IN THE HIGH COURT OF SWAZILAND

Civil case No: 1451/10

In the *ex parte* matter between:

GEORGE EDWARD GREEN	**Applicant**
AND	
SWAZILAND ROYAL INSURANCE CORPORATION	**First respondent**
SWAZILAND RAILWAY	**Second respondent**
Coram:	MAPHALALA M.C.B., J
For Applicant	Attorney Mangaliso Nkomondze
For First Respondent	Attorney Ndumiso Mtsetfwa
For Second Respondent	Attorney Zweli Jele

Summary

Civil Procedure – urgent application for Anton Piller order brought *ex parte* and in camera – requirements thereof discussed – application dismissed for failure to satisfy the essential requirements.

JUDGMENT
28.03.2012

---

[1] An urgent application was instituted *ex parte* seeking an order authorising the Deputy Sheriff for the Hhohho Region accompanied by the Applicant's Attorney to enter into the offices of the First Respondent situated along Somhlolo Road in Mbabane and to search for, attach and seize the original Insurance Policy Documents under Policy No. MBMMA0014816 described as the multimark III Policy and its schedules; he further sought an order authorising and ordering the Deputy Sheriff to make a true photocopy of the Insurance Policy Documents referred to in prayer 3 above and to hand back the original to the First Respondent and to keep the said copy in safe custody pending trial in the action to be instituted by the applicant against the First Respondent.

[2] The applicant alleged that the first respondent is the custodian and in actual possession of the insurance policy documents sought to be attached; and, that the Second Respondent has an interest in the matter since it concluded the contract of insurance with the First Respondent on behalf of the applicant. He argued that the documents sought to be attached constitute vital evidence and are necessary to substantiate his claim against the First Respondent in an action to be instituted; it is common cause that the said action has already been instituted under High Court case No. 1504/11 in which he claims compensation of E1 616 340.00 (One million six hundred

and sixteen thousand three hundred and forty emalangeni) in terms of the Insurance Policy.

[3] The applicant alleged that he was employed by the second respondent in 1997 as a Mechanical Engineer by virtue of a written two-year fixed contract of employment; and that his contract was renewed every two years until he reached his retirement age in December 2008. He further alleged that in terms of sections 2 and 8 of the contract of employment, the second respondent undertook to carry out a personal insurance on his behalf and for his benefit in addition to workmen's compensation; the insurance covered him for the risk of death or bodily injury caused by an employment accident. The second respondent did take out the insurance policy with the first respondent; he alleged, that he doesn't have a copy of the insurance policy but that he knew of the insurance policy number as he was part of the management team which reviewed insurance policies.

[4] He alleged that on the 8th May 2005 during the course and within the scope of his employment, he sustained an injury on duty that strained his back; the said injury left him incapable of continuing with his employment duties and marked the beginning of a miserable and difficult life which was visited with a lot of victimisation from his employer as well as the insurer.

[5] The applicant further alleged that he reported the injury on duty to his employer through the laid down procedures; and, that he received treatment and therapy from various medical practitioners but that his condition did not get better. A doctor at the Mbabane Government hospital Dr. Dundun examined him and certified that he was 30% disabled; pursuant thereto, he filed a workmen's compensation claim with the Labour Department through his employer. He received his payout in 2006; and, the doctor had diagnosed him with Lumber Osteoarthritis and Coccygitis.

[6] Subsequently, he filed through his employer a claim for payment of the personal injury insurance as guaranteed in the contract of employment; the claim was forwarded to the first respondent through an agent AON Insurance Broker. He alleged that his health condition deteriorated as a result of the injury despite attendances to various medical practitioners. On the 25th January 2007 he consulted Dr. Vishwadev Ganpath, a specialist Orthopaedic Surgeon based in Durban South Africa who certified that he was 70% disabled. The first respondent sent him for examination with Dr. C.W. Goosen in Nelspruit, South Africa; he concluded that the applicant was not disabled. Pursuant to this Medical report the first respondent repudiated his claim, arguing that his medical condition does not meet the requirements of the policy.

[7] The applicant was not satisfied with the repudiation, and, on the 27th September 2008, he consulted Dr. Lukhele for another medical opinion; the doctor advised that the applicant was 100% permanently disabled. He made attempts to resolve the claim amicably but he was not satisfied with the offer given by the first respondent.

[8] The applicant alleged that he requested a copy of the insurance policy in order to institute an action before the High Court but the first respondent refused to furnish him with a copy of the policy and told him that he was not entitled to the copy. The first respondent is alleged to have advised the applicant to obtain the copy from the second respondent who is the insured party.

