THE HIGH COURT OF SWAZILAND

CARGO CARRIERS SWAZILAND (PTY) LTD

Applicant

And

USA DISTILLERS (PTY) LIMITED

Respondent

Civil Case No. 2233/2003

Coram	S.B. MAPHALALA - J
For the Applicant Advocate	J.M. Van Der
	Walt (Instructed by Millin & Currie)
For the Respondent	Mr. Z. Magagula

JUDGMENT

(16/12/2003)

Introduction

This is an ex parte application for an interdict in securitatem debiti to restrain the Respondent from dissipating its assets for the purposes of avoiding due execution of a possible judgment for up to E839, 246-41, which amount the Applicant expects to obtain against the Respondent in due course.

On the 18th September 2002 the application brought under a certificate of urgency appeared before me where I issued the following interim order:

1. That the Applicant's non-compliance with the rules relating to forms and service be and hereby is condoned.

2. That a rule nisi issues, with interim and immediate effect, in the following terms: Pending the finalisation of action proceedings to be instituted by the Applicant against the Respondent that;

2.1 The Respondent be and hereby is interdicted from directly or indirectly in any manner whatsoever, dealing in any way with, disposing of or removing from Swaziland any of the assets owned or controlled by it.

2.2 The Respondent be and hereby is directed to pay the Applicant's costs, including the costs of counsel as certified in terms of High Court Rule 68 (2).

2.3 The Applicant is directed to institute action proceedings against the Respondent within two weeks of date of this order.

3. That 2.1 operates with full and immediate effect.

4. That the Applicant be and hereby is directed to serve a copy of the notice of motion and order herein on the Respondent.

5. That the Respondent be and hereby is called upon to show cause on the 25th September 2003 why the order in terms of 2.1, 2.2 and 2.3 should not be made final.

6. Costs reserved.

The matter appeared again before me in the contested motion of the 24th October 2003, for the confirmation of the rule nisi issued on the 18th September 2003.

The application is founded on the affidavit of one David Thomas Mennie who is the Operations Manager of the Applicant. Various annexures pertinent to the application are filed thereto.

The Respondent opposes the confirmation of the rule nisi and to that end the answering affidavit of its Operations Director one Luis Borrageiro is filed of record. Various annexures are filed in support of the affidavit.

The Applicant in turn filed a replying affidavit with pertinent annexures.

The facts.

During March, 2001 and at Big Bend, Swaziland the Applicant represented by its authorised representative Mr. David Thomas Mennie and the Respondent being represented by its authorised representative and Executive Director Joe Calderia, entered into an oral agreement of carriage (hereinafter referred to as the "agreement"), the material terms of which included the following:

7.1 The Applicant would from time to time and at the specific instance and request of the Respondent, carry and convey goods in the form of portable alcohol to destinations stipulated by the Respondent;

7.2 The Respondent shall pay the Applicant for such services at agreed prices alternatively at the Applicant's usual price from time to time further alternatively at reasonable prices.

7.3 The Respondent shall make payment to the Applicant within 14 days after date to statement of account. This was, some months later, converted to a normal 30 days account i.e. payment within 30 days of date of account.

According to the Applicant during the period March 2001, to the 10th September 2003 and in Swaziland and/or the Republic of South Africa the Applicant, pursuant to the agreement and at the specific instance and request of the Respondent, on several occasions conveyed goods from Big Bend to destinations stipulated by the Respondent.

The Applicant duly rendered a statement of account to the Respondent on or before the last day of each month in respect of such carriage by the Applicant.

The Applicant avers in its founding affidavit that in the premises the Applicant duly performed all its obligations in terms of the agreement.

Since October 2001 the Respondent started to default in payment within 30 days of statement, by only paying after 60 days, and since November 2003, by paying after 190 days or more.

Three of the Respondent's cheques, drawn on the Respondent's Standard bank, Big Bend branch in favour of the Applicant, and in payment of the Respondent's obligations to the Applicant, were dishonoured by the Respondent's bankers endorsed "refer to drawer". The note by the drawer bank "refer to drawer", means that the Respondent had insufficient funds with the drawer to meet payment of the said cheques.

At paragraphs 13, 13.1, 13.2, 13.3, 14 and 15 the Applicant list the particulars of the various cheques and the amounts for each payment.

Following the dishonouring of cheque no. 2677 and on the 23rd August 2003, the Applicant instructed its Big Bend branch to immediately cease all services to the Respondent. The Operations Director of the Respondent, Mr. Borrageiro, then organized a bank guarantee for the amount of the said cheque, within two hours. This led the Applicant to suspect that the Respondent's solvency and probity does not bear close scrutiny.

