



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Case Number: 17191/24

In the matter between:

CELLUCITY (PROPRIETARY) LIMITED

Applicant

and

SHARLENE PHILLPSON-GARCIA

First Respondent

JOHN MICHAEL BARRINGTON

Second Respondent

JENNIFER LOUISA BARRINGTON

Third Respondent

CANDICE ASHLEIGH CAMPBELL

Fourth Respondent

BASIC BLUE TRADING 450 (PTY) LTD

Fifth Respondent

CAPITEC BANK LIMITED

Sixth Respondent

FIRST NATIONAL BANK LIMITED

Seventh Respondent

JUDGMENT

JANISCH AJ:

Introduction

1. This is the return day of a *rule nisi* issued *ex parte* on 6 August 2024. After the matter became opposed, the rule was amended by agreement on 11 September 2024 to have regard to a property sale to which I refer below.
2. The substantive relief sought on the return day is two-fold:
 1. the Applicant claims payment from the First Respondent in the amount of R10,184,455.95; and
 2. the Applicant seeks so-called “*anti-dissipation*” orders against the Respondents, which would prevent the withdrawal of amounts from specified bank accounts and the dissipation and/or encumbering of certain immovable properties, pending the payment of the above money claim and the outcome of proceedings to be launched for the recovery of additional amounts.
3. The Applicant is a company operating in the cellular telephone industry.
4. The First Respondent was employed by the Applicant for just shy of 16 years in a financial administration role. She resigned on 8 July 2024 in circumstances to which I return below.

5. The Second Respondent is the First Respondent's son-in-law. He is married to the Third Respondent, who is the First Respondent's daughter. The Fourth Respondent is the First Respondent's niece.
6. The Fifth Respondent is a company of which the First Respondent is the sole director. It had a bank account (now closed) into which it is alleged that the First Respondent dishonestly caused substantial sums of money from the Applicant's funds to be paid over time.
7. The Sixth and Seventh Respondents are commercial banks. The Fifth Respondent's bank account was with the Seventh Respondent. The First Respondent has personal bank accounts with each of the Sixth and Seventh Respondents. The banks are cited to enable enforcement of the prayer that no withdrawals be permitted from these accounts.
8. The Eighth Respondent is the Registrar of Deeds, Cape Town. The Registrar is cited because if the application succeeds, the title deeds of the immovable properties must be endorsed with a *caveat* reflecting the restriction on alienation or encumbrance thereof.

The relevant facts

9. The Applicant sets out the following key facts in its founding papers and in a supplementary affidavit which it had leave to file ahead of the return day.
10. The Applicant states that after noticing unusual and suspicious entries in the financial records under the First Respondent's control, it confronted her with these. She failed to provide an explanation. Three days later, she sent an email tendering her resignation with immediate effect on 8 July 2024.
11. Investigations have revealed that over a considerable period of time, the First Respondent had falsified supplier invoices made out to the Applicant. She inflated the actual invoice amounts and inserted the Fifth Respondent's banking details for payment in place of the suppliers' details. She then purportedly verified the

falsified invoices for payment and caused the Applicant to pay the total amounts into the Fifth Respondent's bank account, of which she had control.

12. In the founding affidavit, it is shown that in relation to 45 separate inflated invoices, payments exceeding the true invoiced amounts by R10,184,455.95 had been made by the Applicant to the Fifth Respondent's account.
13. By the time the supplementary affidavit was filed, the Applicant's investigation had revealed that the inflated sum that the First Respondent had caused the Applicant to pay out amounted to R70,024,152.24.
14. The First Respondent, despite having filed two answering affidavits, one to the founding affidavit in the *ex parte* application and one to the supplementary affidavit, has not denied the allegation that she caused these payments to be made out of the Applicant's funds in the manner alleged.
15. On 25 July 2024, the Applicant's attorneys sent a letter to the First Respondent notifying her that there was evidence of stolen and/or misappropriated funds totalling R10,184,455.95, and that the investigation was ongoing. It was also stated that the Applicant had discovered that a property owned by the First Respondent in Kleinbaai was in the process of being sold. The Applicant sought an irrevocable undertaking from the First Respondent that she would not in any way purport to further dissipate that property and the funds currently in her possession, failing which urgent legal steps would be taken pending proceedings to recover all funds misappropriated.
16. No such undertaking was furnished. This led to the Applicant's *ex parte* application which is the source of the rule *nisi*.
17. By the time that application was launched, the Applicant had further ascertained that the First Respondent had bank accounts in her own name with the Sixth and Seventh Respondents. Moreover, a deeds office search revealed that since 2018 the First Respondent had acquired nine immovable properties in her own name, bond free. Apart from the Kleinbaai property referred to above, six of these properties are registered in her name alone. A further property (Erf 3[...]

