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

Case Number: 14263/2023

In the matter between:

YZERFONTEIN CURESMITHS (PTY) LTD T/A FLYING PIG

(IN LIQUIDATION)

First Applicant

(Registration number 20[....]07)

SHONA EDNA LE ROUX-MARX N.O.

Second Applicant

JOHHNY BASSON N.O.

Third Applicant

(in their capacity as trustees in the insolvent estate

GILBERT HERMANUS FERREIRA, CA[....]19)

and

ALETTA HELENE LAUBSCHER

First Respondent

ABSA BANK LIMITED

Second Respondent

JUDGMENT DELIVERED ON THIS THE 6th DAY OF DECEMBER 2023

Andrews AJ

Introduction

[1] This is the return date of an urgent *ex parte* application in terms of which the Applicants seeks an order confirming the *rule nisi* granted on 24 August 2023. In the alternative, to the attachment to confirm jurisdiction, the Applicants seek an order that the First Respondent be interdicted from transferring the funds held with the Second Respondent, pending the final outcome of the action proceedings. The application is opposed. No relief is sought against the Second Respondent, other than the implementation of the relief applied for, namely the attachment of the funds belonging to the First Respondent, which is held in an account with the Second Respondent.

Factual Background

[2] The First Applicant was placed under final liquidation on 26 June 2019. The business was operated by Mr. Gilbert Hermanus Ferreira ("Mr. Ferreira"), who is the son of the First Respondent. Mr Ferreira's estate was sequestrated on 26 August 2019, because he stood surety for certain obligations of the First Applicant. The Applicants allege that during or about 2018, while the First Respondent was the owner of the property situated at 28 High Street, Darling ("the property"), Mr Ferreira renovated and improved the property with funds received from the First Applicant, which funds were supposed to have been used to pay the First Applicant's creditors but were not.

[3] The Applicants had previously sought a similar order under case number 13828/2023 against the First Respondent and the Conveyancing Attorneys who were attending to the transfer of her property. An order was obtained. However, it was subsequently established that the Conveyancing Attorneys had paid over the proceeds of the sale of the property to ABSA Bank, the Second Respondent *in casu*.

[4] The Applicant launched an urgent *ex parte* application to attach funds of the First Respondent situated within the Republic of South Africa, and specifically being held in a bank account by the Second Respondent or such other investment, savings or other account in the name of the First Respondent held with the Second Respondent. The purpose of the application is to confirm jurisdiction in respect of the action instituted against the First Respondent and Mr. Ferreira for payment of

damages and/or recovery of assets allegedly misappropriated pursuant to various dispositions without value and collusive dealings committed by the First Respondent and Mr. Ferreira against the Applicants.

[5] An interim order was obtained on 24 August 2023 in the following terms:

'1. The proceeds of the sale of the property, being Unit 22 Villa Fontana, Yzerfontein, 7351 or such amount as may be retained in the bank account of the First Respondent held with the Second Respondent, with account number [...], or any other investment, savings or other account the First Respondent holds with the Second Respondent, into which the First Respondent may have deposited the funds from the sale of the property, limited to the amount of R2 250 000.00 ("the funds"), are attached to confirm jurisdiction in respect of the action instituted by the Applicant against the First Respondent and Mr. Gilbert Hermanus Ferreira, under Western Cape High Court case number 12070/23 or such similar proceedings to be instituted in due course ("the action proceedings").

2. The Second Respondent is directed, as soon as possible, to furnish to the Sheriff of this Court all such information pertaining to the funds as may assist the Sheriff to effect an attachment without impacting the Second Respondent's operation of its accounts....

The Applicants' principal submissions

[6] The Applicants allege, that during the said renovations, the First Respondent paid Mr. Ferreira various amounts on separate occasions which totalled R250 000 for the renovations, while being aware at all material times:

- (a) of his commercial and factual insolvency;
- (b) that his estate was under sequestration;
- (c) that his company was in liquidation, and
- (d) that he was indebted to Darling Brewery (Pty) Ltd, being the owner of the premises which his company rented for about R1 125 117.49.

[7] The Applicants furthermore allege that the First Respondent sold the property for a substantial profit based on the renovation effected and used the proceeds to advance a loan of R2 000 000 to Mr. Ferreira's wife.

[8] According to the Applicants, this was a sham transaction, to effectively channel money to Mr Ferreira and was never intended to be repaid as those transactions were designed to move funds from Mr Ferreira and the First Applicant to other family members, such as the First Respondent to defraud creditors.

The First Respondent's principal submissions

[9] The principal submissions of the First Respondent can be summarised as follows. The First Respondent denies:

- (a) that the Applicants have any legitimate or enforceable claim against her;
- (b) that there were any payments made by Mr Ferreira to her;
- (c) having received any money directly or indirectly from the First Applicant;
- (d) that any dispositions were made to her and
- (e) that the loan made to her daughter-in-law was designed to move funds away from the insolvent, Mr Ferreira and the liquidated company, the First Applicant, where neither of them have or had a claim against the First Respondent arising from the alleged profit realised on the sale of the property which was sold in April 2019.

[10] The First Respondent contended that:

- (a) any claim against Mr Ferreira, arose before the sequestration of his estate;
- (b) the application is an abuse of the process;
- (c) the Particulars of Claim are vague and embarrassing and do not disclose a cause of action against her;
- (d) the claim of the Applicants against her has prescribed;
- (e) the full transcript of the evidence that First Respondent gave on 26 August 2020 at the Insolvency Enquiry was not attached to the application which amounts

to material non-disclosure at the *ex parte* hearing, which in itself, is a sufficient ground to set aside the interim order granted by Sher J.

Legal Framework

[11] Section 21(3) of the Superior Courts Act¹ provides that any Division may issue an order for attachment to confirm jurisdiction. It is trite that where an attachment is sought to confirm jurisdiction some ground for that jurisdiction, other than the attachment, must be present. Ordinarily, an attachment is made by an *incola* who is desirous to bring a *peregrinus* before that court.²

[12] ***Tsung and Another v Industrial Development Corporation of South Africa Ltd. And Another***³ distills the historical legal significance of the practice of attachment to confirm jurisdiction.

[4] The practice of arrest or attachment to found or confirm jurisdiction was firmly established in Holland by the 17th Century in the interest of incolae and from considerations of commercial convenience. It enabled them to proceed in local courts against peregrini who were for the time being physically within the jurisdiction area of the court or possessed property there.⁴ In addition to founding or confirming jurisdiction and to commence proceedings, an attachment had since those days an additional function and that was the provision of security enabling the plaintiff, eventually, to execute in his own jurisdiction. Pending the finalisation of the proceedings, the defendant could not alienate or encumber the attached property.⁵ This function of attachment has since repeatedly been highlighted by our courts, including by this Court some months ago.⁶

¹ Act No. 10 of 2013.

² Cilliers et al, Herbstein and van Winsen 'The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa' (5th Ed.) at page 99 'Thus an attachment to found jurisdiction actually establishes jurisdiction, while an attachment to confirm jurisdiction strengthens or confirms a jurisdiction which already exists.'

³ 2006 (4) SA 177 (SCA); [2013] 2 All SA 556 (SCA) at [12].

⁴ *Owners of SS Humber v Owners of SS Answald* 1912 AD 546 at 555; *Siemens Ltd v Offshore Marine Engineering Ltd* 1993 (3) SA 913 (A) 918E-H, 920C-J.

⁵ *Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 (2) SA 295 (A) 306D-H.

⁶ *Naylor v Jansen; Jansen v Naylor* [2005] 4 All SA 26 (SCA) para 26.

Jurisdictional Requirements

[13] It is trite that the onus rests on the Applicant on the return date to:

- (a) satisfy the court that it has a *prima facie* case against the Respondent in respect of the relief sought;
- (b) That on a balance of probabilities, the Applicant is an *incola* and the Respondent is a *peregrinus*;
- (c) that the property sought to be attached is that of the Respondent.⁷

Point in limine

[14] The First Respondent denies that Mr Etienne Jan Marx (“Mr Marx”), the deponent to the Applicants’ Founding Affidavit, has personal knowledge of the relevant facts. It was contended that Mr Marx does not have personal knowledge of the central facts put up in order to support a cause of action against the First Respondent, more particularly in respect of the allegations which he makes in paragraphs 20 to 23 of the Founding Affidavit.⁸

⁷ *Tsung and Another v Industrial Development Corporation of South Africa Ltd. And Another (supra)* at para 7

‘Applications for attachment or arrest are as a matter of course brought without notice and the plaintiff has, until submission, the right to apply for such an order and, if the requirements have been met, entitled to an order. On the return day the court has to be satisfied that the applicant has a *prima facie* case; and that, on a balance of probabilities the applicant is an *incola* and the respondent a *peregrinus* and the property sought to be attached is that of the respondent. Whether submission is possible after the grant of the order but before the attachment, was the subject of *Jamieson v Sabingo* 2002 (4) SA 49 (SCA) para 30 where this Court held that ‘it is not too late for a submission to jurisdiction to be given before the attachment is put into effect.’