[9] The applicant argued that he was entitled to the relief sought because in terms of section 2 of the Employment Contract, his employer carries a personal insurance on his behalf in respect of death or bodily injury caused by accident. He argued that the risk covered by the insurance contract had materialized and that he sustained an injury on duty which left him permanently disabled.

[10] He further argued that initially Dr. C.W. Goosen compiled a Medical report which entitled him to be admitted into the Disablement Income Benefit

Scheme; this entitled him to receive 76% of his monthly salary until retirement from August 2007 under the Swaziland Railway Provident Fund. He argued that the same Dr. Goosen on the 30th June 2008 examined him for the second time at the instance of the first respondent; he concluded that the applicant was not disabled. It was on the basis of this report that the first respondent repudiated the claim. However, this finding was contradicted by Dr. Lukhele who examined him and assessed the applicant on the 27th September 2008 at the instance of the applicant; Dr. Lukhele confirmed that the applicant was 100% permanently disabled.

[11] The applicant further alleged that when his claim was repudiated, the first respondent stated that he was not permanently disabled and, that in so doing he relied on the Medical report of Dr. Goosen which contradicted not only his earlier report but that of four other medical practitioners.

[12] The applicant further alleged that the first respondent refused to furnish him with a copy of the policy allegedly because the contract of insurance was between the first and second respondents; and, that the first respondent has no contractual relationship with him and no obligation to furnish him with the policy. The applicant submitted that such an argument is misguided.

[13] The applicant further argued that by virtue of his contract of employment with the second respondent, a personal insurance was carried out on his behalf by his employer, the second respondent; and, that he accepted the benefit flowing from the insurance contract. He argued that his acceptance created a direct contractual relationship between him and the first respondent which is independent of his employer; and, that the first respondent was legally obliged to furnish him with the insurance documents.

[14] He conceded that under normal circumstances the policy documents should be furnished by the second respondent as his employer; however, he argued that his relationship with his employer was characterised by "bad blood and animosity" such that it had ignored his request to furnish him with the insurance policy documents.

[15] The application is opposed by the first and second respondents. The first respondent in its Answering Affidavit has raised Points in *Limine*. First, that there is a misjoinder because there is no privity of contract between the applicant and, itself; and that there exists no contractual vinculum between the applicant and itself even though he is a beneficiary. Secondly, that this court does not have jurisdiction in the matter because the present cause of action is based on a contract of employment between the second respondent

and the applicant; and, that the Industrial Court has exclusive jurisdiction on matters involving contracts of employment.

[16] On the merits, the first respondent argued that there exists no contractual obligation between the applicant and the first respondent in terms of which the applicant can seek the attachment and seizure of the policy documents. It conceded being in possession of the policy documents but argued that the second respondent was also in possession of the said documents. However, it denied that the applicant has a basis on which he could launch a claim for compensation against it because of the non-existence of a contractual relationship between them.

[17] The first respondent denied that the applicant lodged its claim with it and argued that it was lodged with the second respondent who inturn forwarded it to its brokers; the latter inturn lodged the claim with the first respondent as the Insurer. It conceded having processed the claim and further engaged the applicant as a third party for purposes of making referrals for medical examination in order to assess and evaluate the merit of the claim. It further conceded repudiating the claim on the basis that it did not meet the requirements of the policy; and that such repudiation was communicated to the insurance broker who inturn communicated it to the applicant.

[18] The first respondent argued that the applicant seeks an Anton Piller Order for the search, seizure or the preservation of the Policy documents for use during the trial in the applicant's claim for compensation; he argued that the applicant has not satisfied the requirements of an Anton Piller Order. He further argued that the applicant has not established *prima facie* that he has a cause of action against the first respondent; and, further argued that the proceedings against the first respondent are misconceived to the extent that even if the court finds that the documents exist, they cannot be used against it.

[19] The first respondent further denied knowledge of Dr. Goosen's report issued in 2007 for the disablement benefit of the applicant; it further argued that such a report was not binding on it when assessing the claim because it did not instruct him to undertake the medical examination on the applicant. Similarly, the first respondent denied instructing Dr. Dundun, Dr. Goosen and Dr. Ganpath to undertake the medical examinations on the applicant; hence, the first respondent could not consider their medical reports when assessing the applicant's claim. It further argued that Dr. Lukhele and Dr. Goosen examined the applicant at his own instance. It further argued that when Dr. Goosen was instructed by the first respondent to undertake a medical examination on the applicant, he opined that the applicant was not permanently disabled.

