

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

Application Number: 4540/2015

In the matter between:

PIETER FREIRICH GERHARUS CROTS

Applicant

and

HANNES MULLER VOERKRAAL

1st Respondent

COLEEN SEVENSTER N.O.

2nd Respondent

HENNIE SEVENSTER N.O.

3rd Respondent

JAN DIRK HEYNS N.O.

4th Respondent

HENCO SEVENSTER

5th Respondent

JUDGMENT BY: BOKWA, AJ

HEARD ON: 8 OCTOBER 2015

DELIVERED ON: 14 OCTOBER 2015

A INTRODUCTION

[1] The Applicant is a self-employed farmer conducting a farming business at the farm Damschrub, Kroonstad District. The First Respondent is Hannes Muller Voerkraal a business whose core business is selling livestock with its principal place of business at Hansie Muller Building, Engelbrecht Street, Viljoenskroon. The Second, Third and Fourth Respondents are trustees of a trust called Senekal Bemarkingstrust t/a 7Ster Bemarking. They are cited in these proceedings in their capacity as trustees of the said trust. The Fifth Respondent is a manager of the First Respondent as well as the Senekal Bemarkingstrust t/a 7Ster Bemarking.

[2] The Applicant brought an Application on an ex parte basis on the 22nd of September 2015 in which he obtained an order for a relief that the First

Respondent be restrained and interdicted from paying an amount of R650 000.00 (SIX HUNDRED AND FIFTY THOUSAND RAND) over to the Senekal Bemarkingstrust t/a 7Ster Bemarking or any of its trustees namely the Second to the Fourth Respondent, or any account nominated by the Second to the Fourth Respondent. Furthermore that the First Respondent be restrained and interdicted from paying an amount of R650 000.00 (SIX HUNDRED AND FIFTY THOUSAND RAND) over to the Fifth Respondent, or any account nominated by the Fifth Respondent. The Respondents be ordered to pay the costs of this Application jointly and severally, the one paying the other to be absolved, only if the Application is opposed.

- [3] Upon being served with the Court Order the Respondents applied in terms of Rule 6(12)(c) for the reconsideration of the ex parte order in terms of which the Respondent were called upon to show cause why an interim order granted against them on the 22nd of September 2015 before Moloi J should not be made a final order of the court.
- [4] A Rule *nisi* was granted by Moloi J returnable on the 29th of October 2015. The Application in terms of Rule 6(12)(c) of the Uniform Rules of Court was set down for hearing on the 08th of October 2015 before me.

B BACKGROUND FACTS

- [5] The order obtained by the Applicant on the 22nd of October 2015 had the following terms:
- “1. Condonation is granted for non-compliance with the rules relating to for and process regarding service and that this application is heard ex parte, as an urgent application in terms of the provisions of Court Rule 6(12).

2. A rule *nisi* is issued calling upon respondents to show cause if any, on 29 October 2015 at 09:30 or as soon thereafter as applicant's representation may be heard, why the following orders should not be granted:
 - 2.1 That 1st respondent is restrained and interdicted from paying an amount of R650 000.00 (Six Hundred and Fifty Thousand Rand) over to the Senekal Bemarkingstrust (IT1370/1999) or any of its trustees, namely the 2nd to 4th respondents, or any other account nominated by the 2nd to 4th respondents.
 - 2.2 That 1st respondent is restrained and interdicted from paying an amount of R650 000.00 (Six Hundred and Fifty Thousand Rand) over to the 5th respondent, or any other account nominated by 5th respondent.
 - 2.3 That respondents be ordered to pay the costs of this application jointly and severally, the one paying the other to be absolved, only if this application is opposed and only by those respondents opposing this application.
3. The relief in paragraph 2.1 and 2.2 above operate as an interim interdict with immediate effect.
4. This application, together with the Court Order must be served on the respondents by the sheriff."