See also *Naylor v Jansen; Jansen v Naylor* [2005] 4 All SA 26 (SCA) para 27 and 29; *Utah International Inc v Honeth* 1987 (4) SA 145 (W); *Rosenberg v Mbanga (Azaminle Liquor (Pty) Ltd intervening)* 1992 (4) SA 331 (E); *Bocimar NV v Kotor Overseas Shipping Ltd* 1994 (2) SA 563 (A); *Dabelstein and Others v Lane and Fey NNO* 2001 (1) SA 1222 (SCA) para 7.

⁸ Index, Notice of Motion, paras 20 – 23, pages 12 – 13.

‘20. During or about 2018, while the First Respondent was the owner of the property at 28 High Street, Darling, 7345 (hereinafter “the property”), Mr. Ferreira renovated and improved the property with funds received from the First Applicant. Those funds should have been used to pay the First Applicant’s creditors but were not.

21. During the said renovations the First Respondent paid Mr. Ferreira at least R250 000.00 for the renovations, while being aware at all material times of his commercial and factual insolvency, that his estate was under sequestration, that his company was in liquidation, and that he was indebted to Darling Brewery (Pty) Ltd (the owner of the premises which his company rented) for at least R1 125 117.49.

[15] The First Respondent further submitted that the Confirmatory Affidavit deposed to by the Second Applicant, who is an Insolvency Practitioner, can also not have personal knowledge of the central facts relating to the Applicants' case. It was mooted that if regard is had to the content of the affidavit, even on a *prima facie* basis, same does not support the central factual allegations made by the deponent to the Founding Affidavit. First Respondent furthermore argued that the Confirmatory Affidavit attested to by Mattheus Hendrikus Roos (Mr Roos"), together with the Applicants' Replying Affidavit, is of no assistance to the Applicants. In this regard, Mr Roos, the Managing Director of Darling Brewery (Pty) Ltd, merely confirms that Darling Brewery (Pty) Ltd is a creditor of the First Applicant and Mr Ferreira; that it brought respective liquidation and sequestration applications; and that Mr Roos confirms the Founding Affidavit and Replying Affidavit of Mr Marx, confirming the correctness thereof insofar as it relates to "any dealing of Darling Brewery (Pty) Ltd with Mr. Ferreira and the First Applicant and any information which was in my possession that was conveyed to Mr. Marx".⁹

[16] The Applicants, on the other hand, contended that the Founding Affidavit is to be read in conjunction with the Particulars of Claim. In addition, it is submitted that the Replying Affidavit attaches a Confirmatory Affidavit of Mr Roos who is the Managing Director of Darling Brewery (Pty) Ltd.

[17] It is apparent that Mr Marx had since deposing to the Founding Affidavit, become an admitted legal practitioner and is enrolled as an attorney. I am satisfied that the Confirmatory Affidavit in which Mr Roos confirms having read the Founding Affidavit and Replying Affidavit deposed to by Mr Marx and confirmed under oath the correctness thereof insofar as it relates to any dealings of Darling Brewery (Pty) Ltd with Mr Ferreira and the First Applicant and any information which was in his

22. First Respondent sold the property at 28 High Street, Darling, 7345 at a substantial profit based on the renovations effected and used the proceeds to advance a loan of R2 000 000.00 to Mr Ferreira's wife, Alexandra Ferreira.

23. The loan mentioned in paragraph 22 above was a sham transaction, to effectively channel money to Mr. Ferreira and was never intended to be repaid. Those transactions were designed to move funds from Mr. Ferreira and the First Applicant to other family members, such as (sic) the First Respondent to defraud creditors'

⁹ Index, paras 3 and 4, page 164.

possession that was conveyed to Mr Marx. Consequently, I find that central factual allegations are sufficiently verified.

Consent to jurisdiction

[18] It is trite that for an application to confirm jurisdiction to be brought, it is incumbent on an Applicant to demonstrate that there is some basis on which the Court can have jurisdiction. *In casu* the First Respondent does not dispute that this Court has jurisdiction. However, the Applicants contended that a consent to jurisdiction after the attachment has been made, is not a ground for the attachment to be discharged.

[19] Consent on its own cannot confer jurisdiction unless the Plaintiff is an *incola*. The matter of ***Tsung and Another v Industrial Development Corporation of South Africa Ltd. And Another***¹⁰ (*supra*) deals with the rationale for jurisdiction as follows:

*‘The rationale for jurisdiction is often said to be one of effectiveness, and attachment is historically and logically closely related to this principle; but not only has the principle of effectiveness been eroded’¹¹ (Forsyth says ‘it is artificial and conceptual rather than realistic’),¹² effectiveness is also not necessarily a criterion for the existence of jurisdiction.¹³ In one instance effectiveness is non-existent and that is in the case of submission to jurisdiction (also referred to as prorogation). The reason is this: if a peregrine defendant has submitted – whether unilaterally or by agreement – to the jurisdiction of the court of the *incola*, an attachment or arrest to found or confirm jurisdiction is not only unnecessary, it is not permitted.¹⁴ (Consent on*

¹⁰ At para 6.

¹¹ *Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 (2) SA 295 (A) 300G-H.

¹² *Private International Law* (4 ed) 215 quoted in *Hay Management Consultants v P3 Management Consultants* 2005 (2) SA 522 (SCA) para 17.

¹³ *Ewing McDonald & Co Ltd v M & M Products Co* 1991 (1) SA 252 (A) 260B.

¹⁴ *Hay Management Consultants v P3 Management Consultants* 2005 (2) SA 522 (SCA) para 24; *American Flag plc v Great African T-Shirt Corporation* CC 2000 (1) SA 356 (W) 377F.

*its own cannot confer jurisdiction unless the plaintiff is an incola.)*¹⁵ There are good commercial reasons for this.¹⁶

*'Foreigners who submit voluntarily to the jurisdiction of our Courts should not have to fear that thereafter they or their property are at any time and without notice subject to attachment whenever an incola can satisfy a Court that he has a prima facie case against them.'*¹⁷

*In addition, the ensuing judgment will be internationally enforceable; will be recognised by the courts of the defendant's domicile; and binds the whole property of the defendant.*¹⁸ The downside is that the plaintiff will have to pursue the defendant in order to have the judgment enforced.¹⁹

[20] The matter of ***Bettencourt v Kom and Another (National Airways Corporation (Pty) Ltd Intervening)***²⁰ was referenced in ***Tsung and Another (supra)***, where it was held that a late consent cannot undo an attachment but added that the *peregrinus* who belatedly consents is not necessarily without redress. Hartzenberg J stated as follows:

'I consider myself not to be entitled to set aside the attachment which was validly made in this case. It is any event my view that the correct way to relieve the position of a defendant, who consents to jurisdiction after an attachment and who is inequitably extorted by the attachment, even if he has a good defence, is by an application, as was done in the case of Banks v Henshaw 1962 (3) SA 464 (D). In such an application a Court ought to be at large to look at all the circumstances of the case, such as the amount of the claim, the likelihood of the plaintiff succeeding, the financial position of the defendant, the ease or otherwise of executing on a judgment in the country of domicile of the defendant, the hardship to the defendant if the attachment

¹⁵ *Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd (in liquidation)* 1987 (4) SA 883 (A) 893; *Hay Management Consultants v P3 Management Consultants* 2005 (2) SA 522 (SCA) para 21.

¹⁶ *Hay Management Consultants v P3 Management Consultants* 2005 (2) SA 522 (SCA) para 17.

¹⁷ *Elscint (Pty) Ltd v Mobile Medical Scanners* 1986 (4) SA 552 (W) 558B.

¹⁸ *Jamieson v Sabingo* 2002 (4) SA 49 (SCA) para 23-24.

¹⁹ *Naylor v Jansen; Jansen v Naylor* [2005] 4 All SA 26 (SCA) para 26.