[20] The first respondent further argued that it has the responsibility in terms of the contract of insurance to consider the claim and decide whether or not to repudiate the claim; and, that it informed the second respondent of the repudiation and the underlying reason that the applicant was not permanently disabled. It further argued that the policy condition was that the applicant should be permanently disabled as a consequence of an employment injury.

[21] The first respondent denied that it had refused to furnish the applicant with a copy of the policy and argued that he was duly furnished; the first respondent conceded that it refused to furnish the applicant with the schedules because they contained confidential information which relate, *inter alia*, to the amount of money payable as premium. The first respondent further argued that it is precluded by the Doctrine of Privity of Contract from furnishing the schedules to the applicant who is not a party to the insurance contract.

[22] The first respondent further argued that it stands to suffer prejudice if the application is granted since its customers including the second respondent would lose confidence in doing business with it because of the fear that confidential information relating to its insurance could be accessed by

anyone who is not a party to the insurance contract, and that this may result in the first respondent losing clients.

[23] The second respondent has argued that the allegation by the applicant that both respondents could have tempered and/or defaced the policy document is not only far-fetched but defamatory and demeaning to the respondents, and, that such an allegation is reprehensible. It conceded taking out the policy with the first respondent for the benefit of its employees and that the applicant is not a party to the contract nor is he the sole beneficiary of the policy. It argued that the applicant is a former employee of the second respondent and is not entitled to the policy as of right.

[24] The second respondent argued that the applicant has abused the court process by approaching the court on an *ex parte* basis; and, that he could have applied to have access to the policy documents through discovery, and, it would have been dealt with under the rules of privilege. Similarly, that if an ordinary application was made, then it could have been dealt with in terms of rule 35. It denied receiving a letter from the applicant requesting the policy documents.

[25] The second respondent also argued that the order authorising the Deputy Sheriff to search for, attach and seize documents on its premises constituted

a violation of its Constitutional right to privacy and property enshrined in section 22 of the Constitution.

[26] The second respondent argued that there is a dispute of fact whether or not the applicant was injured on the day when he went to inspect the derailed wagons on the following basis; First, that even though the accident purportedly occurred in May 2005, it was only reported in August 2006; secondly, that none of the fellow workers present on site witnessed the incident; thirdly, that the applicant only raised the issue of his injury at a time when the second respondent was conducting investigations into alleged acts of misconduct against the applicant which if proven had the potential of terminating the services of the applicant. However, it conceded that the first respondent repudiated the applicant's claim; and that it advised the applicant in August 2008 of the repudiation. The second applicant argued that the applicant failed to challenge the repudiation timeously; and, it argued that the present application brought on *ex parte* basis was not urgent.

[27] In its Replying Affidavit, the applicant denied that there was a misjoinder of the first respondent; he argued that the first respondent was the underwriter of the policy and that it had a direct contractual relationship with him entitling him to the joinder. He further argued that the first

respondent is the custodian of the policy, and, that he was legally entitled to join the first respondent in the proceedings.

[28] He argued that this court had jurisdiction in the matter since the cause of action in the intended suit against the first respondent is based on a contract of insurance and not one of employment. He argued that the second respondent as his employer carried out a personal accident insurance cover for his benefit which was underwritten by the first respondent. He further argued that he accepted the benefit when he was employed by the second respondent; and that the first respondent became contractually bound to him in respect of the said insurance cover.

[29] It is common cause that on the 30th April 2010, the applicant obtained an order on an urgent, *ex parte* and in-camera basis. This order, regrettably, was partly of a final nature and partly with interim effect. The final aspect of the order was that the Deputy Sheriff for the Hhohho region accompanied by Applicant's Attorney was authorised to enter into the offices of the first respondent to search for, attach and seize the original Insurance Policy number MBMMA001816 described as the Multimark III Policy and its schedules. It is irregular, unconstitutional and contrary to the principles of Natural Justice to grant a final order on an *ex parte* application without hearing the other side.

[30] The interim aspect of the order was that the Deputy Sheriff was authorised and ordered to make a true photocopy of the Insurance Policy Document and to hand back the original to the first respondent, as well as to keep the said copy in safe custody pending trial in the action to be instituted by the applicant against the first respondent. It is not in dispute that the order was executed by the Deputy Sheriff in the company of Applicant's Attorney; the first respondent complied with the order partially and handed the insurance documents but not the schedules to the policy. The order further called upon the respondents to show cause why the policy documents should not be kept in the custody of the deputy sheriff pending trial in the action to be instituted by the applicant.

