



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 20440/2014

In the matter between:

NON-DETONATING SOLUTIONS (PTY) LTD

APPELLANT

and

MICHAEL JAMES DURIE

FIRST RESPONDENT

NXCO MINING TECHNOLOGIES (PTY) LTD

SECOND RESPONDENT

Neutral citation: *Non-Detonating Solutions (Pty) Ltd v Durie* (20440/2014) [2015]
ZASCA154 (2 October 2015)

Coram: Mhlantla, Theron, Petse and Mbha JJA and Van der Merwe AJA

Heard: **24 August 2015**

Delivered: **2 October 2015**

Summary: Civil procedure – Anton Piller application – requirements for the grant of an Anton Piller order satisfied –interim order granted by court a quo amended and confirmed.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Van Staden AJ sitting as a court of first instance).

1 The appeal is upheld with costs, such costs to include the costs of two counsel.

2 The order of the court a quo is set aside and substituted with the following order:

‘2.1. The provisional order dated 16 August 2012 is amended by substituting paragraphs 10.1, 10.4 and annexure A thereto with the following –

‘10.1 Applicant and its attorneys may inspect any of the removed documents (save for any disc containing forensic copies of any hard drives, discs or other electronic storage devices containing information found at the premises) relevant to the present application or the further legal proceedings envisaged in the application.

10.4 The Applicant and its attorney shall, 96 hours after the electronic copy of listed items has been made as contemplated in paragraph 10.3, be entitled to inspect such electronic copy relevant to the present application or to the further legal proceedings envisaged in the application.’

SCHEDULE A:

List of items to be searched

‘Regardless of the medium on which it appears or the format in which it appears and in respect of a self stemming cartridge substantially identical to the AutoStem cartridge or any component thereof; or based on the concept or idea of the AutoStem cartridge, any component thereof or any adaptation of any or all of the aforesaid:

1. Drawings, designs, depictions;
2. Models; prototypes or three dimensional reproductions;
3. Any stemming or self-stemming device or parts thereof;
4. Communications (be it through email or otherwise) between the first or second respondents and third parties;

5. Documents;
 6. Invoices, quotations, proof of payment;
 7. Requests for quotation;
 8. Requests for assistance with development;
 9. Requests for manufacture;
 10. Any evidence of telephone calls between the first respondent and Mr Priday of Spex CC; the first respondent and Mr Mark de Villers;
 11. The design and drawings made available by the first or second respondents to Valmar Tool & Die CC and/or Blinex Plastiek CC;
 12. The documents, designs and/ drawings returned by Valmar Tool & Die CC and/or Blinex CC to the first and/or second respondent following the letter from Loubser van der Walt Inc of 3 August 2012;
 13. The drawing made of the AutoStem cartridge by the first respondent.
- 2.2. The provisional order as amended is confirmed.'

JUDGMENT

Mbha JA (Mhlantla, Theron and Petse JJA and Van der Merwe AJA concurring):

Introduction

[1] This appeal with leave of this court, concerns the validity of an Anton Piller order that was granted ex parte against the respondents, at the instance of the appellant. The appeal also focuses on the proper approach to be followed on reconsideration of the interim Anton Piller order on the return day.

[2] Non-Detonating Solutions (Pty) Ltd (the appellant) and Nxco Mining Technologies (Pty) Ltd (the second respondent) are competitors in the field of propellant or gas filled rock breaking cartridges which are mainly used for underground mining. The first respondent, Mr Michael James Durie, is the managing director of the second respondent. These cartridges are non-detonating explosives which are not characterized by a violent shockwave, the latter being the characteristic of detonating explosives. These cartridges consist of a propellant-filled tube closed on both ends with end caps and a protruding initiation wire. The cartridges are inserted into a borehole in a rock. Sand is tamped above the cartridges using a wooden stick to create an effective gas seal. This is commonly referred to as stemming. Once initiated, the cartridges create high volumes of gas which breaks the rock or concrete from the inside. These propellant-based cartridges offer critical advantages over high explosives in rock-breaking as they are much safer to handle, transport and store. They do not provide highly destructive super-sonic detonation waves, and they reduce fly-rock which enables personnel and equipment to remain in closer proximity to the work point.

[3] Mr John Hofmeyer Godsiff, invented and developed a self-stemming cartridge, the AutoStem, and owned the copyright in the design and manufacturing drawings from which it was made. The AutoStem has a propellant filled cartridge with an integral stemming device attached to it. This unique feature has dispensed with the need for sand tamping. As such, this self-stemming cartridge can simply be inserted into the borehole and ignited, thus saving much time and effort that was needed for stemming the borehole. Godsiff subsequently assigned his rights in the copyright to Fowlds 3 Ltd (Fowlds), which in turn assigned them to the appellant.

