SOUTH AFRICAN LAW COMMISSION

WORKING PAPER 12

PROJECT 57

ANTON PILLER-TYPE ORDERS

April 1986

INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

The members of the Commission are -

The Honourable Mr Justice G Viljoen (Chairman).
The Honourable Mr Justice H J O van Heerden (Vice-Chairman).
Prof J T Delport.
Mr P A J Kotzé.
Mr J E Knoll.
The Honourable Mr Justice P J J Olivier.
Mr G G Smit.

The Secretary is Mr Dirk Kruger. The Commission's offices are on the 8th Floor, NG Kerk Sinodale Sentrum, 228 Visagie Street, Pretoria. Correspondence should be addressed to:

The Secretary
South African Law Commission
Private Bag X 668
0001 PRETORIA

Telephone: (012) 26-1121*

PREFACE

This working paper has been prepared by Mr Justice G A Coetzee to serve as a basis for the Commission's deliberations. The points of view, conclusions and recommendations contained herein should not at this stage be regarded as those of the Commission. The working paper is being published in full to provide persons and bodies wishing to comment or to make suggestions for the development, improvement, modernisation or reform of this particular branch of the law with sufficient background information to enable them to place substantiated submissions before the Commission.

Any person or body wishing to make oral representations to the Commission, should submit a brief résumé of his or its proposed representations, together with a request to be heard by the Commission, to the Commission in writing.

It would be appreciated if written comments, representations or requests, could reach the Commission not later than 20 June 1986. Please refer to the previous page for the address to which correspondence should be directed.

HIERDIE STUK IS NET IN ENGELS BESKIKBAAR

ANTON PILLER-TYPE ORDERS

1. THE NECESSITY FOR THIS TYPE OF RELIEF

1.1 That cases which cry out for relief along the Anton Piller lines exist in South Africa is beyond question. One only has to look at the facts of the few reported cases[1] for examples, including those where the rules nisi were ultimately discharged because of the oppressive execution of the orders.[2]

1.2 A typical example is the case of a senior executive of the plaintiff who leaves his employment, together with a number of key personnel, in order to start a similar business in competition with the plaintiff. They unlawfully filch much of the plaintiff's custom. They take with them a lot of the plaintiff's documentation, customer lists and so forth. This material is the plaintiff's property, which he is entitled to have returned to him forthwith. But in addition, the defendants canvass customers of the plaintiff, and their own documentation in this respect is brought into existence. This is their property; the plaintiff is not entitled to possession of it, but it is nevertheless vital evidence in his case which will be destroyed if he were to proceed against the defendant. Apart from these two categories of material which must be preserved, the defendant has other material in his possession. He may, for instance, have been entitled, legitimately, to compete in that field with his former employer and he may have created in addition his own custom which is unconnected with that which the plaintiff enjoyed. This material he is entitled to keep away from the eyes of his competitors but it is intermingled with the other

---

1 Roamer Watch Co SA Ltd v African Textile Distributors 1980 2 SA 254 (W); Wilrose Timbers (Pty) Ltd v C E Westergaard (Pty) Ltd 1980 2 SA 287 (W); Easyfind International (SA) Pty Ltd v Instaplan Holdings 1983 3 SA 917 (W); Petre and Madco Ltd v Sanderson-Kasner 1984 3 SA 850 (W); Cerebos Food Corporation Ltd v Diverse Foods SA (Pty) Ltd 1984 4 SA 149 (T); and Trade Fairs and Promotions (Pty) Ltd v Thompson 1984 4 SA 177 (W).

2 "Anton Piller Orders in S A" 1984 SALJ 324; and "Anton Piller-Type Orders in S A Law" 1985 SALJ 634.

material. If the plaintiff does not have an Anton Piller type of remedy in this case, a failure of justice may very well result. But it will also assuredly result if it is available without a careful exclusion of this latter category of material.

1.3 The example in the previous paragraph is taken from a case in which Goldstone J gave a judgment in the Witwatersrand Local Division (no 28292/83) 10 February 1982 (unreported). The following extract from his judgment shows how necessary this kind of remedy is in certain cases. When the deputy sheriff arrived at the new company's premises, a secretary was actually in the process of tearing up contracts of their previous employers. The learned judge said the following:

> Those statements by Johnson appear in a Court file in another matter, namely in a matter where Vermooten J granted what has become commonly to be called as an 'Anton Piller' order. In terms of the order the Deputy Sheriff was authorised, without notice, to search the premises of the respondent and his new company on the basis that confidential and private documents of the applicant had disappeared. The following appears from the return of service of the Deputy Sheriff:
>
> > 'Please note that at the time of service the first respondent was requested to point out any documents relating to this said case. While first respondent pointed out the documents a female secretary was busy tearing up contracts in the office next door. The applicant's attorney, Mr Duncan, selected pieces from the torn documents out of the waste paper basket and these pieces was put in an envelope and is in our possession.'
>
> It appears from the evidence in that case that the documents in question were contracts of the applicant. The respondent in an affidavit admits that, but states that the contracts in question were copies and not originals and were not in his possession but in the possession of one of the ex-employees of the applicant who followed him to his new company. The truth in regard to those allegations cannot be determined on the affidavits.

