



**LESOTHO**

**IN THE COURT OF APPEAL OF LESOTHO**

**HELD AT MASERU**

**C OF A (CIV) NO. 01/2023**

In the matter between:

**VISHAN CLOTHING INDUSTRIES**

**APPELLANT**

AND

**NIMINTA FASHION PTY LTD**

**1<sup>ST</sup>**

**RESPONDENT**

**THE DEPUTY SHERIFF**

**2<sup>ND</sup> RESPONDENT**

**SALAD ENTERPRISE**

**3<sup>RD</sup> RESPONDENT**

**CORAM:** MOSITO P

MUSONDA AJA

MOKHESI AJA

**HEARD:** 10 OCTOBER 2023

**DELIVERED:** 17 NOVEMBER 2023

## **SUMMARY**

**Civil Procedure-** *Urgency must be judged against the background of Rule 8(22). The applicant must persuade the Court that non-compliance with the rules and the extent therefor is justified on the grounds of urgency. Applicant must demonstrate inter alia, that it will suffer real loss or damage if it were to rely on normal procedure. The fact that applicant wants the matter resolved urgently does not render the matter urgent. Mareva injunction is granted when there is a threat that defendant may dissipate the assets, which will render judgement to be obtained by the plaintiff hollow. Though mareva is of English genealogy mareva has been interchangeably been granted in South Africa with the relief called anti-asset dissipation interdict in common law, which is our legal system in the kingdom. On the merits there was not only reasonable apprehension of dissipation, the hypothecation of assets had started - there is no provision in our Rules to attach the assets of incola- Appeal allowed mareva/anti-asset dissipation order granted.*

## **JUDGMENT**

### **MUSONDA AJA.**

#### **Introduction**

[1] The parties will be referred to as they were in the Court a quo. This is an appeal against the High Court (**Nathane J.**) discharge of the rules nisi in both applications, with costs to the 1<sup>st</sup> and 3<sup>rd</sup> respondents on the attorney client scale. The applicant was the applicant in both applications.

[2] On the 29<sup>th</sup> September 2022 the applicant by notice of motion sought an order *ex-parte*<sup>1</sup> that the 1<sup>st</sup> respondent be

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<sup>1</sup> On urgent basis, prayer 1

directed to disclose to the satisfaction of the Court the physical location in Lesotho, where the 1<sup>st</sup> respondent was relocating its assets pending the finalization of the application<sup>2</sup>. The 2<sup>nd</sup> respondent (Deputy sheriff) cannot attach the assets of the 1<sup>st</sup> respondent, which were not subject of the 3<sup>rd</sup> respondent's hypothec pending the determination of prayer 2(a) and institution of proceedings for specific performance <sup>3</sup> against 1<sup>st</sup> respondent, the 1<sup>st</sup> respondent be interdicted from transferring its assets outside the Jurisdiction of the Court including the Republic of South Africa pending the finalization of prayer 2 (a) alternatively damages against the 1<sup>st</sup> respondent <sup>4</sup>. Prayer 1, 2 (a) (b) and (c) were granted in the interim. On the 29<sup>th</sup> September, 2022. The same day, in the afternoon the applicant filed a notice of motion praying for the amendment<sup>5</sup> of the order obtained in the morning.

[3] The amendment was sought and granted by the court to allow 2<sup>nd</sup> respondent (Deputy Sheriff) to break locks into the 3<sup>rd</sup> respondent building where the goods subject of the Order of Court in CCA/0006/2022 were kept. The 2<sup>nd</sup> respondent to lock the premises of the 3<sup>rd</sup> respondent until such a time that the 1<sup>st</sup> and 3<sup>rd</sup> respondent permit the 2<sup>nd</sup> respondent access into the building of the 3<sup>rd</sup> respondent to attach property subject of Order of Court CCA/0006/2022. Mokhorro J, who granted the order in the morning granted the second order in the afternoon of the same day.