²⁰ 1994 (2) SA 513 (T) at 517C-E.

*remains and similar considerations. The Court can then decide if the attachment is to remain unaltered or if it is to be reduced, set aside, or substituted with some other form of attachment or security.*²¹

[21] I am of the view that that the First Respondent's consent to jurisdiction is not dispositive of this matter. The attachment cannot in the milieu of the factual matrix of the matter *in casu* be undone without considering the matter in its entirety. This Court is bidden to consider all the unique circumstances of this particular case in order to make a determination as to whether the attachment is to remain unaltered or if it is to be set aside or substituted with the alternative relief sought.

Prescription of the Claim

[22] The First Respondent has stated that the claim against her has prescribed. It is apparent that she has not set out the basis for the allegation in the Answering Affidavit. The onus rests on the First Respondent to demonstrate the basis for submitting that the claim has prescribed. In this regard, there is no submission as to the date on which prescription would begin. According to the Applicants they aver that they only became aware of the various claims against the First Respondent shortly before the insolvency interrogation in August 2020 and as such any claims would ordinarily prescribe in August 2023.

[23] It must be borne in mind that the First Respondent left South Africa in February 2023 which would delay prescription as set out in Section 13 of the Prescription Act^{22, 23}. It is uncontroverted that Mr Ferreira left for Poland in 2019. In terms of the Prescription Act, the period of prescription has been interrupted in

²¹ See reference in *Tsung and Another v Industrial Development Corporation of South Africa Ltd and Another (supra)* at para 9.

²² Act 68 of 1969.

²³ **13. Completion of prescription delayed in certain circumstances.** — (1) If—

(a)

...

(b)

the debtor is outside the Republic;

...

(i)

the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraph (a), (b), (c), (d), (e), (f), (g) or (h) has ceased to exist, the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i)...

respect of the First Respondent and would only run upon her return to South Africa. It is apposite to note that the First Respondent is aware of the claim against her.

[24] Consequently, I am not persuaded that the First Respondent has demonstrated any reasons in support of this ground of opposition and am satisfied that the period of prescription has been interrupted in terms of the Prescription Act.

Prima facie case

[25] It is required that the Applicant is to provide evidence, which if accepted will establish and/or which supports its alleged cause of action. **Hulse-Reutter and Others v Godde**²⁴ is instructive on the requirements.

'[12] The requirement of a prima facie case in relation to attachments to found or confirm jurisdictions has over the years been said to be satisfied if an applicant shows that there is evidence which, if accepted, will establish a cause of action and that the mere fact that such evidence is contradicted will not disentitle the applicant to relief – not even if the probabilities are against him; it is only where it is quite clear that the applicant has no action, or cannot succeed, that an attachment should be refused. This formulation of the test by Steyn J in Bradbury Gretorex Co (Colonial) Ltd v Standard Trading Co (Pty) Ltd 1953 (3) SA 529 (W) at 533 C – D has been applied both by this Court and the Provincial Divisions. (See eg Cargo Laden and Lately Laden on Board the MV Thalassini Avgi v MV Dimitris 1989 (3) SA 820 (A) at 831 F – 832 B; Weissglass NO v Savonnerie Establishment 1992 (3) SA 928 (A) at 936 E – H.) One of the considerations justifying what has been described as generally speaking a low-level test (MT Tigr : Owners of the MT Tigr and Another v Transnet Ltd t/a Portnet (Bouygues Offshore SA and Another Intervening) 1998 (3) SA 861 (SCA) at 868 I) is that the primary object of an attachment is to establish jurisdiction; once that is done the cause of action will in due course have to be established in accordance with the ordinary standard of proof in subsequent proceedings. (See the Bradbury

²⁴ (34/2000) [2001] ZASCA 102; [2002] 2 All SA 211 (A) (25 September 2001).

Gretorex case, supra, at 531 H – 532 A.) No doubt for this reason Nestadt JA, in the Weissglass case, supra, at 938 H, warned that a court “must be careful not to enter into the merits of the case or at this stage to attempt to adjudicate on credibility, probabilities or the prospects of success.

[13] Nonetheless, the remedy is of an exceptional nature and may have far-reaching consequences for the owner of the property attached. It has accordingly been stressed that the remedy is one that should be applied with care and caution. (See Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd 1969 (2) SA 295 (A) at 302 C – D; Simon NO v Air Operations of Europe AB and Others 1999 (1) SA 217 (SCA) at 228 E – F.) More recently, in Dabelstein and Others v Lane and Fey NNO 2001 (1) SA 1222 (SCA) at 1227 H – 1228 A, it was suggested that the time may come to reconsider the approach adopted in the past and to have regard also, in the assessment of the evidence, to the allegations in the respondent’s answering affidavit which the applicant cannot contradict. In the present case, however, the affidavits filed on behalf of the appellants are such that the issue does not arise and it is unnecessary to consider whether the test should be refined in the manner suggested.

[14] What is clear is that the “evidence” on which an applicant relies, save in exceptional cases, must consist of allegations of fact as opposed to mere assertions. It is only when the assertion amounts to an inference which may reasonably be drawn from the facts alleged that it can have any relevance. In other words, although some latitude may be allowed, the ordinary principles involved in reasoning by inference cannot simply be ignored. The inquiry in civil cases is, of course, whether the inference sought to be drawn from the facts proved is one which by balancing probabilities is the one which seems to be the more natural or acceptable from several conceivable ones. (See Govan v Skidmore 1952 (1) SA 732 (N) at 734 B – D as explained by Holmes JA in Ocean Accident and Guarantee Corporation Ltd v Koch 1963 (4) SA 147 (A) at 159 B – D.) While there need not be rigid compliance with this standard, the inference sought to be drawn, as I have said, must at least be one which may reasonably be drawn from the facts alleged. If the position were otherwise the requirement of a prima facie case would be rendered all but nugatory. As previously indicated,

there are exceptional cases where the requirement may be relaxed, such as for example where a defendant seeks to attach the property of a peregrine alleged by the defendant, in the alternative to a denial of liability, to be a joint wrongdoer (cf the MT Tigr case, supra, at 868 I – 871 B). But nothing like that arises in the present case and the ordinary principles must apply.'

[26] The matter of **Obiang v Van Rensburg and Others**²⁵ also crystallises what constitutes a *prima facie* case, wherein reference was made to the case of **Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Mocambique**²⁶.

[27] The Applicants submitted that they have a *prima facie* case against the First Respondent as is evident from the Founding Affidavit and Particulars of Claim. The First Respondent contended that the summons which is attached cannot itself be regarded as “evidence” for the purposes of the application as it merely sets out the Applicants case as formulated by their legal representatives, and does not provide the necessary evidence even on a *prima facie* basis.²⁷ The Applicants further contended that the First Respondent’s denials that she was party to any fraudulent activity or that the funds which were used to renovate her property came from Mr Ferreira do not disturb that *prima facie* case. In addition, the Applicants argued that the denial by the First Respondent that the R2 million loan she made to Mr Ferreira’s wife was a sham does not bear scrutiny is difficult to reconcile with her evidence given in the Insolvency Enquiry. In this regard, it was mooted that the First Respondent has not indicated what the terms of the loan were and her evidence in the Insolvency Enquiry was that it was for the benefit of her son and his children. It is

²⁵ [2023] 2 All SA 211 (WCC) (3 February 2023), paras 29 – 30.

²⁶ 1980 (2) SA 111 (T) at 118H, where Margo J, writing for the full court stated as follows:

‘The applicant’s case on that score may not appear at this stage to be a strong one, but for the limited purposes of an attachment to found or confirm jurisdiction, that is not the criterion. As Steyn J (later CJ) said in Bradbury Gretorex Co (Colonial Ltd v Standard Trading Co (Pty) Ltd 1953 (3) SA 529 (W) at 533C-E, after an examination of the earlier authorities, the requirement of a prima facie cause of action, in relation to an attachment to found jurisdiction, is satisfied where there is evidence which, if accepted will show a cause of action. The mere fact that such evidence is contradicted would not disentitle the applicant to the remedy. Even where the probabilities are against the applicant, the requirement would still be satisfied. It is only where it is quite clear that the applicant has no action, or cannot succeed, that an attachment should be refused or discharged...’.

²⁷ Index, Annexure “FA4”, paras 27 and 30.

the Applicants' case that when those facts are considered, the rather implausible denials of the First Respondent, together with the facts which the First Respondent cannot deny, demonstrate a fraudulent scheme in order to defraud the company and its creditors.