[31] The applicant is a former employee of the second respondent who retired in December 2008. At the time of his retirement the applicant had lodged a claim for compensation for injuries sustained on duty; the claim was repudiated by the first respondent in July 2008 on the basis that the applicant was not permanently disabled. It is not in dispute that prior to the repudiation, there were consultations between the applicant and the first respondent relating to the injuries allegedly suffered by the applicant which formed the basis of the claim; in essence the first respondent wanted to ascertain whether the injuries sustained arose during the course of

employment and whether they constituted permanent disability as envisaged by the insurance cover.

[32] The first respondent repudiated the claim on the basis of a medical report compiled and issued by Dr. C.W. Goosen on the 30th June 2008 at the instance of the first respondent. Ironically the same doctor had examined the applicant in 2007 and issued a report which caused him to be admitted into the Disablement Income Benefit Scheme by virtue of which he became entitled to receive 75% of his monthly salary until retirement.

[33] It is not in dispute that the applicant was also examined by other medical doctors including Dr. Vishwadev Ganpath, Dr. Dundun and Dr. Lukhele who was instructed by the applicant opined that the applicant was 100% permanently disabled; and, Dr. Ganpath concluded that the disability was 70%, whilst Dr. Dundun said the disability was 30%. The first respondent did not consider the three medical reports on the basis that it never instructed the said doctors to conduct the medical examination on the applicant.

[34] It is not denied that the repudiation of the claim was in terms of a letter dated 20th August 2008; however, the applicant instituted the present application on an urgent basis on the 29th April 2010. Incidentally, the

applicant has not set out cogent facts in his Founding Affidavit explaining the delay in bringing this application, and why the matter has suddenly become urgent. The applicant merely sought leave for the matter to be heard *ex parte* and in camera. Rule 6 (25) (a) and (b) requires of a party approaching the court on urgent basis to set out explicitly the circumstances which he avers render the matter urgent.

[35] The first respondent has raised two points in *limine* relating to jurisdiction and misjoinder. It argued that this court has no jurisdiction to hear the matter since it is a dispute arising out of an employment contract of the applicant and the second respondent; the first respondent argued that the matter should have been heard before the Industrial Court.

[36] Section 8 of the Industrial Relations Act No. 1 of 2000 provides the following:

> **"The Court shall, subject to sections 17 and 65 have exclusive jurisdiction to hear, determine and grant any appropriate relief in respect of an application, claim or complaint or infringement of any provision of this, the employment Act, the Workmen's Compensation Act, or any other legislation which extends jurisdiction to the court, or in respect of any matter which may arise at Common Law between an employer and employee in the course of employment or between an employer or employer's association and a trade union, or staff**

association or between an employees' association, a trade union, a staff association, a federation and a member thereof."

[37] The applicant's claim for compensation is based on the contract of insurance concluded between the first and second respondents; and , it is common cause that the second respondent carried out a personal accident insurance cover for all his supervisors and staff in grade T12 for their benefit; the policy was underwritten by the first respondent. The basis of applicant's cause of action is that the risk covered by the first respondent has materialised; however, the first respondent has repudiated the claim. I agree with the applicant that the claim is not based on the contract of Employment; hence, section 8 of the Industrial Relations Act has no application, and, this court has jurisdiction to hear the matter.

37.1 It is apparent from this court rule that the first respondent has been properly joined in the proceedings. The two respondents concluded the contract of insurance which is now the basis of the claim by the applicant. The intended action by the applicant which has already been instituted against the respondents under High Court Civil Trial No. 1504/11 clearly shows that the cause of action relating to the applicant's claim depends upon the determination of substantially the same question of law and fact. The legal question is whether the risk covered by the

Contract of Insurance has materialised; the factual issue is whether the applicant is permanently disabled and whether such disability arose during the course of employment with the second respondent.

[38] The second point in *limine* raised by the first respondent is misjoinder; and, it is argued that the first respondent has been joined improperly in these proceedings since there is no contractual privity between the first respondent and the applicant. Rule 10 (3) provides the following:

> **"Several defendants may be sued in one action either jointly, jointly and severally, separately or in the alternative, wherever the question arising between them or any of them and the plaintiffs depends upon the determination of substantially the same question of law or fact which, if such defendants were sued separately, would arise in each separate action."**

[39] *Herbstein and Van Winsen* also deals with the question of joinder in their book entitled the Civil Practice of the Supreme Court of South Africa, 4th edition at pages 170-171, and, they state the following:

