ZASCA 116; 2008 (1) SA 76 (SCA) para 10.
- [3] A matter dealt with in greater detail in para 34 below.
- [4] By contrast in Non-Detonating Solutions there were 41 search terms with a good deal of overlap among them. The entire exercise was limited to items relating to a self-stemming cartridge identical or similar to the applicant's cartridge.
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