

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No: 447/2009

In the matter between:

CHERANGANI TRADE & INVEST 113
(PTY) LTD t/a BROCOR

Applicant

and

ROBBIE IANNONE
(In Iannone Family Trust)
CHARL STANDER
(In his capacity as conveyancer)

1st Respondent

2nd Respondent

JUDGMENT BY: KRUGER, J

HEARD ON: 19 MARCH 2009

DELIVERED ON: 26 MARCH 2009

- [1] The applicant obtained a rule *nisi* against the 1st respondent on 5 February 2009 calling upon the respondent to show cause why an amount of R421 800,00 of the purchase price should not be kept in trust with the 2nd respondent pending the outcome of an action to be instituted by applicant for that amount.

[2] The R421 800 is the amount which the applicant alleges it is entitled to as the commission on the sale of 1st respondent's property. Applicant alleges that a portion (10%) of the purchase price of R3.7m is earmarked to be paid to applicant. Applicant states that R3 075 000,00 was already been paid into the 2nd respondent's attorney's trust account, and in the Answering Affidavit of the 1st respondent says that the 1st respondent has other creditors, and applicant fears that they will get the proceeds of the sale to applicant's detriment. First respondent says there is no reason for any fear by the applicant. The 1st respondent has a property in which the equity is at least ½m rand.

[3] Applicant's claim is based on the fact that the snag has been earmarked for payment of its commission. Special rules of practice have developed in respect of interdicts relating to money (See Harms, **Interdicts**, LAW SA, 2nd Edition, Volume II, par 409).

There are also special rules in respect of the protection of the respondent's assets (MAREVA Injunctions). The Mareva injunction is often reflected to as an anti-dissipation order. In

its applicant where the applicant where the applicant fears that he will obtain a hollow judgment because by the time judgment is granted, respondent's assets will have been dissipated. Such interdict preserves for the benefit of all creditors such as the debtor may have (per Marais JA in **MEIHUIZEN FREIGHT (PTY) LTD v TRANSPORTES MARITIMOS DE PROTUGAL LDA** 2005 (1) SA 36 (SCA) par [21]).

- [4] The basis for a Mareva injunction is to stop dissipation on the basis for a claim to interdict money is that to money has been earmarked. A claim for money to be interdicted can be vindicatory or quasi vindicatory, e.g. where funds are fraudulently obtained or misappropriated (loc cit).

- [5] In this regard the following is stated in **STERN AND RUSKIN NO v APPLESON** 1951 (3) SA 800 (W) at 813 B – C:

“The claims now under consideration being neither vindicatory nor 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 that the applicant himself bona fide fears such loss.”

In such case there is a heavier burden in obtaining the interim interdict it seeks:

“the very nature of the respondent's occupation makes it possible that in the short period of a month or two he may lose sums of money running into thousands of pounds to the prejudice of creditors.’

What the applicants have to establish is that the respondent has no bona fide defence to the action and that, objectively considered, there are good grounds for fearing that he intends to make away with his assets in order to defeat the applicants' claims. (*Yamamoto v Rand Canvas Co.*, 1919 W.L.D. 100; *Ncongwane v Molorane*, 1941 OPD 125). The applicants' allegations, such as they are, are denied and there is no evidence from which it is legitimate to infer that the respondent has any such intention. It was in the end argued that because the respondent carries on what is said to be a very precarious trade the applicants should be protected against the possibility that he may lose the money which ought to be available to

satisfy their claims if they succeed in the action. This is in itself, no ground for an interdict.”

- [6] This being neither an option for a Mareva injunction or a case where there is a vindicatory claim to the money. The applicant must show a well-ground fear of inoperable loss. This is a factual enquiring. The test is objective (HILLMAN BROS. (WET RAND) (PROPRIETARY) LIMITED v VAN DEN HEUVEL 1937 WLD 41 at 36).

- [7] Whether money is identifiable with or has been earmarked is a factual enquiry.

- (1) In HENEGAN AND ANOTHER v JOACHIM AND OTHERS 1988 (4) SA 361 (D) a claim was made in respect of a payment provided for in the founding agreement of a close corporation. The applicant claimed payment of this money from the 1st applicant. It transpired that the founding agreement provided that R100 000, would be paid by the close corporation to the third respondent. The counter found that the amount of R124 500 claimed by the applicants “was not

‘earmarked’ by the founding agreement as a fund which is ordained to be kept intact.” (p. 365 D – E)

The court also found: “The mere fact that some part of the sum can be traced back to the applicants does not mean that the money was either ‘earmarked’ or a ‘fund’” (365 F – G). The court found that the R100 000 was ‘identifiable’ as part of the purchase consideration. It could thus perhaps be said that sum thus become identifiable with a “particular fund”, as approved to being “earmarked” (at 365 I – J).

(2) In **NIEUWOUDT v MASWABI NO AND OTHERS** 2002 (6) SA 96 (O).

(3) As to fear of irreparable loss, Mr Reynders, for the applicant submits that the 2nd respondent, on behalf of the 1st respondent informed applicant’s attorneys that there are other creditors of the 1st respondent informed applicant’s attorneys that there are other creditors of the 1st respondent’s trust who were indicating that their claims will be paid out of the proceeds of the sale. Respondents are not prepared to disclose information regarding those

creditors. Applicant fears that some of the creditors may not be creditors of the trust, and it would be to applicant's _____ if those creditors were to be paid by the trust.

Respondent, in its first answering affidavit says at p. 65:

“6.4 I am advised that the first leg of the so-called “*Meriva Injunction*” is therefore not proven, even on a *prima facie* basis.

6.5 Secondly, Applicant's submission in paragraph 29 that the trust may not be able to satisfy a future judgment is based upon supposition and is nothing less than a proverbial fishing expedition. Applicant has barged into court on an urgent basis without fully ascertaining the facts. The trust possesses fixed property in the Ferreira district of Bloemfontein which has a nett value of at least **R550 000-00**. This information could easily have been ascertained via a deeds search, or by contacting Second Respondent.

6.6 Thirdly, there is no allegation in the papers that the trust is divesting itself of funds, or likely to do so with the intention of defeating the claims of creditors. No particular state of

mind to do so has been shown and I am advised that the interdict sought cannot therefore be granted.

6.7 There is not even *prima facie* proof of a well-grounded apprehension of irreparable harm.”

In the replying affidavit the applicant argues that the fear of dissipation flows from the absence of a denial that other creditors are making claims. As to the property to which 1st respondent refers, and says he has no idea of its settlement value. The applicant does not say why it did not check in the Deeds Office. Applicant says that the fact that other creditors want to lay claim to the proceeds of the sale proves a well-focused application of the irreparable harm (p. 73, subsection Ad 6.7).

In the second answering affidavit 1st respondent gives more details of its other property (p. 84, subsection 13).

In the 2nd replying affidavit the applicant says that the 1st respondent does not state who estimated the value of the property at R1m.

A. KRUGER, J

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