1.4 This case also demonstrated how inadequate an order which only relates to the applicant's own property can be at times, and that it was necessary to obtain certain documents which were the respondent's property, documents which showed conclusively how the respondent had unlawfully filched the applicant's custom.

2. THE LEGAL POSITION AT PRESENT

2.1 It has been held, in the Transvaal, that the Anton Piller order is not part of our law and cannot issue.[3]

2.2 It is believed that a similar matter is presently pending in the Appellate Division. Whatever the outcome, it is submitted that a modern Anton Piller-type order should be devised which gives the Court power to make the kind of order suggested later in this memorandum which is designed to do justice without causing the kind of harm to personal and proprietary rights which, more often than not, attended its execution in the past.

3. HISTORY OF THE ENGLISH REMEDY

3.1 To deal meaningfully with a reasonably satisfactory solution of the problems involved, a brief restatement of Anton Piller's early history is desirable. Much can be learnt from it.

3.2 How the remedy which bears this name was invented is best described by Lord Denning in The Due Process of Law.[4] He says:

> In the first case in 1974 the owners had a copyright in sound recordings of Indian music. They found out that a Mr Pandit in a small shop in Leicester was selling infringing copies at a very low price. They issued a writ against him ...
>
> ... They were sure that Mr Pandit had large quantities of infringing materials on his premises; but, if they went through all the usual legal procedures - and served him with process - those infringing copies could disappear. In Mr Justice Templeman's phrase, 'the horse will rapidly leave the stable". So the owners of the copyright made an application - ex parte - for an order enabling them to enter on the

---

3 Economic Data Processing (Pty) Ltd v Pentreath 1984 2 SA 605 (W); Cerebos Food Corporation Ltd v Diverse Foods SA (Pty) Ltd 1984 4 SA 149 (T); Trade Fairs and Promotions (Pty) Ltd v Thompson 1984 4 SA 177 (W) and "Anton Piller Orders in S A" 1984 SALJ 324.

4 (1980) 123-4.

premises and look for the infringing copies. The judge realised that it appeared 'at first blush, to be a trespass of property and invasion of privacy'. But he made the order, see EMI (Ltd & others) v Pandit. ((1975) 1 All ER 418.) Similarly, orders were made in like cases by other Chancery Judges: until one judge doubted the validity of them. Mr Laddie then brought a case before us to test the point. It was again ex parte - so that the other side knew nothing of it. We looked into it all carefully and upheld the new procedure. It is Anton Piller KG v Manufacturing Process Ltd & others. ((1976) 1 All ER 779.) The case was not about records, but about drawings and confidential information.

3.3 In the Anton Piller case Lord Denning MR made an order on the precedent framed by Templeman J in Pandit; and it is to the judgment of Templeman J that one must turn for its genesis. The essence of his order was that the plaintiff's representatives must be permitted to enter the defendant's premises for only two purposes: first, to obtain advance discovery of specified evidential material, documentary and otherwise, for the purposes of an action still to be instituted (this material is the defendant's property and it may not be removed; it may only be inspected and photographed); secondly to remove material which is the plaintiff's property by virtue of its being infringing material. The learned judge emphasises that this kind of order can be justified only by a very strong case on the evidence and where the circumstances are exceptional to this extent, that it plainly appears that justice requires the intervention of the court in this manner and without notice, and that otherwise the plaintiffs may be substantially deprived of a remedy. Furthermore, that the order will be granted only on terms which safeguard the defendant as far as possible and which narrow the relief so far as it might otherwise cause harm to the defendant. He also points out that in essence the plaintiffs are seeking discovery and that this form of discovery will be granted only where it is vital either to the success of the plaintiffs in the action or vital to the plaintiffs in proving damages; in other words, it must be shown that irreparable harm will accrue or that there is a high probability that irreparable harm may accrue to the plaintiffs unless the particular form of relief sought is granted to them.

