IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: 59474/2016

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

17/8/2016

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In the matter between:

ENDETO ENGINEERING CC	First applicant
and	
JULIANA BEZUIDENHOUT	First respondent
KEGO MINING (PTY) LTD	Second respondent
WYNAND PRINSLOO VAN EEDEN ATTORNEYS	Third respondent
REGISTRAR OF DEEDS, NELSPRUIT	Fourth respondent

JUDGMENT

VAN DER WESTHUIZEN, A J

1. This application comes before me by way of urgency.

2. The applicant seeks, pending the final determination of the action instituted by the applicant against the first respondent under case number 95918/2015, an order in terms whereof a portion of the proceeds derived from the sale of immovable property be paid into an interesting bearing account. The amount sought to be preserved is R595 155.19.

3. The aforesaid proceeds of the sale of immovable property arise from the sale of the first respondent's immovable property to the second respondent. The proceeds are to be paid into the trust account of the third respondent by the second respondent or for the benefit of the second respondent.

4. The proceedings referred to above relate to the recoupment of monies owed to the applicant by a Close Corporation for which the first respondent has bound herself as co-principal debtor and surety for the obligations of the Close Corporation. The latter is under winding-up proceedings. The first respondent has in terms of the provisions of the suretyship, renounced the benefits of legal exceptions, excussion and division, cession of action and no value received.

5. The applicant instituted the aforesaid proceedings by way of action during November 2015.

6. In response to the aforesaid proceedings, the first respondent filed an intention to defend the action and during March 2016 filed a concise plea. In the plea the first respondent admits the suretyship and the terms thereof. However, in respect of the balance of the allegations, and in particular that relating to the indebtedness of the principal debtor in favour of the applicant, the first respondent denies those allegations and puts the applicant (as plaintiff) to the proof thereof.

7. On 28 April 2016 the applicant's attorneys served a notice in terms of the provisions of Rule 37 of the Uniform Rules of Court inviting the first respondent to attend a pre-trial conference. There was no response to that notice. On 10 June 2016 a letter was addressed to the first respondent's attorneys determining 14 June 2016 to be the date for the pre-trial. The first respondent's attorneys responded to that letter on 10 June 2016 advising that the date of 14 June 2016 was not suitable and a request was made for alternative dates. In a

letter dated 13 June 2016 alternative dates for the pre-trial were proposed. No response to that letter was received from the first respondent's attorneys and no response to a follow up letter of 21 June 2016 was received.

8. During July 2016 it came to the applicant's knowledge that the first respondent had sold her three immovable properties to the second respondent. The circumstances under which the sale took place are unknown to the applicant. The purchase price thereof is also unknown to the applicant.

9. In a letter dated 18 July 2016, the applicant's attorneys sought an unconditional undertaking by the first respondent not to give transfer of the said properties until the litigation between the parties is finalised or settled.

10. The first respondent was further advised in the letter of 18 July 2016 that the only reasonable inference to be drawn from the terse plea, the unwillingness to attend a pre-trial conference and the unwillingness to provide an undertaking in respect of the sale of the aforesaid properties, was that the first respondent was delaying the inevitable in order to transfer all the first respondent's properties to the applicant's prejudice. A further unconditional undertaking, similar to the previous undertaking sought, was requested in respect of the transfer of the said properties. Again no response to the letter of 18 July 2016 was received.

11. On 20 July 2016 the applicant caused a further letter to be addressed to the first respondent through her attorneys. It was recorded in that letter that apparently clearance figures were requested in respect of the said properties, which were to be valid until 31 August 2016. It was further requested that an undertaking be provided as previously requested.

12. It was further recorded in the letter of 20 July 2016 that the first respondent had on a previous occasion confirmed that the only assets she had were the three properties referred to.

13. It comes as no surprise that no response was received in respect of the letter of 20 July 2016. The applicant was advised to bring the present application.

14. The present application was launched on 27 July 2016 and served on the first respondent on 29 July 2016, an attempt to serve on 28 July 2016 being unsuccessful.

15. The first respondent was afforded the opportunity to file an intention to oppose this application by 1 August 2016 and to file an answering affidavit by 8 August 2016. No intention to oppose was served and no answering affidavit was served.

16. On 15 August 2016, the day before this application was to be heard, a notice in terms of Rule 6(5)(d)(iii) was served upon the applicant's attorneys. The said notice indicated that only "questions of law" would be argued at the hearing of this matter.

17. Rule 6(5)(d)(iii) prescribes that in the event of a notice in terms of those provisions being filed, such is to be file within the time which is indicated for the filing of an answering affidavit. No explanation was provided why that notice could not have been filed by 8 August 2016.

18. A number of points are raised in the Rule 6(5)(d)(iii) notice, the majority of which are not points of law, but require factual allegations to support such. However, the point of law that is raised is premised

upon the decisions in *Carmel Trading Co Ltd v Commissioner SARS*[1] and *Knox D'Arcy v Jamieson.*[2]

19. Counsel for the first respondent submitted that the applicant has not complied with the principles enunciated in the aforementioned decisions. He submitted further that no facts have been alleged that satisfy the requirements laid down in those judgments. It was submitted that only supposition and groundless inferences are to be found in the founding affidavit.

