REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION PRETORIA

15/7/2016

CASE NO: 51715/16

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

15/07/16
DATE

SIGNATURE

MERCHANT WEST (PTY) LTD — APPLICANT

And

SIZWE ASSET FINANCE (PTY) LTD & 4 OTHERS — RESPONDENT

JUDGEMENT

This matter was dealt with as one of urgency. First, second, fourth and fifth respondents ("the respondents") seek reconsideration of an order granted on an urgent basis in terms of Rule 6(12)(a) by this court on 1 July 2016 (as amended by an order by Bam J dated 8 July 2016). The initial application was held in camera and in the absence of the respondents. The order the applicants obtained against the respondents was the *Anton Piller* type order. The reconsideration order is sought in terms of Rule 6(12)(c), which provides that a person against whom an order was granted in his absence in an urgent application may by notice, set down the matter for reconsideration of the order. The application is opposed.

Counsel for the respondents, in a nutshell, submitted that I should consider the matter afresh in order to determine whether or not the initial order of De Vos J ought to have been granted. Should I determine that the order should not have been granted, then, in terms of this court's wide discretion, the order should be set aside. It was argued that, had the correct legal position been presented to De Vos J, he would probably never have granted the order in the first place. In essence, the order granted was defective and should be set aside as it defeats the rationale of Anton Piller relief. Counsel for the respondents submitted that the application and order constitutes an abuse of the process; that the order is unreasonable, unjustified and oppressive. Furthermore, that the application and order was aimed at vindicating and/or possessory relief, which is impermissible as part of *Anton Piller* proceedings. The application and order amounted to a fishing expedition, aimed at building up a case to be instituted by action proceedings. The order obtained was fraught with mistakes, contradictions, vagaries and was non-sensicle.

On the other hand, Mr Cohen, who appeared for the applicants before De Vos J and in this court, argued that the initial order was correctly sought and obtained. It was submitted that the submissions made on behalf of the respondents are all mere technical in nature and has nothing to do with the substance of the original order obtained. It was submitted that with the facts presented to De Vos J *in camera*, the applicants were entitled to the order. The sheriff had proceeded to seize and attach evidence for preservation and there is no reason for this court to reconsider, afresh, the order granted on an urgent basis in the absence of the respondents. Furthermore, so the argument went, the third respondent was not before me and the reconsideration order, should I so decide, would be of no force and effect because of his absence. The respondents rushed to court for reconsideration of the order as it was uncomfortable with the evidence unearthed in its seizure of evidence. In any event, the respondents are by no means prejudiced because the evidence is seized and preserved by the sheriff. The applicants were entitled to approach the court for the *Anton Piller* type order. Existing proceedings were pending against the respondents in the Gauteng Division of the High Court. The application was brought to preserve the evidence which the applicant believed would be destroyed, copied, hidden, spirited away or deleted from computers. These items were essential for the applicants claims for damages against the respondents. The respondents traded unlawfully with the applicants, to the applicants prejudice. By using the applicants confidential information the respondents ensured the survival of the first respondent from an insolvent company to a company making profit and now able to compete unlawfully with the applicant.

It is common cause that the order was granted in the absence of the respondents and that the order was granted pursuant to an urgent application in terms of Uniform Rule 6(12)(a). The respondents seeks reconsideration of the matter in terms of Rule 6(12)(c) for the order to be set aside in toto, alternatively that the order be amended and cots on the punitive scale.

Uniform Rule 6 (12) (c) :

> A person against whom an order was granted in his absence in an urgent application may by notice set down the matter for reconsideration of the order.

The dominant purpose of the sub-rule is to afford an aggrieved party a mechanism designed to redress imbalances in and injustices and oppression flowing from an order granted as a of urgency in his absence. The court reconsidering the order now has the benefit of both sides of the story. In these proceedings the court has a wide discretion to consider the matter afresh, in deciding whether or not the order by DE Vos J ought to have been granted.

It is established law that *Anton Piller* type orders are interim orders directed at the preservation of evidence for trial purposes.

As held by Corbett C J in **Sheba v Officer Commanding, Temporary Police Company, 1995 (4) SA 1(A) 15 G – J**, that in order to obtain the order an applicant must prima facie establish that:

(a) The applicant has a cause of action against the respondents that he intends to pursue;

(b) That the respondent has in his possession specific (and specified) documents and objects that constitute vital evidence in substantiation of the applicant's cause of action; and

(c) There is a real and well-founded apprehension that this evidence may be hidden or destroyed or in some manner spirited away before the case comes to court.