3.4 The facts in the Anton Piller case which eventually came before the Court of Appeal were briefly the following. The plaintiffs were manufacturers who owned the copyright in the design of a high-frequency

converter used to supply computers. They learned that the defendants, their English agents, were planning to supply rival manufacturers with drawings, material and other confidential information so that they could manufacture power units like those of the plaintiffs. This infringement the plaintiffs wished to restrain, but they were afraid, with good reason, that their agents, if notified, would take steps to destroy the documents or would send them out of the jurisdiction so that there would be none in existence by the time the action reached the stage of discovery of documents. The plaintiffs accordingly applied ex parte for a Pandit-type order, requiring the defendants to permit the plaintiffs to enter the defendants' premises in order to inspect, remove or make copies of documents. When the application came before Brightman J in the Chancery Division, he granted only an interim injunction to restrain infringement; he refused to order inspection or removal of documents. Five days after this refusal Mr. Hugh Laddie had already argued the appeal and obtained his Pandit-type order, which by virtue of one of Lord Denning's famous judgments became the Anton Piller.

3.5 Lord Denning MR quotes Brightman J and then makes one of his memorable statements about the rights to privacy and private property which are held sacred and which are jealously protected by independent judiciaries. He says this:

> Let met say at once that no court in this land has any power to issue a search warrant to enter a man's house so as to see if there are papers or documents there which are of an incriminating nature, whether libels or infringements of copyright or anything else of the kind. No constable or bailiff can knock at the door and demand entry so as to inspect papers or documents. The householder can shut the door in his face and say 'Get out'.

He then proceeds to explain at some length why the Pandit order on which the Court of Appeal was putting its imprimatur was not a search warrant. He continues as follows:

> None of us would wish to whittle down the principle in the slightest. But the order sought in this case is not a search warrant. It does not authorise the plaintiffs' solicitors or anyone else to enter the defendants' premises against their will. It does not authorise the breaking down of any doors, not the slipping in by a back door, not

> getting in by an open door or window. It only authorises entry and inspection by the permission of the defendants. The plaintiffs must get the defendants' permission. But it does do this: It brings pressure on the defendants to give permission. It does more. It actually orders them to give permission - with, I suppose, the result that if they do not give permission, they are guilty of contempt of court.

3.6 Lord Denning MR then accepts that this may seem to be a search warrant in disguise, and for the third time explains why that is not the case. Perhaps the lord doth protest too much. Subsequent development of the principle and its application both in England and South Africa (particularly the latter) has shown that more often than not it is exactly that. A search warrant in disguise. Our local variety very rapidly shed the disguise even and became, without shame, an explicit search warrant, issued in secret. Lord Denning MR then proceeds to lay down the prerequisites for such an order namely: (a) it can be made ex parte but "it should only be made where it is essential that the plaintiff should have inspection so that justice can be done between the parties"; (b) "when, if the defendant were forewarned, there is a grave danger that vital evidence will be destroyed, that papers will be burnt or lost or hidden, or taken beyond the jurisdiction, and so the ends of justice be defeated"; and (c) "when the inspection would do no real harm to the defendant or his case".

3.7 Very conscious of the great potential for harm which lurks in this procedure, he lays down what he considers to be essential safeguards against abuse. He says that in the enforcement of this order "the plaintiffs must act with due circumspection"; that "on the service of it, the plaintiffs should be attended by their solicitor, who is an officer of the court. They should give the defendants an opportunity of considering it and of consulting their own solicitor. If the defendants wish to apply to discharge the order as having been improperly obtained, they must be allowed to do so. If the defendants refused permission to enter or to inspect, the plaintiffs must not force their way in. They must accept that refusal, and bring it to the notice of the court afterwards." He then says:

> We are prepared, therefore, to sanction its continuance, but only in an extreme case where there is grave danger of property being smuggled away or of vital evidence being destroyed.

3.8 The two short concurring judgments of Lords Justices Ormrod and Shaw demonstrate their concern. Ormrod LJ makes an interesting observation, namely that the proposed order "is at the extremity of this court's powers" and that "(s)uch orders, therefore, will rarely be made, and only when there is no alternative way of ensuring that justice is done to the applicant". He says:

> Great responsibility clearly rests on the solicitors for the applicant to ensure that the carrying out of such an order is meticulously carefully done with the fullest respect for the defendant's rights, as Lord Denning M.R. has said, of applying to the court, should he feel it necessary to do so, before permitting the inspection.

Shaw LJ adds that the "overriding consideration in the exercise of this ... jurisdiction is that it is to be resorted to only in circumstances where the normal processes of the law would be rendered nugatory if some immediate and effective measure was not available". Also that "(w)hen such an order is made, the party who has procured the court to make it must act with prudence and caution in pursuance of it".