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<sup>2</sup> Prayer (9) of the Notice of Motion

<sup>3</sup> Prayer 2 (b), CCJ/028/2022

<sup>4</sup> Prayer 2 (c) prayer 1 and 2 (b) alternatively 2(c) were to operate with immediate effect as interim orders.

<sup>5</sup> 2(a)

## **Background**

[4] The applicant and respondent were engaged in cloth manufacturing and trading. The applicant used to sub-contract the respondent to make clothes per specification of their South African customers. To facilitate the manufacturing, the applicant brought into Lesotho material from South Africa free of duty, as the clothes were being exported back to South Africa. The applicant would pass this material to the 1<sup>st</sup> respondent to make clothes. The applicant became suspicious that 1<sup>st</sup> respondent was selling clothes made from the material that were given to it. The suspicion was accentuated by the 1<sup>st</sup> respondent moving from the existing factory to a smaller one. The 1<sup>st</sup> respondent had difficulty in paying rent. The rental arrears owed to the 3<sup>rd</sup> respondent were hypothecated by goods belonging to the 1<sup>st</sup> respondent. The relationship between the applicant and first respondent had become frosty.

[5] Around 6<sup>th</sup> September 2022, the applicant launched proceedings in CCA/0282/2022 for breach of contract and damages. Around 6<sup>th</sup> September 2022, the applicant further launched proceedings in CCA/0092/2022, in which the applicant sought specific performance in relation to specific goods, which were subject of another contract with the 1<sup>st</sup> respondent. The later application was triggered by allegations that the 1<sup>st</sup> respondent was relocating its assets to the Republic of South Africa.

[7] The 1<sup>st</sup> respondent raised a point *in limine* pertaining to the Jurisdiction of the Commercial Court in Maseru. The applicant withdrew the matter and launched an application in the Commercial Division of Leribe High Court. This is notwithstanding that application CCT/0282/2022 touching on the same matter remained pending in the main High Court division in Maseru to date.

### **Applicant's case in the High court**

[8] The applicant averred that he was unable to reinstitute the withdrawn application, as he was bedridden until Monday the 27<sup>th</sup> September 2022, when he got back to work, he learned that the premises previously occupied by the 1<sup>st</sup> respondent at Maputsoe Ha Nyenye, next to total garage had been advertised for rent. He went to inspect the premises.

[9] Whilst on the premises, he confirmed that the 1<sup>st</sup> respondent was removing its assets from the premises and actually saw about four or five employees of the 1<sup>st</sup> respondent, packing assets and removing some from the premises. He was shown sewing machines that had been attached by the Landlord. Applicant formed an opinion that the 1<sup>st</sup> respondent had defaulted in its payment of rentals.

[10] Preeminently, it was widely rumored that the 1<sup>st</sup> respondent, whose directors were South African were relocating its business to South Africa, and that it opened a factory in Ficksburg. Further, he

had not seen any notice of change of address as prescribed by section 82(4) of the companies Act No.18 of 2011. In a nutshell that is what motivated the application.

### **1<sup>st</sup> Respondent's case**

[11] In an answering affidavit deposed to by Niminta Singh, a director of the 1<sup>st</sup> respondent, she raised a point *in limine*, that the applicant was barred from instituting the proceedings in the Court a quo or any other, by reason of failure to pay the costs ordered against it by **Kopo J.** in **CCA/0090/2023**.

The applicant had instituted CIV/3/67/2022 in the main division of the High Court, but withdrew the matter before the close of pleading, without tendering costs. There is still a matter pending CCT/O282/2022, which has been vigorously contested as the 1<sup>st</sup> respondent denies owing the applicant 1.6 million or indeed any monies.

[12] The first respondent is an *incola* and there is no need to attach, remove and/or lock to arrest its property.

[13] The 1<sup>st</sup> respondent was relocating to a smaller and more manageable premises. The Covid-19 pandemic had impacted negatively on its business. The 1<sup>st</sup> respondent had to reduce its workforce and enter into negotiations with the 3<sup>rd</sup> respondent in respect of rental arrears.