[4] The appellant thereafter approached certain toolmakers to provide quotations for the manufacture of the AutoStem. Two of such approaches are pertinent to this dispute: First, on 5 March 2012, the appellant's representatives met with Mr Priday, the managing member of Spex CC. They not only furnished him with full details of the AutoStem, but also provided him with copies of drawings and three dimensional electronic models of the cartridge, under strict conditions of confidentiality. From the

information and documentation provided, Priday produced machined models of the cartridge. Secondly, on 7 June 2012, the appellant's representatives met with Mr Pieter Marè of Valmar Tooling and Die Manufacturing and Blimex CC (Valmar) and showed him a sample of the AutoStem, its constituent parts and various drawings relating to the cartridge. As they were aware that Valmar already had a relationship with the second respondent (Valmar manufactured the second respondent's Nonex rock breaking cartridges), Marè was specifically requested to sign a non-disclosure agreement. Although Marè was never given a sample of the AutoStem or its drawings, he was nonetheless left with a very clear concept and understanding of it.

[5] According to the appellant, the AutoStem was an innovation in the area of non-detonating, self-stemming propellant-based cartridges and represented a major advance in the field of rock breaking. The appellant intended to market, sell and distribute the AutoStem. The appellant anticipated that from the successful tests conducted on the AutoStem, it would replace a large proportion of conventional detonating explosives used underground and change the face of mining. It also hoped that it would improve blast-clear support cycle times and contribute unimaginably to improved safety conditions. The appellant anticipated that its commercial potential would be enormous.

Litigation background

[6] The Anton Piller application was triggered after the appellant had received a letter from Valmar's attorneys on 3 August 2012, informing the appellant that the second respondent had on 21 July 2012 presented Valmar with drawings and designs representing a cartridge similar to the AutoStem and had requested Valmar to manufacture that cartridge for it. As a result of the similarity between the AutoStem and the drawings supplied by the second respondent, Valmar declined to manufacture the cartridge and returned all drawings and relevant documentation to the second respondent.

[7] On the same day the appellant's attorneys wrote to the respondents demanding a written undertaking that the respondents would not make use of or supply any cartridges based on the proprietary information of the appellant, and further that they would not infringe the appellant's copyright in the drawings. The respondents were also requested to return all drawings of the cartridge in their possession and provide information of where the drawings were obtained, and of parties to whom the respondents had supplied copies of the drawings.

[8] Durie's initial response was to deny that instructions were given to Valmar to manufacture a cartridge. He contended that the respondents had not received any drawings from any third party and that the drawings provided to Valmar were those of the respondents and, importantly, asserted that they 'were our own ideas or from information that is freely available on the internet'. Durie also stated that the respondent's interaction with Valmar related to a gas blaster cartridge which the respondents had tested on behalf of a UK company, which bore no resemblance to the AutoStem. However, on 6 August 2012, Durie made a complete *volte face*, and admitted that the second respondent's instructions to Valmar related to the manufacture of a self-stemming cartridge which was very similar to the AutoStem. Durie made a reference to the appellant's video on the AutoStem which he had not seen, and also stated that a friend of his had seen the AutoStem at the premises of Spex CC.

[9] A subsequent letter sent by Durie to the appellant on 8 August 2012, is of particular significance. Whereas previously he skirted the issue saying that he knew of the AutoStem cartridge because a friend had told him about it and because of a video which he had never seen, he now admitted to having seen the cartridge. Importantly, he admitted that he made a drawing of the appellant's cartridge that he had seen at the premises of Spex CC from his independent memory. Durie explained further that his reason for making the drawing was not for the purpose of copying the appellant's product but 'to show his staff what it was that we could not use whilst continuing our development work on a self-stemming cartridge.'

[10] Despite his protestations that none of the appellant's rights was going to be infringed, Durie consistently refused to provide copies of drawings and documentation which the second respondent had made available to Valmar. Instead, on 13 August 2012, and in response to appellant's threat to resort to litigation if such documentation and details of instructions to Valmar were not furnished, Durie admitted that a competing cartridge was being contemplated and that they were 'talking to a number of designers'.

[11] On 16 August 2012, the appellant brought an urgent ex parte application in the Western Cape Division of the High Court, Cape Town (Van Staden AJ), in which it sought an Anton Piller order against the respondents for the preservation of evidence and articles relating to the infringement of its rights. At the time of the application, the AutoStem had reached a stage close to production and sale, but had not been introduced into the market. However, the appellant had by then had prototypes and samples made under conditions of strict confidentiality. The AutoStem was also featured briefly in a video which the appellant distributed to key potential customers, again on an understanding of confidentiality. Van Staden AJ, who heard the matter in chambers on the aforesaid date, granted an interim Anton Piller order with the return day on 30 August 2012. The order essentially permitted the sheriff and deputy sheriff, a supervising attorney and two independent Information Technology specialists to enter the first respondent's residence for the purpose of searching and seizing documents and articles specified in the order, and computer equipment or other information storage devices.

[12] The search and seizure proceedings authorized by the Anton Piller order were executed on 17 August 2012 at the first respondent's residence and in his presence. An inventory of 18 attached documents was completed by the sheriff. Forensic copies were made of the data stored on the hard drives of two laptops and an iPhone belonging to the first respondent, and the items were removed in sealed bags and listed as items 19 to 20 on the inventory. The supervising attorney filed his report on 27 August 2012. On the same day, the appellant instituted action against the respondents in the Western

Cape Division of the High Court (the action)¹ for an order restraining the respondents from infringing its copyright in the AutoStem, for delivery of certain items and for payment of damages suffered by the appellants due to the respondents' unlawful actions. This action is still pending.

