

SOUTH AFRICA / JUDGMENT

Lasercraft Mergence (Pty) Ltd v Dreyer and Others (2023-044109) [2024] ZAGPJHC 165; 2024 (6) SA 539 (GJ) (26 February 2024)

[2024] ZAGPJHC 165

COURT

South Gauteng High Court, Johannesburg

BEFORE

S D J Wilson

CASE / FILE NUMBER

2023-044109

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FLYNOTES:

CIVIL PROCEDURE – Anton Piller order – Cause of action

– No

right to see evidence preserved in terms of order before applicant pleads and institutes claim to which evidence is said

to be

relevant – Relief intended to preserve evidence relevant to existing cause of action – Applicant must,

in principle, be

in position to plead that cause of action at the time it seeks

Anton Piller relief – Relief is to

sustain the cause of

action and not for purpose of allowing applicant to formulate the cause of action.

IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, JOHANNESBURG)

1.REPORTABLE:

YES

2.OF

INTEREST TO OTHER JUDGES: YES

3.OF

INTEREST TO OTHER JUDGES: YES

26

February 2024

Case No. 2023-044109

In the matter between:

LASERCRAFT
MERGENCE (PTY) LTD Applicant
and
PAUL
DREYER First
Respondent
PRECISION
LASER ENGINEERING (PTY) LTD
Second Respondent
PIETER
RUDOLF COETZEE
Third Respondent
MICHELLE
VAN DER MERWE
Fourth Respondent
Summary
Anton
Piller relief – there is no right
to see the evidence preserved in terms of an Anton
Piller order before the applicant
pleads and institutes the claim to which the evidence is said to be
relevant – Anton Piller
relief is intended to preserve evidence relevant
to an existing cause of action – the applicant must, in
principle, be in
a position to plead that cause of action at the time
it seeks Anton Piller relief
– an application to extend the deadline for the institution of
legal proceedings for which evidence has been preserved,
in order to
allow the applicant to inspect that evidence, was refused.

JUDGMENT

WILSON J:

1 On 16 May 2023, the applicant, Lasercraft, approached me urgently, in camera and without notice to the respondents to ask for an Anton Piller order. Anton Piller orders grant a litigant the right to cause a search to be made of property at which they believe evidence relevant to a pending or forthcoming suit will be found. During the search, independent attorneys, together with the Sheriff of the court, identify, seize, preserve and inventory that evidence.

The Anton Piller order

2 Anton Piller orders are granted if, and only if, the applicant has a cause of action against the respondent they intend to pursue; if the respondent has in their possession specified documents or things which constitute vital evidence in substantiation of applicant's cause of action (but in respect of which applicant cannot claim a real or personal right); and if there is a real and well-

founded apprehension that the evidence may be hidden or destroyed by the time the case comes to trial or to the stage of discovery (*Shoba v Commanding Officer, Temporary Police Camp, Wagendrift Dam 1995 (4) SA 1 (A)* (“*Shoba*”) at 15F-I).

3 The first, third and fourth respondents are Lasercraft’s former employees. The second respondent, Precision Laser, once held shares in Lasercraft. Lasercraft sought an order authorising a search of the respondents’ premises to identify and preserve a large number of documents said to be in the respondents’ possession. Lasercraft said that the preservation of the documents was necessary to prove that the respondents were intending to, or had already, broken various undertakings of confidentiality they made to Lasercraft when they were Lasercraft’s employees or shareholders. The documents were also said to constitute critical evidence of the first, third and fourth respondents’ breach of contractual undertakings made to Lasercraft in restraint of

trade. Lasercraft told me that it intended to sue the respondents to restrain them from breaching their restraints of trade and from disseminating the confidential material. There were also damages claims in the offing. The documents were alleged, in addition, to be relevant to a case of unlawful competition that Lasercraft intended to pursue against Precision Laser.