[6] A transaction was concluded on the 28th of May 2014 by the Applicant and the Fifth Respondent who was acting either for the First Respondent or the Senekal Bemarkingstrust t/a 7Ster Bemarking in terms whereof the Applicant sold livestock to the Senekal Bemarkingstrust t/a 7Ster Bemarking or the First Respondent. The amount of R527 236.96 (FIVE HUNDER AND TWENTY SEVEN THOUSAND TWO HUNDRED AND THIRTY SIX RAND AND NINETY SIX CENT) was owed to the Applicant by either the First Respondent or the Senekal Bemarkingstrust t/a 7Ster Bemarking. The Fifth Respondent acknowledged liability to the Applicant in the amount of R422 636.48 (FOUR

HUNDRED AND TWENTY TWO THOUSAND SIX HUNDRED AND THIRTY SIX RAND AND FOURTY EIGHT CENT).

- [7] When the Applicant did not receive his money he instructed his attorney who made the demand. The Fifth Respondent initially agreed to pay the money owed with R10 000.00 (TEN THOUSAND RAND) monthly instalments, the balance of which would be paid with the proceeds of a Volkswagen Truck which the Fifth Respondent intended to sell. Subsequently the Volkswagen Truck which was offered as security was indeed sold but no monies were paid, to the applicant.
- [8] It came to the knowledge of the Applicant that the Fifth Respondent is not a trustee of the trust. Applicant is now uncertain who will now be responsible for the debt owed to him. In the circumstances and upon hearing that the Respondent were due to receive monies in respect of the livestock sold Applicant attached the said funds in order to obtain security pending the outcome of the litigation action which the Applicant has already initiated in this court against the Respondents.

C ISSUES TO BE DETERMINED

- [9] It must be determined whether the Applicant has proven the requirements for a final interdict as set down in the seminal decision of Setlogo v Setlogo in order to obtain the relief it seeks, this being:
- a) A clear right;
 - b) An injury actually committed or reasonably apprehended;
 - c) The absence of any other satisfactory remedy available to the Applicant.

D THE LAW

- [10] The interdict in question is an anti-dissipation interdict. To succeed the Applicant must show in addition to a well granted apprehension of irreparable harm, that

the Respondent has assets within the jurisdiction of the court, has no *bona fide* defense against the Applicant's contingent right, and intends to defeat the Applicant's claim or render it hollow by dissipating or secreting the asset.¹

[11] In the **Knox v D'Arcy Ltd v Jamieson** 1996 (4) SA 348 (A) at 373D – I the Appellate Division left open the question whether, in principle and on authority, such an interdict should be granted in cases where the respondent is in good faith disposing of his assets, or threatening to do so, and has no intent to render the applicant's claim nugatory.

[12] In the same case EM Grosskopf JA stated as follows at 372G – I:

“The question which arises from this approach is whether an applicant need 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 creditors. Having regard to the purpose of this type of interdict, the answer must be, I consider, yes, except possibly in exceptional cases. As I have said, the effect of the interdict is to prevent the respondent from freely dealing with his own property to which the applicant lays no claim. Justice may require this restriction in cases where the respondent is shown to be acting *mala fide* with the intent of preventing execution in respect of the applicant's claim. However, there would not normally be any justification to compel a respondent to regulate his *bona fide* expenditure so as to retain funds in his patrimony for the payment of claims (particularly disputed ones) against him.”

[13] The Respondent has brought an Application for reconsideration in terms of Rule 6(12)(c) in terms of the Uniform Rules of Court. The Rule was considered in *ISDN Solutions (Pty) Ltd v CSDN Solutions CC and others* 1996 (4) SA 484 (W) where Faber AJ said the following at 486H – 487C.²

¹ *RS v MS* 2014 (2) SA 511 (GJ) at 513J – 514C).

² *ISDN Solutions (Pty) Ltd v CSDN Solutions CC and others* 1996 (4) SA 484 (W) where Faber AJ said the following at 486H – 487C.

