49/95

Cases nos 500/93 and 525/93

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the appeals of:

(1) THULANE WASHINGTON SHOBA
duly assisted by PHILDA SHOBA in
her capacity as his mother and
legal guardian . . . . . Appellant

versus

THE OFFICER COMMANDING THE TEMPORARY
POLICE CAMP AT WAGENDRIFT DAM . . . . . 1st Respondent

THE MINISTER OF LAW AND ORDER . . . . . 2nd Respondent

and

(2) MDUDUZI SIEGFRIED MAPHANGA . . . . Appellant

versus

THE OFFICER COMMANDING, SAP MURDER &
ROBBERY UNIT, CNR EDENDALE & CAMPS
DRIFT ROADS, PIETERMARITZBURG . . . . . 1st Respondent

THE OFFICER COMMANDING, SAP STATION,
LOOP STREET, PIETERMARITZBURG . . . . . 2nd Respondent

THE MINISTER OF LAW AND ORDER . . . 3rd Respondent

CORAM: CORBETT CJ, E M GROSSKOPF, NESTADT, STEYN JJA
et NICHOLAS AJA.

DATE OF HEARING: 7 March 1995

DATE OF JUDGMENT: 12 May 1995

J U D G M E N T

CORBETT CJ: / . . . . .

CORBETT CJ:

These two appeals raise once again the vexed question of the use of the so-called *Anton Piller* order in our law. This matter was first considered by this Court in the case of Universal City Studios Inc and Others v Network Video (Pty) Ltd 1986 (2) SA 734 (A). In that case the Judge of first instance (Lategan J) had granted what is commonly referred to as an Anton Piller order in an instance of the alleged "pirating" of cinematograph films by a maker and distributor of video tapes. The order was far-reaching in its terms. An appeal to the Full Court was successful and the order was set aside (see Network Video (Pty) Ltd v Universal City Studios Inc and Others 1984 (4) SA 379 (C)). By the time that the case came before this Court on appeal it was moot and the only live issues were the costs of

the various stages of the proceedings. The Court indicated that one of the paragraphs of the order of Lategan J ought properly to have been granted, but as there was no practical point in making a formal order to this effect, this Court's order dealt only with costs.

The judgment of this Court reviewed the more important reported decisions of our Courts relating to *Anton Piller* orders and referred particularly to the trilogy of Transvaal cases (Economic Data Processing (Pty) Ltd and Others v Pentreath 1984 (2) SA 605 (W); Cerebos Food Corporation Ltd v Diverse Foods SA (Pty) Ltd and Another 1984 (4) SA 149 (T); and Trade Fairs and Promotions (Pty) Ltd v Thomson and Another 1984 (4) SA 177 (W)) in which disapproval of the practice of granting such orders was expressed. In the judgment (at 751 B-E) this Court referred to the analysis and

summary of the various components of *Anton Piller* orders granted by South African courts contained in the judgment in the Cerebos Food case, *supra*, at 164 A-C, and reading 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 intending Court case between the parties.
> 4. Orders for the production and handing over of a thing 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."

In the Cerebos Food case the Court, consisting of Boshoff JP, Van Dijkhorst J and O'Donovan J, went on to hold -

(a) that the first of these components, viz an order for the

attachment of property in which a real or personal right was claimed (including both common law and statutory rights) was not a "true *Anton Piller* remedy" and that our Courts had for many years been granting interim attachment orders where the plaintiff alleged an existing right in a thing and where the only way in which that thing could be preserved or irreparable harm prevented was by the attachment thereof *pendente lite* (Cerebos Food judgment at 164D - F);

(b) that neither in Roman law nor in Roman-Dutch law nor in our law as laid down by the Appellate Division was there any authority justifying an order for the type of disclosure covered by the second component (Cerebos Food judgment at 168A - B);

(c) that South African Courts had no jurisdiction to grant the type of order of attachment visualized by the third component, i e where the applicant claimed no right in the property to be attached but wished to have it preserved so that it could be produced as evidence in an intended court action (Cerebos Food judgment at 173F); and

(d) that, in regard to the fourth component, a South African Court had no power to order the handing over of property "to make the interdict effective" where no right to that property existed (Cerebos Food judgment at 173G - I).

With reference to the third component and the views expressed in the Cerebos Food case concerning it, the judgment in the Universal City Studios case makes the following observation (at 754E

- F):

> "Now, I am by no means convinced that in appropriate circumstances the Court does not have the power to grant *ex parte* and without notice to the other party, ie the respondent (and even, if necessary, *in camera*) an order designed *pendente lite* to preserve evidence in the possession of the respondent. It is probably correct, as so cogently reasoned by the Court in the *Cerebos Food* case *supra*, that there is no authority for such a procedure in our common law. But, of course, the remedies devised in the *Anton Piller* case *supra* and other subsequent cases for the preservation of evidence are essentially modern legal remedies devised to cater for modern problems in the prosecution of commercial suits."

After reference to the Court's inherent power to regulate its procedures in the interests of the proper administration of justice, the judgment proceeds (at 755A -E):

"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."
> (I have corrected the misprints which appeared in the published version of the judgment.)

