

IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

CASE NUMBER: 06/17204

In the matter between:

V F MUNISI CIVILS (PTY) LTD

First Applicant

HLANGANANI ENGINEERS AND PROJECT

MANAGERS (PTY) LTD

Second Applicant

and

JOHANNESBURG WATER (PTY) LTD

First Respondent

MALANI PADAYACHEE & ASSOCIATES (PTY) LTD

Second Respondent

KING CIVIL ENGINEERING CONTRACTORS (PTY) LTD

Third Respondent

BONGI-M CONSTRUCTION CC

Fourth Respondent

HLUBALUDONGA CONSTRUCTION PROJECTS CC

Fifth Respondent

STEMELE BOSCH AFRICA (PTY) LTD

Sixth Respondent

MIS SIBINDA INVESTMENTS (PTY) LTD

Seventh Respondent

COLLIMA PROJECTS CC

Eighth Respondent

JUDGMENT ON THE COUNTER-APPLICATION

SCHWARTZMAN J:

- 1.1 This judgment should be read with the judgment I handed down on 13 September 2006, in which I dismissed, with costs, the Applicants' claim for an interim interdict against the First Respondent.
 - 1.2 To avoid confusion, I will, in this judgment, continue to refer to the parties as they are cited in the interdict application.
2. In the interdict application, the Applicants attached to their founding affidavit, and relied on five pages of the minutes of the meeting of the First Respondent's Bid Adjudication Committee held on 4 May 2006 (the minute). Fisher, a director of the First Applicant, says that a copy of the minute was telefaxed to the First Applicant on 30 May 2006. He does not identify the person who sent it to the First Applicant, but does not suggest that the person's identity is not known to him. The First Respondent states that the disputed minute is not available to the general public and that it is part of a private and confidential document. It is then asserted that the First Applicant could only have obtained the document unlawfully and that its possession of the document is a breach of the right to privacy of the First Respondent and the other companies mentioned in the minute. The First Respondent wants to know the identity of the person or persons who leaked its confidential information to the First Applicant so that it can take action against such person or persons.
3. The relief sought in the counter-application is that:

- 3.1. The First Applicant deliver to the First Respondent the original and all copies in their possession or under their control, of the full document, five pages of which is attached to the founding affidavit;
 - 3.2. The First Applicant or Fisher, or the relevant employee, state precisely how the disputed minute came into the First Applicant's possession, including who gave it to the First Applicant; when it was given; if receipt of the disputed minute was preceded by any negotiations, full details thereof are required; which of the First Respondent's employees supplied the disputed minute directly to the First Applicant or to some or other intermediary;
 - 3.3. The disputed minute and all references to it be struck from the First Applicant's founding affidavit.
4. The Applicants' answers are that:
 - 4.1. None of the information in the minute is sensitive or damaging for other parties and that there is nothing in the minute that could give anyone an unfair advantage;
 - 4.2. The minute is a discoverable document that would have to be discovered in the review proceedings and would, in any proceedings, become a public document;

- 4.3. That there is no procedure known to our law entitling the First Respondent to the information it seeks as to the source of the document;
- 4.4. The First Applicant does not have a copy of the full minute. All that it has is the five pages attached to the founding affidavit.
- 5.1 The minutes of the deliberations of a Bid Adjudication Committee that evaluates and ultimately awards a tender are *prima facie* not meant to be public knowledge. What happens at such a meeting would, as a rule, only be known to a restricted number of people. The information furnished to those at the meeting gives an insight into the conduct of all tenderer's businesses and, in particular, their strengths and weaknesses that the Committee must obviously keep confidential. Part of this information is included in the Committee's minute. The disclosure of such information to another tenderer would inevitably give it an unfair commercial advantage over fellow tenderers. For this reason I do not intend to set out those parts of the minute that are clearly confidential. The minute has an economic value to the First Respondent in that it can be used by it in the future when similar tenders are being adjudicated. These characteristics establish that the minutes qualify as a document containing confidential information as this term is understood – **Alum-Phos (Pty) Ltd v Spatz 1997 (1) All SA 616 (W)** at page 623. Parts of the minute telefaxed to the First Applicant contains confidential information.

5.2 It is not in issue that the First Respondent's Committee had the right to conduct its meeting in strict confidence so that the matters before it could be discussed freely and openly. It follows that the minute of such meetings are confidential to the First Respondent. Accordingly, the First Respondent "*would be entitled to regard the confidential oral or written communications of its directors and employees as sacrosanct and would in appropriate circumstances be entitled to enforce the confidentiality of the aforesaid oral and written communications. To my mind, such right would in appropriate circumstances be enforceable against whosoever is in possession thereof and whosoever seeks to utilise it. The fact that the person who is in possession thereof was not party to the unlawful conduct in obtaining it does not exclude the right which the applicants would have.*" – see **Sage Holdings & Another v Financial Mail (Pty) Ltd & Others 1991 (2) SA 117 (W)** at page 132I to 133A; cited with approval in **Janit & Another v Motor Industry Fund Administrators (Pty) Ltd 1995 (4) SA 293 (Appellate Division)** at page 303C to D.