[14] Had the applicant requested for information about the location, there would have been no need for it to have approached the High Court at all. The 1<sup>st</sup> respondent prayed for the discharge for the rule, to enable the 1<sup>st</sup> respondent to continue its business as the order was improperly obtained. The debt is yet unproven, no Judgement has been granted, the truck is a Lesotho registered vehicle L3799. The order of attachment was inappropriate in the circumstances.

[15] She contended that it was the 1<sup>st</sup> respondent to suffer irreparable damage, as it had a large contingency of Basotho employees who are impacted negatively by the two Court orders. In any event there was no urgency to seek an *ex-parte* order. 1<sup>st</sup> respondent was merely relocating and that does not amount to an act of insolvency.

[16] The award of costs on the attorney and client scale was prayed for. The justification was that firstly, applicant did not exercise due diligence, as was the case in CCA/0090/2022. Secondly, applicant acted hastily to approach the Court based on rumours.

### **The 3<sup>rd</sup> respondent's case.**

[17] The answering affidavit was deposed to by one Muhshin Abubaker, a director. He averred that the 1<sup>st</sup> respondent, a tenant of the 3<sup>rd</sup> respondent fell into arrears and was given an eviction notice. Upon service of the notice the landlord exercised its

hypothec and attached all the tenant's properties as a lien for rent owing. This was followed by an acknowledgement of the debt. The closure and / or locking of the premises belonging to the 3<sup>rd</sup> respondent is prejudicial to its business. The applicant was aware of the lien. The Landlord already had a new tenant due to occupy the factory, vacated by the old tenant (1<sup>st</sup> respondent), but was unable to hand over the premises because of the Court order, and has suffered loss in the sum of M150,000.

[18] He averred that the 3<sup>rd</sup> respondent was misjoined to the proceedings, as the impasse surrounding the matter had nothing to do with the 3<sup>rd</sup> respondent.

[19] Prayed for the discharge of the rule as well as costs order on the attorney and client scale in 3<sup>rd</sup> respondent's favour.

### **The High court**

[20] The only issue was whether in the circumstances, the applicant was justified in applying for and being granted the relief sought.

[21] The judge had no doubt in his mind that though the relief sought by applicant was termed an attachment, it was for all intents and purpose a prohibitory interdict commonly known as the "mareva injunction" named after the English case of ***Mareva Compania Naviera SA v International BulkCarriers SA***<sup>6</sup>. The proceedings having been instituted to prohibit the 1<sup>st</sup> respondent

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<sup>6</sup> 1980 1 ALL OR 213



from dissipating or secreting its assets in order to frustrate the satisfaction of any judgement that may be granted in the applicant's favour in the pending proceedings in **CCT/0282/2022** or others, the applicant intended to institute.

[22] The mareva is a special kind of interdict which is sought to prevent a defendant or respondent from dissipating or concealing his assets at any stage before judgement has been taken against him, or even after judgement ***Knox D'Arcy Ltd and Others v Jamieson and Others***<sup>7</sup>.

[23] The applicant through the certificate of urgency as well as in the founding affidavit para 4.7 gave the Court the impression that the 1<sup>st</sup> respondent was relocating to South Africa, resulting in the *ex- parte* orders sought being granted. It was deliberately misleading the Court. That on its own, calls for the setting aside of the said orders. The judge cited in support of that preposition, the case where the Court said<sup>8</sup>:

*"where an order is sought ex parte it is well established that material facts must be disclosed which might influence a Court in coming to the decision, and the withholding or suppression of material facts by itself entitles the Court to set aside an order, even if the non-disclosure or suppression was not willful or mala fide".*

[24] The learned Judge was of the opinion that attachments in our Jurisdiction are provided under Rule 6 (1) of the High Court Rules, which provide that,

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<sup>7</sup> 1996 (4) SA 348

