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# DISPUTE RESOLUTION ALERT

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ISSUE

## CATCH AND RELEASE: LESSONS LEARNT FROM *VIZIYA CORPORATION V COLLABORIT HOLDINGS (PTY) LTD & OTHERS*

An Anton Piller order is an extremely powerful order and exceptional form of injunctive relief. The order allows for the search of premises for vital documents and/or material set out in the order and the removal of such documents to be placed in safekeeping pending the normal discovery process and trial.

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An Anton Piller order is therefore highly invasive, brought without notice and theatrically adds an element of surprise.

The SCA held that due to the invasive nature of an Anton Pillar order, it places a significant burden on the party to ensure that its application diligently and prudently adheres to the requirements of the relief sought.



An Anton Piller order is an extremely powerful order and exceptional form of injunctive relief. The order allows for the search of premises for vital documents and/or material set out in the order and the removal of such documents to be placed in safekeeping pending the normal discovery process and trial.

An Anton Piller order is therefore highly invasive, brought without notice and theatrically adds an element of surprise. The *sine qua non* of the order is demonstrating the importance of protecting vital documents and/or material from potentially being destroyed or disposed of, which if destroyed or disposed of would defeat the ends of justice.

The requirements of an Anton Piller order are not extensive but the burden of proving these requirements are high. The requirements are as follows:

- The plaintiff must show that it has a very strong *prima facie* case;
- There is evidence that the party possesses vital documents and/or material which it might destroy or dispose of so as to defeat the ends of justice; and
- The specific documents and/or material in the possession of the party which might be destroyed or disposed of.

An Anton Piller is therefore not to be used as a yardstick to gain any advantage in anticipated litigation. This was confirmed by the Supreme Court of Appeal (SCA) in the case of *Viziya Corporation v Collaborit Holdings (Pty) Ltd & others* (1189/17) [2018] ZASCA 189. The court a quo granted an Anton Pillar order in favour of Viziya. In execution of the order, Viziya was able to extract information from Collaborit's

servers which included extracting information from laptops, phones, external hard drives and email accounts. The extent of Viziya's search was vast, basically a blanket search for unspecified documents/evidence which may or may not exist.

As a consequence of the extent of the Anton Pillar Order, the matter was taken on appeal. On appeal, the SCA held that "An Anton Piller order is directed at preserving evidence that would otherwise be lost or destroyed. It is not a form of early discovery, nor is it a mechanism for a plaintiff to ascertain whether it may have a cause of action. The cause of action must already exist and the preserved evidence must be identified."

As to whether Viziya indeed met the requirements of an Anton Piller order, the SCA held that the major flaw in Viziya's case was not the scope of the search of the documents but the failure in its affidavit to identify or specify which vital information was in the possession of Collaborit that needed to be preserved.

The SCA held that due to the invasive nature of an Anton Pillar order, it places a significant burden on the party to ensure that its application diligently and prudently adheres to the requirements of the relief sought. It is therefore limited to instances where there is a substantial case supporting the plaintiff's belief that

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the defendant will not properly honour its discovery duties. Essentially, the following needs to be set out in the Anton Piller application:

- A full and proper list of all the vital documents and/or material that the plaintiff seeks to remove from the premises of the defendant; and
- The reasons for why the plaintiff believes that the defendant will destroy or dispose of the vital documents and/or material, which reasons must move past mere suspicion.

In the context of the above, an Anton Piller application must be perfectly timed and by its very nature, being an *ex parte* (without notice) application, contain all the essential

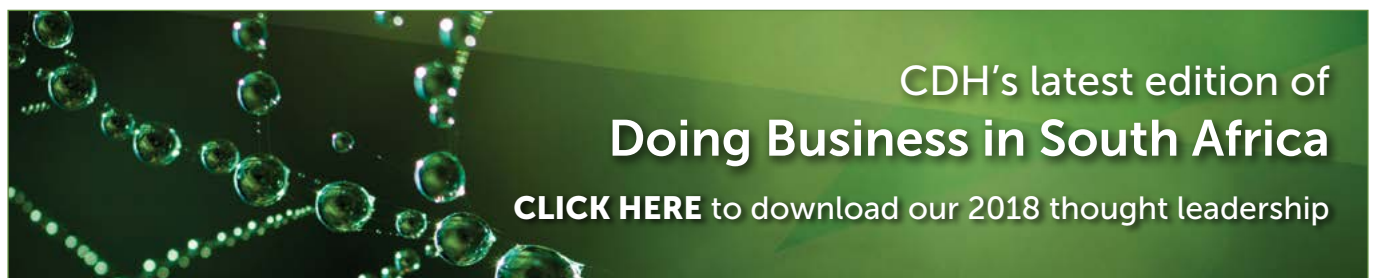
facts within the plaintiff's knowledge irrespective of whether such information is detrimental to the plaintiff's case.

