IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE **CASE NO. 2506/2024**

In the matter be ween:

REDI CURE CONVERSIONS (PTY) LIMITED	**First Applicant**
MMAKHULWANE ROSERT MANAMELA	**Second Applicant**
And	
CONVERSIONS ESWATINI (PTY) LIMITED	**First Respondent**
STANDARD BANK ESWATINI (PTY) LIMITED	**Second Respondent**
INHLONHLA (PTY) LIMITED	**Third Respondent**

JUDGEMENT

Neutral citation: *Redi Cure Conversions (pty) Limited v Conversions Eswatini (pty) Limited (2506/2024) SZHC 37 (7th March 2025).*

Coram: *S.M. MASUKU J*

Date heard: *19th December 2024*

Date delivered: *7th March 2025*

Flynote: *Civil Procedure- interdict sui generis or anti-dissipation interdict or freezing injuctions. Mareva injuctions not a remedy fully available in our law, although akin to our interdict remedy adopted by our courts.*

Summary: *Applicants sought confirmation of interim freezing injuctions. The court drew the historical sources of the relief sui generis and held that anti-dissipation interdict provides a remedy where the applicants have shown on the established basis of an interim interdict (a) a claim against the respondent and (b) that the respondent is (intentionally) secreting or dissipating assets, or is likely to do so with the intention of defeating the applicants' claim. These are the jurisdictional facts to justify the granting of the relief.*

Held: *Applicants not proven as they alleged, that there is a real risk that the 1st Respondent will take every step in the intervening period before the damages claim is heard, to dissipate and/or diminish their assets/funds in order to avoid the efficacy of a court order and to leave them with a hallow judgement should they succeed on their damages claim. This means they have not met the second threshold requirements for obtaining an anti-dissipation interdict. Their application fell to be dismissed.*

[1] The Applicants brought an *ex-parte* urgent application for interim orders *inter alia.*

1.1 that pending the institution and finalization of action proceedings contemplated in part B of the notice of motion to be instituted within 20 days from the date of this order;

1.1.1 directing the Second Respondent to freeze the bank account of the First Respondent, the known details of which are;

1.1.1.1 Account holder: conversions Eswatini (pty) Ltd.

1.1.1.2 Account details statement Annexed hereto and Marked A.

1,1,2 interdicting and restraining the first Respondent, and any other person(s) acting on its behalf either directly or indirectly from dissipating, concealing or dealing in any manner whatsoever with the funds paid or to be paid to the above mentioned account.

2. *Granting leave to the Applicants to bring an application on the same papers, duly supplemented, for an order to freeze the bank account(s) of any person(s) and /or entity to whom the First Respondent may have transferred or ceded the funds.*

3. *Ordering and directing that the prayers above shall operate as an interim order with immediate effect.*

[2] The court granted a *rule nisi* with interim relief on the 31st October 2024. Upon gathering further information that was not available at the initial stage of their application, the Applicants further applied for leave to supplement their application *inter alia;*

"2.1 granting leave to the Applicants to join the Third Respondent Inhlonhla (pty)Ltd as a party in the main proceedings;

2.2 *directing the Third Respondent to pay the sum of E1 369,505 40 (One million three sixty nine thousand five hundred and five emalangeni forty cents) alternatively whatever balance remaining from the funds paid to it by Siyembili Motorst/a NTT Toyota After deducting what is due to it- be remitted only to the frozen Standard Bank Account of the First Respondent.*

3. *Pending the institution and finalization of the contemplated action proceedings, within the timeframes stipulated in the court order granted by the court on the 31st October 2024, the following interim orders be made.*

3.1.1 *urgently interdicting and restraining the Third Respondent, and any other person(s) acting on its behalf either directly or indirectly from complying with any instruction from the First Respondent and/or any person acting on their behalf to effect to a bank account other than the frozen Standard Bank account of the First Respondent.*

3.1.2 *directing the Third Respondent to provide information in respect of the payment made or to be made to it by Siyembili Motors t/a NTT Toyota and disclose the remaining amount after it has deducted what is due to it.*

4. *Ordering and directing the above prayers to operate with immediate effect.*

[3] The court granted the Applicants leave by issuing a second *rule nisi* on the 7th November 2025 for the orders above. It should be mentioned that the actin proceedings contemplated were said to have been instituted 20 days of the orders.