<sup>8</sup> Hlahledi Frank Moropa and another V Kinesh Sachidanandan Pallier and others case No 2987/ 202 (29<sup>th</sup> June 2020)

*“6 (1) the Court may on application grant leave for property of a Peregrinus which is in Lesotho to be attached in order to give the Court Jurisdiction in an action which the applicant intends to bring against such peregrinus 2 (a) (b) (c).*

*(3) such an application shall be an ex-parte one, but if the Court grants the order such order shall be served on the peregrinus within such time as the deems fit.”*

Consequently, attachment of assets in our law is only justifiable under the provisions of Rule 6, of the High Court Rules and only for the purposes of founding and confirming jurisdiction, and most importantly only the property of a peregrinus is liable to attachment.

[25] The amendment contended in the second order was applied for in flagrant discharge of the Rules. Rule 33 of the High Court Rules 1980 reads thus:

*“33(1) any party desiring to amend any pleading or document other than an affidavit in connection with any proceeding, may give notice to all other parties to the proceeding of the intention to do so.*

*(2) such notice, must state that unless objection in writing is made within fourteen days to the said amendment, the party giving the notice may amend the pleading or document in question accordingly.*

*(3) if no objection in writing be so made, the party receiving such notice shall be deemed to have agreed to the amendment.”*

[26] In Conclusion, the learned Judge was of the view that the two orders were obtained by the falsely characterising the 1<sup>st</sup> respondent as a peregrinus, when it was an *incola*. The orders flew in the teeth of section 6(1), of the High Court Rules. The second order was additionally not compliant with Rule 33(1) of

the High Court Rules. Even if he turned a blind eye to the flagrant disregard of the rules, which he is not permitted to do, the respondents in particular the 3<sup>rd</sup> respondent stands to suffer unimaginable harm. It had been denied access to its premises because of a dispute to which it was never a party.

## **Costs**

[27] The Judge awarded punitive costs to the 1<sup>st</sup> respondent and the 3<sup>rd</sup> respondent. **Kopo J.**, before whom the applicant appeared in CCA/0090/2022, which was later withdrawn warned applicant to exercise caution in the future. That notwithstanding the applicant a few days later rushed to Court on urgent and *ex-parte* basis based on rumours that the 1<sup>st</sup> respondent was relocating to South Africa. Despite it becoming clear later that the rumours were not true, applicant strenuously opposed 1<sup>st</sup> and 3<sup>rd</sup> respondents' efforts to have the Rule discharged. The Judge viewed the failure by the applicant to approach 3<sup>rd</sup> respondent for the intervention and obtaining an order against him as an aggravating factor.

[28] The *rule nisi* in both applications were discharged with costs to the 1<sup>st</sup> and 3<sup>rd</sup> respondent on attorney and client scale.

[29] Aggrieved by the order the applicant noted an appeal to this Court. There were four grounds of appeal filed. The first was that the learned Judge erred in finding that the applicant's averment that 1<sup>st</sup> respondent was relocating to South Africa was not true because prayer 2(a) of the notice of motion suggest that the applicant knew that 1<sup>st</sup> respondent was relocating within Lesotho.

The second ground was that the learned Judge a quo erred in holding that the applicant was acting *mala fide* when launching the proceedings. The Judge erred in deciding that the 1<sup>st</sup> respondent had relocated to premises within Lesotho. Awarding the costs on attorney client scale on the basis that it was malicious for applicant to have refused to have the rule discharged when the applicant established that the rumours were not true.

### **Appellant's case**

[30] In support of the first ground, it is was argued that the applicant did not assert a fact that 1<sup>st</sup> respondent was relocating to South Africa but was merely suspicious and cannot be held to such an averment. There was no assertion either that the 1<sup>st</sup> respondent was relocating within Lesotho or South Africa in the founding affidavit, which is evidence in motion proceedings.

[31] The applicant merely wanted to find out from the 1<sup>st</sup> respondent, where it was relocating to within Lesotho or South Africa, as rumoured. The finding by the Court a quo that the application was *mala fide* was unsupported by the evidence on record.

