IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE **CASE NO.2334/2023**

In the matter between:

PJM 125 INVESTMENTS (PTY) LIMITED **Applicant**

And

MWELASE MINING ESWATINI (PTY) LIMITED **1st Respondent**

THE COMMISSIONER OF POLICE **2nd Respondent**

THE ATTORNEY GENERAL **3rd Respondent**

JUDGEMENT

Neutral citation: *PJM 125 Investments (pty) Limited vs Mwelase Mining Eswatini (pty) Limited and Two others (2334/2023) SZHC 327(20th November 2023).*

Coram: *S.M. MASUKU J*

Date of heard: *27th October 2023*

Date delivered: *20th November 2023*

Flynote: *Common law remedy – anti – dissipation interdict- various threshold requirements an applicant for an anti-dissipation interdict has to meet. First, the standard requirements for an interim interdict – second, threshold is for the applicant to convince the court that: the respondent is wasting or secreting assets, or there exist reasonable apprehension that the respondent is about to embark on such conduct, save in exceptional circumstances, with the intention on the part of the respondent to defeat the applicant's claim.*

Summary: *The Applicant ('PJM') issued summons against the Respondent ('Mwelase') for damages for breach of contract. Pending the outcome of its action, it brought this application for interim interdict preventing Mwelase from secreting iron ore outside Eswatini in the intervening period prior to the conclusion of the damages claim, in order to avoid the efficiency of a final order on the damages claim.*

Discussed *Requirements of anti-dissipation interdicts. Approach in the analysis of facts in anti-dissipation interdicts.*

Held: *PJM has proved, as it alleged that there is a real risk that Mwelase has been attempting to move the iron ore or that it is likely to take all steps in the intervening period before the damages claim is concluded, to diminish its assets and leave PJM with a hollow judgement*

Held further: *PJM has met the requirements for an anti-dissipation interdict as required by the law and the interim order or rule nisi is confirmed with costs at ordinary scale.*

Introduction

[1] On the 5 October 2023, the Applicant ('PJM") launched an urgent, *ex parte* application in which it sought an anti-dissipation order against the first Respondent ("Mwelase"). The orders, PJM sought were in the form of an interdict restraining Mwelane from loading, removing or in any other way dissipating any iron ore, slurry, stockpile and/or discard from Ngwenya iron ore mine ("the mine") pending finalization of PJM's action against Mwelase under High Court case No. 2247/2023.

[2] Mwelase and its contractors, representatives or partners were to be restrained from enlisting the help of another person or company to load, remove or in any way dissipate any iron or, slurry, stockpile and/or discard from the mine pending the finalization of its action.

[3] On the first day of the hearing, the application was enrolled as one of urgency. The court however directed PJM to serve the notice of motion soon after the enrolment of the matter and for it to return on the 6th October 2023 (the following day). PJM had prayed for the orders to operate in the interim with immediate effect.

[4] Although, PJM, in its certificate of urgency had submitted that there was a possibility that Mwelase was preparing to move the iron ore in haste from the mine outside of the Kingdom of Eswatini, it became apparent to the court that it was not possible for Mwelase to perform the task in such haste and undermine PJM's right to be heard even under onerous and oppressive orders hence the direction that Mwelase ought to be served with the application.

[5] PJM's case initially rested largely on the ordinary interdict remedy when this is an interdict *sui generis*. It came on *ex-parte* basis, in *camera* and in haste. The court however remained persuaded by the comments endorsed by Stagmann J. in Knox D'Arcy Ltd and others vs Jamieson and Others 1996 (4)

SA 348 at p352 that 'the making of an order affecting an intended defendant's rights, *ex parte*, in haste and in camera, was grossly undesirable and contrary to fundamental principles of justice, and could lead to serious abuses and oppressive orders which could prejudice the intended defendant in unintended ways'. The procedure adopted in that case was also more objectionable when the applicant's case rested largely upon untested hearsay evidence.

[6] The appeal court in the Knox D'Arcy Ltd case 1996 (4) SA 348 (A) per Grosskop F JA held that, 'while it was not correct to say that an application of this nature should never he heard *in camera* and without notice to the respondent, an *ex parte* application should he heard in camera only in the exceptional instances where, clearly justice could not be served otherwise than by depriving a respondent of the right to be heard. The powers of the court to issue an order should be exercised with due caution with practical safeguards abuse, and keeping the oppressiveness of the order and its interference with the rights and obligations of third parties to a minimum. The directive to serve Mwelase was issued having in mind third party business partners and other creditors.

[7] On the 6th October 2023, the parties were heard on the interim relief, even though Mwelase had not filed its answering affidavit. An interim order restraining Mwelase from loading and removing the iron ore was granted in the form of a *rule nisi* returnable on the 25th October 2023 together with administrative directives for filing all the necessary papers for the matter to be heard on the return date.