Background facts

[4] There are hardly any common cause facts in this application owing to the vast and in depth disputed facts regarding the operations or dealings of the parties and their companies. This court is however not called upon to resolved the disputes apparent between the parties or their formed companies, or their historical dealings with each other in this application. This court is to determine if the Applicants can hold on to their interim freezing orders pending the outcome a claim for damages in the amount of E1 602 905 40 (One million six zero two thousand nine hundred and five emalangeni forty cents) they have instituted against the 1st Respondent. Conceivably, those disputed facts would be resolved at the trial in due course.

[5] Mr Mamamela, the 2nd Applicant, claims to be the sole shareholder and director of the 1st Applicant. He said he registered two other companies in Eswatini being Redicure (pty) Ltd and Redicure conversions (pty) Ltd respectively. He appointed Mr Thabang Hlophe for Redicure (pty) Ltd and Mr Selby Nkosinathi Thwala and Mr Babazile Mabuza for Redicure Conversions (pty) Ltd.

[6] The 2nd Applicant later had issues with his co-directors and shareholders in Redicure Conversions (pty) Ltd due to tax liabilities with Eswatini Revenue Authority (ERS). Their relationship became acrimonious. He then met Mr Sidumo Mamba ("Mamba") who is his rivary in these proceedings and is the shareholder and director of the 1st Respondent. Apparently, Mamba introduced himself as an attorney and proferred he would assist the 2nd Applicant to resolve his tax disputes with Eswatini Revenue Authority. The latter facts are denied by Mamba.

[7] The 2nd Applicant averred that through his expertise and the reasons he incorporated the 1st Applicant, he got to be engaged by Siyembili Motors Swaziland (pty) Ltd t/a NTT Toyota ("NTT Toyota") to provide services of converting a Toyota Quantum Panel van into a mobile clinic and three (3) Toyota Quantums Panel Vans into Ambulances. The Applicants quoted NTT Toyota an amount of E1 369 505.40 (One million three hundred and sixty nine thousand five hundred and five emalangeni forty cents) to carry out the jobs.

[8] The parties in this application are presumably the parties in the instituted action proceedings.

[9] It would seem that part of the dispute in the action proceedings which is not before this court is for the determination of who the rightful proprietor of the 1st Respondent. The parties seem to be *ad idem* about the fallout that occurred between the co-shareholders of the two previous companies, Redicure (Pty) Ltd and Redicure Conversions (pty) Ltd. They also agree that the 1st Respondent (Conversions Eswatini (pty) ltd) had to be formed and that the 2nd Applicant could not take the initial shares because of his tax clearance issues with ERS.

[10] On that note, whilst the 2nd Applicant says in April 2024 he instructed Mamba to register a new company in the name of Redicure Conversions (pty) Limited (Eswatini) on his behalf and to allocate ninety-nine percent (99%) shares to him and one percent (1%) to Mamba. Mamba informed him later on after June 2024 that he could not register the name Redicure Conversions but because this name was taken he was to then register this new company as Conversions Eswatini (pty) Limited (the 1st Respondent).

[11] He took Mamba's advice and then instructed him to substitute his 99% shares and to give them to Connie Schoeman. The 1% would remain with Mamba. He said he was shocked to discover that Mamba registered the first

Respondent company and allotted 50% shares to himself and the balance to a certain Mabandla Zulu.

[12] The dispute in the ownership of the 1st Respondent arises because Mamba himself ventures a different version on the proprietory of the 1st Respondent and how it got to be registered. He averred that following the fallout that the 2nd Applicant had with his co-shareholders in the two previous companies, (Redicure (pty) Ltd and Redicure conversions (pty) Ltd). NTT Toyota no longer trusted the 2nd Applicant they jointly discussed the formation of the 1st Respondent. They agreed that 2nd Applicant should not be part of the new company (the1st Respondent) until he sorts out his issues with ERS.