3.9 These dicta which attended the birth of the Anton Piller in England are eloquent testimony of judicial perception of the likelihood of harm which turned out to be well founded. On the one hand, something had to be done. On the other, the remedy (per Templeman J in Pandit's case) could very well turn out to be draconian, which is precisely how it turned out in many cases. That the Anton Piller's subsequent history proved that even the carefully constructed safeguards were insufficient only shows how difficult it is to divine the future practical application of newly devised legal principles. The ingenuity of the legal profession in the handling of fresh tools knows no bounds, as the line of cases descended from the Court of Appeal judgment shows. This in turn illustrates one of the worst features of judge-made law. Legal practitioners are forever seeking extensions of the newly created precedent. Even if this is sought only inch by inch, much mileage is fairly quickly made. Within seven years the local variety had reached a position far removed from the original Anton Piller, one that was fraught with danger from the moment of its being issued.

3.10 Its subsequent history in England shows that it was a very healthy infant. Rapidly it spread to fields other than that occupied by copyright pirates. Soon the principle was employed against copyright bootleggers. And before long it was a general principle of general application to preserve evidential material whatever the nature of the dispute, even if the material so discovered was only used in an action which had not even been contemplated before. One should note an important feature of this growth in England - that in the country of its birth the order itself was never expanded. It remained the simple short order as constructed by Templeman J in the Pandit case.

4. THE SOUTH AFRICAN, PARTICULARLY THE JOHANNESBURG SCENE

4.1 Unlike the English precedent, its main growth lay in the considerable expansion of the order itself - to the point where it was an undisguised search warrant coupled with an obligation to respond to interrogatories and an attachment order in respect of documentation which is the respondent's property.[5]

4.2 The few reported cases prove that this order was an unmitigated disaster. So much so that it sprouted possibly a necessary, but a very stunted legal growth. This is the further principle that was invented to curb the abuse which frequently accompanied its execution, namely to discharge the rule nisi on the return day for this reason, that is, the oppressiveness of its execution, instead of merely punishing the applicant with a special order as to costs. If the original order is indeed sanctioned by law and was on the facts properly obtained, its subsequent denial for this reason irritates one's juridical instincts. It is simply the displacing of principle with casuistry which is dictated by the exigencies of the moment.

---

5 Typical orders which were issued shortly before its demise can be found in the reports in the cases of Petre & Madco Ltd v Sanderson-Kasner (supra) and Trade Fairs and Promotions (Pty) Ltd v Thompson (supra).

This is probably the inevitable and rather typical result of radical departures from well-established legal principles in the first instance, as opposed to well-ordered development of principle after careful consideration.

4.3 The order made in Cerebos Food Corporation Ltd v Diverse Foods SA (Pty) Ltd[6] by the full bench of the Transvaal Provincial Division can be said to be, in the words of Ormrod LJ, at the extremity of a South African court's powers. The first part was a rule nisi calling upon the respondents to show cause why an attachment order should not be made in respect of certain documents carefully described and listed, all the applicant's property. The interim relief was an order, pending the final decision of the application, for attachment only of those documents, the property of the applicant, and no other. They were those which were listed in the first part of the order. The Sheriff was then authorized to enter the respective premises of the three respondents at particular addresses. That did not mean that he could not attach any of these items wheresoever he happened to find them. These documents could not be handed over to the applicant but had to be held under attachment pending the decision of the application. The respondents were ordered to point out and disclose these documents to the Sheriff, and they were given the right to call their legal representatives to be present at the execution of the order. Only one person on behalf of the applicant could accompany the Sheriff for the purpose of identification of the documents.

4.4 This order cannot even be called an Anton Piller-type order. It is no more than the order ad exhibendum of our common law, which is a daily occurrence in our courts. There is not a trace of any of the elements of the Anton Piller. There is no search, not even a disguised one, no discovery of documents or other evidential material which is not the property of the applicant, and there is no form of interrogation.

4.5 Obviously this kind of order cannot solve the problem of potential plaintiffs in cases where only the Anton Piller could be of any assistance. The reason is that the Anton Piller is a discovery order in respect of not

---

6 Supra.

only the plaintiff's property but also the defendant's property, which is relevant and essential for the plaintiff's case. The further powers of search implied in the Anton Piller are there to give teeth to this order. In other words, it is a discovery which is "taken" and not "given" before any action is instituted in cases where its ultimate success depends upon obtaining this kind of relief by way of discovery in anticipando.

