



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO:32429/2021

(1)	REPORTABLE:
(2)	OF INTEREST TO OTHER JUDGES:
(3)	REVISED.
DATE	SIGNATURE

In the matter between:

PATHWAYS HOLDINGS (Pty) LTD

Applicant

Registration No: 1998/021930/07

And

SKYFI INTERNET SOLUTIONS (Pty) Ltd

First Respondent

Registration No: 2014/274610/07

MICHAEL JILIO PINTO RIBEIRO

Second Respondent

ID NO: [....]

JUDGEMENT

MBONGWE J:

INTRODUCTION

[1] The Applicant commenced these proceedings on the 13 July 2021 on an ex parte basis and was granted urgent interim relief in the form of an Anton Piller order for:- the search, seizure and preservation of documents and others things it believed are in the possession of each of the three Respondents. The Applicant alleges that items to be seized constitute vital evidence in the claim for damages it intends to pursue, particularly against the Second respondent. The Applicant does not rule out the possibility of claiming damages against the Third Respondent either, depending on whether the Third Respondent was aware of the impugned actions of the Second Respondent in the business of the First Respondent. The order was executed against the Respondents over a period of three days, being 16, 19 and 20 July 2021.

[2] The matter came before me on the 27 July 2021, being the return date and had become opposed by the second and third Respondents. All the necessary papers had been filed and the matter was ready for hearing. The Applicant sought confirmation of the rule nisi with costs and, conversely, the Respondents sought a discharge of the rule with costs.

BACKGROUND FACTS

[3] The Applicant alleges in the founding affidavit to have invested a substantial amount of money in the First Respondent in December 2020. The investment had translated to a 45% shareholding in First Respondent. The insolvency of

the First Respondent resulted in the Applicant approaching the court on urgent basis seeking an Anton Piller order for the purpose stated in para 1, above.

[4] It is not apparent from the papers who was/were the other shareholders in the First Respondent nor the details of their shareholding. However, the Applicant does mention the Second Respondent, whom it holds culpable for the demise of the business of the First Respondent. According to the Applicant the Second Respondent, while being a director of the First Respondent, had established another business, the Third Respondent, and had, without authorisation transferred ('hijacked') the clients and assets of the First Respondent to the Third Respondent. Documentary CIPC proof linking the second Respondent to the third forms part of the annexures to the founding affidavit.

[5] The Applicant's founding affidavit and annexures consists of over 120 pages, the bulk of which being correspondence the Second Respondent is alleged to have sent to clients of the First Respondent and other parties and which, the Applicant surmises, serve as confirmation of the takeover of the business of the First Respondent by the Third Respondent. Further annexures consists, inter alia, of invoices addressed to the First Respondent by the Third Respondent and another entity called NND as suppliers of the First Respondent. The Applicant has also annexed CIPC proof of the Second Respondent's interests in and connectivity to NND.

NATURE OF THE STANDARD OF PROOF REQUIRED

[6] Unlike in ordinary civil proceedings and, due to the invasive nature of an Anton Piller application, the Court in *Friedshelf 1509 (Pty) Ltd t/a RTT Group and Others v Kalianji* 2015 (4) SA 163 (G) enunciated the principle in the following words:

“[48] The parties agree (and they are supported by the authorities) that the onus resting on an applicant at the hearing of an ex parte

Anton Piller application is a clear case or extremely strong prima facie case.

“[49] An Anton Piller search- and- seizure is an extremely invasive procedure and there are sound public policy reasons as to why an applicant should be required to demonstrate a strong prima facie case (as opposed to a prima facie case) at the ex parte stage of the application”.

[7] For the purpose of solidifying its intended claim, the Applicant sought and obtained an interim Anton Piller order which authorised the Sheriff to search for, identify and seize, from the premises of the Respondents, the originals or copies of:

- 7.1 Bank statements of the first, second and third Respondents;
- 7.2 Invoices pertaining to the first, second and third Respondents;
- 7.3 Invoices sent to or received by the first Respondent;
- 7.4 Invoices sent to and received by the second Respondent concerning the First and third Respondents;
- 7.5 Invoices sent to or received by the third Respondent;
- 7.6 Any audit information for all the first, second and third

Respondents

regardless of the dates.

The order was executed on the 16, 19 and 20 July 2021.

