

SOUTH AFRICA / JUDGMENT

Imedical Ophthalmic International (Pty) Ltd v Lodder (72180/2017) [2017] ZAGPPHC 732 (21 November 2017) [2017] ZAGPPHC 732

COURT

North Gauteng High Court, Pretoria

BEFORE

Mphahlele

CASE / FILE NUMBER

72180/2017

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

21/11/2017

CASE

NO: 72180/2017

Reportable:

No

Of

interest to other judges: No

In the

matter between:

IMEDICAL

OPHTHALMIC INTERNATIONAL (PTY) LTD

Appellant

versus

JULIA

LODDER

Respondent

JUDGMENT

MPHAHLELE, J:

- [1] This matter was dealt with as one of urgency. The respondent seeks the consideration of an order granted on an urgent basis in terms of 6
- (12) (a) by this Court on 23 October 2017. The applicant obtained the Anton Piller order in the absence of the respondent.
- [2] The reconsideration order is sought in terms of rule 6 (12) (c). This rule provides that a person against whom an order was granted in her absence in an urgent application may by notice set down the matter for the consideration of the order.
- [3] The applicant is an international company which was started its operation in 2012. It trades in the ophthalmic industry. The respondent was involved with the applicant since its inception, and de facto in control of the sales and acquisition side of the business in South Africa from its inception. The respondent was also a director of the applicant but has since been removed.
- [4] According to the applicant, the respondent and applicant's employee, one Ms. Yolande van der Walt are involved in a fraudulent scheme which was employed to steal funds from the applicant. The applicant's funds were siphoned out of applicant's bank account and utilized by the respondent to facilitate the businesses of Epic Vision (Pty) and Optimum Ocular (Pty) Ltd. The respondent is the sole beneficiary of the profits generated by Epic Vision (Pty) and Optimum Ocular (Pty) Ltd. The respondent has stolen applicant's client lists and approached the applicant's customers and diverted their business from applicant to Epic Vision (Pty) Ltd and Optimum Ocular (Pty) Ltd.
- [5] On the other hand, the respondent denies the fraud and theft allegations and maintains that her contract as amended with effect from 11 March 2015 provided that she is entitled to conduct ancillary business to that of the applicant. It is on this basis that she set up and operated the business of Epic Vision (Pty) Ltd. Epic Vision (Pty) Ltd and the applicant supplement each other's products and from time to time also cross sold products to their various clients. Optimum Ocular (Pty) Ltd is currently dormant.
- [6] The application for the Anton Piller order has its source in the applicant's claim of fraud and theft and breach of fiduciary duty by the respondent towards the applicant. The applicant intends instituting action against the respondent for the recovery of the misappropriated funds and loss of profit and believes that the respondent has the relevant vital evidence in her possession.
- [7] The court heard the matter in chambers and granted the Anton Piller order. The order granted provided for the sheriff, the attorney's

representative and the computer expert to search the premises of the respondent for the purposes of searching and seizing documents

specified in the court order and computer equipment and/or other information storage devices.