[28] Furthermore, the Applicants submitted that the First Respondent's denials are not sufficient to demonstrate that the Applicants have no claim whatsoever against her. In addition, it was contended that the factual disputes are indicative that the action should proceed and that these issues should be resolved at that stage; more particularly as the First Applicant has not demonstrated that there are no claims against her.

[29] The First Respondent contended that the allegations put up in the Applicants Founding Affidavit as earlier stated, to support the averment that the Applicants have a *prima facie* claim against the First Respondent, as set out in their Summons which is used to support the conclusions based on the provisions of Sections 22, 26 and 31 of the Insolvency Act 24 of 1936 and Section 424 of the Companies Act 61 of 1973, are without merit.

[30] The First Respondent furthermore contended that various general statements were made by the Applicants in the Heads of Argument that they have established a *prima facie* case and what such case comprises, but fails to engage with the relevant evidence by pointing out where evidence of this nature is to be found. In addition, the First Respondent submitted that the Particulars of Claim do not constitute evidence, even on a *prima facie* basis. The First Respondent correctly elucidated that the Particulars of Claim merely reflect the averments made on the Applicants' behalf by their legal representatives.

[31] In order to make a determination on whether the Applicants have discharged the onus by satisfying the court that a *prima facie* case has been established against the First Respondent, it will be apposite to consider the following factors:

(A) The basis of the Applicants' claims against the First Respondent and/or

(B) whether there may have been a material non-disclosure by the Applicants when they approached the court for the interim order.

(A) The claim against the First Respondent

[32] The Applicants claims against the First Respondent are essentially based on:

- (a) Section 26 and/or 31 of the Insolvency Act;
- (b) The *actio pauliana*;
- (c) Section 424 of the Companies Act.

[33] The First Respondent contended that the Applicants have not established they have a claim against the First Respondent, despite reliance being placed on the aforementioned common law and legislative provisions.

(a) The Insolvency Act 24, of 1936

(i) Disposition without value

[34] Section 26 of the Insolvency Act deals with disposition without value and states that:

(1) Every disposition of property not made for value may be set aside by the court if such disposition was made by an insolvent -

(a) more than two years before the sequestration of his estate, and it is proved that, immediately after the disposition was made, the liabilities of the insolvent exceeded his assets;

(b) within two years of the sequestration of his estate, and the person claiming under or benefited by the disposition is unable to prove that, immediately after the disposition was made, the assets of the insolvent exceeded his liabilities:

Provided that if it is proved that the liabilities of the insolvent at any time after the making of the disposition exceeded his assets by less than the value of the property disposed of, it may be set aside only to the extent of such excess.

(2) A disposition of property not made for value, which was set aside under subsection (1) or which was uncompleted by the insolvent, shall not give rise to any claim in competition with the creditors of the insolvent's estate: Provided that in the case of a disposition of property not made for value, which was uncompleted by the insolvent, and which-

(a) was made by way of suretyship, guarantee or indemnity; and

(b) has not been set aside under subsection (1). the beneficiary concerned may compete with the creditors of the insolvent's estate for an amount not exceeding the amount by which the value of the insolvent's assets exceeded his liabilities immediately before the making of that disposition.'

[35] The Applicants contended that the claim based on Section 26 of the Insolvency Act arises from the fact that money flowed from Mr Ferreira to the First Respondent as a consequence of the renovations done to her property. The Applicants maintain that there was no value to that disposition as that disposition occurred while Mr Ferreira has a liability of R1125 117.49 and R695 865.36 respectively, in respect of his suretyship obligations. It is the Applicants contention that it is reasonable to assume that Mr Ferreira's liabilities exceeded his assets as he was sequestered based on that debt. The Applicants argued that the extent of those dispositions falls to be set aside in terms of Section 26 of the Insolvency Act.

[36] The First Respondent submitted that the payment made by the First Respondent to Mr Ferreira cannot be regarded as a voidable disposition by Mr Ferreira in terms of the relevant provisions of the Insolvency Act as the provisions relied upon by the Applicants essentially involve disposition by an insolvent. It is the First Respondent's contention that the facts as described by the First Respondent during the Insolvency Enquiry, do not fall within the ambit of Section 26 of the Insolvency Act as this section relates to dispositions made by an insolvent; more particularly, dispositions "not made for value". According to the First Respondent, the

facts show that Mr Ferreira received payment in the sum of R250 000 for his work in respect of the First Respondent's property. The contention, by the First Respondent is that this work was therefore "for value", and as such does not fall within the ambit of Section 26 of the Insolvency Act.

[37] It is trite that a disposition by the insolvent person must have been made not for value either within or after two years and the trustee or liquidator must prove that immediately after the disposition was made the assets of the insolvent exceeded the insolvent's liabilities.²⁸ Section 26 of the Insolvency Act is aimed at protecting the interests of creditors through powers provided to trustees to approach courts to set aside pre-sequestration transactions that were made without insolvent persons deriving value in return.

(ii) Collusive dealings before sequestration

[38] Section 31 of the Insolvency Act states as follows:

'Collusive dealings before sequestration-

(1) After the sequestration of a debtor's estate the court may set aside any transaction entered into by the debtor before the sequestration, whereby he, in collusion with another person, disposed of property belonging to him in a manner which had the effect of prejudicing his creditors or of preferring one of his creditors above another.

(2) Any person who was a party to such collusive disposition shall be liable to make good any loss thereby caused to the insolvent estate in question and shall pay for the benefit of the estate, by way of penalty, such sum as the court may adjudge, not exceeding the amount by which he would have benefited by such dealing if it had not been set aside; and if he is a creditor he shall also forfeit his claim against the estate.

²⁸ *Van Wyk Van Heerden Attorneys v Gore* (2022) ZASCA 128 para 4.

(3) Such compensation and penalty may be recovered in any action to set aside the transaction in question.'

[39] It is the Applicants' contention that the claim based on Section 31 of the Insolvency Act is premised on the transactions which caused Mr Ferreira to dispose of property belonging to him to the First Respondent in order to prejudice his creditors. In augmentation, the Applicants submitted that the First Respondent was a party to those dealings and that the Trustees of Mr Ferreira are entitled to claim the loss which was incurred in the amount of at least R250 000.

[40] The First Respondent submitted that there is no factual basis provided by the Applicants to support the conjecture that there have been collusive dealings between the First Respondent and Mr Ferreira.

(b) The Actio Pauliana

[41] The common law remedy of *Actio Pauliana* was succinctly dealt with by Steyn J in **Ameropa Commodities (Pty) Limited v Benchimol N.O. and Others**²⁹:

*'The requirements for the actio Pauliana were set out in Fenhalls v Ebrahim & others:*³⁰

The common law on the subject of rescinding alienations made in fraudem creditorum is derived from the civil law. One of the actions by which this relief might be sought was the actio Pauliana, which is recognised in the Roman-Dutch authorities. Pothier on the Pandects, 42.8.2 says: "In order that a transaction may be rescinded under this edict the following factors must be present:

- 1. That it should be of such a nature that the debtor's assets are diminished thereby (secs. 6 and 7).*

²⁹ (D2873/2019) [2020] ZAKZDHC 14 (5 June 2020) at para 4.

³⁰ *Fenhalls v Ebrahim & others* 1956 (4) SA 723 (D) at 727D-G.

2. That the person who receives from the debtor does not receive his own property (secs. 8 to 12),
3. That there should be the intention to defraud (sec. 13 and following),
4. That the fraud should have its effect (sec. 22).”

[42] In ***Commissioner of Customs and Excise v Bank of Lisbon International Ltd & another***,³¹ the *Actio Pauliana* was described as follows:

‘ . . .a personal action of general application which even an individual creditor could invoke to recover from third persons, property which the debtor had alienated in fraudem creditorum and where the third party had received the property with knowledge of the fraud or had not given value for the property.’

[43] It is trite that the *actio Pauliana* may be used to recover assets even after liquidation.³² In order to succeed in a claim based on the *Actio Pauliana*, Boraïne³³ states that the following must be proved:

- (a) the alienation must have diminished the debtor's assets;
- (b) the recipient must not have received his own property or something owing to him;
- (c) the debtor or alienator must have intended to defraud his creditors (if he received value in respect of the alienation, the recipient must also have been aware of the debtor's intention);
- (d) The fraud must have caused the loss suffered by the creditors.

