

SOUTH AFRICA / JUDGMENT

ADP Marine & Modular Proprietary Limited v Rocher and Others (5701/2022) [2023] ZAWCHC 225 (25 July 2023) [2023] ZAWCHC 225

COURT

Western Cape High Court, Cape Town

BEFORE

Hockey

CASE / FILE NUMBER

5701/2022

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FLYNOTES:

CIVIL PROCEDURE – Anton Piller order – Copyright infringement –
Designs
for mineral processing plant – Applicant at least on a prima facie basis established that its copyright infringed
–
Respondent in possession of applicant's confidential information and design drawings – Reports confirm that plant
being manufactured by respondent was in substantial parts virtually identical to the applicant's copyright designs –
Well-founded apprehension that vital evidence may be destroyed, hidden or spirited away by the time this matter came to trial –
Rule nisi confirmed.
IN
THE HIGH COURT OF SOUTH AFRICA
(WESTERN
CAPE DIVISION, CAPE TOWN)
CASE
NO: 5701/2022
In

the matter between: ADP
MARINE & MODULAR PROPRIETARY LIMITED
Applicant
And
EMILE
VIVIAN ROCHER
First
Respondent
WESTARCOR
ENGINEERING (Pty) Ltd
Second
Respondent
HAMMER
TOOL PROPRIETARY LIMITED
Third
Respondent

Coram: Hockey, AJ
Date
of Hearing: 18 - 19 October 2022; 14, 17 &
30 November 2022
Date
of Judgment: 25 July 2023

JUDGMENT

(Handed down electronically on 25 July 2023)

HOCKEY, AJ:

INTRODUCTION

- [1] On 18 May 2022, the applicant obtained an ex parte Anton Pillar Order (“the Anton Pillar order” or “the order”) against the first, second and third respondents. The following day the Sheriff of Bellville executed the order at the premises of the first respondent, the supervising attorney being Mr Riaan Meinjies, and by the Deputy Sheriff of Vredenburg at the premises of the second respondent, the supervising attorney being Mr Ross Kudo.
- [2] During the execution of the order, various items were seized and placed in sealed evidence bags, which were given to and retained by the respective sheriffs. Both supervising attorneys compiled a list of items seized. These lists are attached to the papers[1] and copies were provided to the respondents and the sheriffs concerned.
- [3] In compliance with the order, the applicant instituted an action (“the action”) against the first, second and third respondents as well as against Hammer Tool Tech CC (“HTT”), the latter being a close corporation in respect of which the first respondent is the sole member.

[4] In the action, the applicant claims damages and final interdictory relief against the respondents and HTT based on the alleged infringement of the applicant's rights of copyright in respect of its modular mineral processing pre-treatment plant known as the MB100[2] ("the MB100"), principally used by diamond mining companies in their operations. The applicant alleges that it has

copyright over the design of the MB100 and that it had, in the past, entrusted the second respondent ("Westarcor") with the designs for manufacturing purposes on conditions of confidentiality and exclusivity.

[5] The applicant further alleges that each cause of action could also have been a contractual one against the first respondent for the alleged breach of his duties as a former employee of the applicant and against the second respondent for breach of its undertakings in terms of the agreement under which it fabricated past MB100 plants or parts thereof.

[6] On the return day specified in the Anton Pillar order, the parties consented to an order in terms of which it was agreed to postpone the matter to the semi-urgent role ("the postponement order").

THE RELIEF SOUGHT AND THE POSITION OF THE RESPONDENTS

[7] The first and third respondents consented to an order confirming the Anton Pillar order. They gave an undertaking not to directly or indirectly use or disseminate any of the information subject to this matter for any purpose unless expressly authorised by the applicant in writing.

[8] As against Westarcor, the applicant is seeking an order confirming the Anton pillar order. The applicant also seeks further directives from this court regarding the preserved items in possession of the sheriff of Vredenburg under the execution of the order against Westacor.

[9] In addition to the confirmation of the order, the applicant also seeks, amongst others, interdictory relief against Westarcor from directly or indirectly utilising any of the information which is subject to this matter for any purpose whatsoever unless expressly authorised by the applicant in writing.

[10] As already mentioned, the first and third respondents do not oppose the confirmation of the order sought and have instead consented to confirmation of the Anton Pillar order.

[11] Westarcor, on the other hand, opposes the confirmation of the Anton Pillar order in relation to the items seized at its premises in Saldanha Bay. Westacor also resists the interim interdictory relief sought by the applicant.

- [12] Westarcor filed a counter-application seeking relief, amongst others, that the Anton Pillar order and the ex parte application be dismissed; that the applicant be ordered to return to it the items that the applicant obtained on 19 and 20 May 2022 (i.e. with the execution of the Anton Pillar order); and that the applicant and the supervising attorney who attended Westarcor's premises remove from their personal devices all information which the supervising attorney photographed or copied at Westarcor's premises.

BACKGROUND

- [13] The applicant specialises in engineering services, especially the design and supply of modular mineral processing plants, such as the MB100 plant, for use in, among other things for, the diamond mining industry.
- [14] The applicant has a long-standing relationship with Westarcor, who has been fabricating many components of the various plants of the applicant, including the MB100. For purposes of the outsourced fabrication, the applicant handed its copyright and confidential information to Westarcor, which Westarcor concedes it retained. This information includes the full technical drawings to fabricate at least parts of the various plants.
- [15] The first respondent was a permanent employee of the applicant for 12 years. During his employment, he obtained intimate knowledge of the applicant's modular mineral processing plant designs, as well as the manufacture and servicing thereof. He was effectively the applicant's authorised representative in its dealings with Westarcor in respect of various purchase orders from the latter. According to the applicant, whilst the first respondent was in its employ, the first respondent established the third respondent, of which he became one of two directors. He also established HTT, of which he is the sole member.
- [16] The second director of the third respondent is Mr James van der Linde ("Van der Linde"), also a former employee of the applicant. The applicant states that whilst Van der Linde was in its employ, he downloaded the applicant's copyright and confidential information in relation to inter alia the MB100 plant.
- [17] This application stems from a bid to supply two processing plants or machines with a capacity to process 100 tons per hour (or plants with a lading of 100 tons per hour) to a mine in Angola, UARI, to whom the applicant had previously supplied such plants. UARI published a request for proposal for two plants in December 2020 ("the UARI tender"). The applicant submitted its bid to supply the two plants on or about 18 December 2020 but was informed on or about 20 August 2021 that its tender had been unsuccessful. During April 2022, the applicant was told by an employee of UARI that the latter had recently received delivery of two MB100 plants from Westacor, whose contact person in respect of the delivery was the first respondent.