[8] On the return date Mwelase had filed a second further set of affidavit without leave of the court as envisaged by Rule 6 (13) of the High Court rules, to be on proper notice and served to the PJM. As it turned out the application and reasons justifying this move was contained within the further affidavit.

[9] High Court rule 6 (13) permits the court, in its discretion, to allow the filing of further affidavits. The court will exercise its discretion in permitting the filing of further affidavits against the backdrop of the fundamental consideration that a matter should be adjudicated upon all the facts relevant to the issues in dispute. See Dickson v South African General Electric Co. (Pty) Ltd.1973 (2) SA 620 (A) at 628F and thus flexibility is required. See further Homo Trading cc v JR 209 Investments (Pty) Ltd 2013 (D) SA 161 (SCA) at 164 EG.

[10] Mwelase took the court through all the considerations that a court should take into account in condoning or allowing the filing of further affidavits which I will not repeat in detail as it was interlocutory and will serve little purpose in the main judgement.

[11] It suffices for the court to state that for the general need for finality in judicial proceedings and the reasons given by Mwelase and responded to by PJM, it was imperative that the matter found expeditious resolution and also on the basis of all the facts so as to do justice between the parties.

[12] The circumstances were such that the interest of justice permitted further affidavits which sought on a very limited basis, to provide documentary proof, address new matter on reply and direct this court's attention to facts that arose after the delivery of Mwelase's answering affidavit which demonstrated that Mwelase was already being prejudice by the interim interdict the court had granted. This was not a case where Mwelase had been laxed in dealing with the matter on an urgent basis. PJM's replying affidavit had brought in new and further facts to deal with the dissipation order it sought.

[13] The matter returned on the 27th October 2023 for Mwelase to show cause why a final anti-dissipation interdict ought not to be granted. PJM's initial approach for this remedy gave the impression that it had launched the application for an interdict as we know it to secure the iron ore as its security for the action it had filed in this court. For the parties and the court to be on the same page, it required the court to re-affirm that we are here dealing with distinctive interdict in the form of anti-dissipation interdict. I propose from the onset to set out the nature and form of this remedy.

Anti – Dissipation Interdicts

[14] In 1996, the South African Appeal Court in Knox D'Arcy (pty) Ltd and others v Jamieson and others 1996 (4) SA 348 (A) at pp.372 to 373 (other judgements of the High Court are Knox D'Arcy (pty) ltd and others v Jamieson 1994 (3) SA 700(W)and 1995 (2) SA 579 (W) reaffirmed the existence in South African Law, of a distinctive interdict which provided a remedy where an applicant has shown on the established basis for an interim interdict: (a) a claim against a respondent; and (b) that the respondent is

concealing or dissipating assets with the intent of frustrating the claim. The court in that case embarked on a brief comparison of a similar remedy in England, namely a '*Mareva Injuction* 'from the English case of Mareva Companias Naviera SA v International Bulk carried [1980] 1 All ER 213, coupled with a warning that appellation might suggest that the English principles are automatically applicable. The court reluctantly accepted the description of this remedy as an 'anti-dissipation' interdict.(see page 372 – AC of that judgement also cited in the case of Bassani Mining (pty) Ltd v Sebosat (Pty) Ltd and others (835/2020)[2020]ZASCA 126 (29 September 2021).

[15] I have come to learn of a number of judgements in our jurisdiction that have accepted and appeased this sort of remedy. See for example First National Bank Swaziland Limited v Hlatshwayo (1965 of 2005) [2005]SZHC 63 (17 June 2005), the case of Swazi Spa Holdings Ltd v Standard Bank Ltd and 4 others(1154/12) SZHC 185 (3rd August 20120) and Xolile Fakudze and others v Sukkie Ontime Investments and others High Court case No. 1865/2019.

[16] The requirements that must be satisfied to obtain an anti-dissipation interdict are the same as for any other type of interdict. However, it has been held that this interdict is *sui genesis*. It is either available or it is not and no other remedy, such as a claim for damages can really take its place. (See Herbastian and van Winsen Civil Practice of the High Court and the Supreme Court of South Africa. In V11 **Anti- dissipation interdict (the so-called 'Mareva – Type injunctions or freezing injunctions').**

[17] 'In the absence of special features which dispose of the entire dispute between the parties at the so-called interlocutory stage, leaving no real subject matter in issue to be resolved later, anti-dissipation interdicts are interim both in form and in substance. The mere fact that the respondent has been irreversibly inconvenienced while the interdict is an operation and the resolution of the main dispute is pending will not in itself be a sufficient reason for the court either to refrain from making an interlocutory order or to treat interim relief as though it were final relief; irrevocable inconvenience is inherent in the temporary regulation of disputes by means of interim interdicts; See Herbastain and Van Winsen (supra).