5.3 The review that the Applicants intend to bring has to do with whether it was unlawfully disqualified from the tender and whether on price, it should have been awarded the contracts. The minute records the Committee's reasons for disqualifying the Applicants. What would be discoverable or required to be produced in the review proceedings would be that part of the minute that sets out the First Respondent's reasons for disqualifying the Applicants from the tender process. The

extract of the minute attached to the founding affidavit contains far more than this. In any review, or any other, proceedings, a Court would protect from disclosure those parts of the minute that are clearly confidential – see **Crown Cork & Seal Co Inc v Rheem South Africa (Pty) Ltd 1980 (3) SA 1093 (W)** at page 1098C to F, 1100A to C, 1102A and 1103F.

6. The above finding serves to dispose of the first two defences to the counter-application. I will in due course deal with the application to strike out the minute from the record.
7. I have found that the minute is a confidential document. This much must have been known to Fisher when it was received by the First Applicant. Fisher does not say that he does not know who telefaxed the minute. It is not suggested that anyone was authorised to send a copy of the minute to the First Applicant. When the minute was received by Fisher, he and the First Applicant must also have known that it had been unlawfully taken from the First Respondent. Had Fisher believed otherwise, he would have responded to the First Respondent's challenge to disclose the identity of the person who had sent the telefax.
- 8.1 The issue that was debated before me at great length, both orally and in supplementary written heads, had to do with the First Respondent's claim that I should order disclosure of the identity of the person who

disclosed the minute, and the circumstances under which this happened (paragraph 3.2 hereof). The First Respondent says that it requires this information because it wants to institute proceedings against the person or persons responsible for leaking its confidential information to the Applicants. Such proceedings would include the right to take disciplinary action against the employee or employees of the First Respondent who breached their duty not to disclose the First Respondent's confidential information. It also has a claim for damages based on the unlawful invasion of its right to privacy against any person responsible for this breach. Mr Burman SC, who appeared for the Applicants, submitted that on the facts of this application, and in law, the relief cannot be granted.

8.2 Against this background, I turn to deal with the case law cited by Counsel.

9.1 In **Stuart v Ismail 1942 Appellate Division 327** Centlivres JA said the following:

“There are a number of cases where superior Courts in South Africa have ordered the disclosures of names for the purpose of bringing an action. The practice is so well established that it is too late to question it now. During the course of the argument the Chief Justice referred to the case of Hart v Stone (1883, 1 B.A.C. 309) which is cited in paragraph 2356 of Vol. IV of Nathan's Common Law of South Africa.

In that case the respondent had obtained from a Judge in chambers an order compelling the respondent, who was registered at the office of the Registrar of Claims as the agent of the African Company, to disclose the names of the partners constituting the company. On appeal De Villiers, C.J., said at pp. 331 and 334: -

"What the applicant said was: 'I intend to bring an action against your company, and ex debito justitiae I am entitled to know who the trustees and shareholders are. You are the only person who knows, you represent the company in this Colony, and therefore I apply to you.' The Attorney-General argued with some degree of confidence that applications like the present were quite unknown to the Civil Law, under which, he said, a person could only gain information of the nature required by bringing an action and calling persons as witnesses. If, however, he had referred to the 11th book of the Digest, he would have found in the first title numerous instances in which an "interrogatio in jure", as it was called, was allowed, at all events before the time of Callistratus. Voet, in his Commentary on the title, treats fully upon the subject, and shows that even under the Dutch law - whatever might have been the law of the province of Holland proper - the Judges had very large powers of ordering a disclosure of facts where justice would be defeated without such a disclosure In the present case it is not denied that the respondent bona fide intends to bring his action, and the sole object of the application is to obtain from the appellant, who is the only person who can give it, information as to the names of the persons forming the company which the respondent intends to sue. The application, in my opinion, was properly granted." "

- 9.2 Later in the judgment he stressed the fact that the courts have **“very large powers of ordering a disclosure of facts where justice would be defeated without such disclosure”** and then **“In the present case it is not disputed that the respondent bona fide intends**

to bring his action and it is obvious that he cannot bring that action unless he knows the name and address of the executive committee. The procedure of compelling a person to disclose the necessary information is not in my opinion confined to those cases where information is required of the names and addresses of an unincorporated body." (My emphasis). The practice endorsed by the Appellate Division in May 1942 was traced back 59 years to the decision of De Villiers CJ in **Hart v Stone 1883 (1) B.A.C 309**. In 1976 a full bench of the Eastern Cape Division applied *Stuart v Ismail* – see **Kinekor Films (Pty) Ltd v BA Adams Films (Pty) Ltd 1976 (4) SA 935** at page 939E to G.