As at the 18th September 2003, an amount of E309, 709-78 for services in July 2003 which was due to be paid at the end of August 2003 by the Respondent to the Applicant, as well as the sum of E274, 242-08 in respect of the dishonoured cheque, remain unpaid. This constitute a current total outstanding overdue balance of E583, 951-81.

On or about the 4th September 2003, the said Luis Borrageiro as well as the Respondent's executive Director, Rob Wurdeman, informed the Applicant the Illovo Group in the Republic of South Africa are busy negotiating with the Respondent for the sale of the Respondent's alcohol plant in Big Bend to the best of the Applicant's knowledge, this Plant constitutes the only significant asset of the Respondent in Swaziland.

Should the Respondent's plant be sold to a third party, the Respondent will no longer have any assets within the Kingdom, thereby making it impossible to recover any monies in the future.

The Applicant avers that the prospective purchaser is South African, and there is no guarantee that the purchase price paid would end up within the jurisdiction of this court, thereby further putting the Respondent's creditors at risk.

At paragraphs 24, 24.1, 24.2, 24.3 the Applicant alleges that the Respondent is now querying its indebtedness to the Applicant.

Most importantly, on the evening of the 16th September 2003, a person from Illovo, who understandably does not want to have his identity disclosed to Mr. Mennie that the proposed sale to Illovo will be concluded this Friday, the 19th September 2003.

At paragraph 24.5, 24.5.1, 24.5.2, 24.5.3, 24.5.4, 24.6, 25, 26, 26.1 and 26.2 the Applicant outlines the Respondent's actions in stalling the Applicant and spinning out payment until the sale to Illovo is done, and that it has no bona fide defence to the Applicant's claim. The Respondent has the intention to defeat the Applicant's claim or render it hollow, by contriving to create the situation where the Respondent will have no executable assets in Swaziland.

At paragraph 29 the Applicant avers that it has not only prima facie rights, but also clear rights inter alia.

29.1 To be paid for the services rendered by it to the Respondent.

29.2 Payment of the indisputable claim in respect of the dishonoured cheque which has not been settled yet, be it by way of provisional sentence proceedings or otherwise.

29.3 To execute against the Respondent's assets once it obtains judgement in the action proceedings.

29.4 That the Respondent should not dissipate any of its assets to the prejudice of the Applicant's right to payment.

At paragraph 30, 31, 32, 33, 34 and 35 the Applicant makes averments to show actual irreparable harm or a well-grounded apprehension of such harm.

At paragraph 36, 37, 38 the Applicant alleges that it has no other satisfactory remedy.

The Applicant makes averments to show that the balance of convenience is in its favour at paragraphs 39, 40, 41 and 42.

At paragraph 42, 43 and 44 the Applicant makes averments on urgency.

The Respondent has filed an answering affidavit per contra. At paragraph 5.1, 5.2 and 5.3 the Respondent avers that it denies that the Applicant was entitled to approach this court on an ex parte basis, and to, obtain the relief that it has obtained. Where an Applicant approaches the court on an ex parte basis, it must make a full disclosure of all facts and information that is at its disposal and should not in any way mislead the court on the factual position regarding the matter.
At paragraph 6, 6.1, 6.2, 7, 7.1, 7.2, 7.3, 7.4 and 8 of its answering affidavit the Respondent sought to demonstrate that the Applicant has made a number of unsubstantiated allegation in its founding affidavit and has in fact not been candid with the court on a number of material facts and as such is making an application to the court for the discharge of the interim order that has been granted in this matter with the appropriate order as to costs.

The Respondent avers that the reasons for the delays in the payments and also for the cheques not being met at the bank were adequately explained to Mr. Minnie. The Respondent did encounter certain cash flow problems caused by a refusal by a major debtor to pay its account, which was in excess of four million emalangeni (E4, 000,000-00) that there are presently legal proceedings between the Respondent and that debtor in respect of the outstanding amount.

The Respondent further avers that even if such a sale were to take place, and in the ordinary course of a commercial transaction of this magnitude a creditor such as the Applicant would be catered for. In any event there is no imminent sale as yet. Furthermore, the Applicant would have a number of remedies available to it.

The Respondent urged the court to be loath in accepting hearsay evidence of a person whose identity has not been disclosed. It is not correct that the sale was due to be concluded on the 19th September 2003, nor has in fact any sale been concluded. The

matter has not as yet reached the stage wherein it could be described as a sale, but rather negotiations are still ongoing. From a business perspective, one would say that the negotiations are still in their infancy.

The Respondent avers that the Applicant has not established a clear right to the relief sought in that it has not demonstrated that there is an imminent sale or that there is no dispute on the amounts that it says are due. With respect to the amounts that Respondent concedes are due, payment will be made no later than the 10th October 2003.

