IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2019/17644

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED: 4 September 2020

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In the matter between:

MEYERSDAL NATURE ESTATE HOMEOWNERS ASSOCIATION NPC First Applicant

MARQUISOL PROPERTY INVESTMENTS (PTY) LTD Second Applicant

and

FARRAR, ADRIAN MITCHELL First Respondent

FARRAR, RYNETTE Second Respondent

NHLABATHI, GYS LOUW INC. Third Respondent

JUDGMENT

HEARD REMOTELY VIA ZOOM PLATFORM 2 SEPTEMBER 2020

FA SNYCKERS AJ:

INTRODUCTION

1 This is an application for anti-dissipatory relief (a so-called *"Knox D'Arcy"* order).[1] It is an interdict aimed at restraining someone from disposing of his own property with an intention to thwart a legitimate claim, or rather, to make it impossible for the applicant to execute against such property in due course in enforcement of its claim.

2 The claim in question comprises a number of debts, all relating to liability for legal costs on the part of the first and second respondents ("the Farrars") to the applicants. There are three categories of cost liability at issue:

2.1 taxed bills of costs;

2.2 cost awards that are yet to be taxed;

2.3 anticipated cost awards not yet handed down.

3 All of the costs awards, and the whole of this application, can be traced to proceedings the Farrars instituted against the applicants relating to building work constructed by the second applicant in a residential estate. This building

[1] *Knox D'Arcy Ltd & Others v Jamieson & Others* 1996 (4) SA 348 (A).

work occurred close to the property of the Farrars in the same estate. The first applicant is the Homeowners Association of the estate. The Farrars had adopted the attitude that the building work was illegal and contrary to the rules of the estate, and when their objections were rejected by the Homeowners Association, they resorted to legal action.

4 The action became an arbitration after the Homeowners Association contended that the matter was arbitrable in terms of its articles, to which the Farrars were bound. An unbelievable flood of proceedings, relating to this arbitration process, then ensued. The Farrars withdrew their arbitration claim and a cost award was made against them in the arbitration. The applicants did not seek any substantive relief against the Farrars in the application. Attempts to enforce this cost award yielded a series of proceedings entailing various ways of challenging the arbitration process, revolving around the notion that there was never a validly signed written arbitration agreement. These proceedings included an application by the Farrars enrolled on the unopposed roll, setting aside the arbitration, in the teeth of a parallel application that had been brought by the applicants to make the arbitration (costs) award an order of court. The order that had been obtained by the Farrars in this way then needed to be set aside by the applicants, and this occurred with a concomitant punitive cost order against the Farrars. Attempts to tax various bills of costs that issued forth from this process were resisted by the Farrars on the basis that all bills of costs that issued from this process were illegitimate, as the arbitration process itself was illegitimate.

5 By the time the matter came before me, almost ten years had passed since the institution of the original action. The process of seeking to obtain execution on some of the cost awards yielded *nulla bona* returns against both Farrars in 2016. In the meantime, a bank obtained judgment against the first respondent on a mortgage bond held against the property that had been the site of grievance with respect to the construction work executed close to it. This eventually led to an aborted attempt to sell the property in execution. Acts of insolvency on the part of the Farrars abound, including statements made in the affidavit resisting summary judgment in the bank's foreclosure application.

6 In 2017 both Farrars gave notice of an intention to apply for voluntary surrender of their estates and in February 2018 the first respondent once again gave such notice. Steps were never taken to complete any voluntary surrender processes.

7 The sale in execution of the Farrars' property at the instance of the bank was not implemented. Instead, in March 2019, the Farrars managed to sell their property for a purchase price in excess of R6 million. The bank debt was settled and an amount of some R3 million in free residue was held in the trust account of the third respondent (attorneys). Attempts to elicit undertakings from the Farrars and their attorneys to retain sufficient funds in the trust account to cover the various cost awards that had been made against the Farrars met with refusals.

