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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 24005/2022

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED.

25/08/2022

In the matter between:

INTERWASTE (PTY) LTD

1st Applicant

GREEN'S SCRAP RECYCLING (PTY) LTD

2nd Applicant

and

ABSA BANK LTD

1st Respondent

STANDARD BANK OF SOUTH AFRICA

2nd Respondent

FIRSTRAND LIMITED t/a FIRST NATIONAL BANK

3rd Respondent

DISCOVERY BANK LIMITED

4th Respondent

CAPITEC BANK LIMITED

5th Respondent

NEDBANK LIMITED

6th Respondent

THELMA VILJOEN	7 th Respondent
CHARMONIQUE WATSON	8 th Respondent
NADYA EL-QAISSI	9 th Respondent
SHANE VILJOEN	10 th Respondent
MARYNA WATSON	11 th Respondent
ALFONSO SAMUELS	12 th Respondent
SHARNE VILJOEN	13 th Respondent

JUDGMENT

MAKUME, J:

[1] On the 13th July 2022 Manoim J, granted an anti-dissipation order in favour of the Applicants pending finalisation of the relief sought in Part B of the Application in which the Applicant seeks an order that an amount of R24 350 781.05 be paid to them.

[2] The order in Part A was granted on an *ex parte* basis. The tenth and thirteenth Respondents are now applying in terms of Rule 6(12) C for a reconsideration of that order granted in their absence.

BACKGROUND

[3] The interim order granted in Part A achieved the freezing of bank accounts of the seventh to the thirteenth Respondents held in their names with the financial institution cited as first to sixth Respondents.

[4] The seventh Respondent was until the 1st July 2022 in the employment of the first Applicant as a bookkeeper she had been so employed since the year 2013. She also did bookkeeping work for the second Applicant which is a subsidiary of the first Applicant.

[5] The Applicants in this reconsideration application are the tenth and thirteenth Respondents. The tenth Respondent is the ex-husband of the seventh Respondent whilst the thirteenth Respondent is the daughter of the seventh Respondent.

[6] The order granted by Manoim J amongst others interdicted and restrained the first Respondent being ABSA bank from giving effect to any transaction on the bank account number [....] (2.1.5). Similarly, the sixth Respondent being Nedbank was interdicted and restrained from giving effect to any transaction on bank account number [....]

[7] The tenth and thirteenth Respondents apply that the orders and the relief granted in paragraphs 2.6; 2.8 and 2.10 shall not apply to them and lastly they seek an order that the Applicants furnish to them certain information that they now require.

[8] It is common cause that the seventh Respondent admitted committing fraudulent acts whilst in the employ of the Applicants which acts of fraud resulted in the loss of the amount of over R24 million Rand.

THE RECONSIDERATION APPLICATION

[9] The tenth Respondent Mr Shane Viljoen says that he and the seventh Respondent separated in the year 2019. The thirteenth Respondent their daughter. He is the holder of account number [....] at Nedbank whilst his daughter the thirteenth Respondent holds account number [....] at ABSA bank. He says that he also holds accounts at FNB bank being account number [....] as well as account number [....]. The thirteenth Respondent also has an account at FNB and one at Nedbank being account number [....] and [....] respectively.

[10] The tenth Respondent denies that the seventh and eighth Respondents ever deposited any money in the later 4 bank accounts detailed in paragraph 9 above. He says that is why he seeks an order that the orders granted in terms of paragraphs 2.6; 2.8 and 2.10 should not be applicable to them. Eighth Respondent is the daughter of the seventh Respondent.

[11] At the commencement of this application it was confirmed by Counsel for the Applicant in the main application that the tenth and thirteenth Respondent's bank accounts which were affected by the order in paragraphs 2.1.5 and 2.5.2 have now been unfrozen and are no longer affected by the order. What remains is the order granted as set out in paragraphs 2.6, 2.8 and 2.10.

[12] Paragraphs 2.6 of the order reads as follows:

“The first to sixth Respondents are interdicted and restrained from giving effect to any transaction on any other bank account (The receiving account) into which the sum of R22 062 059.80 or any part thereof was transferred from the eighth Respondent's ABSA bank savings account bearing account number [...] where the savings account is held with the first to sixth Respondents in the name of:

2.6.2 the eighth to thirteenth Respondents or any other proven family member of the seventh Respondent.”

[13] Paragraphs 2.8 and 2.10 read the same as 2.6 but refer to different account numbers. The net effect of that order according to the tenth Respondent is that they are more invasive and have no basis in law. The words used in all these paragraphs refers to “any other bank account in the name of the tenth or thirteenth Respondents”

[14] The Applicant in opposing the reconsideration application maintains that since the accounts referred to in paragraphs 2.1.5 and 2.5.2 have been unfrozen they there is no bank account of the tenth and thirteenth Respondents that is frozen accordingly that this reconsideration application is not only not urgent but is an abuse of the Court process.

[15] In support of its case on the merits the Applicant argue that the mere fact that an amount of R236 000.00 and also R350 000.00 were paid into the tenth and thirteenth Respondent's account respectively is proof that there is a reasonable suspicion that is stolen money.