Milnerton) is owned in undivided shares between the First, Second and Third Respondents. Another (Erf 3[...] Milnerton) is owned in undivided shares between the First and Fourth Respondents.

18. The Applicant contended that given the First Respondent's salary (which at termination was R41,500 per month before tax), it would have been all but impossible for her to afford these properties, let alone without the need for a bond. The Applicant's conclusion was stated as follows:

"The only plausible explanation is that these properties were purchased with the proceeds of the fraud and theft committed."

19. The First Respondent did not deny this.
20. The Applicant also put up a range of further facts which it contended warranted an order interdicting the First to Fourth Respondents from disposing of the identified assets pending the finalisation of recovery proceedings.
21. On 5 August 2024, this Court issued the rule *nisi* and granted interim interdicts prohibiting the disposal or encumbrance of the identified properties and any withdrawals from the bank accounts pending the return day.
22. On 11 September 2024, the rule *nisi* was amended by agreement to deal with an arrangement that had been reached pertaining to the sale of the Kleinbaai property. It was agreed that the sale could be put into effect and the proceeds paid into the Applicant's attorneys' trust account pending the final determination of the application.
23. I turn to deal with the Applicant's claims for substantive relief.

The Money Claim

24. The Applicant in its founding papers demonstrated that the First Respondent had knowingly misappropriated the sum of R10,184,455.95 through producing inflated invoices and causing the Applicant to pay the inflated amount into the bank

account of the Fifth Respondent, which was controlled by the First Respondent. The said sum is the difference between the inflated and valid invoices and was effectively stolen from the Applicant.

25. The Applicant seeks an order directing the First Respondent to repay to it the misappropriated or stolen amount.
26. The First Respondent has made no effort to deny or contest this claim in any way. In oral argument, counsel for the First Respondent fairly conceded that his client had no defence to the claim.
27. In these circumstances, I am satisfied that the Applicant has established a right to judgment in the amount claimed.
28. The Applicant intends to launch separate proceedings to claim the difference between the above amount and the total of some R70 million that it contends to have been stolen or misappropriated. That claim is not before me, although I note that the First Respondent has also not denied the allegations on which it will be based.

The Anti-Dissipation Orders

29. What was in dispute before me were the prayers to interdict the transfer or encumbrance of the immovable properties and any withdrawal from the bank accounts, pending payment of the money claim and the outcome of the intended proceedings to recover the rest of the misappropriated money.
30. The law in relation to “*anti-dissipation*” interdicts (i.e. interdicts prohibiting the alienation or encumbering of assets pending proceedings in which amounts will be claimed from the owner of those assets) is well developed.
31. The leading case is **Knox D’Arcy Ltd v Jamieson** 1996 (4) SA 348 (A) (“*Knox D’Arcy*”). It recognises that a court is empowered to grant such relief. While it remains necessary for the applicant to establish all the requirements for an interim interdict (a *prima facie* right, an apprehension of irreparable harm, the

balance of convenience favouring the grant of the interim and the lack of an adequate alternative remedy), the remedy will not be granted unless a particular state of mind on the part of the respondent is shown to exist: 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”* (at 372G).