[32] This litigation was preceded by two actions, the first ones applicant prayed for payment in the sum of M1,600,000 (One million six hundred thousand Maloti) in CC7/0282/22 and the second CCA/0090/22, a mandatory interdict to enter the premises of the 1<sup>st</sup> respondent.

[33] The 1<sup>st</sup> respondent took an illegal step of failing to comply with section 82 (4) of the Companies Act 2011, which makes it a requirement to put the change of address in three consecutive editions of a newspaper with wide circulation in Lesotho. The moving of goods from the 3<sup>rd</sup> respondent's premises fueled the suspicion.

[34] The 1<sup>st</sup> respondent denying applicant access to the premises, failure to debunk rumours that it was relocating to South Africa are circumstances which warranted attachment and negate the finding by the Court a quo that there was *mala fide* in approaching the Court.

[35] The applicant mitigated its ambivalence in having sought an attachment against an *incola* by submitting that in the context of section 119(1) of the Constitution the High Court can perfectly amend its procedures or interpret them in a way that would not render its rules repugnant to justice. Our decision (per **Mosito P.**) in ***Leteka v Leteka***<sup>9</sup> para 15 was further cited in support of that proposition.

[36] The applicant concedes to a point made by the learned Judge a quo that what was being sought was a *mareva* injunction<sup>10</sup> whose objective is to freeze the assets where the defendant is likely to dissipate or conceal assets with the intention of defeating the claim.

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<sup>9</sup> C of A (CIV) 48 of 2019 (2020) LSCA 19 29<sup>TH</sup> May 2020

<sup>10</sup> Para 6 3

[37] Joining the 3<sup>rd</sup> respondent was justified on the ground that the 3<sup>rd</sup> respondent as owner of the premises, 1<sup>st</sup> respondent was operating from, may have to obey an order.

[38] Applicant attack the attorney client costs order by the Court a quo, as unjustified. The case of ***Plastic Converters Association of South Africa on behalf of members v National Union of Metal Workers of South Africa***<sup>11</sup>, was cited in support of the argument, where the Court said:

*“...the scale of Attorney and Client is an extraordinary one which should be reserved for cases where it can be found that the litigant conducted itself in a clear and undoubtable vexatious and reprehensible manner. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium.”*

[39] In the supplementary affidavit applicant deny that they sought attachment to found Jurisdiction. They admit they knew that 1<sup>st</sup> respondent was not compliant with the companies Act, 2011 and that he was vacating 3<sup>rd</sup> respondent’s premises were sufficient reasons to trigger the apprehension, that 1<sup>st</sup> respondent was relocating assets to a location within Lesotho or South Africa.

### **1<sup>st</sup> and 3<sup>rd</sup> Respondent’s case**

[40] For the respondents, it was strenuously argued that prayer 2(a) in the notice of motion which sought that the respondent disclose to the satisfaction of the Court, the physical location in Lesotho, where the 1<sup>st</sup> respondent was relocating its assets, was glaring testament that applicant’s consequent launching of these proceedings was *mala fide*.

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<sup>11</sup> 21016 (ZALAL 39, Machett V Pretorius and others 3119/2022(2022))

[41] In *ex-parte* applications parties must show good faith. They should not willfully or negligently abdicate the duty to disclose material facts. The Courts will frown upon such conduct and will set an order aside. The cases of ***Pillay and Another v Hammond and Another***<sup>12</sup>, ***Lesotho Hotels International (Property) Limited v Van Hoovels***<sup>13</sup>, ***Felleng Mamakeka Makeka v Africa Media Holdings and Lesotho Times and 2 Others***<sup>14</sup>, were cited in support of that proposition.

