IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Reportable
Case No. 2142/12

In the matter between

SPINTEX SWAZILAND (PTY) LTD	**Applicant**
and	
NOLWAZI CHARITY MOTSA	**1st Respondent**
MDUDUZI SOUTHERN FORMELY DLAMINI	**2nd Respondent**
SWAZILAND EMPLOYEE BENEFIT CONSULTANTS (PTY) LTD T/A ALEXANDER FORBES FINANCIAL SERVICES	**3rd Respondent**
NEDBANK SWAZILAND LIMITED	**4th Respondent**
STANDARD BANK SWAZILAND	**5th Respondent**
SWAZILAND BUILDING SOCIETY	**6th Respondent**
FIRST NATIONAL BANK	**7th Respondent**
SWAZILAND DEVELOPMENT AND SAVINGS BANK	**8th Respondent**
AFRICAN ALLIANCE SWAZILAND	**9th Respondent**
STANLIB	**10th Respondent**
THE REGISTRAR OF MOTOR VEHICLES	**11th Respondent**
THE ATTORNEY GENERAL	**12th Respondent**

Neutral citation: *Spintex Swaziland (Pty) Ltd v Nolwazi Charity Motsa & 11 Others* (2142/12) [2013] SZHC 97 (30 April 2013)

Coram: Mamba J

Heard: **12 April, 2013**

Delivered: **30 April, 2013**

[1] Civil Law and Procedure – employee allegedly defrauding employer of over E1200000.00 and employer discovering this after termination of employment but before payment of pension to former employee – employer applying for preservation order of assets of ex-employee plus disclosure by banks, pending action against ex-employee.

[2] Civil law – 1st and 2nd Respondents married to each other by civil rites and in community of property – equal owners of joint estate and preservation or freezing interdict applies to both of them equally.

[3] Civil Law – application for preservation order – applicable to assets of defendant, howsoever acquired.

[4] Civil law and Procedure – application for freezing or preservation interdict pending action – applicant to establish strong arguable prima facie case even if not strong enough to justify a case for summary judgment.

[5] Civil Law and Procedure – application for assets protection interdict pending action – applicant not required or expected to show proof of dissipation of assets by respondent – to render judgment in favour of applicant worthless or hollow – sufficient for applicant to show that conduct of respondent likely to have such effect.

[1] I shall refer to the parties as they have been described by the applicant in its founding affidavit; namely:

> "3.1 The applicant is Spintex Swaziland (Pty) Limited, a company dully incorporated in terms of the company laws of the Kingdom of Swaziland, carrying on business at the Matsapha industrial sites in the Kingdom of Swaziland.
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> 3.2 The 1st Respondent is Nolwazi Charity Motsa, a Swazi married woman residing at Nhlambeni in the district of Manzini.
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> 3.3 The 2nd Respondent is Mduduzi Dlamini who recently changed his surname to Southern. He is married in community of property, to the 1st Respondent residing at Nhlambeni, district of Manzini.
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> 3.4 The 3rd Respondent is Swaziland Employee Benefits consultant (Pty) Ltd trading as Alexander Forbes administering Sibaya, Pension Fund, with powers to sue and be sued represented by its trustees and registered pursuant to provisions of the Retirement Fund Act 2005, having its registered office at 2nd Floor Sales House building, Swazi Plaza Mbabane.

3.5 The 4th Respondent is Nedbank Swaziland Limited, a financial institution having powers to sue and be sued in terms of the laws of th e Kingdom of Swaziland, having its principal place of business at Nedbank Building, Swazi Plaza, Mbabane, district of Hhohho.

3.6 The 5th Respondent is Standard Bank Swaziland, a financial institution having powers to sue and be sued registered in terms of the laws of the Kingdom of Swaziland, having its principal place of business at Swazi Plaza, Mbabane, district of Hhohho.