[13] On the extended return day, Van Staden AJ considered the application. In his judgment he was critical of Durie's conduct and noted that in his opposing affidavit, Durie admitted that he infringed the appellant's copyright by making a drawing of the AutoStem, and also conceded that he should have come clean at the outset. The learned judge also found that Durie's interest in the development of a self-stemming cartridge and his approaches to toolmakers after making a sketch of the AutoStem, belied the denial of the novelty of the AutoStem and of the respondents' intention to infringe the appellant's copyright in the AutoStem. The learned judge however discharged the interim Anton Piller order on the grounds, inter alia, that the order was over-broad and stretched beyond what was reasonable and lawful, and that its terms relating to the forensic enquiry were too wide and should have been limited to documents and items produced after a specified period only and not before a particular date. This appeal is against the findings of the court a quo and in particular the discharge of the interim order.

Issue of mootness of the appeal

[14] Before considering the merits of the appeal, it is necessary to first dispose of a preliminary issue concerning the mootness of the appeal. This point was raised by the respondents in their heads of argument in February 2015. The respondents aver that the appellant lacks *locus standi* as a result of the expiry on 15 August 2013, of the assignment to it by Fowlds of the copyright and all common law rights in the AutoStem. They contend that as all copyright and common law rights previously assigned to the appellant reverted to Fowlds on expiry of the assignment, the appellant is effectively deprived of *locus standi* to continue to seek any relief founded in an alleged infringement of copyright and misuse of confidential information, and therefore also to

¹ Case no 16601/12

appeal the judgment of the court a quo which was handed down after the aforementioned expiry. To counter the issue of mootness raised the appellant brought an application to this court to tender new evidence to prove that the aforesaid assignment had since been extended.

[15] In my view this argument of mootness cannot succeed. At the time the appellant launched the application on 16 August 2012, it did so as the owner of all copyright and relevant common law rights in the AutoStem in terms of a valid assignment procured on 15 August 2012. This has been the case without interruption since that date. The appellant also retains an interest in the litigation instituted by it in the court a quo on 27 August 2012 in which it claims damages for alleged infringement of copyright and ancillary relief. That action is still pending. Clearly, such interest would have remained in respect of the time during which the appellant owned the copyright in the AutoStem.

[16] As the appellant has an enduring interest in this litigation until its finality, the argument raised of mootness must fail. It follows, accordingly, that the application by the appellant to tender new evidence is rendered nugatory. Consequently, it is not necessary to consider the application to tender new evidence.

[17] Returning to the merits, the application for the Anton Piller order has its source in the appellant's claim that the respondents breached its rights to the copyright and confidential information in a self-stemming rock-breaking cartridge (the AutoStem). Accordingly, the crisp issue for determination in this appeal is whether the requirements for Anton Piller relief were satisfied and consequently, whether the court below was correct in discharging the interim order.

The requirements for Anton Piller relief

[18] The use of Anton Piller orders in our law is now well-established.² The requirements that must be satisfied for the granting of such an order were summed up by Corbett JA in *Universal City Studios Inc v Network Video (Pty) Ltd*,³ as follows:

'In a case where the applicant can establish prima facie that he has a cause of action against the respondent which he intends to pursue, that the respondent has in his possession specific documents or things which constitute vital evidence in substantiation of the applicant's cause of action (but in respect of which the applicant can claim no real or personal right), that there is a real and well-founded apprehension that this evidence may be hidden or destroyed or in some manner spirited away by the time the case comes to trial, or at any rate to the stage of discovery, and the applicant asks the court to make an order designed to preserve the evidence in some way . . .'

[19] The purpose of Anton Piller orders is therefore to preserve evidence to be used in a forthcoming dispute. Such evidence must constitute vital evidence in substantiation of the applicant's cause of action.⁴

[20] While it must be acknowledged that Anton Piller orders have the potential to impact negatively on the right to privacy guaranteed in s 14 of the Constitution, they are necessary and proportionate to the legitimate aim pursued.⁵ Whatever harm or inconvenience might be caused to the respondent can be attenuated by the inherent principle of proportionality which requires a balancing of competing interests and values. This resonates with what Chaskalson P stated in *S v Makwanyane and another*, that the limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values and ultimately an assessment based on proportionality.⁶ Thus Corbett CJ recognized that in exercising its discretion whether or not to grant an Anton Piller order, the court must pay regard to

² *Universal City Studios Inc & others v Network Video (Pty) Ltd* 1986 (2) SA 734 (A) at 747E-F.

³ *Universal City Studios Inc* (above) at 755A-C.

⁴ *Shoba v Officer Commanding, Temporary Police Camp, Wagindrift Dam & a nother; Maphanga v Officer Commandi; South African Police Murder and Robbery Unit, Pietermaritzburg & others* 1995 (4) SA 1 (A) at 15F-16C.