[42] The duty of good faith extends to counsel when drawing the certificate of urgency. In the case of ***Toto v Special Investigation Unit and Others***<sup>15</sup>, the Court said:

*“It is trite that it is the duty of a litigant party’s legal representative to inform the Court of any matter which is material to the issues before Court and of which he is aware.... This Court should always be able to accept and act on the assurance of a legal representative in any matter it hears and in order to deserve this trust, legal representatives must act with utmost good faith towards the Court... A legal representative who appears in Court is not a mere agent of his client but has a duty towards the judiciary to ensure the efficient and fair administration of justice. The proper administration of justice could not easily survive if the professionals were not scrupulous of their dealings with the Court.”*

The essence of this statement is to support the assertion that the certification that this matter was urgent by counsel had no foundational basis.

[43] The respondents went to length to support the learned Judge’s cost order at attorney and client scale. The rationale was

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<sup>12</sup> Case Number 2020/44362 (2021 J2AGPJHC107 25<sup>TH</sup> January 2021)

<sup>13</sup> 1994 LSCA 102 (02 June 1994)

<sup>14</sup> 2021 LSHC 8 Com (9<sup>th</sup> February 2022)

<sup>15</sup> 2001 (1) SA 763 (E).

that the proceedings were *mala fide*, so was counsel's certification that they were urgent. The decisions in ***Abel Moupo Mathaba & Others v Enock Matlaselo Lehema & Others***<sup>16</sup>, ***Nel v Waterberg Landbouwers Ko-Operative Vereeniging***<sup>17</sup>, were cited in support.

[44] The issues for determination in this appeal

- (i) Was there justification for granting the orders on urgency, and
- (ii) was the case made for the *mareva* injunction.

## **The Law**

[45] Urgent applications are governed by Rule 8 (22) of the High Court, which is couched in these terms:

*"22(a) In urgent applications the Court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matters at such time and place and in such a manner and in accordance with such procedure as the Court or judge may deem fit.*

*(b) In any petition or affidavit filed in support of an urgent application, the applicant shall set forth in detail the circumstances which he avers render the application urgent and also the reasons why he claims that he could not be afforded substantial relief in an hearing in due course if the periods presented by this rule were not followed.*

*(c) Every urgent application must be accompanied by a certificate of an advocate or attorney which sets out that he has considered the matter and that he bona fide believes it to be a matter for urgent relief."*

The import of the rule is that both the applicant's affidavit and the certificate of urgency by the legal representative must be *bona*

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<sup>16</sup> 1993-1994 LLR & LB 402 at 452

<sup>17</sup> (1949) A 597 at 607



*fide*. The party must not come by the way of urgency to gain a tactical advantage over the opponent. As the party who comes by way of urgency sets the Rules.

[46] Urgent applications require an applicant to persuade the Court that non-compliance with the Rules and the extent thereof, is justified on the grounds of urgency. The applicant must demonstrate *inter alia* that it will suffer real loss or damage if it were to rely on normal procedure. The Rules adopted by an applicant must as far as practicable, be in accordance with the existing Rules both as to procedure and time periods applicable. A respondent faced with an urgent application, to avoid the risk of judgement being given against it by default, is obliged to provisionally accept the Rules set by applicant and then when the matter is heard make its objection thereto if any, per **Lowe J**, in ***Tekoa Engineers (Pty) Ltd v Alfred Nzo Municipality***<sup>18</sup> \_

[47] An applicant cannot create its own urgency by simply waiting till the normal rules can no longer be applied. The issues to be considered are:

- (i) whether respondent can adequately present its case in the time given.
- (ii) other prejudice to the respondent and the administration of justice; and

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<sup>18</sup> Case No 1284/20 (2022) ZA ECMICHC 34( 23 March 2023)

(iii) the strength of applicant's case and any delay in asserting its rights (self-created urgency)<sup>19</sup>

[48] In ***D. F. Scott (EP) Ltd v Golden Valley Supermarket***<sup>20</sup>, **Harmes JA** held that:

*"The rules are designed to ensure a fair hearing and should be interpreted in such a way as to advance and not to reduce, the scope of the entrenched fair trial right contained in the constitution".*

[49] In ***Bandle Investments Pty Ltd v Registrar of Deeds and Others***<sup>21</sup>. It was held that the fact that applicant now wants the matter resolved urgently does not render the matter urgent.