32. At the same time, the Court recognised that there may be exceptional circumstances in which this state of mind need not be established.
33. Different principles apply where the interdict is claimed to protect or preserve property that is the subject of what have been described as vindicatory or *“quasi-vindicatory”* claims.
34. In **Fey N.O. v Van Der Westhuizen** 2005 (2) SA 236 (C) (*“Fey”*) at 249D-E, this Court held that in the circumstances of that case, where a trustee was seeking to preserve assets in a trust which was the *alter ego* of the insolvent pending a claim to recover them, it was not necessary for the applicant to show an intention on the part of the respondent to dissipate assets to defeat the claims of creditors. The Court held that the circumstances before it, which fell into the category of a quasi-vindicatory or quasi-proprietary claim, could be regarded as one of the *“exceptional cases”* envisaged in **Knox D’Arcy**.
35. I am not sure that the rule in relation to the preservation of assets in the context of vindicatory or quasi-vindicatory claims is truly an exception to **Knox D’Arcy**, since the Court in that case expressly made its findings in relation to funds *“to which the applicant lays no claim”* (at 372H), i.e. non-vindicatory claims.
36. Be that as it may, the legal position in relation to vindicatory or quasi-vindicatory claims is independently established. In **Fedsure Life Assurance Co. Limited v Worldwide African Investment Holdings (Pty) Ltd** 2003 (3) SA 268 (W) (*“Fedsure Life”*) , a full bench decision, Cloete J stated that in relation to applications for interim relief pending vindicatory and quasi-vindicatory actions, it was settled law that *“the court is entitled to ensure that the thing shall be preserved until the dispute is decided finally”* (in paragraph [27]). There was no need in those circumstances to demonstrate an intention to dissipate to frustrate

a creditor's claim, as per **Knox D'Arcy** (see the distinction of the cases in paragraphs [44] and [45]).

37. I am of the view that the Applicant's claim against the First Respondent, which is for the return or recovery of stolen or misappropriated money, can be described as quasi-vindictory, with the result that the interdict can be granted without establishing an intention to dissipate on the part of the First Respondent. My reasons are as follows.

38. In **First National Bank of Southern Africa Limited v Perry N.O.** 2001 (3) SA 960 (SCA) ("*Perry*") in paragraph [18], the following was stated:

"..our courts have recognised that a person whose money has been stolen or obtained by fraud and deposited in a bank account may be entitled to an interim interdict prohibiting the respondent from dealing with the money pending the institution of action".

39. The Court cited **Lockie Bros. Limited v Pezaro** 1918 WLD 60 ("*Lockie Bros*") and **Henegan v Joachim** 1988 (4) SA 361 (D) ("*Henegan*") at 365 B-C in support of this principle. On that basis:

"What an applicant must do in such a case is to trace the money back to the stolen money, to identify it as a 'fund' of stolen money in the defendant's hands."

40. In **Henegan** (at 365B-C), it was held that an interdict can be granted in respect of money:

"if the money is identifiable with or earmarked as a particular fund to which the plaintiff claims to be entitled ... examples of a fund would be where fraudulently obtained or misappropriated money can be traced to its source, or where money, such as trust money is kept in a separate account, or where a separate sum of money is received, retained or is destined for a designated purpose such as the payment of a particular debt." (underlining added)

41. In **Lockie Bros** it was sought to interdict the transfer of an amount held to the credit of the respondent in a fixed deposit account in a bank. It was shown that the respondent had conspired to steal the applicant's money which was first paid into the respondent's current account. Part of this was then withdrawn and paid into the fixed deposit account. In granting the relief sought, the Court stated as follows (at 61-62):

"I think it is sufficient to show that the misappropriated money went to swell the respondent's banking account and that the deposit was drawn from that account."

42. In **Perry** (supra in para [18]) it was specifically held that **Lockie Bros** was correctly decided.

43. In **Fedsure Life** in para [30], the following was stated:

"If the money to be interdicted is identifiable with or earmarked as a particular fund to which the plaintiff claims to be entitled, the money may be interdicted. ... Money remains earmarked where the property of the applicant has been realised and the respondent is in possession of the proceeds, where the proceeds are clearly identifiable." (underlining added)

44. The consequence is that where it is possible to "follow the stolen money" to an identifiable fund, it does not matter that the money may first have been placed in a bank account and mixed with other money of the respondent. It is only where the mixing was done with the authority of the applicant that an interdict would not be available (cf. **Fedsure Life Assurance** (supra) in para [37]).

