REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2022/6747

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

[redacted]

AD STEIN **05 JUNE 2024**

In the matter between:

PATHWAYS HOLDINGS (PTY) LIMITED	First Excipient
WINSTON STOLTZ	Second Excipient
and	
MICHAEL JULIO PINTO RIBEIRO	First Respondent
FIBRE STREAM (PTY) LIMITED	Second Respondent
in re:	
MICHAEL JULIO PINTO RIBEIRO	First Plaintiff
FIBRE STREAM (PTY) LIMITED	Second Plaintiff
and	
PATHWAYS HOLDINGS (PTY) LIMITED	First Defendant
WINSTON STOLTZ	Second Defendant

This judgment was handed down electronically by circulation to the parties' and/or the parties' representatives by email and by being uploaded onto CaseLines. The date and time for hand-down is deemed to be on 05 June 2024.

JUDGMENT

STEIN AJ:

INTRODUCTION AND BACKGROUND

[1] This exception raises fundamental issues concerning the nature, scope and enforcement of the undertakings to compensate for damages given in the course of obtaining an Anton Piller Order, where that Order is subsequently found to have been wrongly granted and is set aside.

[2] The first defendant sought and was granted an Anton Piller Order on an urgent and *ex parte* basis ("**the Order**"). The Order permitted the attachment and seizure of the documents listed at the defined premises of the listed respondents, and was executed between 16 and 19 July 2021.[1] As is standard in Orders of this kind granted *ex parte*, the Order made provision for interested parties to approach the court for the setting aside of the Order and a simultaneous rule *nisi* which was issued, appointing a date, which could be anticipated by notice, on which the respondents were invited to demonstrate why an order permitting the identified items to be retained by the Sheriff and inspected by the first defendant, should not be made final.[2] In addition, the Order contained the usual undertakings by the applicant for the Order including that it would not be executed outside of specified hours and that the applicant would limit the disclosure of any information gained except for the purposes of obtaining legal advice.[3] In obtaining the Order, the applicant (the first defendant and excipient in these proceedings) also gave the following undertakings (the "**Damages undertaking**"):

> "4. The Applicant will compensate the Respondents for any damages caused to the Respondents by anyone exceeding the terms of this Order.
>
> 5. The Applicant will compensate the Respondents for any damage caused to the Respondents by reason of the execution of this Order should this Order subsequently be set aside."[4]

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1 Particulars of Claim: paras 6-8 and annexure POC1, paras 1 and 2.

2 Order: paras 9.3 and 19. As will appear further below, this Rule is not strictly speaking within the scope of the Anton Piller itself, as inspection goes beyong mere preservation of evidence.

3 Order: paras 2 and 3.

4 Order: paras 4 and 5.

[3] This Damages Undertaking is in accordance with the model Order provided for in the Practice Directions for Anton Piller orders in this Division.[5]

[4] On 21 January 2022, the Order was set aside and the rule *nisi* discharged ("**Dismissal Judgment**"). In setting aside the Order, the court notably held, amongst other things, that the applicant (first defendant in these proceedings) had misconceived the purpose of an Anton Piller Order, disingenuously seeking the Order for the purpose of scouting whether it had a cause of action, and that in seeking the Order it had failed to disclose to the court all relevant facts as it was obliged to do.[6]

[5] It appears from the Dismissal Judgment that the question of the undertaking to pay damages was not raised before that court by any of the parties, and the court did not consider it. This appears to have been common cause in the proceedings before me.

[6] In the wake of the dismissal of the Anton Piller Order the plaintiffs, who were both respondents in the Anton Piller application, sued the defendants on the basis of the undertaking for damages arising out of the execution of the Anton Piller Order.

[7] The defendants (excipients) have raised three exceptions to the plaintiffs' claim. Each rests on the premise that it is bad in law. In summary, the first exception is that the court, in setting aside the Anton Piller Order, did not order damages or grant leave for the plaintiffs to sue on the undertaking, that court is now *functus officio* and there is no independent ground in law for the claim, accordingly there is no cause of action. Secondly, the defendants take exception to the damages claimed and thirdly, the defendants except to an alternative claim against the second defendant which rests upon a piercing of the corporate veil.

[8] I proceed to consider each of these exceptions in turn. For simplicity, I refer to the parties by their designations in the action proceedings; namely the defendants (excipients in this exception application) and the plaintiffs (respondents in this exception).[7]

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5 Practice Manual of the Gauteng Local Division of the High court of South Africa, Chapter 10.1, p 89 paras 4-5; Annexure B, p 200-204, paras 3-4.