The judgment also deals with safeguards and procedures (at 755F - G), but then goes on to state that it is not necessary in the instant case to "pronounce finally on these matters" inasmuch as the orders in issue granted by Lategan J are "a far cry from an order designed merely to preserve specific evidence for trial" (at 755H - I).

This brings me to the second decision of this Court in a case involving an *Anton Piller*-type order, viz Jafta v Minister of Law and Order and Others 1991 (2) SA 286 (A). In that case the applicant (appellant), alleging that he had been taken into custody by the police and interrogated at a police station and that in the course of

interrogation he had been assaulted and tortured by being given electric shocks, made application in the Witwatersrand Local Division in accordance with the usual *Anton Piller* procedures for an *Anton Piller*-type order, citing as respondents the Minister of Law and Order and certain senior police officers. The order sought, which ran to many paragraphs, was designed generally to enable the applicant to point out and identify, at the police station, the alleged torture apparatus and to ensure that such apparatus be preserved so that it should serve as evidence in a civil claim for damages to be instituted by the applicant against the respondents.

The application came before Streicher J, who permitted it to be heard *ex parte*, *in camera* and without notice to the respondents. After hearing argument he dismissed the application, holding that he

was precluded by the decision of the Full Court in the Cerebos Food case, *supra*, from granting the relief claimed, but granted leave to appeal to this Court. An application that this Court hear the appeal *in camera* and without notice to the respondents, and argument on the merits of the appeal, were heard by this Court, as a matter of urgency, *in camera* and without notice. The procedures which were followed to achieve this result are fully set forth in the judgment of this Court (Jafta case, *supra*, at 290H - 291J) and need not be detailed.

In its judgment in the Jafta case this Court held as follows:

(1) That the above-quoted dictum in the Universal City Studio case, *supra* (and appearing in the reported judgment of the case at 755A - E) was *obiter* (see Jafta judgment at 292G - 293A);

(2) That Streicher J was correct in holding that he was precluded from granting the orders prayed by the decision of the Full Court in the Cerebos Food case (Jafta judgment at 293B - D).

(3) That for the application and the appeal to succeed it was necessary for this Court to translate the obiter dictum referred to in (1) above into "a positive decision" and to overrule *pro tanto* the Cerebos Food decision (Jafta judgment at 293D - E).

(4) That there were various statutory provisions which might possibly prevent an order being granted against the respondents *ex parte* and without notice, of which sec 35 of Act 62 of 1955 appeared *prima facie* to be the most pertinent (Jafta judgment at 294D - 295I); and that owing to the *ex parte* nature of the proceedings the Court could not be sure that there were no other

statutory bars to the relief being granted without notice (Jafta judgment at 295 J);

(5) That in the circumstances it would be unwise to decide these and other issues in the matter without hearing argument from all the parties concerned (Jafta judgment at 296A - D); and

(6) That the application be dismissed, that no decision be given on the merits of the appeal and that it be for the applicant to decide whether to prosecute the appeal in accordance with the normal rules of procedure (Jafta judgment at 296E).

In the result the appeal was not taken any further and the questions left open in Jafta's case remained unresolved; and that was the position when proceedings were launched on motion in the two matters now under consideration. For the sake of brevity, I shall refer

to them as the Shoba case and the Maphanga case.

In the Shoba case the applicant, a seventeen-year-old schoolboy (who was assisted in these proceedings by his mother, his legal guardian), was arrested by the police at his home in Bruntville, Natal on suspicion of having been involved in arson committed in relation to the hostel at Bruntville. He was taken to various places at which he was interrogated by members of the police. One such place was a temporary camp at or near the Wagendrift Dam. Here, so the applicant alleged, he was tortured by being subjected to electric shocks. This was done by means of an apparatus operated by the police and described by the applicant as a square grey metal box, on top of which there were two holes. From these holes, which looked like plug sockets, there emerged wires over a metre long and ending

with metal clamps. There were switches and coloured lights, which lit up when the box was turned on. All this happened in January 1993.

In the founding affidavit the applicant averred that he suffered pain and injury as a result of these electric shocks. In a supporting affidavit applicant's attorney, Mr Varney, stated that he had been instructed by the applicant (duly assisted) to bring an action for damages against the Minister of Law and Order by reason of the torture committed by members of the South African Police in the course and scope of their employment. Mr Varney proceeded to point out that it was likely that the persons responsible for these unlawful assaults would deny the applicant's allegations and would do everything possible to conceal the truth. For this reason it was

essential that the applicant be given the opportunity to attempt to secure as evidence the equipment that was used to torture him, or at least to have the existence of the equipment confirmed by independent observation. The only way to achieve this would be to allow the applicant, accompanied by his attorney, to inspect the premises and point out the equipment, if still there. He further submitted that it was in the interests of justice that the persons who had custody of the torture equipment should not have notice of the application, since if they did have such notice it was likely that they would remove or conceal the equipment and in that way seek to defeat the applicant's rights to justice.

Nevertheless, notice of the application was given to the respondents cited, viz the Officer Commanding the Temporary Police

Camp at Wagendrift Dam (first respondent) and the Minister of Law and Order (second respondent). The form of order sought, which was evidently dictated by the Jafta decision, was one:

"1. Declaring that the Applicant would have been entitled in the circumstances set out in this Application to have brought an Application, to be heard *in camera* for the relief set out in paragraphs 1.1 to 1.7 without notice to the Respondents herein:

1.1 That the provisions of the Rules of Court with regard to the form and service of this application are dispensed with in terms of Rule of Court 6(12).