[18] With regard to the fabrication and delivery of the two plants to UARI in terms of the UARI tender, the following are undisputed:

[16.1] The first respondent instructed a Mr Ellis, employed by the applicant as a draughtsman, to prepare drawings for what was termed a PT100 plant. At the time, Mr Ellis had full access to the necessary drawing software of the applicant as well as the applicant's copyright and confidential information, including MB100 drawings.

[16.2] During the execution of the order at the premises of Westarcor, the email account of the first respondent from which instructions were sent to Mr Ellis was deleted in its entirety, preventing it from being downloaded.

[16.3] The second director of the third respondent, Mr James Van der Linde, who was previously also an employee of the applicant, admitted that he deleted the email account mentioned above. Mr Van der Linde also admitted that he had downloaded the applicant's copyright and confidential information in relation to inter alia the MB100 plant during the period 2016- 2017 whilst he was employed by the applicant.

[16.4] The first respondent contracted Westarcor to fabricate the material components of the PT100 plant in accordance with the drawings prepared by Mr Ellis.

[16.5] The first respondent submitted a bid under the AURI tender. However, given the lack of an export licence and an established track record, UARI was unwilling to engage with the first respondent. The first respondent and Westarcor came to an agreement in terms of which Westarcor, who has an export licence, became a party to an agreement with UARI. Westarcor, with the first respondent's assistance, delivered at least two PT100 plants to UARI, and payment was made directly to Westarcor by UARI.

[19] The application is based on the allegations, amongst others, that the first respondent and Westarcor were in possession of "artistic work" as defined in the Copyright Act 98 of 1978 ("the Copyright Act"), that they unlawfully used the confidential information of the applicant and collaborated to manufacture two plants with a lading of 100 tons per hour, which they termed "PT100 plants" and delivered these to UARI in terms of the UARI tender, which in turn caused damages and prejudice to the applicant. On this basis, the applicant sought and obtained the order dated 18 May 2022.

The Paley reports.

[20] Pursuant to the postponement order, the parties consented to the appointment of an independent expert to conduct two inspections of a PT100 plant that was in the process of being fabricated by Westarcor at its premises in Saldanha Bay. The applicant duly appointed Mr Richard Paley ("Mr Paley"), an engineer, who conducted an interim inspection at Westarcor's premises on 13 and 14 June 2022, and a final inspection on 28 and 29 June 2022.

- [21] Following the above inspections, Mr Paley produced an interim report (“the Paley interim report”) and a final report (“the Paley final report”). In these reports, Mr Paley compared the PT100 plant with the design drawings of the MB100 plants, which the applicant provided to him.
- [22] The interim and final Paley reports were circulated to the respondent before the answering affidavits were prepared. The contents of the reports were not rebutted in Westarcor’s answering affidavit.
- [23] In the Paley interim report, it is explained that “the plant [that was being fabricated at Westarcor’s premises] is comprised of 3 modules (to be inter-connected with a specific design criterion for each”. The modules are a scalping module (to remove the oversized material); a scrubber module (to wash, remove clay and other fine material); and a screening and conveying module (used for sizing to stockpile and waste removal). When installed on a mine site as an integrated processing plant, these modules were to be mechanically connected to perform their operational duty. At the time of the first inspection by Mr Paley, these modules were under construction as separate units.
- [24] In the Paley final report, it was concluded:

“The ‘Process Flow’ of the ADP MB100 is conceptually an “a-typical” design within the mining industry when

utilized as a pre-treatment facility. The Intellectual Property, however, resides in the process design detail and equipment selection. Mineral processing design companies apply their competitive design advantages using the Intellectual Property collected over years of practical experience which differentiates the operational effectiveness and overall costs.

The dimensions of the three modules and conveyors at Westarcor’s workshops were measured and photographed during the 2-day inspection process and compared in detail to that of the drawings provided by ADP [the applicant].

Dimensional differences were found to be present in the structural steelwork on both the scrubber and screening modules compared to the ADP drawings, this is to be expected in the absence of a trommel screen (bolt-on) and change in the scrubber drive arrangements In other words, the MB100 structural steelwork would need to be modified to accommodate these design revisions and may have been driven by client preference or design enhancements introduced by Rocher[3].

Notwithstanding the dimensional differences found present in the screening and scrubbing support structures, the critical items of equipment that ensure the plant’s overall performance were still present in the Rocher design and corresponded to that of the ADP MB100 equipment type and size and therefore process performance.

In other words, the dimensional differences observed between the Rocher and ADP designs, would have minimal to no influence on the process performance, whereas the equipment selection present in both designs (ADP in origin) would ensure a high level of process efficiency.

The most noteworthy finding from a dimensional perspective, was that of the Vibrating Grizzly Module which was found to be the same size (within millimetres) of the ADP design drawings and 3-dimensional layout. This module is the least likely to experience any change in design due to its specific process requirements: valley angles, tonnage throughput, blockage mitigation and the high wear characteristic on chutes due to the plants demanding design duty.

