

APPLICATION FOR ANTON PILLER ORDERS IN THE REPUBLIC OF SOUTH AFRICA

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“The order is to the effect that the party applying for relief is permitted to search the premises of his adversary for the evidence in question . . .”

IT SOMETIMES HAPPENS that a person believes that he has a cause of action against another, but requires, in order to establish his case, documentation or other evidence which is in the possession or under the control of the person he wishes to sue. The danger then exists that his adversary will frustrate the claimant

In the recently reported South African case of *Audio Vehicle Systems v Dale Whitfield and 4D Realtime Solutions (Pty) Ltd*, His Lordship Bozalek held as follows:

“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/her possession which [is] vital evidence in substantiation of the applicant's cause of action. Thirdly, the applicant must show a real and well founded apprehension that this 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 applicants rights.

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. *Frangos v Corpcapita/2004* (2) SA 643 (T) at 649C - G. In exercising its discretion to grant an Anton Piller order, the court will also consider whether the terms of the order sought are no more onerous or far-reaching than is necessary to protect the interests of the applicant. Wilfulness or *mala fides* need not be present to result in the discharge of a *rule nisi* where the original order was too widely framed. In these circumstances it is for the applicant to establish cogent reasons as to why the

order should not be discharged. Where the court reconsiders an Anton Piller-type order in terms of Rule 6(12)(c) and it appears that the application was an abuse of the process of court, the court may in its discretion order the applicant to pay costs on an attorney and own client scale.

Regarding the form of order in the Cape High Court a specimen order is prescribed in Practice Direction 18. 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 the critical evidence.

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.

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 purposes 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.

An important attack was made on the Anton Piller order which was granted in the *Audio Vehicle* case, namely, it was argued that the Anton Piller order which was granted violated the first Respondent

"There can be no doubt, on the facts and circumstances of this matter, that the first respondent's right to privacy, which includes the right not to have ones home and property searched nor to have ones possessions seized, was breached. Arguably, furthermore, first respondent's right to dignity was also violated. I would add that not only the terms of the order but the manner of its execution breached the first respondent's constitutional rights. Nor has the applicant come close to discharging the *onus* that he bears to show that the violation was justified in terms of the limitation provisions of s 36 (1) of the Constitution, particularly taking into account the requirement of a proportionality analysis envisaged by that section.

The *Audio Vehicle* judgment was delivered on October 10, 2006 in the Cape High Court. It is interesting to note that on July 27, 2006 the Canadian Supreme Court released its judgment in *Celanese Canada Inc v Murray Demolition Corp* ((2006) SCC 36). In an excellent article entitled *Anton Piller orders must protect privileged information* it is stated:

Mr Justice Binnie, writing for a unanimous Supreme Court, stated: "[t]his appeal thus presents a clash between two competing values - solicitor-client privilege and the right to select counsel of one's choice."

The court resolved the clash of values by deciding that no one has the right to be represented by counsel who has accessed privileged information in circumstances where:

it should have been anticipated that, in carrying out the search, privileged information might be found;

there is a risk that such privileged information might be inadvertently viewed; and

the searching party has failed to rebut the presumption of a resulting risk of prejudice to the party against whom the Anton Piller order was made.

The court disqualified the counsel for Celanese, as they had failed to prove that Canadian Bearings' interests were not and would not be prejudiced as a result of accessing the privileged material.

In the *Celanese* case, the Canadian court set out its guidelines for Anton Piller orders in the future and the Supreme Court of Canada has made it clear that an Anton Piller order, being an extraordinary remedy, imposes extraordinary responsibility on the solicitors who seek to execute it.

The *Audio Vehicle* case lends eloquent testimony to the fact that attorneys and counsel in South Africa must exercise extreme caution before advising clients to proceed with *Anton Piller* orders and, if so advising their clients, must ensure that they are extremely meticulous in the preparation of the documentation. The judgments of the courts in the various divisions should be studied carefully and the rules of the applicable court must be followed to the letter. If not, unsuccessful applicants can expect to suffer the same fate as the applicant did in the *Audio Vehicle* case namely, that the applicant will be ordered to

pay the costs of application and any counter application including the cost of the striking out application on the scale as between attorney and own client.□

ENDNOTES

- 1 Mervyn Dendy in *DE REBUS*, September 2003
 - 2 *Ryno Hotel and Resort (Pty) Ltd v Forbes* 2000 (1) SA 1180 (C) at 1185A B.
 - 3 *Sun World Internation Inc v Unifruco Ltd* 1998 (3) SA (C) 151 at 174D E
 - 4 *Retail Apparel (Pty) Ltd v Ensemble Trading* 2243 CC 2001 (4) SA 228 (T) at 2331 to 234F
 - 5 *Food Corporation Ltd v Diverse Foods SA (Pty) Ltd and Another* 1984 (4) SA 149 (T) *Universal City Studios Incorporated and Others v Network Video (Pty) Ltd* 1986 (2) SA 734 (A)
 - 6 *Park-Ross and Another v Director: Office for Serious Economic Offences* 1995 (2) SA 148 (C) at 162 B - C.
 - 7 *8 S v Manamela and Another* (Director-General of Justice intervening) 2000 (3) SA 1 (CC) para 49 and 50.
 - 8 *Fraser Milner Casgrain LLP*
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