What prompted this Application.

[13] The Applicants averred that believing that Mamba was acting in good faith and in accordance with the instructions given to him they proceeded to secure work with NTT Toyota by quoting to it E1 369 505,40 (One million six hundred sixty nine thousand five hundred and five emalangeni forty cents) for and on behalf of the 1st Applicant for equipment and conversion of three (3) mini buses, taxis to ambulances.

[14] The 2nd Applicant averred that Mamba for the 1st Respondent embarked on an elaborate scheme of fraudulent conduct and misrepresentation designed to defraud the 1st Applicant and him of their monies including E233 400 (Two hundred and thirty three thousand four hundred emalangeni) and the revenue in the sum of E1 369 505,40 (One million three sixty nine thousand five hundred and five emalangeni forty cents) flowing from the accepted quotation by NTT Toyota for the conversion of the 3 mini bus taxis,

[15] The 2nd Applicant alleged that Mamba broke into premises under his control to forcefully took the vehicles and deliver them to NTT Toyota. Mamba denies any break in and entry and is defending spoliation proceedings filed by the Applicants against him or the 1st Applicant.

[16] Mamba acting for the 1st Respondent acknowledged an invoice of E1 197 077-48 (One million one ninety seven thousand seventy seven emalangeni forty eight cents) to NTT Toyota as issued by the 1st Respondent and not E1 369 505 (One million three sixty nine thousand five hundred and five emalangeni) as claimed by the Applicants. He said there are also costs incurred by third parties including legal fees for defending this application required to be paid apparently from this invoice.

[17] From the aforesaid it is clear that, the 1st Respondent looks forward to a payment from NTT Toyota in excess of E1 200 000 (One million two hundred thousand emalangeni) for the conversions. The Applicants have successfully obtained the interim order in these proceedings to freeze the 1st Respondents account and sought to confirm the rule on the return date.

The Return date

[18] For the record, there were certain preliminary issues that both parties had raised at the return of the matter. The Applicants objected to the non-compliance of certain administrative directives made by the court to the parties for the filing of pleadings in readiness for the return date. The Applicants complied with these directives but the 1st Respondent failed. The Applicants however did not pursue this objection and as such it was dropped at the hearing.

[19] The 1st Respondent also raised some points of law in the answering affidavit. These were, misjoinder of the 1st Applicant. The Non-joinder of NTT Toyota. However at the hearing of the Application it discontinued the objection.

Interdict *sui genesis* or Anti-dissipation interdict (the so-called Mareva-type injunctions or freezing injuctions.

[20] A likely recurring pitfall that litigants are prone to encounter when they embark on seeking recourse from the courts is the failure to chose a fitting relief from the different types of interdicts that have emerged since the traditional and well known interdict relief proffered by Setlogelo v Setlogelo (1914 AD 221) back in 1913 or even earlier. The earlier interdict in Setlogelo *(supra)* sought to prevent an unlawfulness or protect legally protectable rights. In that case the right that was protected by way of interdict was the right to possess land, albeit in terms of the laws of the land at the time Setlogelo could not own land.

[21] The courts in our jurisdiction and those that are persuasive to our legal principles ameliorate with the times to find relevance with litigants' needs in real time.

[22] Most often than not, an Applicant that approaches the court under a certificate of urgency and *ex-parte* is prone to mix-up or mislabel the type of relief he intends. The bar nonetheless is not compromised from the expectation that a litigant should be 'spot on', the relief sought or face failure and dismissal of his application for selecting an inappropriate relief.

[23] What is the nature or essential characteristics of the interdict that Applicants have applied for in these proceedings? I venture to discuss the different interdicts.

