

NATIONAL SPICEWORKS t/a F. NEILL AND SONS
versus
MANE SOURCE AFRICA (PVT) LTD
and
WAYNE OWEN

HIGH COURT OF ZIMBABWE
TAKUVA J
HARARE; 7 November 2024 and 28 May 2025

Application for an Anton Piller Order – R 60(1) H/C Rules

A. Y Sinyoro, for the applicant
T. G Kachenga, for the respondents

TAKUVA J:

The applicant successfully obtained an “ANTON PILLER” order on 20 October 2023 per CHIKOWERO J. The provisional order was carried out on 30 October 2024 resulting in documents and products being seized from the respondents’ premises and were retained by the Sheriff. This is the return day of applicant’s Anton Piller order. The respondents filed their Notice of Opposition supported by a single affidavit by the second respondent. On 24 November 2023, the applicant filed its answering papers.

Factual Background

The factual basis is largely uncontested by the respondents – see para 10 of the Opposing Affidavit which raises “no issues” in relation to 19 paragraphs of the Founding Affidavit. The applicant has been in the business of selling spices and other products to butchers in Zimbabwe for 68 years. Specifically, applicant has been importing and marketing the spices and other products of EXIM INTERNATIONAL (PROPRIETARY) Ltd (EXIM) into Zimbabwe for decades. The applicant entered into a Distribution and Commission Rebate Agreement in June 2017 – See Annexure A to the Founding Affidavit. In July 2017 the parties to the Main Agreement executed ADDENDUM NO. 1 to the Main Agreement – Annexure B1 of the Founding Affidavit. The second respondent signed on behalf of the applicant.

Addendum No. 1 provided that effective from 1 June 2020 through African Spice Traders (AST), the applicant became the exclusive distributor of EXIM's products in Zimbabwe. The minimum purchasing obligations increased to ZAR 1.2 million per month. The respondents expressly admit that the applicant is a sole distributor of Exim products in Zimbabwe – see para 27 of the Opposing Affidavit. The second respondent left the applicant's employ in November 2020 and became a Director of the first respondent.

In June 2023, the applicant discovered that the respondents had opened an outlet in Graniteside and that their products looked very similar to the Exim products distributed by the applicant. The labels on first respondent's products assert that they were packed for a company called 'SAKOA TRADING' (SAKOA). A laboratory analysis revealed that the respondents were, in fact keeping EXIM's products. Respondents do not deny this.

Also not denied are the following facts:

1. First respondent's product list provides the applicant's "POPULAR DESCRIPTION"
2. First respondents' products:
 - 2.1. Are packaged in the same weight as the applicant's;
 - 2.2. Have a label in identical size and font as the applicant's;
 - 2.3. Have the same ingredients description and other information as the applicant's;
 - 2.4. Have the same Halaal certification number as the applicant's – a number issued to Exim and not to Sakoa or the first respondent.

The Issue

This court has already found that the applicant's founding papers disclose a *prima facie* case to the effect that:

- (a) Applicant has a cause of action against the respondents which it intends to pursue;
- (b) Respondents have in their possession specific and specified documents or things which constitute vital evidence in substantiation of the applicant's cause of action, but in respect of which the applicant cannot claim a real or personal right; and
- (c) 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 cases come to trial or to the stage of discovery.

An Antony Pillar Order, which is a part of English Law following the cases of ANTON PILLER v MANUFACTURING PROCESSES LTD (1976) 1 All ER 779 (CA) was expressly accepted as part of the law of Zimbabwe in the case of COOPER v LESLIE (2000) (1) ZLR 124. Since *Cooper v Leslie*, such orders have been granted in numerous cases, such as STANBIC NOMIEES PVT LTD v REMO INVESTMENT BROKERS (2013) (2) ZLR 413.

As *Cooper v Leslie* established, and Stanbic Nominees confirmed:

“An Anton Piller order is a modern legal remedy devised to cater for modern problems in the prosecution of civil actions. The procedure allows a party to make an ex parte application without notice to the other side, for the attachment and removal of documents or other evidence. It has its genesis in English Law. Originally its use was confined to cases involving intellectual property, but has since been extended to cover other civil cases. It has after some initial reluctance and some contradictory judgments, been accepted by the court of South Africa and should be accepted as part of the law of Zimbabwe.”

An applicant for an Anton Piller order must *prima facie* establish:

1. That he has a cause of action against the respondent which he intends to pursue;
2. That the respondent has in his possession specific and specified documents or things which constitute vital evidence in substantiation of the applicant’s cause of action, but in respect of which the applicant cannot claim a real or personal right; and
3. 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 to the stage of discovery.