4 Lasercraft feared that, if the respondents learned of Lasercraft’s intent to sue, the evidence it needed to substantiate these claims would be lost. Lasercraft submitted that the respondents could only have obtained the documents dishonestly. Having already acted dishonestly in obtaining the documents, the respondents, I was told, would not hesitate to hide or destroy the documents if they knew of the *Anton Piller* proceedings, or of Lasercraft’s intent to sue.

5 Apart from the *Anton Piller* relief, Lasercraft sought a rule nisi, operating as an interim interdict, restraining the respondents from using, copying or disseminating the documents subject to the preservation order for any purpose whatsoever. The interim interdict also restrained the first, second and third respondents from breaching their restraints of trade pending the final determination of the litigation that Lasercraft intended to institute against them. The order Lasercraft asked for required it to start that litigation within 60 days of the *Anton Piller* relief and the rule nisi being granted.

6 After a hearing in camera, I granted the order Lasercraft sought without input from the respondents. If the applicant has made out a case that the respondents may destroy or hide the evidence it wishes to preserve, this is normal practice in *Anton Piller* cases, where the fear is always that the evidence sought to be preserved will be lost if the respondents are given notice of the proceedings. The *Anton Piller* order was executed shortly thereafter. On 18 May 2023, I granted a brief extension to the period during which the search of Precision Laser’s premises authorised in the *Anton Piller* order could be carried out.

The reconsideration and extension applications

7 The order I granted did not provide for a return date on which the rule nisi would be reconsidered in the respondents' presence. However, it did advertise to the respondents that it was open to them to seek the reconsideration and the discharge of the Anton Piller order and the rule nisi. In due course, the respondents applied to have the Anton Piller relief reconsidered and set aside, and for the rule nisi to be discharged. They denied that Lasercraft had a cause of action against them on any of the bases it had identified in its application for the Anton Piller order or the rule nisi. They said that the documents preserved under the order were not of a confidential nature. They also disputed the application and scope of the restraints of trade Lasercraft alleged.

8 Before the respondents' reconsideration application could be heard, the 60-day period within which Lasercraft was bound to institute the proceedings envisaged in my order expired. Lasercraft accordingly also brought its own application to extend the deadline for the institution of the proceedings it wished to bring against the respondents.

9 I heard Lasercraft's extension application on 20 February 2024. I dismissed the extension application, and set aside the Anton Piller relief. In light of the effluxion of the period Lasercraft had to sue, I declared the rule nisi to have lapsed. I directed Lasercraft to pay the respondents' costs, including the costs of two counsel. I said at the time that my reasons would follow in due course. These are my reasons.

Lasercraft's failure to institute proceedings

10 Lasercraft failed to institute the proceedings it said it wanted to bring against the respondents within the 60-day period specified in my order. In fact, it had still not instituted those proceedings when its application to extend the 60-day period was argued before me. The founding affidavit to Lasercraft's extension application was deposed to by its attorney, Mr. Rebello. In that affidavit, Mr. Rebello all but admitted that he had misunderstood the import of my order. He had mistakenly thought that Lasercraft had 60 days from the date on which the Anton Piller relief and the rule nisi had been reconsidered and confirmed in the respondents' presence in which to institute the proceedings.

11 It was accepted before me that this interpretation of the order is untenable. Lasercraft had 60 days from the date of the order I made ex parte on 16 May 2023 in which to launch its proceedings. This must, or should, have been clear to Mr Rebello by the time he deposed to the founding affidavit in the extension application, on 25 October 2023. It seems to me that every effort should then have been made to launch the proceedings envisaged in the Anton Piller order and the rule nisi as soon as possible thereafter.

12 But, for months after Mr. Rebello should have realised his mistake, Lasercraft took no steps at all to plead or institute its claims. It still had not done so when its extension application was called for hearing before me. The obvious question is: why not?

13 That question, which I posed in argument on 20 February 2024, elicited a different explanation to the one Mr. Rebello gave in his affidavit of 25 October 2023. Mr. Ohannessian, who appeared together with Ms. Lombard for Lasercraft, explained that the proceedings had still not been instituted because Lasercraft needed to see the documents preserved under the Anton Piller order before it could plead its case.

