



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 5705/2018

In the matter between:

WEALTH4ALL SOLUTIONS (PTY) LTD

Applicant

and

LETABA LEHLOHONOLO

1st Respondent

EMMANUAL SIAME

2nd Respondent

LEBOHANG ZALI

3rd Respondent

MAPELI MOSHOESHOE

4th Respondent

FIRST NATIONAL BANK

5th Respondent

NEDBANK

6th Respondent

HEARD ON: 25 APRIL 2019

JUDGMENT BY: MATHEBULA, J

DELIVERED ON: 26 AUGUST 2019

[1] The applicant approached the court on an urgent basis on 13 December 2018, which interim order I granted in the following terms: -

1. **The condonation be granted to the Applicant for the non-compliance with the Rules of the Court, in respect of the time frames, form and service of this application and that this application be heard as an urgent ex parte application.**
2. **The Respondents be called upon to show cause, on or before the 6th December 2018 at 09h30, why an order in the following terms should not be final.**
3. **Ordering the fifth Respondent to freeze and/or suspend the bank accounts of the first, second and third Respondents and allowing the Applicant or the Sheriff of the High Court, Mr. Pule Foka, or his deputy, access to obtain and retrieve bank statements of the first, second and third Respondents, with effect from May 2018, to date, pending determination by the Court on the Applicant's intended action/damage claim to be filed within 21 days, from the date of the Order sought against the first, second and third Respondents is granted.**
4. **Ordering the sixth Respondent to freeze and/or suspend the bank account of the fourth Respondent and allowing the Applicant or the Sheriff of the High Court, Mr. Pule Foka, or his deputy, access to obtain and retrieve bank statements of the fourth Respondent, with effect from May 2018, to date, pending determination by the Court on the Applicant's intended action/damages claim to be filed within 21 days, from the date of the Order sought against the fourth Respondent is granted.**
5. **Alternatively, the first, second, third and fourth Respondents each reimbursing the Applicant's liquidated amounts deposited into their respective accounts, wherein, they are employed by**

the Applicant in their respective capacities as forex traders to trade in forex markets on behalf of the Applicant and with immediate effect thereof, upon granting of this order, the Applicant will agree to discharge the rule nisi, thereof with immediate effect in respect of paragraph 5.1 and 5.2 above, whichever comes first.

- 5.1 Such amount paid, in respect of the first Respondent is the sum of R436 000.00(four hundred and thirty-six thousand rand), excluding the expected profitable interest/proceeds accrued and still to be paid from the Forex investment markets, as of the dates of such investments made.
- 5.2 Such amount paid, in respect of the second Respondent is the sum of R287 000.00 (two hundred and eighty-seven thousand rand) less R20 000.00 (twenty thousand rand) paid to the Applicant and thereby the remaining balance owing to the Applicant is R257 000.00 (two hundred and fifty-seven thousand rand) excluding the expected profitable interest/proceeds accrued and still to be paid from the Forex investment markets, as of the dates of such investments made.
- 5.3 Such amount paid, in respect of the third Respondent is the sum of R490 000.00 (four hundred and ninety thousand rand) less R200 000.00 (two hundred and eight thousand rand), reimbursed to the Applicant and thereby the remaining balance owing to the Applicant is R290 000.00 (two hundred

and ninety thousand rand) excluding the expected profitable interest/proceeds accrued and still to be paid from the Forex investment markets, as of the dates of such investments made.

5.4 Such amount paid, in respect of the fourth Respondent is the sum of R408 000(four hundred and eight thousand rand), excluding the expected profitable interest/proceeds accrued from the Forex investment markets, as of the dates of such investments made.

- 6. Ordering the First, Second, Third and Fourth Respondents to be interdicted from withdrawing money and/or payments from their Bank accounts, pending decision of the Court, on the return date, alternatively and at their election, honouring the provisions of paragraph 5.1, 5.2, 5.3 and 5.4.**
- 7. Service of this Order, together with the notice of this application, shall be effected by the Sheriff on the Respondents or person in charge of their premises, on a period not less than 48hours.**
- 8. Prayers 3, 4, 5, 5.1, 5.2, 5.3, 5.4, 6 and 7 serve as an interim order with immediate effect.**

[2] On 25 April 2019, I granted a final order against the second respondent who had not filed any papers in opposition of the application.

[3] The applicant is now seeking a confirmation of the aforementioned interim order against the third and fourth respondents. Before me Mr. MJ Ponoane appeared for the applicant while Ms. S

Boonzaaier and Mr. H J van der Merwe appeared for the third and fourth respondent respectively.