[18] Bhoola A.J. in the matter of Bassani Morning (Pty) Ltd v Sebosat (Pty) Ltd.High Court of South Africa Gauteng Division JHB Case No. 191905/20

at paragraph 6 sets out the requirements for an anti-dissipation interdict by stating that *'The first of which, given the nature of the order sought, are the standard requirements of an interim interdict. These are trite and include: [a] a prima facie right albeit open to some doubt, [b] a well- grounded fear of irreparable harm to the Applicant if the interim relief is refused and the ultimate relief is granted eventually,[c] the absence of a satisfactory alternative remedy, and [d] the balance of convenience favors the grant of interim relief.'*

[19] It must be noted however that the authority of Knox D'Arcy ZASCA 58 (supra) criticized the view of the court *a quo* that part of the enquiry was whether the petitioners 'claim for damages would not be a satisfactory remedy in the absence of an interlocutory interdict'. The only claim which the petitioners had was the claim for damages and the purpose of the interdicts sought was not to substitute it with the claim for damages, but to reinforce it, to render the claim move effective (A3721/J and 373 B-C). Effectively the proposition in that case as re-affirmed in the Bassani Mining judgement and in Myflor Investments (Pty) Ltd v Everett NO and others 2001 (2) SA 1083 (c) AT 108 E-F is that the requirement of absence of a satisfactory alternative remedy (in an application for interim relief) does not apply in the case of an anti-dissipation relief.

[20] The dicta in Knox D 'Arcy Ltd 1996 (4) SA 348 (SCA) held that 'if the petitioners had shown a fairy strong case for the payment of damages and for the proposition that the respondents were secreting their assets with the intention of thwarting the damages claim, the balance of convenience might have played a role. On the facts of the case, however, the issue hardly seem to arise.' (at 378 J – 379 A/B). The court in that case did not find the need to look at other considerations in deciding on the interdict because it had concluded that the petitioners' claim for damages were on the papers, insubstantial and that they had not shown conduct on the part of the respondents which would warrant the grant of an interdict of the sort that it was dealing with. The court held '*in the circumstances I need hardly consider any other requirements for an interdict';*

[21] Having dealt with the first threshold requirement, the second requirement to be met in order to obtain an anti-dissipation order, where the applicant does not have any special claim to the respondent's property, is for the applicant to

convince the court that; 'the respondents are wasting or secreting assets, or there exists a reasonable apprehension that the respondents are about to embark on such conduct; and save in exceptional circumstances, it is demonstrated that there is an intention on the part of the respondents to defeat the applicant's claim:Knox D'Arcy Ltd and others(supra) and also Bassani Mining (Pty) Ltd (supra).

[22] Bhoola AJ in Bassani Mining (Pty Ltd (supra) examined the second threshold and stated that, 'In determining whether the requirements for an anti-dissipation interdict have been met the following important passage by Grosskopt JA in Knox D'Arcy Ltd is of particular importance:

"As to the nature of the interdict, this was dealt with by Stegman J in 1994 (3) S.S at 706 B707 B and in 1995 (2) at 591 A600F. The latter passage was largely devoted to showing that it is not necessary for an applicant to show that the Respondent has no bona fide defence to the action... What then must an Applicant show in this regard? Holplay J in Mcitiki and Another V Maweni 1913 CPD 684 at 687 states the effect of earlier cases as follows:

'... (T) 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 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. 'See also Brickatec (Pty) Ltd vs Payland 1977 (2) SA 489 (T) at 493 EG.

[23] Knox D'Arcy Ltd (supra) posed the following question:

"The question which arises from this approach is whether an applicant need show a particular 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 claims of creditors. Having regard to the purpose of this type of interdict, the answer must be, 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 (at para 372 F-H).(underlining added).

[24] The proposition in both Knox D A'rcy and Bassani Mining (Pty) Ltd, *a quo*, is that it might possibly be argued that the base requirements for an anti-

dissipation interdict may be relaxed in possible exceptional circumstances warding off the need to demonstrate the intention on the part of the respondent to defeat the applicant's claim. It was held to be speculative by the SCA which dismissed the appeal and added that the case in Knox D'Arcy in the court *a quo* had been speculating about circumstances of a possibility of relaxing the requirements. The exceptional circumstances had not been identified as it was necessary then for the court to do so. In considering the Bassani appeal, the SCA added that it had great difficulty in circumstances where the base requirements had not been met, imagining what such 'exceptional circumstances' might be.

Onus

[25] The onus rests on the applicant to establish the requirements for the grant of the interdict and the fact that the Applicant has previously obtained an interim anti-dissipation order *ex-parte* will confer no procedural advantage on him when the matter comes before court on the return day. Knox D'Arcy Ltd v Jameson 1995 (2) SA 579 (W) at 590 F-J.

