IN THE HIGH COURT OF ESWATINI

JUDGMENT

In the ex – parte matter between: Case No. 1865/2019

XOLILE FAKUDZE	**1st Applicant**
DERRICK NKONDE	**2nd Applicant**
NOMCEBO DLAMINI	**3rd Applicant**
SABELO DLAMIMI	**4th Applicant**
DLAMINI THABO ANDILE	**5th Applicant / Intervening**
GADLELA JABU THULILE	**6th Applicant / Intervening**
SHABANGU CYNTHIA ANDREA	**7th Applicant / Intervening**
NXUMALO SIFISO JUSTICE	**8th Applicant / Intervening**
MBINGO NOMPUMELELO OCTAVIA	**9th Applicant / Intervening**
MAMBA JABULILE BONGIWE	**10th Applicant / Intervening**
KHOZA THEMBI THERESA	**11th Applicant / Intervening**
FAITH XOLILE NTSHANGASE	**12th Applicant / Intervening**
THWALA GABSILE MARY	**13th Applicant / Intervening**
NKAMBULE HENDRICK LUKE	**14th Applicant / Intervening**
DLAMINI TIMOTHY LUCKY	**15th Applicant / Intervening**
DLAMINI DAVID SIHLE	**16th Applicant / Intervening**
MAMBA GILBERT ZIBIZEZWE	**17th Applicant / Intervening**

And

SUKKIE ONTIME INVESTMENTS	**1st Respondent**
SWAZILAND DEVELOPMENT & SAVINGS BANK (MBABANE BRANCH)	**2nd Respondent**
FIRST NATIONAL BANK SWAZILAND (MBABANE BRANCH)	**3rd Respondent**

Neutral citation	**:**	***Xolile Fakudze & 12 others v Sukke Ontime Investment & 2 others (1865/2019) [2020] SZHC 60 (3rd April, 2020)***
Coram	**:**	**M. Dlamini J**
Heard	**:**	**13th February, 2020**
Delivered	**:**	**3rd April, 2020**

Summary: The applicants and the intervening parties (applicants) have asserted that they have made an investment in 1st respondent who has since August 2019, reneged in its obligation. The 1st respondent has raised a *point in limine,* in that applicants have failed to plead facts establishing that it was dissipating their assets.

The Parties

[1] The applicants are all individuals suing in their capacities as such. They are all residents of this country.

[2] The 1st respondent is a company duly incorporated and registered in terms of the company laws of the Kingdom. Its principal place of business is situate at Sigwaca House Office No. 9, Sheffield Road, Industrial Site, Mbabane region of Hhohho.

[3] The second and third respondents are commercial banks duly established in terms of the banking laws of the country and used by 1st respondent. They are the custodian of part of *merx* sought to be restrained.

The Applicants' case

[4] The applicants assert that in response to an advertisement in both the local dailies and the radio, they all proceeded to the offices of the 1st respondent. They were advised to deposit each a specific though varying sums in either 2nd or 3rd respondents. The sums deposited were said to be a purchase price for copier machines. 1st respondent undertook to lease out the copier machines on behalf of the applicants. 1st respondent undertook to service and manage them. In return the applicants would get monthly rentals resonate to the value of their copier machines for a specific duration.

[5] The applicants' terms of contract were that they were to purchase various sizes of copier machines. The applicants were to deposit the purchase price into 1st respondent's account held by 2nd and 3rd respondents who would in turn purchase the copier machines on their behalf. The 1st respondent would then lease the copier for monthly rentals due to the applicants. Part of their transaction in terms of monies deposited for purchases and monthly rentals with the duration of the leases can be summarized in a table form as follows:

	Applicant	Value of Copier E	Duration of lease in months	Returns per month E
1st		14 375.00	48	1 250.00
2nd		14 370.00	48	1 250.00
3rd		28 750.00	48	1 250.00
4th		188 594.00	48	4 800.00
5th		14 375.00 + 7 935.00 **22 231.00**	48	1 900.00
6th		7 935.00 + 4 485.00 **12 420.00**	48	1 100.00
7th		14 375.00 X 3 **43 125.00**	48	3 700.00 x 3 **11 100.00**
8th		28 500.00 x 2 **57 000.00**	60	3 300.00 x 2 **6 600.00**
9th		14 375.00 + 14 375.00 **28 750.00**	48	36 685.00
10th		12 500.00 X 6 **75 000.00**	48	86 250.00
11th		3 900.00 x 3 6 900.00 x 1 12 500.00 x 1 **31 100.00**	**48**	64 515.00
12th		24 225.00 x 2 48 450.00 12 300.00 x 4 49 200.00 **97 650.00**	48	114 500.00
13th		12 500.00 x 4 10 000.00 x 2 **70 000.00**	48	77 500.00
14th		12 500.00 x 5 6 900.00	48	78 810.00

[6] They all deposed that in the month of September, 2019, the 1st respondent failed to pay the agreed monthly rentals. When confronted 1st respondent

advised them that it was experiencing some "*glitches*" in their system. A similar version was repeated in the following month of October, 2019. The applicants decided to resort to litigation as they did not buy the explanation.

1st Respondent

[7] In answer the 1st respondent clarified as follows as its contractual terms:

> *"Save to state that the 1st respondent presented business opportunities for individuals interested in purchasing machines, subject to payment of monthly rentals, the contents therein are not in issue"*[1]

"4.

4.1 I state that the 1st Respondent sold copier machines to the Applicant, and ownership passed to the Applicant.

4.2 The parties concluded a lease agreement, which was the business opportunity offered by the 1st Respondent; subject to payment of monthly rentals.

4.3 Leasing out the copier machines was not a pre-condition for sale of the copier machines."

[8] The 1st respondent was emphatical in its answer that there was a lease agreement existing between the applicants and it as it deposed to this effect

[1] Para 7.1-73 page 99 – 100 of book of Pleadings

several times in its answering affidavit. Admitting failure to pay monthly rentals on the due date, it expentiated:

"9.

Save to deny that the Applicant was advised that there were glitches in the system, the contents therein are admitted.

9.1 The delay in payment came as a result of preliminary audit report which indicated some fraudulent activities committed by some employees of 1st Respondent with certain lessors.

9.2 The preliminary report called for a full blown audit exercise resulting in the 1st Respondent falling into arrears for the months of September and October 2019.

9.3 Prior to the discovery of the said fraudulent activities, the 1st Respondent paid the Applicant timeously all rentals due to her." [2]

[9] It then proceeded to state:

"10.

AD PARAGRAPH 23 – 25

[2] Page 102 para 9 of book of pleadings

Save to deny that 1st Respondent's Offices were stormed at by investors and that the 1st Respondent does not intend to pay the arrear rentals due to Applicant, the contents therein are admitted." [3]

[10] On the hearing date however 1st respondent did not pursue its undertaking to pay the arear rentals. Instead 1st respondent argued its *point in limine* raised in the body of its answering affidavit as follows;

"11.

The contents therein are denied and Applicant is put to strict proof thereof.

11.1 There is no evidence presented by the Applicant that the 1st Respondent is dissipating its assets or depleting its funds.

11.2 Funds held by the 1st Respondent are, in the interim, frozen as per the order of Her Ladyship Mabuza PJ under case number 1814/19.

11.3 The 1st Respondent is a solvent business with adequate assets to pay the Applicant's arrear rentals for the months of September 2019 and October 2019.

11.4 The matter is not urgent in that, in the very least, as at the 11th November 2019 that the 1st Respondent's assets had been frozen. I am advised and verily believe that the Applicant

[3] Page 103 paragraph 10 of book of pleadings

ought to have applied for joinder as an applicant under case number 1814/19. [4]

"12.

The contents therein are denied and Applicant is put to strict proof thereof.

12.1 The Applicant was never an investor but instead a Lessor to 1st Respondent. His right is limited to arrear rentals of E5000.00 (five thousand Emalangeni and the balance of convenience does not favour the grant of the relief sought.

12.2 There is no irreparable harm to be suffered by the Applicant since there is no evidence that the 1st Respondent is dissipating its assets.

12.3 The Applicant has an alternative remedy, which includes a claim for damages for any alleged breach of the lease agreement."

"13.