> **"If a third party has or may have a direct and substantial interest in any order the court might make in proceedings or if such an order cannot be sustained or carried into effect without prejudicing that party, he is a necessary party and should be joined in the proceedings, unless the court is satisfied that he has waived his right to be joined."**

[40] At page 172 the learned authors state the following:

> **"A direct and substantial interest has been held to be an interest in the right which is the subject-matter of the litigation and not merely a financial interest which is only an indirect interest in such litigation. It is a legal interest in the subject-matter of the litigation excluding an indirect commercial interest only."**

[41] *His Lordship Fagan AJA* in the case of *Amalgamated Engineering Union v. Minister of Labour* 1949 (3) SA 637 (A) at 659 stated the following:

> **"Indeed it seems clear to me that the court has consistently refrained from dealing with issues in which a third party may have a direct and substantial interest without either having that party joined in the suit or, if the circumstances of the case admit of such a course, taking other adequate steps to ensure that its judgment will not prejudicially affect that party's interests. There may also, of course, be cases in which the court can be satisfied with the third party's waiver of his right to be joined, e.g. if the court is prepared, under all the circumstances of the case, to accept an intimation from him that he disclaims any interest or that he submits to judgment. It must be borne in mind, however, that even on the allegation that a party has waived his rights, that party is entitled to be heard; for he may, if given the opportunity dispute either the facts which are said to prove its waiver, or the conclusion of law to be drawn from them, or both."**

[42] It is apparent from the above authorities that the test for joinder is whether a litigant has a direct and substantial interest in the subject-matter of the proceedings before court which may be affected prejudicially by the

judgment of the court. There is no doubt in the present case that the first respondent has been properly joined since its rights may be affected prejudicially by the judgment of the court if it could not be joined. It is trite law that a party's right to demand that someone be joined as a party arise if such a person has a joint proprietary interest with one or either of the existing parties to the proceedings or has a direct and substantial interest in the court's order. Furthermore, the High Court in its inherent jurisdiction has a discretion *mero motu* to require the joinder of a party in proceedings that have been instituted.

[43] It is trite law that an Anton Piller Order is available only to preserve specific evidence for trial and not for the purpose of founding a cause of action. The applicant has demonstrated in his Founding Affidavit that he understands and appreciates the object of this remedy in law; he states the following in paragraphs 43 and 44 of his Founding Affidavit:

> **"43. I humbly state that I do not intend and I have not made any plans, nor my Attorneys do require and intend, by virtue of the order to be granted herein, to use the evidence to be attached and seized for any other purpose other than same to be preserved in the custody and possession of the Deputy Sheriff who will execute this order, for evidence in trial.**

44. As such the evidence to be attached and seized shall neither be used for purposes of drafting any pleadings nor used for any preparations or any other purpose in the contemplated action other than to be presented and used in evidence in trial."

[44] *His Lordship Corbert JA* in the case of *Universal City Studios Incorporated v. Network Videos* 1986 (2) SA 734 (A) at 754 E, G, and 755 A-B stated that the court has the inherent power to grant an Anton Piller order *ex parte* and if necessary in camera *pendente* lite to preserve evidence in the possession of the respondent.

"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, i.e. the respondent (and even, if necessary, in camera) an order designed *pendete lite* to preserve evidence in the possession of the respondent. It is probably correct … that there is no authority for such a procedure in our Common law. But of course, the remedies devised in the Anton Piller case… for the preservation of evidence are essentially modern legal remedies devised to cater for modern problems in the prosecution of commercial suits.

There is no doubt that the Supreme Court possesses an inherent reservoir of power to regulate its procedures in the interests of the proper administration of justice…."

In the 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 state of discovery, and the applicant asks the court to make an order designed to preserve the evidence in some way…. 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.…

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."

[45] His Lordship conceded that the possibility exist that the procedure of bringing the Anton Piller applications in camera and *ex parte* could be open to abuse and should therefore be entertained in special circumstances. His Lordship continued at page 755 F-G and stated the following:

"It seems to me, however, that the potential harm to the respondent inherent in the *ex parte* and in camera procedure could largely be obviated in cases where real and documentary evidence was attached and taken into possession if the court included in its order a rule nisi giving the opportunity to the respondent to come to court and to show cause why the attached evidence should not be retained *pendete lite* and, in an appropriate case, giving leave to the respondent to anticipate the return day."