14 In my view, that is plainly impermissible. Anton Piller orders are meant to preserve evidence vital to sustain a cause of action a litigant knows or reasonably believes they have. They may not be used to procure documents necessary to found a cause of action that the litigant merely suspects might exist (see *Universal City Studios Inc v Network Video (Pty) Ltd* [1986] ZASCA 3; 1986 (2) SA 734 (A) at 755H-J and *Viziya Corporation v Collaborit Holdings (Pty) Ltd* 2019 (3) SA 173 (SCA) paragraph 23).

15 Nor do Anton Piller orders automatically entitle the applicant to inspect the documents preserved (*Hall v Heyns* 1991 (1) SA 381 (C) at 389H-I). That happens, if it happens at all, only with the court's permission, during the discovery phase of the proceedings the applicant intends to launch, after the issues in those proceedings have been defined in the pleadings. As the Appellate Division made clear in *Shoba*, Anton Piller applications are animated by the fear that "evidence may be hidden or destroyed or in some manner be spirited away by the time the case comes to trial or to the stage of discovery" (*Shoba* at 15I, my emphasis). Only then is it possible to determine whether and to what extent the preserved documents really are relevant to the applicant's claim.

16 It follows from this that, when it approached me for Anton Piller relief, Lasercraft ought to have known what its cause of action was. It should also, in principle, have been ready to plead its cause of action without reference to the evidence it sought to preserve. Lasercraft cannot now expect to be able to look at the documents seized in terms of my order for the very purpose of formulating and pleading the cause of action it says it has had all along.

17 There is in our law a well-known distinction between pleadings and evidence. The pleadings contain each party's statement of the facts they intend to prove at trial. The evidence tends to prove or disprove those facts. But a party's allegations of fact and the evidence relevant to determining the truth of those allegations are two different things. The evidence on which a litigant founds their case is often beyond the litigant's grasp at the time the pleadings are drafted. That is why our rules of civil procedure provide for a process of discovery, during which each party is required to disclose relevant evidence in their possession. This includes evidence that helps their opponent's case, or harms their own. When all the relevant evidence comes to light in the discovery process, it might not turn out to be what a litigant originally thought it would be. In that case, the litigant will either withdraw or amend their pleadings.

18 Sometimes, a litigant knows or reasonably believes that the evidence necessary to prove the facts they intend to allege in their pleadings is in the possession of a person who will likely conceal or destroy that evidence if they are notified of the litigant's intention to sue. In that event, Anton Piller relief may be necessary and appropriate to preserve the evidence the litigant needs, and to give that litigant a meaningful opportunity to pursue their claim. But none of that gives the litigant a right to see the evidence so preserved before pleading their case.

19 It is of course true that an applicant for an Anton Piller order need not have drafted their particulars of claim or their founding papers at the time the relief is sought. Nor must they exhibit those papers in draft form to the court from which they seek Anton Piller relief. But the reason for this is not that the applicant is entitled to see the documents seized and preserved under the Anton Piller order before they plead their case. It is because Anton Piller relief is likely to be very urgent. In those urgent circumstances, the need to preserve the evidence upon which the applicant intends to rely means foregoing a thorough interrogation of the strength of their cause of action. A court need only be satisfied that there is a cause of action *prima facie* and that the applicant honestly intends to pursue it. That can be ascertained without reference to draft pleadings. The cause of action must still exist, however, and the purpose of Anton Piller relief seems to me to be to allow the applicant to formulate its pleadings knowing that doing so is not an exercise in futility. The applicant can rest assured that the evidence it will later need has not been lost or destroyed.

20 To grant Anton Piller relief for the purpose of allowing an applicant to formulate rather than sustain their cause of action seems to me to transcend the purpose of the remedy. It also risks authorising grave and unjustified intrusions into the constitutional rights of those who may be subject to an Anton Piller order. Anton Piller relief is an extraordinary invasion of the rights to dignity and privacy of those who are subject to it. The relief is only justified where it is necessary to ensure the applicant's right of access to court, entrenched in section 34 of the Constitution, 1996.