In conclusion, it is highly improbable (if not impossible) to reproduce the Vibrating Grizzly Module to the same precise dimensions and process design of the ADP MB100 without having access to the ADP design drawings or having visited an existing unit in the field. It would further appear, but cannot be confirmed, that the scrubber and screening modules were based on the ADP MB100 design and modified to suit a particular requirement (client or otherwise)."[4]

THE APPLICABLE LEGAL PRINCIPLES

[25] In *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam and Another; Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg, and others*[5], Corbett CJ stated the requirements for an Anton Pillar order as follows:

"The use of Anton Piller orders in our law is now well established. The requirements that must be satisfied for the granting of such an order were summed up by Corbett JA in Universal City Studios Inc. v Network Video (Pty) Ltd, as follows:

'In a case where the applicant can establish prima facie that he has a cause of action against the respondent which he intends to pursue, that the respondent has in his possession specific documents or things which constitute vital evidence in substantiation of the applicant's cause of action (but in respect of which the applicant can claim no real or personal right), that there is a real and well-founded apprehension that this evidence may be hidden or destroyed or in some manner spirited away by the time the case comes to trial, or at any rate to the stage of discovery, and the applicant asks the Court to make an order designed to preserve the evidence in some way'

[26] In *Van Niekerk and Another v Van Niekerk and Another*[6], the Supreme Court of Appeal confirmed that an Anton Piller order is directed at preserving vital evidence that might otherwise be lost, hidden or destroyed.

[27] An Anton Piller order is an invasive order. In *Non-Detonating Solutions (Pty) Ltd v Durie*[7], it was held:

"While it must be acknowledged that Anton Piller orders have the potential to impact negatively on the right to privacy guaranteed in s 14 of the Constitution, they are necessary and proportionate to the legitimate aim pursued. Whatever harm or inconvenience might be caused to the respondent can be

attenuated by the inherent principle of proportionality which requires a balancing of competing interests and values. This resonates with what Chaskalson P stated in S v Makwanyane and another, that the limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values and ultimately an assessment based on proportionality. Thus Corbett CJ recognized that in exercising its discretion whether or not to grant an Anton Piller order, the court must pay regard to inter alia, 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.' This balancing of interests is particularly crucial on reconsideration of the interim order on the return day when the court adjudicating the application has been furnished with all the relevant evidence including the respondent's opposing affidavit, as happened in this case. Thus courts must constantly be wary that the refusal to grant an Anton Piller order could, in a deserving case, result in a denial of justice." (Internal references omitted).

- [28] It is trite that an Anton Piller order is directed at preserving evidence. It is of an interlocutory nature to preserve evidence for use at a subsequent trial. This is so when the order is granted at the ex parte stage, and it remains so on reconsideration on the return date. This was confirmed in *Friedshelf 1509 (Pty) Limited t/a RTT Group and Others v Kallianji*[8], where it was held:

"An Anton Pillar order accordingly remains interlocutory in nature and its purpose is to preserve evidence for use at a subsequent trial, regardless of whether it is being considered at the ex parte stage or the return day stage. Employing analogous reasoning, when an interim interdict is sought and obtained ex-parte and is reconsidered by court at the instance of a respondent after service of the order, the court hearing the reconsidered application is still hearing an interim interdict, where the test remains a prima facie right open to some doubt. It is only where the substance of the relief changes on the return day (e.g. a provisional versus a final sequestration order) that the onus changes."

- [29] In *Friedshelf*, the court concluded that the test for proof of the existence of the cause of action on the return day or at the reconsideration stage remains a strong prima facie case.
- [30] The test to be applied when considering whether an Anton Piller order should be discharged was discussed in *Van Der Merwe and Others v Van Wyk Auditors and Others*[9]. The court referred with approval to *Retail Apparel (Pty) Ltd v Ensemble Trading 2243 CC and Others*[10] where it was held:

"It could be improper to hold that an applicant can abuse the considerable power which the order gives, without facing a penalty

for doing so other than a possible claim for damages.

The test seems to be whether the execution is so seriously flawed that the Court should show its displeasure or disapproval by setting aside the order. Obviously a serious flaw would include conduct which could be regarded as blatantly abusive, oppressive or contemptuous, but would not be limited to conduct of such extreme nature. I respectfully agree with these guidelines, by which I regard myself as bound in any event. Far from being unwilling to grant drastic remedies,

provided for by the law, the more drastic and potentially harmful a remedy may be, the more closely it has to be scrutinised by a court, and the more meticulously it must be applied and executed by all involved. It is also possible that non-compliance with the order as far as the execution is concerned may attract a punitive costs order.

However, not every flaw seems to be regarded as equally serious and equally relevant by the Courts. For example, in the abovementioned Hall case Conradie J stated at 392G - H that he did not wish to place too much emphasis on a certain lapse in terms of the order which he describes in that judgment."

- [31] From the above, it is clear that not every flaw in the execution of an Anton Piller order should be regarded as serious enough to set aside the order. A court must assess the seriousness of any alleged breach and confirm whether such breach is serious enough to result in the Anton Piller order being discharged.
- [32] In *Schlesinger v Schlesinger*[11], the court concluded, after referencing various authorities, that it "appears quite clearly from these authorities that:
- (1) ex parte applications all material facts must be disclosed which might influence a Court coming to a decision;
 - (2) the non-disclosure or suppression of facts need not be wilful or male fide to incur the penalty rescission; and
 - (3) the Court, apprised of the true facts, has a discretion to set aside the former order or preserve it."

WESTARCOR'S GROUNDS OF OPPOSITION

- [33] In support of its contention that the Anton Piller order should be discharged, the respondent relies on various grounds, including that the order should never have been granted for lack of certain disclosures and the failure to show a cause of action against

Westarcor, that the order is unnecessarily broad, and that the execution of the order is flawed with irregularities. I deal with the various contentions below.