8 Papers were then drawn and delivered, founding and answering, in this application. Before delivery of the replying affidavit, the applicants launched an *ex parte* interim application seeking essentially the same relief as in, but

pending the outcome of, this application. Certain bouts of litigation flowing from the original arbitration litigation were still pending at the time this application was launched but had, by the time it was heard, in the meantime been resolved in the applicants' favour, yielding further cost awards. On 15 July 2019 Mashile J granted an interim anti-dissipation interdict against the funds held in the trust account up to R1 million, pending the outcome of this application.

9 By the time the application was ready to be heard by me, all the legal proceedings pending the outcome of which the anti-dissipatery relief was originally sought had been finalised, with cost awards still needing to be taxed. An application for leave to appeal against the last outstanding order relating to the arbitration proceedings (which also yielded a finding, a further cost award, against the Farrars) had been dismissed, but an application for leave to appeal before the Supreme Court of Appeal was (and is at the time of this judgment) still pending.

ASSESSMENT

10 In the answering papers, the Farrars concede that two costs awards that were spawned in the suite of proceedings flowing from the arbitration process founded undisputed debts (i.e. irrespective of the outcome of the challenge to the whole arbitration process) and that these could be held in trust to the benefit of the applicants. This comprised a taxed bill in favour of the second applicant in the amount of R53 816.39, together with admitted interest on that bill of R16 959.15, and an amount of R150 000 towards an untaxed bill for a cost award flowing from the order yielded against the Farrars when their

application to set aside the arbitration award, that had been enrolled on an unopposed basis, had to be undone.

11 I confirmed with counsel for the Farrars in argument that this amounted to consent to anti-dissipatery relief being granted in the total amount of R220 775.54, pending the final outcome of the proceedings that are currently subject to the pending application for leave to appeal to the Supreme Court of Appeal and the final taxation of all the outstanding bills of costs, and any ancillary challenges and/or appeal proceedings flowing from such taxations. This is a rough paraphrase of the relief sought in the application before me, about which formulation I say more below.

12 It is useful to separate two questions:

12.1 the existence of a debt owing to the applicants as “security” for which the anti-dissipation relief is being sought; and

12.2 the existence of a well-founded apprehension that the funds in the trust account would be dissipated to thwart the ability of the applicants to obtain execution against such debt.

13 The existence of a debt in an amount of just over R220 000 is common cause.

14 The cost awards flowing from the arbitration and from the defeats suffered by the Farrars in their attempts to challenge the arbitration proceedings are all undeniable. An application for leave to appeal against the order making the award an order of court was dismissed at first instance. Although a further application for leave to appeal is pending before the Supreme Court of Appeal, unless cogent grounds were advanced as to why serious doubt could be said

to be cast on a *prima facie* entitlement to the benefits of the cost awards to date, I would, on the principles of interim relief, accept the existence of the indebtedness established at on a *prima facie* basis, even if open to some doubt.

15 Far from casting serious doubt on the applicants' entitlement to these cost awards, the basis for the application for leave to appeal before the Supreme Court of Appeal, upon which the arbitration process is challenged, appears to me to be seriously dubious. The notion that the arbitration clause in the Articles of Association of the Homeowners Association, on the strength of which the arbitration was conducted, was not a sufficiently bespoke written arbitration agreement for the requirements of the Arbitration Act strikes me as wholly untenable, as does the contention that the nature of the proceedings originally instituted was not of the kind covered by such arbitration clause. It appears to me overwhelmingly unlikely that, even if leave to appeal were to be granted by the Supreme Court of Appeal, an appeal would succeed. At the very least, there cannot be said to be sufficient material before me (factual or legal) to cast serious doubt on the existence of the debts, for purposes of establishing at least a strong *prima facie* right, flowing from all the cost awards.

16 The applicants' costs from the arbitration proceedings alone amounted to some R507 000. It was pointed out that the Farrars had themselves submitted a bill of costs for their arbitration costs in an almost identical amount of some R511 000 in legal proceedings challenging the arbitration. Counsel for the Farrars was constrained to concede that it appeared that the amount of

R507 000 must be seen as reliably quantified for purposes of the relevant cost award, and could not point to any cogent material or consideration to dispute this amount.