An Anton Piller application is not a fishing expedition, meaning that the plaintiff must ensure that it fully substantiates its reasons for the application and sets out the vital documents and/or material it believes will be destroyed or disposed of by the defendant as well as the reasons supporting this belief. If the plaintiff fails to lay out these essentials, it may be forced to risk releasing its catch if an application is brought by the defendant to set aside the Anton Piller order.

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*Corné Lewis and Neha Dhana*

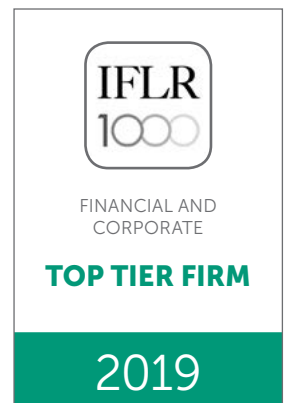


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## OUR TEAM

For more information about our Dispute Resolution practice and services, please contact:



**Tim Fletcher**  
National Practice Head  
Director  
T +27 (0)11 562 1061  
E tim.fletcher@cdhlegal.com



**Thabile Fuhrmann**  
Chairperson  
Director  
T +27 (0)11 562 1331  
E thabile.fuhrmann@cdhlegal.com

**Timothy Baker**  
Director  
T +27 (0)21 481 6308  
E timothy.baker@cdhlegal.com

**Roy Barendse**  
Director  
T +27 (0)21 405 6177  
E roy.barendse@cdhlegal.com

**Eugene Bester**  
Director  
T +27 (0)11 562 1173  
E eugene.bester@cdhlegal.com

**Tracy Cohen**  
Director  
Business Development  
T +27 (0)11 562 1617  
E tracy.cohen@cdhlegal.com

**Lionel Egypt**  
Director  
T +27 (0)21 481 6400  
E lionel.egypt@cdhlegal.com

**Jackwell Feris**  
Director  
T +27 (0)11 562 1825  
E jackwell.feris@cdhlegal.com

**Anja Hofmeyr**  
Director  
T +27 (0)11 562 1129  
E anja.hofmeyr@cdhlegal.com

**Julian Jones**  
Director  
T +27 (0)11 562 1189  
E julian.jones@cdhlegal.com

**Tobie Jordaan**  
Director  
T +27 (0)11 562 1356  
E tobie.jordaan@cdhlegal.com

**Corné Lewis**  
Director  
T +27 (0)11 562 1042  
E corne.lewis@cdhlegal.com

**Richard Marcus**  
Director  
T +27 (0)21 481 6396  
E richard.marcus@cdhlegal.com

**Burton Meyer**  
Director  
T +27 (0)11 562 1056  
E burton.meyer@cdhlegal.com

**Zaakir Mohamed**  
Director  
T +27 (0)11 562 1094  
E zaakir.mohamed@cdhlegal.com

**Rishaban Moodley**  
Director  
T +27 (0)11 562 1666  
E rishaban.moodley@cdhlegal.com

**Byron O'Connor**  
Director  
T +27 (0)11 562 1140  
E byron.oconnor@cdhlegal.com

**Ashley Pillay**  
Director  
T +27 (0)21 481 6348  
E ashley.pillay@cdhlegal.com

**Lucinde Rhoodie**  
Director  
T +27 (0)21 405 6080  
E lucinde.rhodie@cdhlegal.com

**Belinda Scriba**  
Director  
T +27 (0)21 405 6139  
E belinda.scriba@cdhlegal.com

**Willie van Wyk**  
Director  
T +27 (0)11 562 1057  
E willie.vanwyk@cdhlegal.com

**Joe Whittle**  
Director  
T +27 (0)11 562 1138  
E joe.whittle@cdhlegal.com

**Pieter Conradie**  
Executive Consultant  
T +27 (0)11 562 1071  
E pieter.conradie@cdhlegal.com

**Willem Janse van Rensburg**  
Executive Consultant  
T +27 (0)11 562 1110  
E willem.jansevanrensburg@cdhlegal.com

**Nick Muller**  
Executive Consultant  
T +27 (0)21 481 6385  
E nick.muller@cdhlegal.com

**Jonathan Witts-Hewinson**  
Executive Consultant  
T +27 (0)11 562 1146  
E witts@cdhlegal.com

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### JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.  
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

### CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.  
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

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