The duty to make full disclosure

- [34] it is a trite legal principle that where an order is sought ex parte, the applicant must display utmost good faith and must disclose all material facts which might influence a court in coming to its decision. The withholding or suppression of material facts may result in the setting aside of an order, even if the nondisclosure or suppression was not woeful or by the file.[12] This principle applies especially to Anton Piller orders, where the relief sought is draconian and invasive. If an applicant has not been forthright, the order made may be dismissed on that basis alone.[13]

[35] Westarcor alleges that the applicant did not fully, frankly and accurately disclose all the relevant facts and circumstances and included information in its founding affidavit which was incorrect and misleading.

The locus standi attack.

[36] The respondent alleges that the applicant had no locus standi to have brought this application. This is so, it is argued, because it was incorporated in 2012, whereas the artistic works the applicant seeks to protect were created in 2004. Westarcor complains that the applicant did not disclose these facts.

[37] In its replying affidavit, the applicant explained that it mistakenly averred in its founding affidavit that it is the copyright owner of the MB100 and apologised for the mistake. It states that its holding company with the same name (ADP Holdings) is the actual owner of the copyright and that the applicant has been the licensee with exclusive rights ever since its inception in 2012.

[38] The applicant further explained that ADP used to be known as ADP Marine and Modular before it was renamed in 2012 when the applicant was incorporated. On 19 July 2012, ADP Holdings concluded a written agreement with the applicant, its wholly owned subsidiary, in terms of which ADP Holdings sold its entire business to the applicant. Pursuant to clause 11 of the agreement, ADP Holdings retained ownership of all its intellectual property (including copyright in the MB100 plant) and granted an exclusive licence to the applicant for the use of that intellectual property in compliance with section 22(3) of the Copyright Act, 1978 (the Copyright Act).

[39] At this juncture, it is apt to note the rights of action and remedies of an exclusive licensee as provided for in section 25 of the Copyright Act, as follows:

“(1) An exclusive licensee and an exclusive sub-licensee shall have the same rights of action and be entitled to the same remedies as if the licensee were an assignment, and those rights and remedies shall be concurrent with the rights and remedies of the owner of the copyright under which the licence and sub-licence were granted.

(2) Before an exclusive licensee or sub-licensee institutes proceedings under subsection (1), he or she shall give notice in writing to the owner of the copyright concerned of the intention to do so, and the owner may intervene in such proceedings and recover any damages he or she may have suffered as a result of the infringement concerned or a reasonable royalty to which he or she may be entitled.”

[40] It is undisputed that on 28 April 2022, the applicant informed ADP Holdings by email that it intended to institute these proceedings.

This complies with section 25(2) of the Copyright Act. Furthermore, on 30 August 2022 (i.e. after the Anton Piller order had been granted), ADP Holdings, by round-robin resolution, unanimously resolved that it approved and supported the institution of these Anton Piller proceedings and also ratified and confirmed all steps

taken by the applicant in the proceedings.

[41] In the circumstances of the above, there cannot be any doubt that the applicant did have locus standi under section 25 of the Copyright Act to have brought these proceedings. The only error it made was a mistaken reference to it

being the owner instead of the exclusive licensee of the copyright in question. I am of the view that this mistaken reference is not material in the sense that it would have resulted in the Anton Piller order not being granted.

The allegation that the applicant failed to disclose that it never provided Westarcor with a complete set of MB100 plans and that the latter had never built a complete MB100 plant before.

[42] Westarcor alleges that the applicant failed to disclose that it had never provided Westarcor with a complete set of MB100 plans[14] and that it did not fabricate a complete MB100. It is further argued that the applicant did not disclose that it never requested Westarcor to return the design diagrams it had provided to Westarcor during the long-standing business relationship. It is also suggested that the applicant should have disclosed that Westarcor could have received a complete set of plans from HTT to fabricate the PT100 plants.

[43] The applicant avers that, over time, it had provided Westarcor with a complete set of plans for the latter to produce a complete MB100 plant. Annexure “TL10” to the founding affidavit is a list of drawings provided by the applicant to Westarcor, which remains in Westarcor’s possession.

[44] Westarcor admits in its answering affidavit that annexure “TL10” is a spreadsheet which purports to be a recordal of the transmission of drawings and other documents to it and that the contents of this annexure are accurate. It is further admitted that the applicant provided it with a “vast extent” of design drawings[15]. However, the deponent of the answering affidavit acknowledged that he did not have the time or the inclination to interrogate the accuracy of the information in annexure “TL10”.

[45] The applicant correctly argues that a cause of action for copyright infringement does not require reproducing the entire work. Instead,

liability arises if “any substantial part of such work”[16] has been reproduced. I agree with counsel for the applicant that a cause of action for the unlawful use of confidential information by Westarcor is not dependent upon Westarcor having manufactured a complete MB100 plant in the past. It is common cause that Westarcor had in the past manufactured components of the MB100 plant, such as the Vibrating Grizzly Module, which is one of the three major components of the plant, for the applicant.

[46] From a reading of the answering affidavit, it is clear that there has been close collaboration between the first respondent and Westarcor in fabricating multiple PT100 plants. What is striking is that the first respondent, whilst an employee of the applicant, oversaw the fabrication and marketing of complete MB100 plants in the past. It cannot be disputed that the first respondent had access to the applicant's design drawings in respect of the complete MB100 plant, and as argued by the applicant, any gap in Westarcor's knowledge could easily have been filled by the first respondent.

[47] I am mindful that all that the applicant must do at this stage of these proceedings is that it has a strong prima facie case for a cause of action for infringement of copyright and unlawful use of its confidential information. I am satisfied, in the

circumstances, that such a prima facie case has been shown. The attack that Westarcor could not have infringed the applicant's copyright based on the argument that

it never had a complete set of MB100 plans and never produced a complete MB100 plant must fail.

The non-disclosure of an alleged failure by the applicant to investigate its own employees.