3.7 The 6th Respondent is Swaziland Building Society, an organization dully established by its own statute with powers to sue and be sued in its own name, having its principal place business at Asakhe House, Gwamile Street, Mbabane, district of Hhohho.

3.8 The 7th Respondent is First National Bank Swaziland, financial institution having it power to sue and be sued in terms of the laws of the Kingdom of Swaziland, having its principal business at Sales House Building Swazi Plaza, Mbabane, district of Hhohho.

3.9 The 8th Respondent is Swaziland Development and Savings Bank, a financial institution having powers to sue and be sued in terms of the laws of the Kingdom of Swaziland, having its principal place of business at along, Gwamile Street, Mbabane, district of Hhohho.

3.10 The 9th Respondent is African Alliance Swaziland, a company dully registered in accordance with the company laws of the Kingdom of Swaziland which is also a fund administrator duly registered in terms of the provision of the Retirement Fund Act of 2005 carrying its business at 2nd Floor, Nedbank Building, Swazi Plaza, Mbabane, district of Hhohho.

3.11 The 10th Respondent is STANLIB, a company duly registered in terms of the company laws of the kingdom of Swaziland with powers to sue and be sued, having its principal place of business at 1st floor Ingcamu Building, Mhlambanyatsi Road, Mbabane, Hhohho.

3.12 The 11th Respondent is Registrar of motor vehicles, cited herein in his official capacity as the officer in charge of registering motor vehicles in the Kingdom of Swaziland, c/o Treasury building, Mbabane, district of Hhohho.

3.13 The 12th Respondent is The Attorney General, a position presently held by Mr. Majahenkhaba Dlamini who is cited herein at his capacity as the legal

advisor of the government of the kingdom of Swaziland having its chambers at 4th Floor Ministry of Justice Building, Usuthu Link road, Mbabane, district of Hhohho (hereinafter stated at The Attorney General)."

[2] On 18th December last year, the applicant successfully applied ex parte, for an interlocutory order inter alia

"3. That pending the finalization of the matter instituted under case no.2140/2012:-

3.1 Interdicting the 1st and 2nd Respondent be interdicted from transferring any monies that may hold in accounts opened with the 4th, 5th, 6th, 7th, 8th and 9th, 10 and 11th Respondents.

3.2 Directing the 3rd Respondent to cancel a cheque issued to the 1st Defendant in the sum of E19, 937.77 and to retain the money in an interest bearing account pending the finalization of this matter instituted under case no. 2140/2012.

3.3 Directing the 4th, 5th, 6th, 7th, 8th and 9th Respondent to furnish the Applicant or its attorneys with the details of accounts and balance thereof that they hold operated by the 1st and 2nd Respondents.

3.4 That the 3rd Respondent cancels the cheque in the sum of E19 937.77 that it has already issued out to the 1st Respondent and kept the proceeds pending the final determination of this matter.

3.5 That the 11th Respondent be interdicted from effecting any change of ownership of the following vehicles registered ISD 225 BM, FSD 660 BM and SSD 908 AM registered in the names of the 1st and 2nd Respondents pending the final determination of the claim to be instituted by the Applicant against the 1st and 2nd Respondent.

4. That a Rule Nisi do hereby issued returnable on Friday the 15th Febrauary 2013, calling upon the Respondent to show cause why, prayer 1,2,3 inclusive of 3.1,3.2,3.3,3.4,3.5 and 4 should not be made final.

5. That the cost of this applicant be cost in the action, save in the event any of the Respondents opposing the relief sought which costs should include, costs of cancel as certified in terms of High Court Rules 68.

6. That the Deputy sheriff of Manzini and Hhohho District respectively, be and is hereby directed and required to:

(a) Forthwith and serve the notice of motion and the court order upon the Respondents and explain the full nature and exigency thereof to then;

(b) Attaché all the motor vehicles mentioned in prayer 3.5 to be kept by the Applicant in a safe place pending the finalization of the civil claim instituted under case no. 2140/2012. that a Rule Nisi do hereby issued returnable on Friday the 15th February 2013, calling upon the Respondent to show the cause why, prayer 1,2 inclusive of 2.1 – 2.5,3, should not be made final.