- [8] The search and seizure proceedings authorized by the Anton Piller order were executed on 31 October 2017 at the respondent's residence and in her presence. The respondent permitted the sheriff to attach and remove documents and a representative of the applicant, one Vicky Marsh acknowledged receipt of the attached documents. Instead of an inventory completed by the sheriff, the applicant submitted a document termed 'the agreement between the parties for the hand over of document'. The agreement list the attached documents as the HP printer with serial #CN4963b24F; imedical files x 4; Seagate external hard-drive with serial #NA7GHOP; photocopies of Epic Vision documents retrieved.
- [9] Counsel for the respondent submitted that the initial order was incompetent and should never have been granted, either in fact or in law.
- [10] The respondent contends that the order was vague and many of the items seized were unspecified amounting to a fishing expedition for the purpose of getting information disguised as the seizure of evidence for trial purposes. The respondent further contends that the applicant made out no case whatsoever that the respondent had or has in her possession specific (and specified) documents and objects that constituted vital evidence in substantiation of the applicant's cause of action.
- [11] Counsel for the applicant argued that the initial order was correctly sought and obtained. It was further submitted that with the presentation made to Molopa J the applicant was entitled to the order. The sheriff has proceeded to seize and attach evidence for preservation and there was no reason for this court to reconsider the initial order granted in the absence of the respondent. The applicant maintained that the seized items were essential for the applicant's claim for damages against the respondent.
- [12] Anton Piller orders are directed at the preservation of evidence. An applicant seeking an Anton Piller order ex parte must prima facie establish the following:
- 12.1 That the applicant had a course of action against the respondent which it intends to pursue;
- 12.2 That the respondent has in his possession specific (and specified) documents or things which constitute vital evidence in substantiation
- of the applicant's course of action (in respect of which the applicant cannot claim a real or personal right);
- 12.3 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 to the stage of discovery; and

12.4 That the remedy is the only reasonable and practicable means of protecting the applicant's rights.

- [13] The applicant sought and was granted access to its own documents in terms of clause 2 (2.1; 2.2; 2.3; 2.4 and 2.5) of the court order and the sheriff was specifically ordered to hand over these documents to the applicant. Under the circumstances, it is clear that the applicant used the Anton Piller order as a substitute for possessory or proprietary claims.
- [14] The applicant further sought and was granted access in terms of clause 2 (2.6; 2.6.1; 2.6.2; 2.6.3; 2.6.4 and 2.6.5) of the court order to documents of Epic Vision (Pty) Ltd and Optimum Ocular (Pty) Ltd that had not been cited in the application. The applicant failed to set out the basis upon which it was entitled to documentation that belonged to Epic Vision (Pty) Ltd and Optimum Ocular (Pty) Ltd, particularly in view of the fact that they are not respondents in the application.
- [15] Further, in its founding papers, the applicant stated that its investigation is ongoing and on finalization of the investigation and having regard to the documents it is trying to recover from the respondent, applicant will establish with greater certainty, its exact losses. This contention is clearly against the purpose of Anton Piller orders, the purpose which is to preserve evidence to be used in a forthcoming dispute. It is clear that the applicant intends to use the Anton Piller order in order to obtain evidence to build a case against the respondent.
- [16] The applicant sought and was granted access to the documents mentioned in paragraphs 13 and 14 above belonging to the applicant itself as well as to Epic Vision (Pty) Ltd and Optimum Ocular (Pty) Ltd respectively. But under circumstances which are not very clear, the applicant attached and removed Ms. Yolande van der Walt's and the respondent's cellular telephones, laptops, hard-drives and invoicing programs. These items are not specified in the court order and this lends credence to the respondent's argument that the order granted against her is vague amounting to a fishing expedition for the purpose of getting information disguised as the seizure of evidence for trial purposes. The court order as sought by the applicant does not clearly state which specific (and specified) documents and/or objects in the possession of the respondent constitute vital evidence in substantiation of the applicant's cause of action against the respondent.
- [17] It follows that the applicant's application does not meet the requirements for an Anton Piller order and therefore stands to be set aside.
- [18] I accordingly make the following order:
1. The court order granted on 23 October 2017 is hereby set aside;
 2. The applicant's application is hereby dismissed;

3. The applicant alternatively the applicant's attorney alternatively the sheriff of the court is hereby ordered to forthwith return to the respondent all the documents and/or items attached and removed in terms of the court order granted on 23 October 2017, including all copies of such documents and/or items made consequent upon the attachment and removal by the sheriff of the court.
4. The applicant to pay the costs of this application.

MPHAHLELE, J

JUDGE OF THE HIGH COURT

For the applicant: Mr. Z Omar

Instructed by: Zehir Omar Attorneys

For the respondent: Mr. T Kruger

Instructed by: Welman Bloem Attorneys

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