REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

CASE NO : **2023/026522**

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE : /NO
(2) OF INTEREST TO OTHER JUDGES: /NO
(3) REVISED

02 December 2024

DATE

In the matter between:

GUARDRISK INSURANCE COMPANY LIMITED	First Applicant
GUARDRISK GROUP (PTY) LIMITED	Second Applicant
MOMENTUM METROPOLITAN HOLDINGS LIMITED	Third Applicant

and

UNIVERSAL ACCEPTANCES (PTY) LIMITED	First Respondent
UNIVERSAL ACCEPTANCES HOLDINGS (PTY) LIMITED	Second Respondent
UNIVERSAL ACCEPTANCES SOUTH AFRICA (PTY) LIMITED	Third Respondent
TIMOTHY PARAMASIVAN	Fourth Respondent
SANDISIWE VAPI	Fifth Respondent

ALLAN TIFLIN Sixth Respondent

JUDGMENT

THERON AJ:

[1] This application is described by the Applicants (collectively referred to as "Guardrisk") as:

> *"... a search and seizure application to restore possession of the Applicants' confidential information and to delete the Applicants' confidential information that was (prior to the execution of the search and seizure order) in the Respondents' possession."*[1]
> (my underlining)

[2] Guardrisk disavows any reliance on an Anton Piller application aimed at preserving evidence.

[3] The Full Bench in this division recognised the availability of the relief sought, i.e. the attachment of property in which a real or personal right

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[1] Applicants' heads of argument, paragraph 4

is claimed, *pendente lite*.[2]

[4] Information or knowledge, of whatever value and however confidential, is not recognised as property in South Africa.[3]

[5] This was the finding of Serrurier, AJ in **Waste-Tech** which was support although in an obiter dictum in **Avusa**.

[6] I am bound by **Waste-Tech** unless I find that it is patently wrong, a judicial blunder, or that it results in a manifest and unsustainable absurdity or injustice.[4]

[7] I am not prepared to do so.

[8] In **ABSA Insurance and Financial Advisers (Pty) Limited v Möller**[5], Binns-Ward J said the following:

"[10] While Serurrier AJ was probably correct, in my respectful

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[2] **Cerebros Food Corporation Limited v Diverse Foods SA (Pty) Limited and Another** 1984 (4) SA 149 (T) at 164 D-E ("**Cerebros**")

[3] **Waste-Tech (Pty) Limited v Wade Refuse (Pty) Limited** 1993 (1) SA 833 (W) at 843 D and 845 B ("**Waste-Tech**"); **South African Broadcasting Corporation v Avusa Limited and Another** 2010 (1) SA 280 (GSJ) at paragraph [15] ("**Avusa**") and **Prinsloo v RCP Media Limited t/a Rapport** 2003 (4) SA 456 (T) at 464 C-G

[4] **Strutfast (Pty) Limited v Uys and Another** 2017 (6) SA 491 (GJ) at paragraph [30]

[5] [2014] ZAWCHC 176 at paragraph [10]

> *opinion, in holding that information is, in general, not property amenable to vindication, I am in agreement with the argument advanced by the applicant's counsel, with reference, amongst other matters, to the full court's judgment in Cerebros Food Corporation, that search and seizure relief of the type sought by the applicant in the current case is nevertheless competent if it is shown to be required to protect the applicant against harm that it is able to show that it is likely to suffer as a consequence of the use of the information by the respondents in the context of unlawful competition, or breach of contract. The judgment in Cerebros Food Corporation in point of fact serves as authority for the point, if such were required."*
>
> (my underlining)

[9] I refer to the underlined portion as "the finding".

[10] I respectfully disagree with the finding.

[11] Cerebros is not authority for the finding and the examples given by the

Full Court demonstrate this.[6]

[12] The preservation of the *"thing"* seized and the prevention of irreparable harm to *"it"* may be achieved by attachment *pendente lite* when an applicant alleges an existing right in a *"thing"* or a contractual right to delivery of the *"thing"*.[7]

[13] This is not a case of *ubi ius ibi remedium* or one that requires me to hold the scales of justice where no specific law provides directly for the situation.[8]

[14] For these reasons, the *rule nisi* providing for the search for and seizure of information falls to be discharged.

[15] In accordance with the reasoning of Binns-Ward J[9], the judge made law in this division does not allow for a search and seizure in relation to information and I am bound to the parameters set in **Cerebros** and **Waste-Tech**.

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6 **Morrison v African Guarantee and Indemnity Co Limited** 1936 (1) PH M35 (T); **Loader v De Beer** 1947 (1) SA 87 (W) and **Van Rhyn v Reef Developments A (Pty) Limited** 1937 (1) SA 488 (W)

7 **Cerebros** at 164 E-F

8 **Cerebros** at 166 I to 167 A and ***Ex parte* Millsite Investment Co (Pty) Limited** 1965 (2) SA 582 (T) at 585 H

9 **Mathias International Limited and Another v Baillanche and Others** 2015 (2) SA 357 (WCC) and **Möller**

[16] Any order outside of the parameters set in **Waste-Tech** and **Cerebros** would be an order which the judge was not empowered to grant and the setting aside of the rule must follow as a matter of course.[10]

[17] Even though it is strictly speaking unnecessary to deal with the criticisms levelled at the order, its effect and execution, I deal with some of the criticisms on a superficial basis to demonstrate that I would have discharged the rule even if it was competent.