[48] Westarcor complains that the applicant failed to disclose to the court that it failed to perform the necessary investigations "behind its own unit lines" and contends that the court would not have granted the ex parte Anton Piller order had it known that HTT designed the PT100 plans. The argument goes that HTT is presumed to be the copyright owner and that HTT provided Westarcor with a complete copy of the plans. There is, therefore, no potential inference of impropriety on the part of Westarcor.

[49] The applicant points out that it did investigate its employees before the application was instituted and that specific reference to this is made in paragraphs 64 and 65 of the founding affidavit.

[50] After the application was launched, the applicant filed supplementary affidavits when new facts were discovered regarding Van der Linde's and Mr Ellis's involvement. According to the applicant, these facts were unknown when the application was launched, and the applicant could not disclose what it did not know at the time. This argument by the applicant must be accepted as correct. In any event, the complaint relating to the investigation of the applicant's employees was not pleaded and was raised for the first time in Westarcor's heads of argument.

The alleged distortion of the UARI bid.

[51] Westarcor complains that the applicant, in its founding affidavit, represented that UARI had published a request for the supply of two MB100 plants, whereas the bid was for the supply of delivery of two machines with a lading of 100 tonnes per hour. It is argued that had the court been informed of the true nature of the bid, the court could have been expected to come to a different

conclusion.

[52] The applicant explains that as far as it was concerned, the tender was for the supply of its MB100 plants, being the plants which the applicant manufactured that met the tender specifications. It is undisputed that the applicant had supplied these plants to UARI before, and its aforesaid assumption, therefore, is not unreasonable.

[53] I agree with counsel for the applicant that had the applicant stated that the tender was for two plants with a lading of 100 tons per hour, it would have made no difference in the granting of the Anton Piller order.

The complaint that the applicant falsely represented that Westarcor would suffer no harm.

[54] Westarcor argues that the applicant euchred the court into believing that Westarcor would suffer no harm through the execution of the Anton Piller order “other than the temporary inconvenience of the order’s execution and temporary disposition of the listed items.”

[55] It is argued that the applicant was fully aware of the nature of Westarcor’s business and that Westarcor is a repository of many design drawings of its clients because it retains these after the fabrication to enable it to troubleshoot failures and attend to repeat orders. Because nobody wants their confidential diagrams to be removed from a trusted repository, Westarcor, through the execution of the Anton pillar order, suffered substantial reputational damage. Westarcor contents, therefore, that the court would have refused the ex parte order had it been aware of the nature and extent of the prejudice which Westarcor would suffer.

[56] Counsel for the applicant argues that no proper case has been made out in the answering affidavit that Westarcor suffered any reputational damage; that there is no mention of a single customer that has refused to deal with Westarcor because of what has happened; that any reputational damage was self-created; and this is not the kind of “fact” that would be material in the granting of an Anton Piller order. I agree with these contentions, particularly that if reputational damage as alleged were a weighty consideration for the refusal of an Anton Piller order, such an order would seldom, if ever, be granted. By their very nature, all Anton Piller orders may have some reputational consequences.

The allegation that the applicant failed to make out a copyright infringement claim.

[57] Westarcor alleges that the applicant’s averment that the work it seeks to protect is original has not been supported by evidence of facts relating to the making of the work from which it can be concluded that it is indeed original. Westarcor further states that the contention of the applicant that there was no other plant like the MB100 plant in South Africa or anywhere else is, at best, questionable.

[58] Westarcor further argues that the facts relating to a defendant’s alleged conduct giving rise to a copyright infringement claim must be set out to sustain such a claim. What the plaintiff must establish, it is argued, is that the defendant committed one or more of the restricted acts in relation to the relative work or substantial part of it and that the defendant

committed the restricted acts without the authority of the copyright owner. Furthermore, it is submitted that in the case of a secondary infringement of copyright, it must be shown that the defendant had so-called “guilty knowledge” when the acts were committed.

[59] In relation to the claim instituted by the applicant, the applicant argues that if the copyright claim failed to disclose facts to sustain a cause of action, then Westarcor would have had to file an exception in the period within which to do so. I agree with the applicant’s stance that the allegations relating to a lack of facta probanda are undermined by the fact that Westarcor filed a plea to the applicant’s particulars of claim in the action proceedings.

[60] The applicant submits that when manufacturing the PT100 plants using the plans/diagrams with HTT’s name on them, Westarcor would have known, simply from manufacturing the same or at least substantially similar components for the applicant using the diagrams provided by the applicant, that these were the designs of the applicant which had been copied. Given the conclusions reached in the Paley reports relating to the similarities of the ADP and the HTT designs, one can only conclude that the applicant’s submission above must be correct. In the final Paley report, it is concluded that “it is highly improbable (if not impossible) to reproduce the Vibrating Grizzly Module to the same precise dimensions and process design of the ADP MB100 without having access to the ADP design drawings or having measured an existing unit in the field.” The Paley reports have not been challenged.

[61] It is unnecessary to further deal with the “guilty knowledge” argument as the applicant’s action is for direct copyright infringement, which does not require knowledge on Westarcor’s

part.

The alleged lack of a cause of action.

[62] As has already been established, one of the requirements for granting an Anton Piller order is that the applicant must have a cause of action against the respondent it intends to pursue.

[63] Westarcor argues that the applicant did not show a viable cause of action against it.

[64] Before the return date, the applicant instituted action proceedings for damages and final interdictory relief based on the alleged

infringement by the defendants of the applicant’s copyright in the MB100 designs, alternatively for the unlawful use of the

applicant’s confidential information in relation to the MB100 designs. Westarcor is cited as a defendant in those proceedings.

[65] It is common cause that Westarcor has been in possession of the applicant’s confidential information relating to the MB100

plant, which information includes the design and drawings of the plant, costings, equipment schedules, supply lists, bills of material

for fabrication, specifications, datasets, general arrangements, and knowledge concerning the MB100's fabrication and assembly.