⁵ *Dabelstein* above at 65E; *Shoba* above at 15F-16C.

⁶ *S v Makwanyane* 1995 (3) SA 391 (CC) at 104.

inter alia, the cogency of the prima facie case established, the 'potential harm that will be suffered by the respondent if the remedy is granted as compared with, or balanced against the potential harm to the applicant if the remedy is withheld.'⁷ This balancing of interests is particularly crucial on reconsideration of the interim order on the return day when the court adjudicating the application has been furnished with all the relevant evidence including the respondent's opposing affidavit, as happened in this case. Thus courts must constantly be wary that the refusal to grant an Anton Piller order could, in a deserving case, result in a denial of justice.

Prima facie cause of action

[21] The requirement of a prima facie cause of action is simply that an applicant should show no more than that there is evidence which, if accepted, will establish a cause of action.⁸ In *Bradbury Gretorex & Co (Colonial) Ltd v Standard Trading Co (Pty) Ltd*,⁹ Steyn J, said the following:

'[T]he requirement of a prima facie cause of action . . . is satisfied where there is evidence which, if accepted, will show a cause of action. The mere fact that such evidence is contradicted would not disentitle the applicant to the remedy. Even where the probabilities are against him, the requirement would still be satisfied. It is only where it is quite clear that he has no action, or cannot succeed, that an attachment should be refused or discharged on the ground here in question.'

[22] The appellant's cause of action, based on copyright, confidential information and unlawful competition is made out in the founding affidavit. The appellant averred that it owns the copyright in the two-dimensional works, the drawings, and in three-dimensional works being the cartridge itself, or any adaptation thereof and had at the time of the Anton Piller application, a right in respect of the confidential information in the AutoStem. The appellant alleged that the respondents infringed the appellant's copyright in the AutoStem when Durie made a two-dimensional reproduction of the

⁷ *Shoba* above at 16B-C.

⁸ *Cargo Laden and Lately Laden on Board The MV Thalassini AVGI v MV Dimitris* 1989 (3) SA 820 (A) at 831H-J.

⁹ *Bradbury Greforex & Co (Colonial) Ltd v Standard Trading Co (Pty) Ltd* 1953 (3) SA 529 (W) at 533C-E.

three-dimensional model of the cartridge shown to him by Priday at the premises of Spex CC, and by reproducing the drawing prior to sending it to Valmar and to other toolmakers. The appellant placed reliance on Durie's concessions as set out in his opposing affidavit.

[23] The appellant's case of unlawful competition is based on the allegation that the respondents were using information about the AutoStem which they obtained unlawfully as a springboard to produce their own product. In this regard the appellant avers that as the respondents did not have their own design, they used the appellant's copy and then furnished it to mould makers and their own employees. By so doing, so the appellant contends, they were unlawfully appropriating an unfair advantage to themselves and were seeking to interfere unlawfully with the appellant's right to attract custom.

[24] As regards the *causa* for the imposition of a duty of confidentiality, the appellant averred that this arose from the fact that the second respondent was the appellant's trade rival, which, through Durie had obtained the information relating to the AutoStem, in an improper manner. Furthermore, this information enabled the second respondent to compete unlawfully with the appellant using information about its newly developed product to enable it to place its own product on the market.

[25] The respondents dispute all the aforesaid allegations. They submitted, inter alia, that the appellant does not have a cause of action for copyright infringement, that the appellant is not the owner of the copyright in the AutoStem, and that the AutoStem is not a work of craftsmanship nor 'an original work' as defined in the Copyright Act.¹⁰ Furthermore, they submitted that the assignment of the copyright by Godsiff to Fowlds, and ultimately to the appellant constituted impermissible export and import of intellectual property to and from South Africa in terms of the Exchange Control Regulations,¹¹ and is therefore invalid. The appellant's cause of action based on unlawful competition and confidential information is similarly challenged.

¹⁰ Copyright Act 98 of 1978.

¹¹ Regulations made under the Currency and Exchanges Act 9 of 1933 published in GN R1111 of December 1961 as amended up to GN R445, GG 35430 of 8 June 2012.

[26] Be that as it may, all the issues in dispute raised by the parties will properly be adjudicated in the action that is still pending. Although I am constrained not to enter into the merits of the case at this stage and to attempt to adjudicate on credibility, probabilities or the prospects of success, I can nonetheless state unequivocally, that on the facts and the evidence as adduced on the papers, I am satisfied that the court a quo was correct in finding that the appellant had established a prima facie cause of action against the respondents.