The contents therein are denied and Applicant is put to strict proof thereof.

[4] Page 103 para 11 and 12 and page 104 – 105 para 13

13.1 The Applicant cannot be entitled to costs when it has sought for an order that it never prayed for in its application. In this respect the Applicant was granted an interim order to the effect that any vehicle inscribed SUKKE TRANS be attached yet there is no prayer for such relief.

13.2 The 1st Respondent, as a result of the aforementioned court order, is susceptible to legal suits in that such inscribed vehicles do not necessarily belong 1st Respondent."

Adjudication

[11] There are two special spicies of interim interdict often flooding our courts. These are Auton Pillar orders and the Moreva injunction interdict *securitatem debiti*. They both have their origins from the English jurisprudence. They share a similar characteristic in that besides being interim interdicts in nature they are both anti-dissipatory orders.

Issue

[12] The question for determination is crisp. It is whether applicants have established the requirement of an anti-dissipatory order as well captured by 1st respondent.

Legal Principles

[13] The requirement of an interdict *pendete lite* interim are well settled:

(a) a *prima facie* right (a right which, though *prima facie* established is open to some doubt);

(b) a well-grounded apprehension of irreparable injury;

(c) absence of ordinary remedy "as per **Setlogelo v Setlogelo 1914 AD 221 at 227;**

(d) balance of convenience.

[14] In our jurisdiction we often refer to interdict *securitatem debit* or anti-dissipatory interdicts. **Harms** discusses two species of interdicts. These are **Anton Pillar** and **Mureva** interdicts. Following that their origins is English law, concurring with **Stegmann J.** *a quo***, Grosskopf JA**[5] criticised the conceptual use of the terminology associated with these interdicts. He clarified as follows in this regard:

> *"The former (*interdict *securitatem debiti*) *expression may suggest that the purpose of the interdict is to provide security for the applicant's claim. This is not so. The interdict prevents the respondent from dealing freely with his assets but grants the applicant no preferential rights over those assets. And 'anti-dissipation' suffers from the defect that in most cases and, certainly in the present case, the interdict is not sought to prevent the respondent* ***from dissipating his assets, but rather from preserving them*** *so well that the applicant cannot get his hands on them." (in brackets, my own)*

[5] **Knox D'arcy Ltd and Others v Jamieson and Others 1996 (4) SA 348** at 372

[15] That as it may, the learned Judge of Appeal immediately pointed out:

> *"Having criticized the names used for the interdict I find myself unfortunately unable to suggest a better one. I console myself with the thought that our law has recognized this type of interdicts for many years without giving it any specific name."* [6]

[16] In other words, although critical of our courts to the English adaptation of these interdicts, the court recognized that they are part of our law**. Harms** fortified this position by pointing out that it is too late to object to the extension. For this reason I must look at their distinct characteristics lets they (as often seen) be used inter-changeably, a legal misnormer.

Auton Pillar and Mureva interdicts / orders - Similarities

[17] They are both anti-dissipatery interlocutory applications meant to preserve property of the respondent. The applicant therefore has no right or claim over the property as it vests in the respondent. The applicant seeks an order restraining the respondent from alienating or spiriting it away. These applications are further lodged in anticipation of either already instituted or future independent action. It is for this reason that an order under these interdict is held to be final in nature or definite of the rights of the parties and therefore appealable.

[18] This however does not alter the position of the law that it is interlocutory as it is granted in anticipation of a pending or a future immediate action.

[6] *supra*

However in as much as they share a number of common characteristics, these interdicts are distinct in purpose.

Distinction

Anton Pillar

[19] The **Anton Pillar** orders are granted where the litigant seeks to preserve property in the hands of the respondent for purposes of presenting same as evidence in future litigation. It is for that reason that initially cases of preservation of material evidence were predominately concerned with patent rights. So if for instance the respondent is alleged to be in possession of a counterfeit visual or audio cassette, or film the applicant would approach the court for a preservation order in order to use such material as proof in a later claim for damages.

[20] Over the years the orders have extended to other spheres of law. They extend to any material in the hands of the respondent which may provide as evidence for the applicant's action proceedings, including documentary evidence. The applicant may seek for a search and seizure warrants in the same application. A third party may be appointed to preserve the property or material pending litigation of the main claim.