[66] The Paley reports support the existence of a strong prima facie case in which the confidential information has been used to fabricate the PT100 plants at Westarcor's premises. For this and other reasons already dealt with in this judgement, there can be no doubt that the applicant has shown a prima facie cause of action against Westarcor.

The allegation that the scope of the order is too broad.

[67] In *Non-Detonating Solutions*, [17] it was held:

"It is trite that an applicant must establish that the respondent possesses specific documents or things that constitute vital evidence

in substantiation of the applicant's cause of action. Strict compliance with this requirement is pivotal to the legality of the use of the procedure. The reason for this requirement is obvious. The procedure has, potentially, draconian and extremely invasive consequences for respondents or defendants who are subject to it. The implementation in particular of the search leg of the order, can amount to the most manifest intrusion of the respondents' right to privacy guaranteed in s 14 of the Constitution as mentioned in para 20 above. Thus as was stated in *Shoba*, and as part of the balancing act to be performed by courts based on the principle of proportionality only vital evidence in the sense of evidence of importance to the applicant's case, must be the subject of the search. The specified documents must constitute vital evidence and a blanket search for unspecified documents or evidence which may exist is not allowed."

[68] Westarcor contends that the Anton Piller order sanctions the seizure of information on grounds that are too nebulous to be given exigible content related to the purpose for which the order was ostensibly sought and that the order is too broad.

[69] Westarcor refers to paragraphs 4.5. and 4.6. of the order, which authorised the applicant to seize information contained on listed devices in possession of or under the control of Westarcor for purposes of identifying and determining whether they contain any of the applicant's information or the related information and complaints that they are too broad. Paragraph 4.6 adds any remote cloud storage for these purposes.

[70] Westarcor also raises issue with paragraphs 4.9. and 5.3. of the order, which enables ENS Forensics to make electronic copies of the devices and the data found thereon and to upload these to secure off-site servers under the control of ENS Forensics and then to conduct a search of the said information. The items identified in the search could then be copied onto a storage device or devices.

[71] The above procedure, according to Westarcor, is that it authorised the blind seizure of information which was present at its premises. It is argued that this was too broad and violated the rights of those persons whose devices were present at Westarcor's premises.

[72] From a reading of the order, however, it is apparent that the search and seizure authorised therein is confined to the applicant's

information and the related information as defined in paragraphs 4.3.1. and 4.3.2. of the order.

[73] The order made specific provisions for a process by which control of any of Westarcor's electronic devices would be given to the sheriff. ENS Forensics would then make secure copies of the data on these devices, which copies would be handed to the sheriff for safekeeping pending further steps provided in paragraph 5 of the order.

[74] Of importance to note is that none of Westarcor's devices was removed from its premises, and the copies made by ENS Forensics

remain under seal with the Vredenburg sheriff. Paragraph 5 of the order provides that on confirmation of the order, a process is to be followed whereby on a date and at a place to be arranged with the sheriff and the supervising attorneys and in their presence as well as the presence of the respondent's representatives (should they wish to be present) a further search would be undertaken to search for the applicant's information and the related information as defined in the order. This is clearly to protect

Westarcor's interest.

[75] In the circumstances of this matter, there are sufficient safeguards to protect the interest of Westarcor in the order which specifies the information that can be searched for. The procedure for the execution of the order does not exceed what the law permits[19].

The threat that evidence would be concealed or destroyed.

[76] Westarcor argues that there is nothing to suggest that it is dishonest. It states that the evidence allegedly at risk of destruction is objectively verifiable and available elsewhere. There is thus no purpose to be served in destroying the evidence.

[77] In *Non-Detonating Solutions*, it was held:

"The Anthon Piller order is made where a reasonable fear exists that the respondent might, in the normal course, not discharge its duty to make full discovery. The establishment of an element of dishonesty in the conduct of a respondent must ordinarily give rise to a fear that vital evidence might be concealed or that the respondent might not make full discovery."[20]

[78] In its founding affidavit, the applicant asserts that its causes of action entail an element of intentionality on Westarcor's part, involving the knowing misuse of infringement of the applicant's rights. It states that the risk that the concerned items may not be safeguarded by the first respondent and Westarcor is firmly grounded.

[79] The applicant further relies on its contention, which from the facts of this matter seems reasonable, that Westarcor was a co-conspirator

with the other respondents, in particular in relation to the sale of the PT100 plants in direct competition with the applicant involving the use of the applicant's confidential information. This was all done in a secretive manner.

[80] It is also clear that some of the evidence has already been destroyed during the execution of the Anton Pillar order at Westarcor's

premises. In particular, the email account of the first respondent was deleted in its entirety before it could be downloaded during the execution of the order. It cannot be disputed that this is the email account which the first respondent used to provide instructions to Mr Ellis to produce the drawings that were provided to Westarcor. Westarcor simply denies knowledge as to who may have deleted the account.

[81] On an evaluation of all the evidence, without making any credibility findings at this stage, there was indeed a well-founded apprehension

that vital evidence may be destroyed, hidden or spirited away by the time this matter came to trial.

The execution of the order.

[82] Westarcor raises the following four complaints relating to the execution of the order;

[82.1] the alleged failure to warn Mr Dixon (who represented Westarcor during the execution of the order) that he was not required to incriminate himself and had a right to remain silent;

[82.2] the supervising attorney's use of a cell phone to photograph documents and the plant that was under construction;

[82.3] the supervising attorney's inclusion of matter in his report, which allegedly had the effect of pre-empting the return date and gave the applicant an advantage to which it was not entitled; and

[82.3] the "tendentious manner" in which the supervising attorney reflected the search results were allegedly calculated to and provided the applicant with an advantage it was not entitled to.

[83] As for the first of the four complaints above, this can be disposed of quickly. Our courts have never insisted upon a reference to the right of silence when Anton Piller orders are executed. Such rights may exist in criminal proceedings, but there are no criminal proceedings against any of the respondents and no evidence that criminal proceedings may follow.