Apprehension or fear that evidence may be spirited away

[27] The Anthon Piller order is made where a reasonable fear exists that the respondent might in the normal course not discharge its duty to make full discovery. The establishment of an element of dishonesty in the conduct of a respondent must ordinarily give rise to a fear that vital evidence might be concealed or that the respondent might not make full discovery. Thus in *Dabelstein and others v Hildebrandt and others*,¹² Farlam J said the following:

'I think that it is clear from the summary of the disputed facts set out above that the first respondent has shown himself to be a thoroughly untrustworthy person in his dealings with the applicants. In my view the applicants have established that there is a real and well-founded apprehension that the evidence in his possession relating to the funds paid over to the third respondent may be hidden or destroyed or in some manner spirited away by the time the applicants seek to enforce the judgment they hope to obtain against the respondents'. Durie's conduct justifiably spurred the appellant to approach the court in the manner it did on 16 August 2012. Durie's conduct and responses were, in my view, clearly indicative of duplicity on the respondents' part. This is underscored by, inter alia, the initial denial that instructions were given to Valmar to manufacture the cartridge, the initial response that the subject of the interaction with Valmar related to a gas blaster cartridge bearing no resemblance to the AutoStem, the obfuscation about how the respondents came to

¹² *Dabelstein & others v Hildebrandt & others* 1996 (3) SA 42 (C) at 69F-G.

know of the AutoStem, the false claim that the drawings provided to Valmar were those of the respondents, the failure to admit at the outset to making the drawing and after ultimately admitting to having made the drawing, his patently false reason advanced for the making of the drawing. Based on the respondents' glaring duplicitous conduct, I am unable to fault the learned judge's criticism of Durie's conduct.

[28] The court a quo therefore correctly held that there was a real and well-founded apprehension that crucial or vital evidence, particularly relating to the drawing made by Durie and the respondents' instructions and correspondence with the toolmakers, may be hidden, destroyed or spirited away by the time the case came to trial. Significantly, to date such evidence has not been produced by the respondents.

Requirement of specificity

[29] The issue whether or not the Anton Piller order was overly broad and stretched beyond what was reasonable and lawful and therefore not competent, became the main focus of the appeal. Before I consider the reasoning and finding of the court a quo on this issue, it is necessary to first briefly elucidate on the applicable principles governing this aspect.

[30] It is trite that an applicant must establish that the respondent possesses specific documents or things that constitute vital evidence in substantiation of the applicant's cause of action. Strict compliance with this requirement is pivotal to the legality of the use of the procedure. The reason for this requirement is obvious. The procedure has, potentially, draconian and extremely invasive consequences for respondents or defendants who are subject to it. The implementation in particular of the search leg of the order, can amount to the most manifest intrusion of the respondents' right to privacy guaranteed in s 14 of the Constitution as mentioned in para 20 above. Thus as was stated in *Shoba*,¹³ and as part of the balancing act to be performed by courts based on the principle of proportionality only vital evidence in the sense of evidence of importance to the applicant's case, must be the subject of the search. The specified documents

¹³ *Shoba* supra at 15I-16C.

must constitute vital evidence and a blanket search for unspecified documents or evidence which may exist is not allowed. Binns-Ward J in *Mathias International Ltd and Another v Baillache and Others*,¹⁴ aptly emphasized the position thus:

‘The impermissibility of the use of the procedure to enable searches to be undertaken to look for evidence to identify or found a case, as distinct from the preservation of evidence, for use in an already identified claim is fundamental. The strict limitation of the use of the procedure to the preservation of the evidence, as distinct from, say, a search for evidence (the so-called fishing expedition), is a feature that is essential to the legality of the procedure within the requirements of s 36(1) of the Constitution. An application for authority to search for evidence in the nature of a fishing expedition should flounder at the first hurdle for want of compliance with the specificity requirement mentioned as the second of the three essential requirements for the grant of the Anton Piller order. . . . The specificity requirement is a material factor in accepting that the limitation of basic rights inherent in the Anton Piller procedure is reasonable and justifiable as required by s 36(1) of the Constitution.’

[31] In terms of the order, two categories of evidence were subject to search and seizure at Durie’s residence. The first category consisted of physical documents like drawings, designs, communication documents and so forth listed in Schedule ‘A’ to the order (the listed items), and the second category referred to evidence stored on electronic, photographic and recording equipment and making a forensic copy of information found on such equipment.

[32] The order prescribed the manner in which the seized items were to be dealt with, and provided in relevant parts that:

‘10.1. Applicant and Applicant’s attorneys may inspect any of the removed documents (save for any disc containing forensic copies of any hard drives, discs or other electronic storage devices containing information found at the premises) in order to assess whether it provides evidence relevant to the present application or the further legal proceedings envisaged in the application.

. . .

10.3. Applicant will be entitled to cause an inspection to be held of copies of the discs so provided, discs onto which information (including images) had been copied and other electronic

¹⁴ *Mathias International Ltd & another v Baillache & others* 2015 (2) SA 357 (WCC) para 20.

storage devices containing information found on the premises. The inspection will be done by the said IT Specialists under the supervision of the supervising attorney and sheriff. The first respondent shall be entitled to have present thereat an independent attorney and IT specialist. The inspection, which shall be done in respect of each forensic disc of which a copy has been produced as aforesaid or other electronic storage device onto which electronic images had been copied during the search of the premises, shall be done for the purposes of searching the discs or other electronic storage devices and copying onto another disc or other electronic storage device any of the listed items. A copy of this disc or other electronic storage shall be provided to the each of respondents and to the sheriff.