6 Dismissal Judgment: case no. 32429/2021, 21 January 2022 (per Mbongwe J), Particulars of Claim, Annexure POC2, paras 17 and 22.

7 All of the parties, save for the second defendant, were parties to the Anton Piller application. The first defendant was the applicant in the Anton Piller proceedings and the plaintiffs were respondents in those proceedings.

[9] The fundamental principles governing the approach to exceptions are settled and I do not repeat them here. In essence, the plaintiff must plead all facts necessary to sustain a cause of action and the facts pleaded are assumed to be correct. To sustain an exception based on the failure to disclose a cause of action, the Particulars must fail to disclose a cause of action on any reasonable construction.[8]

FIRST EXCEPTION: THE CLAIM BASED ON THE DAMAGES UNDERTAKING

[10] The first exception raised by the defendants engages an enquiry into the very essence of the nature of undertakings to compensate for damages in the course of seeking and obtaining an the Anton Piller Order. In order to do it justice, I reproduce the first exception in full:

> "2.First Exception
>
> 2.1 The plaintiffs sue on a claimed right to enforcement of the undertaking and to payment in respect of the alleged damages.
>
> 2.2 The relevant legal principles are as follows:
>
> 2.2.1 The undertaking was given to the court.
>
> 2.2.2 The court had an unlimited discretion whether to enforce the undertaking and to award damages.
>
> 2.2.3 The plaintiffs have neither a right to the enforcement of the undertaking nor any right to damages unless the discretion to enforce the undertaking and to award damages was exercised in their favour.
>
> 2.2.4 The undertaking does not found a cause of action prior to the exercising of the discretion to enforce the undertaking and to award damages in favour of the plaintiffs.
>
> 2.3 The plaintiffs do not plead any basis for and do not claim the exercising of the discretion to enforce the undertaking, and to award damages, in their favour.

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8 *Pretorius and Another v Transport Pension Fund and Another* 2019 (2) SA 37 (CC);
McKenzie v Farmers' Cooperative Meat Industries Ltd 1922 AD 16;
Dharumpal Transport (Pty) Ltd v Dahrumpal 1956 (1) SA 700 (A);
Barclay's National Bank Ltd v Thompson 1989 (1) SA 547 (A);
Michael v Caroline's Frozen Yoghurt Parlour (Pty) Ltd 1999 (1) SA 624 (W).

2.4 The plaintiffs plead that the court order containing the undertaking was set aside (para. 10 and annexure "POC2", para. 24(2)).

2.5 The plaintiffs do not plead that the court, in setting aside the court order, exercised the discretion to enforce the undertaking and to award damages in their favour, and the court did not do so ("POC2", para. 24).

2.6 The judgment setting aside the court order (annexure "POC2") is final and the court is functus officio, alternatively has no jurisdiction to exercise the discretion to enforce the undertaking and to award damages in favour of the plaintiffs.

2.7 Accordingly, the plaintiffs do not have a right to the enforcement of the undertaking and to the damages claimed, do not allege a foundation for the granting of those rights and can no longer obtain those rights from the court.

2.8 In the premises, the claim against the first defendant and the alternative claim against the second defendant lack the necessary averments to sustain a cause of action."

[11] In essence, and at the risk of over-simplification, the reasoning that underlies this exception is the following: the right (if any) giving rise to the cause of action to claim damages arises from the court Order which is granted in the exercise of the court's discretion. There is no independent right giving rise to the cause of action. In setting aside the Anton Piller Order, the court did not exercise its discretion to award damages to the plaintiff or to give the plaintiff leave to sue for damages pursuant to the undertaking. Having set aside the Order without awarding damages or granting the plaintiff leave to sue for damages, the court is now *functus officio*. Accordingly, there is no basis in law for the plaintiffs' claim.

The Anton Piller Order

[12] Since its first reported emergence in our law in *Roamer Watch*[9] our courts have on many occasions considered the origin, status and scope of the Anton Piller Order.[10] It is not necessary to traverse this again here, However, it is important to emphasise some of the key principles that emerge from these cases as this is relevant for a proper consideration of

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9 *Roamer Watch Co SA and Another v African Textile Distributors Also t/a MK Patel Wholesale Merchants and Direct Importers* 1980 (2) SA 254 (W) ("**Roamer Watch**").