(c) Make a returns to the Applicant's attorneys and the Registrar of the High Court of what he has done in the execution of the order."

[3] As a basis or justification for this application, the applicant states in its founding affidavit, which has been deposed to by Pius Dlamini, its financial manager that whilst the first respondent was employed by the applicant as a creditor's clerk, she unlawfully defrauded the applicant a sum of about E1286 024.83 (One million two hundred and eighty six thousand and twenty four Emalangeni and eighty three cents). This was during the period 27th March 2006 to 21st June, 2012 when she resigned from the applicant's employment.

[4] The alleged fraud took place over a long period whereby the 1st respondent allegedly misrepresented to the applicant that certain payments were lawfully due to creditors of the applicant when in truth and infact she knew that this was not the case. Once the applicant had authorized these fraudulent payments, the 1st respondent instead electronically transferred

these monies into her personal bank account number 62200131770 held at the First National Bank Swaziland. In support of this allegation the applicant has filed a computer print-out of its bank statement. This is annexure s2 to its founding affidavit. These fraudulent activities by the first respondent were discovered by the applicant after she left the applicant's employ in June 2012.

[5] Upon discovery of the fraud, the applicant laid a formal charge or complaint against the first respondent with the police. She was subsequently charged and this matter is still pending with the police.

[6] After resigning from the applicant, the first respondent applied for employment at Swaki Group of Companies. After being arrested by the police following the complaint by the applicant, she then sent an electronic mail to Mr Alex Mngomezulu, the managing director of Swaki admitting that she had, during her employment with the applicant, 'made mistakes and defrauded Spintex for the past three years.' (See annexure s4 on page 33 of the Book of Pleadings herein).

[7] Based on the above information or evidence, the applicant has instituted an action in this court under case number 2140/2012 against the 1st and 2nd respondents in an attempt to recover the monies fraudulently taken from it

by the first respondent. In the meanwhile and pending finalization of those action proceedings, the applicant has applied for this interlocutory interdict, whose terms have been set out above.

[8] The legal requirements for an interlocutory interim interdict were stated and crystalised in *Setlogelo v Setlogelo, 1914 (AD) 221* and this is the law in this jurisdiction as well. These are:

(a) a prima facie right;

(b) a violation or well grounded apprehension that that right is about to be infringed

(c) that the applicant has no other satisfactory remedy and that applicant would suffer irreparable harm if the application is not granted; and that

(d) the balance of convenience favours the grant of the interdict.

See also *A & R Estate Agents (Pty) Ltd v Ngcamphalala, Tycoon & Others, 2000 – 2005 (l) SLR 6, Sihlongonyane Alpheus v Tsabedze Zanele & Others, 2000-2005 (1) SLR 144, Swazi Spa Holdings Ltd v Standard Bank Swaziland Ltd & 4 others, case 1154/2012 unreported judgment delivered on 3rd August, 2012, and Standard Bank Swaziland Ltd v Busisiwe Motsa N.O. & 11 others, case 2401/2011, judgment handed down on 23rd April 2012* and the cases therein cited.

[9] The nature of the interlocutory interdict applied for herein has over the years, been described or called by various names such as Mareva interdict or injunction, preservation or protection order, freezing order or as an anti-dissipation order or interdict and it is usually filed and granted ex parte. This is understandable regard being had to the nature and object of this relief. The object is to restrain and or interdict a respondent from disposing of or dissipating or alienating his or her own property pending an action already instituted or yet to be instituted by the applicant for the payment or recovery of certain money or property owed to the applicant by the respondent. The object is to prevent a respondent from disposing of his assets or property in order to defeat and to render an impending judgment in favour of the applicant hollow or worthless. Because it is interim and interlocutory, it predates a substantive judgement in favour of the applicant against the party who has been restrained or interdicted from dealing with his property. This poses an intrusion or restriction on an owner's right to the use and enjoyment of his property.