- [4] In a nutshell the applicant is a juristic person engaged in forex investment and trading. It collects small to substantial deposits from individuals in and around the Qwa-Qwa area with a promise of a large turnover within a very short period. It appears that the respondents were either contracted or employed as forex traders to trade in the forex markets on behalf of the applicant for the benefit of investors. I hasten to add that the parties had entered into an oral agreement.
- [5] In pursuance of their business relationship the applicant deposited the sum of R490 000.00 and R468 000.00 into the accounts of the third and fourth respondent respectively. Of this amount R200 000.00 was repaid by the third respondent to the applicant. This was meant to be utilised by them to trade in the forex markets. It stands to reason that these were funds sourced from the investors. It is common cause that these funds were not repaid to the applicant by the respondents.
- [6] In the voluminous papers filed of record with annexures, the bulk of which is totally unnecessary the applicant alleges that the respondents squandered the funds by living a high life using it to purchase luxury motor vehicles, visiting holiday destinations and even bankrolling a sumptuous wedding. According to the respondents, they operated in a high risk volatile environment and therefore with the financial markets characterised as down, they underperformed and lost the money. The money that they received

was used exclusively for the forex trading and in pursuit of the “high risk/ high reward” strategy they suffered heavy losses.

- [7] Clearly the applicant is seeking an order in the nature of an anti-dissipation order. The practical effect of such an order, which is an interdict, is to prevent the respondents from dealing with the assets freely. These are the assets that the applicant is laying claim on them.
- [8] The primary difficulty with money is that it loses its identity when it is in the bank account and obviously mixed with other money. This problem was clearly expressed by **Schutz JA** as follows: -

“It might seem a simple thing to recover stolen money from one found in possession of it. But the matter is complicated by the rule in our law, an inevitable rule it seems to me, flowing from physical reality, that once money is mixed with other money without the owner’s consent, ownership in it passes by operation of law.”¹

- [9] In order to succeed in matters of this nature, the applicant must have some underlying legal right against the respondents who have the money in their accounts in order to lay a claim to it. It is incumbent on the applicant to show that the respondents are threatening to dissipate, wasting or secrete their assets to avoid to satisfy a judgment that might be granted against them in the future. This form of relief is to guard against what might turn out to be a worthless judgment because the assets may have been depleted.

¹ First National Bank of Southern Africa Ltd v Perry NO and others 2001(3) SA 960 (SCA) at 967 H-I

- [10] This form of relief is an interim one. Therefore the requirements that the applicant must satisfy are those of an interim relief. This position was stated in **Erickson Motors (Welkom) Ltd v Protea Motors, Warrenton and another**² as follows:-

“The granting of an interim interdict pending an action is an extra ordinary remedy within the discretion of the court. Where the right which it is sought to protect is not clear, the Court’s approach in the matter of an interim interdict was lucidly laid down by INNES, J.A., in *Setlogelo v. Setlogelo*, 1914 A.D. 221 AT p. 227. In general, the requisites are-

- a) a right which, “though primie facie established, is open to some doubt”;**
- b) a well-grounded apprehension of irreparable injury;**
- c) the absence of ordinary remedy.**

In exercising its discretion, the Court weighs, inter alia, the prejudice to the applicant, if the interdict is withheld, against the prejudice to the respondent if it is granted. This is sometimes called the balance of convenience.”

- [11] The approach, as I mentioned it, is to weigh the strength of the applicant’s case against the balance of convenience. In **R S v M S** it was held that:-³

“But, even if these jurisdictional requirements are present, then an applicant must still show a well-grounded apprehension of irreparable loss, should the

² 1973 (3) SA 685 (A) at

³ 2014 (2) SA 511 (GJ) at para 18

interdict pendent lite not be granted. It is perhaps apposite her to point out that, because of the Draconian nature, invasiveness and conceivably inequitable consequences of such anti-dissipation relief, the courts have been reluctant to grant it, except in the clearest of cases. See generally: *Knox D' Arcy Ltd and Others V Famieson and others* 1196 (4) SA 348 (A) ([1996] 3 ALL SA 669; [1996] ZASCA 58) at 372C; *Mngadi v Beacon Sweets & Chocolates Provident Fund and Others* 20004 (56) SA 388 (D) ([2003] 2 ALL SA 279) at 396E; *Reeder v Softline supra* at 849-851.”

- [12] It was argued on behalf of the applicant that bank statements of the 4th respondent obtained from the 6th respondent indicated that the money was massively embezzled. The money was used to fund a luxurious lifestyle and pay for personal expenses this did not have anything to do with the core business relationship between the parties namely forex trading and investment. Substantial cash withdrawal transactions from the automated teller machine were regularly conducted and in most cases shortly after the applicant had deposited the money, consumables like cellphone airtime and motor repairs were paid for. These could not have been for the purpose of investing the funds as contemplated by the parties. In fortifying its case, the applicant attached photos of the assets that have been purchased by the respondents and an invitation card to the planned wedding. The logical conclusion of the argument is that the respondents are depleting their assets and that if the interim order is not granted, then they will be met with a hollow judgment in the event of a successful action for damages.