10 See, for example, *Cerebros Food Corporation Ltd v Diverse Food SA (Pty) Ltd and Another I1984 (4) SA 149 (T)* "**Cerebros Food**";
Easyfind International (SA) (Pty) Ltd v Instaplan Holdings 1983 (3) SA 917 (W);
Eiser and Another v Duna Health Care (Pty) Ltd and Others 1998 (3) SA 139 (W).

the nature and effect of the damages undertaking given in the course of seeking and obtaining such an Order, which is central to the present Exception.

[13] In the memorable passages from *Cerebros Food* the court, recognising its uncertain origin in the law of equity in England, carefully traversed the origins of the Anton Piller Order both in English law and in our law describing it as a "*wild and prickly bramblebush which its ancestors would hardly recognise*" and considered whether "*to prune the vigorous growth of this alien shrub or to eradicate it as a noxious weed*."[11] After carefully considering its doctrinal basis, the court decided on the former course of action. It held that an the Anton Piller type Order could not have been founded in the *actio ad exhibendum* but is better sourced as an incident of the court's inherent jurisdiction to protect its process in order to ensure that a remedy is available where a right is established in due course.[12]

[14] Almost without exception, courts that have grappled with the Anton Piller have emphasised the substantial risks of prejudice to parties that are the objects of the Order. The court in *Cerebros Food* noted that the procedure is "*fraught with danger*", "*can lead to great abuse*" and should therefore "*only be entertained in special circumstances*".[13] This echoed the statements of the court in *Roamer Watch* as well as the seminal English cases from which it originated. In the eponymous *Anton Piller* case the court emphasised that in view of the fact that the Order is almost invariably taken on an *ex parte* basis, often on urgent grounds and constitutes a profound incursion into the private property of the object parties, the Order could only be justified "*in the most exceptional circumstances*".[14] In view of this, courts have developed principles and mechanisms to restrict the scope of the incursion into the private domain of the object party, narrowly to tailor the Order so that it is confined to the preservation of evidence rather than expanding into a kind of private search warrant and ameliorating the harm that may result; particularly if the Order is subsequently set aside.[15] Crucially, our courts have emphasised that as a form of interdictory relief, which is an incident of the court's inherent jurisdiction, the granting of an Anton Piller Order as well as the terms and conditions on which it is granted, is within the wide discretion of the particular court exercised in the circumstances of each case.[16]

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11 *Cerebros Food* at 161H and 163C.

12 *Cerebros Food* at 170A and 171B. See also *Roamer Watch* at 272(C) which also understood the Order as an exercise of the court's inherent jurisdiction.

13 *Cerebros Food* at 157C.

14 *Anton Piller KG v Manufacturing Processors and Others* (1976) 1 All ER 779 at 783.

15 *Roamer Watch* at 272C.

16 *Roamer Watch* at 272C.

The nature and effect of the damages undertaking

[15] It is against this background that the damages undertaking given by the party seeking the Anton Piller Order, almost invariably *ex parte*, must be understood. It is a condition imposed by the court in the exercise of its discretion to grant the Anton Piller as one of the mechanisms to ameliorate the potential harm of the Order should it be shown in due course, and in the presence of the affected parties, that it was wrongly granted whether through abuse or for some other reason. The courts in England have bluntly described the undertaking given in seeking the Order as "the price for its grant".[17]

[16] Our courts' practice of imposing an undertaking to compensate for damages as a condition for the exercise of its discretion to grant an interim interdict is neither new nor confined to Anton Piller Orders. As far back as 1937 the court in *Hillman Bros*. recorded the practice in imposing such a condition pending an action for monies loaned and advanced.[18] It has since been applied in a variety of circumstances by our courts when considering whether to exercise their discretion to grant interim relief.[19]

[17] In *Hix Networking* the failure to tender such an undertaking was considered a significant factor. The Appeal Division (as it was) remarked:

> "There is only one further feature of the case on which I would comment. This is the fact that Hix refused, in express terms in the reply, to tender an undertaking to cover the respondents' losses should it transpire that the interim relief it sought should not have been granted. In cases of this nature this is a very common rider added to the court's order when an interdict is granted. It is designed to protect the person against whom the interdict is granted from suffering loss as a result of the interdict being granted. <u>This is because the interdict is a judicial act</u>. <u>The party interdicted would not (in the absence of malice) be able to recover damages</u>."[20] (Emphasis added)

[18] While our courts have regularly imposed the undertaking in the exercise of their discretion – indeed, as indicated above it now forms part of the model

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17 *Cheltenham & Gloucester Building Society v Ricketts* [1993] 1 WLR 1545 (1993) at 1554 ("**Cheltenham & Gloucester**").

18 *Hillman Bros. (Westrand) (Pty) Ltd v Van den Heuvel* 1937 WLD 41 at 46.