10. **Roamer Watch Co SA & Another v African Textile Distributors 1980 (2) 254 (W)**, is the watershed decision that transplanted from England the notion that a Court could order the delivery up of property for safekeeping pending the decision of an action. In England and South Africa, these preservation orders have come to be known as Anton Piller orders. In *Roamer Watch*, the return date of an unopposed rule *nisi*, the Court had to consider what parts of a nine paragraph draft order it should grant. After dealing with the Anton Piller elements of the application, Cilliers AJ, at page 277G, set about considering the relief sought in paragraph 7 of the draft, which was for an order "*Directing that the respondent disclose to the applicants (the) source or sources of supply of the Roma and or Romex watches whether in South Africa and or elsewhere in the world.*" This order

was sought in the context that the respondents were selling watches under the name Roma and Romex in breach of the Applicant's long established "*Roamer*" trade mark.

- 11.1 At page 277H to 279 Cilliers AJ referred extensively to English authorities that laid down the circumstances under which such an order would be granted. A survey of South African decision starts at page 280. At page 281, and after referring to a number of South Africa decisions, including *Stuart v Ismail*, he distinguished two categories. The first had to do with disclosure involving unincorporated bodies. At page 281E to 282E (and this is particularly material to this application) he said "*In the second category of cases, the applicant is not concerned to obtain the names of officers of an association or corporation whom he is able to identify, and where he merely seeks the names of the appropriate persons to cite, but is concerned to obtain the name of a party whom he is unable to identify and against whom he may have a cause of action. In this latter situation, he is seeking discovery of such a name from a party who may have sound commercial or other reasons for being reluctant to disclose such a name. See, for instance, the considerations raised by the respondent in the Norwich Pharmacal case, and referred to by Lord Reid at 175F and 176D, and Lord Morris at 182B - D, Viscount Dilhorne at 189F - 190E, Lord Cross at 199D - G and Lord Kilbrandon at 206B - E, and see the considerations mentioned by Bale CJ in *Spies v Vorster* (supra at 217 - 218). While the Court, in the*

exercise of its discretion, will no doubt take into account the particular circumstances of each case, it seems to me that, generally speaking, an applicant seeking the relief falling within the second category of cases referred to above should in his papers indicated at least the following:

- (a) That he has a bona fide belief in his right of action against the party whose name he seeks to be disclosed (see Colonial Government v Tatham (supra)) and that he has reasonable grounds for believing that he has such a claim against such party; in this regard the strength of the applicant's case against the unknown alleged wrongdoer would be relevant to the exercise of the Court's discretion (see the Norwich Pharmacal case supra per Lord CROSS at 199F - G); and*
- (b) that he has no other complete remedy (see Orr v Diaper (supra); Colonial Government v Tatham (supra at 158 - 159); Spies v Vorster (supra at 216)). Another appropriate remedy may consist either of an adequate claim against a party who is known to him in respect of the same damages which the applicant claims to have suffered, or in another procedural remedy to establish the same information which he seeks from the respondent; and*
- (c) that the respondent is able to supply such information.*

Generally speaking, it seems appropriate that the type of relief sought in the second category of cases should be sparingly exercised, so as

not to make unnecessary inroads on that confidentiality which businessmen are at liberty to impose on their dealings.”

(My emphasis).

11.2 Cilliers AJ, who was dealing with this second category in the context of it being a matter of substantive law, found that on the facts, relief should be refused because the Applicant's did not express a *bona fide* belief that they had a cause of action against the suppliers and because the Applicant had failed to show that they could not obtain the required information from other sources (at page 283A to D). On the facts, he went on to distinguish the full bench decision in the Kinekor Films matter.

11.3 In the course of argument before me, Counsel referred to a number of more recent English decision entrenching the Court's right, in appropriate circumstances, to grant the type of order sought in this application. The most recent being **Interbrew SA v Financial Times Ltd (2002) EMLR 446 (CLD)** and **Ashworth Hospital Authority v MGN Ltd (2002) 4 AER 193 (H.L)**

12.1 On 8 November 1982, Coetzee J gave judgment in **House of Jewels and Gems v Gilbert 1983 (4) SA 824 (W)**. The case had to do with the Applicant's claim for the return of certain diamonds. An order empowering the Sheriff *inter alia* to search for and inquire as to the whereabouts of the diamonds and ordering the Respondents to inform

the Sheriff as to the whereabouts of the diamonds was sought. The judgment concerns itself primarily with the second leg of the inquiry. It was Counsel's submission that the remedies sought were available by way of the interrogation *in jure*. Reliance was placed on the *Stuart v Ismail* and the *Kinekor Films* decisions.