This is the return day of the Anton Piller order. Since this court has already found that the application discloses a *prima facie* case, the *onus* is on the respondents to show cause why the evidence obtained pursuant to the Anton Piller order should not be made available to the applicant. The crisp issue becomes have the defendants been able to show such good cause?

The applicant contends that it has several causes of action against the respondents. They are as follows;

(1) PASSING OFF

In F. W WOOLWORTH & Co (Zimbabwe) (Pvt) Ltd v THE W. STORE & ANOR 1998 (2) ZLR 402, the Supreme Court set out the relevant principles of a passing off claim as follows;

“The essence of an action for passing – off is to protect a business against a misrepresentation of a particular kind, namely that the business, goods or services of the representor is that of the plaintiff

or is associated therewith_ __. In other words, it protects against deception as to a trade source or to a business connection_ __. Misrepresentation of this kind can be committed only in relation to a business that has good will or a drawing power.”

(2) INTERFERENCE WITH THE APPLICANT’S CONTRACTUAL RIGHTS

According to the applicant, the defendants have and continue to interfere with contractual rights in that despite knowledge that the applicant is exclusive distributor of Exim products in Zimbabwe they have also imported into Zimbabwe the EXIM products. In TROJAN NICKEL MINE LTD v RESERVE BANK OF ZIMBABWE 13 HH – 169 MATHONSI J(as he then was) cited GROSS KOPF JA in DNATES INVESTMENTRS HOLDINGS (PTY) LTD v BRENNER & ORS NNO 1989 (1) SA 390 (AD) at 395D stating:-

“It is clear that an interference with contractual rights can in certain circumstances constitute a delict.”

(3) AQUILIAN LIABILITY FOR ECONOMIC LOSS

The scope of the *Lex Aquilia* is such as to provide a basis or relief in cases of pure economic loss where the cause of loss can be regarded as wrongful. See ZIMBABWE BANKING CORPORATION LTD v PYRAMID MOTOR CORPORATION (PVT) LTD 1985 (1) ZLR 358 (SC).

The requirements of the *Lex Aquilia* were set out in NYAGUSE v SKINNERS AUTOBODY SPECIALISTS HH 32 – 2007 as follows;

“It is now well established in our law that the plaintiff in an Aquilian action for patrimonial loss must establish that;

- (i) the defendant committed a wrongful act;
- (ii) the plaintiff suffered patrimonial loss, actual capable of assessment;
- (iii) the defendant’s act caused the loss suffered by the plaintiff and that the harm occasioned was not too remote from the act complained of;
- (iv) responsibility for the plaintiff’s loss is imputable to the fault of the defendant, either in the form of dolus (intention) or culpa (negligence).”

It was contended by the applicant that these requirements are clearly established in casu.

The Respondents’ Case

Respondents’ argument is that their conduct does not vest a cause of action in the victim of their conduct. This contention is based on the following grounds;

1. The respondents cannot breach applicant’s contract with EXIM.

2. Passing Off

Respondents argued that the applicant's cause of action regarding passing off is "nonsensical" as a third party cannot approach the court alleging of (sic) the product is quiet (sic). The existence of applicant's goodwill is admitted by the respondents in their opposing affidavits paras 10 and 16. However respondents went on to argue that only a manufacturer of a product can established goodwill in relation to the product.

3. Applicant is fighting to retain its monopoly

Respondents contended that applicant is preventing competition. It was alleged that applicant is seeking to establish a monopoly in Zimbabwe.

4. Applicant's intellectual property rights

It is respondents' argument that applicant has "no intellectual property of its own" in the EXIM's products." Applicant cannot competently seek to enforce any trademarks or other intellectual properties.

5. Respondents relationship with Sakoa

Respondents insisted that a proper arm's length relationship exists between them and Sakoa. They submitted that they are lawfully importing Sakoa products as opposed to EXIM products.

6. The relevance of the fact that the second respondent used to be employed by the applicant

While not denying the fact that the second respondent used to be employed by the applicant as General Manager, the respondents seek to down play his role by asserting that this fact is completely irrelevant. Respondents admit that the second respondent is the director of the first respondent. Further it is admitted that the second respondent in his (ex while) capacity as General Manager of the applicant signed the very agreements that form the basis of applicant's claim.

7. Prejudice

Respondents assert neither actual nor potential prejudice if the Provisional Order is confirmed.

Analysis

In my view, the defendants have not discharged the onus cast upon them. They have not shown good cause why the evidence obtained pursuant to the Anton Piller Order should not be available to the applicant. As regards passing off applicant's business has considerable goodwill

established over the past decades. This is shown by the fact that the respondents' own product list describes their own products by reference to the names of the applicant's products as "Popular Description".