19 *Mdauti v Kgami and Others* 1948 (3) SA 27 (W);
Chopra v Sparks Cinemas (Pty) Ltd and Another 1973 (4) SA 372 (D);
Shoprite Checkers Ltd v Blue Route Property Managers ((Pty) Limited and Others [1994] 1 All SA 101 (C);
Hix Networking Technologies CC v System Publishers (Pty) Ltd and Another [1996] 4 All SA 675 (A) ("**Hix Networking**").

20 *Hix Networking* at 685.

Order in the Practice Directions of this Division for the granting of an Anton Piller – there has been little discussion in our law on the nature, effect and enforcement of the undertaking. In this regard both counsel in the present proceedings helpfully referred me to English case law and, in particular, the case of *Cheltenham & Gloucester* where the English court of Appeal undertook a detailed consideration of the matter.[21]

[19] In having regard to these cases, I am mindful of the statement of the court in *Cerebros Food*, expressed in the context of a consideration of the origin of the Anton Piller Order in our law, that while English law obviously has no binding authority in South Africa this does not mean that we should not seek guidance from the approaches of foreign courts where that is in conformity with our legal principles.[22] This applies with particular force in the present circumstances where the Anton Piller Order itself was derived from English law and where our courts have frequently looked for guidance as to its application.

[20] As to the fundamental nature of the undertaking, the court in *Cheltenham & Gloucester* held:

> *"*When granting an injunction of an interlocutory nature it is the usual practice of the court to require the plaintiff to give an undertaking as to damages. The use of the word 'damages' is perhaps inappropriate because it might suggest that the grant of the injunction involved a breach of some legal or equitable rights of the defendant. The undertaking is given to the court and is intended to provide a method of compensating the party enjoined if it subsequently appears that the injunction was wrongly granted.*"*[23] (Emphasis added)

[21] This understanding of the underlying nature of the undertaking accords with the statement of the Appellate Division (as it them was) in *Hix Networking*, quoted above. The undertaking is given to the court, is imposed as part of the court's discretionary power to grant interdictory relief and does not give rise to a separate substantive cause of action.

[22] I was urged, in this regard, in the course of argument by counsel for the plaintiff to have regard to the different formulation of the wording of the undertaking. In England, the standard form of the undertaking is "*to abide by any order which this court may make as to damages in case this court shall be of the opinion that the defendants or either of them or any innocent third party shall have suffered any by reason of this order* ...".[24]

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21 *Cheltenham & Gloucester Building Society v Ricketts* [1993] 1 WLR 1545 (1993).
22 *Cerebros Food* at 163D.
23 *Cheltenham & Gloucester* at 1551.
24 *Cheltenham & Gloucester* at 1549.

[23] By contrast, the standard wording of the undertaking in the Practice Direction and as applied by the court in the present proceedings is simply to "*compensate the respondents for any damage caused ... by reason of the execution of this Order should the Order subsequently be set aside*." It was argued that this wording suggested a direct undertaking to the other party, akin to a *stipulatio alteri* or some other contractual arrangement, giving rise to an independent substantive right.

[24] I cannot agree. Apart from the practical difficulty that the other party is seldom present when the undertaking is given and the Order taken *ex parte*, as in the present case, both our courts and the English courts have emphasised that the imposition of the undertaking is an incident of the court's discretionary power in deciding whether to grant the interdictory relief. The necessary corollary of this is that the decision as to whether to enforce the undertaking in the event that the interdict is subsequently set aside is also within the court's discretion.

[25] A further important principle recognised by the English courts, flows from this appreciation that the undertaking is a condition imposed by the court in the exercise of its discretion as to whether to grant an interim order, and does not give rise to an independent cause of action. That principle is that the question as to whether the original Anton Piller Order should be set aside is distinct from the question as to whether the undertaking to pay damages should be enforced.[25] The party affected by the Anton Piller Order, which is subsequently set aside, can ask the court to enforce the undertaking but it has no right to its enforcement nor any right to damages until the court exercises its discretion in favour of enforcing the undertaking and damages are subsequently awarded.[26]

[26] It follows that a court approached to consider enforcement of the undertaking must undertake two different inquiries: first, whether the undertaking should be enforced and secondly, whether damages were caused by the taking of the order. As the court in *Financiera Avenida v Shiblaq*[27] held:

> "Two questions arise whenever there is an application by a defendant to enforce a cross-undertaking in damages. The first question is whether the undertaking ought to be enforced at all. This depends on the circumstances in which the injunction was obtained, the success or otherwise of the plaintiff

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25 *Cheltenham & Gloucester* at 1551.