1.2 That the Registrar of this Honourable Court is to retain the file in this matter in his/her custody and that no person having any knowledge of the contents of this application or of the fact that this application has been brought is to disclose such facts or any facts relating thereto to any other person pending the execution of paragraph 1.4 (of) this order without leave having been granted by this Honourable Court.

1.3 That the Officer Commanding Estcourt Prison, or the person in charge of the prison for the time being, where the applicant is presently being held, be ordered to release the applicant immediately into the custody of the Deputy Sheriff for the purposes of carrying out the directions set out hereunder in paragraph 1.4. On the completion of the execution or attempted execution of the directions contained in paragraph 1.4, the Deputy Sheriff is ordered to return the applicant to the custody of the Officer Commanding, Estcourt Prison or to the person in charge of the prison.

1.4 That the policeman or person in control of the structures and premises (hereinafter referred to as 'the premises'), or the policeman or person in control thereof for the time being, referred to in paragraph 9 of the affidavit of the applicant, permit attorney HOWARD VARNEY of the firm of attorneys, LEGAL RESOURCES CENTRE, and the applicant:-

1.4.1 To be granted immediate access to the premises upon being presented with this order;

1.4.2 Thereupon to inspect the premises and vehicles in the vicinity of the premises, for the purposes of enabling the applicant to point out and identify any apparatus and object which may be present there; and capable of being used to administer electric shocks and in particular an instrument such as described in the affidavit of the applicant;

1.4.3 To examine any apparatus or object such as is referred to in sub-paragraph 1.4.2 above."

In addition there were prayers requiring the terms of para 1.4 to be executed only in the presence of a deputy sheriff, who was to prepare an inventory of any such apparatus found on the premises, to retain any such apparatus in his possession at the pleasure of the Court and to provide the parties with a copy of the inventory; requiring the applicant's attorney to file an affidavit describing the execution of the

order; and giving any interested party the right to set the matter down on notice for further hearing or for variation of the order or for the grant of other relief (par 1.5, 1.6 and 1.7).

The application was opposed by the respondents upon a number of grounds, both legal and factual. As to the facts, there is no dispute about the applicant's arrest and the fact that he was interrogated by the police, but it is denied "emphatically" that applicant was tortured, or that anyone was in possession of a square, grey metal box or that the applicant was subjected to electric shocks. I shall come later to the various legal points taken in opposition to the application.

The matter came before Hurt J in the Natal Provincial Division, who for reasons to be stated later, dismissed the application

with costs, but gave leave to appeal to this Court. The case was heard and judgment was delivered on 27 August 1993.

Just over a week later a similar application was launched in the Maphanga case. The applicant in this case (in which Mr Varney again acted as the attorney) alleged, too, that he had been arrested and taken to two police stations in Pietermaritzburg, where he was assaulted. In the course of the assaults he was punched and kicked and motor-car inner tubes were pressed against his face, preventing him from breathing; and wires were pushed against him, causing sharp pain. He later noticed on the premises a black electric cord, one end of which appeared to be plugged in behind a cupboard. The other end of the cord consisted of three bare wires. Shortly thereafter he was released. That night he was examined by a doctor,

who found multiple bruises over the whole of applicant's body; wrist trauma consistent with a history of his wrists having been tied with sacking; a swollen upper lip; a small patch of blood in the right ear canal; and both nostrils filled with blood.

In a supporting affidavit Mr Varney stated that he had been instructed by the applicant to bring an action for damages against the Minister of Law and Order by reason of the torture committed by members of the South African Police in the course and scope of their employment. He proceeded to explain, as in the Shoba case, the need to have an inspection of the premises in order to locate and identify the torture equipment; and the reasons why the persons having custody of the equipment should not have notice of the application.

In the notice of motion, citing as respondents the officers

commanding the two police stations and the Minister of Law and Order, orders similar to those claimed in the Shoba case, apart from the declarator, were sought. In addition, the applicant asked that the provisions of the Rules of Court relating to service of the application be dispensed with; that the application be heard *in camera*; and that, in effect, pending the execution of the order sought, secrecy be maintained in regard to the application and the contents of the papers filed (paras 1 and 2).

The matter came before Shearer J in the Natal Provincial Division, *ex parte* and *in camera*. The learned Judge dismissed the application on the basis that the decision in Jafta's case precluded him from hearing the matter without notice to the respondents. He granted leave to appeal to this Court.

Thereafter the full papers in this matter were served on the respondents, who have participated fully in the appeal. Because the two cases, i e Shoba's case and Maphanga's case, involved similar issues the appeals were heard together. The same counsel and attorneys acted for the appellants, on the one hand, and for the respondents, on the other hand.

On appeal a number of points were argued. I shall deal with them in what appears to be their logical sequence.

