



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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Dhlamini v Schumann, Van den Heever & Slabbert Inc and Others (505/2021) [2023] ZASCA 79 (29 May 2023)

Today, the Supreme Court of Appeal (SCA) upheld an appeal from the Gauteng Division of the High Court, Johannesburg (high court). The order of the high court was replaced with one striking the matter from the role.

During September 2014 the appellant was involved in a motor vehicle accident. The first respondent contacted her in 2015 and offered to represent her in her claim against the Road Accident Fund (RAF). Subsequently, the claim was settled but the appellant received a substantially lower amount. During 2019, the appellant received a tipoff from a member of the press who informed her that a whistle-blower within the first respondent had informed him that she and others were victims of the respondents' scheme of defrauding both their own RAF clients as well as the RAF. The appellant then launched an application for an Anton Piller order against the respondents to secure the records pertaining to her RAF claims, as well as RAF claims by other clients with the intent of using evidence obtained from the files to institute a class action against the respondents for losses suffered as a result of the alleged fraudulent scheme. In the application for the Anton Piller order, the appellant maintained that when paying over the settlement amount of her RAF claim, the respondents misrepresented the settlement amount and paid over to her only 40% of the amount actually received. The respondents, in turn, denied any fraudulent or unethical conduct on their part. They tendered delivery to the appellant's attorneys and the Legal Practice Counsel (LPC), but held that the appellant was not entitled to the files of other clients.

On 24 March 2020 the high court granted an interim Anton Piller order. It incorporated a rule *nisi*, returnable on 6 July 2020, which authorised immediate access to the respondent's premises for the purpose of obtaining material relevant to the order, *inter alia*, client files and accounting records related to claims against the RAF prosecuted to finality. Additionally, a class action was to be instituted by the appellant within 30 days of execution of the interim order. On the return day of the rule *nisi*, the respondents raised a point *in limine* that the Anton Piller order had lapsed as the legal action that was to be instituted against them had never been instituted. The appellant, in turn, submitted that despite the failure to institute the intended action, the interim order remained in operation and effective until the return date and that reference in the order to institution of legal proceedings in the order did not constitute a resolute condition or provide for lapse of the rule *nisi* issued as the respondents claimed. However, the high court struck the matter from the roll after it found that the Anton Piller order was indeed subject to a resolute condition that the class action would have been instituted within 30 days of the execution of the interim order. Because there had been non-compliance with the interim order, it had accordingly lapsed. The applicants in the high court were ordered to pay the costs of the application for the Anton Piller order.

Upon appeal, the respondents contended that the proposed appeal and the order striking the matter from the roll, as well as the resultant costs, were moot. They asserted that the tender to release the files in question to the appellant's attorneys and the LPC rendered the appeal moot. The appellant contended that the high court ought to have confirmed the rule *nisi*, or at least, ought to have extended it, with costs on a punitive scale.

This Court held that the purpose of the Anton Piller application was the identification, securing and preservation of evidence from the relevant files for use in the intended action. Although the files were identified and secured on execution of the interim order, it remained open to the respondents to oppose the application. There could be no dispute that once the respondents tendered delivery of the files, the objective of the appellant's application was satisfied. Any concerns which pertained to the evidence were averted once the files were uplifted from the respondents and placed in the possession of the sheriff and finally dissipated once the tender was made. There was no evidence that the respondents impeded the process of proceeding with the intended action subsequent to the tender. Moreover, despite the application having been struck off the roll by the high court, the appellant remained capable of instituting the intended proceedings against the respondents. Consequently, the order relating to the merits of the appeal would have had no practical effect, and the appellant's contention that the interim order remained valid and in operation perpetually did not take the matter any further.

Furthermore, the SCA considered the question of costs and found that exceptional circumstances existed which justified reconsideration of the costs order made by the high court. On appeal, both parties were in agreement that on the return date, the high court was reminded that the issue of costs was not before it and that an application would be brought as provided in the Anton Piller order. It was unclear why the high court made a cost order, and in the result the order had to be set aside and the matter left to the parties to prosecute at their election.

In the result, the SCA upheld the appeal and replaced the order of the high court with one striking the matter from the role.

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