Mareva injuction relief

[24] Moshoana J, in the case of The South African Revenue Services (SARS) v Maloto and Others (63778/2021) [2022]ZAGPPHC 832; [2023] 1 All SA 607 (GP) 85 SATC 47; (2 November 2022) had occasion to analyze the remedies and noted that ,

'The remedy of *Mareva* injuction owes its origin from the English legal system. The remedy is referred as *Mareva*, but it first emerged in Nippon Yusen Kaisha v Karageorgis [1975] 1 WLR 1093 (*Kaisha*), where the Plaintiff company had chartered a ship to the defendants, A large sum was claimed for the hire. The charterers could not be found but there was evidence of funds at a bank in London. An *ex-parte* application was then launched for an order restraining the charterers from disposing of or removing from the jurisdiction any assets which were within the jurisdiction. The application was refused by the court *a quo*. *On* Appeal, the order sought was granted. The reasoning behind the granting of the order was that the assets were in danger of being removed from the jurisdiction so as to frustrate the money judgement which the Japanese ship-owners had against the Greek Charterers. The charteres had disappeared but had funds in London Banks.

[25] Moshoana J. in the South African Revenue Services case (*supra*) ("the SARS case) at paragraph 9 opined that what the court sought to protect in *Kaisha* was a money judgement that could be satisfied by attaching the assets that are in the danger of being removed. Owing to the situation in *Kaisha,* it seems to be so that for an applicant to succeed, that applicant must prove the following: (a) there is money debt and or judgement in its favour; (b) in order to satisfy the debt and or judgement, it may lay execution on the assets owned by the Respondent, (c) The assets that could satisfy the debt or judgement are in danger of being disposed of or removed;

[26] The English court of Appeal in the matter of Mareva Compania Naviera SA v International Bulkcarriers SA [1980] 1 All ER 213 (CA) (*Mareva*) followed *Kaisha*. What obtained in *Mareva* is that ship-owners were owed money for charter hire and the Charterer had money in a London Bank. Similarly, an *ex-parte* interim freezing injunction was made stopping the funds from being taken out of the jurisdiction. Both *Kaisha* and *Mareva* were written by the erudite Honourable Lord Denning. In *Kaisha* he said:

"We are told that an injunction of this kind has never been granted before, it has never been the practice of English courts to seize assets of a defendant in advance of judgement or to retain the disposal of them.

There is no reason why the High Court or this Court should not make an order such as is asked here... the High Court may grant a mandamus or injunction or appoint a receiver by interlocutory order in all cases in which it appears to the court to be just or convenient so to do. It seems to me that this is such a case. There is a strong prima facia case that the hire is owing and unpaid. If an injunction is not granted, these monies 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 ex-patre and we should continue it "(underlining added)".

[27] The court is the SARS case (*supra*) discernibly captured the following requirements from *Mareva* namely (a) just, Justice or justness;(b) convenience; (c) strong prima facie case of owing and unpaid; (d) assets may be removed; and (e) great difficulty in recovery. The SARS case (*supra)* opined that for the Applicant to succeed, he must establish the existence of those five requirements.

[28] The court in the SARS case concluded that, 'A *Mareva* interdict is designed to protect the claimant against the dissipation of assets against which the

claimant might otherwise execute judgement either immediately or in the future. For as long as the claimant has a claim against the defendant and that the defendant has assets, which may be used to satisfy the judgement, a claimant may successfully apply for a *Mareva* interdict'.(*see* paragraph 12 of the case).

In South Africa.

[29] A remedy akin to *Mareva* injuction emerged in South Africa the case of Fredericks v Gibson Miller and Co. Lennox and Another (18 C.T.R 402)where the court confirmed that the property of the respondent may be attached if the respondent threatens to do away with his or her assets. Clarity of the remedy was provided further by Hopley J, in the South African case of Mcitiki and Another v Maweni (1913) CPD 684 (*Maweni).* The facts were briefly that a father of a daughter gave the hand of the daughter into marriage. As dowry (*lobola*) cattle had been given, later the daughter deserted. The father of the son demanded the return of the cattle. An action was brought to recover from the respondent father cattle, which had been given to him as dowry since he refused to return them following the desertion of the daughter. The father of the son discovered that the respondent father had moved a number of stock from his kraal, presumably with the intention of hiding them. Apparently, the respondent had told the applicant that he intended delaying the action and disposing of his cattle in order to defeat the Applicant's claim. The applicant's father obtained a *rule nisi* that restrained the respondent father from selling or disposing of fifteen (15) head of cattle and three horses pending the result of the litigation between the return date. The rule was confirmed by the court on the return date.