- [13] The argument on behalf of the 3rd respondent is that the applicant has not met the requirements of the interim relief and that the *rule nisi* should be discharged. The primary contention of the 3rd respondent is that the money was paid into a forex trading account and lost while pursuing a “high risk / high reward” trading strategy. It was contended that the applicant has failed to allege and establish *prima facie* that there were transactions made from the bank account of the 3rd respondents with the intention of undermining the claim that the applicant intended to institute in the future. Another point raised is that the applicant has not established any legal basis upon which it would be entitled to reclaim the payment of the sum of R290 000.00. In essence there is no basis for alleging that the 3rd respondent was under an obligation to repay the applicant any money given to him to trade in the forex markets. further that there are no facts to sustain any conclusion that the 3rd respondent has embezzled the money. Lastly, it was submitted that the 3rd respondent will be adversely affected in the event that the order is granted because he had a *bona fide* defence to what is considered to be a spurious claim.
- [14] The crux of the 4th respondent’s version is that he traded with the money deposited in his account and lost it because of the market volatility. The argument, so it goes, is that the parties entered into an oral agreement with the terms not clearly defined in finer details. As a result, weighing the applicant’s case against the general probabilities, it is unthinkable that a forex trader would agree to invest the money on behalf of investors and also assume the risk and liability for losses that might be incurred. Given the surrounding circumstances, it was contended that there was no meeting of minds between the applicant and the 4th respondent

relating to the risk in the event that no profit was not made. It was pointed out that Annexure “E” on page 415 of the papers is a clear indication of proof that the risk did not lie with the traders. On this basis, it was submitted that the application must be dismissed with costs

- [15] Certainly the parties concluded an oral agreement without clearly defined terms and conditions. These are gleaned from many sources in the conduct of their relationship. Perhaps this aspect was given a cursory look in pursuit of the returns. What is certain between the parties is that they were in the business of forex trading with the primary objective to maximize the profits. After all that is the primary objective of any capitalist venture.
- [16] The argument that the applicant has not established a prima facie right to be reimbursed the remainder of the capital sum falls flat on this aspect. Anybody in pursuit of profit will expect to increase the capital outlay. It is logical that the capital invested and the maximum profit achieved from the venture less operating costs will have to be repaid. To think otherwise it will be the denial of what is the norm in the commercial world. After all this money did not belong to the applicant but investors. This was well known to both the applicant and the respondents. To demonstrate the falling of this argument, the third respondent repaid the R200 000.00 of the R490 000.00 paid him. I am convinced that on this aspect the applicant has discharged the necessary onus on a balance of probabilities.
- [17] It was argued that the applicant has failed to allege or establish a prima facie intention that the respondents were spending the

money in order to frustrate the future claim to be instituted. This failure was deemed to be fatal and therefore the applicant will not be entitled to the relief. This submission in my view is without merit.

- [18] The transactions between the parties was conducted through personal banking accounts of the respondents. The bank statements point to a litany of transactions which do not have anything to do with forex trading. Automated teller machine withdraws of sizable cash amounts, purchases of fast food and other unidentified purchases. The pattern created is that these generous purchases were occurring immediately after the applicant had deposited the money. This was the money that ultimately belonged to the investors spent on what is palpably personal expenses. Weighing the probabilities, I am satisfied that the applicant has demonstrated that the respondents were dissipating their assets which will adversely affect any future claim.
- [19] The bulky documents attached as annexures by the 3rd respondent did not advance his case. These documents purporting to be statements from International Capital Markets Pty Ltd and a proof that the money was paid to them, are largely incomprehensible. I was not directed to even one transaction that indeed the 3rd respondent deposited the money with them in advancing the business venture with the applicant.
- [20] For all the reasons set out above, I conclude that the applicant has discharged the necessary onus and that the respondents had no answer to the formidable case against them. I could do not find any reason to depart from the general rule that the costs follow the event.

[21] Accordingly I make the following order: -

21.1 The rule nisi is confirmed.

21.1.1 Pending the determination of an action to be instituted within twenty-one (21) days of this order by the applicant against the 3rd and 4th respondent for payment of the amount of R290 000.00 and R408 000.00 respectively, the following interim interdict issues: -

21.1.2 The third and fourth respondents are restrained from withdrawing money or making payments from the accounts held with the fifth and sixth respondent.

21.1.3 The third and fourth respondents are directed to pay the costs of this application, including all reserved costs, jointly and severally.

MATHEBULA, J

On behalf of applicant:

Mr M J Ponoane

Instructed by:

Ponoane Attorneys

BLOEMFONTEIN

On behalf of 3rd respondent:

Adv. H.S. Van der Merwe

Instructed by:

Balden Vogel and Partners INC

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On behalf of 4th respondent:

Adv. A.S. Boonzaaier

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