IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 50920/2019

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

20/7/2020

SIGNATURE **DATE**

In the matter between:

HOUSTON GROUP (PTY) LTD **APPLICANT**

And

LUKE JONATHAN ADAMSON **FIRST RESPONDENT**

DISCOUNT BOARD SPECIALISTS (PTY) LTD **SECOND RESPONDENT**

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

BASSON J

[1] The applicant (Houston Group (Pty) Ltd) applies for leave to appeal against specific portions of this court's judgment as well as the whole of the order (including the order for costs) handed down pursuant to a reconsideration of an Anton Piller order under case number 50920/2019.

[2] Following a reconsideration of the order, the court set aside the order granted on 18 July 2019 owing to the flawed execution thereof with particular reference to the actions of Mr Bera ("Bera") and Mr Commons ("Commons").

[3] In arriving at a decision, the court took into account the fact that Anton Piller orders in general have an enormous potential to harm a respondent and that it therefore stands to reason that these orders must be exercised with restraint and with the fullest respect for the respondent's rights.

[4] In this particular instance, Bera and Commons, by personally and actively conducting the search of both premises, exceeded what was permissible. The respondent in its written submissions refers in fair detail to the manner in which Bera and Commons conducted themselves during the search not only at the respondent's house but also at the business premises.[1] It is not necessary to regurgitate the manner in which these two individuals effectively usurped the powers of the Sheriff during the search. As a result of their conduct, the order was set aside as the search was so flawed that it warranted the setting aside of the order.

Leave to appeal

[5] Leave to appeal is granted in terms of section 17(1) of the Superior Courts Act[2] where the intended appeal would have reasonable prospects of success or where there exists some other compelling reason why the appeal should be heard. Bertelsmann, J in *Mont Chevaux Trust v Goosen*[3] explains:

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[1] Ad paras [14] – [16] of the written submissions.
[2] Act 10 of 2013.
[3] 2014 JDR 2325 (LCC)

> "It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see *Van Heerden v Cronwright & Others* 1985 (2) SA 342 (T) at 343H. The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against."

[6] The applicant in this matter appears to rely on the fact that compelling reasons exist as to why leave to appeal should be granted. In this regard reference is made to two decisions,[4] both of which preceded the decision in *Memory Institute SA CC t/a SA Memory Institute v Hansen & Others*[5] and on which this court relied in arriving at a decision. The applicants submit that, in light of the fact that the earlier judgments conflict with the decision in *Memory* as to whether an applicant and/or its attorney may participate in a search pursuant to an Anton Piller order, this court should grant leave to appeal. I have perused the judgments. I do not agree with the applicant's assessment of the two earlier judgments and I am particularly not persuaded, in light of the later clear dictum of the Supreme Court of Appeal in *Memory*, that there exist compelling reasons to grant leave to appeal.

[7] I am further in agreement with the submission on behalf of the respondent that, in the context of an Anton Pillar order (as in this case) where the order is premised on unlawful competition, it would lead to absurdity to allow the applicant to personally search its competitor and in doing so, be exposed to the competitor's own confidential information. A clear warning to this effect was sounded by Conradie AJ in *Petre & Madico (Pty) Ltd t/a T-Chem v Sanderson-Kasner & Others*:[6]

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[4] *Shoba v Officer Commanding Temporary Police Camp, Wagendrift Dam; Maphanga v Officer Commanding, SAPS Murder and Robbery Unit, Pietermaritzburg* 1995 (4) SA 1 (A) and *Universal City Studios Inc and Others v Network Video (Pty) Ltd* 1986 (2) SA 734 (A).
[5] 2004 (2) SA 630 (SCA).
[6] 1984 (3) SA 850 (W) at 855A – F.

"What seems to be obvious, is that if one is to have the type of remedy provided by the *Anton Piller* procedure at all one must see to it that it is meticulously executed according to the letter of the order.

This was emphasised in the decision of the Court of Appeal in *Anton Piller KG v Manufacturing Processes Ltd and Others [* 1976] 1 All ER 779. The Court was only prepared to permit the procedure in "an extreme case" where it was essential that the plaintiff should have inspection so that justice might not be defeated by the destruction or removal of vital evidence. And then the order might be granted, so it would seem, only if the inspection would do no real harm to the defendant or his case.

ORMROD LJ thought that the order sought was "at the extremity of this Court's powers" and stressed that "great responsibility rested on the solicitors for the plaintiff to ensure that the carrying out of such an order is meticulously carefully done".

The order has enormous potential for harm, particularly since it would frequently be granted at the instance of a competitor who would not be astute to see that no harm comes to the respondent.

Severe sanctions are necessary to curb any abuse of stringent remedies. An unruly horse needs to be kept on a tight rein.

It would offend one's sense of propriety to be told that an applicant could abuse the considerable powers which the order had given him without fearing any penalty for doing so other than a claim for damages, provision for which may or may not have been incorporated in the rule and which will always be difficult to prove and may in any event come too late to help a respondent ruined by an improper execution of the order.

Of course, prejudice would not always be eliminated by a discharge of the rule. But I would like to think that the sanction of an urgent discharge of the rule - on an anticipated return day - would serve to restrain the temptation, which must often be great, to stretch the language of the order."

[8] In light of the above I am not persuaded that the applicant has made out a case for leave to appeal. The application therefore falls to be dismissed with costs.

Order

[9] In the result the following order is made:

The application for leave to appeal is dismissed with costs.

A.C. BASSON
JUDGE OF THE GAUTENG DIVISION,
PRETORIA

Appearances

For Applicant

Adv. M Bronkhorst

Instructed by: Jassat Attorneys

For Respondents

Adv. D Block

Instructed by: Westly McLaughlin Attorneys