5. A SUGGESTED SOLUTION

In a lecture delivered on 22 August 1985 in the Friends of the Law Students Series, Coetzee J suggested a solution. Extracts from this lecture were published in the South African Law Journal[7] and much of this memorandum is based on that lecture. The following is a reproduction of the last five pages of this publication which contain his suggestion and a description of a possible scenario of its application:

> "This means that statutory relief is the only possibility. What should it be and how is it to be achieved?
>
> It seems to me that a new rule of court is part of the answer. The existing rules 35 and 36 deal with discovery, inspection and production of documents, and with inspections, examinations and expert testimony. These rules could be redrafted to accommodate this kind of relief. However, because a radical change in substantive law is required, the rule-making powers contained in s 43 of the Supreme Court Act (Act 59 of 1959) are not wide enough to permit of such rules. Only rules for 'regulating the conduct of the proceedings' can be made. In addition the Rules of Court may prescribe the different things enumerated in subsec (3) of s 43. (Act 59 of 1959.) An additional item is here required to cover this situation. This, however, is not a hurdle. The real question is what substantive legal structure should be devised. I confess that I have not come up with a perfect solution. I do believe that I can suggest a reasonable satisfactory solution, one which deserves consideration.
>
> The cumulative experience in England and in South Africa during the last ten years provides much evidence of the good features of the Anton Piller. It also shows up its wholly unacceptable face. The main trouble lies in the area of its execution. This was accurately foreshadowed at its birth. It was thought that the provision that the plaintiff's solicitor should attend would ensure that in the enforcement

---

7 1985 SALJ 634.

of the order his presence would contribute to its being accomplished with due circumspection. Lord Denning MR stressed that the solicitor was an officer of the court. Ormrod LJ said that great responsibility rested on him to ensure that the carrying out of the order was 'meticulously carefully done with the fullest respect for the defendant's rights'. (Op cit note 3 at 62C-D, 784.) It was realized that some responsible person should oversee this potentially dangerous operation. This was indeed one of the central features of the Anton Piller. Alas, subsequent experience has shown that this safeguard is worthless. How could it ever work? The law knows so well that no person can at once be a party and a judge in his own case. It is just too much to ask of any attorney of even above average integrity to perform this vital overseeing task with the requisite degree of objectivity and detachment. How can he? He was probably involved for days in collecting and collating the evidence of the defendant's alleged misdeeds in order to present an adequate case for interim relief. He is, even more than his client, intensely concerned to search for and obtain evidence. Being probably a thorough person, he is unlikely to leave a stone unturned in the process. To thrust this further responsibility upon him must lead to intolerable ambivalence, which can only detract from his effectiveness as attorney for his client if he is in addition to act as an objective referee. It is not surprising that experience has invariably shown that his client's interests reigned supreme. He is only human.

This feature, namely, the provision of an effective referee at the crucial time, is, I believe, nevertheless the key to the solution of our problem. Such a one must be found. This is the nettle that has to be grasped.

Postulating a proper case, a search, quite undisguised, may be necessary but, ideally, it should be conducted in the presence of the judge who granted the order. Literally with him presiding over the search proceedings, which should be regarded as simply an extension of the proceedings in the court itself. Apart from ensuring the propriety of the operation, he would examine each document to see in which category it falls. Material which is the defendant's property and which is not relevant to the plaintiff's contemplated cause of action would be kept away from the plaintiff's and his attorney's gaze. The judge would then determine in the light of the circumstances there prevailing, when, how and where the plaintiff and his attorneys may inspect and copy those items that are properly discoverable. But, of course, this is just an impossible pipe dream. However, it must not for that reason be discarded immediately, as it contains the germ of the solution.

Why can someone not be appointed by the court for this purpose to hold its commission, to be virtually its extension as it were? Let us take a leaf out of company law. Section 418 of the Companies Act (Act 61 of 1973) provides that the court may appoint a person for the purpose of holding an inquiry under the Act in connection with the winding-up of any company. The commissioner so appointed has the same powers of summoning and examining witnesses, and of requiring the production or delivery of documents, as the court which appointed him. He must, in terms of subsec (3), report to the court on any inquiry in such manner as the court directs. This system is capable

of suitable adaptation to the situation with which we are now dealing, as I hope to show presently. It requires no more than a modicum of innovative thinking. Above all it solves the problem of the identity of the referee. In inquiries instituted under s 418, the court ususally appoints as commissioner an independent advocate of sufficient standing to wield these powers. Once again a leaf could be taken out of this practice. It is upon this base that we can now begin to construct a satisfactory remedy which hardly, if at all, offends against the elemental personal or property rights of the defendant.

The remedy itself is discovery of evidential material and its preservation for the purpose of an action which is contemplated. The cause of action and its factual basis must be clearly stated, as on that, exclusively, questions of relevance will be determined. Prerequisites for its grant, ex parte, are the following:

(a) A strong prima facie case for the contemplated cause of action must be made out. Let us fish for evidence, not for causes of action.