26 *Cheltenham & Gloucester* at 1555.

27 *Financiera Avenida v Shiblaq (*The Times 14 January 1991 Court of Appeal, cited with approval in *Cheltenham & Gloucester* at 1555.

> at the trial, the subsequent conduct of the defendant and all the other circumstances of the case. It is essentially a question of discretion. The discretion is usually exercised by the trial judge since he is bound to know more of the facts of the case than anyone else. If the first question is answered in favour of the defendant, the second question is whether the defendant has suffered any damage by reason of the granting of the injunction. Here ordinary principles of the law of contract apply both as to causation and as to quantum ... In a simple case the trial judge may be able to deal with causation and quantum himself as soon as he has exercised his discretion. But in a more complicated case it may be necessary or him to order an enquiry as to damages either before himself, or before some other judge or before the Master or the Registrar. Very occasionally he may find it necessary to leave over the exercise of the discretion."[28] (Emphasis added)

[27] Where an interlocutory order such an Anton Piller Order has been found to have been wrongly obtained and is set aside, whether through failure to disclose material facts in the *ex parte* application or through an error or misapplication of the law, the court in *Cheltenham & Gloucester* held that, save for special circumstances, the court will invariably exercise its discretion in favour of enforcing the undertaking.[29] Examples of what may constitute special circumstances for the court not to enforce the undertaking may include undue delay in seeking its enforcement, some inequitable conduct or bad faith on the part of the party seeking enforcement of the undertaking. However, this is by no means a closed list.[30]

[28] I cannot see that a court in our jurisdiction seized with the question of whether to exercise its discretion to enforce the undertaking would adopt a different approach. As appears from the discussion above, our courts have repeatedly recognised the extraordinary nature of the Anton Piller Order and its potential to cause harm. The undertaking to compensate for damages given by the applicant for an Anton Piller Order is a serious and onerous one, presumed to be offered in good faith to the court, and where the Order is subsequently set aside in my view the party that offered the undertaking to pay damages should not readily or easily be let off the hook. It should be held to its undertaking, save in special circumstances.

[29] The court in *Cheltenham & Gloucester* helpfully distilled certain fundamental principles pertaining to the enforcement of such an undertaking to pay damages.[31] These may provide helpful guidance to our own courts when

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28 *Financiera Avenida v Shiblaq* citing with *F. Hoffmann – La Roche and Co AG v Secretary of State for Trade and Industry* [1975] AC 295 at 361.

29 *Cheltenham & Gloucester* (per Gibson LJ) at 1556.

30 *Cheltenham & Gloucester* at 1557.

31 *Cheltenham & Gloucester* at 1551

exercising the discretion to enforce a similar undertaking and I therefore reproduce the relevant portion of the judgment below:

"(1) Save in special cases an undertaking as to damages is the price which the person asking for an interlocutory injunction has to pay for its grant. The court cannot compel an applicant to give an undertaking but it can refuse to grant an injunction unless he does. (2) The undertaking, though described as an undertaking as to damages, does not found any cause of action. It does, however, enable the party enjoined to apply to the court for compensation if it is subsequently established that the interlocutory injunction should not have been granted. (3) The undertaking is not given to the enjoined but to the court. (4) In a case where it is determined that the injunction should not have been granted the undertaking is likely to be enforced, though the court retains a discretion not to do so. (5) The time at which the court should determine whether or not the interlocutory injunction should have been granted will vary from case to case. It is important to underline the fact that the question whether the undertaking should be enforced is a separate question from the question whether the injunction should be discharged or continued. (6) In many cases injunctions will remain in being until the trial and in such cases the propriety of its original grant and the question of the enforcement of the undertaking will not be considered before the conclusion of the trial. Even then, as Lloyd L.J. pointed out in *Financiera Avenida v. Shiblaq*, The Times, 14 January 1991; court of Appeal (Civil Division) Transcript No. 973 of 1990 the court may occasionally wish to postpone the question of enforcement to a later date. (7) Where an interlocutory injunction is discharged before the trial the court at the time of discharge is faced with a number of possibilities. (a) The court can determine forthwith that the undertaking as to damages should be enforced and can proceed at once to make an assessment of the damages. It seems probable that it will only be in rare cases that the court can take this course because the relevant evidence of damages is unlikely to be available….. (b) The court may determine that the undertaking should be enforced but then direct an inquiry as to damages in which issues of causation and quantum will have to be considered. It is likely that the order will include directions as to pleadings and discovery in the inquiry. In the light of the decision of the court of Appeal in *Norwest Holst Civil Engineering Ltd. v. Polysius Ltd*., The Times, 23 July 1987; Court of Appeal (Civil Division) Transcript No. 644 of 1987 the court should not order an inquiry as to damages and at the same time leave open for the tribunal at the inquiry to determine whether or not the undertaking should be enforced. A decision that the undertaking should be enforced is a precondition for the making of an order of an inquiry as to damages. (c) The court can adjourn the application for the enforcement of the undertaking to the trial or further order. (d) The court can determine forthwith that the undertaking is not to be enforced. (8) It seems that damages are awarded on a similar basis to that on which damages are awarded for breach of contract." (Emphasis added)