45. A change in the nature of the stolen item does not alter the principle. In **Gernholtz and Another N.N.O. v Geoghegan** 1953 (2) PH F102 (O) (referred to in **Fedsure Life** in para [31]), a *prima facie* case had been made out that a truck had been fraudulently acquired by the respondent from the applicant. The truck had been sold in the meantime. The Court however held that there was a clear link between the truck and the proceeds that the respondent had in her

possession. In that case the fund consisting of the proceeds of the misappropriated item could be interdicted.

46. A further case relied on in **Fedsure Life** was **Van Woudenberg N.O. v Roos** 1946 TPD 110. Here a person incapable of managing his own affairs had made a cash donation to a third party which had then been placed on fixed deposit. The court interdicted the further disposal of the fixed deposit, stating as follows (underlining added):

“I am of opinion that an applicant is entitled to relief not only where it is clear that the property is the subject matter in dispute but also where the immediate proceeds of such subject-matter are in possession of the respondent. A clear direct connection between the subject-matter converted and the money sought to be interdicted appears to me to be sufficient to found an applicant’s right to an interdict. To hold that the respondent may be restrained from disposing of the cheque but that the proceeds therefrom are immune would be to indulge in unjustifiable nicety and refinement.”

47. In my view, this principle applies equally where stolen money has been converted into another form of property such as a fixed asset. If it is competent to interdict money into which a stolen or misappropriated asset has been converted (as in **Gernholtz**) or a separate deposit funded with stolen money (as in **Lockie Bros** and **Van Woudenberg**), there is no reason why the same should not apply where stolen monies have been used to acquire identified properties which are in the hands of the respondent.
48. Applying the above to the present case, the applicant has not only established a clear or at least *prima facie* case that the First Respondent has stolen and/or misappropriated a substantial sum of money, but also that the identified immovable properties owned by her were acquired out of this money. The First Respondent has not denied the Applicant’s specific averment to this effect.
49. The Applicant has therefore established a clear connection between the misappropriated funds and the immovable properties. In essence, the properties

represent the stolen money which it is sought to recover. The claim thus amounts to a quasi-vindictory claim.

50. Accordingly, to establish a right to an interdict, it is not necessary to go further and show that the First Respondent is intending to dissipate these properties.
51. Relief is also sought prohibiting withdrawals from a bank account in the name of the Fifth Respondent and two bank accounts in the name of the First Respondent.
52. It is apparent that the Fifth Respondent's bank account has since been closed. There is no basis for an order in relation to a closed account.
53. As regards the other two bank accounts, the founding papers refer to them and aver, in relation to them, that "*this is the Applicant's money.*" In other words, it is averred that whatever is in those accounts also emanates from the stolen money.
54. In respect of these averments, too, the First Respondent has chosen to remain silent. It would have been possible for her to identify and explain the source of funds in the account, if such source was legitimate. The lack of an explanation, particularly in the context of other evidence provided as to how she diverted amounts derived from the Applicant into acquiring fixed property and to fund certain other businesses, means that she cannot displace the *prima facie* conclusion that her two personal bank accounts also contain funds derived from the stolen monies.
55. The necessary *prima facie* right has therefore been established in relation to both the properties and the bank account. The resultant presumption of irreparable harm (see **Fedsure Life** in para [28]) has not been rebutted. The balance of convenience also favours the granting of the interdict, since the assets will be protected pending the further proceedings, and the First Respondent has put up no facts as to any inconvenience to her if the interim relief is granted. There also does not appear to me to be an adequate alternative remedy to protect the assets pending the payment of the money claim and the further proceedings to be launched.

56. I am therefore of the view that the Applicant has made out a proper case for the interdict in relation to the First Respondent's bank accounts and immovable property (including her undivided shares in two of the properties).
57. I mentioned above that an interim arrangement had been made in relation to the Kleinbaai property, with a special provision having been added to the rule *nisi* to cater for the proceeds of the sale. I was told by counsel for the Respondents that the sale had in the meantime fallen through, but there is nothing about this on the papers and I cannot say that the sale will not be resurrected. I therefore propose to retain the specific language added to the rule, although if that sale does not proceed, the general interdict applies to the property.

