IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

DATE: 18/5/2006

CASE NO. 6206 / 2006

UNREPORTABLE

In the matter between

RONALD R C TROYE BASSON	**1ST Applicant (1st Respondent main application)**
CHRISTA BASSON	**2ND Applicant (2ND Respondent Main application)**
IMMUNADUE HERBALS CC	**3RD Applicant (3RD Respondent main application)**
and	
VUSELELA HERBALS (PTY) LTD	**Respondent (Applicant in main Application)**

JUDGMENT

MAVUNDLA J

1. This is an application for leave to appeal against the order that I

granted on the 6 March 2006, in terms of which I dismissed with cost including the costs of two counsel, the application for the discharge of an Anton Piller order that I had earlier granted against the Respondents, who are the present applicants.

2. For purposes of convenience, I shall refer to the parties as in the main application.

3. In their notice for leave to appeal the Respondents have stated that I have erred in that I failed to have regard to:

3.1. The purpose of an Anton Piller order is to preserve evidence; Such order is not a substitute of a vindicatory action or similar action;

3.2. The **principles and critiria stated in Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam**: **Maphanga v Officer Commanding, SA Police Murder & Robbery Unit, Pietermaritzburg, 1995 (4) SA 1 (AD)**

4. In opposing the application for leave to appeal, Mr. Cillier who appeared for the Respondent, handed in a letter dated the 28-03-2006 addressed by attorneys Strydom & Bredenkamp, on behalf of the Respondent, to Deon Viljoen, attorneys for the Applicants in the main application.

5. Mr Cillier advised that the said letter contains a settlement of the

dispute between the parties, save the question of the cost. He further submitted that proceeding with the appeal would therefore be academic and that the Appeal Court under those circumstances will dismiss the appeal for that reason only. He referred me to section 20 of the Supreme Court Act. In the **Superior Court Practice, Erasmus at A1-50 [Service 24, 2005]** it is stated that in an application for leave to appeal, where the only remaining issue is the question of costs, the principle as set out in the matter of **Tsosane v Minister of Prisons1982 (3) SA 1075(A),** will continue to apply.

6. Mr Van Rensburg for the Respondents on the other hand advised that he does not have instructions in regard to the said letter and that he is obliged therefore to continue with the application for leave to appeal. He premised his submissions on the authorities and the principles stated in the notice for leave to appeal and that I erred in not taking these principles into account in firstly having granted the Anton Piller order and in failing to discharge the said order when the Respondents anticipated the return date. The relevant authorities are namely:

(a) **Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam and Another 1995 (4) SA 1 (A);**

(b) **Memory Institute SA C t/a Memory Institute v**

Hansen and Others 2004 (2) SA 630 (A)

(c) **Pohlaman and Others v Van Schalkwyk and Others 2001 (1) 690 (E) ;**

(d) **Retail Apparel (Pty) Ltd v Ensemble Trading and Others 2001 (4) SA 228**

7. He further submitted that at this stage of the application for leave to appeal, I need not take into account what the Appeal Court would or not do in terms of Section 20 ,since this Court is not the Appeal Court. I do not agree with him on this point since the authorities I have cited herein above are very clear on this aspect.

8. In the said case of Tsosane supra at 1076 E-1077A King AJ said :

"The order sought to be appealed against relates to cost only and accordingly the leave of the Court a quo is required—see s20 (2) (b) of the Supreme Court Act 59 of 1959 which, in so far as is here relevant, provides that no judgment or order given as to costs only which by law is left to the discretion of the Court shall be subject to appeal save with the leave of the Court by which the judgment was given or the order was made. It is clear from this provision that the Legislature wished to discourage appeals of this nature—see **Lendalease Finance (Pty) Ltd v Corporation De Mercadeo Agricola and Others 1976 (4) SA 464 (A) at 488D; Delmas Kooperasie Bpk v Koen 1952 (1) SA 509 (T) at 510E-F.**

Bearing this in mind, the principles to be observed in arriving at a decision in an application of this nature may be stated as follows:

(i) Such leave to appeal is not lightly given; The Court's disinclination derives not only from the attitude of the Legislature as expressed in the aforesaid section, but also from the fact that the costs are ordinarily a matter of judicial discretion---see **Kruger Bros & Wasserman v Ruskin 1918 AD 63 at 69**—also in the overall interest of the administration of justice;, that where the merits of a matter have been determined, finality should generally be regarded as having been reached. (No doubt these factors also motivated the Legislature.)

(ii) thus the Court will not ordinarily grant leave to appeal in respect of what has become a dead issue merely for the purposes of determining the appropriate order as to costs— see **Read Read v SA Medical and Dental Council 1949 (3) SA 997 (T) at 1026-7; Jenkins v SA Boilermakers, Iron & Steel Workers and Sip Builders Society 1946 WLD 15 at 18.**

(iii) The Court will, however, more readily grant leave where a matter of principle is involved—see **Divine Gates & Co v Press & Co 1913 CPD 143; Lakosky v O'Reilly 1933 WLD 126; cf Langverwacht Farming Co v Sedgwick & Co Ltd (2) 1942 CPD 155 at 168;** and see

also Kruger Bros & **Wasserman v Raskin (supra)** at 69 .