- 12.2 Following a *tour de force* through the Roman and Roman-Dutch authorities, it was held, at page 833D to E, that “*not a single element of either the interrogation in jure or the procedural interrogations of old Dutch law is applicable today*”. Moving on to South African authorities, Coetzee J found that in **Hart v Stone** (*supra*), De Villiers CJ did not appear to base his judgment on his references to the Digest and Voet, but rather on his view that the Applicant was *ex debito justitiae* entitled to the information to enable him to institute action. Reference is then made to **Stuart v Ismail** and Centlivres JA's finding that the Courts have “*very large powers of ordering a disclosure of facts where justice would be defeated without such a disclosure*”. At page 834B to C, Coetzee J states that this quotation is obviously taken from the judgment of De Villiers CJ in *Hart v Stone* “*...and the interesting result is that this authoritative and binding statement of principle is extracted from a judgment in which these words are used in relation to a practice which is irrelevant, as I hope I have pointed out above. Moreover and with great respect to De Villiers CJ, this dictum is not even an accurate reflection of Voet's description of the Judge's powers.*” (My emphasis).

12.3 What I find noteworthy is that in 1942 Centlivres JA had found that a practice going back 59 years, to at least 1883, was “so well established that it is too late to question it now”. In a judgment handed down on 8 November 1982, some forty years later, Coetzee J acknowledged that although based on a wrong premise, *Stuart v Ismail* sets out an “authoritative and binding statement of principle”. He went on to say, at page 835E to F, that this principle has been frequently applied since 1942 “to order disclosure of the identity of persons applicants wish to sue. In intellectual property cases, special remedies are available to a plaintiff to obtain wider disclosure and delivery up of the offending articles” (at page 835E). After referring to the *Roamer Watch* and *Kinekor Films* decisions as recent examples of such cases, he said that these decisions are, however, not helpful “because they are not in point for the reasons stated, i.e. that special remedies are available in cases of infringement of patents, trade marks and copyright.” All I would add is that this limitation is not to be found in *Stuart v Ismail*.

13.1 In **Economic Data Processing (Pty) Ltd v Pentreath 1984 (2) 605**, a judgment handed down on 21 February 1984, Coetzee J was confronted by what he called a “present day” Anton Piller application in which he could discern three components or elements:

“(1) a search warrant which authorises the Sheriff to search, without hindrance,

- (2) *for documents, inter alia, of very general description, which the applicant or his attorney thinks might be needed to prove a claim which he might want to institute at some time in the future; coupled with*
- (3) *an obligation to respond to interrogatories by the search party, be it on affidavit or otherwise.*

In short, it is the combination of a search warrant, a wide discovery in anticipando and a kind of interrogatio in jure.” (At page 607H to 608A)

13.2 He found that our common law did not recognise any of these elements. With reference to the first and third element he referred to the House of Jewels decision in which he had investigated these issues and had concluded that no right to a search warrant exists and that the interrogation *in jure* has been obsolete for centuries already and that it is incapable of resurrection (at page 608A to C).

13.3 In dealing with Counsel's submission that the law recognises developments, the following is said at page 609 G to H: *“Something similar actually happened in Hart v Stone (1883) 1 G Buch AC 309 in which De Villiers CJ ordered the agent of a foreign company to disclose the names of the trustees and shareholders of the company in order to sue the company. His scalpel was fashioned from remnants of the obsolete interrogatio in jure. (House of Jewels and Gems v Gilbert (loc cit).) This decision was the origin of the right to obtain a simple disclosure (note, not any form of discovery of the type*

involved in this inquiry) of names for the purposes of bringing an action - see *Stuart v Ismail* 1942 AD 327 - but this remedy was never developed beyond that point, and it cannot possibly constitute any basis or authority for the totally different and drastic *Anton Piller*. Not even by analogy, as there is none.” (My emphasis)

- 13.4 After referring to a number of other decisions, Roamer Watch is dealt with in a one liner at page 616C to D, where it is said that “*The other case, that of Roamer Watch Co, was apparently undefended throughout. Nobody seemed to care.*” Reading Roamer Watch, this is a somewhat unwarranted stricture of an Acting Judge who, to my mind, gave great care and attention to the issues before him.
- 14.1 On 25 May 1984, the Full Bench judgment in **Cerebos Food Corp v Diverse Foods SA 1984 (4) 149 (T)**, was handed down. The judgment concerned an application for an Anton Piller order and ancillary relief that was referred for hearing to a full bench in terms of Section 13 (1) of the Supreme Court Act “*in view of a practice which has arisen in connection with the grant of the so-called Anton Piller orders and the outright condemnation thereof by Coetzee J in *Economic Data Processing (Pty) Ltd v Penreath* 1984 (2) SA 605 (W), it is necessary to express our view*” (at page 158A to B). As the Court was dealing with an *ex parte* application, the Respondent was not represented. The Court was however assisted by Senior and Junior

Counsel, who acted for “*potential future Respondents in Anton Piller orders*”.