10.4. The Applicant and its attorney shall, 96 hours after the electronic copy of listed items had been made as contemplated in paragraph 10.3, be entitled to inspect such electronic copy order to assess whether it provides evidence relevant to the present application or to the further legal proceedings envisaged in the application.'

[33] Schedule A to the order, which sets out the listed items reads as follows:

'Regardless of the medium on which it appears or the format in which it appears and in respect of a self stemming cartridge identical or similar to the AutoStem cartridge or any component thereof; or based on the concept or idea of the AutoStem cartridge, any component thereof or any adaptation of any or all of the aforesaid:

1. Drawings, designs, depictions;
2. Models; prototypes or three dimensional reproductions;
3. Any stemming or self-stemming device or parts thereof;
4. Communications (be it through email or otherwise) between the first and/or second respondents and third parties;
5. Documents;
6. Photographs;
7. Videos;
8. Invoices, quotations, proof of payment;
9. Requests for quotation;
10. Requests for assistance with development;
11. Requests for manufacture;
12. Any evidence of telephone calls between the first respondent and Mr Priday of Spex CC; the first respondent and Mr Mark de Villers;

13. The design, drawings and documents made available by the first and/or second respondents to Valmar Tool & Die CC and/or Blinex Plastiek CC;
14. The documents, designs and/or drawings returned by Valmar Tool & Die CC and/or Blinex Plastiek CC to the first and/or second respondent following the letter from Loubser van der Walt Inc of 3 August 2012;
15. The drawing made of the AutoStem cartridge by the first respondent;
16. IT search terms include, but are limited to:
 - 16.1 Self-stemming; Auto-Stem; Auto Stem; AutoStem; Self stem cartridge; new cartridge; stem; stemming; cartridge system; plug; cone, conical; reverse cone; sleeve; gas cartridge;
 - 16.2 Josy Cohen, Jonathan Cohen, Reenen Muller, Ted Priday, Pieter Mare, Stephan, Blinex, Valmar, Mark de Villers;
 - 16.3 Gas blaster; gasblaster
 - 16.4 GBT; Green Break Technology; Denel;
 - 16.5 Mould manufacture; draftsman; design, cartridge design;
 - 16.6 Patent; copyright; drawings; proto-types;
 - 16.7 Compete; new product;
 - 16.8 Non detonating systems; propellant.'

[34] In discharging the interim order, the learned judge reasoned as follows:

- (a) The appellant failed to identify properly the vital documents in respect of the search and the terms of the order relating to the forensic enquiry (ie electronic enquiry) are too wide and should have been limited to documents and items produced after 4 July 2012, the day the copyright infringement occurred. Nothing before that date could be relevant to the relief sought by the appellant.
- (b) The search should have been limited to specified documents and items specifically identified in the founding papers namely drawings and/or reproductions of the AutoStem and correspondence and annexures to the correspondence between the respondents and the toolmakers.
- (c) It is unlikely that any further evidence would be discovered on the return day and a further search would be nothing but a fishing expedition.
- (d) As a consequence of the order, the first respondent's home was raided by several strangers and the search was directed at Durie's personal and private data and correspondence.

(e) The appellant was not entitled to discovery of the documentation under the respondent's possession and control pertaining to self-stemming devices not infringing the rights of the applicant.

[35] To my mind, in finding that the search should have been limited to documents specified in the founding affidavit, the court adopted a too restrictive approach to the terms of the order. The court's approach in this regard was informed by the view that only individual documents identified for being exactly what they are, are properly to be the subject matter of Anton Piller orders.

[36] In my view, this approach is against clearly established law which permits search and seizure orders for specific classes of documents. The test for the identification of documents in Anton Piller orders has been described as follows:

'There must be clear evidence that the respondent has such incriminating documents, information, articles and the like in his possession, or that, at least, there are good grounds for believing that this is the case.

. . .

The applicant should satisfy the court that he has, as best the subject-matter in dispute permits him to do, identified the subject matter in respect of which he seeks attachment and/or removal, and that the terms of the order which he seeks have been delimited appropriately and are not so general and wide as to afford him access to documents, information and articles to which his evidence has not shown that he is entitled.'¹⁵

[37] The court a quo agreed with the respondent's submission that the order was not limited to specific (and specified) documents or things which constitute vital evidence in substantiation of the appellant's case, and that it ought to have been formulated as narrowly as practically as possible. I do not agree. The opening paragraph to Schedule A to the order contains, significantly, a proviso limiting the needed documents and items to those that are identical or similar to the AutoStem cartridge, and to any component or

¹⁵ See *Roamer Watch Co SA & another v African Textile Distributors also t/a M K Patel Wholesale Merchants and Direct Importers* 1980 (2) SA 254 (W) at 273C-274F.

any adaption thereof. Clearly, anything outside of this easily defined class is irrelevant and not covered by the order.