[26] **The Silent Features of the Anti-Dissipation Relief.**

26.1 The nature of an anti- dissipation interdict is to prevent a respondent from concealing its assets, the applicant does not claim any proprietary or quasi-proprietary right in those assets, nor does it say that the respondent's conduct in respect of those assets is unlawfully, it merely alleges a general right to damages;

26.2 The anti-dissipation interdict prevents a respondent from dealing freely with its assets (but grants the applicant no preferential rights over those assets) with the objective of preventing a dissipation of those assets so that the applicant may satisfy any judgement obtained against the respondent using those assets;

26.3 Its purpose, is not to substitute the applicant's claim for the loss suffered, but to enforce it in the event of success in the pending action, so that he will not be left with a hollow judgement;

26.4 To succeed on an application for an anti-dissipation interdict one must show that absent exceptional circumstances, the respondent's intention is to dissipate his assets so as to frustrate the applicant's claim against him and render such judgement granted against him hollow;

26.5 The order is not competent in circumstances where the plaintiff merely established its claim against the defendant and that the defendant is likely, in the ordinary course of its business, to dissipate certain assets;

26.6 It does not operate as attachments (of assets). It merely retrain the owner from dealing with assets in certain ways;

26.7 In the absence of special features which dispose of the entire dispute between the parties at the so-called interlocutory stage, leaving no real subject matter in issue to be resolved late, anti- dissipation interdicts are interim both in form and in substance;

26.8 The onus rests on the applicant to establish the requirements for the grant of the interdict, and the fact that the applicant has previously obtained an interim anti-dissipation order *ex-parte* will confer no procedural advantage on him when the matter comes before the court on the return date;

26.9 The grant of an anti-dissipation interdict is discretionary and may be obtained *ex parte* and in camera, but since it is an invasive remedy that can course severe prejudice to the respondent and possibly to third parties, due care should be exercised by a court in operating such order.

26.10 The requirement of absence of a satisfactory alternative remedy (in an application for interim relief) does not apply in the case of an anti-dissipation order.

26.10 Although the balance of convenience is one of the requirements of interim interdicts, in anti-dissipation interdict, it would only arise where the applicant had shown a fairly strong case for payment of damages and for the proposition that the respondents were secreting their assets with the intention to thwarting of the damages claim.

(Summarised, although not exhaustive from Knox D'Acry Ltd (supra), Herbstein and Van Winsen and Barssani Mining (pty) Ltd.(supra).

Application of the law to the facts

[27] The brief facts that are of common cause to both parties are that in 2021 Mwelase was issued a Notarial Mining lease for Iron Ore Dumps by the Minerals Management Board of Eswatini, which amoungst other things, gave Mwelase the sole and exclusive right to process, extract and remove iron ore from the mine dumps/tailings and to sell iron ore recovered from the area. Mwelase had started prospecting on the mine, but had not yet started Mining. Mwelase's business plan was to first process all stock piles and to only commence mining operations thereafter.

[28] On the 31st July 2022, Mwelase issued a purchase order to PJM in which it was stated that the order was placed for 'material of dumps and associated management for a period of 12 months renewable- estimated'; on the 17th February 2022, PJM represented by Mr Pieter Muller and Mwelase represented by Mr Victor Ndhlovu concluded a mining agreement. There is no need to go through the terms of the agreement as this application is not for the determination of any of the terms.

[29] Suffices for purposes of the application to state that PJM and Mwelase commenced with the agreement on or about October 2022 and processed certain material in the stock piles as well as the netra-fine discard that was sent to the ceramic plant and processed further.

[30] As the material were processed, the product was stockpiled. Mwelase stated that it ran into logistical difficulties in securing post allocation in Mozambique which was required in order to ship the product overseas and to sell. The product for an overseas market. The terms of sale to such customers (one of whom had shown interest when the matter was serving in court) had not been finalized. Mr Ndhlovu was said to have remained in contact communication to resolved both the issue with the port allocations and also the terms of supply to customers.

[31] In the ordinary course of its business, Mwelase is required to sell its iron ore. At the time when the matter was serving before court Mwelase had no off-take agreement and was still looking to conclude one. Mwelase averred in its further affidavit that no iron ore removed from the mine/or was going to be removed from the mine unless and until Mwelase had secured a customer willing to buy the iron ore.

[32] Mwelase averred that its mining lease agreement allowed it to terminate the agreement at anytime, for convenience provided that it gave 60 days notice to PJM. The lease agreement also permitted Mwelase to halt all production at the time for a period of two years without its lease being revoked.

[33] On the 28th April 2023 Mwelase issued a termination notice in terms of clause 30.1 of its agreement. It alleged that placing the operation on hold was the best commercial decision in the circumstances. Prior thereto, Mwelase was incurring substantial costs including, *inter alia*, electricity costs, costs of project manager on site, monthly maintenance and of maintenance of personnel security costs which had all been eradicated by this move.

