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DISPUTE RESOLUTION **ALERT**

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Whether instituting Anton Piller proceedings in the true sense, or in an application for a search and seizure, procedural requirements are to be strictly adhered to in order to preserve the fundamental rights of a respondent while also attempting to protect the applicant's rights – whether a real right or the protection of evidence pursuant to a cause of action.

The notion of Anton Piller proceedings was crystalised in an English case in 1975 (where the name was coined), *Anton Piller KG v Manufacturing Processes Ltd and Others* [1975] EWCA Civ 12, [1976] 1 All ER 779 (8 December 1975), in which Lord Denning described such proceedings as follows:

> *"Let me say at once that no court in this land has any power to issue a search warrant to enter a man's house so as to see if there are papers or documents there which are of an incriminating nature, whether libels or infringements of copyright or anything else of the kind. No constable or bailiff can knock at the door and demand entry so as to inspect papers or documents. The householder can shut the door in his face and say, 'Get out.' ... None of us would wish to whittle down that principle in the slightest.*
>
> *But the order sought in this case is not a search warrant. It does not authorise the plaintiffs' solicitors or anyone else to enter the defendant's premises against his will. It does not authorise the breaking down of any doors, nor the slipping in by a back door, nor getting in by an open door or window. It only authorises entry and inspection by the permission of the defendant. The plaintiff must get the defendant's permission. But it does do this: It brings pressure on the defendant to give permission. It does more. It actually orders him to give permission – with, I suppose, the result that if he does not give permission, he is guilty of contempt of Court"*

Although akin to Anton Piller proceedings, search and seizure applications have developed through South African case law when an applicant has a *prima facie* personal or real right to a document or article. However, that document or article would not be used as the proverbial smoking gun in legal proceedings launched by the applicant.

Anton Pill(age)?*...continued*

Courts are obligated to ensure that the respondent's fundamental rights are not unduly infringed upon, as this application genus has far-reaching consequences.

The case of *Universal City Studios Inc v Network Video (Pty) Ltd* [1986] (2) SA 734(A), sets out the *prima facie* requirements for an applicant's founding papers (to be brought on an *ex parte* basis) for an Anton Piller application, which is devised "*to cater for modern problems in the prosecution of commercial suits*". These are that:

- a valid cause of action exists against the respondent(s) and the intention exists to pursue such cause of action;
- the respondent(s) have possession of the documents or articles that are vital evidence in substantiation of the applicant's cause of action; and
- there is a real and well-founded apprehension that the evidence would be hidden, destroyed or "*spirited away*" by the time discovery will take place or the case comes to trial.

Unlike the famous Anton Piller remedy, in a search and seizure application, the preservation of documentation is not founded on a potential cause of action (which the applicant intends to pursue), but on whether the applicant has a real or personal right to it.

The full bench of the Transvaal Provincial Division (as it was then named), in *Cerebos Food Corporation Ltd v Diverse Foods SA (Pty) Ltd and Another* [1984] (4) SA 149 (T), described a search and seizure application as follows:

> "*For many years, the courts have granted interim attachment orders where the plaintiff alleged an existing right in a thing and the only way in which that thing could be preserved or irreparable harm be prevented would be by the attachment thereof pendente lite.*"

As such, a search and seizure application is founded on a personal or real right, instead of a cause of action to be launched by an applicant. In the matter of *Waste-Tech (Pty) Ltd v Wade Refuse (Pty) Ltd* [1993] (1) SA 833 (W), the court confirmed that the applicant in a search and seizure application must:

- identify the document or article which is to be attached; and
- establish (at least *prima facie*) their right to the document or article, that is, "*his right to ownership or right to delivery or statutory intellectual property right in the document*".

A prime example of a search and seizure application would be the protection of confidential information based on a contractual duty between an employer and employee – or enforcement of an employer's contractual right under a restraint of trade or unlawful competition.

Protection of respondents

Whether an Anton Piller in the true sense, or a search and seizure application, courts are obligated to ensure that the respondent's fundamental rights are not unduly infringed upon, as this application genus has far-reaching consequences. Equally, the courts should be alive to preventing a fishing expedition against respondents.

As such, courts impose strict procedural requirements before any *ex parte* interim order is granted, including:

- **The *ex parte* order:** This must be detailed in its instructions to the Sheriff of the High Court, to carry out his/her attachment.

Anton Pill(age)?*...continued*

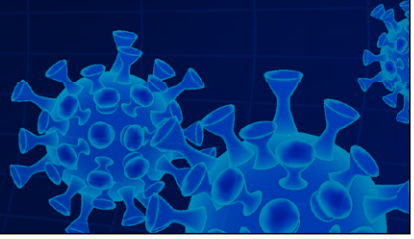
The existence of high procedural and regulatory requirements for the fulfilment of the *ex parte* order, and the subsequent argument on whether a final order should be granted, are in place to protect the respondent's fundamental rights while the applicant attempts to enforce their real or personal rights to an article or document.

- **Explanatory note:** This usually accompanies any *ex parte* interim order of this nature, and includes the nature and extent of the application and interim order, and highlights the respondent's specific rights – i.e. their right for legal representation to be called.
- **Appointment of a supervising attorney:** This attorney is independent from the applicant's attorney of record, and his/her role is to oversee the attachment process with the Sheriff of the High Court in order to ensure that it is carried out in strict compliance with the order (which is then recorded in an affidavit deposed to by the supervising attorney and filed in the matter)
- **Balance of probabilities:** On the return date of the *rule nisi*, and once the respondent has had the opportunity to file their answer to the founding papers, the court will determine the matter on the balance of probabilities, including taking into consideration the facts before the court during the *ex parte* hearing and whether the respondent's rights have been unduly infringed on by the execution of the *ex parte* order.

The existence of high procedural and regulatory requirements for the fulfilment of the *ex parte* order, and the subsequent argument on whether a final order should be granted, are in place to protect the respondent's fundamental rights while the applicant attempts to enforce their real or personal rights to an article or document. This is ultimately to ensure that the respondent's constitutional rights are limited in accordance with section 36 of the Constitution.

While these applications are quite extreme in nature (however essential in some circumstances), they are both well supervised to ensure that the respondent's rights are not unduly infringed and the applicant's rights are protected and enforced within the bounds of the Constitution.

Claudette Dutilleux



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