[44] The Applicants contended that the First Respondent received funds from the First Applicant to which she was not entitled and which was in part a repayment of loans she made to Mr Ferreira. It is submitted that the First Respondent’s property increased in value and that the value of the First Applicant’s property was reduced as was the estate of Mr Ferreira. In addition, it is contended that the intention of the First Respondent and Mr Ferreira were to divert money from the First Applicant and

³¹ *Commissioner of Customs and Excise v Bank of Lisbon International Ltd & another* 1994 (1) SA 205 (N) at 213F-G.

³² *Kommissaris van Binnelandse Inkomste en 'n ander v Willers en andere* 1999 (3) SA 19 (SCA).

³³ Andre Boraïne, Towards Codifying The *Actio Pauliana* (1996) 8 SA Merc LJ 213.

its creditors to the First Respondent, which is supported by the fact that the First Respondent, for no apparent reason, lent Mr Ferreira's wife an amount of R2 million which was for the benefit of Mr Ferreira and to place those funds out of reach of his creditors.

[45] The First Respondent contended that in order for the Applicants to successfully rely on the common law *Actio Pauliana*, the relevant authorities indicate that proof of alienation of assets by the insolvent to another with the intention to defraud creditors needs to be proved. It is the First Respondent's contention that there is no factual basis which is provided by the Applicants in order to support such an averment. The Applicants make a bald statement in their Heads of Argument that the facts "demonstrate that the First Respondent received funds from Yzerfontein Curesmiths (Pty) Ltd to which she is not entitled and which was in part a repayment of loans she made to the Second Defendant".³⁴ The Respondent submitted that there is no reference to where these facts might appear as it is not apparent from the portion of the transcript of the Insolvency Enquiry put up by the Applicants in support of the application *in casu*.

[46] The Applicants argued that the claim based against the First Respondent on the *actio pauliana* is strong as there can be no plausible explanation for the conduct of the First Respondent but for the intention to defraud creditors. The Applicants further contended that, together with the facts which have been admitted by the First Respondent, demonstrates that the proceeds of the sale of her property will be disposed of with the intention of frustrating any possible claim against her.

(c) The Companies Act, 1973³⁵ (the "Companies Act")

[47] Section 424 states that:

(1) When it appears, whether it be in a winding-up, judicial management or otherwise, that any business of the company was or is being carried on recklessly or with intent to defraud creditors of the company or creditors of any other person

³⁴ Applicants' Heads of Argument, para 34, page 15.

³⁵ Act 61 of 1973.

of for any fraudulent purpose, the Court may, in the application of the Master, the liquidator, the judicial manager, any creditor or member or contributory of the company, declare that any person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court may direct.

(2)

(a) Where the Court makes any such declaration, it may give such further directions as it thinks proper, for the purpose of giving effect to the declaration, and in particular may make provision for making the liability of any such person under the declaration a charge on any debt or obligation due from the company to him, or on any mortgage or charge or any interest in any mortgage or charge on any assets of the company held by or vested in him or any company or person on his behalf or any person claiming as assignee from or through the person liable or any company or person acting of his behalf, and may from time to time make such further orders as may be necessary for the purpose of enforcing any charge imposed under this subsection.

[48] Section 424 of the Companies Act is crystallised in Henochsberg³⁶ on the Companies Act where the following is stated:

‘Liability can be attached to any person, even if he is neither a member nor a director nor an officer of the company, and also a juristic person (Cooper NNO v SA Mutual Life Assurance Society 2001 (1) SA 967 (SCA)) so long as he is found to have been knowingly a party to the carrying on of the business recklessly etc...Persons with locus standi to bring s424 proceedings may choose whom they wish to sue. In Fourie v Newton 2010 JDR 1437 (SCA) the liquidators proceeded against only one of the directors of a company in liquidation, not because his conduct was any different from the other directors, but (apparently) because he was the only director with liability insurance, and the Court held that there was “nothing improper in such a course”.

³⁶ At page 912.

[49] Section 424 of the Companies Act makes provision that any person, not only a director, may be held liable if that person was knowingly a party to the carrying on of the business recklessly or with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose.

[50] The Applicants place reliance on the provisions of Section 424 of the (old) Companies Act³⁷, in terms of which an order is sought in the Summons that the First Respondent is to be held jointly and severally liable with Mr Ferreira to Darling Breweries (Pty) Ltd for payment. The Applicants contended that Section 424 is made applicable due to the provisions of the new Companies Act, in that the First Applicant was liquidated and thus certain provisions of the old Companies Act finds application. In addition, the Applicants contended that the relief can be sought against any party who was knowingly a party to the carrying on of the business of the company in the manner specified in Section 424(1). In amplification, the Applicants submitted that the First Respondent was knowingly a party to the diversion of funds from the First Applicant and its creditors to herself and thereafter to the wife of Mr Ferreira and that on that basis alone there is a *prima facie* claim against the First Respondent in addition to Mr Ferreira based on Section 424 of the Companies Act.

[51] The First Respondent contended that there is no factual basis for such an order as the record of the Insolvency Enquiry reflects that the First Respondent had nothing to do with Mr Ferreira's business and knew nothing about it. Moreover, the First Respondent contended that it is blithely alleged on behalf of the Applicants that they "have established that the First Respondent was knowingly a party to the diversion of funds from Yzerfontein Curesmiths (Pty) Ltd and its creditors to herself and thereafter the Second Defendant's wife".³⁸ The First Respondent submitted that there is no substance to this contention, more particularly in relation to the assertion that they have "established" such facts neither have the Applicants provided a *prima facie* case in this regard. The First Respondent argues that the transcript of the Insolvency Enquiry is destructive of this notion.

(B) Material non-disclosure

³⁷ Act 61 of 1973.

³⁸ Applicants Heads of Argument, para 40, page 18.

[52] The First Respondent contended that only a portion of the transcript of the proceedings at an Insolvency Enquiry held at the Malmesbury Magistrate's Court on 26 August 2020 is attached to the Applicants Founding Affidavit.³⁹ The First Respondent submitted that the portion of the transcript put up by the Applicants do not support the contentions on their behalf in the Founding Affidavit. The First Respondent argued that this amounts to material non-disclosure at the *ex parte* hearing which in itself is a sufficient ground to set aside the interim order granted by Sher J. The full transcript is attached to the First Respondent's Answering Affidavit⁴⁰ The following was illuminated by the First Respondent in relation to the undisclosed portions of the transcript, namely that:

- (a) the First Respondent paid an amount of R250 000 for the renovations that were effected by Mr Ferreira prior to the sequestration of his estate;
- (b) the First Respondent denied that she owes Mr Ferreira or his estate any money in respect of the renovation and he and his estate has no claim against the First Respondent in respect thereof and
- (c) the property at which the renovations were effected was sold prior to the sequestration of Mr Ferreira's estate.

[53] The First Respondent denies having made any payments to Mr Ferreira which could possibly fall under Section 22 of the Insolvency Act⁴¹ ("the Insolvency Act"). The First Respondent argued that the testimony of the First Respondent at the Insolvency Enquiry demonstrates that there was no disposition of property as meant in Section 26 or 31 of the Insolvency Act. Furthermore, the First Respondent submitted that the record of the Insolvency Enquiry shows that the First Respondent had no knowledge of the affairs of the First Applicant; did not participate in or conduct its business and had no dealings with it and that there is no basis whereupon the Applicants or any creditor of First Applicant could have a claim based on Section 424 of the Companies Act against the First Respondent.

³⁹ Index Bundle, Annexure "FA3".

⁴⁰ Index bundle, Answering Affidavit, pages 99 - 134.

⁴¹ Insolvency Act, 24 of 1936.