[30] The granting of the interdict in the Maweni case (*ibid)* was the desire by the court not to do an injustice to the Plaintiff by reason of leaving the debtor

possessed with funds sufficient to satisfy the claim, when the circumstances show that such debtor is wasting or getting rid of such funds to defeat his or her creditors or is likely to do so. 'see also Brickatec (pty) Ltd v Payland 1977 (2) SA 489 (T) at 493 EG.

[31] The Supreme Court of Appeal in the South African case of Knox D'Arcy Ltd and Others v Jammeson and Others [1996] 3 All SA 669 (A) AT 31 affirmed the existence of this remedy in South African law, and preferred to describe it as an interdict *sui generis* or anti-dissipation interdict, it went further to settle its requirements.

[32] The remedy as traced back from Knox D'Aray was reinstated by the SA Supreme Court in KSL v AL (356/20230; 2024 (6) SA 410 (SCA) 13 June 2024) the court; Mokgohloa (Zondi and Mabidla – Bongwana JJA concurring) confirmed thus;

"[15] An anti –dissipation interdict may be granted where a respondent is believed to be deliberately arranging his affairs in such a way so as to ensure that by the time the applicant is in a position to execute judgement, he will be without assets or sufficient assets on which the applicant expects to execute. Its purpose is to preserve the assets which is in issue between the parties. The onus is on the Applicant for such an interdict to establish the necessary requirements for the grant of the interdict".

[33] The requirements for an interim interdict are (a) *prima facia* right, even if it open to some doubt b)injury actually committed or reasonably apprehended c) the balance of convenience; and d) absence of similar protection by any other remedy.

[34] In Knox D'Arcy (*supra*) the court went further and held that an anti-dissipation interdict provides a remedy where an applicant has shown on the established basis of an interim interdict (a) a claim against the Respondent and

b) that the Respondent is (intentionally) secreting or dissipating assets, or is likely to do so with the intention of defeating the applicant's claim. These are the jurisdictional facts to justify the granting of an anti-dissipatory relief were re-affirmed by the SCA in Bassani Mining (pty) Ltd v Sebosat (pty) Ltd and Others [2021] ZASCA 126 Paragraph 1 and recently by KSL v AL case *(supra)*.

[35] The SA Supreme court has also settled the matter on the requirement of whether an applicant needs to show a particular state of mind on the part of the Respondent ie. that he is getting rid of the funds or is likely to do so with the intention of defeating the claims of the creditors. In KSL v AL *(supra)* at paragraph [29] the court states, *'Knox D'Arcy, a decision of this court, settled the matter on the requirements of intent in anti-dissipation application'*.

The Anti-dissipation Remedy in Eswatini

[36] Eswatini seem to have adopted the Knox D'Arcy principles or requirements for anti-dissipation interdict. See for example First National Bank Swaziland Limited v Hlatshwayo (1965/20050 [2005] SZHC 63 (17 June 2005) the case of Swazi Spa Holdings Ltd v Standard Bank Ltd and 4 others (1154/120 SZHC 185 (3 August 2012), Xolile Fakudze and Others v Sukkie Ontime Investments and Others High Court case 1865/2019 and PJM 125 Investment (Pty) Limited v Mwelase Mining Eswatini (pty) Ltd and two others (2334/2023) SZHC 327 (20 November 2023).

[37] In the PJM 125 case, this court considered a number of silent features of this sort of relief summarized, although not exhaustive from the Knox D'Arcy *(supra)*, Bassani Mining *(supra)* and Herbaston and Van Winsen civil practice of the High Court and Supreme Court of South Africa (at V11 **anti-**

dissipation interdict (the so called 'Mureva- type injuctions or freezing injuctions).

[38] For purposes of the present application the following are worth a repeat and reminder;

38.1 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 unlawful, it merely alleges a general right to damages;

38.2 An applicant needs to show a particular state of mind on the part of the respondent i.e he is getting rid of the funds or is likely to do so, with the intention of defeating the claims of the creditors.