[46] In *Shoba v. Officer Commanding Temporary Police Camp Wagendrift Dam & Another; Maphanga v. Officer Commanding, South African Police Murder & Robbery Unit, Pietermaritzburg, & Others* 1995 (4) SA 1 (A) at page 15G – I, *His Lordship Corbett CJ* stated the following:

> **"…it is necessary to give a decision in regard to… 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 of 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."**

[47] His Lordship continued at page 16 B-C and stated the following:

> **"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."**

[48] The Anton Piller Order is indeed a drastic remedy which grants immediate relief and requires the respondent forthwith and without any opportunity to voice opposition to submit to the search of his premises. It is designed to the preservation of evidence to be used for ultimately securing the substantive relief; and a rule nisi is usually incorporated as a means of giving the respondent the opportunity to contest the matter and have the order set aside. This remedy has been subjected to severe criticism over the years on the basis that it violates section 22 of the Constitution which seeks to protect the right to privacy; the section provides the following:

> **"22. (1) a person shall not be subjected-**
>
> **(a) to the search of the person or the property of that person;**

(b) to the entry by others on the premises of that person;

(c) to the search of the private communications of the person, except with the free consent of that person first obtained."

[49] The right to privacy has certain limitations reflected in sub-section (2), which provides the following:

"22. (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision that-

(a) is reasonably required in the interests of defence, public safety, public order, public morality, public health, town and country planning, the development and utilisation of mineral resources, or the development or utilisation of any other property in such a manner as to promote the public benefit;

(b) is reasonably required for the purpose of promoting the rights or freedoms of other persons;

(c) authorises an officer or agent of the government or of a local government authority or of a body corporate established by law for public purposes, to enter on the premises of any person in order to inspect those premises or anything on those premises for the purposes of any tax, rates due or in order to carry out work connected with any property that is lawfully on those premises and that belongs to the government, authority, or body corporate as the case may be;

(d) authorises, for the purposes of enforcing the judgment or order of a court in any civil proceedings, the entry upon any premises by order of a court;

Except so far as, in respect of paragraph (c) or (d) that provision or, as the case may be, the thing done under the authority of that government, local authority or body corporate is shown not to be reasonably justifiable in a democratic society."

[50] However, the constitutionality of the Anton Piller order is not in issue, and it is not the basis upon which the application is opposed; hence, it will not be necessary to decide the matter on the basis of the Bill of Rights enshrined in the Constitution. The matter will be decided on the basis of the principles of the remedy as reflected in the Universal City Studios Incorporated v. Network Videos (Supra) and Shoba cases decided by the Supreme Court of Appeal in South Africa; and these principles reflect our own law in respect of this remedy.

[51] There is no doubt that the respondents are in possession of the policy documents required by the applicant; and, this has not been denied. It is common cause that the applicant executed the court order; his Attorney accompanied by the Deputy Sheriff attached the policy document from the first respondent; however, the first respondent did not surrender the policy schedules.

[52] Similarly, it is common cause that the applicant pursuant to the attachment of the policy documents proceeded and instituted the substantive remedy against the respondents for damages for bodily injuries allegedly suffered by the applicant during the course of his employment with the second respondent. The action instituted is under High Court Civil Trial No. 1504/2011; it is still pending before this court. There can be no doubt at all that the policy documents constitute vital evidence in substantiation of applicant's cause of action which is based on a Contract of Insurance concluded between the respondents. The purpose of the policy was to cover certain categorises of employees of the second respondent in respect of death or bodily injury caused by an employment accident; the applicant was also included in the category of the employees who were to benefit under the policy.

[53] It is apparent from the above that the applicant does have a cause of action against the respondents on the basis of the contract of insurance concluded between the respondents. It is not denied that the second respondent took out a personal insurance for the applicant from the first respondent; the applicant stands to benefit from the policy if he can show that the risk has materialised. The absence of a contractual privity between the applicant and the first respondent is irrelevant; what is paramount in the substantive

action is whether or not the risk for which the policy was taken has materialised. If it has materialised, the first respondent will be liable.

[54] Similarly, it is common cause that the first respondent engaged the applicant directly when processing his claim for compensation; this was at the stage when the first respondent was investigating, assessing and evaluating the claim. The first respondent even referred the applicant to Dr. Goosen and Dr. Lukhele for medical examination. The claim was subsequently repudiated by the first respondent on the basis that the applicant was not permanently disabled which was the risk covered by the policy; it is the repudiation of the claim which is now the basis of the pending proceedings under High Court Civil Trial No. 1504/2011.