(b) The applicant must satisfy the court that exceptional circumstances exist. It must plainly appear that justice requires the intervention of the court in this manner, that the plantiff will otherwise effectively be deprived of his remedy in the main contemplated action, which means that if the defendants were forewarned there would be a grave danger that vital evidence would be destroyed or smuggled away and so the ends of justice would be defeated. This involves proof that the defendant has in his possession this incriminating material, which must be adequately described and identified. It must also plainly appear that this form of discovery and inspection would do no real harm to the defendant or his case.

These requirements involve proof that the defendant is likely to destroy or otherwise dispose of this evidence. This in turn means that mere suspicion will not do. Facts from which this is the only reasonable inference must be proved. As indicated in Jeffrey Rogers Knitwear Productions Ltd v Vinola (Knitwear) Manufacturing Company, (Fleet Street Reports April 1985) this also involves a full disclosure of all relevant knowledge which the applicant himself or through his agents possesses. There must be a precise indication of the premises, with a description of them, where this material is held by the respondent or his agents.

I now come to its interim execution. The Sheriff is authorized to attach all this material, which is clearly described in the order. But he executes it subject to the directions of a commissioner whom the court appoints. The commissioner must be an advocate of at least ten years' standing and must not be nominated or suggested by the applicant as usually happens in applications under s 418 of the Companies Act or applications for the appointment of a curator ad litem. This is to make doubly sure that he is completely independent. There is no problem. Frequently we select counsel on our own to sit as assessors. The plaintiff's attorney will be responsible for the commissioner's fees, which will be included in the costs of suit.

The commissioner will preside over what is at once an inquiry and the execution of the order, which may include a search. Or putting it another way, over the execution in the course of a running inquiry in situ. As he must direct how the order is to be executed, soon after the order is made he will be given all the founding papers to acquaint himself thoroughly with the plaintiff's case and all the facts. The Sheriff has also by now had the papers, but he awaits the commissioner's directions. Once he has qualified himself, the commissioner gives directions to the Sheriff, first as to the time that the execution will take place. If the commissioner does not have secretarial assistance, it must be provided by the plaintiff's attorney. With a secretary he now attends the execution at the appointed time. Only the plaintiff's attorney and such of the plaintiff's deponents as the commissioner directs may be present on the plaintiff's side. He will now inform the defendant who he is, and explain briefly what it is all about. He will explain that he holds a commission of the Supreme Court and has certain powers equivalent to those of the judge, for instance to give directions, and that failure to carry them out will be in contempt of the Supreme Court itself. He informs the defendant that he may get in touch with his attorney, who may be present during the proceedings. I suppose that the defendant will probably avail himself of this opportunity and telephone his attorney there and then. It may be advisable, depending upon the particular circumstances, for the commissioner to speak to the defendant's attorney, apprising him fully of the proceedings and arranging with him for his attendance. Let us assume the attorney arrives half an hour later and is given a brief opportunity to consult with his client, and then the running inquiry proceeds.

The commissioner now directs the defendant to permit entry of the premises or rooms where the material is kept. If the defendant refuses, the commissioner wil enquire what his reasons are, and if these are not good and sufficient, he may direct the Sheriff to effect forcible entry. He will now direct the defendant to point out the listed material, and he may ask any question which is calculated to ensure that a full and proper discovery of it is being made. If he is not satisfied that a full discovery is being made, he may direct the Sheriff to make a search there and then. For this purpose he may obtain information from the relevant deponent on behalf of the plaintiff. But he will continue to supervise the search. Once the material has been collected, he will, in the company of only the defendant and his attorney, decide whether any item is properly discoverable on the basis of relevance to the probable issues in the contemplated action. Those items which are so discoverable he will then list fully and he will order their attachment by the Sheriff.

At this stage the plaintiff and his attorney are again permitted to be present and there in the presence of the Sheriff to inspect such material. The plaintiff's attorney may also copy it. The plaintiff's attorney may then indicate which originals should be preserved and remain under attachment. If there are any problems about that, the commissioner gives directions again after he has listened to the representations of both sides.

Thereafter the commissioner frames a full report for the court about the proceedings, including any inquiries which he made and the

responses to them. This report must be available on the return day of the rule nisi and will be admissible in this application and any subsequent proceedings as prima facie evidence of the correctness of its contents.

The foregoing discussion demonstrates that the remedy contains the three elements which I described in the Economic Data case, namely, discovery in anticipando, coupled with powers of search and interrogation. Because, by definition, the remedy exists only by reason of the court's conviction that the defendant will otherwise hide or destroy vital evidence, it follows that to be effective this remedy must be equipped with adequate teeth. These are the powers of search and interrogation. The difference is that these powers are all very strictly formulated and very tightly controlled so as to limit any invasion of the defendant's rights to the bare necessary tolerable minimum. Any forcible invasion of these rights will occur only once the capable and responsible person entrusted with the Suppreme Court's commission has, on the spot, for good reason, decided that that should be done, and only after the defendant has been given the opportunity to co-operate but has proved to be recalcitrant. Because the commissioner must report fully and be present in court on the return day, the court retains full control over the manner in which he performed his commission. Indeed, I believe that this suggested remedy has better but less dangerous teeth than the original Anton Piller.