Relief against the Second to Fourth Respondents

58. The Applicant also claims anti-dissipation relief against the Second to Fourth Respondents in relation to their undivided shares in the two erven referred to above.
59. Although the papers contain certain statements to the effect that the Second to Fourth Respondents, who are apparently also business associates of the First Respondent, must have known that the source of her wealth was ill-gotten, the Applicant does not go so far as to say that they committed theft or misappropriation of its money.
60. The papers also do not specify the nature of any claim which the Applicant may pursue against the Second to Fourth Respondents. Counsel for the Applicant suggested that such claims may lie in unjustified enrichment.
61. I do not intend to speculate as to what cause of action, if any, the Applicant may in due course be able to establish against the Second to Fourth Respondents. What is important for present purposes is that it has not established that the undivided shares held by the Second to Fourth Respondents would constitute a "*fund*" which could be the subject of a quasi-vindictory claim by the Applicant.

62. In those circumstances, any interdict restricting them from disposing of their undivided shares would have to meet the requirements of **Knox D'Arcy**.
63. The Applicant has not made out a case that the Second to Fourth Respondents have the intention of disposing of their undivided shares in the properties to frustrate claims by creditors such as the Applicant. The mere fact of a close familial and business relationship with the First Respondent, or the fact that they have benefited from the First Respondent's largesse in various respects, does not assist in this regard.
64. Accordingly, I do not believe that the Applicant has established a case for an anti-dissipation order against the Second to Fourth Respondents.
65. For all practical purposes, however, the interdict on disposal of the First Respondent's undivided share of the two properties will preserve the whole of the properties. They cannot be disposed of in their entirety without the First Respondent's co-operation, which is impossible under the interdict. The Second to Fourth Respondents could attempt to dispose of their undivided shares to a third party, but this is an unrealistic scenario as anyone purchasing those shares would co-own the property with the First Respondent, whose share is restricted. These are however not considerations that warrant an interdict against the disposal of those undivided shares.

Costs

66. The Applicant has been successful against the First Respondent on both legs of the relief it sought in these proceedings (i.e. the money claim and the interdict). It follows that it should have its costs pertaining to those claims.
67. As regard the scale of costs, the Applicant sought an order on an attorney and client scale. It pointed to the blameworthy conduct of the First Respondent which had compelled it to incur the cost of bringing this application.
68. Although the First Respondent's conduct as a litigant cannot be described as vexatious or unnecessarily obstructive, that is not the only circumstance in which

a court, in the exercise of its discretion, may award costs on a punitive scale. Such an order may be made on the basis of the circumstances which gave rise to the action or application, where the Court thinks it just, by way of such an order, to ensure more effectively than it can by way of a judgment for party and party costs that the successful party will not be out of pocket in respect of litigation costs (**Nel v Waterberg Landbouwers v Ko-operatiewe Vereeniging** 1946 AD 597 at 607).

69. This is one of those cases. The First Respondent has essentially admitted fraud and self-enrichment on a significant scale, to the detriment of the Applicant. She has also not voluntarily undertaken not to dispose of her assets pending the finalisation of the claim. The Applicant was therefore put to significant expense in having to enforce its rights to protect the assets from which it must try to recoup its lost funds.
70. In these circumstances, I am of the view that a costs order against the First Respondent on a scale as between attorney and client is warranted.
71. As regards the Second to Fourth Respondents, their opposition has been successful. Whether or not some substantive relief may be claimed against them in the future, I have found that the Applicant was not entitled to attempt to restrict their ability now to deal with their undivided shares. I see no advantage in holding over the question of their costs for later determination.
72. While I consider that the Applicant should bear the Second to Fourth Respondents' costs, I cannot however find that the Applicant's conduct is sufficiently blameworthy to warrant a punitive costs order.
73. For practical purposes it will be necessary to apportion the costs between the First Respondent on the one hand and the Second to Fourth Respondents on the other.
74. The vast majority of the costs of this application related to the claim between the Applicant and the First Respondent. Having regard to the contents of the affidavits and the written and oral arguments, I am of the view that a fair

apportionment of costs would attribute 80% to the case involving the First Respondent and 20% to the case involving the Second to Fourth Respondents.