Declaration of Rights

This point pertains only to the Shoba appeal. In this case, it will be recalled, the applicant actually gave notice to the respondents, thus forfeiting the surprise effect of an *Anton Piller*-type order. The order prayed did not contemplate an actual inspection of

the premises in question and search for the alleged torture apparatus. What was sought was a declaratory order that, in the circumstances described by the application, the applicant would have been entitled to move the Court, *in camera*, and without notice to the respondents, for an order permitting inspection of the premises, etc. In fact, in his affidavit Mr Varney referred to the Jafta case and stated that he had advised the applicant that in that case the Appellate Division had declined to make an order without notice to the respondents. The affidavit continues:

> "As I understand the case, however, the Court left it open to an Applicant to persuade a Court after notice to all Respondents and full argument, that an order without notice, to be heard *in camera*, could still be made in appropriate circumstances. I submit that this is in the nature of a test case and that a decision will assist litigants in future who are faced with similar

circumstances."

In the Court *a quo* the issue was raised as to whether in such circumstances the Court had the power to make a declaratory order such as that sought by the applicant (now the appellant, but whom I shall continue to call the "applicant"). The applicant relied on sec 19(1)(a)(iii) of the Supreme Court Act, 59 of 1959, which empowers a provincial or local division of the Supreme Court -

> " . . . in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination."

In this regard Hurt J stated in his judgment -

> "The section empowers a Court to 'enquire into and determine any existing, future or contingent right or obligation'. What the applicant is seeking to do in this case is (if one gives the wording of the Notice of Motion its literal meaning and effect) to ask this Court to rule that in the situation as existed in January 1993 the applicant would have been entitled to a procedural order on an application brought *in camera* and without notice to the respondents."

Having emphasized that the question as to whether the applicant was entitled to any form of interim relief was a procedural one and that the Court had a discretion in the matter, the learned Judge continued:

> "Accordingly it seems to me that what this Court is now being asked to enquire into is not really the determination of an existing, future or contingent right, but a question of whether there were good prospects of success, to put it roughly, available to the applicant if he had moved for urgent relief *in camera* in January 1993.
>
> It follows that I do not consider that this is a case in

> which the Court is being asked to enquire into a matter which falls under section 19(1)(a)(iii) of the Supreme Court Act even though the question at issue in this application is obviously an important one and even though it would be most desirable to have a ruling by the Courts on the question of whether the statutes which are referred to in Jafta's case may prove to be a bar to relief *in camera* in the type of situation contemplated in this application. I unfortunately do not consider that I have the power, especially sitting as a Judge of first instance, to grasp the nettle and resolve the question which the applicant implicitly poses in this application."

I agree with Hurt J. Generally speaking, the Courts will not, in terms of sec 19(1)(a)(iii), deal with or pronounce upon abstract or academic points of law. An existing or concrete dispute between persons is not a pre-requisite for the exercise by the Court of its jurisdiction under this subsection, though the absence of such a dispute may, depending on the circumstances, cause the Court to refuse to

excercise its jurisdiction in a particular case (see *Ex parte* Nell 1963 (1) SA 754 (A), at 759H - 760B). But because it is not the function of the Court to act as an adviser, it is a requirement of the exercise of jurisdiction under this subsection that there should be interested parties upon whom the declaratory order would be binding (Nell's case, at 760B - C). In Nell's case, *supra,* at 759A - B, Steyn CJ referred with approval to the following statement by Watermeyer JA in Durban City Council v Association of Building Societies 1942 AD 27, at 32, with reference to the identically worded sec 102 of Act 46 of 1935:

> "The question whether or not an order should be made under this section has to be examined in two stages. First the Court must be satisfied that the applicant is a person interested in an 'existing, future or contingent right or obligation', and then, if satisfied on that point, the Court must decide whether the case is a proper one for the exercise of the discretion conferred on it."

I shall assume in applicant's favour that the subsection applies to procedural rights, as well as substantive rights. Even on that assumption I do not see how the declaration sought by the applicant could be regarded as relating to an existing, future or contingent right. By the time the matter was heard by Hurt J the applicant no longer sought or wished to seek orders for the inspection of the premises and a search for the torture apparatus. He merely wanted to be advised whether, had he made application *in camera* and without notice in January 1993, he would have been entitled to obtain such orders. This does not seem to me to be covered by the powers granted the Court under sec 19(1)(a)(iii) of the Supreme Court Act. It is not a matter upon which the judgment of the Court would be binding on the interested parties. Accordingly, the arguments of

applicant's counsel notwithstanding, I am of the opinion that Hurt J correctly refused to make an order under the subsection.

In the Court below applicant's counsel, in the course of argument, moved an amendment of the notice of motion, which in the words of Hurt J -

> " . . . would have effectively removed the prayer for relief in the form of a declarator and substituted therefor relief in the form of an order granting the applicant the right to proceed, as set out in paragraphs 1.1 to 1.7 of the Notice of Motion."

On appeal applicant's counsel pursued the application for an amendment, as an alternative to his main argument to the effect that the Court should have made an order under sec 19(1)(a)(iii).

Hurt J refused the amendment on the ground that the

respondents would be irreparably prejudiced if it were granted at that stage. I am not persuaded that the learned Judge exercised his discretion improperly and consequently this alternative argument, based upon an application for an amendment, fails.

These conclusions are fatal as far as the appeal in Shoba's case is concerned.

I turn now to the other points which are common to both cases but which are now academic in Shoba's case.