Mureva

[21] On the other hand, a **Mureva** order is one obtained at the instance of a creditor in order to preserve the debtor's property for purposes of execution of its future patrimony judgement against the judgement debt. The view

that orders or judgements of courts must be given effect or not rendered nugatory is reinforced partly by the **Mureva** interdict.

[22] **McEwan J**[7] referred to **Hopley J**[8] observed as follows:

> *"It is said if one were to interdict a man like respondent in such circumstances from parting with some of his property so as to satisfy a judgement, one would be revolutionising the practice of this Court. The practice of this Court is to do justice between people according to the circumstances that may arise. It has, of course, long been the practice of this Court that if the respondent, although an incola, were in fuga, the Court would in such circumstances restrain him from parting with certain property pending the result of an action; and that doctrine has been extended a little further,* ***where the respondent is a prodigal wasting his money or is purposely making away with funds although remaining an incola of the country, so that eventually when his creditor gets the judgement it may be a barren one; and, to use a graphic phrase in one of our old law cases, when he went there with his writ of execution, such creditor would find he was fishing behind the net.' It is to protect a bona fide plaintiff against a defeat of justice in such a case that such orders are given.*** *The cases cited such as*
>
> ***David v Reinhard, 8 E.D.C. 39; Robinson, Miller and Co. v Lennox and Another, 18 C.T.R. 402; Fredericks v. Gibson, C.T.R. 445****, all have their distinguishing features,* ***but they all proceed upon the wish of the Court that the plaintiff should not have an injustice done to him by reason of leaving his debtor possessed of funds***

[7] Bricktec (Pty) Ltd v Pantland 1977 (2) SA 489 (T) at 493 – G
[8] Mcitiki and Another v Maweni 1913 CPD 684 at 686 – 687

sufficient to satisfy the claim, when circumstances show that such debtor is wasting or getting rid of such funds to defeat his creditors, or is likely to do so." (my emphasis)

Case *in casu*

[23] The present 1st respondent has submitted that the applicants have dismally failed to show that the respondent is dissipating or disposing off property with the intention of rendering nugatory a future judgement in their favour. No doubt the applicants interdict falls under the **Mureva.** Writing on the elements of this interdict **McEwan J**[9] stated:

> "*If principles applicable to the present case are to be extracted from those cases, they would appear to me to be the following:*
>
> *(1)* ***If the applicant can show that respondent intends to dispose of his property in a way that will defeat any ultimate right that the applicant may have to levy execution upon it,*** *the applicant may be able to obtain an interim interdict restraining the respondent from disposing of the property.*
>
> *(2)* *It is by no means clear that the applicants entitled to such an interdict if he can show no more than a* ***fear that the respondent may so dispose*** ***of his property."***

What should applicant establish?

[24] On this sub-topic, **Grosskopf** eloquently writes:

[9] At page 493 E – F

"The question which arises from this approach is whether applicant needs show particularly state of mind on the part of the respondent, i.e. that he is getting rid of the funds, or is likely to do so, with the intention of defeating the claim of creditors."

[25] The learned Judge answered:

Having regard to the purpose of this type of interdict, the answer must be, I consider yes, except possibly in exceptional cases. As I have said, the effect of the interdict is to prevent the respondent from freely dealing with his own property to which the applicant lays no claim. Justice may require this restriction in cases where the respondent is shown to be acting mala fide with the intent of preventing execution in respect of the applicant's claim.[10]

[26] Turning to the averments in *casu*, the applicants have pointed out that each was not paid in the third month of the contract. Each demanded payment and was advised payment would be forthcoming. However, a subsequent month lapsed without any payment. None of the applicants in the case at hand averred that specifically that the respondent was alienating or disposing of its property with the intention of defeating their subsequent action claim.