[10] Bearing in mind the above restrictions or difficulties, Beck J in *Republic Motors (PVT) Ltd v Lytton Road Service Station (PVT) Ltd 1971 (2) SA 516 (R) at 518* was prompted to say:

> 'The procedure of approaching the court ex parte for relief that affects the rights of other persons is one which, in my opinion, is somewhat too lightly employed.

> Although the relief that is sought when this procedure is resorted to is only temporary in nature, it necessarily invades, for the time being, the freedom of action of a person or persons who have not been heard and it is, to that extent, a negation of the fundamental precept of audi alteram partem. It is accordingly a procedure that should be sparingly employed and carefully disciplined by the existence of factors of such urgency or of well-grounded apprehension of perverse conduct on the part of a respondent who is informed before hand that resort will be had to the assistance of the court, that the course of justice stands in danger of frustration unless temporary curial intervention can be unilaterally obtained.'

[11] The available evidence seems to suggest that, under English law, before 1975, the law was that established in *Lister & Co v Stubbs (1890) 45 Ch.D.1 (CA)* that a debtor could not be interdicted from using or enjoying his assets at the suit of a creditor in the absence of the creditor having a judgment in his favour against the creditor. In that case Cotton L.J. at 13 said:

> 'I know of no case where because it was highly probable that if the action were brought to a hearing the plaintiff could establish that a debt was due to him from the defendant, the defendant has been ordered to give security until that has been established by the judgment or decree'.

This position came to an end in 1975. By a stroke of judicial activism by Lord Denning MR in Nippon *YUSEN KAISHA v KARAGEORGIS [1975] 3 ALL E.R. 282 (C.A.).* The plaintiff, a firm of Japanese shipowners had leased some of their ships to the defendant. The defendant who was in arrears with his payments had money in a London Bank. He disappeared

and could not be located. The plaintiff filed an application for an interim interdict restraining the defendant from dealing or alienating the said funds in the London Bank. Following the decision in *Stubbs (supra),* the application was dismissed. However, this decision was reversed on appeal. Lord Denning MR at 283 held that:

> 'We are told that an injuction of this kind has never been done before. It has never been the practice of the English courts to seize assets of a defendant in advance of judgment, or to restrain the disposal of them. …It seems to me that the time has come when we should revise our practice. There is no reason why the High Court or this court should not make an order such as is asked for here. It is warranted by s45 of the Supreme Court of Judicature (Consolidation) Act 1925 which says the High Court may grant a mandamus or injunction or appoint receiver by an interlocutory order in all cases in which it appears to the court to be just or convenient so to do. It seems that this is just such a case. There is a strong prima-facie case that the hire is owing and unpaid. If an injunction is not granted, these moneys may be removed out of the jurisdiction and the ship owners will have the greatest difficulty in recovering anything. Two days ago we granted an injunction exparte and we should continue it."

[12] The *Nippon* case (supra) was soon followed by MAREVA COMPANIA NAVEIRA S.A. v INTERNATION BULKCARRIERS LTD [1980] 1 ALL ER 213 (C.A.), from which the injunction derives its name, also decided by Lord Denning MR. The facts were almost similar to *Nippon (supra)*. The plaintiff had chartered its ship to the defendant who in turn chartered it to the President of India who paid his dues to the defendant's London Bank account. The Defendant failed to pay the plaintiff's charges. The plaintiff

filed an ex parte application interdicting and restraining the defendant from removing or disposing of the money in the said bank account pending an action. The application was successful Lord Denning MR saying:

> ' If it appears that the debt is due and owing, and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment, the court has jurisdiction in a proper cause to grant an interlocutory judgment so as to prevent him disposing of those assets. It seems to me that this is a proper case for the exercise of this jurisdiction.'