[34] On or about 25th September 2023 PJM issued a combined summons against Mwelase in this court under case 2247/2023 in respect of a damages claim in the amount of about E68 000-00(Sixty Eight thousand emalangeni) in respect of what it said are contractual damages due to it for unilateral termination of its working agreement between the parties. PJM further claimed damages for additional work performed under a separate agreement.

[35] Mwelase is strenuously defending the claim and averred that it was entitled to terminate the agreement for convenience in terms of the clauses of the agreement. The contention(it said) raised by PJM that Mwelase repudiated the agreement is inconsistent with the terms of the agreement and PJM's conduct at the time. I must mention that Mwelase has gone into detail to show this court that it has a *bona fide* defence against PJM's claim however as stated authoritatively above that it is not necessary for the anti-dissipation interdict for the respondent to show that it has a *bona fide* defence. That is for the court to decide in the action proceedings.

[36] Pending the resolution of its action in due course, PJM brought on urgent basis the anti-dissipation application. The basis of which are set out by its director Pieter Kaiman Muller who stated that;

36.1 On the 4th October 2023 he received a call from a trusted and well respected business associate, who informed him that Mwelase had ordered diesel in order to fill no less than 45 inter link trucks. He was informed further that Mwelase intended moving the iron ore at the Ngwenya iron mine ('iron ore mine') with haste as soon as the diesel was delivered for which specific purpose it was ordered for. He said

he was unable to divulge that identity of his informant as it may cause serious repercussion for him;

36.2 In July 2023 Mwelase's representative requested PJM to quote on loading processed iron ore at the iron ore mine into trucks and to also quote for the other stock piles at the Mpaka railways to be moved outside the borders of the country;

36.3 Mwelase had sold expensive equipment parts, such as bearing with a value of E250 000-00 (Two hundred and fifty thousand emalangeni) as scrap metal;

36.4 Mwelase had in the past three months completely ceased and dismantled its operation at the iron ore mine;

36.5 Mwelase's listed offices Mbabane were seemingly permanently closed;

36.6 Mwelase allegedly dismissed all its staff at the mine;

36.7 Mwelase's erstwhile mine manager Dirk Coetzee is now employed in a different mine in South Africa-Middleburg;

36.8 To the best of PJM's knowledge, Mwelase has no known assets within the court's jurisdiction except for the processed iron ore at the mine and scray metal with no value;

36.9 Mwelase is clearly intent on removing the iron ore from the Kingdom of Eswatini, after which it clearly has no intention to address the applicant's claim.

36.10 Mwelase is alleged to be facing financial difficulties and not a storage problem as it alleges.

[37] Mwelase *per contra* averred that;

37.1 At the time of the proceedings, the material and discard remain at the mine;

37.2 PJM's cause of action and its right requiring protection (that it will, in all likelihood, have a judgement against which it will be entitled to execute). Mwelase averred that this is irrelevant consideration insofar as the balancing of interests is concerned;

37.3 Mwelase does not dispute that it has not sold any iron ore. It presently cannot sell any iron ore as it is experiencing difficulties in securing a port allocation, it cannot presently sell the iron ore because it does not yet have an off-take agreement. In any event Mwelase stated that even if it had moved all or part of its iron ore off the mine (which is not the case) there is no objective and reasonable basis to believe that it did so for any reason other than conducting business as usual.

37.4 That Mwelase has ceased and dismantled its operations at the mine and its listed offices are seemingly permanently closed. Mwelase stated that the averment does not demonstrate the dissipation of assets in order to deficit a judgement. The mine is simple placed under care and maintenance.

37.5 That Mwelase has not disposed of any of its iron ore. Mwelase said the 'disposal' of ore and the necessary concomitant action of transporting the iron ore beyond the Kingdom of Eswatini is therefore part and parcel of Mwelase conducting its own business in the ordinary course. That being so PJM is required to show more than that Mwelase, by removing its ore is not merely conducting its 'business as usual' but deliberately taking steps to remove its ore to defeat PJM's judgement and render it hollow.

37.6 Mwelase said, PJM relied on hearsay evidence on its facts underpinning its cause of action when it alleged that it relied on information from a 'trusted' and well respected business associate who was not identified in the papers and no confirmatory affidavit filed. The argument raised is that in urgent applications interim relief is hearsay evidence may be admitted provided that the applicant discloses the source of his information and belief. This is not the case in *casu.*

37.7 That Mwelase has laid off/dismissed basically all its staff at the time, is consistent (so it is argued) with the mine being placed under care and maintenance. Mwelase argued that even if all its employees had been laid off (which it says its not the case), this again would not indicate any covert conduct on the part of Mwelase to avoid the consequences of an adverse judgement.