[38] In my view, save for a few words which can easily be excised without affecting the substance of the paragraph, there is nothing irregular about the aforesaid paragraph. It, in effect, accords with orders made by our courts in similar applications. I will refer to just a few to demonstrate the point:

(a) In *Aercrete South Africa (Pty) Ltd and Another v Skema Engineering Co (Pty) Ltd and Others*,¹⁶ the court made an order which sought the attachment of ‘all copies of any plans, specifications, manuals, brochures and production sheets in their possession for the manufacture and production of the said helical mixing device or aerated cement mixer’.

(b) In *Dabelstein*,¹⁷ the documents to be attached in the Anton Piller search had been identified, inter alia, as follows:

‘any financial statements, ledgers, accounting records, books of account, invoices, receipts, bank deposit books, bank statements, ledgers and other documentation relating to the business of third respondent, or to monies or investments administered or held or controlled by first, second or third respondent for or on behalf of applicants and all other investors/creditors listed on annexure “JH 1” to annexure 1 to this Honourable Court’s order dated 23 August 1995 in case no. 3952/95, or to monies due to Applicants;

all bank statements, cheques, deposit books, proof of deposits, drafts, swift codes, instructions to transfer funds relating to the amount of US\$698 455 240,00 transferred from or to be transferred from the accounts held by or in the name of the Respondents and/or Interinvest Limited and/or Mr Nezar Yamani at the Saudi Hollandi Bank, Main Branch, Jeddah, Saudi-Arabia or any other funds held at such bank by or in their names’.

¹⁶ [1984] (4) SA 814 (D) at 828D.

¹⁷ *Dabelstein v Hilderbrandt* above at 27-28.

[39] The requirement that the applicant must show, *prima facie*, that the respondent has in his possession specific (and specified) documents that constitute vital evidence in substantiation of the applicant's cause of action, does not mean that only individual documents identified by, for example, date or origin, are properly liable to be attached. Obviously, if it were so none of the orders referred to above ought to have been granted. Not even in the *locus classicus*, *Anton Piller KG v Manufacturing Processes Ltd and others*,¹⁸ where a search and seizure order in respect of all documents, files or things relating to the design, manufacture, sale or supply of copies of the plaintiff's equipment or parts thereof was granted, would, on the court a quo's approach have been unacceptable. In *Dabelstein*, the applicants did not know precisely what documents they required relating to the funds that were paid over to the third respondent. However, they knew that documents so identifying the affairs of the trust in question existed but could not identify them with greater specificity than, for example, stating that they required bank statements, cheques and deposits books relating to the particular deposit.

[40] By parity of reasoning, the documents and items required *in casu* are clearly defined and limited to the subject matter in question, namely a self-stemming rock breaking cartridge called the AutoStem. The documents are specified and specific and there cannot be any question of doubt regarding what is required to be searched.

[41] Equally, I find the high court's reasoning that the forensic enquiry should have been limited to documents and other items produced after 4 July 2012, and that it should be confined to correspondence and annexures thereto between the respondents and other toolmakers, to be erroneous. These presumably, related to instructions by Durie to toolmakers to manufacture a competing self-stemming cartridge for the second respondent. In so doing so, the court a quo overlooked the evidence that Durie, on his own version, saw the AutoStem and thus knew all about it before his visit to Spex on 4 July 2012. Because Durie on his own version approached various other designers and

¹⁸ *Anton Piller KG v Manufacturing Processes Ltd and others* [1976] 1 ALL ER 779 (CA).

toolmakers other than Valmar, there was accordingly no cause to restrict the documents only to those relating to the interaction between the respondents and Valmar.

[42] The court a quo's finding that there would be no point in conducting a further forensic search as it was unlikely that any further evidence would be discovered, is not supported by the evidence. I say so because, as on the return day, no forensic search of the forensic copies of the data stored on Durie's laptops and iPhone, had taken place. Furthermore, the known documents, namely the drawings and instructions that Durie gave to Valmar and those returned to the respondents, were not found during the search of the physical documents. They do not appear on the inventory. It follows that the answer that Durie gave to the supervising attorney, namely that he did not have anything other than items 1-18 on the inventory, cannot be truthful as the instructions to Valmar, which Durie had persistently refused to provide, are not listed on the inventory.

[43] The court a quo's criticism that the search operation was directed at Durie's personal and private data and correspondence and at documentation of the respondents pertaining to self-stemming devices, is not supported by the evidence. No such targeting appears from the terms of the order. Furthermore, the respondents themselves have made no complaint in this respect. The report of the supervising attorney contains an explicit account of what happened during the search. Durie's attorney Brian Bacon of Brian Bacon Incorporated, although not physically present at the time, was however involved and kept abreast telephonically by Durie, the sheriff and the supervising attorney throughout the search. Significantly, no complaint was lodged by Bacon regarding the search. To the contrary, after the search, Durie personally wrote a note which he gave to the supervising attorney, in which he recorded that he was '... satisfied that the Anton Piller proceedings have been conducted in accordance with the terms of the order'. It follows that this criticism has no legal or factual basis.