Anton Piller: A General Remedy?

At this point it is necessary to give a decision in regard to what was left open in both the Universal City Studios case, *supra*, and Jafta's case, *supra*, viz whether an *Anton Piller* order directed at the preservation of evidence should be accepted as part of our practice.

In my view, it should; and I would define what an applicant for such an order, obtained *in camera* and without notice to the respondent, must *prima facie* establish, as the following:

(1) That he, the applicant, has a cause of action against the respondent which he intends to pursue;

(2) That the respondent has in his possession specific (and specified) documents or things which constitute vital evidence in substantiation of applicant's cause of action (but in respect of which applicant cannot claim a real or personal right); and

(3) That there is a real and well-founded apprehension that this evidence may be hidden or destroyed or in some manner be spirited away by the time the case comes to trial or to the stage of discovery.

I have used the words "vital evidence" in the sense of being evidence of great importance to the applicant's case. In the case of *Ex parte* Matshini and Others 1986 (3) SA 605 (E) it was held that in order to obtain an *Anton Piller* order the applicant would have to show that the evidence was "essential" or "absolutely necessary" in order for him to prove his claim and that its non-availability at the trial would result in the administration of justice being defeated (at 613A - C). As I suggested in Jafta's case (at 294A), this poses too stringent a test.

The Court to which application is made for such an *Anton Piller* order has a discretion whether to grant the remedy or not and, if it does, upon what terms. In exercising this discretion the Court will pay regard, *inter alia*, to the cogency of the *prima facie* case

established with reference to the matters listed (1), (2) and (3) above; the potential harm that will be suffered by the respondent if the remedy is granted as compared with, or balanced against, the potential harm to the applicant if the remedy is withheld; and whether the terms of the order sought are no more onerous than is necessary to protect the interests of the applicant.

The acceptance of the *Anton Piller* principle in regard to the preservation of evidence on the basis set forth above means that, to the extent to which they are in conflict with this, the judgments in the Economic Data, Cerebos Food and Trade Fairs cases must be taken to be overruled.

It is not necessary in this case to decide whether the *Anton Piller* principle has any scope in our law other than what is

indicated above.

The above-stated formulation in regard to the preservation of evidence is in general terms. It was submitted, however, by respondent's counsel that the *Anton Piller* remedy was essentially one designed for litigation in the intellectual property field and that it should be limited to those classes of cases. In this connection counsel referred to certain remarks by Lord Wilberforce in the English case of Rank Film Distributors Ltd and others v Video Information Centre and others [1981] 2 All ER 76 (HL), at 78g - h, to the effect that the *Anton Piller* order was designed to deal with situations created by infringements of patents, trade marks and copyright and more particularly with acts of commercial piracy in these fields. That the *Anton Piller* procedure originated in this way is beyond question; but

the English decisions show that the procedure has been extended to other classes of cases as well. Thus, in Yousif v Salama [1980] 3 All ER 405 (CA) an *Anton Piller* order was made for the preservation of documents which were "the best possible evidence to prove the plaintiff's case" (but which were not the subject matter of the action) in a commercial dispute between a supplier of goods for re-sale and his distributor under a profit-sharing agreement. In a similar kind of dispute an *Anton Piller* order was granted after judgment in order to elicit and preserve documents relating to the defendant's assets and essential to the execution of the judgment (Distributori Automatici Italia SpA v Holford General Trading Co Ltd and another [1985] 3 All ER 750 (QBD)). And in Emanuel v Emanuel [1982] 2 All ER 342 (Fam D) an *Anton Piller* order for the preservation of documents

required as evidence, but not themselves the subject matter of the proceedings, was granted in the Family Division in a matrimonial (post-divorce) dispute. There is, so far as I am aware, no authority in English law suggesting that these cases were incorrectly decided or that the *Anton Piller* procedure should be confined to intellectual property cases. (See also Universal Thermosensors Ltd v Hibben and others [1992] 3 All ER 257 (Ch)).

In this country the *Anton Piller* procedure has been used mainly in the intellectual property field, but in other areas as well, more particularly in applications similar to those under consideration in these appeals. In this regard I would refer particularly to Ex parte Matshini and Others 1986 (3) SA 605 (E) and Ex parte Dyantyi and Another 1989 (4) SA 826 (CkGD). In Matshini's case an *Anton*

Piller order was refused because, so the Court held, the real evidence in question (torture apparatus) was not shown to be "essential" or "absolutely necessary" in order for the applicants to prove their claims. (See my remarks above as to the correctness of this test.) At the same time the Court appears to have accepted that otherwise and in principle there was no reason why in that case an order for the preservation of the evidence by way of an *Anton Piller* order should not be granted (see judgment at 609E - H). In Dyantyi's case an *Anton Piller* order for the pointing out and identification of torture apparatus at certain security police headquarters was granted. According to an article by M C Plasket entitled "The Final Word on Anton Piller Orders Against the Police" and published in (1992) 8 SAJHR 569, the premises in question were searched in pursuance of

this order and certain of the articles were found; and subsequent claims for damages were settled. Mr Plasket also makes mention in his article of similar *Anton Piller* orders granted in five other cases, in four of which torture equipment was found.