[54] The matter of **Obiang**⁴² is instructive on the issue of non-disclosure of material facts in the *ex parte* application:

*‘It is trite that a party which approaches the court ex parte is duty bound to observe the utmost good faith (“uberrima fides”) and that if material facts are withheld at that stage the court may, on the return day, dismiss the application on that basis alone. Furthermore, such non-disclosure need not be willful or mala fide before the court will discharge the rule nisi. However, it is not a given that the ex parte order will necessarily be set aside in the event of material non-disclosure – the court hearing the matter on the return day will always be entitled to exercise a discretion as to whether to confirm the rule or not.’*⁴³

[55] Gamble J, in **Obiang** referred to the matter of **Philips v National Director of Public Prosecutions**⁴⁴ where the Supreme Court of Appeal set out the considerations which come into play in deciding whether to discharge an order obtained *ex parte* in circumstances where there was a failure to observe the *uberrima fides* rule namely:

- (i) *The extent of the non-disclosure;*
- (ii) *Whether the first court might have been influenced in the event that there was proper disclosure;*
- (iii) *The reason for the non-disclosure; and*
- (iv) *The consequences of setting aside the order granted ex parte.*

[56] The Applicants submitted that there was no material non-disclosure in the *ex parte* application. The Applicants contended that the First Respondent failed to indicate in the Answering Affidavit which portions of the transcript are relevant and ought to have been disclosed. In addition, the Applicants argued that the First Respondent has not stated that, had a specific portion been disclosed, the Court considering the *ex parte* application would not have granted the Order. It is the

⁴² 2019 JDR 1518 (WCC) at para 35.

⁴³ See also *MV Rizcun Trader v Manley Appledore Shipping Ltd* 2000 (3) SA 776 (C) at 794E.

⁴⁴ 2000 (3) SA 447 (SCA) at 455B.

Applicants' contention that the alleged failure to attach a transcript of the full insolvency interrogation is not material and was not required. Furthermore, the Applicants submitted that same was not attached in an attempt to avoid placing lengthy documents before the court when it was unnecessary.

[57] The Applicants argued that there is no reason why the Court should consider discharging the Order based on vague and unsubstantiated allegations of non-disclosure. It was contended that, at most, there may be portions of her evidence in the Insolvency Enquiry which indicate that she took a view that the renovations to her property were carried out with only those funds which she gave Mr Ferreira. The Applicants argue that the allegation by the First Respondent in this regard is improbable.

[58] It will therefore be necessary to consider the arguments as it pertains to the Insolvency Enquiry, more particularly in relation to the materiality of the non-disclosure as the Applicants contended that had the full transcript been placed before the Court at the hearing of the ex parte application, it would not have swayed the Court.

The Insolvency Enquiry

[59] As previously stated, the First Respondent submitted that the portion of the transcript put up by the Applicant does not include the significant and relevant portions of the full transcript of the Insolvency Enquiry. The First Respondent deals with the various aspects of non-disclosure testimony by the First Respondent in the Heads of Argument, wherein the following was illuminated⁴⁵:

(a) That certain alterations were effected by Mr Ferreira to the First Respondent's property during 2017. The First Respondent paid Mr Ferreira the sum of R250 000 for such alterations. As to the question of whether Mr Ferreira put his own money into the alterations, the First Respondent testified that he did not, as he did not

⁴⁵ First Respondent's Heads of Argument, paras 15 – 17, pages 8 – 11.

have money. It is for this reason that the First Respondent financed the alterations by paying Mr Ferreira.⁴⁶

(b) During further questioning of Mrs Laubscher, she testified that Mr Ferreira's source of income was not only what he received from working "at the restaurant", he had other sources of income, described by her. It was then put to the First Respondent that the "argument" would be that the property was improved partially from funds provided by the First Respondent, and partially through other money that Mr Ferreira was paid by Darling Brewery, but she did not agree with this proposition.⁴⁷

(c) That the First Respondent had nothing to do with Mr Ferreira's business and knew nothing about it.

(d) The First Respondent testified that she made the loan to Mr Ferreira's wife as opposed to her son because he was under sequestration at the time and her understanding was that she could not lend money to him. The First Respondent, according to her testimony, had accepted that the loan was for the benefit of the family.

(e) That it was not suggested to the First Respondent at the Insolvency Enquiry that the loan was anything other than a loan to her daughter-in-law.

(f) It was not put to her in clear terms that the loan was in fact a loan to Mr Ferreira or that it was a "sham" of any kind.

[60] In light hereof it was argued that there is no factual foundation for the allegations made in the Applicants' Founding Affidavit that:

*'The loan mentioned in para 22 above was a sham transaction, to effectively channel money to Mr. Ferreira and was never intended to be repaid. Those transactions were designed to move funds from Mr. Ferreira and the First Applicant to other family members, such as (sic) the First Respondent to defraud creditors.'*⁴⁸

⁴⁶ Heads of Argument on behalf of the First Respondent, para 15.1 at page 8.

⁴⁷ Heads of Argument on behalf of the First Respondent, para's 15.1 -15.2, pages 8 – 9.

⁴⁸ Index bundle, Founding Affidavit, para 23, page 13.

[61] It was contended that there is no factual or evidential basis for the contention made in the Founding Affidavit to the effect that Mr Ferreira renovated and improved the property “with funds received from the First Applicant”. It was argued that on the contrary, the transcript of the Insolvency Enquiry reflects that Mr Ferreira received the sum of R250 000 from the First Respondent for such renovations. It was submitted that, any “argument” which might be advanced to this effect does not constitute evidence, even on a *prima facie* basis.

[62] The First Respondent argued that on the facts which are undisputed, it could never be suggested that the loan agreement fell within the ambit of the provisions of the Insolvency Act on which reliance is placed. The First Respondent contended that the Applicants failure to provide the full transcript of the Insolvency Enquiry involves a breach of their fundamental duties of providing all relevant information when bringing an application on an *ex parte* basis. The First Respondent argued that the omitted portions of the transcripts contained highly relevant evidence which is destructive of the Applicants’ case. It is the First Respondent’s contention that the omission was deliberate because the portions did not support the case which the Applicants are attempting to advance.

Abuse of process

[63] As earlier mentioned, the First Respondent contended that the application is an abuse of process and the delay in proceeding with the matter should be held against the Applicants. The Applicants argued that it is not an abuse of process. In this regard, the First Respondent confirmed that the funds that were in the account of BDP Attorneys were paid over to her account with ABSA bank. The proceeds of the sale were R2.6 million of which R850 000 was transferred to an account in Poland on 6 July 2023. The First Respondent is a peregrinus who has sought to transfer her only asset from South Africa to Poland.

Discussion

[64] The decision on whether or not the Applicants have succeeded in showing that they have established a *prima facie* case against the First Respondent for the

relief sought is interwoven with a number of considerations as distilled earlier in this judgment. As a starting point, the question to be answered is whether the Applicants have shown that there is evidence which, if accepted, will establish a cause of action. Of seminal importance is that the evidence on which the Applicant relies, save in exceptional cases, must consist of allegations of fact as opposed to mere assertions.

[65] These allegations of fact are to be contained in the Applicants' Founding Affidavit. It is trite that an Applicant must make out its case in the Founding Affidavit which must contain sufficient facts in itself upon which a court may find in the Applicant's favour. I am enjoined to consider the application on the strength of the papers before me. This is based on the trite legal principle that the an Applicant must stand or fall by his founding papers which principle has been enunciated in the seminal case of **Director of Hospital Services v Mistry**⁴⁹ where the Appellate Division held:

"When...proceedings were launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is. As was pointed out by Krause J in Pountas' Trustees v Lahanas 1924 WLD 67 at 68 and has been said in many other cases:

'...an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny'

Since it is clear that the applicant stands or falls by his petition and the facts therein alleged, 'it is not permissible to make out new grounds for the application in the replying affidavit (per Van Winsen J in SA Railways Recreation Club and Another v Gordonias Liquor Licensing Board 1953(3) SA 256 (C) at 260)"

⁴⁹ 1979 (1) SA 626 (AD) at 635H-636B.

[66] In ***South African Transport and Allied Workers Union and Another v Garvas and Others***⁵⁰ it was held that:

‘Holding parties to pleadings is not pedantry. It is an integral part of the principle of legal certainty which is an element of the rule of law, one of the values on which our Constitution is founded. Every party contemplating a constitutional challenge should know the requirements it needs to satisfy and every other party likely to be affected by the relief sought must know precisely the case it is expected to meet.’

[67] It is a fundamental legal principle that where the application is brought on an *ex parte* basis, the Applicant is duty bound to observe the utmost good faith and if material facts are withheld at that state the court may, on the return day, dismiss the application on that basis alone. *In casu* the full transcript of the Insolvency Enquiry was not attached, which begs the question as to whether there was bad faith on the part of the Applicants by not attaching the full transcript. It is therefore incumbent on the court to deal with the consideration identified by the Supreme Court of Appeal in ***Philips*** (*supra*).