37.8 Mwelase submitted further that it is simple incorrect to suggest that it has cut up major parts of its processing plant at the mine and sold it as scrap metal to dealers in Matsapha. It says this too is quite usual in mining industry, the proceeds received were employed in the care of the equipment. There is nothing (it argued) that is indicative of Mwelase acting other than in the ordinary course of the business. In any event Mwelane denies knowledge of any bearing being sold and its investigation showed that the bearing sold to a certain Zorah Waste Management was not from the mine.

37.9 Mwelase stated that it is simply incorrect that it has no other assets in the jurisdiction other than the iron ore. PJM, it says has not placed averments that once the iron ore is sold the proceeds will be placed beyond PJM's reach. Any such allegations would in any event be speculative. Mwelase said it has assets within the jurisdiction.

37.10 It pointed our in the affidavits that Mwelase has a lease agreement and prospecting licence in its asset book. The plant and the mine is also an asset held by Mwelase. Mwelase admitted that it has not placed any valuations as to the lease and prospecting licence or the plant but estimated that both are substantial and can easily be estimated to be excess 1 billion emalangeni.

37.11 Mwelase brought in a sale agreement it signed with SG Iron Ore in November 2021 and alleged that it acquires assets worth E50 000 000-00 (Fifty million) but valued at E142 441 938.41(One hundred and forty two million four hundred and forty one thousand nine hundred and thirty eight emalangeni forty one cents) another sale agreement entered into with First National Bank in December 2021 where Mwelase purchased equipment therein listed for E2 500-000-00 (Two million five hundred thousand emalangeni). It argued that this does not even include the proceeds of the sale from the iron ore which would remain in the business. This is more than enough in Mwelase's submissions to put paid any professed fear by PJM.

[38] Mwelase submitted finally that its business has already felt the negative effects of the interim judgement as it is in the process of closing sales deals with new customers for the iron ore. Should the court on the return date confirm the interim interdict, its business will be brought to a grinding halt for

as long as it takes to resolve the trial. The damages sustained as a result thereof would be uncalculatable and PJM would, in any event, be unlikely to satisfy such a judgement. For these reasons, the balance of convenience clearly favours Mwelase. This is in the event Mwelase is called upon in these proceedings to prove the balance of convenience which it said it was tackling with the greatest of caution.

The Approach in the analysis of facts in anti- dissipation interdicts.

[39] Bhoola AJ in Bassani Mining (Pty) LTD (supra at para 10).when analyzing complex facts and applying the law, stated that *'the proper approach in an application for interim relief such as the present one is to take the facts set out by the applicants together with any facts set out by the respondents which the applicants cannot dispute and to consider whether having regard to the inherent probabilities the applicants should (not could) on those facts obtain final relief at the trial. Furthermore, although normally stated as a single requirement, the requirement for a right prima facie established, though open to doubt, involves two stages. Once the prima facie right has been assessed that part of the requirement which refers to the doubt involves a further enquiry in terms whereof the court looks at the facts set up by the respondent in contradiction of the applicant's case in order to see whether serious doubt is thrown on applicant's case and if there is mere contradiction or in convincing explanation, then the right will be protected. Where however there is serious doubt then the applicant cannot succeed ; See also Webster vs Mitchell 1984 (1) SA 1186 (W) at 1189, Gool v Minister of Justice and Another 1955 (2) SA 682 (c) AT 688. (emphasis added).*

[40] I gather from the proposition above that the applicant's allegations must contain objective and reasonable facts convincing for the court to grant the interim interdict. Millin J in Stern and Ruskin, NO V Appleson 1951 (3) SA 800 (W),1951 (3) SA P800 states in that case that, the claims now under consideration being neither vindicatory or quasi-vindicatory the applicants cannot obtain an interdict unless they prove in addition to a *prima facie* case an actual or well grounded apprehension of irreparable loss if no interdict is granted. In the case of vindicatory or quasi-vindicatory claims this is presumed until the contrary is shown. In the case of all other claims it must be established by the applicant for the interdict as an objective fact. It is not

sufficient to say the applicant himself *bona fide* fears such loss. (emphasis added).

[41] I now turn to the analysis of the merits of the facts provided for by the parties. There are no exceptional circumstances advanced by PJM to warrant a lesser standard of proof than that Mwelase's intention is to dissipate its assets so as to frustrate its claim against it and render any such judgement granted against it hollow.

Prima facie right though open to doubt.

[42] It is not necessary for this court to re-capture the nature of PJM's action for damages arising out of the contract that was signed with Mwelase because, it is captured with a fair amount of detail above. The first part of the PJM claim is predicated on a repudiation by Mwelase of the contract. Mwelase has in its affidavits placed in detail both the facts and its defence to the claim to demonstrate that PJM's alleged repudiation is unsustainable.