ON THE RETURN DATE

- [8] In both its replying affidavit and Heads of Arguments, the Applicant appears to have changed its stance in relation to both the capacity in which it has approached the Court for relief and the beneficiary of the relief. In para 3.1 of the founding affidavit, the applicant states:

“3.1 This affidavit is thus deposed to in support of an application for an

Anton Piller-type order to secure evidence currently in the possession of the First, Second and Third Respondents for an action to be instituted against any/all of the Respondents by the Applicant, and/or for a possible interdict and, if appropriate, damages arising out of the proverbial “hijacking” of the First Respondent’s clients and transfer thereof by the Second Respondent to the Third Respondent.” and, in its heads of arguments:

“2.5 The applicant, as set out herein above and in the founding affidavit, approaches the Honourable Court for relief in the form of an Anton Piller type of order to obtain certain documents in order to issue further legal proceedings against the second respondent on behalf of the first respondent”.

- [9] This is a clear turn-about in relation to the capacity in which the Applicant has presented itself (locus standi) as a party in these proceedings and the purpose for which it instituted the proceedings (relief). The Applicant is confined to the capacity, cause of action and entitlement / lack thereof, set out in the notice of motion and the founding affidavit. Until gaining knowledge of the contents of the Respondents’ replying affidavit, the Applicant had been acting in its own capacity and seeking relief for itself. Come the return date, that situation has changed. The invasive interim relief obtained in the now abandoned circumstances remain pursued on the papers.

[10] This turn-about came as a result of and in response to the Respondent's averment that even if the Applicant were a shareholder in the first Respondent, the insolvency of the first Respondent would have amounted to a reflective loss for the Applicant not entitling it to a claim against any of the Respondents. The judgment in *Hlumisa Investment Holdings (RF) Ltd & Another v Kirkinis & Others* [2020 [5] SA 419 SCA at para 32], defining a derivative claim and belatedly relied on by the Applicant does not avail an Applicant who from the onset sought to claim damages for itself. The Applicant would have had to be seeking relief on behalf of the first Respondent to find umbrage in the *Hlumisa Investment* case in which it was aptly stated:

"[32] *We pause to note that Nova trust also dealt with derivative claims. In a situation where wrongdoers themselves control the company, so that they can prevent the taking of the necessary steps, any one or more of its members may bring what is known as a derivative action, that is, an action by an individual shareholder, in own name, against the wrongdoers for relief to be granted to the company, the action being one on the company's behalf.*"

[11] The Applicant further sought to bolster its intended claim on what it referred to as admissions by the second Respondent in the answering affidavit; namely that the first Respondent was;

11.1 Insolvent

11.2 Without any directors, and that;

11.3 First Respondent has not been wound-up and that;

11.4 The Second Respondent had transferred the assets of the first Respondent to the third Respondent without a resolution authorising him to do so and "in contravention of the provisions of section 115 of the Companies Act".

THE RESPONDENTS' DEFENCES

- [12] The Second Respondent deposed to the Answering Affidavit on his and the third Respondent's behalf. In the first instance, the Respondents dispute the locus standi of the Applicant to institute these proceedings, contending that the Applicant had no interest whatsoever in the First Respondent, let alone as shareholder. This is followed up by the Respondents setting out the proximity of the connectivity the Applicant has to the first Respondent thus;

"The Applicant is a shareholder in Steven Stars Technology (Pty) Ltd which, in turn, is a shareholder in in Skytech Solutions (Pty) Ltd. It is Skytech which is a shareholder in the first respondent."

- [13] With regard to the Applicant's allegations of the unauthorised transfer of the clients and assets of the First Respondent to the third Respondent, the Second Respondent alleges that him and his co-director/shareholder of the First Respondent had taken a resolution in 2019 to close the business of the first Respondent. A copy of the relevant resolution is attached to the answering affidavit reads as follows:

"It was resolved by the shareholders that, Skyfi Internet Solutions, will no longer continue in the fibre operation of business, and that the assets, will be given away at nil value, in order to mitigate risk from its supplier's accounts. Supplier accounts will be closed, and asset list will be drawn up by the directors of the company. This will be with immediate effect".

- [14] The Second Respondent states further that subsequent to the resolution, the Third Respondent had bought certain clients of the First Respondent for an amount of R100 000-00 following the conclusion of a written sale agreement. The assets of the First Respondent were taken over by the Third Respondent as determined in the resolution.

ANALYSIS

- [15] Save for the bold allegation that it is a shareholder in the first Respondent, the Applicant has not established this fact, nor has it produced cogent proof

thereof in rebuttal of the Respondents' denial and assertion that the Applicant has no ties whatsoever to the first Respondent. Section 1 of the Companies Act, 1973 defines a shareholder in the following terms: "*Shareholder.... means.... the holder of a share issued by a company and who is entered as such in the certificated or uncertificated securities register, as the case may be.*" The Applicant has not proved that the first Respondent had issued any shares to it nor that the Applicant was/is entered in the securities register as a shareholder in the first Respondent. The challenge to its locus standi has seen the Applicant deviating from the station from which it initially sought relief for itself to doing so on behalf of the first Respondent – an insolvent entity without directors that has been dormant since 2019. By and large, the proceedings envisioned by the Applicant, such as interdictory relief, expose the Applicant's oblivion to the obtaining circumstances of the first Respondent.

