(P) A 303/99

SOUTH AFRICAN SUGAR ASSOCIATION

Vs

NAMIBIA SUGAR DISTRIBUTORS (PTY) LTD

LEVY AJ

2000/05/24

PRACTICE

SUMMARY JUDGMENT - The Anton Piller Order being final, this Court had no jurisdiction to set it aside.

The Rule *nisi* granted when the Anton Piller Order was granted was related to the Anton Piller Order but the Anton Piller Order was not subject thereto.

In a return day of a Rule *nisi* for an interdict, Applicant must prove that it is entitled to a final interdict.

CASE NO.: (P) A 303/99

IN THE HIGH COURT OF NAMIBIA

In the matter between:

SOUTH AFRICAN SUGAR ASSOCIATION APPLICANT/PLAINTIFF

and

NAMIBIA SUGAR DISTRIBUTORS (PTY) Ltd RESPONDENT/DEFENDANT

CORAM: LEVY, A**.J.**

Heard on: 2000.05.11

Delivered on: 2000.05.24

JUDGMENT

LEVY, A.J.: In this matter Applicant is represented by Adv D F Smuts and Respondent is represented by Mr R Heathcote.

This is a return day of a rule nisi issued on 23 November 1999, the return date having been postponed from time to time.

On 23 October, 1997, Applicant (then Plaintiff) issued summons against Respondent (then Defendant) for damages arising from a written contract concluded by the parties on 7 December 1995 at Windhoek. As far as is relevant hereto sugar was sold by Applicant to Respondent at a rebate and as a condition of the Respondent's entitlement to purchase sugar at a rebate, all sugar sold to Respondent, would have to be consumed in Namibia and furthermore it was a condition of the sale that during the operation of the agreement and for 90 days after its termination, Respondent would not sell or otherwise dispose, directly or indirectly, of such sugar, unless repacked into bags or packets of 50 kilograms or less, by a packaging plant operated by Respondent in Namibia, nor to any person whom Respondent knew, or suspected, would directly or indirectly export such sugar back to the Republic of South Africa or Botswana, either as sugar, or as a product containing such sugar.

Applicant alleged that Respondent wrongfully and unlawfully breached these conditions and caused Applicant damages in a sum in excess of N$6 000 000 (six million) and is liable to Plaintiff for such damages.

The essence of Respondent's defence is a denial of such breach.

The matter was set down for hearing on 22nd and 23rd November, 1999, but in the interim period, between summons and the date of hearing, there were certain clashes between the parties, two of

these clashes took the form of applications to Court arising from Respondent's failure to make proper discovery and a third application was an application to strike out Respondent's defence, also on the alleged grounds of Respondents persistent failure to discover properly.

In the two applications to compel Respondent to make certain documents available to Applicant, Hannah J granted such orders and in respect of one of such matters castigated Respondent.

In respect of the matter to strike out Respondent's defence, the Learned Judge who heard that matter, postponed that matter to the date of trial.

At the trial on 22 November 1999 once again Applicant protested that Respondent had failed to make full and proper discovery. After argument, the trial was postponed, Respondent to pay costs. On the 23 November 1999, Applicant, still dissatisfied with Respondent's purported discovery, applied to Court and obtained from the High Court an order, somewhat inelegantly drafted, for an order known as an Anton Piller Order and for a rule nisi in respect of relief not provided for in the Anton Piller Order.

The Anton Piller procedure is as much part of Namibian Law as it is part of English and South African law. As far as this Court is aware, the Courts of Namibia have granted such an order on at least three occasions:

> Ex parte Shadrack Mivilina - January 1990 (unreported) Ex parte Ruben Nowaseb and two Others - 22 June 1991 (unreported) Blackwood Hodge (S.A¥Pty) Ltd v Earthquip Plant Shares and Repairs (Pty) Ltd -February 1994 (unreported)

In South Africa the leading cases are:-

> Shoba v Officer Commanding, Temporary Police Company

Wagendriftdam and Another (1995(4) SA 1 (A))

Universal City Studios Inc v Network Video (Pty) Ltd 1986 (2) SA 734(A).

An Anton Piller order inter alia authorises entry into and inspection of a party's premises for the purpose of finding and preserving evidence, usually in an action to be instituted, and which the applicant has a reasonable suspicion exists but which the Respondent is trying to withhold or conceal. Depending on the facts placed before a court, the court concerned may be reluctant to grant such an order lest the applicant be engaged on a fishing expedition. On the other hand there is substantially less chance of a fishing expedition, where the order is granted, as it was in this instance, after the commencement of proceedings, and after the defendant has persistently failed to make a full and proper discovery. In the present case the search pursuant to the Anton Piller Order produced order books which should have been discovered on the first occasion when the present

Respondent made discovery and failed to discover these books. It does not avail Respondent to argue that the books found did not help Applicant and that in any event Applicant should have a record of those orders as they were orders placed with Applicant. The rule as to discovery, requires discovery of all material documents whether they go to prove either party's case or not. They were therefore discoverable and were not discovered.