ORDER

75. In the premises, I make the following order:

1. The First Respondent is to make payment to the Applicant in the amount of R10,184,455.95 (Ten Million One Hundred and Eighty-Four Thousand Four Hundred and Fifty-Five Rand and Ninety-Five Cents).
2. The First Respondent is not permitted to make, or cause to be made, any withdrawal from the following bank accounts:
 - 2.1 Bank: First National Bank Limited
Account Number: 6[...]
 - 2.2 Bank: Capitec Limited
Account Number: 6[...]
3. The First Respondent is not to dissipate and/or encumber any of the following immovable properties:
 - 3.1. The First Respondent's undivided share in Erf no: 3[...] Milnerton, Cape Town, also known as 9[...] B[...] Road, Table View, Cape Town.
 - 3.2. The First Respondent's undivided share in Erf no: 3[...] Milnerton, Cape Town, also known as 1[...] B[...] Road, Table View, Cape Town.
 - 3.3. Erf no: 2[...] Milnerton, Cape Town, also known as 4[...] R[...] Drive, Parklands, Cape Town.
 - 3.4. Erf no: 3[...] Milnerton, Cape Town, also known as 9[...] B[...] Road, Table View, Cape Town.

- 3.5. Erf no: 1[...] Milnerton, Cape Town, also known as 2[...] A[...] Avenue, Table View, Cape Town.
- 3.6. Erf no: 3[...] Milnerton, Cape Town, also known as 9[...] B[...] Road, Table View, Cape Town.
- 3.7. Sectional Title Unit [...] SS J[...] Court – Scheme Number 1[...], Langebaan 5[...], Cape Town.
- 3.8. Erf no: 5[...], Langebaan, Cape Town, also known as [...] C[...] Close, Langebaan, Cape Town.
- 3.9. Erf no: 9[...] V[...], Gansbaai Municipality, Cape Town, also known as 3[...] R[...] Street, Kleinbaai, Western Cape, subject to paragraph 4 below.
4. The First Respondent will be permitted to sell and effect transfer of the property described in paragraph 3.9 supra ('the Property'), in terms of the deed of sale marked Annexure 'A' hereto, subject thereto that the proceeds of the sale, after deduction of the outstanding bond(s), if any, held by registered financial services provider(s), are to be kept in an interest-bearing trust account of Heidi van der Meulen Attorneys, or such alternative firm of attorneys as may be nominated by the Applicant.
5. The Eighth Respondent is authorised and directed to endorse the title deeds of the immovable property listed in paragraphs 3 and 4 with a *caveat* evidencing the aforesaid, where necessary in substitution for any *caveat* already endorsed under the interim relief granted in this application.
6. Paragraphs 2 to 4 above are to operate as an interim interdict pending:
 - 6.1 Payment of the amounts contemplated in paragraph 1 and paragraph 7 below; and

- 6.2 The outcome of an application and/or action to be instituted by the Applicant for the recovery of any monies, in addition to the amount of R10,184,455.95, misappropriated and/or stolen by the First Respondent, which is to be instituted within 21 calendar days of the date of this order.
7. The First Respondent is to pay the Applicant's costs of this application (as to 80% thereof) on a scale as between attorney and client, including the costs of counsel.
8. The application against the Second to Fourth Respondents is dismissed with costs on a scale as between party and party, including the costs of counsel on scale B, in respect of 20% of the costs of the application.

M W JANISCH
Acting Judge of the High Court
Western Cape Division

APPEARANCES:

For the Applicants: J P Steenkamp
Instructed by:
Heidi van der Meulen Attorneys

For the First to Fourth Respondents: T I Ferreira
Instructed by:
Andre Kirsten Attorneys

Date of hearing: 28 October 2024

Date of judgment: 4 November 2024 (electronically)