21 Every Anton Piller order embodies a balance between that right, and a respondent's rights to dignity and privacy under sections 10 and 14 of the Constitution. That balance would be unjustly skewed if it were possible to obtain Anton Piller relief in the absence of a cause of action the applicant is capable of pleading at the time the court is approached for Anton Piller relief. It would, in effect, authorise the speculative search of a person's premises and the seizure of evidentiary material, merely on the basis that the material might found a claim in law. I cannot imagine the circumstances in which that kind of power should be given to an ordinary civil litigant.

22 Lasercraft's concession that it needs to see the documents preserved under the terms of my order before it can institute the main proceedings means that it was never entitled to Anton Piller relief in the first place. Lasercraft accepts that it cannot now plead, and probably never could have pleaded, the causes of action it assured me were available to it when I originally granted the Anton Piller order.

23 It follows from this that there was, in truth, no cause of action to which the preserved documents could have had any cognisable relevance, and no basis on which the Anton Piller relief could properly have been sought or granted. There is obviously, in these circumstances, no good cause to extend the period

available to Lasercraft to institute proceedings against the respondents.

Application and arbitration proceedings

24 Mr. Ohannessian argued that this result would effectively mean that Lasercraft is debarred from instituting arbitral proceedings it intends to take against the respondents. I was informed from the bar that the relevant arbitration rules require Lasercraft to attach all the evidence on which it intends to rely to its notice referring a dispute for arbitration, including the evidence preserved under the Anton Piller order. Mr. Daniels, who appeared together with Ms. de Villiers-Golding for the respondents, disputed this. He contended that what is required to institute arbitration proceedings under the relevant rules is no more than a notice declaring Lasercraft's intent to refer a dispute to arbitration.

25 The issue of whether anything more than a notice of intent to refer a dispute to arbitration is necessary to institute arbitral proceedings was not fully explored before me. I decline to express a final view on it. I shall assume, without deciding, that Mr. Ohannessian is correct, and that my judgment creates the obstacle that he has identified. Nonetheless, there was no case made out that this difficulty justifies the revision of the principles that preclude advance sight of evidence preserved under an Anton Piller order before an applicant pleads their cause of action. If the standard rules of arbitration really are inconsistent with these

principles, then the standard rules of arbitration should probably be changed.

26 Mr. Ohannessian's submission also raises the issue of whether documents procured as a result of an Anton Piller search can be annexed to an affidavit in motion proceedings to which that material is relevant. This court has already held that material preserved under the authority of an Anton Piller order that was later rescinded cannot be used in subsequent motion proceedings without the court's leave (see *Paul's Homemade (Pty) Ltd v Boshoff* [2021] ZAGPJHC 747 (29 November 2021), paragraph 60). I see no reason why the situation should be different if the Anton Piller order has not been rescinded. The applicant need only draft their affidavit to advert to the fact that the evidence necessary to sustain the relevant averments will be produced if the court grants them leave to inspect the preserved documents. The principle remains that the applicant's cause of action must be pleaded and the claim instituted before the relevance of the preserved evidence can be established, and the relevant material is made available to them.

27 It was for these reasons that I set aside the Anton Piller order, declared the rule nisi to have lapsed, and directed Lasercraft to pay the respondents' costs, including the costs of two counsel.

S D J WILSON

Judge of the High Court

This judgment was prepared by Judge Wilson. It is handed down electronically by circulation to the parties or their legal representatives by email, by uploading to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 26 February 2024.

HEARD ON:

20 February 2024

DECIDED ON:

20 February 2024

REASONS:

26 February 2024

For the Applicant:

T Ohannessian SC

N Lombard

Instructed by Smith Attorneys

For the Respondents: AJ Daniels SC

C de Villiers-Golding

Instructed by Richter Attorneys

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