See also the judgment by Harms ADP in CARMEL TRADING COMPANY LIMITED v THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE & 3 OTHERS, 2008 (2) SCA 433.

[13] In Metlika Trading Ltd v Commissioner, SA Revenue Services, 2005 (3) SA 1 (SCA) Streicher JA said:

> 'An interdict at the instance of a creditor preventing his debtor, pending an action instituted or to be instituted by the creditor, from getting rid of his assets to defeat his creditors has for many years been recognized in our law. It is similar to the Mareva injunction in English law.'

[14] Again, there is evidence that the Mareva injunction underwent a metamorphosis of its own. For example, it was initially viewed as only applicable against peregrini defendants but this was later changed by the courts. In Prince Abdul Rahman Bin Turlei Al Sudairy v Abu Taha [1980] 3 ALL E.R. 409 at 412 again Lord Denning MR stated:

> 'So I would hold that a Mareva injunction can be granted against a man even though he is based in this country if the circumstances are such that there is a danger of his absconding, or a danger of the assets being removed out of the jurisdiction or disposed of within the jurisdiction, or otherwise dealt with so that there is a danger that the plaintiff, if he gets judgment, will not be able to get it satisfied.'

In RASU MARITIMA S.A. v PERUSAHAN MINYAK DAN GAS BUMI NEGARA [1977] 3 ALL E.R. 324 (A), the court held that the injunction was applicable to all and any assets of the defendant and not just money and that all the applicant had to show was that he had a strong or good arguable case, even if it was not so strong as to justify a grant for summary judgment. The court held that:

> *'It must be noted too that in those two cases the assets consisted of money in the hands of banks; whereas here it consists of goods lying at a dock in Liverpool. Money at banks is a very good thing to attach. It can be identified precisely and attached as a rule without doing much damage to the defendant. But I would not limit the new procedure to money. Money can easily be changed into pictures, or diamonds, or stocks and shares or other things. The procedure should apply to goods also. Care should be taken before an injunction is granted over assets which will bring the defendant's trade or business to a standstill or will inflict on him great loss, for that may be fully compensated for by the undertaking in damages.'*

[15] I have given the above brief history of this injunction or interdict because of the nature of the defence or objections raised by the first and second respondents herein. Both have argued that the applicant has failed to demonstrate that the properties or assets that have been sought to be

encumbered or attached are in any way connected with the alleged fraud by the first respondent. This, in my judgment is not a requirement for the grant of the interdict. The interdict may be granted on any of the assets of the defendant that are within the jurisdiction of the court.

[16] The other consideration of course is that the applicant must demonstrate that if the interdict is not granted there is a real risk that there would be no property owned by the defendant to satisfy the judgment – thus the judgment would be hollow or worthless. This is linked to or tied with the requirement, I think, that the applicant must establish that if the interdict is not granted, he would suffer irreparable harm. As stated by my Learned brother and colleague Hlophe J in *Swazi Spa supra* (unreported) at paragraph 27;

> 'It is in law not essential that the applicant presents proof that the respondent (intended defendant) intends to frustrate an anticipated judgment by dissipating his assets, but it is enough if the conduct of the respondent is likely to have that effect. In this regard, **Herbstein and Van Winsen**, in their book **The Civil Practice of the Supreme Court of South Africa**, said the following at page 1088;
>
> > "It is not essential to establish an intention on the part of the respondent to frustrate an anticipated judgment against himself if the conduct of the respondent is likely to have that effect."