[30] While the above principles were expressed in the course of the court's consideration of a Mareva order, I consider them to be equally apposite to the damages undertaking in the course of obtaining an Anton Piller Order which has, together with the Mareva-type Order, been described as one of the civil law's "two nuclear weapons".[32]

[31] Against this conspectus of the law, I consider the defendants' first exception.

Analysis of the first exception

[32] The force of the argument underlying the defendants' first exception, described and reproduced above, is as follows: (1) The damages undertaking tendered by the defendants in the course of obtaining the Anton Piller Order is an undertaking to the court and its enforcement is subject to the discretion of the court. It does not give rise to an independent right of action in substantive law. (2) The court in the present matter in deciding to set aside the Anton Piller Order did not exercise its discretion to allow the plaintiffs to enforce the damages undertaking. (3) In setting aside the Anton Piller order the court has now exercised its discretion and is *functus officio*. Therefore, (4) there is no basis in law for the plaintiffs' damages claim.

[33] As is clear from my consideration of the case law above, and the Dismissal Judgment, I am in agreement with the first two premises of the argument. A court cannot and does not, by insisting on the damages undertaking as a condition for the granting of the order thereby create a new substantive remedy in our law. The damages undertaking given in the context of an application for interim relief - and an Anton Piller Order is but one example - is a condition imposed by the court in the exercise of its discretion and its enforcement is similarly subject to the court's discretion.

[34] The third premise of the argument is, however, in my view wrong in law and also wrong in the circumstances of the present case. The conclusion on which the exception rests accordingly does not follow. As considered above, the question of whether the Order should be set aside is a distinct and separate question from whether the damages undertaking should be enforced. Moreover, if and when approached to consider the separate question of whether to exercise its discretion to permit the damages undertaking to be enforced, the court has a variety of options including to decide the question of damages there and then, to defer the determination of damages for determination in different proceedings after a full ventilation of the facts or to dismiss the claim. As has been observed, it is unusual for a court to determine damages or dismiss the claim there and then. The

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32 *Bank Mellat v Nikpour* 1985 F.S.R 87 at 92.

court will usually not be in possession of all of the facts relevant to the exercise of its discretion. Where there is a pending trial on the merits, in which the Anton Piller was an interlocutory proceeding (as was the case in *Cheltenham & Gloucester,* though not apparently in these proceedings), it has been held that the court seized with the merits in that trial will usually be best placed to determine the question of the enforcement of the undertaking and the damages, if any. However that does not, and cannot, preclude another court from doing so if the issue has not been decided.

[35] In the present case it appears from the Dismissal Judgment that the court did not consider, and was not asked to consider, either the issue of whether the damages undertaking should be enforced, or to determine the merits or quantum of such damages. It appears that neither party brought it to the attention of the court. The issue simply did not arise. It cannot be said, in these circumstances, that the court has exercised its discretion and has determined the second crucial issue of whether the damages undertaking should be enforced and, if so, the merits of that claim.

[36] There can also be no sound basis for a contention that the court considering the question of whether, in its discretion, to allow enforcement of the damages undertaking and to determine the damages if any, must be the same court as the court that ordered the setting aside of the Anton Piller Order. As appears from the above cases, often that is not the case. Moreover, as in the present case, invariably the court granting the Anton Piller Order is not the same court as that which considers and determines whether it should be set aside. The “discretion of the court” is a discretion in the generic sense of the collective discretion which may be exercised on different occasions by different judges seized with the distinct issues.

[37] In the present case the plaintiffs (the respondents in the Anton Piller proceedings), have elected to approach the court by means of action proceedings for enforcement of the damages undertaking. The law is agnostic as to whether the enforcement of the undertaking is sought by way of application or action proceedings; although obviously the latter would be preferable where material disputes of fact are anticipated.