[55] The first respondent in paragraph 25.2 and 25.3 of its Opposing Affidavit makes certain admissions which support the conclusion that the applicant has a cause of action to institute these proceedings:

> **"25.2 It is not in dispute that the first and second respondents entered into a group personal insurance contract for cover of its employees who suffer employment injuries. The applicant, although he is a beneficiary in this policy is however, not a party to this contract.**

25.3 Further, although the applicant is covered in terms of this policy against injuries or medical conditions arising from an employment accident in terms of his contract of employment with the second respondent, there is however no clause in the said contract of employment which vests the right or cedes it to the applicant to claim against the first respondent in terms of the policy."

[56] The applicant argued that in mid 2007 when the first respondent was processing his claim, it directed him to undergo medical examination to establish, confirm and/or verify the extent of his injuries. He advised the first respondent that he had undergone medical examination with Dr. Ganpath in January 2007; the first respondent asked him to furnish the medical report to which he obliged. The first respondent further sought from Dr. Ganpath certain clarifications on the medical report, and it was confirmed that the applicant was 70% disabled.

[57] The first respondent directed the applicant to undergo a further medical examination with Dr. Lukhele for a second opinion; an appointment was scheduled by the first respondent for the medical examination of the applicant. However, on the date of applicant's attendance to Dr. Lukhele's surgery, he was advised that the doctor was not present and no appointment was made with him.

[58] The first respondent then sent the applicant to Dr. Goosen for the second medical opinion; the examination took place on the 30th June 2008 and, the doctor concluded that he was not permanently disabled. The first respondent repudiated the claim on the basis of Dr. Goosen's medical report.

[59] Subsequently, the applicant sought another medical opinion from Dr. Lukhele at his own instance on the 27th September 2008; after examination, the doctor issued a report that the applicant was 100% permanently disabled. The applicant and his attorney used the medical report to negotiate with the first respondent an amicable settlement of the claim; the negotiations did not succeed because the applicant felt that the offer made by the first respondent was too low. It would therefore be unreasonable for the respondent to argue that the applicant has no cause of action in the circumstances on the basis of contractual privity.

[60] *His Lordship Justice Harms* in the case of *Memory Institute SA CC t/a SA Memory Institute v. Hansen and Others* 2004 (2) SA 630 (SCA) at 633 stated the following:

> **"Anton Piller orders are for the preservation of evidence and are not a substitute for possessory or proprietary claims. They require built-in protection measures such as the appointment of an independent attorney to supervise the execution of the order. An applicant and**

own attorney are not to be part of the search party. The goods seized should be kept in the possession of the sheriff pending the court's determination. Since it is the duty of an applicant to ensure that the order applied for does not go beyond what is permitted… and since Musi J granted a rule nisi he was not empowered to grant, the setting aside of the rule had to follow as a matter of course…."

[61] *Bozalek J* in the case of *Audio Vehicle systems v. Witfield and Another* 2007 (1) SA 434 (CPD) at 442-443 para. 20-21 dealt with the legal principles applicable to Anton Piller Orders:

"Broadly speaking, the requirements for an Anton Piller Order are, firstly, that the applicant has a cause of action against the respondent which it intends to pursue. Secondly, that the respondent has specific documents or things in his possession which are vital evidence in substantiation of the applicant's cause of action. Thirdly, the applicant must show a real and well founded apprehension that his evidence may be destroyed or in some manner spirited away by the time the case comes to trial or to the stage of discovery and, finally, that the remedy is the only reasonable and practical means of protecting the applicant's rights.

21. Such an order may be granted, in appropriate circumstances, *ex parte*. However, it must be borne in mind that an *ex parte* application by its nature requires the utmost good faith on the part of the applicant. A failure on the part of the applicant to make full and fair disclosure of all material facts may lead the court to set aside the rule nisi on that ground alone."

[62] His Lordship proceeded to deal with the effect of irregularities in the execution of the order as follows:

> **"Similar rigorous controls apply to the execution of the order. Because of the highly invasive nature of such orders, execution thereof must be meticulous and strictly according to the letter thereof. The test in this regard is whether the execution is so seriously flawed that the court should show its displeasure or disapproval by setting aside the order. A serious flaw would include conduct that could be regarded as blatantly abusive, oppressive or contemptuous, but is not limited to conduct of such extreme nature. The governing principle would appear to be that the more drastic and potentially harmful the remedy may be the more closely it has to be scrutinised by the court and the more meticulously it must be applied and executed."**

[63] The third requirement of an Anton Piller Order is that there should exist 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. In support of this requirement, the applicant contends that the basis for his apprehension is two-fold: first, that the first respondent had repudiated his claim and ignored medical opinion from four medical practitioners verifying and confirming the extent of his disability but opted to adopt an opinion of one medical practitioner who not only contradicts the others but himself as well; secondly, he argued that

when repudiating the claim the first respondent hid behind undisclosed conditions of policy which he did not meet.