As a matter of legal policy, I can see no reason why the *Anton Piller* procedure should be confined to intellectual property cases; or indeed why it should not extend to cases such as those under consideration in these appeals. The torture of persons in police custody is a very serious matter indeed and where a person alleges that he has been so tortured and wishes to sue for damages the Court should not be tardy in coming to his assistance by way of an *Anton Piller* order for the discovery and identification of torture equipment in the possession of the police, provided that the three requisites which

I have listed above are satisfied. Evidence of the existence of such equipment would in most instances be vital or critical in any such action for damages, even though it might not be the only evidence of assault. Inspection of the premises in question in pursuance of such an *Anton Piller* order would, in normal circumstances, not cause more than minor inconvenience to the police, often far less than that caused to a potential defendant in an intellectual property suit. On the other hand, refusal of such an order in a deserving case could result in a subsequent denial of justice. Naturally the Courts should be careful to ensure that the *Anton Piller* procedure is not used indiscriminately or as an instrument to harass the police or other potential defendants, but this should not occur if the Court gives careful attention to the above-mentioned three requisites and exercises its discretion with good

judgement.

In the case of Krygkor Pensioenfonds v Smith 1993 (3) SA 459 (A), at 469E - I, reference was made to the traditional reluctance of the Courts to depart from the procedures laid down by the Rules of Court and to the fact that only in exceptional cases will they exercise their inherent jurisdiction to follow procedures not so laid down. With reference thereto E M Grosskopf JA, delivering the judgment of the Court, stated (at 469H - I):

> "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 prosedure-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."

In my view, the *Anton Piller* procedure in matters such as those now under consideration constitute appropriate exceptions to the normal rules of procedure.

For these reasons, I am of the view that the submission by respondents' counsel that the *Anton Piller* order should be confined to intellectual property cases is not well-founded; and that it may be employed in cases where the applicant seeks an order for the discovery and preservation of evidence, as for example torture apparatus in the possession of the police. This, of course, is premised by the assumption that there is no statutory or other bar to the grant of such an order. It is to this aspect of the matter that I now turn.

Sec 35, General Law Amendment Act, 1955

Sec 35 of the General Law Amendment Act, 62 of 1955,

provides as follows:

> "Notwithstanding anything to the contrary contained in any law, no court shall issue any rule *nisi* operating as an interim interdict against the Government of the Union including the South African Railways and Harbours Administration or the Administration of any Province, or any Minister, Administrator or other officer of the said Government or Administration in his capacity as such, unless notice of the intention to apply for such a rule, accompanied by copies of the petition and of the affidavits which are intended to be used in support of the application, was served upon the said Government, Administration, Minister, Administrator or officer at least seventy-two hours, or such lesser period as the court may in all the circumstances of the case consider reasonable, before the time mentioned in the notice for the hearing of the application."

It was this statutory provision, primarily, which gave us pause in the Jafta case, *supra*. Now, however, the matter has been

fully argued by the interested parties and we are in a position to decide whether sec 35 constitutes a bar to the grant of an *Anton Piller* order against the South African Police and/or the Minister of Law and Order.

It has been held that sec 35 is peremptory to the extent that notice of at least 72 hours, or such lesser period as the Court may allow as being reasonable, must be given of an application falling within the ambit of the section (Maharaj Brothers v Pieterse Bros Construction (Pty) Ltd and Another 1961 (2) SA 232 (N); Xaba and Others v Bantu Affairs Commissioner, Newcastle 1968 (1) SA 193 (N), at 195C - D). In Xaba's case, however, it was held that the section did not preclude an urgent application being made against an officer of the Government on oral evidence.

In terms, sec 35 applies only to an application for a "rule *nisi* operating as an interim interdict". The term "rule *nisi*" is derived from the English law and practice, and the rule may be defined as an order by a Court issued at the instance of the applicant and calling upon another party to show cause before the Court on a particular day why the relief applied for should not be granted (see Van Zyl's Judicial Practice, 3 ed, 450 *et seq*; Tollman v Tollman 1963 (4) SA 44 (C), at 46H. Walker's Oxford Companion to Law, sv *"nisi"*, states that a decree, rule or order is made *nisi* when it is not to take effect unless the person affected fails within a stated time to appear and show cause why it should not take effect. As Van Zyl points out, our common law knew the temporary interdict and a "curious mixture of our practice with the practice of England" took place and the practice

arose of asking the Court for a rule *nisi*, returnable on a certain day, but in the meantime to operate as a temporary interdict.