The attack against the order of De Vos J is that it is vague and that the items seized is unspecified, amounting to a fishing expedition for the purpose of getting information disguised as the seizure of evidence for trial purposes. As directed in Shoba, the order should contain prayers to enable the sheriff to enter and search premises and to seize, attach and remove specified material. In this instance, the order allows the sheriff to seize unspecified items, directly in conflict with the position laid down in Shoba.

See : **Shoba** (supra), page 15 J :

> *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 Motshini 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. As I suggested Jafta's case, 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 exrcising this discretion the court will pay regard, inter alia, to the cogency of the prima facie case established, 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 onerus than is necessary to protect the interests of the applicant.

See: **Memory Institute SA CC t/a SA Memory Institute v Hansen 2004 (2) SA 630 at 633 F–G**

Anton Piller order 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 theown 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.

Audio Vehicle Systems v Whitfield and Another 2007 (1) SA 434 at 443 E :

The terms of an Anton Piller order should ordinarily not be so wide as to give the applicant access to documents to which the evidence does not show him or her to be entitled. Nor should they go further than strictly necessary for the preservation of critical evidence.

Mathias International v Baillche 2015 (2) SA 357 at 371 B

The inappropriately wide cast net included in the material described in the schedule to the order, resulted in the search authorised by the order granted by the application judge being, in my view, in the nature of an impermissible fishing expedition. It failed materially to comply with the requirements of specificity and essential evidence contained in the second of the three requirements described in Shoba.

Non-Detonating Solutions v Durie 2016 (3) SA 445 at 459 G – H

In my view this approach is against clearly established law which permits search and seizure orders for specific classes of documents. The test for the identification of documents in Anton Piller has been described as follows :

There must be clear evidence that the respondent has such incriminating documents, information, articles and the like in his possession, or that, at least, there are good grounds for believing that this is the case.

...

The applicant should satisfy the court that he has - at best the subject matter in dispute permits him to do – identified the subject matter in respect of which he seeks attachment and for removal, and that the terms of the order which he seeks have been delimited appropriately and are not so general and wide

as to afford him access to documents, information and articles to which his evidence has not shown to be entitled.

The matter comes before me for the reconsideration of the *Anton Piller* order granted ex parte in respect of which the sheriff has attached and with the opportunity of now having the respondents side of the story. With all the information now at hand, the question raised is, if I presided over the matter as the court of first instance, would I have granted the order or not. Should the answer to this question be in the negative, it follows that the stands to be discharged.

The respondents complaints are two-fold. Firstly that in terms of the practice directives of this division, application for *Anton Piller* type orders must stand on its own and not form part of an application in which other relief is claimed. Argument was submitted that the applicant seeks to combine relief relating to the restoration of possession of documents in which it claims to have a personal or real right, with *Anton Piller* proceedings. While this may be so, I am persuaded by the argument that the breadth of the order obtained by the applicants was unduly wide. The breadth of the order would allow for searches to be undertaken to look for evidence as in a fishing expedition, to identify or found a case. This is clearly distinguishable from the preservation of evidence for use in an already identified claim. I say this when regard is had to perusal of the order itself, to the effect that "...being all documents (whether in hard copy or electronic form) which correspond with the file name and/or file contents and/or file size of those documents listed in annexure "A" and Annexure "B" to the order makes no reference to a file name, file contents or file size of

"documents listed" therein. No documents are listed therein, only "key words". Mr Cohen argued that this is merely an error and that I should order an amendment in this regard. This is not where the problem ends.

My difficulty is that the items identified in the Key Words stated in Annexure "B" reflects a host of generalised items that can hardly be described as "essential" or "absolutely necessary" or "specified material" or "vital evidence" seized for the purpose of preserving evidence. It is evident that with reference to the Key Words stated in Annexure "B", it goes further than obtaining critical evidence, strictly necessary for the preservation of such evidence. The complaint of the respondents are well-founded and I am of the view that had the full picture been presented to De Vos J, he would not have granted the order.

I am satisfied that the order of the 1 July 2016, as amended, should be set side in toto.

Though punitive costs had been argued for, I do not deem it appropriate in the current circumstances. Ordinary party and party costs are awarded.

Order:

1. **The order dated 1 July 2016 by Mr. Justice De Vos (as amended in terms of the order by Mr. Justice Bam dated 8 July 2016) is set aside in toto;**
2. **The Applicant's application is dismissed;**
3. **Costs on the party-and-party scale including the costs of two counsel.**

HONOURABLE JUSTICE SWARTZ (AJ)