[18] Other than the identification of one or two specific documents, the Applicant did not *prima facie* establish that the Respondents had in their possession specific information.

[19] I am of the view that the identification of specific information is a requirement, also of the type of application I am considering, and not just to an Anton Piller if regard is had to the draconian nature of the order and its effect, being the invasion of the Respondents' privacy.[11]

[20] The phrases *"Guardrisk's Confidential Information"* as further defined[12]

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[10] **Memory Institute SA CC t/a SA Memory Institute v Hansen and Others** 2004 (2) SA 630 (SCA) at paragraph [3] and **Möller** at paragraph [5] and [17]

[11] **Mathias International Limited and Another v Baillanche and Others** 2015 (2) SA 357 (WCC) at paragraph [20]

[12] see for example paragraph 10.1 of the order

is excessively broad and facilitates a near boundless fishing expedition.

[21] The keyword search parameters set out in an annexure to the order, NOM2B, contain for example, the surnames of Respondents, their private e-mail addresses and general terms which would clearly flag a wide range of documents private and confidential to the Respondents and not susceptible to any seizure.

[22] The search, applying the keyword search parameters authorised by the order, has generated a vast number of *"responsive"* documents, i.e. documents containing the search words and demonstrates why specificity is required.

[23] The effect of the order granted is abusive of the Respondents and their privacy.

[24] I do not need to find that the order was wilfully couched in the wide terms that it was or that there are any *mala fides*.[13]

[25] A disturbing feature of the order is that it contemplates and allows for

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[13] See **Quindell Business Process Outsourcing (Pty) Limited v Bespoke BPO (Pty) Limited** (unreported, KZD case number 9796/2015 dated 22 March 2017) at paragraph [33]

the destruction of documents without affording the Respondents a hearing.

[26] Paragraphs 10.2 to 10.4 of the *ex parte* order permit the Applicants' forensic experts to seize the Respondents' devices, conduct searches of the data on those devices and to permanently delete what they consider to constitute Guardrisk's Confidential Information from all such digital devices or media.

[27] The order does not require the Applicants' forensic experts to give prior notice to the Respondents of what information they regard as Guardrisk Confidential Information before deletion, nor does it require them to consider any potential objections to the deletion of the data before doing so.

[28] The order merely affords the Respondents with an opportunity to object to the seizure of the devices and the search thereof.

[29] This affords no protection the Respondents because it is not the scanning of the devices which deals the most significant lasting damage to the Respondents.

[30] In their report, the forensic experts have confirmed that information has

been permanently deleted. The deletion was without an opportunity for the Respondents to object thereto.

[31] The order allows for the retention of all the devices seized without allowing the Respondents access to the devices. The Respondents are effectively precluded from discerning what information the forensic experts, as final arbiter, chose to delete.

[32] Guardrisk, belatedly, in reply and in heads of argument indicate that the forensic copies would allow for the *"return"* of information which was deleted if it was later found that it did not constitute Guardrisk's confidential information.

[33] I accept that this is physically possible, but the order granted *ex parte* does not make provision for a mechanism to make a determination of the alleged confidentiality of any information.

[34] I have not dealt with all of the complaints raised by the Respondents against the order and their contention that the order was an abuse as a result thereof.

[35] This is unnecessary because of my finding above that the order was incompetent to begin with.

[36] The Applicants are not without remedy as they are free to pursue claims for damages in delict.

[37] The Applicants seek a final interdict interdicting and restraining them from utilising or disclosing any of *"Guardrisk's Confidential Information"* or any part thereof.

[38] The interdict is simply too vaguely formulated as Guardrisk's Confidential Information as further defined in paragraph 10 of the order is too vague to be enforceable.

[39] I therefore decline to exercise my discretion and to grant an interdict in the terms sought.

[40] To be clear, I make no finding as to whether the Respondents are unlawfully in possession of information or whether they are utilising such information to unlawfully compete with Guardrisk.

[41] In the result I make the following order

1. The *rule nisi* granted on 28 March 2023 (as amended) is discharged.

2. The Applicants are ordered to pay the Respondents' costs

including costs that were reserved on Scale C, such costs to include the costs of senior and junior counsel.

3. The Applicants shall pay jointly and severally to the Respondents any costs incurred in complying with the order on the same scale.

_____ [redacted] ___

THERON AJ
Acting Judge of the High Court

Date of hearing: 8 November 2024

Date of judgment: 2 December 2024

Appearances:

Counsel for Applicants: C Whitcutt SC
S Swartz
Instructed by: Edward Nathan Sonnenbergs Inc

Counsel for Respondents: D Mahon SC
L Acker
Instructed by: Terry Mahon Attorneys