(iv) The amount of costs should not be insubstantial, lest the matter be regarded as altogether too trivial to engage the further attention of the Court.

(V) The applicant for leave to appeal should have a reasonable prospect of success on the appeal in the sense that his case should be fairly arguable--- see **Fouch v Erlanger &Co. CPD 76; Holmes and Another v Lawrie 1927 OPD 223; Gray v Goodwood Municipality and Others 1942 CPD 549; Ex parte Registeur van Aktes**: In re **Van den Berg NO v Registeur van Aktes 1975 (3) SA 321 (T)**"

9. In the Tsosane matter the Court after considering the facts of the matter, it nonetheless proceeded to grant leave to appeal notwithstanding the fact that the appeal was only against cost.

10. On reading the letter that was handed in, it is clear that although greater part of the issues that formed a divide between the parties have been resolved, the question of cost was not at all addressed. The cost that I have awarded against the present applicants , included cost of two counsel. Those cost it can

not be said that they are insubstantial. A senior counsel was involved in this matter.

11. The notice of leave to appeal is founded on the ground that in granting the Anton Piller order, I had ignored the principles that flow from the Shoba case supra, **Memory Institute SA CC t/a Memory Institute v Hansen and Others 2004 (2) SA 630 (A); Pohlman and Others v Van Schalkwyk and Others 2001 (1) SA 690 (E) and Retail Apparrel (Pty) Ltd v Ensemble Trading and Others 2001 (4) SA 228T.** In other words the question of principle is still a burning issue on the part of the Applicants for leave to appeal.

12. In **Beyers v Elf Regters Van die Grondwetlike Hof 2002 (2) SA 630** the Court held that the furnishing of reasons for the refusal of an application for leave to appeal by a Court of final instance is not necessary. The Court also referred to the test employed in the consideration of an application for leave to appeal as follow: "If there is a reasonable prospects of success only, leave to appeal is granted."

13. In this matter, when I granted the Anton Piller order, I had regard to what was said in the matter of **Pohlman and Others v Van Schalkwyk and Others 2001 (1) SA 690 at 696C by Froneman J**, repeating what was stated by Corbett CJ in the Shoba case, that:

" The Common-law requirements for an Anton Piller order are that it must be *prima facie* established that (1) the applicant has cause of action against the respondent which he intends to pursue; (2) the respondent has in his possession specific and specified documents or things which constitute vital evidence in substantiation of applicant's cause of action (but in respect of which the applicant cannot claim a real or personal right); (3) 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 prior to the stage of discovery (**Shoba v Officer Commanding, Temporary Police Camp Wagendrift Dam, and Another; Maphanga v Officer Commanding**, **South African Murder and Robbery Unit**, **Pietermaritzburg, and Others 1995 (4) SA 1 (A) at 15G-16B**). For an order "freezing " assets (the so-called Mareva injunction) the common law requires a subjective intention of defeating a creditor's claim, except possibly in exceptional cases, and in the likely existence of assets within the Court's jurisdiction **(Knox d'Arcy Ltd and Others v Jamieson and Others 1966 (4) SA 348 (A) at 372D-373E).**', as well as what he said at 698G-699A with regard to the three safeguards in matters of this nature. I had regard to the fact that the applicant must show that he had a prima facie case against the Respondents, and that it had a prima facie cause of action against the Respondents and also that it had reasonable apprehension that the Respondents would spirit away the data that was contained in the hard drives of the computers of the Respondents. I further took into consideration that the Sheriff of this Court was going to be present in the execution of the order.

14. In the premises, in so far as it is contended by the present applicants that I did not have regard to the principles flowing from the relevant cases, they cited in their notice for application for leave to appeal, bearing in mind the fact that the issue of such Anton Piller orders is also discretionary, I am of the view that there are no prospect of another court arriving at a different conclusion.

15. The aspects that need to be taken into consideration, as stated in the Tsosane case must not be looked at in isolation and independent of each other. Their cumulative effect as they are weighed against each other should be borne in mind .

16. In as much as I have stated that the costs are not insubstantial, I am swayed by the fact that the parties have to agreed extent bridged their differences, as pointed out by Mr Cillier. Further more finality must be reached. Also the fact that , I am of the view that there are no prospects of success, there is no need to burden the parties with further costs in pursuing an issue that will be of academic interest to the parties when they have resolved their differences to agreed extent, as in casu.

17. In the light of the fact that the parties reached agreement as stated by Mr Cillier, there was no need on the part of the Respondents to persists in arguing the application for leave to appeal. Therefore they should pay the costs of this application.

18. **In the premises the application for leave to appeal is dismissed with costs.**

N.M. MAVUNDLA
JUDGE OF THE HIGH COURT

HEARD ON THE: 25APRIL 2006
DATE OF JUDGMENT: 18 MAY 2006
APPICANT`S ATT: STRYDOM & BREDENKAMP
APPLICANT`S ADV:
DEFENDANT`S ATT: DEON VILJOEN
DEFENDANT