- [16] The Applicant's purported cause of action is plainly unfounded. Both the alleged fraudulent hijacking of the business of the first Respondent and the alleged unlawful transfer of its assets are plainly false. The second Respondent has attached cogent proof that establishes the legitimacy of his actions. The principle in *Frangos v Corpcapital* [2004 (2) SA 643 (T) at 649] is that a Respondent's version, where supported by evidentiary proof, must be accepted on the application of the Plascon –Evans rule, for the purposes of determining issues in motion proceedings.

THE LAW

- [17] It is apparent in the present matter that the Applicant has misconceived the purpose of an Anton Piller order: - the seizure and preservation of evidence that would be vital to the Applicant's case that is to follow. A reasonably grounded apprehension that the evidence may be lost, destroyed or disappear is the rationale behind the order. The Applicant in the present matter disingenuously sought the order for the purpose of scouting whether it has a cause of action against the Respondents.

[18] The courts have in numerous matters set out criteria to be met by an Applicant seeking an Anton Piller order. [See *Viziya Corporation v Collaborit Holdings (Pty) Ltd & Others* 2019 (3) SA 173 (SCA); *Mathias International Ltd v Baillache* 2015 (2) SA 357 (WCC); *Shoba v Officer Commanding, Temporary Peace Camp, Wagendrift Dam*; *Maphanga v Officer Commanding, South African Police Murder & Robbery Unit, Pietermaritzburg* 1995 (4) SA 1 (A)], inter alia, wherein the following requirements were laid down;

18.1 The Applicant must have an already existing cause of action which it intends to pursue;

18.2 The evidence sought to be preserved must be clearly identified and,

18.3 Be in the possession of the Respondent and

18.4 Must constitute vital evidence in substantiation of the Applicant's cause of action;

18.5 There must be a real and well-founded apprehension that the specified evidence may be destroyed, hidden or in any manner spirited away by the time the case comes to trial or reaches the stage of discovery.

18.6 That the remedy sought is the only reasonable and practical means of protecting the Applicant's rights [see *Roamer Watch Co SA v African Textile Distributors also t/a M K Patel Wholesale Merchants & Direct Importers* 1980 (2) SA 254 (W)]

[19] It is necessary in the determination of the present matter to weigh the Applicant's entire case against the requirement mentioned above.

THE CAUSE OF ACTION

[20] The core of Applicant's case is that the second Respondent hijacked the business of the first Respondent by transferring both its clients and assets to the third Respondent. The second Respondent's actions have resulted in the insolvency of the first Respondent - an outcome that in turn saw the Applicant losing its investment in the first Respondent.

[21] The relief, in the Applicant's view, lay in possible proceedings in the form of interdictory relief or a claim for damages. Neither form avails to the Applicant; the impossibility of interdicting an act that occurred approximately eighteen months earlier and, secondly, a shareholder is not entitled to claim damages for losses suffered by the company [see *Hlumisa Investment*, above]. Only the company can claim damages where a wrong has been done to it.

CONCLUSION

[22] By its failure to establish the primary requirements such as its locus standi and the cause of action it intends to pursue; important factors that are individually dispositive of this application, the Applicant was clearly not entitled to the Anton Piller order it obtained, but for its failure to honestly disclose all relevant facts, as it was obliged to do, when applying for the ex parte orders in the Urgent Court.

COSTS

[23] It is customary that costs follow the outcome of the matter. The entire application and issues concerned justified the employment of senior counsel.

ORDER

[24] Based on the findings in this judgment the following order is made;

1. The matter is not urgent.

2. The rule nisi issued against the respondents on 13 July 2021 is set aside

and discharged.

3. The application is dismissed.

4. The Sheriff of the Court is directed to return to the second and third Respondents all the documents and things it has attached or uplifted in the execution of the order of the 13 July 2021.

5. The Applicant is ordered to pay the costs of the second and third Respondents on an attorney and client scale, including the costs consequent upon the employment of senior counsel.

M. MBONGWE J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA.

APPEARANCES

For the Applicant:

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Date of hearing: 27 July 2021

**JUDGMENT HANDED DOWN / ELECTRONICALLY TRANSMITTED ON THE 21st
JANUARY 2022.**