

In the matter between:

**MEMORY INSTITUTE SA CC
T/A SA MEMORY INSTITUTE
Appellant**

and

ALBERT (A P) HANSEN **1st**
Respondent

LIZETTE (J E) HANSEN
2nd Respondent

ANDRIES STEPHANUS DU PLESSIS **3rd**
Respondent

MICRO MATH TRADING 273 CC **4th**
Respondent

MARLIE DU PLESSIS **5th**
Respondent

Coram: HARMS, SCHUTZ, CAMERON, CONRADIE and HEHER

JJA

Heard: 8 MAY 2003

Delivered: 16 MAY 2003

Subject: Anton Piller orders; copyright: proof of; approach to ex parte

applications

JUDGMENT

HARMS JA/
HARMS JA:

[1] The name of Anton Piller, once again, has been taken in vain and the guilty party, the appellant, deserves to bear the consequences by having its case dismissed, which will be done in due course. The appellant, a close corporation, without notice brought an urgent *ex parte* application in the Orange Free State High Court seeking a rule *nisi* with interim effect against two respondents (Mr and Mrs Hansen). Counsel calls it an *Anton Piller* order. Musi J, who heard the matter, granted an order in its terms.

[2] It should, I venture to suggest, be common knowledge that *Anton Piller* orders had their origin in a judgment of the Court of Appeal in *Anton Piller KG v Manufacturing Processes Ltd*.¹ In this country the seed fell initially on rocky ground guarded by prophets of old but eventually took root and the plant grew and prospered.² What is permitted and what not for the grant of these orders, considering the number of reported judgments on the matter, should also be common knowledge. Regrettably it is not.

¹ [1976] RPC 719 (CA), [1976] 1 All ER 779 (CA), [1976] Ch 55 (CA).

² *Cerebos Food Corporation Ltd v Diverse Food SA (Pty) Ltd* 1984 4 SA 149 (T) 161H and 163A-B commenting on *Economic Data Processing (Pty) Ltd v Pentreath* 1984 2 SA 605 (W).

[3] The order granted provided for the removal of goods (such as a computer) by the sheriff (with the police's assistance if need be – why, we are not told) and the handing over of them to the appellant. Duly armed with the order the sheriff, Mr van Vuuren (a member of the appellant) and the attorney proceeded to the Hansen residence and took what they wanted. I shall deal with this in a few words without references since those who care to look can find them easily. *Anton Piller* orders are for the preservation of evidence and are not a substitute for possessory or proprietary claims. They require built-in protection measures such as the appointment of an independent attorney to supervise the execution of the order. An applicant and the own attorney are not to be part of the search party. The goods seized should be kept in the possession of the sheriff pending the court's determination. Since it is the duty of an applicant to ensure that the order applied for does not go beyond what is permitted (something that was not done in this case) and since Musi J granted a rule *nisi* he was not empowered to grant, the setting aside of the rule had to follow as a matter of course (as happened when Van Coller J discharged the rule).³

[4] But, says the appellant, it was entitled to rely on a *rei vindicatio*, having alleged that at least some of the goods belonged to it. The problem is that on its own showing the Hansens were in possession of the goods in terms of an agreement with the appellant. The agreement, as counsel seemed to concede, appears to be a partnership agreement. How one partner can claim possession of partnership goods, which by agreement is in the possession of the other, I fail to understand. Even if one assumes that the agreement was something other than a partnership, the Hansens were still entitled to retain possession until the agreement was cancelled, and that had not been done.

[5] As a second 'but' the appellant relies on copyright for the relief sought. Counsel, however, could not refer to any prayer that related to or was based on copyright infringement. In any event, how anyone could waste time and money to pursue this so-called copyright claim is beyond comprehension, as a superficial glance at the Copyright Act 98 of 1978 would have shown. Copyright, it has been said, is a technical subject and the claimant is obliged to provide evidence to cover the technical points necessary to establish the claim to copyright.⁴ Technical or not, any claimant must prove the *facta probanda*, whether *prima facie* for an interim order or on a balance of probabilities otherwise. The appellant alleged that it held copyright in documents but these have neither been identified nor produced, a novel way of proving copyright. Then Van Vuuren said that he is the author of these documents; later he said that he is the co-author. He failed to

³ The appeal is against this order. Van Coller J refused leave to appeal, which was granted by this Court.