38.3 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.

38.4 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 hallow judgement or to 'fish behind the net' as it were.

38.5 It does not operate as attachments (of assets), It merely restrain the owner from dealing with assets in a certain way.

38.6 Anti-dissipation interdicts are <u>interim both in form and in substance</u>.

38.7 The onus rests on the applicant to establish the requirements for 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.

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

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

38.10 Although the balance of convenience is one of the requirements of interim interdict, in anti –dissipation interdict, it would only arise where the applicant has 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.

The approach in analyzing facts in anti-dissipation interdicts.

[39] I found Bhoola AJ's approach as a handy tool to follow in analyising complex facts and application of the law in anti-dissipation interdicts. In the case of Bassani Mining (pty) Ltd v Sebosat (pty) Ltd and Another (191905/20 [2020] ZAGPJHC 347 (21 August 2020 (Paragraph 10) where he observed that;

"[10] The proper approach in an application for interim relief such as the present one is to take the fact 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 for a right prima facie established, though open to some doubts, involves two stages once a 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 respondent in contradiction of the applicant's case in order to see whether serious doubt is thrown on the applicant's case and if there is a mere contradiction or unconvincing explanation, then the right will be promoted. Where, however, there is serious doubt then the applicant cannot succeed. See Webster v Mitchell 1948 (1) SA 1186 (w) at 1189. Gool v Minister of Justice and Another 1955 (2) SA 682 (c) at 688.

[40] From the above proposition, the applicant's allegations must contain objective and reasonable facts convincing for the court to grant the interim interdict, Millin J in Stein 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 quari-vindicatory the applicant cannot obtain an interdict unless they prove in addition to a *prima facia* case an actual or well grounded apprehension of irreparable loss if no interdict is granted. In the case of vindicatory or quari-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 (underlining added).

[41] 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

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 respondent to defeat the applicant's claim Knox D'Arcy Ltd and others (*supra)*.

A strong prima facia claim

[42] A view must be formed that the applicant possesses good prospects of success on the claim to be instituted. Prospects of success is an assumption regarding one's chances of successfully pursuing a case. What the reasonable prospects of success postulates is a dispassionable decision, based on the facts and law that there is likely to be success. *See* the SARS case (*supra*) paragraph [33] of that judgement.

[43] The Honourable Mr Justice Robert J.Sharpe in his work, injunctions and specific performance, loose-leaf (Aurora: Canada Law Book 2005 as cited by Moshoana J in SARS case (*supra)* at paragraph [33] of the judgement said;

'While it is difficult to be precise about the strength of case the plaintiff must demonstrate, it is clear that the courts have proceeded cautiously, recognizing the risk of substantial harm and inconvenience that may be caused to the defendant. The Mareva injuction is one which calls for careful scrutiny of the merits of the claim and refusal of injuctive relief unless there is good prospects of success at the trial'. (underlining added).

[44] In *casu*, when the matter first came before court, the Applicant sought a *rule nisi* with interim relief pending the institution and finalization of action proceedings contemplated in part B of the notice of motion

within 20 court days from date of the rule. In short the action proceeding had not been instituted at the time. Part B of the motion reads that the Plaintiffs have suffered damages amounting to E1 602 905,40 (one million six zero two thousand nine hundred and five emalangeni forty cents) resulting from the 1st Defendant's fraudulent and/or misrepresentation through the actions of their shareholders and directors.

[45] In the Applicants submission to prove that they have established a *prima facie* case, they stated that there are extensive facts pleaded in the founding affidavit and annexures thereto.

[46] The facts they submitted are that the 2nd Applicant sent a quotation in the amount of E1 369 505,40 (One million three sixty nine thousand five hundred and five emalangeni forty cents) to NTT Toyota for converting that (3) minibus taxis and it was accepted. The minibuses were delivered at the warehouse and Ms Tshenge and Mr Mokoena commenced the conversion process in August 2024 on the instruction of the second Applicant.