[43] Mwelase has similarly dealt with PJM's second claim to recover the money that it spent on 'up-scaling' in order to perform the works it tendered to perform. Mwelase has also placed a fair amount of detail on why PJM cannot 'seek refuge' in an additional and separate agreement when the contract itself contains a clause that the written recordial of the agreement between the parties cannot be varied without a formal written recordical. Mwelase submitted that it is therefore highly impausible for a trial court to be convinced of a separate agreement relating to the ceramic/slurry claim.

[44] That being said, this court is not required to determine the *bona fides* of the respondent's defence nor the merits of its defence in this application. The amount of detail that Mwelase has placed in its affidavit on its defence to the claim is an indication that PJM has placed a *prima facie* cause of action against Mwelase. PJM is likely to have a judgment against Mwelase, details of which cannot be a subject of speculation by the parties to this application. PJM would be entitled to execute a judgement it obtains in due course.

[45] The other requirements of interim interdict is a well grounded fear of irreparable harm to the applicant if the interim relief is refused or ultimate relief is granted eventually. This requirement is the second threshold that the applicant must show that the respondent is wasting or secreting assets, or there

exist a reasonable apprehension that the respondent is about to embark on such conduct with the intention to defeat the applicant's claim.

[46] Has Mwelase thrown serious doubt at PJM's case or there is just mere contradiction or unconvincing explanation on the alleged wasting or secreting of assets to defeat PJM' claim, such that PJM's *prima facie* right is not be protected by an interim interdict. If the court finds serious doubt in PJM's assertions, PJM cannot succeed.

[47] The court observes that Mwelase has not only admitted but also accepted in its affidavit and in argument that;

47.1 In the ordinary cause of its business, it is required to sell the iron ore;

47.2 Mwelase has attached a letter of intent marked **'DC7'** which reflects that Mwelase was still in the course of engaging with various third parties to sell its product;

47.3 At the time of requesting a quotation from PJM to move the iron ore, Mwelase was on the verge of closing an off-take agreement with a potential client;

47.4 Whilst there has not been any off- take agreement in place with any buyer, Mwelase averred that it had to be pro-active and ask PJM and others to quote to move the iron ore to a point of departure.

47.5 Whilst it is common cause between the parties that no iron ore had been removed from the mine, Mwelase contended that no iron ore was to be removed from the mine unless and until Mwelase had a customer willing to buy the iron ore and the means to transport the iron ore to the customer. At that stage the iron ore will be sold in the ordinary course of business.

47.6 To buttress its marketing strategy or process, Mwelase averred that on the 17th October 2023 one of its director Mr Ndhlovu received an email from an undisclosed customer with an interest to procure the iron ore. Mwelane attached the e-mail marked it **'DC7'**.

47.6 On the 20th October 2023 another undisclosed potential customer wrote an e-mail and registered his great concern about reports in the news that Mwelase had been interdicted from loading its iron ore (Paragraphs 19-22.2 of the further affidavit).

[48] These facts as volunteered by Mwelase must be taken together with its earlier admissions that it could not sell its iron ore after signing the mining lease and the agreement with PJM because it ran into logistical difficulties in securing port allocation so as to ship and sell the product to overseas market. One may ask, where is the iron ore being moved to when admittedly there is no off - take agreement in place with any customer. Mwelase had not said that the logistical difficulties in the Maputo port had been resolved.

[49] Mwelase contended in court and in papers that the movement of the iron ore is to ensure that it is taken closer to the departure points of ports to ease movements once an off-take agreement is concluded and/or the port allocation problem is resolved. The court is not given any explanation for example, if the movement closer to the port before the resolution of the port allocation is a condition precedent to the conclusion of an off-take agreement. One would have thought that Mwelase should have been forthcoming with the information to dispel the allegations that it is praying for the discharged of the interim interdict so as to dissipate the iron ore to places outside Eswatini, out of reach for PJM.

[50] Mwelase further contended that there is objectively no sustainable apprehension of harm if the interdict was not granted and the balance of convenience (raised only in abadence of caution) does not favour the granting of the interdict because not only does Mwelase hold substantial assets in the Kingdom it also holds the mining lease. Its assets (it submitted) are worth more than 1 billion emalangeni. In any event its says PJM can execute against an equipment it bought for E50 000 000-00 (Fifty million) but valued at E142 441 938.41(One hundred and forty two million four hundred and forty one thousand nine hundred and thirty eight emalangeni forty one cents). This amount is more than enough to put paid any proffered fear by PJM.