[38] The defendants (who proffered the undertaking in the course of obtaining their Anton Piller Order which was subsequently dismissed) are free to plead as they see fit including that the court should not exercise its discretion to permit enforcement. In that case the defendants will be required to plead the grounds on which the court should decline to exercise its discretion to enforce the damages undertaking which the defendants gave to the court prior to taking the order. In this regard, however, it should be borne in mind that a court will invariably exercise it discretion in favour of allowing the

undertaking to be enforced save in exceptional circumstances. These circumstances would therefore need to be pleaded. In addition, or in the alternative, the defendants may choose to plead over on the merits of the damages claim. That court will then be in the best position to decide, on a conspectus of all of the relevant facts and circumstances, whether the court's discretion should be exercised to enforce the claim and, if so, to determine the merits and quantum of the claim. Of course, if there are circumstances (of which I am unaware) which were to suggest that the court that determined the Dismissal Judgment did consider and determine the issue of whether the undertaking could be enforced, and that this issue has therefore been determined on a full conspectus of the facts, then that too may be pleaded in the same way as any special plea of issue estoppel or res judicata.

[39] In my view, however, it would not do justice to the importance of the damages undertaking and the earnestness in which it is offered and imposed by the court as a condition for the granting of this invasive Order, if a party could avoid the consequences of the undertaking merely because neither party raised it, the court did not do so mero motu and it was therefore not considered by the court when setting aside the Order. Even though, as the English courts have suggested, it may be desirable that the Court setting aside the Anton Piller should consider at the same time whether to allow enforcement of the damages undertaking and direct the procedure for determining the merits of the damages claim, where a court omits to do so, whether by oversight, or deliberately because it is not in possession of all relevant facts to determine the question at the time or for some other reason, this cannot, in my view, preclude the court from considering the issue and exercising its discretion in respect of the issue, at a later stage. That would deprive the court of an essential portion of the discretion which arose in in granting the Order.

[40] In my estimation, though I express no final view on this aspect in particular, both parties bear a responsibility to raise the issue of enforcement of the damages undertaking before the court that is seized with considering the issue of whether to set aside the Anton Piller order. The court should not be deprived of the opportunity to consider this separate and fundamental issue and to exercise its discretion in this regard, merely because it was not raised, deliberately or through oversight, and that it also did not occur to the court to consider it mero motu. This flows from the fundamental nature of the Anton Pillar order which I traversed above, its invasive features, danger of harm and the fact that the undertaking to compensate for damages is initially tendered in good faith to the court by the party seeking the order, usually in the absence of opposing parties. The court is then in proper a position to decide whether to exercise it discretion there and then to allow

enforcement of the undertaking, or to defer that decision for future determination and to give such further directions as it sees fit.

[41] One further argument needs to be considered. It was submitted on behalf of the defendants that a further indication that the undertaking should not be enforced is that it is recorded separately under the heading "Undertakings" and does not form part of the operative portions of the order which follows under the heading "It is thus ordered".[33]

[42] The submission cannot be sustained. First, it runs contrary to the various pronouncements of the courts regarding the underlying nature of the undertaking, considered above. However, secondly, it is contrary to the proper approach to the interpretation of orders, which, like all documents, must be considered as a whole and in their proper context.[34] It could hardly be contended, for example, that the additional undertakings recorded under the same heading, such as the hours of execution of the Order and the restrictions on disclosure of information, did not have similar status or operate as effectively as the other parts of the Order.[35] The damages undertakings have no different status.[36]

[43] For these reasons, I am of the view that the first exception cannot be sustained.

THE SECOND EXCEPTION: DAMAGES CLAIMED

[44] The second exception raised by the defendants takes aim at the damages claimed by the plaintiffs. Included in the pleaded damages claim is a claim for non-patrimonial loss alleged as a result of a breach of privacy of the first plaintiff; and a claim for patrimonial loss by the second plaintiff alleged to be occasioned by a loss of a potential contract with a third party company, Thamani Technologies ("**the Thamani damages**").

[45] The exception is two-pronged. The defendants contend that the claim for non-patrimonial damages must fail because only contractual damages are permitted under the damages undertaking. They contend that the Thamani claim must fail because even if such loss was suffered by the plaintiffs, it was too remote to have been caused by the Order.

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33 Anton Piller Order, Particulars of Claim, Annexure POC 1, paras 2-5.