Further, respondents' products are likely to deceive the customers in that;

- a) the respondents' packaging is similar or at times identical to applicant's packaging;
- b) Applicant's packaging is the same weight as respondents'
- c) Respondents' labelling uses the same font and size and provides identical information about the product (e.g. ingredients)
- d) Respondents exhibit the same Halaal stamp as applicant
- e) Respondents' descriptions are similar to those used by the applicant, and respondents' batch numbering and product expiry dates seem to be identical to the applicant's products.

In my view, the claimant's claim for passing off against the respondents has bright prospects of success. It is most likely that an interdict and an award of damages for loss of trade caused by the respondents will be granted.

The argument that the applicant is bent on establishing a monopoly is not well taken in that no evidence or explanation of what market respondents claim applicant has a monopoly in? EXIM is not the only manufacturer of spices and related products. It follows therefore that an exclusive distributorship of EXIM products does not result in a monopoly. I find it not true that applicant is seeking to prevent competition in that the respondents are at liberty to sell any products they like apart from EXIM products which the applicant has an exclusive distributorship right over. The essence of an exclusive distributorship agreement is that the product is marketed exclusively by one distributor. The applicant's rights emanate from this agreement and not from the fact that it is the "manufacturer" of the products.

As regards the submission that applicant has "no intellectual property of its own", I take the view that this is based on a misunderstanding of applicant's cause of action. The applicant in my view does not seek to enforce any trademarks or other intellectual properties. Its cause of action is not based on an intellectual property right. Instead, the applicant seeks to enforce its common law rights to the effect that (i) Applicant's contracts should not be interfered with (ii) Applicant's

customers should not be deceived as to the respondents' trade and business and (iii) Applicant should not be harmed through wrongful conduct.

Respondents' assertion that they are lawfully importing Sakoa products as opposed to EXIM products is directly contradicted by the Supervising Attorney's Report that states the following;

"There were about 3 pallets in the first respondent's warehouse on which were wrapped and packed EXIM International (Pvt) Ltd products. These were clearly labeled and could not be mistaken at all."

This averment has not been dealt with by the respondents at all. Applicant's case will be that respondents' sham relationship with SAKOA was set up in order to give the impression that respondents import a different product to the one imported by the applicant. Respondents on the other side have failed to adduce a single piece of evidence corroborating their bold assertion. Evidence such as:

- a) a confirmatory affidavit from SAKOA,
- b) a contract with SAKOA,
- c) any correspondence with SAKOA
- d) any invoices from SAKOA
- e) any importation documents or delivery notes of SAKOA products etc. could have been produced.

At the end of it all, the question remains, why would there be three (3) pallets of EXIM products in the respondents' products if they were importing only SAKOA products as they allege? In my view, it is vital that the whole range of products seized be tested and compared with the EXIM products. Both physical and documentary evidence are crucial for applicant to establish its causes of action against the respondents.

Respondents' allegation that the relationship with second respondent is completely irrelevant is clutching at the straws in light of the following common cause facts;

- (i) the second respondent in his capacity as General Manager of the applicant, signed the very agreements that form the basis of applicant's claim.
- (ii) a company is a legal fiction which can only know and act through its directors and employees.

(iii) a director's knowledge is attributed to the company it is a director of. The second respondent is the director of the first respondent and first respondent is also aware of the contents of the agreements that second respondent had signed when employed by the applicant. I take the view that this forms the basis of respondents' liability for the interference with applicant's contractual rights.

This court has already found that the applicant's fears that respondents would likely hide or destroy the evidence were well – founded. Respondents have not claimed any prejudice, if the evidence under the Sheriff's control is inspected.

Disposition

1. The applicant successfully obtained an ANTON PILLER ORDER which was carried out and evidence i.e. documentation as well as certain products were obtained and are retained by the Sheriff.
2. The onus is on the respondents to show cause why the applicant should not be entitled to have access to the evidence obtained.
3. Respondents failed to establish any reason why the applicant should not be able to access the evidence. Not a single document to corroborate their case was produced.
4. Further, respondents failed to allege any basis on which the evidence could be withheld from the applicant.

In the result, the following FINAL ORDER IS GRANTED;

1. The applicant shall have access to the evidence obtained pursuant to the Interim Relief.
2. Costs of suit to be in the cause.

TAKUVA J:

Ventures & Samukange, applicant's legal practitioners

James Majatame Attorney at Law, respondents' legal practitioners