[68] The first consideration pertains to the extent of the non-disclosure which has at large been dealt with earlier in this judgment and does not require repeating, save to highlight a few pertinent aspects.⁵¹ During argument, Counsel for the Applicants, methodically dealt with each page of the transcript of the Insolvency Enquiry to show its relevance, more particularly the pages that were not attached to the *ex parte* application. It is the Applicants’ contention that the Founding Affidavit contains reference to the amount of R250 000 that was paid for the renovations and that the property at which the renovations were made was sold prior to the sequestration of Mr Ferreira.⁵²

⁵⁰ [2012] ZACC 13; 2013 (1) SA 83 (CC); 2012 (8) BCLR 840 (CC) (*Garvas*) at para 114.

⁵¹ Para 10 *supra*; First Respondent’s Answering Affidavit, para 7, page 83.

⁵² First Respondent’s Answering Affidavit, para’s 7.1 and 7.2; Applicant’s Founding Affidavit, paras 16, 17 and 19.

[69] The Applicants furthermore highlighted that the First Respondent made contradictory statement at the Insolvency Enquiry insofar as First Respondent avers that she had no knowledge of the affairs of the First Applicant as contained in the papers.⁵³ In addition, Counsel for the Applicants submitted that this aspect was not a non-disclosure *per se* and could be argued. It was argued that in order to assess the non-disclosure the court is to consider the Answering Affidavit as the Heads of Argument of the First Respondent expounds on the submissions contained in the First Respondent's Answering Affidavit.

[70] Counsel for the Applicants submitted that the only aspect which is of great relevance was that Mr Ferreira had some other source of income and the fact that there were contradictions regarding the First Respondent's knowledge of the affairs of the First Applicant. This, it was submitted, amounted to limited amount of non-disclosure.

[71] The authorities are clear that such non-disclosure need not have been *mala fide* or wilful before a court will discharge a *rule nisi*. It is also not a matter of course that the *ex parte* order will necessarily be set aside in the event of material non-disclosure.

[72] The second consideration is whether the first court might have been influenced in the event that there was proper disclosure. Counsel for the Applicant correctly elucidated that the hurdle to overcome at the *ex parte* phase of the application is low as the court only has to consider whether a *prima facie* case is made out on the papers. Gamble J, writing for the full court in **Obiang** (*supra*)⁵⁴ reaffirmed the trite legal principle that once the Applicant in such an *ex parte* application establishes a *prima facie* cause of action, the court does not have a discretion to refuse to order an attachment.⁵⁵

⁵³ Insolvency Enquiry Transcript, pages 117 – 118.

⁵⁴ At para 31.

⁵⁵ See *Longman Distillers Ltd v Drop In Group of Liquor Supermarkets (Pty) Ltd* 1990 (2) SA 906 (A) at 914E-F where Nicholas AJA stated:

'In our law, once an incola applicant (plaintiff) establishes that prima facie he has a good cause of action against the peregrine respondent (defendant), the Court must, if other requirements are satisfied, grant an order for the attachment ad fundandam of the property of the peregrine respondent (defendant). It has no discretion ...The Court will not enquire into the merits of[f] whether the Court is a convenient forum in which to bring the action...Nor, it is

[73] The third consideration is the reason for the non-disclosure. Counsel for the Applicants argued that the court wasn't sought to be burdened with a record that was barely relevant. Counsel for the First Respondent contended that it was not a lengthy document. It is trite that mere fact that evidence is contradicted will not disentitle the Applicant to relief, even if the probabilities are against him. It is manifest that it is only where it is quite clear that the Applicant has no action or cannot succeed that an attachment should be refused.

[74] Fourthly, the court is to consider the consequences of setting aside the order granted *ex parte*. Counsel for the Applicants mooted that the funds will flow to Poland if not attached and as such the consequence would be serious.

[75] The threshold for an *ex parte* application has been termed to be a low-level test, bearing in mind that the primary object of an attachment is to establish jurisdiction. Once that is done, the course of action will in due course have to be established in accordance with the ordinary standard of proof in subsequent proceedings. I am mindful that Courts have been cautioned not to enter into the merits of the case at this stage to attempt to adjudicate on credibility, probabilities or the prospects of success. It is trite that the court hearing the matter on the return day will always be entitled to exercise a discretion as to whether to confirm the rule or not.

[76] It is apparent that the Applicants no longer persist with their reliance on Section 22 of the Insolvency Act. Insofar as reliance is placed by the Applicants on Sections 26 and 31 of the Insolvency Act, the common law *Actio Paulina* and Section 424 of the Companies Act, it is sufficient that the Applicant need only prove one in order to overcome the threshold required for a *prima facie* case.

conceived, will the Court enquire whether it is "fair" in the circumstances for an attachment to be granted.'

The authors Herbstein and van Winsen, '*The Civil Practice of the High Courts and Supreme Court of Appeal of South Africa*' 5th Ed, Vol 1 at 110 – 111, sets out the threshold as follows:

'It is only when it is quite clear that the applicant has no action or cannot succeed that an attachment should be refused or discharged on the ground that there is no prima facie cause of action.'

[77] Much of the Applicants' arguments are based on conjecture as there appears to be a lack of evidence to support the conclusions made. For example, the inference drawn regarding the R250 000 used to renovate the First Respondent's property. In this regard, the Applicants speculated that it is highly unlikely that the R250 000 was the only funds used to renovate the property. Furthermore, the question is asked why the First Respondent did not just renovate the property herself.

[78] As earlier indicated it is imperative that the evidence upon which the Applicant relies must consist of allegations of fact and not on mere allegations. It is only when the assertion amounts to an inference which may reasonably be drawn from the facts alleged that it can have any relevance. It is critical importance that the test of reasoning by inference must accord with the standard inquiry in civil cases, namely, whether the inference sought to be drawn from the facts proved is the one which seems to be the more natural or acceptable from numerous plausible ones.

[79] In a nutshell, it is the Applicants' case that the First Applicant did not pay its creditors and the property of the First Respondent increased significantly in value, and an amount of R2 million is then lent to the daughter-in-law of the First Respondent. The Applicants' case is based on the scenario that the funds should have been used to pay the creditors and that the monies were effectively taken away from the creditors to their prejudice. The question to be answered is whether this is sufficient to make out a *prima facie* case against the First Respondent, based on the inference drawn from the facts in dispute. Counsel for the Applicants conceded in argument that the claim against the First Respondent, may be criticised for being speculative or weak, but, has correctly pointed out that this is not the test. The inference sought to be drawn must on a balance of probabilities be reasonable from the facts alleged. To reiterate, it is only where it is evident that the Applicant has no action or cannot succeed that an attachment should be refused.

[80] The *prima facie* claims against the First Respondent do not have to be proved at this stage. It is sufficient to establish that the First Respondent has claims to answer, which in my view centres around the loan made to Mr Ferreira's wife presumably to come to the aid of Mr Ferreira and his family. This is to be viewed

against the backdrop of Mr Ferreira being released from an earlier R40 000 loan and the First Respondent's awareness of the financial difficulties of Mr Ferreira, and his status as an insolvent. A loan of R2 million without structured terms for repayment, appears to be more of a donation to her insolvent son, if regard is had to the definition of a donation which has received judicial endorsement by a number of authorities.⁵⁶ It is generally accepted in our law that a donation is:

'an agreement which has been induced by pure (or disinterested) benevolence or sheer liberality, whereby a person under no legal obligation undertakes to give something ... to another person ... in return for which the donor receives no consideration nor expects any future advantage'

[81] Even if I am wrong, the trial court will be better placed to make such a determination as previously stated, courts have been cautioned not to enter the merits of the case at this stage. I therefore make no determination on whether the common law and/or legislative provision in terms Section 26 and/or 31 of the Insolvency Act, the *actio pauliana* or Section 424 of the Companies Act finds application; neither do I make any determinations on credibility, probabilities or the prospects of success.

[82] This court is enjoined to consider whether or not the Applicants have succeeded in making out a *prima facie* case for the relief sought on a conspectus of the evidence before me. The authorities in this regard are clear that the evidence on which an Applicant relies must consist of factual allegations as opposed to mere assertions as distilled in **Hulse-Reutte** (*supra*).

[83] In considering the matter in its entirety, I am of the view that the purported loan of R2 million to the wife of Mr Ferreira, based on the First Respondent's own evidence at the Insolvency Enquiry, require further ventilation and is sufficient factual evidence which would support the conclusion that they have established a *prima facie* case against the First Respondent for her to answer.