[27] However, the applicants have pointed out to peculiar circumstances which precipitated this **Mureva** application. They each state that it is upon reading a clip in one of the local daily newspapers to the effect that creditors flocked to the 1st respondent's offices and each demanded

[10] Page 372 of E M Grosskopf JA Knox D'arcy Ltd and others v Jamieson and others 1996 (4) SA 348

payment under similar contracts. These averments alone, in my view, are sufficient to raise the reasonable apprehension that the respondent funds might be dissipated at the instance of those creditors who stormed the offices of 1st respondent such that if the present applicants do not interdict the 1st respondent's funds and its property any judgement sounding in money in their favour might be of no effect.

[28] The 1st respondent has not disputed such allegations. In brief, I find that in as much as there are no direct averments that the respondent is or might dissipate its properties, the applicants have on a balance of probability as per the standard of proof, established circumstances which show that there is reasonable likelihood that the 1st respondent might dissipate its assets.

[29] The second point raised on behalf of the 1st respondent is that the applicants have an alternative remedy under a claim for damages. A similar point was raised in **Knox**[11] case. Their Lordship disposed of the submission on a claim for damages as an alternative remedy as follows:

> *"It is often said that an interdict will not be granted if there is another satisfactory remedy available to the applicant. In that context a claim for damages is often contrasted with a claim for an interdict. The question is asked: should the respondent be interdicted from committing the unlawful conduct complained of, or should he be permitted to continue with such conduct, leaving the applicant to recover any damages he may suffer?*

[11] supra

> *In the present circumstances there is no question of a claim for damages being an alternative to an interdict. The only claim which the petitioners have is one for damages. There is no suggestion that it could be replaced by a claim for an interdict.* ***The purpose of the interdict is not to be a substitute for the claim for damages but to reinforce it – to render it more effective."***

[30] The above reasoning cannot be faulted in view of the purpose of an interdict. As already explained, a **Mureva** order means that should the creditor succeed in its claim for instance damages, it would enforce such judgement against the property so preserved or attached under the **Mureva** interdict. The argument therefore that a claim for damages could be substitute for the **Mureva** interdict application is without merit in the circumstances.

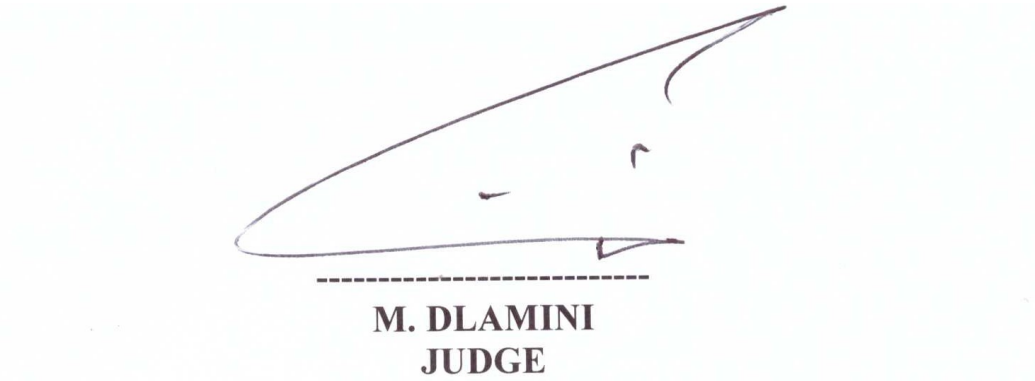
[31] Further taking into consideration the circumstances of the case and I must point out that I am constrained to say whether the business arrangement of 1st respondent is one falling under a pyramid scheme or not especially at this stage of the proceedings, I do however conclude the balance of convenience favours the grant of the **Mureva** interdict. I say this because from the pleadings, it is evident that most of the applicants were paid for the first two or three months and in subsequently months a host of creditors were not paid. It is for this reason that the applicants herein were awaken by a flood of other creditors who are not applicants herein and who stormed 1st respondent offices.

[32] In the final analysis, I must find for the applicants. I therefore enter the following orders:

32.1 Applicant's application succeeds;

32.2 The *rule nisi* issued on 14th November 2019 is hereby confirmed.

32.3 1st respondent is ordered to pay costs of suit.



M. DLAMINI
JUDGE

For Applicant : M.M. Dlamini of Robinson Betram
V. Thomo of Thomo and Maziya Attorneys

For Respondent : T. Simelane for Simelane Shongwe Attorneys