IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 20/26709

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

07.10.21
DATE

Electronic
SIGNATURE

In the matter between:

OCULAR TECHNOLOGIES (PTY) LTD	First Applicant
VELOCITY IMPORTS (PTY) LTD	Second Applicant
LUTCHMAN; PREEMISH SHASHIKANT	Third Applicant

and

C X ENGAGE (PTY) LTD	First Respondents
A I VISION CONSULTING (PTY) LTD	Second Respondent
DINAT; EBRAHIM	Third Respondent
DINAT; BILKEES	Fourth Respondent

JUDGMENT

CRUTCHFIELD AJ:

[1] The applicants seek leave to appeal in terms of section 17 of the Superior Courts Act, 10 of 2013 ('the Act'), against the aspects of the judgment applicable to the relief referred to by them in their application for leave to appeal, in respect of:

1.1 the dismissal of the Anton Piller order;

1.2 the dismissal of the applicants' application for a variation of the order dated 28 November 2020; and

1.3 my award of costs against the applicants, including the costs of 3 counsel (including senior counsel) where so employed.

[2] The application for leave to appeal ('leave application') was opposed by the respondents.

[3] The applicants at the hearing of the leave application, did not advance arguments addressing the application for leave in respect of the order dismissing the application for a variation.

[4] The applicants contended a reasonable prospect of success on appeal. Two arguments were raised by the applicants that I seek to deal with herein.

[5] The applicants relied upon *Non-Detonating Solutions*[1] to base their contention that a *prima facie* cause of action is not required in an Anton pilar application. The threshold is low and it is not a question of probabilities.

[6] In respect of the two causes of action raised against CX Engage (Pty) Ltd ('CX') and the third respondent, Dinat ('Dinat'), the applicants made out a case in respect of the diverting of Ocular's biggest customers, particularly in respect of Tracker and Bayport and that CX's response thereto was evasive and sketchy.

[7] Furthermore, that the reasons provided by CX as to why Ocular's clients left it does not negate the existence of the applicants' cause of action.

[8] The difficulty with the applicant's contentions in this regard is that the respondents' version in respect of Tracker and Bayport is not sketchy or evasive as alleged. The applicants did not show that those clients left Ocular pursuant to anything done by CX, and, they are not customers of CX. That response of the respondents is not evasive nor sketchy.

[9] The reasons furnished by the respondents in respect of why clients left Ocular, serves in this instance to demonstrate that the clients did so not because of conduct on the part of CX.

[10] Ocular relied on two alleged errors of fact in the judgment, at paragraphs 52 and 65 thereof. The consequence of the error at paragraph 52 allegedly was that it demonstrated that a *prima facie* case was made by the applicant.

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1 *Non-Detonating Solutions (Pty) Ltd v Durie & Another* 2016 (6) SA 445 (SCA) ('Non-Detonating Solutions').

[11] The error was to the effect that contrary to that stated by me in paragraphs 52 and 65, Ocular did allege that Farhaan shared the SLA with Dinat. I disagree that the applicants made such allegation. The reference provided by the applicants in the papers does not state that alleged by the applicants this regard.

[12] The alleged errors of fact are however not relevant in that the 2019 SLA was alleged by the respondents to be outdated with reference to the test for confidential information, which I accepted. The latter test, that for information to be confidential it must have an economic value, is generally accepted in our caselaw as correct.

[13] As to Farhaan sharing the SLA with Dinat, I remain of the view that the pricing structure at the relevant time would have been outdated, (it lay with the applicant to furnish evidence to the contrary which they did not do), the pricing structure formed part of Dinat's own body of knowledge and he would not have needed the SLA to be aware of Ocular's pricing and know-how.

[14] One of the references to the economic value component of the test that I referred is the judgment[2] of *Advtech Resourcing (Pty) Ltd t/a Communicate Personnel Group v Koen*.[3] although the case deals with restraints. That reference by me does not constitute the application of an incorrect legal test to the facts that will serve as grounds for an application for leave to appeal.

[15] Whilst *Advtech* deals with restraints of trade, it also deals with the requirements for confidentiality in respect of documents and it was to that extent that I referred to the judgment.

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2 Para [54]

3 *Advtech Resourcing (Pty) Ltd t/a Communicate Personnel Group v Koen* 2008 (2) SA 375 (C) ('Advtech')

[16] Costs, in and of themselves, are not grounds for an appeal.

[17] In my view, there is no basis for leave to appeal to be granted given that there is no reasonable prospect that another Court will come to a different outcome.

[18] The applicants correctly aargued that the costs order in respect of three counsel was not consistent with the fact that the respondents did not continue to use three counsel. Insofar as there is insufficient clarity in my order in this regard, the order should be understood to state and refer to the respondents' costs of three counsel, where three counsel were so employed. That was the intention of the order and takes into account the fact that the respondents did not utilise the third counsel after the relevant rule of the JSA was brought to their attention.

[19] In the circumstances the application for leave to appeal is dismissed with costs.

A A CRUTCHFIELD SC
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

Electronically submitted therefore unsigned

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 7 October 2021.

PP. NRB.

Counsel for the applicants:	Mr Y Alli.
Instructed by:	Vally & Chagan Attorneys.
Counsel for CX Engage, Ibrahim Dinat and Bilkees Dinat:	Mr G kairinos SC
Instructed by:	Jordaan & Wolberg Attorneys.
DATE OF THE HEARING:	19 August 2021.
DATE OF JUDGMENT:	7 October 2021.