[17] I accept that a mere allegation by the applicant that if the interdict is not granted he stands a real risk that he would have a worthless judgment

because the defendant would have either spirited his assets out of the jurisdiction of the court or dissipated them is not enough. The applicant must go further and state his reason or reasons for holding this belief. The past conduct of the respondent in the whole transaction certainly comes to the fore in this enquiry. The first respondent's bank accounts proves her spending and dissipation of the funds in her accounts. If, for instance, as in the present case, the respondent is shown to have been spending money or utilizing or depleting his assets rapidly, this is a material factor to take into account. In *Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH & Co (1984) 1 ALL E.R. 398* the court at 406, per Mustill J, held that:

> 'It is not enough for the plaintiff to assert that the assets will be dissipated. He must demonstrate this by solid evidence …it may consist of direct evidence that the defendant has previously acted in a way which shows that his probity is not to be relied on. …Precisely what form the evidence may take will depend on the particular circumstances of the case. But the evidence must always be there. Mere proof that the company is incorporated abroad, accompanied by the allegation that there are no reachable assets in the United Kingdom apart from those which it is sort to enjoin, will not be enough.'

Evidence rather than proof is required. (Evidence is of course not proof but material in aid of proof). However, as stated above, the applicant's case need not be as strong as required in an application for summary judgment.

[18] In the present case, the applicant has alleged and *prima facie*, demonstrated that the first respondent is guilty of the crime of fraud. This fraud was perpetrated on the applicant. The first respondent confessed to Alex

Mngomezulu that she committed these fraudulent acts, whilst she was an employee of the applicant. She betrayed the trust that her employer had placed on her. Her probity is seriously dented and cannot be relied on. Admittedly, this is not evidence that she will dissipate their assets, in order to frustrate a judgment in favour of the applicant, but it is a factor to be taken into account in determining and ascertaining whether or not there is a real risk that she may do so if the interdict is not granted. Her use of the money in her bank accounts also shows this risk in my judgment.

[19] It is common cause that the first and 2nd respondents are Swazis and are married to each other in terms of civil rites and the marriage is in community of property. They do not own any immovable or fixed property registered in their name other than that situate on Swazi Nation Land in some unspecified area in the Manzini region. I shall assume for purposes of this judgment, that this property is situate at KaShali or Nhlambeni area where the first respondent states they live. Their proprietory rights over such land is that of use or occupation only. The land does not belong to them. It belongs to the King of Swaziland and the Nation at large.

[20] Because of the nature of their marriage, the first and second respondents are joint owners of their assets. Although the 2nd respondent has not been accused of having participated in the fraud that is the subject of the action

instituted by the applicant against them in case 2140/2012, the 2nd respondent clearly has, in law, at least a substantive interest in the joint property which is the subject of this application. It is not just a 50% interest as stated by them in their opposing papers. Again it is immaterial or irrelevant how the property of the joint estate was acquired.

[21] The first respondent has denied ever committing the fraudulent acts complained of in this application. The applicant's bank account statement, however, prima facie disproves her denial. Her contention that such bank statements are hearsay because no bank official has handed them into court has no merit at all. These statements belong to the applicant and the debits therein were allegedly electronically made by the first respondent and the corresponding credits confirmed in her own bank accounts.

[22] The attached assets herein comprise two motor vehicles owned by the 1st and 2nd Respondents plus a sum of about E80,000.00 being monies held in some of the local banks plus about E20,000.00 held by the third respondent. The motor vehicles in question have not been evaluated.

[23] The first and second respondents have both confirmed that they are unemployed and have no income or means of sustaining their lives other than the monies referred to above. These monies, together with the motor

vehicles attached herein, that is, the assets, are clearly insufficient to cover or satisfy the possible judgment or claim by the applicant in the impending action and any further depletion of these assets would prejudice the applicant's claim.

[24] For the foregoing reasons, the rule nisi granted by this court herein on 18th December, 2012 is hereby confirmed, save in so far as it relates to the attachment of motor vehicle registered ISD 225 BM. This motor vehicle has not been shown by the applicant to be owned by the first or second respondents herein.

[25] The costs of this application, including costs of Counsel, shall be the costs in the action.

MAMBA J

For the Applicant : Adv. P. Flynn

For 1st & 2nd Respondents : Mr. M. Ndlovu