20. In particular, it is submitted that the applicant has not alleged that the first respondent is "wasting or secreting assets with the intention of defeating the claims of creditors".[3]

21. It is further submitted on behalf of the first respondent that the applicant has no claim against the assets in question and that the interdict sought is merely to prevent the first respondent from freely dealing with her own property to which the applicant lays no claim. In this regard, counsel for the first respondent relies upon a passage appearing in *Knox D'Arcy, supra.*[4] The context in which that passage appears is as follows:

> *"As to the nature of the interdict, this was dealt with by Stegmann J in 1994 (3) SA at 706B707B and in 1995 (2) SA at 591A600F. 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. This conclusion was not attacked before us and I agree with it.*
> *What then must an applicant show in this regard? In the passages mentioned above, Stegmann J quoted the relevant*

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[1] 2008(2) SA 433 (SCA)
[2] 1996(4) SA 348 (A)
[3] *Carmel Trading, supra,* at 435D
[4] at 372G

cases in our law and I do not propose dealing with all of them. For the most part they were decided on their own facts without providing any theoretical justification for the interdict. However, in Mcitiki and Another v Maweni 1913 CPD 684 at 687 Hopley J stated the effect of earlier cases as follows:

'. . . (T)hey 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.'

See also Bricktec (Pty) Ltd v Pantland 1977 (2) SA 489 (T) at 493EG.

The question which arises from this approach is whether an applicant need show a particular state of mind on the part of the respondent, ie 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 I might arise, for instance, by contract or under the law of insolvency."

22. From the aforementioned quotation, all that is required of an applicant is to show *circumstances that such debtor is wasting or getting rid of*

such funds to defeat his creditors, or is likely to do so or put otherwise, *need to show a particular state of mind on the part of the respondent, i.e. that she is getting rid of the funds, or is likely to do so, with the intention of defeating the claims of creditors.*

23. In respect of the degree of proof required, the following was said in *Knox D'Arcy, supra,*[5]

> *"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. However, 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".*

24. Counsel for the first respondent, after completing his argument, submitted that in the event the point of law that is raised is not upheld, the first respondent should be afforded an opportunity to file an answering affidavit on the merits. That submission was not pressed. As referred to earlier, no explanation was provided for the failure to file an answering affidavit or for the late filing of the Rule 6(5)(d)(iii) notice.

25. In *Boxer Superstores Mthatha et al v Mbenya*[6] it was held that where the respondent relies exclusively on the Rule 6(5)(d)(iii) notice, the allegations in the founding affidavit must be taken as established facts.

26. In this regard the following is important:

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[5] at 373G-H

[6] 2007(5) SA 450 (SCA) at 452F-G

(a) The first respondent has indicated that the said three properties are her only assets;

(b) The statement that the only reasonable inference to be drawn from the terse plea, the unwillingness to attend a pre-trial conference and the unwillingness to provide an undertaking in respect of the sale of the aforesaid properties, was that the first respondent was delaying the inevitable in order to transfer all the properties to the applicant's prejudice is uncontroverted;

(c) The unwillingness on the part of the first respondent to provide an undertaking as requested.

27. In my view the foregoing issues constitute circumstances that the first respondent is wasting or getting rid of such funds to defeat her creditors, or is likely to do so. Furthermore, the foregoing shows a particular state of mind on the part of the first respondent, i.e. that she is getting rid of the assets, or is likely to do so, with the intention of defeating the claims of the applicant. In my view, the lack of response to the statements contained in the letters clearly supports a finding that the first respondent in dealing freely with her assets has no intention to satisfy the applicant's claim.

28. It is further submitted on behalf of the first respondent that the interdict sought would have a "devastating effect on the affairs of the first respondent", constitutes an abuse of process and is intrusive of the rights of the first respondent from freely dealing with her own property.

29. No facts have been placed before me to substantiate any of the foregoing submissions. They are mere supposition on the part of the first respondent. The first respondent had amply opportunity to deal with the allegations referred to earlier, but declined to do so.

30. It follows that the application must succeed.

I grant the following order:

(a) Pending the final determination of the action instituted by the applicant against the first respondent under case number 95918/2015:

(1) The third respondent is directed to retain the sum of R595 155.19 (Five hundred and ninety five thousand one hundred and fifty five rand and nineteen cents), and an additional amount of R100 000.00 (one hundred thousand rand) form the funds to be paid into its trust account by the second respondent, or for the benefit of the second respondent, *in lieu* of the purchase price to be paid by the second respondent to the first respondent in respect of the sale of holdings 15, 16 and 17 of Kendal Forest Holdings, held by Deeds of Transfer T48185/1991, T9392/2015, T9601/2010, by the first respondent to the second respondent;

(2) That aforesaid amounts are to be retained in an interest bearing account, opened in terms of section 78(2) of the Attorneys Act, 53 of 1979;

(b) The first respondent is to pay the costs of this application.

C J VAN DER WESTHUIZEN
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION

On behalf of Applicant:	D Prinsloo
Instructed by:	Krugel Heinsen Inc
On behalf of Respondents:	HC Janse van Rensburg
Instructed by:	S C Vercueil Prokureurs