Since none of these three elements exists in South African law, it will be necessary to create them by statute. I have already suggested that it be done by rule of court preceded by a suitable amendment to the Supreme Court Act. The neatest way of doing it is probably to frame a special statute embodying these principles and the remedy together with its elements, and then simply to provide that rules of court in terms of s 43 of the Supreme Court Act may be framed for the conduct of proceedings under its provisions.

I realize that the appointment of a commissioner will result in a more costly procedure than otherwise. It is unavoidable. This kind of proceeding is obviously only apposite when the subject-matter of the suit is substantial, and then costs will not be such a serious consideration. The extra costs of the commissioner are no more than a reasonable premium that has to be paid for effective insurance against abuse of the type that one now knows is very likely otherwise to occur. Without this insurance such a remedy is not worth the candle, and in my view further attempts to construct it should be dropped. I doubt that there is an effective alternative to what might come to be called the referee order. Or simply a Referee, for short, instead of an Anton Piller."

6. Certain Observations of the Appellate Division

6.1 On 25 February 1986, the Appellate Division gave judgment in Universal City Studios Inc and others v Network Video (Pty) Ltd. This was an appeal from the full court of the Cape Provincial Division whose

judgment was reported in 1984(4) SA 379 (C). The Appellate Division (per Corbett J A) held that in the light of the facts of the case and the amended order sought on appeal "the instant case is now moot" and that the Court would consider only certain of the issues from the point of view of the costs. The learned judge nevertheless made some interesting observations. At p 32 he says:

> Procedurally the typical Anton Piller order is very unusual in that it is normally sought ex parte without notice to the other party and in camera.
>
> Moreover, aspects of the order immediately affect in an adverse manner the rights of the other party without him having been heard in opposition to the order. In addition, there is abundant evidence that in the past Anton Piller orders have been grossly abused by those in whose favour they have been granted at the expense of those against whom they have been granted (see in this regard the judgments in the Easyfind International case, supra at pp 932 D - 933 E; the Economic Data Processing case, supra at pp 606-7, 615-6; the Petre & Madco case, supra at pp 855 I - 857 E; the Trade Fairs case, supra at pp 189 I - 190 E). Apart from the question as to whether the court has the power to make Anton Piller orders, this evidence of abuse makes understandable the negative reaction of certain Judges to the practice that has evolved in this country of granting such orders.

At p 42 the learned judge says:

> 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, is the court obliged to adopt a non possumus attitude? Especially if there is no feasible alternative? I am inclined to think not. It would certainly expose a grave defect in our system of justice if it were to be found that in circumstances such as these the court were powerless to act. Fortunately I am not persuaded that it would be. An order whereby the evidence was in some way recorded, eg by copying documents or photographing things or even by placing them temporarily, ie pendente lite, in the custody of a third party would not, in my view, be beyond the inherent powers of the court. Nor do I perceive any difficulty in permitting such an order to be applied for ex parte and without notice and in camera, provided that the applicant can show the real possibility that the evidence will be lost to him if the respondent gets wind of the application. And in regard to the in camera procedure I would endorse the view expressed in the Cerebos Food case, supra at p 159 E - H.

6.2 Although this passage is probably obiter it is of great value as it indicates the limits to which a court may in the exercise of its inherent powers go, which in most cases is not far enough. The learned judge of appeal goes on as follows:

> Naturally, any such order would have to be hedged in with the kind of safeguards that have been discussed in the cases. What particular safeguards are adopted would be in the discretion of the Judge granting the order and would depend on the particular facts of the case under consideration. It seems to me, however, that the potential harm to the respondent inherent in the ex parte and in camera procedure could largely be obviated in cases where real and documentary evidence was attached and taken into possession if the court included in its order a rule nisi giving the opportunity to the respondent to come to court and to show cause why the attached evidence should not be retained pendente lite and, in an appropriate case, giving leave to the respondent to anticipate the return day. This seems preferable to the somewhat cumbersome procedure envisaged by par 6 of the order granted by Lategan J. —
>
> It is not necessary, however, in this case to pronounce finally on these matters for the order sought and initially obtained by appellants in terms of par 1.2 and 1.5 of the order of court is a far cry from an order designed merely to preserve specific evidence for trial. In fact par 1.2 and 1.5, as explained by appellant's counsel are designed to give authority for a search for, and attachment of, evidence in order to found a cause, or causes, of action. This is a proposed procedure for which there is a considerable body of judicial disapproval in our law (see the Cerebos Food case, supra at pp 169 H - 170 F and the cases there cited). In my opinion, it is not a procedure to which this Court can or should give the stamp of its approval. If there is a deficiency in our law in this respect, then the remedy must be sought in appropriate legislation and/or amendment of the Uniform rules of Court.
>
> Nor is this Court called upon to decide in this case whether the other components of an Anton Piller order referred to by the Court in the Cerebos Food judgment, ie orders for the disclosure of sources and retail outlets (component 2) and orders for the production and handing over of things in order to make an interdict effective (component 4) can competently be granted.

