



Anton Piller: not a fishing expedition

by Gaelyn Scott

The Anton Piller order is an extraordinary thing. It's essentially an evidence-preserving legal mechanism. It allows a party that feels that their rights are being infringed to approach the court as a matter of urgency and without notice to the alleged wrongdoer for an order sanctioning a raid of the premises of the alleged wrongdoer in order to find and preserve evidence that it believes will otherwise be destroyed. Unsurprisingly, it's controversial, and it should (theoretically at least) only be granted in exceptional circumstances. It is quite often used in the context of IP.

The South African Supreme Court of Appeal ("SCA") recently had an opportunity to re-examine the Anton Piller order in the case of *Viziya Corporation v Collaborit Holdings (Pty) Ltd & others*. The facts were that Viziya, a Canadian company that develops computer systems and software, signed an agreement with a South African company called Collaborit, in terms of which Collaborit agreed to refer and sell Viziya's products in return for fees. There were confidentiality and non-compete clauses in the contract. Viziya terminated the agreement because of a suspected breach. It subsequently went to court and obtained an Anton Piller order that entitled it to search Collaborit's premises for evidence. The issue of whether the Anton Piller had been correctly granted eventually made its way to the SCA. I will quote extensively from the SCA's judgment as it does lay down the law on Anton Piller orders clearly.

Judge Mathopo described the Anton Piller as follows: "An Anton Piller order is directed at preserving evidence that would otherwise be lost or destroyed. It is not a form of early discovery, nor is it a mechanism for a plaintiff to ascertain whether it may have a cause of action."

The judge then quoted some famous lines from Judge Corbett in the case of *Universal City Studios Inc. v Network Video (Pty) Ltd*. In that case, the judge said that an Anton Piller might be appropriate 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."

Judge Mathopo said that that there are various requirements for an Anton Piller, namely:

A *prima facie* case

Viziya's case was premised on claims of breach of contract, unlawful competition and use of confidential information, but the judge felt that the case had not been established. The facts are unedifying but it's worth noting that one of the reasons why the judge felt this way was because there was no evidence that Viziya had ever identified to Collaborit what information it regarded as confidential.

Specific (and specified) documents or things constituting vital evidence

The judge said that the search had been very broad, with 28 of Collaborit's storage devices (including laptops and phones) having been copied. The judge said that it was very likely that information not relating to Viziya would have come up in this exercise. The judge referred to the case of *Non-Detonating Solutions v Durie* and said this:

"As this court held in para 30 of *Non-Detonating Solutions*, a blanket search for unspecified documents or evidence, which may or may not exist, is not permitted. Viziya was obliged to identify the documents it sought to preserve with the necessary degree of specificity, possibly by category as occurred in *Non-Detonating Solutions*. Counsel submitted that 'things have moved on' since Corbett JA laid down as a requirement for an Anton Piller order that the applicant show a *prima facie* case of the existence of specific, or specified, documents or things that were vital and required preservation. That is a proposition that must be firmly dispelled. The law has not changed in that regard and this is still a requirement for obtaining an Anton Piller order. This requirement serves the important purpose of balancing the rights of the respective parties and enables the court to assess whether there is a reasonable likelihood that without an order they may be destroyed."

The judge went on to say this: "In my view identification of vital and specific information is necessary for the preservation of evidence. Its context cannot be widened as Viziya wishes to do. Such information must be measured against what can be obtained through discovery. If a party can obtain information on discovery, then it means that a party does not need an Anton Piller order, unless it shows that what would be discoverable would be concealed or destroyed thereby defeating the purpose of discovery."

The judge concluded that the search had been a "fishing expedition", one that had involved "a departure from the basic premise upon which Anton Piller orders are granted, namely that they are to preserve evidence, not search for it." The search "materially prejudiced Collaborit by unlawfully exposing its core business and proprietary information."

A reasonable apprehension that Collaborit would destroy or hide evidence

The judge said that "the test of a reasonable apprehension is an objective one and is based on the view of a reasonable person when confronted with the facts." Viziya had not satisfied that test, because it "failed to set out any factual basis for an objective conclusion to be reached of the well-founded and reasonable apprehension that evidence would be concealed." The judge categorised Viziya's evidence of dishonesty on the part of Collaborit as "flimsy". These words are very important:

"Without a substantiated case of significant dishonesty, there cannot be a reasonable apprehension that a party will destroy or conceal evidence. In every case it is notionally possible that a litigant will, when it comes to the time for discovery, suppress documents which are adverse to its case. This notional possibility is not enough. An Anton Piller order is highly invasive and must be restricted to those cases where, *inter alia*, there is a substantial case for believing that the respondent will not properly honour its discovery duties in due course."

So, the Anton Piller had been wrongly granted. Hopefully this judgment will make it less likely that this happens again!



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