In determining whether an *Anton Piller* order falls within the ambit of "a rule *nisi* operating as an interim interdict", account must be taken of the principle that a statutory provision which clogs or hampers the ordinary rights of an aggrieved person to seek the assistance of the courts should be restrictively construed and not be extended beyond its expressed limits (Benning v Union Government (Minister of Finance) 1914 AD 180, at 185; Avex Air (Pty) Ltd v Borough of Vryheid 1973 (1) SA 617 (A), at 621F - G; Administrator, Transvaal and Others v Traub and Others 1989 (4) SA 731 (A), at 764E - F). Taking due account of this principle, I am of the opinion that an *Anton Piller* order such as that sought in these two

cases cannot be regarded in law as a "rule *nisi* operating as an interim interdict". A rule *nisi*, as I have indicated, contemplates that the relief sought will only be granted at some future date after the respondent has had time to show cause that it should not be granted. The *Anton Piller* order, on the other hand, grants immediate relief and requires the respondent forthwith - and without any opportunity to voice opposition - to submit to the search of his premises and to the other demands of the order. A rule *nisi* usually relates to substantive relief; the *Anton Piller* order relates merely to procedural relief, viz the preservation of evidence, to be used for ultimately securing the substantive relief. It is true that a rule *nisi* is sometimes incorporated in an *Anton Piller* order as a means of giving the respondent the opportunity to contest the matter and have the order set aside, but

more often than not (as in the Shoba case) the order sought contains a provision, not in the form of a rule *nisi*, entitling the respondent to apply, on notice, to vary or discharge the order (cf also Jafta's case, *supra*, at 289D). In Maphanga's case the order prayed contains neither. Furthermore, the interim interdict attached to a rule *nisi* usually seeks to maintain the *status quo ante*; whereas an *Anton Piller* order gives instant relief, subject to the possibility of a later variation or discharge of the order.

While a decision that an *Anton Piller* order against, for example, the Minister of Law and Order is not debarred by sec 35, does undoubtedly give rise to anomaly (see Jafta's case, at 295G - I), that is not, in my opinion, sufficient ground for differently interpreting sec 35. And in this regard it must be borne in mind that sec 35 was

enacted long before the *Anton Piller* procedure was devised.

For these reasons, I hold that sec 35 did not protect the respondents against the issue of an *Anton Piller* order in the Maphanga case.

Section 3, State Liability Act, 1957

The next statutory bar relied upon by respondents' counsel was sec 3 of the State Liability Act, 20 of 1957. At the relevant time this section read as follows:

> "No execution, attachment or like process shall be issued against the defendant or respondent in any such action or proceedings or against any property of the State, but the amount, if any, which may be required to satisfy any judgment or order given or made against the nominal defendant or respondent in any such action or proceedings may be paid out of the Consolidated Revenue Fund."

This section does not assist the respondents. Assuming that certain of the relief asked for in the Maphanga case, e g that authorising the Deputy Sheriff to retain the apparatus or object found and placed on his inventory until the Court otherwise orders, would amount to an "attachment or like process" in terms of the section, it seems to me that an insuperable difficulty confronting the respondents is the fact that the section applies only to the attachment of"property of the State". In the ordinary course, so I am inclined to think, the onus of establishing the factual applicability of sec 3 would rest upon the party relying upon it (cf Thorne v Union Government 1929 TPD 156, at 159). There is no evidence to suggest that the alleged torture apparatus (if it exists) belongs to the State. On the contrary, it may be accepted that, if discovered, such apparatus would probably be

disowned by the State. It is not necessary to pursue these points (or to decide them), however, since counsel for the applicant, having given notice thereof in his heads or argument, moved an application before us for the amendment of certain prayers in the notice of motion. The amendments in effect provide for the photographing of any such apparatus and eliminate the prayer for the retention of possession thereof by the Deputy Sheriff. The application for amendment was not opposed by the respondents and, in my view, it should be granted. Respondents' counsel conceded, as I understood him, that once this amendment was granted, sec 3 ceased to have any relevance. I agree.

Public Policy

It was submitted on respondents' behalf that it would be contrary to public policy to permit an *Anton Piller* order to be granted

in a case such as the present one. In this connection two points were made:

(1) In principle the primary duty to investigate crime and to prosecute rests upon the State and, if evidence of a crime exists, public policy requires that evidence tending to prove the commission of such a crime should be protected until the State has decided whether to prosecute or not. To permit private individuals to conduct their own investigations into criminal offences would be in conflict with these principles.

(2) The granting of an *Anton Piller* order in a case such as this conflicts with the individual's privilege against self-incrimination.

There is no substance in these points. As to (1),

accepting the principles postulated, what is involved here is not an impermissible investigation into a criminal offence by a private individual but an attempt, by means of an order of Court, to preserve evidence required in a civil case to redress a civil wrong. The fact that the civil wrong may also constitute a criminal offence is, in my view, of no moment. I know of no authority, and none was quoted to us, which establishes that, because a certain action constitutes a criminal offence as well as a civil wrong, the victim of both is not entitled to pursue his civil remedy and collect evidence to substantiate his claim. It is true that when the civil claim comes to court, the proceedings may, on application, be stayed pending the finalisation of criminal proceedings relating to the same facts. This may be done in the interests of justice if the accused can show prejudice to himself in

the criminal proceedings if the civil action were to be heard first (see Harms Civil Procedure in the Supreme Court, L 11, p 343). But that is a different matter altogether. And, in any event, there is no suggestion of a criminal prosecution in the present case.

As to (2), no question of self-incrimination arises. The *Anton Piller* order prayed for does not involve, nor is it likely to lead to, any admissions or incriminating conduct on the part of a potential accused person. It simply entails a search of police premises for torture apparatus; and requires whoever happens to be in charge of the premises at the time to give the applicant, his attorney and the Deputy Sheriff access to the premises and to allow the search to take place. In connection with this line of argument respondents' counsel referred to the Rank Film case, *supra*. The authority is against him

since it is clear that orders requiring the respondents in that case to allow access to the premises for the purpose of enabling the appellants to look for illicit copy films and to allow their being removed to safe custody, were held not to involve or impinge upon the privilege against self-incrimination (at 80 c - e).

