ANTON PILLER ORDERS

Recognition in South Africa

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The position of owners of intellectual property and of trade secrets has been greatly strengthened by the recognition by the Appellate Division of the Supreme Court of South Africa of the availability under South African law of a procedural remedy that has its origins in British law and has become commonly known as an 'Anton Piller order'.

This recognition has occurred in the case of *Universal City Studios Inc and others v Network Video (Pty) Limited.*[1]

The so-called Anton Piller order derives its name from the British case of *Anton Piller KG v Manufacturing Processes Ltd and others.*[2] The order was followed and developed in subsequent cases, and by the late 1970s had become a well-established procedural remedy in the United Kingdom. It has been used in the United Kingdom mainly in cases of infringement of copyright, but its use has also been extended to cases of passing-off and the infringement of trade marks and to cases involving the misuse of confidential information.

The essence of the Anton Piller order as used and granted in the United Kingdom consists in the following elements: A prospective plaintiff has a cause of action against a wrongdoer. He fears that, once court proceedings are instituted against the wrongdoer or the wrongdoer becomes aware of the fact that proceedings are about to be instituted against him, the wrongdoer will destroy or otherwise dispose of infringing articles and evidence in his possession essential to the plaintiff's case. The plaintiff therefore approaches the court without notice to the wrongdoer, and behind closed doors requests an order authorizing him and his solicitor to go to the business premises of the wrongdoer and to take into their custody all infringing articles and material in the nature of evidence relevant to the cause of action, in order to preserve it for the contemplated court proceedings. The remedy is unusual, in that it is granted without notice to the other party at a hearing behind closed doors, and entitles the prospective plaintiff to seize material in order to preserve it as evidence for court proceedings that have not as yet been instituted.

South African legal practitioners followed the example of their British counterparts, and commenced seeking and obtaining Anton Piller orders in cases concerning intellectual property in the late 1970s. This step was taken mainly in the early stages of cases involving the infringement of copyright and trade marks. The first reported judgment was in the case of *Roamer Watch Co SA and another v African Textile Distributors,*[3] a case dealing with the infringement of a trade mark and passing-off. The South African variety of the Anton Piller order closely resembled its British counterpart, and was sought in an urgent ex parte application and heard in camera. The standard search and seizure orders were included, but, in addition, the order usually incorporated a temporary interdict restraining the wrongdoer from continuing the unlawful conduct. This temporary interdict was made subject to a so-called rule nisi, calling upon the wrongdoer to show cause within a stated period why the temporary interdict should not be made final.

As the order developed in practice, embellishments — such as orders requiring the wrongdoer to disclose the source from which he obtained the offending goods — were added. According to the standard practice in the South African version, a representative of the applicant, together with his attorney and the Deputy Sheriff, was entitled to carry out the inspection of the wrongdoer's premises, and to have all material considered to be relevant taken into the custody of the Deputy Sheriff and held by him pending the outcome of the proceedings.

This order became very popular, and a large number were granted in the late 1970s and the early 1980s, particularly in the Transvaal. As time went by applicants became more and

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[1] The judgment, which was handed down on 27 February 1986, has not yet been reported.
[2] [1976] Ch 55 (CA), [1976] 1 All ER 779.
[3] 1980 (2) SA 254 (W).

more extravagant in the scope of the orders requested, and more and more cavalier in the execution of them. In certain instances, it would appear as though the procedure was being abused, and perceived wrongdoers were subjected to unfair treatment and occasioned undue prejudice.

A reaction set in against the orders, and matters came to a head in the case of *Economic Data Processing (Pty) Ltd and others v Pentreath*.[4] In this case Coetzee J criticized the remedy and the way in which it was sought, granted and executed in practice in this country. He reached the conclusion that there was no justification or basis for the procedure in South African common law or in the Supreme Court Rules, and that the Supreme Court did not have the inherent power or jurisdiction to create such a remedy.

This position was subsequently tempered somewhat by the full bench of the Transvaal Provincial Division of the Supreme Court in the case of *Cerebos Food Corporation Ltd v Diverse Foods SA (Pty) Ltd and another*.[5] In this case the court held that an applicant with a proprietary or similar interest in goods in the possession of another party who wished to lay claim to such goods could, if the conclusion were justified in the circumstances that the possessor of the goods was likely to destroy or otherwise dispose of them, approach the court for and be granted an order authorizing the Deputy Sheriff to search for and take possession of them, pending the finalization of litigation. While it had some of the elements of an Anton Piller order, this order was a substantially diluted version. The court expressly said that the applicant was not entitled to an order authorizing the seizure of material that had purely evidential value, since the granting of such an order was beyond the power of the Supreme Court. The court proceeded from the standpoint that it did not have inherent power to grant a procedural remedy in circumstances where the applicant could not show a substantive claim to the material that he sought to be attached.

The *Economic Data* and *Cerebos* cases, together with the case of *Trade Fairs and Promotions (Pty) Ltd v Thompson and another*,[6] a further judgment of Coetzee J, in which some criticism is expressed of the judgment in the *Cerebos* case, effectively put an end to the granting of Anton Piller orders in South Africa, and were commonly interpreted by commentators as in fact marking the demise of the Anton Piller order in South African law.

In the mean time the major American film-producing companies had sought and obtained a wide-ranging Anton Piller order in the Cape Provincial Division of the Supreme Court. The case was the *Universal City Studios case,* which involved the infringement of copyright and dealt with video piracy. The Anton Piller order that was granted authorized the inspection for and seizure of infringing copies of the applicants' films (including those of their films that had not been identified in the papers and in respect of which copyright

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[4] 1984 (2) SA 605 (W).
[5] 1984 (4) SA 149 (T).
[6] 1984 (4) SA 177 (W).

Social conflict — USA and SA

'The successful resolution of *social* conflict proceeds always along the same lines. Take the issue of desegregation, a problem of the first magnitude not only in this country but in the world at large. On the social level it is a matter of bringing resistant provincial interests in line with more inclusive national and world values. On the personal level, it is a problem of enlarging the outlook of individuals who live now according to an exclusionist formula that secures for them self-esteem at the expense of dark-skinned people. At present they are willing to form no inclusive unit with the federal majority in this country nor with the world majority; nor will they form inclusive units with the Negro minority in their midst. They are not able even to resolve the moral dilemma in their own breasts. In all directions the principle of inclusion fails.

'At the moment this particular problem is most acute in the United States and in South Africa. Although I have not the space to diagnose the sitation in detail, let me say briefly that so far as South Africa is concerned the chief blunder of the Nationalist Party government, morally and politically, lies in its failure to consult with the Bantu peoples concerning their own destiny. The master group *tells* the servant group, who outnumber the masters three to one, that they have nothing to contribute to the life of the multiracial society excepting manual labour. Thus the cultural pride, love of homeland, and all other normal human aspirations and abilities of the Bantus are excluded from the existing matrix of values. The policy of apartheid extends to housing, transportation, schools, public assemblies, recreation, and politics, so that there is no legal opportunity to become acquainted. And needless to say the precondition of all normative compatibility is communication.

'Both South Africa and the United States are exciting test cases for social science at the present time, the one following officially a policy of *excluding* interests, the other an official policy of *inclusion*. The world is watching the outcome.'

— G W Allport 'Normative Compatibility in the Light of Social Science' in *New Knowledge in Human Values* A H Maslow (ed) Regnery/Gateway Inc South Band Indiana (1959) 142.