34 See, for example, *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* 2022 (1) SA 100 (SCA).

35 Anton Piller Order, Annexure POC1, paras 3 and 4.

36 Anton Piller Order, Annexure POC1, paras 4 and 5.

[46] In my view, this exception also cannot be sustained for three reasons. First, both the non-patrimonial damages claimed and the Thamani damages are a part of the larger damages claim pursuant to the damages undertaking. Neither an upholding of the prong of the exception dealing with non-patrimonial loss nor that addressing the alleged Thamani damages would result in the claim being dismissed. Courts are generally reluctant to uphold an exception where it is not dispositive of the claim as a whole.[37] Secondly, the prong of the exception which aims at the Thamani damages is conceptually a complaint about remoteness and the absence of causation. While this includes questions of law, it is also properly a matter for evidence at trial.

[47] Thirdly, there is a more fundamental reason that this exception cannot be upheld. While it is correct that the English courts have held that questions of causation and damages arising from an undertaking should be approached on a "similar basis" to those on which damages are awarded for breach of contract, this is not settled even in that jurisdiction. The court in *Cheltenham & Gloucester* pointedly noted that the issue "has not been fully explored".[38]

[48] What is clear is that this is not a question that has been fully explored or decided in our law. Our courts will develop the principles applicable to determining proper scope of the damages that may be claimed and the standards of causation in the exercise of their discretion according to the circumstances of each case. This may or may not include scope for non-patrimonial damages or other categories of damages.

[49] It is therefore not possible or appropriate for me to determine this in abstract on exception.

THIRD EXCEPTION: THE PIERCING OF THE CORPORATE VEIL

[50] The plaintiffs advance an alternative claim in which they contend that in effect, the corporate veil should be pierced and the legal personality between the first and second defendants should be disregarded for determining the defendants' liability for damages.[39]

[51] The defendants take exception to this aspect of the pleadings on the basis that the piercing of the corporate veil is a drastic remedy that should be

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37 *Du Plessis v Nel* 1952 (1) SA 515 (A);
Stein v Gise 1939 CPD 336.

38 *Cheltenham & Gloucester* at 1552 and 1555.

39 Particulars of Claim: para 20.

resorted to sparingly and only as a matter of last resort where justice will not otherwise be done between the parties.[40]

[52] The defendants contend further that the plaintiffs cannot advance a cause of action that relies both on the corporate personality and simultaneously on disregarding the corporate personality of the first defendant.

[53] The claim for the piercing of the corporate veil is advanced as an alternative claim. As indicated above, and for the same reason, our courts are reluctant to entertain an exception of this kind since it will not dispose of the claim in its entirety. In addition, as this claim is pleaded in the alternative, it is in my view incorrect to contend that the plaintiff is simultaneously relying both on the legal personality and the absence of legal personality of the first defendant. All that follows is that the plaintiff cannot succeed on both claims.

[54] However, and in any event, while it may be correct to assert that a claim for the piercing of the corporate veil is a remedy of last resort that is seldom granted,[41] this is a question of evidence depending on the circumstances of each case and is therefore quintessentially an issue for trial.

[55] Accordingly, I am of the view that the third exception also cannot be upheld.

CONCLUSION AND COSTS

[56] For the reasons traversed above, I conclude that the defendants' exceptions must be dismissed.

[57] The usual order in these circumstances would be for costs to follow the result. However, since the ultimate question of whether the undertaking to pay damages should be enforced as well as the merits of that claim will be determined by the court seized with these issues (presumably the Trial Court or another court if the issues are separated out) on a conspectus of all of the relevant facts, in the exercise of that court's discretion, I have decided that the question of costs is better reserved for final determination by that court.

[58] In the result I make the following order:

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40 Exception: para 4.6.

41 *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others* 1995 (4) SA 790 (A); *Amlin (SA) (Pty) Ltd v Van Kooij* 2008 (2) SA 558 (C).

Order

1. The first and second defendants' exceptions are dismissed;

2. The first and second defendants are ordered to file their plea, if any, within the periods afforded by the Rules of Court reckoned from the date of this order;

3. Costs in the exception are reserved for determination by the Trial Court or any other court seized with determining, in the exercise of its discretion, whether the undertaking of the first defendant in paragraphs 4 and 5 of the Order of this Court, dated 13 July 2021, under case number 32429/2021 should be enforced and the damages, if any, suffered pursuant to the undertaking.

AD STEIN
Acting Judge of the High court
Gauteng Division, Johannesburg

Heard: 22 February 2023
Judgment: 05 June 2024

Appearances:

For Plaintiffs: AJ Lamplough SC (with LM Spiller)
Instructed by Keith Sutcliffe and Associates Inc.

For Defendants: QG Leech SC (with K Hardy)
Instructed by Van der Berg Attorneys