Both Counsel contended that this Anton Piller Order was a final order. It was one of the few matters on which they were ad idem. However, each Counsel had different contentions concerning such finality. Mr Smuts said that inasmuch as Mr Heathcote concedes that the Anton Piller Order was final, Mr Heathcote could not attack it, in this forum, and could only do so on appeal. He argued that if it was contended that the order was interlocutory in effect, the Defendant could still appeal with the prior leave of the Court. Mr Heathcote's contention was that because it was final

and because it was granted ex parte. Applicant was obliged to disclose to the Court all and anything which may relate to the matter and which may influence the courts decision and because of failure to do so, the order must be set aside. He referred this Court to certain English decisions in this regard. It is unnecessary to refer to the English law. There are several cases in our own law which govern the principle. One of the leading cases is Schlesinger v Schlesinger (1979(4) SA 342(W) and 348 E and 349 A) where the learned judge concluded that (a) in ex parte applications all material facts must be disclosed which might influence a court in coming to a decision (b) the non-disclosure or suppression of facts need not be wilful or mala fide to incur the penalty of rescission of an order granted

ex parte and (c) the court apprised of the true facts, has a discretion to set aside the ex parte order or to preserve it. Even where there is a false statement by the applicant, there is no rule of law which obliges the court to set aside the rule which has been granted. It is a matter for the discretion of the court whether to do so or not. (cf. Hillman Bros (West Rand) Pty Ltd vs Van den Heuvel 1937 W.L.D. 41 at 43).

Respondent refers particularly to a letter written by its Attorney to Applicant's Attorney, wherein Respondent's Attorney invites Applicant "to inspect" documents. Respondent argues that if this letter had been disclosed to the Court, the Court would not have granted the Anton Piller Order. In my view, this letter should have been disclosed, but failure to do so, does not justify this Court in interfering with the Anton Piller Order nor does this failure affect the Rule Nisi. An "inspection" in our law of procedure, presupposes that the documents to be inspected have all been discovered and that they are available to be inspected in the office of the Attorney. This letter falls far short of that. Even an invitation to an opposing litigant to inspect a "batch", or a "bundle" of documents, or to inspect documents which may be found, is not a substitute for discovery. It was because of the persistent failure to make proper discovery that suspicion was aroused and that the Anton Piller

Order was granted. This argument of Respondent is rejected.

While it was at first conceded by Counsel for Respondent that the Anton Piller Order was final he subsequently argued that it formed part of the Rule Nisi and that it should, with the Rule Nisi, be discharged.

Inasmuch as this Court does not sit as a Court of appeal, it cannot set aside the Anton Piller Order, and if it is part of the Rule Nisi (which I am satisfied it is not) for the reasons already mentioned and for the reasons to be dealt with hereunder, this Court would make that Order final.

At the time that Applicant applied for the Anton Piller Order it applied for a rule nisi which was granted calling upon the Respondent to show cause, if any, on 3 December, 1999, why a final order should not be granted interdicting and restraining Respondent from destroying or hiding or in any was interfering with any of the documentation referred to in paragraph 7 (of the Anton Piller Order) or any other documentation which may be relevant to the action instituted against it by the applicant. Respondent was also called upon to show cause why an order to pay Attorney and Client costs should not be made final.

The return date was postponed from time to time and this Court is now seized with the application that the rule should be made final.

The Rule Nisi was intended to compliment the Anton Piller Order and to assist in the preservation of evidence which Respondent had in its possession for the trial, which was still to take place in the future.

Paragraph 6 of the Anton Piller Order provides:-

"That the Respondent or person's in charge of Respondent's premises for the time being, are directed forthwith to point out and disclose and hand to the Deputy Sheriff who shall seal some in a suitable envelope or container, any documents as described in paragraph 7 hereunder, until the discharge or confirmation of the rule."

This clearly shows that while the two orders are in one document and related they are in fact two distinct orders.

Paragraph 7 described the nature of the documents referred to in paragraph 6 and they comprised relevant order books and documents evidencing proof of payment of orders including bank transfers and accounting records relating to payments for purchases of sugar.

All the aforegoing documentation should have been referred to in Respondent's discovery affidavit.