- 14.2 What was sought in Cerebos Food was an order to search for, seize, and hold under attachment pending the determination of the application, all sets of documents that were the property of the Applicant, which were in the Respondent’s possession.
- 14.3 What was not asked for in Cerebos Food was an order that the Respondent disclose the name of any supplier or retail outlet. This is clear from the second sentence of the paragraph at page 166D to E.
- 14.4 At page 163 (*in fin*) to page 164D Van Dijkhorst J, who gave the judgment of the Court in Cerebos Food, defined the question the Court had to decide as being:

“what legal basis can be found in our law for a procedure such as the Anton Piller order. For this purpose it is necessary to deal with the various components of the Anton Piller orders separately. They can be summarised as follows:

1. *Authorising the search for and attachment of property in the possession of the defendant where the plaintiff has a real or personal right to it.*

2. *Orders for the disclosure of names of sources and retail outlets of the defendant as they enable the defendant to operate unlawfully, infringing on the plaintiff's rights.*
3. *Orders for the attachment of documents and other things to which no right is claimed except that they should be preserved for and produced as evidence in an impending Court case between the parties.*
4. *Orders for the production and handing over of a thing C to which no right is claimed but as part of an interdict to make the interdict effective, for example by erasure of a trade mark from the defendant's goods.” (My emphasis)*

15.1 I would here interpose by saying that in the land of its birth, an Anton Piller is understood to be a remedy directed at the preservation of evidence pending a trial. That this is its role in South African law was reaffirmed in **Memory Institute SA CC v Hanson 2004 (2) SA 633 (SCA)**, where it is said that such an order is for the preservation of evidence and not a substitute for possessory or proprietary claims (at page 633E to F).

15.2 Returning to the Cerebos Food judgment it is said that the relief sought by the Applicants (the first component) is not a true Anton Piller remedy because for years Courts granted interim attachment orders where the Plaintiff alleged a right in property, and the only way

the property could be preserved, or irreparable harm prevented would be by way of an attachment *pendente lite* (page 164E to F)]

- 15.3 On the facts placed before it, the Court granted the Applicant the order it sought. As this was the only relief sought by the Applicant, there was no need for the Court to proceed to deal separately with the other three components. What it thereafter said on these issues is then, strictly speaking, obiter, which does not bind me, but to which considerable weight must nevertheless be attached.

16. Although orders for the disclosure of names of sources and retail outlets had been sought in some Anton Piller applications, such disclosure is not, strictly speaking, an element of an Anton Piller (see paragraph 15.1 above). This appears to have been recognised at page 162B to D where, after referring to Roamer Watch as the first reported South African case in which Anton Piller relief was considered, and in which Cilliers laid down a number of guidelines, it is said that the Court (Cilliers AJ) “*also held that applications could be granted for the discovery of the names of the officials of bodies, officers of an association or corporation, parties and persons who have contracted with a party.*” (My emphasis).

- 17.1 Van Dijkhorst J went on to consider the circumstances under which such power should be exercised. At page 166F he said that in Hart v Stone the “*Court wrongly relied on Digest 11.1, Voet 11.2.1 and Van*

der Linde's supplement thereto as authority for granting an order to compel the furnishing of the names of partners in a partnership by the credited agent thereof to enable the applicant to institute action."

- 17.2 At page 166G to H, and after quoting the passage from *Stuart v Ismail* in which it is said that "*the practice is so well established that it is too late to question it now*" and that the Courts have "*very large powers of ordering a disclosure where justice would be defeated without such disclosure*", Van Dijkhorst said at page 166I to 167B that "*It is to this passage, which incorporates the wide dictum of De Villiers CJ in Hart v Stone (supra), that applicants in Anton Piller applications have hitched their wagons. The judgment contains no discussion at all of the effect or ambit of the interrogatio in iure and it appears to be based on the doctrine of stare decisis in respect of the established practice. It should, however, be pointed out that in Stuart v Ismail as in Hart v Stone the plaintiff had an existing right but would have been left without a remedy if the name of his adversary had not been disclosed. The Court, with respect, correctly applied the principle ubi ius ibi remedium. In as far as this case is based upon Hart v Stone, which in turn was based upon an incorrect reading of the old authorities, it should be strictly limited to the rule thereby created, namely the type of case where an order is sought for the disclosure of the name of a principal where it is intended to sue that principal." (My emphasis). This is then the Court's finding on the second component (see paragraph 14.4 at page 18).*