- [84] As for the second of the four complaints, it is alleged that the supervising attorney took photographs of diagrams, designs and the plant under construction with his mobile phone. The supervising attorney denied these allegations and stated that he only used the magnifying function of his mobile phone to look at the small print on drawings that Mr Dixon showed them[21]. The supervising attorney reiterated that he preserved no information on his mobile phone, nor did he put any information on it in the first place.[22]
- [85] The third complaint is that during the execution of the order, Mr Dixon provided the supervising attorney information in confidence and in response to questions he had been asked. So, for example, Mr Dixon told the supervising attorney that a further three plants (in addition to those provided in terms of the UARI tender) had been manufactured. The supervising attorney reported on this in his report. Westarcor argues that in doing so, the supervising attorney pre-empted and stultified the return day as the applicant had now been given access to information revealed during the search, notwithstanding the fact that the court has not sanctioned this.
- [86] It cannot be disputed that Mr Dixon voluntarily provided the information complained about. In the replying affidavit, he states that Westarcor would have readily provided this information had the applicant asked for it.[23] I cannot see how it can be held that information voluntarily disclosed by Mr Dixon and reported by the supervising attorney be impermissible. In any event, the information on Westarcor's version, if confidential at all, belongs to HTT. There is no complaint by HTT that its confidentiality has been violated.
- [87] In the last of the four complaints, it is alleged that the supervising attorney should have been more meticulous in preparing his report to ensure that there was no suggestion of bias. It is argued that the supervising attorney did not live up to the required standard and deliberately skewed certain of his findings.
- [88] It is argued that when Mr Dixon showed the supervising attorney the design drawings utilised to manufacture the PT100 plants, he did not use the phrase MB100. The supervising attorney, however, in his report reflected that certain of the design drawings he was shown were for the "MB100/HTT". It is argued that this is a categorisation of the evidence by the supervising attorney.
- [89] I agree with counsel for the applicant that the use of terminology by the supervising attorney is neither here nor there. An overall

reading of his report shows that it is meticulous. Using the term "MB100/HTT" is certainly not a ground to conclude that the supervising attorney's report is tendentious.

CONCLUDING REMARKS

- [90] The evidence on record clearly shows that there was close cooperation between the first respondent and Westarcor in everything required to meet the UARI bid. Westarcor became the contracting party with UARI when it was clear that the latter was not prepared to do business with the first respondent due to a lack of a track record and an export licence. The purchase price for two of the plants Westarcor manufactured was paid into Westarcor's account.
- [91] The evidence is that the first respondent instructed Mr Ellis, who was at the time an employee of the applicant and had access to the applicant's design drawings, to produce drawings for what is called the PT100 plants. What is striking is the finding in the Paley final report relating to the similarities between the MB100 and PT100 plants. The evidence of both Paley reports remains uncontested.
- [92] In the circumstances of this matter, the facts strongly favour that this court exercises its discretion in favour of the applicant.

INTERIM RELIEF

- [93] The interim relief sought by the applicant is to interdict and restrain Westarcor from directly or indirectly utilising any of the

applicant's alleged information as defined in paragraph 4.3.1 of the Anton Piller order or any other confidential information owned by the applicant for any purpose whatsoever, unless authorised by the applicant in writing, pending the final determination of the action proceedings instituted by the applicant against Westarcor and other parties.

- [94] In *United Democratic Movement and Another v Lebashe Investment Group and Others*,^[24] The Constitutional Court had this to say:

"An interim interdict pending an action is an extraordinary remedy within the discretion of the court. For an order to be said to be interim, it must be susceptible to alteration and capable of being reconsidered at the pending trial on the same facts by the court of first instance. . . . The requisites for the right to claim an interim interdict are: (a) a prima facie right even if it is open to some doubt; (b) injury actually committed or reasonably apprehended; (c) the balance of convenience; and (d) the absence of similar protection by any other remedy."

A prima facie right

- [95] I agree with counsel for the applicant that the applicant has, at least on a prima facie basis, established that its copyright has been infringed. This is borne out by the fact that Mr Ellis was in possession of the applicant's

design drawings and was instructed by the first respondent to produce drawings for the plants which were to be manufactured by Westarcor pursuant to the UARI bid. The Paley reports confirm that the PT100, which was manufactured for this purpose, was, in substantial parts, virtually identical to the applicant's copyright designs of its MB100 plant.

Injury actually committed or reasonably apprehended.

[96] I have already found that the applicant established a prima facie cause of action against Westarcor and the other respondents for violating its copyright. With the execution of the Anton Piller order, it was found that Westarcor was manufacturing a further PT100 plant. Mr Dixon of Westarcor advised that two additional plants (in addition to those provided to UARI under the UARI bid) had been manufactured. Westarcor, however, has not been prepared to divulge to whom these additional plants had been provided.

[97] Westarcor remains in possession of the applicant's confidential information and the design drawings for the MB100 plants. Paley found there to be similarities between the two types of plants.

[98] In my view, it is reasonable to conclude that there is a reasonable apprehension of harm to the applicant regarding its confidential

information should an interim order not be granted.

The balance of convenience.

[99] Westarcor, by its own version, is a fabricator and is not in the business of selling to end customers. The applicant and the other hand, owns copyrights in respect of various plants and machinery. It engages manufacturers to fabricate plants and machinery, which it then sells to clients.

[100] Westarcor, as a manufacturer, will suffer little or no harm should the interim interdict be granted, and by contrast, the prejudice of the applicant would be severe if it is not granted as the essence of the applicant's business is affected. The balance of convenience, therefore, clearly favours the granting of the interim interdict.

No alternative remedy.

[101] I agree with counsel for the applicant that there can be no debate as to whether an alternative remedy exists.

COSTS

[102] The applicant asks for a punitive cost order to be made against Westarcor. I am not convinced that it is appropriate for such a cost order to be made in the circumstances of this matter. The usual party and party cost order in favour of the applicant is suitable.