The Respondent further denies that the Applicant will suffer irreparable harm and point out that if the Respondent (and if one were to follow the Applicant's version) were due a sum in excess of one hundred

and forty million Emalangeni) (El40, 000, 000-00); it would allow such a transaction to be jeopardised by a debt of less than a million Emalangeni. This would not make business sense and such demonstrates the fallacy of the Applicant's argument.

The arguments

Both parties filed very comprehensive Heads of Argument in support of their positions in this matter.

The Applicant's case is premised on a dicta in the case of Ericksen Motors (Welkom) Ltd vs Protea Motors, Warrenton and another 1973 (3) S.A. 685 (A) which outlines the requirements to be met for the granting of an interdict in securitatem debiti Holmes J A at 691C stated the following, and I quote:

"(The) granting of an interim interdict pending an action is an extra ordinary remedy within the discretion of the court".

The learned Judge then (at 691 D - E) set out the requisites for such interim interdict on the authority of Setlogelo vs Setlogelo 1914 A.D. 221 at 227 as follows:

"a) A right which, though prima facie established, is open to some doubt;

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b) A well grounded apprehension of irreparable injury, and

c) An absence of ordinary remedy".

According to Mcitiki and another vs Maweni 1913 C. P. D. 684 at 687 approved by the Full Bench of the South African Appellate Division in the case of Knox D'arcy Ltd vs Jamieson and others 1996 (4) S.A. 348 (A) it was held that the purpose of the grant of such an interdict is based on the court's desire that the Plaintiff in an action for damages should not suffer the injustice of the debtor being left in possession of sufficient funds to satisfy the claim when circumstances should either that the debtor was wasting or dissipating such funds in order to defeat his creditors or that he was likely to do so and that, although it was not necessary for an Applicant for such an interdict to show that the Respondent had no bona fide defence to the claim for damages, an Applicant would have to show a particular state of mind on the part of the Respondent, namely that the Respondent was getting rid of the funds, or was likely to do so, with the intention of defeating the claims of creditors.

Miss Van Der Walt for the Applicant attempted to relate the facts of this matter to the dicta propounded in the above-mentioned legal authorities.

Mr. Magagula also filed very comprehensive Heads of Argument au contraire. He relied heavily on what was enunciated in the case Pohlman and others vs Van Schalk Wyk and others 2001 (1) S.A. 690 (EC) at 698 G - I) where Froneman J stated the following:

"The courts have devised at least three different and complementary safeguards. The first is to be found in the substantive requirements that must be met before any order is granted. These I have already referred to in dealing with the facts of this case. These requirements ensure the interest that an Applicant seeks to protect is worthy of protection (there must be a proper cause of action) and that these interest are really under threat (real apprehension of harm and the like) the second kind of safeguard is aligned with these aims, namely to ensure that the methods by which the Applicant's interest are protected are not disproportionate to the interest being protected". (my emphasis)

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The above-cited case dealt extensively with the use of what has become known as Anton Pillar orders and Mareva injunctions, names that come from the origins of these kind of orders in English Law.

Mr. Magagula argued at great length to show that the requirements laid down in Pohlman and others (supra) have not been met by the Applicant in casu.

The court's decision.

I have read the papers filed in this matter and considered the arguments advanced for and against the confirmation of the rule nisi granted by the court on 18th September 2003. There are two issues for determination in this case. The first issue concerns Applicant's non disclosure of material facts and the second issue is whether the Applicant has satisfied the requirement of an interdict in securitatem debiti laid down in Eriksen Motors (supra) and Pohlman and others (op cit).

I shall address these issues ad seriatum: thus; 1. The issue of non-disclosure.

Having brought the proceedings ex parte, it is trite law that the applicant had an obligation to the court to disclose fully the true circumstances and facts pertaining to the application; Roper J in the case of De Jager vs Heibrow and others 1947 (2) S.A. 419 (w) said the following, and I quote:
"It has been laid down, however, in numerous decisions of our court that utmost good faith must be observed by litigants making ex parte applications, and that all material facts must be placed before the court (see Re: Leysdorp and Pieterburg Estates Ltd 1903 T.S. 254; Crowley vs Crowley 1919 T. P. D. 426). If any order has been made upon an ex parte application, and it appears that material facts have been kept back which might have influenced the decision of court whether to make the order or not, the court has a discretion to set aside the order on the ground of non-disclosure (Venter vs Van Graan 1929 T. P. D. 435; Barclays Bank vs Gilfs 1931 T. P. D. 9; Hillman Bros vs Van Den Heuvel 1977 W. L. D. 41). It is not necessary that the suppression of the material fact shall have been wilful or malafide" (my emphasis).