- 18.1 In **Universal City Studios Inc v Network Video (Pty) Ltd 1986 (2) SA 734 (AD)**, at page 754, Corbett JA referred to *Stuart v Ismail* as authority for the proposition that the Supreme Court has an inherent reservoir of power in the interest of the proper administration of justice. He went on to find that *“It is probably true that, as remarked in the Cerebos Food case (at 173E), the Court does not have an inherent power to create substantive law, but the dividing line between substantive and adjectival law is not always an easy one to draw ... Salmond states that: ‘Substantive law is concerned with the ends which the administration of justice seeks; procedural law deals with the means and instruments by which those ends are to be attained.’ It is difficult to compose a closer definition of the distinction than this.”*
- 18.2 After dealing with the limited circumstances under which an Anton Piller like order could be granted, Corbett JA said the Appellate Division was not required to decide whether the other components of Anton Piller relief referred to in *Cerebos Food* can competently be granted (at page 756A to B).
- 19.1 In **Krygkor Pensioenfonds v Smith 1993 (3) SA 459 (AD)**, the Appellate Division once again had occasion to refer to *Stuart v Ismail* in the context of whether a South African Court had jurisdiction to order a party, against whom an Applicant had no cause of action and who was not a party or intended party to litigation with the Applicant, to supply information sought by the Applicant. The Court found that it

had authoritatively affirmed that it was entitled to adapt its procedures in the interests of justice, and that without deciding the issue, it accepted that in the present case, the Court had the jurisdiction to grant the relief sought. The further question that involved an issue of substantive and not procedural law was how the jurisdiction should be exercised. On the facts, it was found that this was not a case in which the Court's jurisdiction should be exercised.

- 19.2 Grosskopf JA, who gave the judgment of the Court, said, at page 467D to E, that “*Hart v Stone en Stuart v Ismail het dekades lank min aandag in ons regspleging ontvang en is grotendeels, indien nie uitsluitlik nie, toegepas in die soort gevalle waarmee hulle pertinent te doen gehad het, tw gevalle waar 'n voornemende eiser die name van persone verlang het teen wie hy aksie wou instel. Teen die tagtigerjare van hierdie eeu het hierdie sake skielik omstrede geword. Die rede hiervoor was dat daar gepoog is om die wye stellings uitgespreek in hierdie sake te gebruik as 'n kapstok om sogenaamde Anton Piller-bevele, en soortgelyke bevele, aan te hang.*” (My emphasis). After referring to the decisions in *Economic Data*, *House of Jewels* and *Cerebos*, their references to *Stuart v Ismail* and *Kinekor Films*, Grosskopf JA referred to the passage from *Universal City Studios* quoted in paragraph 18.1 above.

- 19.3 At page 469B to I Grosskopf JA breathed new life and vigour into *Stuart v Ismail* by saying that “*Hoewel die debat rondom Hart v Stone*

en Stuart v Ismail dus nog nie finaal afgehandel is nie, het hierdie Hof gesaghebbend bevestig dat die Hof wel sy prosedure kan aanpas in die belang van behoorlike regspleging. Vir huidige doeleindes is ek bereid om ten gunste van mev Smith te veronderstel, sonder om die punt te beslis, dat 'n Hof in 'n gepaste geval selfs 'n derde party, teen wie die applikant geen eisorsaak het nie en wat nie 'n party of beoogde party tot litigasie met die applikant is nie, kan gelas om die aangevraagde inligting te verstrek. Dit sou verder veronderstel dat afgewyk word van die dicta in die House of Jewels & Gems-saak supra op 828H-829A en die Cerebos Food-saak supra op 173E ten effekte dat die verlening van so 'n bevel 'n saak van substantiewe reg is, en nie een van prosesreg nie. In hierdie veronderstelling sou die Hof a quo die bevoegdheid gehad om die verskaffing van die aangevraagde inligting deur die Pensioenfonds te gelas. Die verdere vraag is dan hoe hierdie bevoegdheid uitgeoefen moes word. Normaalweg word die verstrekking van inligting as 'n deel van die regsproses gereël deur die Hofreëls. Voorsiening word gemaak vir blootlegging inter partes en vir getuiedagvaardings of dagvaardings duces tecum ten opsigte van derde partye. Ons Howe is tradisioneel ongeneë om buite hierdie bepalinge te gaan. Sien, bv, behalwe die gewysdes reeds F hierbo handel, Biden v French and D'Esterre Diamond Mining Company (1882) 1 Buch AC 95; Colonial Government v W H Tatham (1902) 23 NLR 153 op 157-8; Spies v Vorster 1910 NLR 205 op 216; Messina Brothers, Coles and Searle v Hansen and Schrader Ltd 1911 CPD 781; Moulded Components and

