

Short notes on:

ANTON PILLER – IN THE CONTEXT OF DATA AND PRIVACY SECURITY REGULATION

Introduction

The right to privacy is protected in terms of the common law. More importantly, though, section 14 of the Constitution covers the right to privacy. However, the request is not absolute. Section 36 of the Constitution allows for the limitation of, among other things, privacy rights.

As a recent development, the Protection of Personal Information Act 4 of 2013 or “POPIA” was enacted and aims to further these concepts by regulating data privacy in South Africa. It allows owners or data subjects to exercise specific rights concerning the information. The Promotion of Access to Information Act 2 of 2002 or “PAIA” also provides a framework for accessing information from an organisation.

In a High Court litigious environment, Rule 35 of the Uniform Rules of Court deals with the discovery of evidence and the duty of litigants to exchange it during proceedings. In addition, rules 35 (12) and 35 (14) may be used when we have a specific request for records to be disclosed.

But what happens when you still think there is more? And that something devious is happening to the records?

An application to compel performance under rule 35 could follow in the context of having a valid or enforceable claim against someone. Or, in the same context, an application for an Anton Piller order could follow.

In English and English-derived legal systems, like South Africa, an Anton Piller order is a court order that provides the right to search premises and seize evidence without prior warning. This is intended to prevent the destruction of relevant evidence. However, it is not lightly ordered.

In *Cratos Capital (Pty) Ltd versus Zimri Investments CC and Hein Vogel* Case No. 20968/2021 (Western Cape High Court – 24 May 2022), the requirements when the information sought is comprehensive and where there has not been full disclosure as required under the provisions.

The facts

The applicant successfully applied on an ex parte basis for an Anton Piller order directing the respondents or the person on whom the order was served to allow:

1. the Sheriff,
2. the supervising attorney,
3. the applicant's attorney of record,
4. two persons representing the applicant company and
5. two IT experts engaged by the applicant

to immediately enter the premises to search for and deliver listed records.

It is well-established that there is a stringent duty of disclosure on applicants who move for relief on an ex parte basis. In *Schlesinger v Schlesinger* 1979 (4) SA 342 (W), a failure to comply fully with the duty can result in a dismissal of the application irrespective of the case's merits and the absence of mala fides on the part of the applicant. Thus our courts are vested with the discretion not to rescind an order obtained ex parte where there has not been full disclosure.

Under *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam and Another; Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg, and Others* [1995] 2 All SA 300 (SCA), 1995 (4) SA 1 (A), the essential requirements are:

1. That there is a cause of action an applicant has against the respondent which he intends to pursue;
2. The respondent has in his possession specific (and specified) documents for things which constitute vital evidence in substantiation of the applicant's cause of action; and
3. There is a genuine and well-founded apprehension that this evidence may be hidden or destroyed. Or spirited away by the time the case comes to trial or the stage of discovery.

The question the Court had to answer was whether the applicant established that it strictly needed an Anton Piller order to obtain the documentation it sought to bring using the search is another matter that requires consideration. The judge was not persuaded that such an order would be appropriate. It seems that the applicant was misdirected in its application, not mala fide.

Conclusion

Therefore, the evidence must be carefully considered as claims succeed or fail based on evidence and in the future to select the best remedy to collect evidence. If there is any reason indicating that the integrity of the proof is in the balance, an Anton Piller order may be appropriate if it is launched correctly. Contact an expert in dispute resolution at SchoemanLaw for assistance with all your civil needs.