### **Anti-asset Dissipation Relief**

[50] **Hoyle**, says, there can thus be little doubt that, with some exceptions, the Mareva is accepted in all major jurisdictions based on English Law. It operates in the same way as it does in England, even though it's statutory base may differ, but its effect is the same. It's almost of universal welcome in these jurisdictions, must underline its practical importance<sup>22</sup>.

[51] In South Africa orders similar to Mareva can be granted in cases where a Plaintiff shows that a defendant intends dealing with his property in a way which will prevent effective execution by the Plaintiff after judgement ***Brictee (Pty) Ltd v Pantland***<sup>23</sup>.

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<sup>19</sup> Urid, Tekoa Engineer

<sup>20</sup> 2002 (3) All SA (23<sup>RD</sup> May 2002)

<sup>21</sup> 2001 (2) SA 489 (T)

<sup>22</sup> Hoyle. S. Mark The Mareva injunction and related orders 3<sup>rd</sup> Edition (London:LLP, 1997), P167

<sup>23</sup> 1977(2) SA 489(T)

In **Commissioner for the South African Revenue Services v Mashilo Obrien Moloto and 16 others** <sup>24</sup>: it was held:

*“The Mareva injunction is not a remedy fully developed in our law, although it is akin to our interdict remedy. South African law recognizes an interdiction *suis generis* for matters of this nature. Requirements of the interdict *suis generic* are (a) presence of a *bona fide* claim and (b) that the debtor is dissipating assets or likely to do so with an intention to defeat the *bona fide* claim. The applicant has made out a case that meets those requirements.”*

[52] Although the classic Mareva is of English ancestry, in **Commissioner for South African Revenue Services supra, Moshoana J.** in his analysis of the Mareva injunction remedy, discussed the first case in which **Lord Denning** granted the Mareva, **Nippon Yusen Kaisha v Karageorgis (Kaisha)**<sup>25</sup> and **Mareva Compania Naviera SA v International Bulkcarriers SA** <sup>26</sup> which was second and was referred to by the learned Judge *a quo* in his judgement.

[53] Discernibly, **Moshoana J.** was of the view that the following requirements emerged from mareva, namely, (a) just, justice or justness, (b) convenience, (c) strong *prima facie* case of owing and unpaid, (d) Assets may be removed, and (e) great difficulty in recovery. There must be real risk. The real risk is not necessarily annexed to the requirement of an irreparable harm, but to the likelihood of dissipating or diminishing of assets in order to avoid the efficacy of a Court order and to leave the applicant with a hollow judgement, should the applicant succeed, said the

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<sup>24</sup> (2022) ZAGPPHC 832 (2<sup>nd</sup> November, 2022)

<sup>25</sup> (1975) 1 WCR 1093

<sup>26</sup> (1980) 1ALL CR 213 (CA)

Supreme Court Appeal (SCA) in ***Bassani Mining (pty) Ltd v Sebosat (Pty) Ltd and others***<sup>27</sup>.

[54] In ***VBP v K.M.P and Another***<sup>28</sup> the remedy provided by the ‘anti-dissipation interdict’ performs a similar function to that of a mareva injunction in English Law, but the English law principles are not automatically applicable. The interdict has its own unique features. The interdict may be granted where the 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 a judgement, he would be without assets or sufficient assets on which the applicant expects to execute. ***Carmel Trading Company Ltd v Commissioner for South African Revenue Services and Others***<sup>29</sup>. 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 the hollow judgement. ***Msunduzi Municipality v Natal Joint Municipality***<sup>30</sup>

### **Consideration of the Appeal**

[55] The applicant had launched proceedings in **CCA/0282/2022** in July 2022 for breach of contract. On or around 6<sup>th</sup> September 2022 the applicant further launched proceedings in **CCA/0090/2022**, in which the applicant sought specific performance<sup>31</sup>. The certificate of urgency was filed on 28<sup>th</sup>