Rotomoulding South Africa (Pty) Ltd v Coucourakis and Another 1979 (2) SA 457 (W) op 462H-463B; *Roamer Watch Co SA and Another v African Textile Distributors also t/a M K Patel Wholesale Merchants and Direct Importers* 1980 (2) SA 254 (W) op 282C en 284C en *Seetal v Pravitha and Another* NO 1983 (3) SA 827 (D) op 832G-833E. Vergelyk ook die bespreking in *Jafta se saak supra* op 293J-294D. Wat duidelik uit hierdie gewysdes blyk, is dat die Hof slegs in uitsonderlike gevalle sy inherente bevoegdheid sal uitoefen om prosedures te volg waarvoor nie in die gewone prosesreg voorsiening gemaak word nie. Die uitsonderlike gevalle word op verskillende maniere omskryf in die beslissings wat hierbo aangehaal is. Vir huidige doeleindes is dit egter genoeg om te sê dat die Hof hierdie bevoegdheid sal uitoefen net waar geregtigheid vereis dat afgewyk word van die gewone procedure-reëls. En selfs waar 'n afwyking nodig mag wees, sal die Hof natuurlik altyd poog om so naby as moontlik aan die erkende praktyke te bly.” The extracts from *House of Jewels* and *Cerebos Food* to which reference is being made have to do with whether the issue is one of substantive or adjectival law.

- 19.4 What I would like to emphasise is that nowhere in the *Krygkor* judgment is it suggested that the *ratio* of *Stuart v Ismail* should be strictly interpreted. To me, the ratio in *Stuart v Ismail* is simple and clear. It is unfortunate that this decision became a victim of the *Anton Piller* controversy that raged across the Jukskei in the 1980's.

20. **A v R Kinder- en Kindersorgvereniging 1996 (1) SA 649 (T)** is the last judgment to which I need refer. What was sought in this application was that the Respondent, a voluntary welfare association that investigated social problems involving children, disclose to the Applicant, the father of two daughters, the identity of the informer who had wrongly told the Respondent to investigate the Applicant's alleged abuse of his daughters. The investigation showed that there was no cause for concern. The Respondent refused to identify its informant unless ordered by a court of law.
- 20.1. After quoting the paragraph from *Cerebos Food*, referred to in paragraph 17.2 hereof, Southwood J, and with reference to *Stuart v Ismail* and *Colonial Government v Tathlaam*, said that the Full Bench had said that *"our old authorities were not examined and the same criticism applies as in respect of Hart v Stone. The question is not whether the 'principle' is the same, but whether a court of law is empowered to create law by extending a principle for which no basis exists in our law."*
- 20.2. Southwood J then said that this principle was dealt with in the *Krygkor* decision in the passages quoted in paragraph 19.3 hereof.
- 20.3. The learned Judge then said, at page 656G to H, that it appeared to him that he was bound by the finding of the Full Bench in *Cerebos Food* that the principle only applied to *"the type of case where an*

order is sought for the disclosure of the names of a principal where it is intended to sue that principal.”

20.4. Applying this principle to the facts, Southwood J said that the application had to fail because it was clear that the Respondent was not the agent of the informer. If he was not bound by Cerebos Food, the application still had to fail because *“Nêrens in die funderende eedsverklaring beweer die applikant dat hy van voorneme is om 'n aksie teen die betrokke persoon in te stel nie; wat die eisoorsaak is waarop hy in sodanige aksie sal steun nie; en dat hy te goeie trou in hierdie aksie glo nie. Indien dit die basis vir die onderhawige aansoek is, is hierdie 'n opvallende leemte.”* A further reason for refusing the application was that it was in the public interest that the identity of the informer should not be disclosed.

21. Mr Campbell SC, who appeared with Mr Stein for the First Respondent, submitted that on the authority of *Stuart v Ismail*, read with *Roamer Watch* at page 282A to C, the First Respondent is in principle entitled to the order it was seeking. It was also submitted that none of decisions to which I have referred question the correctness of this extract from *Roamer Watch*.

22. Mr Burman SC, who appeared for the Applicants, submitted that I am bound by the Full Bench decision in *Cerebos Food* that limits the right of disclosure to cases where an order is sought for the disclosure of

the names of a principal, where it is intended to sue that principal. As this is not such a case, the application should be dismissed.