⁴ *Vagar (t/a Rajshree Release) v Transavalon (Pty) Ltd (t/a Avalon Cinema 1977 (3) SA 766 (W) 775C.*

inform anyone of when the works were created: was it before or after the registration of the appellant as close corporation? Originality of these phantom works is not alleged (s 2(1)). Van Vuuren is equally reticent about whether he and his co-authors were qualified persons (s 3) or whether copyright was conferred by reference to the country of origin (s 4). Since he does not allege that he had been employed by the appellant at the time the works were made and that the works had been made in the course and scope of his employment, the alleged authorship of the alleged works had to remain his and the co-authors (s 21(1)(d)). No written assignment of copyright to the appellant is alleged (s 22(3)). And, if there are joint authors (s 21(1)(a)), do they not all have to be a party to the proceedings?⁵

[6] Not able to satisfy the requirements of the Act, counsel pinned his hopes on the Berne Convention on Copyright to which South Africa is a signatory, apparently not realising that accession to the Convention did not in itself make it part of our law. To add insult to injury the allegations concerning possible infringement in the founding affidavit were purely speculative, something borne out by the results of the sheriff's search.

[7] The appellant, perhaps in desperation, also relied on unfair competition. Again counsel was unable to identify any part of the order sought that applied to this cause of action. The essential facts are these: the Hansens wished to withdraw from the partnership agreement. The appellant was prepared to buy them out but insisted that they agree to a restraint of trade clause, which they refused. The original contract did not contain one. And the Hansens took steps to begin their own and similar business and commissioned someone to prepare the necessary material (which the appellant admits differs from its material). No trade secrets are alleged and I cannot perceive what wrong the appellant relies upon unless it laments the fact that the Hansens wish to compete with it some time in the future and that the appellant cannot prevent it because there was no restraint of trade and it has no copyright protection.

[8] One is reminded of the words of Schutz JA in *Payen Components SA Ltd v Bovic CC and Others*⁶ dealing with a similar situation where reliance was placed upon copyright and in the alternative passing off:

'In my opinion a Court should be wary of allowing the sharp outlines of these two established branches of the law of unlawful competition, evolved through long experience, to be fudged by allowing a vague penumbra around the outline. Unlawful competition should not be added as a ragbag and often forlorn final alternative to every trade mark, copyright, design or passing off action. In most such cases it is one of the

⁵ Dean *Handbook of South African Copyright Law* (loose leaf ed) 1-30A thinks not.

⁶ 1995 (4) SA 441 (A) 453 G-H.

established categories or nothing.’

These words are enough to put this part of the case to rest.

[9] In the course of the proceedings against the Hansens in the Court below the appellant, without service in the prescribed way, sought an urgent interim order against a Mr and Mrs du Plessis and another close corporation identical to that obtained against the Hansens. It also sought their joinder in the proceedings against the Hansens. We are told that an order was issued, but since we have not been afforded the privilege of seeing it, we do not know what it contains. Van Coller J also did not have sight of the provisional order but set it aside on counsel’s say-so. There is no reason why this Court should be so accommodating. In any event, the result of this sideshow cannot be but the same as that of the case against the Hansens.

[10] In the course of this judgment there is little reference to the answering affidavits simply because they only exacerbate the appellant’s problems by having created a number of serious factual disputes. Another reason for disposing of the case on the appellant’s version is to illustrate another point and that is that interim orders and rules *nisi* are not to be had simply for the asking. Courts should satisfy themselves that a proper case has been made out, more so if the subject is technical. The fact that a respondent may approach the court for a reconsideration of the rule (Uniform rule 6(12)(c)) and that it may be set aside on the return day should serve neither as a sop nor as a soporific.

[11] The appeal is dismissed with costs and these include those of two counsel (to the extent that two were employed).

L T C HARMS

JUDGE OF APPEAL

AGREE:

SCHUTZ JA
CAMERON JA
CONRADIE JA
HEHER JA