[47] By end of August the second Applicant discovered Mamba's fraudulent conduct which is that he had not registered the company in terms of the instruction he was given by the 2nd Applicant. Instead he registered himself and Mr Mabandla Zulu as co-shareholders and co-directors.

[48] On the 26th August 2024, the second Applicant reported Mamba's fraudulent conduct and misrepresented to NNT Toyota. It is at this juncture that NTT Toyota confirmed that it had accepted the 1st applicant's quotation which had been dispatched by the 2nd Applicant and therefore it expected the conversion of the mini buses to be delivered in accordance with the accepted quotation. The Applicants

concluded by saying that Mamba's responses were far fetched, untruthful and unreliable, therefore must be rejected.

[49] Mamba disputed the allegations of fraud made by the Applicants against him in their founding affidavit.

[50] The pleadings do not disclose the cause of action contemplated in the action proceedings. The Applicants did not attach the issued action process. The court was therefore faced with no averments of the Applicants cause of action of their damages claim. It is therefore difficult to discern whether or not the Applicants are likely to have a judgement against the 1st Respondent in the action in due course without the action proceedings or the material facts of the action pleaded in this application. There is a lot that is left to speculation for the court on prospects of their success or prospects of a judgement in the trial in due course.

Well grounded fear of irreparable harm to the Applicant

[51] What follows is the next standard requirement for an interim interdict. A well grounded fear of irreparable harm to the applicants if the interim relief is refused and the ultimate relief is granted eventually. See Bhoola AJ in the Bassani Mining case (*supra*). This is the second threshold requirements to be met, where the applicant does not have any special claim to the respondent's property, the applicant is to convince the court that the respondent is wasting or secreting assets, or there exists a reasonable apprehension that the respondent is about to embark on such conduct; and save in exceptional circumstances, it in demonstrated that there is an intention on the part of the respondent to defeat the Applicants' claim Knox D'Arcy Limited 1996 ZA SCA 58.

[52] The Applicants in *casu* have not shown that they have a claim on the funds they seek to interdict. I say so because the 1st Respondent in the application demonstrated that it also has a fair chance of the disputed funds that the Applicants seek to interdict. The court had no sight of the Applicant action proceedings and or a demonstration by the Applicants of its cause of action in their application. It is impossible to assess first their prospects of success in the pending action and secondly, that the Applicants in the action proceedings should not have an injustice done to them by being left with no funds sufficient to satisfy their claim when circumstances show that the 1st Respondent is wasting or getting rid of such funds to defeat their claim or is likely to do so.

[53] The Applicants filed supplementary heads and submitted to the court that it should consider the evidence adduced by the Applicants against the 1st Respondent in the founding affidavit for the spoliation proceedings and the present application to gather Applicants' reasonable chances of succeeding in the action. This proposition cannot work for the Applicants for their prospects of success in the pending action must be determined from the action proceedings itself as would be narrated in the interdict application before court.

[54] The court is also left to scan and speculate on the facts that should give rise to a conclusion that the 1st Respondent is spiriting away the funds with the intention to defeat the Plaintiffs' claim. The court was only called upon to accept and be satisfied that the Applicants' have at least established a reasonable chance that the 1st Respondent with the assistance of Mamba diverted the NTT Toyota orders for the conversion of the motor vehicles for its own fraudulent gain. The Applicants concluded that they have demonstrated extensive injury

committed and/or reasonable apprehension of continuous harm. There is nothing said about the interest of other creditors that the 1st Respondent averred they invested in the conversions in the event all the funds are permanently frozen.

[55] I am of the considered view that the Plaintiffs have failed to place allegations of the claim it has against the 1st Respondent or at least to show that there is *Prima facie* substance in the cause of action established for the courts consideration. On the second enquiry, the Applicants have failed to place evidence that there is an arrangement or activities by the 1st Respondent to deplete the funds in its account with the intention for thwarting their claim in the pending action. The evidence must be such that the court can conclude without speculation that the 1st Respondent has fashioned its affairs in such a way to ensure that by the time the Applicants are in a position to execute their judgement, the 1st Respondent will be without the funds or without assets sufficient on which the Applicants will be expected to execute.

