IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

(3) REVISED

10 October 2022

DATE

SIGNATURE

CASE NO: 028461/2022

DATE: 10 October 2022

In the matter between:-

KATLEGO SIDNEY CHIPANE MALEFAHLO Applicant

V

MEDICLINIC HEART HOSPITAL First Respondent

NONTUTUZELO NJEZA Second Respondent

JUDGMENT

KOOVERJIE J

[1] The applicant, a practising surgeon, has instituted this Anton Pillar application in respect of securing evidence regarding an alleged sexual harassment complaint made against him.

[2] The first respondent is the Mediclinic Heart Hospital (Mediclinic) and the second respondent is the general manager of the first respondent, Ms Njeza.

[3] In essence, the applicant, at paragraph 5 of the affidavit states that:

"I seek to have the searching of the premises of the First Respondent in order to enable the Sheriff to collect all "the Evidence" being all statements / affidavits obtained during the First Respondent's investigations of alleged sexual harassment complaint made against me and for the Sheriff to make copies of the statements and outcomes of such investigations to enable me to launch an action for damages against the First Respondent and / or employees of the First Respondent and / or any other third party."

[4] The said application was premised on the following events that came to the knowledge of the applicant. On 19 July 2022 he received an anonymous tipoff that an announcement was made that he had made advances of a sexual nature towards one of his female colleagues. Sister Michelle, one of the nurses, was responsible for spreading such rumor. In fact, it was Michelle who informed the applicant that one of the colleagues informed her that the applicant sexually harassed her. Concerned that

these rumors were spreading to the other nursing staff and some patients, his working environment has become uncomfortable.

[5] Thereafter the applicant, through his instructing attorneys, requested the first respondent to investigate the source of the rumors and hold those who were party to the spread of the rumors accountable.[1] Mediclinic informed the applicant that none of its employees were involved in the publication of such rumor.[2]

[6] In response, the applicant's attorney advised that they were aware that there exists statements of the complainant and sister Michelle. Such statements together with the report of the investigations was requested. Mediclinic, in reply, advised that it was not at liberty to divulge a statement to any third party and statements are confidential.

[7] The applicant was informed that such statements were part of its internal process and information remains privileged.[3] The applicant finds these responses unacceptable as he claims that he is entitled to have such statements as he is implicated in the matter.

[8] The applicant therefore persists that this application is warranted as the respondent failed to provide a valid reason for refusing to provide the requested documents which included the outcome of the investigation of the rumors. It was argued that the respondents are concealing the information in order to protect themselves from any prospective damages claim so as to avoid being held responsible for the publication and the malicious rumors.

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[1] Annexure 'KSC01'
[2] Annexure 'KSC02'
[3] Annexure 'KSC06'

[9] The applicant submitted that the purpose of inspecting the statements is to enable him to utilize same in his claim for defamation.

[10] The applicant is of the view that the spreading of these rumors is intended to ruin his good name and reputation within the hospital and the profession as a whole. He states at paragraph 20:

"As soon as I have sight of the investigation and the statements I intend bring the defamation suit against the respondent and / or any third party."

[11] Such evidence is vital for his damages claim as it will show the source and extent of the defamatory rumors. He is of the view that the evidence may be destroyed.

URGENCY

[12] Insofar as urgency is concerned, I have noted that the only basis made is that the rumors have impacted his working relationship in the hospital environment. It is imperative to obtain the documents as soon as possible. In this way Mediclinic would not have an opportunity to destroy such evidence.

[13] In the well-known matter of ***East Rock Trading***[4] the court echoed that urgency is not there for the taking. In terms of Rule 6(12) an applicant has to set forth explicitly the circumstances that renders the matter urgent. The court stated:

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[4] East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd & Others (11/33767) [2011] ZAGPJHC 196 (23 September 2011) paragraph 6 & 7

"The applicant must state the reasons why it claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in the application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress."

[14] Whether or not the applicant will be able to obtain substantial redress in the application in due course will be determined by the facts of each case. In this instance, the applicant was well aware since July 2022 of the alleged rumors against him. I have noted that the applicant engaged with Mediclinic during August and September 2022.

[15] However, as set out above, the core explanation for urgency is that there is a strain on his working relationship. He is required to interact daily not only with the staff, but with his colleagues as well as the patients. Furthermore there is a tendency that the information may be destroyed.

[16] In my view, this application is not only not urgent but does not satisfy the requirements for such a draconian order. The court has an exclusive jurisdiction to grant an Anton Piller order on an *ex parte* basis and can do so in circumstances where there is a real danger that relevant documents and/or property may be removed or that vital evidence may be destroyed. The main object of this order is to ensure that there is a preservation or the protection of the evidence and not the

removal of the evidence. The purpose of this order is specifically not to allow the applicant to embark on a fishing expedition.

[17] In the often cited matter of ***Shoba***[5], the essential requirements for the Anton Pillar order were set out, namely:

"1. That the applicant seeking an order in camera and without notice to the respondent must prima facie establish the following, namely that the applicant has a cause of action against the respondent which he intends to pursue.