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Margo J in the case of Cometal Nometal vs Corlana Enterprises 1981 (2) S.A. 412 expressed the same sentiments at page 414 (G - H) in the following terms; and I quote:

"It seems to me that, among the factors which the court will take into account in the exercise of its discretion to grant or deny relief to a litigant who has breached the uberima fides rule, are the extent to which the rule has been breached, the reasons for the non-disclosure, the extent to which the court might have been influenced by proper disclosure in the ex parte application, the consequences, from the point of doing justice between parties, of denying relief to the applicant on the ex parte order, and the interest of innocent third parties, such as minor children, for whom protection was sought in the ex parte application".

Further, authority can be found in the following: Herbstein et al The Civil Practice of the Supreme Court of South Africa (4th ED) at 367; Nathan Burnett and Brink, Uniform Rules of Court, 1977 (2nd ED) at page 58; Spieg vs Walker 1947 (3) S.A. 499 and Stanley Matsebula vs Aaron Mavimbela Civil Appeal No. 54/1999. that if there are any material facts that might have influenced the court's decision and such facts are wilfully, negligently or in bad faith withheld, the court will as a rule set aside or rescind its earlier order.

In casu, it is my considered view, that on reading Applicant's founding affidavit and the Respondent's answering affidavit it became apparent that the Applicant has failed to make a full and frank disclosure of all the relevant facts which were within its knowledge at the time the application was launched on the 18th September 2003. At page 33 of the Book of Pleadings in the answering affidavit at paragraph 6 the following appears.

"I am advised and humbly submit that for purposes of disclosure it is necessary that I set out certain material facts which are known to the Applicant but which have not been disclosed in Minnie's founding affidavit and have not been put before court.

6.1 It is correct that the Applicant and the Respondent have an agreement in terms of which the former transports alcohol to various destinations in the Republic of South Africa. The primary destination is Durban. The Respondent pays for such service.

6.2 There are however, instances wherein the Applicant collects alcohol on behalf of third parties and the transport costs of such transactions are borne by the third party. For example, the Applicant collects alcohol on behalf of Kango Co-operative in the Eastern Cape. Some of the invoices that have now been allocated to the Respondent are in fact for the account of Kango. Details of these invoices will be set out below".

Further at paragraph 7.4 of the Respondent's answering affidavit the following appears:

"Furthermore, it is correct that I have personally advised Mr. Minnie about negotiations relating to the possible sale and in so far as that is concerned, believe that we have conducted ourselves above board with respect to informing our creditors. It is important to put on record that the Applicant came to know about the sale negotiations as a result of information that has been freely and voluntarily given to them by myself. Applicant did not stumble on these facts. If there had been an intention to conceal this information or prejudice the Applicant then I would not have made this disclosure.

Yet the Applicant avers at paragraph 24.4 of its founding affidavit as follows:
"Most importantly, on the evening of the 16th September 2003, a person from Illovo, who understandably does not want to have his identity disclosed, to me that the proposed sale to Illovo will be concluded this Friday the 19th September 2003".

It would appear to me that from the above mentioned excerpts the Applicant had been appraised by the Respondent as to the nature of the negotiations taking place.

On the basis of the authorities I have cited above the rule nisi issued in this matter ought to be discharged, however for the sake of completeness I shall proceed to consider the other outstanding issue viz, whether the Applicant has satisfied the requirements of an interdict in securitatem debiti.

2. Whether the Applicant has satisfied the requirement of the interdict.
On the basis of the evidence presented before me on affidavits it appears to me that the method of protection in casu is disproportionate to the Applicant's interest allegedly being protected. The debt being protected is less than El million yet the

Manufacturing Plant which is the subject matter of the rule nisi issued by this court is in excess of El40 million Emalangeni in value. Further on this point the Plant, which will remain intact in Swaziland, cannot be removed overnight. I find on this point that the requirements enunciated in Pohlman and others (supra) have not been met. If the Respondent were due a sum in excess of one hundred and forty million Emalangeni (E140, 000,000-00) it would not make any business sense to allow such a transaction to be jeopardised by a debt of less than a million Emalangeni.

Furthermore, it has not been shown that the Respondent is dissipating its assets, that it is wilfully scattering or consuming or squandering its assets. It has not been shown that the Respondent intended to make away with its assets in order to defeat the Applicant's claim.

All in all I agree with the submissions made by Mr. Magagula for the Respondent that the Applicant has failed to meet the requirements in Pohlman (supra) and therefore, the rule nisi issued by the court on the 18th September 2003 is accordingly discharged.

The costs to follow the event.

S.B. MAPHALALA

Judge