

PIERCING THE RIGHTS OF PRIVACY: ANTON PILLER ORDERS

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The Bill of Rights in Chapter Two of our Constitution is the cornerstone of democracy in South Africa, and it enshrines a number of rights bestowed upon its citizens. It also places specific emphasis upon the right to privacy.

The Bill provides that citizens, including juristic persons, have the right not to have themselves, or their property searched; not least also the privacy of their communications being infringed. That notwithstanding, the right to privacy has certain limitations which are not often highlighted. These limitations can in fact be 'the fly in the soup' so to speak, especially if a person is suspected of -- as an example -- 'unlawful behaviour' in the commercial world. Before elaborating on the manner in which the privacy of either a natural or juristic person's privacy rights may be invaded, it is important to note that such an intrusion may only be exercised through legal application and where proper processes have been followed. Expectedly, the privacy intrusion, when it is permitted by a Court, must be done on a basis which has reasonable cause and is justifiable.

Moreover, the fact that such an intrusion has been permitted, which in itself is contrary to the provisions of the Bill of Rights and the Protection of Personal Information Act No.4 of 2013 (POPI), particular care must be taken to ensure that the dignity of the person whose privacy is being violated, is protected. Whilst all these provisions of privacy protection are set out in our statutes, it's interesting then to observe some of the reasons why these rights to privacy can be pierced.

"Defendants usually first learn they are the subject of an Anton Piller Order when they are served with the Order."

"This can happen sometimes very early in the morning upon receiving a knock on the door at home before they have even had an opportunity to brew their morning coffee."

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In order to explain the rationale of such intrusion, the 1976 case of *Anton Piller KG vs. Manufacturing Process Ltd.* in the United Kingdom has bearing. This was the first such occasion where a civil search warrant enabled an aggrieved party ('the Applicant') the right to request entrance into the premises of the accused party ('the Respondent') to search for, and seize relevant documents the Applicant believed were pertinent to their case. The granting of this Court Order was because the Applicant believed the Respondent would attempt to remove or destroy the "incriminating" evidence, and thereby evade their wrong-doing.

Following the UK's precedent case, when an 'Anton Piller Order' is granted in South Africa, it gives, inter alia, the Sheriff of the Court and an independent supervising attorney the right to enter and search the Respondent's premises and seize the articles mentioned in the Court Order without warning, which documents are to be preserved by the Sheriff for use in further proceedings. While this procedure is extreme, the Order does not, as a matter of right, permit the Applicant to gain forcible entry into the Respondent's premises. The Respondent can refuse such entry to their premises, however, in doing so their refusal to permit such entry could lead to them being charged with contempt of a Court Order. In appropriate circumstances, an Applicant can motivate for a special order permitting the search party to utilise the services of a locksmith to gain access to the Respondent's premises, where such premises are found to be closed.

The main purpose of an Anton Piller Order, is to preserve crucial evidence which is in the Respondent's possession that the Applicant wishes to use in further proceedings, which the Applicants believe would be

destroyed or hidden by the Respondents if proceedings were instituted in the ordinary course. An Anton Piller application is therefore only an interim measure that must always contemplate further proceedings.

Anton Piller Orders are brought about in secret, namely *ex parte*. This means, unlike a typical application where both parties are aware of the impending proceedings, an Anton Piller Order is brought without notifying the Respondent of the Order which may be granted as a result of the Application. Moreover, the Respondent will also have had no knowledge of the Court Application being made by the Applicant. Whilst this may seem rather unfair, such that the Respondent is caught blind-sided, *that is* the intention behind this invasive and somewhat draconian procedure. The rationale is that the evidence held by the Respondent needs to be preserved – at all costs – because it will be required during foreshadowed Court proceedings.

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