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<sup>27</sup> 835/2020 (2021) ZASCA, 26

<sup>28</sup> 247/2019 (2022) ZAECBHC 39 (30 August 2022)

<sup>29</sup> 2008 (2) ALL SA 125

<sup>30</sup> 2007 (1) SA 142 (N) at 157

<sup>31</sup> Para 4.1 founding affidavit

September post the institution of proceedings. Allegations by the legal representative, that 1<sup>st</sup> respondent was relocating to South Africa were unverified. The advocate or attorney has to consider the matter and to state that he has a *bona fide* belief that the matter is urgent. The averments and the certificate of urgency were based on a brazen assumption that applicant was relocating to South Africa. Integrity is the fundamental quality of any person who seeks to practice as a member of the legal profession. An advocate or attorney servicing the justice system and those who serve it like judges, should never mislead them. The Court a quo was misled that 1<sup>st</sup> respondent was relocating to South Africa. The affidavit and certificate of urgency and the reasons stated therein do not comply with Rule 8 (22). An interlocutory application was tenable under the Rule 8(21) of the High Court Rules.

### **The Merits**

[56] It cannot plausibly be denied that the 1<sup>st</sup> respondent was not in compliant with Section 82 of the Companies Act 2011. The deponent of the answering affidavit Niminta Singh is of a South African address in Ficksburg. The property of the 1<sup>st</sup> respondent had been hypothecated to secure rental arrears owed to the 3<sup>rd</sup> respondent, so the dissipation of assets had commenced, so to speak. The relationship between the applicant and 1<sup>st</sup> respondent was commercial. It was therefore commercially disreputable for the 1<sup>st</sup> respondent not to inform the applicant that it was relocating, not the applicant to discover that on their own. What I have said above, is that, which rang the alarm bells. There was

reasonable apprehension on the part of the applicant that assets were being dissipated.

[57] On the merits the learned Judge did not properly assess the evidence. While he condemned the applicant, he did not put the conduct of the 1<sup>st</sup> respondent into context. There was no balanced analysis. If he did, he would have come to the conclusion that the applicant had well-grounded apprehension that if a freezing assets Order (Mareva injunction) was not granted the Judgement which would be obtained in favor of the applicant would be a hollow victory.

### **Disposition**

[58] The affidavit in support of the urgent application so called, fall far short of the dictates of Rule 8(22), so is the legal representative's certificate. On the facts there was reasonable apprehension that dissipation of assets was under way and the learned Judge ought to have granted a 'Mareva injunction'. The applicant not being sure-footed whether an order for attachment or interdict, was the appropriate order notwithstanding. When parties are the same and the facts, matters must be brought at once. It is important to use judicial time economically. Alternative Dispute Resolution is intended to relieve the Court of the backlog. Matters like this one between business associates are better settled pacifically, mediation is an appropriate forum, which has provision for caucusing. I say this because the parties made an attempt to mediate, not that Court is ordering them to mediate.

Choosing the forum is for the parties. The appeal is allowed and the learned Judge's order is set aside in substitution thereof the following order is made.

**[59] Order**

- (i) Appeal allowed
- (ii) The Order of the High Court is varied to read:
- (iii) The mareva injunction or anti-asset dissipation interdict, Order is granted in respect of the unencumbered assets, pending finalization of the application.
- (iv) Each party to bear its own costs.



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**P. MUSONDA  
ACTING JUSTICE OF APPEAL**

I agree



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**K.E MOSITO  
PRESIDENT OF THE COURT OF APPEAL**

I agree



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**M.MOKHESI**  
**ACTING JUSTICE OF APPEAL**

**FOR THE APPELLANT:** ADV. D. METLAE  
**FOR THE 1<sup>ST</sup> AND 3<sup>RD</sup> RESPONDENT:** ADV. K.A MARITI