[16] The Applicant relies on the fact that both the tenth and thirteenth Respondents are family members of the seventh Respondent who has admitted defrauding the Applicant of several million rands whilst in their employ.

[17] The tenth and thirteenth Respondents have alluded to the fact that it is true that they hold other bank accounts at Nedbank and First National Bank besides the bank accounts that have now been unfrozen. They further indicate at paragraph 5 that neither the seventh nor the eighth Respondents deposited any money in those accounts hence there is no prospect that any of the alleged fruits of fraud were deposited into those accounts.

[18] In paragraph 49 of their founding affidavit the Applicants say that they have a "quasi vindicatory right" that extends beyond the seventh and eighth Respondents who are the main culprits in the fraudulent scheme. They say that right extends to both the tenth and thirteenth Respondents.

[19] The difficulty with this argument was correctly identified by the SCA in the matter of **First National Bank of South Africa Ltd v Perry NO and Others 2001 (3) SA 960 at paragraph 16** thereof:

"[16] If we had been dealing with identifiable and identified bank note the matter would have been simple. Then the owner could have based his claim on ownership which being a real right which avails against the world could be asserted against the party found in possession even if the possessor had acquired the notes in good faith."

[20] The Court in **Roestoff v Cliffe Dekker Hofmeyer Inc. 2013 (1) SA 12 GNP** cited with approval the principle enunciated in *First National Bank* (supra) at

paragraph 53 – 54 the Court refused to recognise a *quasi-vindictory* claim in a matter where the money in the possession of a third party was no longer identifiable as part of the stolen funds.

[21] There is nothing in the Applicant's papers to show that any amount in the bank account of the tenth or thirteenth Respondents are part of the amount fraudulently paid out by the seventh or eighth Respondent. There is also no indication of the amounts as well as the date when such pay-outs were made.

[22] The tenth Respondent has explained that whatever amounts were received by him from the seventh Respondent was done so during the course of their marriage and also as part of their settlement agreement when they divorced. The thirteenth Respondent as a daughter of the seventh Respondent received money from her mother in the normal case. Accordingly, the money that both tenth and thirteenth Respondents received cannot be positively identified as part of the stolen funds.

[23] In paragraph 53 of their Founding Affidavit the Applicants say that an inference should be drawn that if the order they seek is not granted then the Respondents will dissipate the stolen funds and they will not be able to obtain meaningful relief in due course. In **Knox D'Arcy Ltd and Others vs Jamieson and Others 1996 (4) SA 348 AD** this type of relief was described as objectionable if the Applicant's case rests largely on untested hearsay. The Court in Knox D'Arcy referred and quoted from a judgment by Stegman J in the WLD wherein the later said the following:

“The making of an order which affects an interested Defendant's rights in secret, in haste and without the intended Defendant having had any opportunity of being heard, is grossly undesirable and contrary to fundamental principles of justice. It can lead to serious abuses and oppressive orders which may prejudice an intended Defendant in various ways including some ways that may not be foreseeable.”

[24] I am persuaded that the Applicants were not entitled to the relief they sought against the tenth and thirteenth Respondents. They failed to demonstrate that they

had a *quasi-vindictory* claim against the tenth and thirteenth Respondents accordingly the tenth and thirteenth Respondents are entitled to a reconsideration of the order granted in their absence. In the result I make the following order:

Order

1. The order granted on 13 July 2022 by Manoim J (the "order") is hereby reconsidered in accordance with Rule 6(12) (c) of the Uniform Rules of Court.
2. Paragraphs 2.1.5 and 2.5.2 of the order are hereby deleted in as far as it relates to the 10th and 13th Respondents.
3. Paragraphs 2.6, 2.8 and 2.10 of the order shall not apply to the tenth or thirteenth Respondents or to any bank account in their name.
4. The Applicants are directed to furnish the tenth and thirteenth Respondents with a copy of the following documents obtained pursuant to the above court order, insofar as they are documents, records or information pertaining to the bank accounts held by the tenth and thirteenth Respondents:
 - 4.1 The present account balance received by way of paragraph 8 of the court order; and
 - 4.2 The records obtained by way of paragraphs 9 and 10 of the court order.
5. The first Respondent is directed to remove any interdict, block or freeze imposed as a result of the order on the bank account bearing account number [...], in the thirteenth respondent's name.

6. The sixth Respondent is directed to remove any interdict, block or freeze imposed as a result of the order on the bank account bearing account number [...], in the tenth respondent's name.

7. The Applicants are to pay the costs of this reconsideration application on a party and party scale.

Dated at Johannesburg on this 26th day of August 2022

M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Appearances:

DATE OF HEARING : 16 AUGUST 2022

DATE OF JUDGMENT : 26 AUGUST 2022

FOR APPLICANT : ADV G HERHOLDT

INSTRUCTED BY : MESSRS EDWARD NATHAN &
SONNENBERGS ATTORNEYS

FOR RESPONDENT : MR N HITTLER