

**By Janie Slabber B.A (Stel) LL.B (Stel)**

**October 2016'**

### **IS THE PROOF OF YOUR CLAIM IN ANOTHER'S POSSESSION?**

Picture yourself this; you discover an employee of yours has stolen a valuable product from your workshop but he denies being in possession thereof. You want to take legal action against your employee but are afraid the moment the legal papers are served on him, he will destroy or hide the product or any evidence thereof. What legal remedy do you have available to you in such an instance?

In such an instance, you may launch a civil application for an Anton Piller order. An Anton Pillar order derives from the 1975 United Kingdom case *Anton Pillar KG v Manufacturing Processes Limited* in which the order was established and which was subsequently accepted into our law.

In terms of such an order, the court will grant a civil search warrant in terms of which the employer is allowed to inspect the employee's residence and or premises, usually with the aid of the Sheriff, and to remove any goods to which the employer might have a claim. The effectiveness of an Anton Pillar order lies in the fact that one need not give notice to the other party before executing the search and the element of surprise therefore goes a long way in recovering stolen property and or evidence needed to prove your claim.

It must be noted however that an Anton Pillar order is an extreme and extraordinary injunction which will only be granted in exceptional circumstances. It is usually obtained by way of an urgent *ex parte* notice of motion before a Superior Court Judge and the legal requirements as set out in the Canadian decision, *Celanese Canada Inc v Murray Demolition Corp*, must be adhered to. These requirements are as follows:

1. evidence which would prove the case unless rebutted, in other words a *prima facie* case, must be placed before the court;
2. evidence that the employer's misconduct would cause the employer serious damage must also be placed before the court;
3. convincing evidence showing that the stolen goods are in the employee's possession must further be placed before the court;

4. evidence of a real possibility or likelihood that the employer will destroy or hide the goods must also be produced.

For such an Anton Pillar order to be granted one must have concrete evidence of the aforementioned and one cannot merely rely on hearsay or rumours to substantiate your claim. For example, information, documents or objects required must be clearly specified and set out in detail. The court in *Mathias International Ltd and Another v Baillache and Others* held that “*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 is required by s 36(1) of the Constitution.*” The granting of such an order could have dire consequences for the employee and to prevent this, the requirements for obtaining such an order are strictly applied.

Moreover, the court will be reluctant to grant this type of order should there be an alternative process available which would afford the employer the same level of discreetness and surprise for the recovery of the goods or evidence. It is further imperative that the employer fully discloses any facts which may impact the decision of the court in granting the Anton Pillar order. If the ambit of the relief sought would amount to a mere “fishing expedition” for evidence, the court is unlikely to grant the order.

It is therefore imperative to take heed that these orders are not easily obtained and the courts will always be inclined when making a decision herein to weigh up the possibility of harm to the employer, with the possibility of harm to the employee’s right to privacy and his right to deal with his property as he sees fit.

Even though this type of order is challenging to obtain, it is capable of application in a wide variety of fields and can be used for the protection of rights not only in cases of theft but also in cases concerning disputes vis-à-vis intellectual property, trade and trade secrets, competition, misuse of company information and restraint of trade.

It must be noted that an Anton Pillar order must be sought in the High Courts of South Africa, and therefore cost implications should always be considered by a person wishing to pursue this type of legal remedy to recover goods or evidence to prove their claim.