Absence of a satisfactory alternative remedy.

[56] The authority of Knox D'Arcy ZASCA 58 (*supra*) criticized the view of the court a *quo* that part of the enquiry (or requirements) was whether the petitioners 'claim for damages would not be a satisfactory remedy in the absence of an interlocutory interdict.' The court stated that the only claim that the petitioners had was the claim for damages and 'the purpose of the interdict sought was not to substitute it with the claim for damages, but to reinforce it, to render the claim more effective' (see A3721/j and 373 B-C). Effectively the proposition in that case as re-

affirmed in the Bassani Mining judgement and Mayflor Investment (pty) Ltd v Everest 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 anti-dissipation order. (underlining added). It would therefore be unnecessary to explore in the present application whether the Applicants have an alternative remedy, regard being heard to this authority.

The balance of convenience favours the grant of interim relief

[57] The dicta in Knox D'Arcy Ltd 1996 (4) SA 348 (SCA) held that 'if the petitioners had shown a fairly 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 consideration in deciding on the interdict because it had concluded that the petitioners' claim for damages were on the papers, unsubstantiated and that they had not shown conduct on the part of the respondents which would warrant the grant of the interdict of the sort that it was dealing with. The court held in the circumstances. The court said *I need hardly consider any other requirements for the interdict.* It is for the similar reasons in *casu* that this court would not consider the balance of convenience as required in interim interdicts.

Conclusion

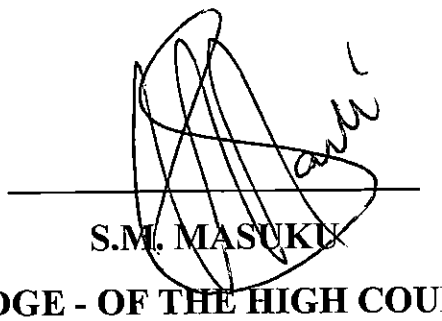
[58] Notwithstanding that the Applicants claimed to have replying instituted a claim for damages against the 1st Respondent, the claim was neither attached to the pleadings non its particulars alleged to the application for this court to give its own consideration on its substance and prospects success at trial. The court is mindful of the fact that it is not required to determine these issues in this application but for present purposes it is required to determine whether the test for an anti-dissipation interdict has been met. It is common cause, alternatively not though seriously disputed that the 2nd Applicant and Mamba initially worked together and there was later some serious fall outs that led to litigation between them and the companies and business they represent. Thus resulted not only in a split but allegations of misrepresentation and fraud made against each other. The applicants sought to have the 1st Respondent's account frozen pending their judgement and at the same time claimed that there is a the real risk of those funds being dissipated by the 1st Respondent such that by the time they have a judgement the funds would have been spirited away leaving them with a hollow judgement.

[59] To succeed in this application, the Applicants have to show that the funds in that account are being disposed of with the intention of thwarting their pending damaged claim. I find no evidence that the Applicants are depleting those funds with the intent to defeat their claim. It should be recalled that this type of interdict is not to substitute the Applicants' claim for the loss suffered, but to enforce it in the event of success in the pending action, so that they are not left with a hollow judgement.

[60] The Applicants have therefore not proven as it has alleged, that there is a real risk that the 1st Respondent will take every step in the intervening period before the damages claim is heard, to dissipate and/or diminish their assets/funds in order to avoid the efficacy of a court order and to leave them with a hallow judgement should they succeed on their damages claim. This means that they have not met the second threshold requirement for obtaining an anti-dissipation interdict as required by Knox D'Arcy Ltd (*supra*) and their application falls to be dismissed.

[61] The court makes the following orders.

1. The *rule nisi* issued on the 31st October 2024 and the subsequent rule issued on the 7th November 2024 is discharged.
2. The Applicants are to pay the costs of the 1st Respondent.



S.M. MASUKU

JUDGE - OF THE HIGH COURT

For the Applicants: Advocate T.Mfokeng instructed by Mr K.N.Simelane of K.N Simelane Attorneys.

For the 1st Respondent: Mr S.Madzinane of Madzinane Attorneys.