17 The additional amount of some R220 000 is, as alluded to above, admitted.

18 There is therefore at least a *prima facie* indebtedness in an amount of some R730 000 in relation to which no serious doubt has been established.

19 There are then three further undeniable cost awards:

19.1 that flowing from the dismissal of the Farrars' review application in relation to the arbitration award;

19.2 that flowing from the order making the award an order of court, an award of costs on the attorney and client scale;

19.3 that flowing from the order dismissing the application for leave to appeal in this regard.

20 Cost awards would also attract costs for drafting bills and for attending to taxation, even if one ignored any possible challenges in the process.

21 Counsel for the Farrars conceded that any realistic estimate of the amount of these additional awards would quickly reach an amount of R270 000, and could not submit to me that such amount would be in any way an inordinate estimate in relation to these undeniable awards.

22 This is to ignore cost awards against the Farrars that may emanate from this application itself.

23 There is therefore a strong basis for finding on these papers that an amount of at least R1 million is owing in cost awards (if not yet due and payable) by the Farrars to the applicants. This finding can comfortably be reached without resort to the late supplementary affidavit submitted by the applicants' attorney substantiating untaxed awards with reference to fee lists submitted in the meantime, an affidavit I allowed despite opposition.

24 In my view, the evidence is overwhelming that, without retaining the anti-dissipatery relief in place against the funds in the trust account, the applicants' allegation that attempts in due course to execute on the cost awards would yield no fruit, must be accepted, at least for the purposes of a well-founded apprehension.

25 The conduct of the Farrars is akin to those who play insolvent or are insolvent. The evidence is rife of non-payment, default, evasion, *nulla bona* returns, attempts to initiate surrender, and neglect to pay a single cost award at any point. This includes a version from a pawnshop owner that the Farrars had "pawned" their household goods, yet these had not been sold off but had instead been kept on the Farrars' property, against a version by Mrs Farrar's mother, when confronted with an execution attempt, that all the movables in the Farrars' household belonged to her. No evidence was put up to suggest that there was anything to the submission that the position of the Farrars had changed for the better. There was certainly no evidence that there would in due course be anything to execute against if the anti-dissipation relief that has been in place since July 2019 were to be lifted. I have little doubt that, but for

such relief, the amount of R1 million currently held subject to such relief would have been dissipated.

26 I raised with counsel for the applicants the concern that the mere fact that absent the relief there would be nothing to execute against was by itself not sufficient to establish the requisites for the interdict sought, namely that the dissipation was being done or threatened with the intention to thwart payment of the applicants' claim. My point was that it seemed as if any creditor might be in the position of the applicants and that the applicants did not necessarily enjoy a peculiar or unique position when it came to a fear that dissipation of funds on the part of the Farrars would make it impossible for them to enforce their claims.

27 Counsel for the applicants submitted that it might well be that other creditors, should they be able to establish claims as cogently as those of the applicants, would similarly be entitled to relief of the kind sought by the applicants, but that there was no suggestion in the papers of other creditors, nor did counsel for the Farrars suggest that there were any. It is interesting that the court in *Knox D'Arcy* at 372E-F spoke of the requisite intention as *"the intention of defeating the claims of creditors"*, i.e. not necessarily requiring an intention specifically directed at the applicant's claim.[2] Furthermore, the history of the conduct of the Farrars in relation to payment of any cost awards owing to the applicants is such as to raise at least a *prima facie* justification for the proposition that the threatened removal of the funds from the trust account would indeed be calculated specifically to deny the applicants an ability to

[2] *Metlika Trading Ltd & Others v Commissioner, South African Revenue Services* 2005 (3) SA 1 (SCA) at para 35 employs a similar formulation in paraphrasing and referring to *Knox D'Arcy*.

enforce their cost awards. I certainly think there is enough on a *prima facie* basis to establish this directed threatened conduct.