[44] In the circumstances, the court a quo erred when it discharged the interim order on the return day. The high court ought to have confirmed the interim order subject to a

few amendments which do not alter the substance of the order but further ensures that the forensic search is limited to relevant items. Counsel for the appellant rightly conceded that the formulation of the interim order does not in some respects comply with the requirements for Anthon Piller orders. In particular, the phrase in clauses 10.1 and 10.4 of the order, which reads ‘. . . in order to assess whether it provides evidence. . .’ should be deleted. Schedule A to the order should also be amended to limit the search and seizure to relevant documents by deleting the words ‘. . . identical or similar to. . .’ in the second sentence and substituting these with ‘. . . substantially identical to. . .’. No case was made out for the search and seizure of photographs and videos and the appellant is thus not entitled to an order in this regard. Paragraph 16 of Schedule A is irrelevant and should be deleted.

[45] The relevant parts of the amended Anton Piller order, should read as follows;

‘10.1 Applicant and its attorneys may inspect any of the removed documents (save for any disc containing forensic copies of any hard drives, discs or other electronic storage devices containing information found at the premises) relevant to the present application or the further legal proceedings envisaged in the application.

10.4 The Applicant and its attorney shall, 96 hours after the electronic copy of listed items has been made as contemplated in paragraph 10.3, be entitled to inspect such electronic copy relevant to the present application or to the further legal proceedings envisaged in the application.’

SCHEDULE A:

List of items to be searched

‘Regardless of the medium on which it appears or the format in which it appears and in respect of a self stemming cartridge substantially identical to the AutoStem cartridge or any component thereof; or based on the concept or idea of the AutoStem cartridge, any component thereof or any adaptation of any or all of the aforesaid:

1. Drawings, designs, depictions;
2. Models; prototypes or three dimensional reproductions;
3. Any stemming or self-stemming device or parts thereof;

4. Communications (be it through email or otherwise) between the first or second respondents and third parties;
5. Documents;
6. Invoices, quotations, proof of payment;
7. Requests for quotation;
8. Requests for assistance with development;
9. Requests for manufacture;
10. Any evidence of telephone calls between the first respondent and Mr Priday of Spex CC; the first respondent and Mr Mark de Villers;
11. The design and drawings made available by the first or second respondents to Valmar Tool & Die CC and/or Blinex Plastiek CC;
12. The documents, designs and/ drawings returned by Valmar Tool & Die CC and/or Blinex CC to the first and/or second respondent following the letter from Loubser van der Walt Inc of 3 August 2012;
13. The drawing made of the AutoStem cartridge by the first respondent.

Costs

[46] As the appellant was substantially successful with the appeal it is proper that the respondents should be liable for costs. I am satisfied that the complexity of the matter also justified the employment of two counsel.

[47] I accordingly make the following order:

1 The appeal is upheld with costs, such costs to include the costs of two counsel.

2 The order of the court a quo is set aside and substituted with the following order:

‘2.1.The provisional order dated 16 August 2012 is amended by substituting paragraphs 10.1, 10.4 and Schedule A thereto with the following –

‘10.1 Applicant and its attorneys may inspect any of the removed documents (save for any disc containing forensic copies of any hard drives, discs or other electronic storage devices containing information found at the premises) relevant to the present application or the further legal proceedings envisaged in the application.

10.4 The Applicant and its attorney shall, 96 hours after the electronic copy of listed items has been made as contemplated in paragraph 10.3, be entitled to inspect such

electronic copy relevant to the present application or to the further legal proceedings envisaged in the application.'

SCHEDULE A:

List of items to be searched

'Regardless of the medium on which it appears or the format in which it appears and in respect of a self stemming cartridge substantially identical to the AutoStem cartridge or any component thereof; or based on the concept or idea of the AutoStem cartridge, any component thereof or any adaptation of any or all of the aforesaid:

1. Drawings, designs, depictions;
2. Models; prototypes or three dimensional reproductions;
3. Any stemming or self-stemming device or parts thereof;
4. Communications (be it through email or otherwise) between the first or second respondents and third parties;
5. Documents;
6. Invoices, quotations, proof of payment;
7. Requests for quotation;
8. Requests for assistance with development;
9. Requests for manufacture;
10. Any evidence of telephone calls between the first respondent and Mr Priday of Spex CC; the first respondent and Mr Mark de Villers;
11. The design and drawings made available by the first or second respondents to Valmar Tool & Die CC and/or Blinex Plastiek CC;
12. The documents, designs and/ drawings returned by Valmar Tool & Die CC and/or Blinex CC to the first and/or second respondent following the letter from Loubser van der Walt Inc of 3 August 2012;
13. The drawing made of the AutoStem cartridge by the first respondent.

2.2. The provisional order as amended is confirmed.'

BH Mbha
Judge of Appeal

APPEARANCES:

For Appellant: A R Sholto-Douglas SC (with him R M Robison)
Instructed by: Von Seidels Intellectual Property Attorneys, Cape Town
Webbers, Bloemfontein

For Respondents: A J Bester SC (with him M Seale)
Instructed by: Cliffe Dekker Hofmeyr Inc, Cape Town
Symington De Kok, Bloemfontein