6.3 It seems clear that the remedies suggested in this memorandum and the requisite safeguards can only be statutorily created.

7. LEGISLATION IS REQUIRED

The Courts have not the power to make the kind of order suggested by Coetzee J. The most satisfactory way of providing the necessary powers is probably by introducting a section in the Supreme Court Act after section

19bis. This seems the logical place for it. Section 19bis deals with the Court's power to appoint a referee in certain circumstances. A new section (19ter) to provide for the appointment of a commissioner could follow it. A draft section 19ter is attached. It is probably not necessary to have rules of court as suggested in the lecture.[8] Each Division can develop its own practices, so long as the Court's powers are clearly provided by statute.

---

8 Par 5 supra.

BILL

To amend the Supreme Court Act, 1959, so as to provide for the discovery and seizure of evidential material in civil proceedings; and to provide for matters connected therewith.

To be introduced by the Minister of Justice

BE IT ENACTED by the State President and the Parliament of the Republic of South Africa, as follows:-

Insertion of section 19*ter* in Act 59 of 1959.

1. The following section is hereby inserted in the Supreme Court Act, 1959, after section 19*bis*:

"Discovery and seizure of evidential material.

19*ter* (1) Any court of a provincial or local division may, on the *ex parte* application of any party to civil proceedings or contemplated civil proceedings, grant an interim order for the discovery and seizure

of any document or article which is in the possession of a specified person (hereinafter referred to as the respondent) or his agent, which is the property of the applicant or which affords proof of the appli= cant's cause of action or defence or contemplated cause of action or defence, if the court is satisfied that -

(a) the applicant has a bona fide cause of action or defence, which is clearly described and verified;

(b) due to exceptional circumstan= ces, it is just to issue such order in that such document or article is the property of the applicant to which the respon= dent has prima facie no claim as of right or that it consti= tutes evidence which is vital for the proof of the applicant's cause of action or defence and is otherwise likely to be suppressed or destroyed or

removed beyond the jurisdic= tion of the court;

(c) the respondent or his agent has in his possession or under his control such documents or articles of a nature or class adequately described by the applicant;

(d) the execution of the interim order will not cause undue harm to the respondent.

(2) If the court issues an interim order it shall simultaneously appoint a commissioner who must be a practising advocate of at least seven years standing, in whose presence and under whose direction and supervision the interim order must be executed by the sheriff and who must report in writing to the court on the return day of the order, in the manner that the court may direct, on all proceedings during and in connection with the execution of the order.

(3) The court may give the commissioner such powers as, in its opinion, are reasonably required for the just and effective execution of the order, and particularly that the commissioner may -

(a) order the sheriff to effect forcible entry to any premises occupied by the respondent or his agent, where he has reason to believe such documents or articles are kept, if the respondent or his agent should refuse entry for the purpose of execution of his order;

(b) interrogate the respondent, his agents and servants, to establish the whereabouts of any document or article of the category mentioned in the order;

(c) order the sheriff to conduct a search, in his presence and subject to his supervision and

direction, for such documents or articles; and

(d) give any order for the seizure and preservation of documents and articles which have been discovered in the course of execution of the order pending the return day of the interim order.

(4) The applicant shall be responsible for the payment of the commissioner's fees and the costs that he may have incurred in respect of secretarial services, if the applicant did not supply such services, provided that the court may, on the return day, order that such costs shall be costs in the cause or make any special order in respect thereof.

(5) During the execution of the order of court, any lawful order given by the commissioner shall be deemed to have been made by the court which appointed him,

and any person who refuses, unlawfully or unreasonably, to com= ply with such order, shall be deemed to have committed contempt of court and shall incur the same liability or penalty as he would have incurred if the court had made such an order.

(6) The commissioner's report contemplated in subsection (2) shall be prima facie evidence of the facts contained therein and admissible in evidence upon its mere production in any subsequent proceedings between the same parties arising from the same cause of action.".

Short title.

2. This Act shall be called the Supreme Court Amendment Act, 198 .