- 23.1 In paragraph 15.3 I have found that the Court's finding in Cerebos Food, on the second component referred to by it, is *obiter*. This means that I am not bound by that eminent Court's decision. I therefore disagree with Southwood J's finding on this issue in *A v R Kinder- en Kindersorgvereniging* (paragraph 20 above). For the further reasons given by him, that application was correctly dismissed.
- 23.2 If I am wrong and I am bound by Cerebos Food, the application must still succeed. This is because, and as submitted by Mr Campbell and Mr Stein in their supplementary written argument, "*Cerebos Food dealt with a situation where a plaintiff seeks information from a defendant regarding suppliers of unlawful goods, and retail outlets, all relating to the defendant's own wrongdoing. The principle in Roamer Watch relied upon by the applicant dealt with the disclosure of information by a third party (i.e. someone who is not a defendant) in order to enable the applicant to sue someone else (the unidentified wrongdoer). This is why Van Dijkhorst J did not overrule Cilliers AJ on this point; indeed, his reliance on the principle ubi ius ibi remedium indicates quite clearly that he had not overruled this particular principle in Roamer Watch. Accordingly, it is respectfully submitted that Southwood J was wrong to find himself bound by Cerebos Food Corporation to deny the relief sought in A v R.*"

- 23.3 Even if I accept, as was found in *Cerebos Food*, that *Stuart v Ismail* is based upon *Hart v Stone*, which is in turn based on an incorrect reading of the old authorities, I have a difficulty, in 2006, in placing any limitation, let alone a strict limitation, on a practice going back to 1883, which Centlivres JA, sitting in the Appellate Division in 1942, found to be “*so well established that it is too late to question it now*”. It is practice that serves the interests of justice and, in the development of the common law, it is a practice that should be reaffirmed. What I believe I should do, and what I will do, is follow what was said by the Appellate Division until such time as the Supreme Court of Appeals finds that the decision in *Stuart v Ismail* is wrong.
24. By ordering disclosure in the circumstances referred to in *Roamer Watch* and in this application, I hope that “*moles*” and others who, in breach of a duty of confidence, or in contempt of a person’s right to privacy, leak confidential information may be deterred from their wrongful conduct. At the same time, an employer will be able to act against employees who breach their duty of good faith to their employer in the belief that they are assured of anonymity. The safeguards referred to in *Roamer Watch* provide sufficient protection against an abuse of the right sought to be asserted. To deny the First Respondent relief “*would be a denial of justice to the (First Respondent) and the gap in the law would constitute a charter for*

*wrongdoers such as the taker of the documents in this case” – per Viscount Dilhorne in **British Steel v Grenada Television 1981 A.C. (H.L.) 1096** at page 1184D to E.*

25. In the event of my granting the application, Mr Burman did not object to any part of the order sought.
- 25.1. Fisher has said under oath that only the five pages attached to the founding affidavit were telefaxed to the First Applicant. The First Respondent does not dispute this averment. My order will reflect this fact.
- 25.2. In addition to the five pages of the minute, the First Applicant should also deliver up a copy of any covering sheet, or other document, transmitted with the five pages.
- 25.3. Fisher states that his son Vaughn received the telefax.
- 25.4. The information to be furnished by Fisher, Vaughn Fisher, or any other person, shall be in affidavit form.
- 25.5. Paragraphs 26.2 to 26.4 will be included in my order.
26. Having dismissed the main application, there is no need to consider the application to strike out references to it in the minute.

27. The following order is made:

1. The First Applicant is ordered to deliver to the First Respondent the original and all copies, in its possession or under its control, of the five pages of the minute telefaxed to it, which is attached to the Applicants' founding affidavit in the interdict application as annexure "CJDF 11", together with any covering sheet or other document transmitted with it.
2. The First Applicant; Mr Carel Johannes Daniel Fisher, Vaughn Fisher and any other employees, shareholders or office bearers, having knowledge thereof, is ordered to state in an affidavit precisely how the document CJDF11 came into the First Applicant's possession, including but not limited to the following facts:
 - 2.1. Who sent it to the First Applicant?
 - 2.2. On what date was it sent?
 - 2.3. Whether receipt of the document was preceded by any communications or negotiations of whatsoever nature, and the full details of such communications or negotiations.
 - 2.4. Precisely which of the First Respondent's employees transmitted the document to the First Applicant? If it was not an employee, the full name and address of such other person must be furnished.

3. The First Applicant is ordered to pay the costs of this application including the costs occasioned by the employment of two Counsel.

I W SCHWARTZMAN
JUDGE OF THE HIGH COURT

Counsel for the Applicants:

Mr B Burman SC

Instructed by:

Mr E Levestein

Werksmans Incorporated

Counsel for the First Respondent:

Mr J Campbell SC

Mr A Stein

Instructed by:

Mr R Kriel

Ross Kriel Attorneys

Judgment handed down:

15 September 2006