“The Rule has been widely formulated. It permits an aggrieved person against whom an order was granted in an urgent application to have that order reconsidered, provided only that it was granted in his absence. The underlying pivot to which the exercise of the power is coupled is the absence of the aggrieved party at the time of the grant of the order.

Given this, the dominant purpose of the Rule seems relatively plain. It affords to an aggrieved party a mechanism designed to redress imbalances in, and injustices and oppression flowing from, an order granted as a matter of urgency in his absence. In circumstances of urgency where an affected party is not present, factors which might conceivably impact on the content and form of an order may not be known to either the applicant for urgent relief or the Judge required to determine it. The order in question may be either interim or final in its operation. Reconsideration may involve a deletion of the order, either in whole or in part, or the engraftment of additions thereto.”

E APPLICATION OF THE LAW TO THE FACTS

[14] It is submitted on behalf of the Applicant as follows on page 16 and 17, paragraph 11.1 to 11.7 of the applicant’s affidavit:

“11.1 I am personally aware that the 5th Respondent and/or Trust incur many expenses.

11.2 I have seen that the 5th Respondent is driving a new Mercedes ML 500 SUV, which he started driving during March 2015.

11.3 I have also seen that the 5th and 3rd Respondents, as well as an employee of the Trust are driving new bakkies during May 2015.

11.4 The 5th Respondent’s wife also started driving a new vehicle around September 2014.

11.5 The 5th Respondent's wife furthermore consistently places photos and posts on her facebook account of holidays they take to various places.

11.6 Furthermore, the 5th Respondent and/or Trust did not honour the undertaking to pay me when the truck is sold.

11.7 I respectfully aver that I have a reasonable apprehension that I will not be paid, even if I obtain judgment in the action proceedings, thus I request the Honourable Court to order that the money be retained as security by the 1st Respondent."

[15] The fundamental question is whether or not the Applicant has established a "clear right". The Applicant submits that he has established a clear right because he has proven that the Respondents admitted that it owes them money.

[16] The word "clear right" relates to the degree of proof required to establish the right. In order to establish a clear right the Applicant has to prove on a balance of probability the right he seeks to protect.³

[17] Advocate Reinders implores me to make a finding that with "Mareva injunctions" there would normally not be any justification to compel a respondent to regulate his bona fide expenditure so as to retain funds in his patrimony for payment for claims against him. Furthermore he submitted on behalf of the Respondent that these kind of interdicts will only be granted by the court where it is shown that the Respondents were acting male fide with the intent in preventing execution in respect of the Applicants claim. In *casu* he argued that the Applicant had failed to demonstrate that.

[18] "If money is sought to be interdicted pending an action for its recovery, it must be shown that the money sought to be interdicted is identifiable with or earmarked as a particular

³ Nienaber v Stuckey 1946 AD 1049 at 1053-4.

fund to which the applicant claims to be entitled.” 14 Stern & Ruskin NO v Appleson 1951 (3) SA 800 (W) at 811 – 812.⁴

[19] It was submitted by Mr. Reinders that the Applicant failed to identify the money it claims is owed with a particular fund. I am persuaded by his submissions and I agree.

[20] In view of the a foregoing I am satisfied that the first to fifth Respondent are entitled to have the order of Moloi J set aside.

[21] In the circumstances I make the following order:

- (a) The Order made by Moloi J on the 22nd of September 2015 is set aside;
- (b) The Applicant is ordered to pay the costs of the Respondents.

I.R.O BOKWA, AJ

On behalf of the applicant:

Adv: Berry
Instructed by:
Symington & De Kok
BLOEMFONTEIN

On behalf of the respondent:

Adv: Reinders
Instructed by:
Rosendorff Reitz Barry
BLOEMFONTEIN

⁴ 14 Stern & Ruskin NO v Appleson 1951 (3) SA 800 (W) at 811 – 912.