2. That the respondent has in its possession specific (and specified) documents or things which constitute vital evidence in substantiation of the applicant's cause of action (but in respect of which the applicant cannot claim a real or personal right); and

3. There is a real or well-founded apprehension that the evidence may be hidden or destroyed or in some manner be spirited away by the time the case comes to trial or at a stage of recovery."

[18] It must be appreciated that the relief sought under Anton Piller has a draconian effect and this court will only grant such an order under strict circumstances and with certain safeguards against abuse. An Anton Piller order can have a negative impact and cause inconvenience to parties.

[19] In the case of ***Anton Piller KG v Manufacturing Processes and Others [1976] 1 All ER 779*** the court made it clear that such a procedure will only be permitted in extreme cases where it is essential that the plaintiff should have access so that

[5] Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam and Another; Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg & Others 1995 (4) SA 1 (A) at 15 G-I

justice may not be defeated by the destruction or removal of vital evidence. The order can be granted only if the inspection would do no real harm to the defendant or his case.

[20] The applicant is required to demonstrate that he has a *prima facie* cause of action. There are three essential preconditions for the making of an order. In ***Bradbury***[6] the court stated:

"There are three essential preconditions for the making of such order, in my judgment. First there must be an extremely prima facie case. Secondly, the damage potential or actual must be very serious for the plaintiff. Thirdly, there must be clear evidence that the defendants have in their possession incriminating documents or things and there is a real possibility that they may destroy such material before any application inter partes can be made."[7]

[21] I have considered Annexure 'KSC01', a letter dated 1 August 2022 from the applicant's instructing attorneys alleging, *inter alia*, that an announcement was made at the hospital nursing managers' caucus, that he solicited sex from Ms Mashakeng and another staff member. When they refused his advances he made their working environment uncomfortable. Another staff member, Michelle, has relayed this to the hospital doctors' relationship management and to the hospital general manager. Thereafter this rumors spread throughout the hospital causing a tense working environment. Mediclinic was requested to investigate this rumor for the applicant.

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[6] Bradbury Gretorex Co (Colonial) Ltd v Standard Trading Co (Pty) Ltd; EMI Ltd and Others v Pandit [1975] 1 ALL ER 418 CH at 784

[7] See also Roamer Watch Co SA v African Textile Distributors 1980 (2) SA WLD 254 at page 272

[22] Mediclinic, in Annexure 'KSC02', responded that the individuals concerned are independent allied health care workers and not employees of the Mediclinic Heart Hospital. Hence Medicilic was not in a position to respond on their behalf and the applicant was requested to engage with them directly. Mediclinic also advised that it has no evidence of any of the nursing staff spreading such rumors.

[23] Mediclinic further confirmed that the manager attempted to facilitate a discussion between the applicant and the concerned allied health care worker in order to resolve the alleged dispute on an amicable basis and further stated that such resolution can be achieved. The applicant was once again reminded that the parties resolve the issue in a professional and respectable manner and that Mediclinic assist in this process.

[24] Despite this undertaking, the applicant's instructing attorney persisted with requesting the statement of Ms Mashakeng and the nurse, Michelle, as well as an investigation report.

[25] I find it necessary to point out that the applicant was not even certain at that point whether any investigation on this issue was conducted.

[26] In the 7 September 2022 response of Mediclinic, the applicant was informed that the statements obtained were part of its internal process and remained confidential. Once again the applicant reminded that Ms Mashakeng was an independent health worker and not an employee at the Mediclinic Heart Hospital.

[27] In my view, I am not satisfied that there is clear evidence that the documents which the applicant seeks are in Mediclinic's possession but for the statements Mediclinic claimed to have. In particular, the applicant seeks an investigation report which appears to be non-existent. The applicant was further informed that the complainants were not employed by Mediclinic but provided services on an independent basis. They may have reported the incident/s to another body or institution. Such body or institution to who they are accountable should be engaged with.

[28] I have also noted the type of information the applicant seeks. The applicant failed to show that certain information exists. Particularly in paragraphs 6.1.1 of the notice of motion, the applicant sought originals or copies of such statement and/or affidavits as well as outcomes in any of such investigation. The applicant further sought digital images and printouts, when he is unsure of their existence.

[29] Furthermore at this stage, the applicant relies on rumors. There appears to be no confirmation of an alleged sexual assault. If there are concrete facts, the first respondent as well as the complainant would be obliged to furnish the applicant with the necessary statement and/or other evidence pertaining to the alleged sexual harassment matter.

[30] The court in ***Rhino***[8] clearly stated that Anton Piller procedure is not appropriate. It stated:

"Proposed actions for defamation ought not to give rise to Anton Piller applications."

He makes it clear that the main purpose of inspecting the documents is to build his defamation case.

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[8] Rhino Hotel and Resort (Pty) Ltd v Forbes and Others 2000 (1) SA 1180 at 1185

[31] Lastly, in my view, the applicant has been invited to resolve this issue with the complainant and has been silent on this aspect. For the reasons set out above, the applicant is not entitled to this draconian order.

[32] In the premises, therefore, I make the following order:

This application is dismissed with costs.

H KOOVERJIE

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the applicant:	Adv E Muller
Instructed by:	ML Rababalela Attorneys
Counsel for the respondents:	No appearance
Instructed by:	
Date heard:	4 October 2022
Date of Judgment:	10 October 2022