[51] Mwelase substantiated the asset values of the mine by attaching sale agreements annexure **DC1** and **DC2** signed in November 2021 and December 2021 (with SG Iron and FNB)valuated in July 2018 for E142 441 938.41 (One hundred and forty two million four hundred and forty one thousand nine hundred and thirty eight emalangeni forty one cents). (SG Iron) and E2 500 000 000-00 (Two million five hundred thousand emalangeni) (FNB). The challenge with this evidence is that these are simple deeds of sale and there is

no evidence of the real purchase of these assets. The other challenge is that the valuations were carried out in 2018 with no proof that the assets currently form part of Mwelase's inventory. No recent balance sheet of Mwelase that reflects its state of solvency or at least its asset base ever since its acquisition of these assets has been filed. Not even a certification by an independent auditor despite the deponents saying so.

[52] Mwelase does not firmly deny a number of PJM's allegations on the alleged activities intended to dissipate its assets at the mine. Mwelase avoided giving direct responses to the allegations and chose to give explanations on why the activities purported to be happening the way they are alleged by PJM. Examples are;

52.1 PJM alleged that Mwelase has ceased and dismantled its operations at the mine and its listed offices ae seemingly closed. Mwelase's respondent by stating that the averment does not demonstrate the dissipation of assets in order to deficit a judgement. The mine is simple placed under case and maintenance. It is not necessary for the mine manager and a few of its employees to be on site on a day to day basis.

52.2 Although Mwelase denies having sold any bearings to a scrap metal, it admits having sold some scrap metal for which proceeds thereof were used to cover costs of repair to the front end loader. It says this is normal to mining companies. The challenge with the response is that it does not give evidence that verifies if the scrap sold were not bearings. Mwelase only approached Zorah's waste management to confirm that the bearings it received were not from Mwelase.

52.3 PJM alleged that Mwelase had asked its Manager to quote so it can move iron ore by trucks to Mpaka rail siding . The quotations were attached to PJM's replying affidavit dated 15th June 2023. Mwelase's does not deny the allegations but stated that PJM put no context to the allegations. Instead PJM was trying to create an impression that Mwelase is intent on moving its assets beyond the reach of PJM in order to frustrate any judgement it may, in due course. This is not the case. Mwelase in the ordinary course of its business is required to sell its product and to do so it has to move the iron ore to a point of departure. The challenge in Mwelase's response is that there is no explanation as to why it has to move the iron when there is no buyer for it yet. Against

the stark allegations by PJM on the preparation for the movement by the request for transport, Mwelase should have done more to dispel the allegations.

52.4 PJM alleged that Mwelase had laid off certain workers. A certain Victor Dlamini representing Mwelase verbally promised about 25 or alternatively all the erstwhile employees working at the mine to take them over. It is alleged that never happened and the employees were now back to PJM for jobs. Although Mwelase admitted that the care and maintenance of the mine required a scale down of activities such that its production manager and some managers are based in South Africa, they occasionally come to Ngwenya mine because it is not totally closed. In any event, Mwelase disputed the notion of retrenchment and said if that were the case there should be a claim for damages for the alleges breach. The allegation therefore are irrelevant to a consideration of the matter, argued Mwelase. Mwelase has not shared its care and maintenance plan with PJM or the court to confirm its strategy on its employees for the said two (2) years period under maintenance and care. There is no details for example of how many employees it had when the mine was fully operational and how many it required for the two year period so as to refute PJM's allegation that there are no employees left in the mine.

[53] I am of the considered view that in the totality of the allegations that PJM has made regarding its claim for damages for breach of contract, there is subsistence in its cause of action at least *prima facie*. On the second enquiry, I am as well convinced that Mwelase has only made bald denials alternatively, avoided to contradict PJM's averments and/or has placed unconvincing explanation that there are no arrangements or activities occurring at the mine to move the iron ore with the intention of thwarting the damages claim. The evidence is such that Mwelase is arranging its affairs in such a way as to ensure that by the time PJM is in a position to execute its judgement it will be without assets or sufficient asset on which PJM will be expected to execute. In the event PJM succeeds in the pending action it will be left with a hollow judgement.

[54] PJM has therefore proved, as it alleged, that there is a real risk that Mwelase has been attempting to move the iron ore and that it is likely to take all steps in the intervening period before the damages claim is heard to move the iron ore outside the borders of Eswatini to diminish its assets in order to avoid the efficiency of a court order.

[55] PJM has met the requirements for an anti-dissipation interdict required by the law and the interim order or *rule nisi* is confirmed.

In the result the following order is made;

1. The interim order granted by this court on the 6th October 2023 is confirmed.
2. Mwelase is ordered to pay PJM's costs at ordinary scale.

S.M. MASUKU
JUDGE - OF THE HIGH COURT

For the Applicant: **Mr M.Dlamini of Dynasty Inc Attorneys.**

For the 1st Respondent: **Counsel C de Witt instructed by J.Dlamini of Robinson Bertram**