28 Counsel for the applicants fairly pointed out that the interdict would be neutral and negative in its operation; it would not create any preference, nor even earmarking of any funds as far as the applicants were concerned, and it would in fact operate to the benefit of creditors as a whole were any to come forward.[3]

29 It is well established that *"[t]here is an inverse relationship in interim interdicts between the requirements of a prima facie right and the balance of convenience: the stronger the one, the weaker the other is permitted to be."* [4] In the instant case, the *prima facie* right is strong enough to have the balance of convenience pale into insignificance. But in any event, the Farrars want to use the R1m to invest in a business venture in the Congo, perhaps conveniently outside the jurisdiction of these courts. Against this, the applicants would have nothing to execute against if the money were to fly. The balance of convenience favours the applicants.

30 In the circumstances I am of the view that the requirements of an anti-dissipation order have been sufficiently fulfilled to warrant such an order.

31 The draft order in the form proposed by the applicants would, however, have remained in place pending any appeals or challenges in relation to proceedings that may be spawned, whether ancillary as a tributary or more

[3] In *Knox D'Arcy* at 372A it is pointed out that the remedy does not create any security in the true sense for the applicant's claim, as there is no preferential right created in respect of the interdicted funds.
[4] Van der Linde J in *Resilient Properties (Pty) Ltd v Eskom Holdings SOC Ltd & Others* 2019 (2) SA 577 (GJ), para 49.

directly, from the pending leave to appeal application and the anticipated taxation proceedings in relation to the outstanding cost awards. I do not think it appropriate to put the applicants in a position, by themselves reviewing or appealing any orders, to extend the operation of any anti-dissipation order I may grant. I have therefore adapted the relief somewhat to remove this possibility.

32 I do not believe that it is appropriate to *"confirm"* the order of Mashile J of 15 July 2019, as it operated pending the outcome of this application so that, if it be not discharged as a result of the failure of this application, then it would be automatically discharged and subsumed by this application.

33 I grant an order in the following terms:

1. The order of Mashile J of 15 July 2019 is discharged.

2. The third respondent is interdicted from paying to the first and/or second respondent the free residue amount, up to a maximum of R1 million, currently held in trust, which forms part of the proceeds of the sale of the property known as […], Meyersdal Nature Estate, Alberton, pending:

    1.1 the finalisation of any leave to appeal applications or appeals, initiated by the first and/or second respondent, in relation to the order of Hartzenberg AJ of 7 February 2020 in the High Court, Gauteng Division, Pretoria (Case No. 88605/2016);

1.2 the taxation by the applicants of any cost awards made in their favour, and the levying of execution in respect of any taxed costs, in respect of the following matters:

1.2.1 the application and counter-application in Case No. 88605/2016 referred to above, yielding the order of Hartzenberg AJ on 7 February 2020, and the application for leave to appeal under Case No. 88605/2016, dismissed by Hartzenberg AJ on 17 July 2020, and any further unsuccessful applications for leave to appeal against the order of Hartzenberg AJ issued on 7 February 2020;

1.2.2 the final determination of any appeal for which the respondents may be granted leave to appeal against the order of Hartzenberg AJ issued on 7 February 2020;

1.2.3 the application brought by the first and second respondents in the High Court of South Africa, Gauteng Local Division, Johannesburg under Case No. 9036/2018, to rescind the arbitration award;

1.2.4 the costs flowing from this application as ordered, and from any application for leave to appeal or appeals that may be initiated by the respondents against this application or its costs awards.

2. The first and second respondents jointly and severally are directed to pay the costs of this application and of the application that yielded the order of Mashile J on 15 July 2019.

FA SNYCKERS AJ

ACTING JUDGE OF THE HIGH COURT

4 September 2020

Date of Hearing: 2 September 2020

Judgment Delivered: 4 September 2020

APPEARANCES:

On Behalf of the Applicants:	**LW de Koning SC**
Instructed By:	Mills & Groenewald Vereeniging
On Behalf of the Respondents:	**C Grant**
Instructed By:	Mncube Attorneys Johannesburg