[64] The basis upon which the applicant relies for his apprehension that the insurance documents may be hidden or destroyed or in some manner spirited away by the time the case comes to trial or to the stage of discovery is merely speculative; and, it cannot be said to be real and well-founded. There is no evidence before court of a "real possibility" that the documents will be destroyed. Furthermore, there is no evidence before court that the Anton Piller order is the only reasonable and practical means of protecting applicant's rights. Admittedly, the Registrar of Insurance when approached by the applicant was unable to assist him secure the documents; however, no evidence has been adduced why the applicant could not utilize the discovery procedure in terms of Rule 35. This rule also provides for inspection and production of documents as between the parties.

[65] *His Lordship Bozalek J* in the *Audio Vehicle Systems'* case (supra) at page 450 para 50 states the following:

> **"The basis of the applicant's fear that the documents might be destroyed must not be merely speculative. The cases speak of a 'grave danger' and 'a real possibility that documents will be destroyed'. Touching on this element is the further requirement that the remedy**

must be the only practicable means of protecting the applicant's rights."

[66] I am satisfied that the applicant failed to execute the court order meticulously and in accordance with its terms. There is evidence before court that the execution of the court order was seriously flawed to the extent that this court should show its displeasure or disapproval by setting it aside. The order authorised the deputy sheriff for the Hhohho District accompanied by the Applicant's attorney to enter into the offices of the fist respondent to search for, attach and seize the original insurance policy documents and its schedules; it further authorised and ordered the deputy sheriff to make a true photocopy of the documents and to hand back the original document to the first respondent and to keep the said copy in safe custody pending to the instituted by the applicant against the first respondent.

[67] The applicant's attorney was part of the search party that accompanied the deputy sheriff; and, this was part of the court order. An independent attorney was required to be appointed by the court to accompany the deputy sheriff. Contrary to the court order, the deputy sheriff after securing the documents did not keep them but handed them over to applicant's attorney. It is common cause that the attorney has annexed them to the substantive

action which he has brought against the respondents under Civil Trial No. 1069/2011. The execution of the order in this regard is seriously flawed and the court is bound to show its displeasure and disapproval at the abuse of the Anton Piller remedy.

[68] *His Lordship Bozalek J* in the *Audio Vehicle Systems* case (Supra) at pages 443-444 para. 24 emphasised the purpose and object behind the Anton Piller orders:

> **"Two types of Anton Piller order have been developed in our jurisprudence although both seek the attachment of an item or documentary evidence thereby preserving such evidence for the purpose of securing substantive relief. The first type involves an attachment of material in which the applicant has no proprietary interest and the second where the applicant seeks to assert a real or personal right in the material being attached. The golden thread running through an Anton Piller order is, however, that its primary purpose is the preservation of evidence."**

[69] The applicant has breached his own undertaking made under oath in his Founding Affidavit paragraphs 43 and 44 above and used the evidence in drafting pleadings. It is also apparent that the documents are not being kept by the deputy sheriff as ordered by the Court but by applicant's Attorney.

[70] It is trite law that the court has a discretion whether or not an Anton Piller Order should be granted, and if it does, upon what terms. In exercising its discretion, the court will pay regard, *inter alia*, to the cogency of the prima facie case established with reference to the essential requirements of the remedy, the potential harm that will be suffered by the respondent if the remedy is granted as balanced with 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:

- ***Shoba v. Officer Commanding Temporary Police Camp, Wagendrift Dam; Maphanga v. Officer Commanding, South African Police Murder and Robbery Unit*** **(Supra) at page 16 B-C.**
- ***Audio vehicle systems v. Whitfield and Another*** **(Supra) at page 443 para 21.**

[71] As stated in the preceding paragraphs, it is merely speculative of the applicant that the documents will be destroyed; no evidence has been advanced of a "grave danger" or "real possibility" that the documents will be destroyed. Similarly, there is no evidence that the remedy is the only practicable means of protecting the applicant's rights; and it is apparent that no prejudice will be suffered by the applicant if the order is withheld because he could utilise the remedy afforded by Rule 35. In view of the

drastic nature of the remedy and the potential harm to the respondents, the balance of convenience favours that the court exercises its discretion in favour of the respondents.

[72] The application is dismissed and the rule discharged. No order as to costs.

M.C.B. MAPHALALA
JUDGE OF THE HIGH COURT