For these reasons I hold that there is no statutory or other bar to the grant against the respondents in the Maphanga case of an *Anton Piller* order in the form sought by the applicant. As to the factual merits, it seems to me that the applicant established (i) a strong *prima facie* case of having been assaulted and tortured while in police custody; (ii) that he intended to pursue against the second respondent a civil action arising from such assault and torture; (iii) that, if it existed, the torture apparatus would be vital evidence in such a civil

action; and that there was a real and well-founded apprehension that such apparatus, if it existed, would be hidden or destroyed before the matter came to trial. This was hardly in dispute. In my opinion, the Court *a quo* should, therefore, have granted an *Anton Piller* order in this case. Although such an order is almost certainly academic at this stage, I shall substitute for the order of Shearer J an order which accords with the conclusions reached in this judgment.

In regard to the form of the order, there are four points to be made. Firstly, the prayers must be altered in accordance with the amendments which are to be granted. Secondly, in contrast to the Shoba application, the prayers in the Maphanga application do not contain provision for an interested party to set the matter down on notice for further hearing or for variation of the order or for the grant

of other relief. This should be remedied. Thirdly, in formulating the order I have otherwise followed the wording of the prayers in the notice of motion, but restricted their scope in certain respects and made a different order as to costs. (See below). I do not wish to be understood to convey that this is a model order or that it and the procedure which it establishes cannot be improved upon. Because of the academic nature of the order this is not a matter of importance; and in any event it was not debated with counsel. Fourthly, inasmuch as Shearer J heard the matter *ex parte* and *in camera,* prayers 1 and 2 of the notice of motion fall away.

Finally, there is the question of costs. The appeal in the Shoba case fails and that in the Maphanga case succeeds. In each case costs will follow the event. As I have indicated, however, the

same counsel and attorneys acted in both cases. Moreover, the two cases were argued together, all the issues, apart from that relating to the declaration of rights in the Shoba case, being common to both cases. This may cause problems in sorting out the costs of the hearing of the appeal and, in this regard, I would indicate for the guidance of the Taxing Master that the argument on the declaration of rights issue occupied approximately one-quarter of the time of the hearing and the other issues approximately three-quarters. The application for the amendment of the prayers in the notice of motion in the Maphanga case did not, in my estimation, occasion any wasted costs and no order in regard thereto need be made. As regards the costs of the application in the Court *a quo* the relevant prayer in the notice of motion asked that these be ordered to be paid by the respondents.

But, in my view, such an order would be premature. Much would depend in a case such as this on what the inspection revealed. The award of such costs should consequently be left to the decision of the Judge who hears the action for damages foreshadowed in the application.

Accordingly it is ordered:

I That the appeal in the matter of Shoba v The Officer Commanding the Temporary Police Camp at Wagendrift Dam and Another be dismissed with costs, such costs to include the costs of two counsel.

II That as regards the appeal in the matter of Maphanga v The Officer Commanding, SAP Murder and Robbery Unity, Cnr

(1) the application for the amendment of prayers 3(c) and 4(b) of the notice of motion is granted;

(2) the appeal is allowed with costs;

(3) the order of the Court *a quo* is set aside and there is substituted the following order:-

"(a) That the Officers Commanding or the policeman in control of the structures and premises at the Murder and Robbery Unit, corner Edendale and Camps Drift roads (known as Halfway House) and Loop Street police station in Pietermaritzburg ("the premises") permit attorney Howard Varney of the Legal Resources Centre and/or candidate attorney Ian Dutton of the firm of attorneys Volsum, Chetty and Lax and the applicant:-

(i) to be granted immediate access to the premises upon being presented with this order;

(ii) thereupon to inspect the premises for the purpose of enabling the applicant to point out and identify the apparatus used to administer electric shocks as described by him in his affidavit;

(iii) to examine and photograph any such apparatus referred to in sub-paragraph (ii) above;

(b) That the terms of paragraph (a) above be executed only in the presence of the Deputy Sheriff, who is directed -

(i) to prepare a detailed inventory of any such apparatus found on the premises; and

(ii) to provide the applicant's attorney and the first and second respondents with a copy of such inventory;

(c) That the applicant's attorney file with this Court an affidavit setting forth the manner in which this order was executed, the portion of the premises inspected and the observations made by the applicant's attorney in the course of such inspection; and that a copy of such affidavit, together with the documents filed in these proceedings and the Court's order be served upon the respondents;

(d) That any interested party is given leave to apply to this Court, on not less than 24 hours written notice, for the variation or setting aside of this order or for any other appropriate relief; and to file such affidavits as may be necessary in connection therewith.

(e) That the question of the costs of this application is reserved for decision in the action foreshadowed in Mr Varney's affidavit. If such action is not instituted within three weeks of the date of this

order, the applicant is ordered to pay the costs of the application".

M M CORBETT

E M GROSSKOPF JA)
NESTADT JA)
STEYN JA) **CONCUR**
NICHOLAS AJA)