⁵⁶ Joubert, Rabie and Faris *The law of South Africa* Vol 8 Part 1 (2005) para 301; *DE v CE* 2020 1 All SA 123 (WCC) para 38; *Mcbride v Jooste* 2015 JOL 33891 (GJ) para 14; and *Ashbury Park (Pty) Ltd v Dawjee* 2002 1 All SA 137 (N) at 141

[84] It is noteworthy that inasmuch as the First Respondent has indicated that she requires the proceeds for her living expenses, she has not set out any of her financial circumstances in order for the court to assess the veracity of the assertion, bearing in mind that the First Respondent has already received an amount of R850 000 which was transferred to her bank account in Poland.

Alternative interdictory relief

[85] The Applicant seeks in the alternative that the First Respondent be interdicted from transferring the funds pending the outcome of the action proceedings against the First Respondent. It is trite that the threshold requirements for an anti-dissipation interdict include the standard requirements for an interim interdict which include:

- (a) A prima facie right;
- (b) A well-grounded apprehension of irreparable harm;
- (c) The absence of a satisfactory alternative remedy and
- (d) Balance of convenience

[86] An amount of R54 304.05 held in the First Respondent's ABSA current account was frozen as well as an amount of R1845 417.50 held in the depositor plus account was also frozen. It is uncontroverted that the funds attached are the only assets which the First Respondent holds in South Africa. It is the Applicants' contention that if it were not for the attachment or interdict, the funds would be paid to an account in Poland. It is apparent that an amount of R850 000 from the proceeds of the sale has already been transferred.

[87] The Applicants are required to prove, on a balance of probabilities that they have a *bona fide* claim against the First Respondent. Furthermore, the Applicants are to demonstrate that the First Applicant is dissipating assets or is likely to do so with the intention to defeat the *bona fide* claim. What constitutes evidence has been crystallised in **Hulse – Reutter** (*supra*).

[88] The Applicants have raised a concern that the First Respondent has not stated that she will not transfer the funds overseas. The contention of the Applicants is that the possibility exists that there will be no monies left by the time the action against the First Respondent has been resolved or finalised, as she has on her own version, stated that she requires the funds to service her living expenses. It was contended that it would ultimately render the Applicants' claim against the First Respondent futile in the circumstance. The First Respondent submitted that the Applicants have failed to establish that the First Respondent is dissipating assets or intends to do so with the intention of defeating such claim.

[89] It is trite that at common law the Applicant is obliged to establish a rebuttable presumption that the Respondent will dissipate his or her assets with the intention of defeating the Applicant's claim. A fundamental foundation for an anti-dissipation order is that there must be proof that the Respondent is attempting to dispose of his property in order to defeat the Applicant's potential right to execute upon a successful judgment. It follows that a substantial basis to support the allegation that the Respondent has the intention of dissipating assets to avoid payment is essential and this burden of proof needs to be established at least by providing *prima facie* evidence of this allegation and not irrefutable proof thereof. This requirement will be met if it can be properly inferred from the objective facts that there is a risk that the Respondent will evade execution of a judgment obtained or to be obtained against him or her.

[90] The seminal judgment of ***Knox D'Arcy Ltd and Others v Jamieson and Others***⁵⁷ is instructive on this point.

'...The interdict prevents the respondent from dealing freely with his assets but grants the applicant no preferential rights over those assets. And "anti-dissipation" suffers from the defect that in most cases...the interdict is not sought to prevent the respondent from dissipating his assets, but rather from preserving them so well that the applicant cannot get his hands on them...As to the nature of the interdict, this was dealt with by Stegmann J in 1994 (3)

⁵⁷ (283/95) [1996] ZASCA 58; 1996 (4) SA 348 (SCA); [1996] 3 All SA 669 (A); (29 May 1996) at paras 61 -67.

SA at 706B to 707B and in 1995 (2) SA at 591A to 600F. The latter passage was largely devoted to showing that it is not necessary for an applicant to show that the respondent has no bona fide defence to the action...What then must an applicant show in this regard? ...In *Mcitiki and Another v Mawesai* 7973 CPD 684 at p 687 Hopley J stated the effect of earlier cases as follows:

“...they all proceed upon the wish of the Court that the plaintiff should not have an injustice done to him by reason of leaving his debtor possessed of funds sufficient to satisfy the claim, when circumstances show that such debtor is wasting or getting rid of such funds to defeat his creditors, or is likely to do so.”

...The question which arises from this approach is whether an applicant need show a particular state of mind on the part of the respondent, 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. 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. I am not, of course, at the moment dealing with special situations which might arise, for instance, by contract or under the law of insolvency...’

[91] On the facts to be decided in **Knox D’Arcy** the court was called upon to consider whether the petitioner have proved *prima facie* that the Respondent had an ‘intention to defeat the petitioners’ claims, or to render them hollow, by secreting their assets.’⁵⁸ In this regard, Grosskopf JA stated as follows:

⁵⁸ At para 67.

*'It was common cause that if these facts could be proved, together with the other requirements for an interim interdict, the petitioners would have a good case, and for the reasons given above, I agree with this approach. There was some argument on whether the fact that assets were secreted with the intent to thwart the petitioners' claim had to be proved on a balance of probabilities or merely prima facie. It seems to me that here also the relative strength or weakness of the petitioners' proof would be a factor to be taken into account and weighed against other features in deciding whether an interim interdict should be granted.'*⁵⁹

[92] The test for an anti-dissipation order is explained as follows by Herbstein and Van Winsen, *The Civil Practice of the High Courts of South Africa*⁶⁰:

'A special type of interdict may be granted where a respondent is believed to be deliberately arranging his affairs in such a way as to ensure that by the time the applicant is in a position to execute judgment he will be without assets or sufficient assets on a which the applicant expects to execute. It is not a claim 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 hollow judgment.'

[93] Insofar as the alternative relief sought by the Applicants are concerned, I am not persuaded that the Applicants have met the threshold requirements for obtaining an anti-dissipation order that the First Respondent is dissipating assets or intends to do so with the intention of defeating such a claim as required by **Knox D'Arcy Ltd** (*supra*). However, in light of the conclusion to which I have come, the alternative relief consideration becomes moot.

Conclusion

[94] It is clear that an application to found or confirm jurisdiction is an exceptional and extraordinary remedy. Although a court to which such an application is made

⁵⁹ At para 67.

⁶⁰ Herbstein & Van Winsen, *The Civil Practice of the High Courts of South Africa*, 5th ed, p1488.

has no discretion to refuse it once the requirements for an order are met, a court will approach such an application with care and caution.⁶¹

[95] As earlier stated, the mere fact that the evidence that the Applicants are placing reliance on is contradicted or challenged does not disentitle or prevent the Applicants from the relief they seek even if the probabilities are against them. The court hearing the matter on the return day will always be entitled to exercise a discretion as to whether or not to confirm the rule or not. I cannot find that the Applicants have approached this court with *mala fides* and neither can I find that the application involves an abuse of process. The court is mindful that, without an order, no funds will remain in South Africa.

[96] The primary consideration as earlier distilled in this judgment is whether or not the Applicant has made out a *prima facie* case against the First Respondent for the relief sought. Consequently, I am satisfied that all the jurisdictional requirements have been sufficiently met for the final relief sought by the Applicants.

Costs

[97] The costs in respect of the *ex parte* stage of the application stood over for determination on the return date. Counsel for the Applicants argued that costs are to follow the result, alternatively, costs are to stand over for determination in the action proceedings.

[98] I am in agreement with the latter proposition as the trial court will be best placed to make a determination on the issue of costs once all issues have been fully ventilated.

Order

[99] Having heard Counsel for the Applicant and Counsel for the First Respondent, and having read the papers filed of record, the following order is made:

⁶¹ *ACL Group (Edms) Bpk and Others v Qick Televentures FZE* (2013 (1) SA 508 (FB)) [2012] ZAFSHC 249; [2012] ZAFSHC 145 (12 July 2012).

- (a) The *rule nisi* granted on 24 August 2023 is hereby confirmed.
- (b) The costs of this application including the costs of the *ex parte* stage of the application are to stand over for determination in the action proceedings.

P Andrews

Acting Judge of the High Court of South Africa

Western Cape Division, Cape Town

APPEARANCES:

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Counsel for the Respondent:

Advocate J Newdigate

Instructed by:

TSP Cape Town Inc.

Heard on 15 November 2023

Delivered 06 December 2023 – This judgment was handed down electronically by circulation to the parties' representatives by email.