By reason of Respondent's failure to comply with the Rules of Court, application was made on 15 June 1999, to the High Court and Respondent was ordered to discover, "1.1 All invoices and statements in its possession relating to the sale of sugar or
industrial fondant by the Respondent, Terra Trading (Pty) Ltd, or, Namibia Sugar Packers (Pty) Ltd on credit for the period December, 1995 to 16 May, 1997, 1.2 All of the Respondent's bank statements and deposit slips for the period
December, 1995, to July, 1997, in respect of all the Respondent's bank accounts."
The aforegoing order did not relieve Respondent from discovering any further and additional documentation which Respondent found. Because of its failure so to do, in October 1999 further application was made to Court and Respondent was ordered to comply with Applicants further

Rule 35(3) notice in relation to:-

"1. Invoices, statements and delivery notes received by the Defendant in respect of all sugar and/or industrial fordant imported "into Namibia from Swaziland and countries, other than the Republic of South Africa, by the Defendant and/or Terra Trading (Pty) Ltd and/or Namibia Sugar Packers (Pty) Ltd during the period 1995 to 1997 (inclusive)

2. All documents relating to the importation of sugar and/or industrial fondant.

3. All documents and records which record when, and the manner in which, the Defendant paid for such imported sugar and/or industrial fondant"

When this action came to trial on 22 November 1999, Respondent had not complied with this order and Applicant on 23 November 1999 was granted the Anton Piller Order and the Rule Nisi referred to above.

At this hearing of the return date of the Rule Nisi, Mr Heathcote did not contend that his client had complied with that order which the Court had made in October 1999. In one of his heads of argument which he echoed in Court, Mr Heathcote said, "The main reasons for the delay in complying with the ... .order, is that some thousands of documents have been moved from the administrative principle office of the

Respondent (situated in Windhoek) to Walvis Bay and those documents were in a state of disorder"

His heads of argument go on to say that Respondent "could not state under oath that it was or was not in possession prior to a proper search was finalised."

This is an unacceptable excuse when one considers that summons in this matter was issued on 23 October 1997 and Respondent has had about 3 years to collect and collate the evidence.

Although the ostensible effect of a rule nisi is to order a respondent to show cause why an interim interdict granted, should not be made final, the onus remains on an applicant for a final order, to satisfy the court that it is entitled to such order.

Firstly, therefore, Applicant must satisfy this Court that it has a clear right sometimes referred to as a definite right. In the instant case, if there is evidence of whatever nature, for or against Applicant, Applicant is entitled to know what that evidence is. It has a clear and definite right thereto. Without such knowledge there would not be a "fair trial" as envisaged by Article 12 of the Constitution of Namibia.

Secondly Applicant must satisfy this Court that there is a reasonable fear that this evidence, whatever it may be, may not still be in existence when this matter eventually comes to trial should an interdict not be granted. Respondents blatant disregard for the preservation of evidence since the commencement of the proceedings, justifies a
reasonable fear that such evidence may not be preserved. This fear, furthermore, is confirmed by the repeated efforts made by Applicant in its applications to Court to get Respondent to make various documents available and Respondent's excuses why it is not available.

Thirdly, there must be no alternative remedy available to Applicant to protect its right. Mr Heathcote argues that the Rules of Court and the implementation thereof, constitutes the correct and only remedy. That clearly was the intention of the framers of the Rules but Respondent's complete and utter disregard for its obligations in terms of the Rules, as illustrated by the history of this litigation, justifies sterner methods. A final order has the effect of a criminal sanction for failure to comply therewith, and those responsible for the management of Respondent, particularly the conduct of this litigation, may well find that such criminal sanction, is more persuasive than

civil litigation.

I accordingly make the Rule Nisi issued on 23 November 1999 final and order that Respondent pay the costs on an attorney and client scale.

Respondent brought an application to strike out from the Replying Affidavit to the Anton Piller application certain paragraphs of Rademeyer and the entire affidavit of Gabriel. As I have said, inasmuch as this Court is not a Court of Appeal, it cannot deal therewith. In any event and notwithstanding this fact, those paragraphs and the affidavit of Gabriel, have not influenced this Court on coming to the decision at which this Court has arrived.

Respondent has not complied with the Order of Court granted by Hannah, J on October 1999 and has still not filed a proper discovering affidavit.

The Respondent's Application of 11 May 2000 is therefore refused with costs.

This Court's Order therefore is:-

A.(l) The Rule Nisi issued on 23 November 1999, is made final, (2) Respondent shall pay the costs on an Attorney and Client scale,

B.(l) The Respondent's Application to strike out dated 11 May 2000, is refused, (2) Respondent shall pay the costs of such Application.

For the benefit of the taxing master, this Court spent approximately half an hour, in all, considering the Application to strike out.

ON BEHALF OF PLAINTIFF/APPLICANT	**ADV D SMUTS**
Instructed by:	**Lorentz & Bone**
ON BEHALF OF DEFENDANT/RESPONDENT	**ADV R HEATHCOTE**
Instructed by:	**p F Koep & Partners**