

THE HIGH COURT OF SWAZILAND

FIRST NATIONAL BANK SWAZILAND LIMITED

Applicant

And

DERRICK HLATSHWAYO

Respondent

Civil Case No. 1665/2005

Coram

For the Applicant

For the Respondent

S.B. MAPHALALA-J

MR. J. HEN WOOD MR.

B. ZWANE

JUDGMENT
(17th June 2005)

[1] The Applicant has moved an urgent application for what appears to be an anti-dissipation interdict for an order, *inter alia*, ordering and/or authorising the Respondent to hold in an interest bearing account any surplus of the proceeds of the funds in respect of the sale of the property described as Lot 2926 Mbabane Extension No. 21 Mbangweni Township pending finalisation of an action to be instituted by the Applicant against the Respondent in respect of monies misappropriated by the Respondent from the Applicant; ordering the Applicant to institute the said

proceedings within 7 days of the granting of this order; a rule *nisi* to operate with interim and immediate effect; and costs.

[2] The said urgent application appeared before Annandale ACJ on the 10th May 2005, where a rule *nisi* was issued returnable on the 20th May 2005. The matter then appeared before court on a number of occasions until the rule *nisi* lapsed after sometime.

[3] The Respondent filed an Answering affidavit on the 18th May 2005, where he raised points *in limine* and also answered on the merits of the application. The Applicant in turn filed its Replying affidavit on the 25th May 2005 in reply to the Respondent's Answering affidavit.

[4] On the 2nd June 2005, the Respondent filed an interlocutory urgent application for an order, *inter alia*, directing the Respondent to pay to the Applicant forthwith in full all amounts withheld by it and in excess of E98, 000-00 recovered from the sale of the Applicant's house being Lot No. 2926 Mbabane, Extension No. 21 (Mbangweni Township) situate in the district of Hhohho, Swaziland.

[5] The whole matter was argued before me on the 10th June 2005, where after hearing arguments I reserved judgement.

[6] For an understanding of how this dispute came about, it is necessary to recount some of the history. The Respondent at times material hereto was employed as a banker by the Applicant. It is alleged by the Applicant that whilst Respondent was in its employ he defrauded the bank in an amount in excess of E232, 000-00. As a result of this the Respondent has been dismissed from the employ of the Applicant. The Respondent during the course of his employment had a home loan with the Applicant in terms of which a property which he owns has been used to serve that home loan. The Applicant has discovered that the Respondent has since sold the property for the sum of E1 85, 000-00 to one Miss Refiloe Mamogobo. The Applicant is financing the purchaser in respect of this sale after the home loan due by the Respondent has been paid to the Applicant a net surplus of about E98, 000-00 remain. The Applicant therefore seeks an order attaching the said residue of the sale pending the outcome of the legal proceedings which the Applicant will institute against the Respondent for the recovery of the funds which were stolen from it. This, therefore is the crux of the matter.

[7] According to *Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa, 4th Edition*, at page 1087 anti-dissipation interdicts are a special type of interdicts which may be granted where a Respondent is believed to be deliberately arranging his affairs in such a way as to ensure that he will be without assets within the Republic by the time when the

Applicant is in a position to execute against him on a judgement which the Applicant expects to secure. A remedy that performs a similar function to that of the "Mareva injunction" of English Law, this interdict *in securitatem debiti* was dubbed an "anti-dissipation interdict" by Stegman J in the leading case of *Knox D 'arly Ltd & others vs Jamieson & others 1994 (3) S.A. 700 (w)* at 706 D - E. It also appears to be trite law that in such interdicts the Applicant is obliged to prove all the requirements in interdict generally and further for the Applicant had to show that the Respondent was **"arranging his affairs in such a way as to ensure that he will be without assets within the country by the time when the Applicant is in a position to execute"**.

[8] *Mr. Henwood* for the Applicant contended that the Applicant has made a case for an anti-dissipation interdict and that it would be absurd for the Applicant to hand over the residue of the sale proceeds on one hand whilst it is also seeking compensation of monies due to it by the Respondent on the other hand. He further contended that it would only be fair and proper that the surplus funds be placed in an interest bearing account pending the finalization of the matter but that it would also be just in the circumstances as the Applicant if successful the Respondent would find some funds in satisfaction of its judgment. If it were not successful the Respondent would still be entitled to receive his funds with interest and as such would not have suffered any harm.


[9] *Mr. Zwane* who appeared for the Respondent argued with all the force in his command and it appears to me that he hit the nail on the head that in *casu* the Applicant has not shown the most important requirement for an anti-dissipation interdict that Respondent **was arranging his affairs in such a way as to ensure that he will be without assets within the country by the time when the Applicant is in a position to execute.**

[10] It has not been shown on the affidavits that the sale by the Respondent to Miss Refiloe Mamogobo was intended to defeat the Applicant's claim, or render it hollow, by secreting or dissipating assets before judgment can be obtained and executed, from successfully defeating the ends of justice. On the contrary, in *casu* the interim order was granted on the 10th May 2005 and the summons were only issued on the 18th May 2005. Therefore it cannot be argued that Respondent intended to defeat the Applicant's claim.

[11] It would appear to me on the totality of the facts before me and also on the authority of the case of *Knox D 'arly Ltd (supra)* the Applicant has not shown that the Respondent was arranging his affairs in such a way as to ensure that he will be without assets within the country by the time when the Applicant is in a position to execute. The Applicant has not

endeavoured to show that Respondent wanted to expatriate any of his assets save for that he was simple selling his house.

[12] For the afore-going reasons therefore the application is dismissed with costs.


S.B. MAPHALALA
JUDGE