THE ORDER

[103] in the result, the following order is made:

1. The rule nisi relating to the “Applicant Information” and the “Related Information” that was obtained from the second respondent at the second respondent’s premises in the execution of the order of this court dated 18 May 2022 (“the Anton Piller order”), pursuant to the Anton pillar application which was brought under the above case number (“the Anton Pillar application”) and which remains in possession of the sheriff of Vredenburg (“the second respondent’s information”), is hereby confirmed.
2. The further conduct of this matter in relation to the second respondent’s information shall be as follows:
 - 2.1 All information and documentation seized pursuant to the Anton Piller order at the second respondent’s premises are to remain preserved and be kept by the sheriff at Vredenburg.
 - 2.2 The information and documentation in relation to the remaining respondents are to be dealt with as provided for in the agreed order with those respondents.
 - 2.3 The applicant shall be permitted to have paragraph 5 of the Anton pillar order in the terms sought therein executed and given effect vis-à-vis the second respondent.
 - 2.4 The sheriff, the second respondent, the forensic experts (ENS Forensics) and the supervising attorney, Mr Ross Kudo, shall agree on a date or dates and place for the execution of the steps described in paragraph 5 of the Anton Piller order to be completed.
 - 2.5 In the event that the sheriff, the second respondent, the forensic experts and the supervising attorney are unable to agree on such date or dates, the sheriff shall be entitled to unilaterally determine a date and place and have the forensic experts proceed with the execution of the steps described in paragraph 5 of the Anton Piller order in accordance with the remainder of the terms provided therein on 5 (five) days’ written notice to the attorneys of record for the second respondent.
 - 2.6 The sheriff of Vredenburg shall do all things necessary to enable the execution of the steps described in paragraph 5 of the Anton Piller order, including but not limited to the sheriff of Vredenburg providing ENS Forensics with the passwords for the second respondent’s email and cloud accounts comprising part of the second respondent’s information, which passwords are contained in the evidence bags under his control, and access to all other documentation and further evidence of an electronic nature currently preserved by him and under his control.
 - 2.7 Thereafter, the parties are to make discovery in terms of Uniform Rule 35(1) and

- (2) - including of information and documentation obtained through the execution of paragraph 5 of the order.

2.8 The parties are to call for further and better discovery in terms of Uniform Rule 35(3) in the event that such further and better

discovery is required.

2.9 The parties' further rights in terms of the Uniform Rules with regard to applications to compel discovery, the issuing of subpoenas duces tecum, etc., are reserved.

3. Pending the final determination of the action proceedings instituted in this court under case number 9167/22 (the action), the second respondent is interdicted and restrained from directly or indirectly utilising any of the applicant's alleged information (as defined in paragraph 4.3.1 of the Anton Piller order) or any other confidential information owned by the applicant, for any purpose whatsoever, unless expressly authorised by the applicant in writing to do so.

4. The second respondent shall pay the applicant's costs on a party and party scale, such costs to include the costs of two counsel.

5. The remaining costs of the Anton pillar application, including the qualifying costs of the forensic experts and Mr Paley, the further

cost of the forensic experts and Mr Paley, the supervising attorney and the sheriff shall stand over for determination at the trial.

6. The second respondent's counter application is dismissed with costs.

HOCKEY AJ

(Acting Judge of the High Court of South Africa)

For Applicant:

Adv R Stelzner SC

Adv L Kelly

Adv A Price

Instructed by:

Francis Thompson & Aspden

For 1 & 3 Respondents: Adv J Roux SC

Instructed by:

Bredenkamp Attorneys Inc

For 2nd Respondent: Adv P Tredoux

Instructed by:

Ebersohn Attorneys

- [1] Record pages 367 and 379, respectively.
- [2] The abbreviation stands for Mobile (modular) plant, and the hundred depicts a reference to the fact that the plant can process one hundred tons of ore per hour.
- [3] This is a reference to the first respondent.
- [4] Quoted verbatim from the Paisley final report, pages 942 – 943 of the record.
- [5] 1995
- (4) SA 1 (A) at 15F-J
- [6] 2008 (1) SA 76 (SCA) at para 10.
- [7] 2016
- (3) SA 445 (SCA) at para [20].
- [8] 2015
- (5) SA 163 (GJ) at para 65.
- [9]
- [2022] ZAGPPHC 522 (18 July 2022) at paras 69 - 72
- [10] 2001
- (4) SA 228 (T)
- [11] 1979
- (4) SA 342 (W), at 349 A-B.
- [12] See, for example, National Director of Public Prosecutions v Basson 2002
- (1) SA 419 (SCA) at para 21.
- [13] Frangos v Corpcapital Ltd and Others 2004 (2) SA 643 (T) 649 C-E.
- [14] It is common cause, however, that the applicant, from time to time, provided Westarcor with the applicant's design diagrams and other intellectual property for Westarcor to fabricate for the applicant (para 6.3 of the answering affidavit, record page 984).
- [15] Record 1023 para 111 of the answering affidavit.
- [16] See section 1(2A) of the Copyright Act. >
- [17] Footnote 7 supra.

[18] Supra, para [30].

[19] See Mathias International Ltd and Another v Baillache and Others 2015

(2) SA 357 (WCC) at para 37.

[20] Supra, at para [27].

[21] Record page 1141, para 38.

[22] Record, page 1153 para 81.

[23] Record page 1076, para 245.5.

[24] 2023

(1) SA 353 (CC), at para [47].

[16] See section 1(2A) of the Copyright Act.

[17] Footnote 7 supra.

[18] Supra, para [30].

[19] See Mathias International Ltd and Another v Baillache and Others 2015

(2) SA 357 (WCC) at para 37.

[20] Supra, at para [27].

[21] Record page 1141, para 38.

[22] Record, page 1153 para 81.

[23] Record page 1076, para 245.5.

[24] 2023

(1) SA 353 (CC), at para [47].

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