REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 63778/2021

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

02 November 2022
Date

Signature

In the matter between:

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES	**Applicant**
and	
MASHILO OBRIEN MOLOTO	**First Respondent**
BUSTQUE 542 (PTY) LTD	**Second Respondent**
YOUNG EMERGING EQUITIES CC	**Third Respondent**
MOM ESTATE (PTY) LTD	**Fourth Respondent**
MASHILO OBRIEN MOLOTO N.O.	**Fifth Respondent**
KHOLOFELO MOLOTO N.O.	**Sixth Respondent**

MASHILO OBRIEN MOLOTO N.O.	**Seventh Respondent**
OFENTSE MAMONGANE LETTA MASINGA N.O.	**Eighth Respondent**
CORALLO RESOURCES (PTY) LTD	**Ninth Respondent**
EL CAZADOR GUEST HOUSE CC	**Tenth Respondent**
NULANE INVESTMENTS 143 (PTY) LTD	**Eleventh Respondent**
PROUDAFRIQUE TRADING 408 (PTY) LTD	**Twelfth Respondent**
MOHAU & KGAUGELO CC	**Thirteenth Respondent**
TR SOLUTIONS 877 (PTY) LTD	**Fourteenth Respondent**
MASHAKGOMO INTERNATIONAL HOLDINGS (PTY) LTD	**Fifteenth Respondent**
SIYAGHOPA TRADING 417 (PTY) LTD	**Sixteenth Respondent**

Summary: The return day for a provisional order – The applicant seeking to make the order final. The *Mareva* injunction not a remedy fully available in our law, although it is akin to our interdict remedy. South African law recognises an interdict *sui generis* for matters of this nature. Requirements of the interdict *sui generis* 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. The applicant is entitled to the relief being made final. Held: (1) The provisional order confirmed and made final with the necessary changes effected as set out in the order to be detailed in the judgment.

JUDGMENT

MOSHOANA, J

Introduction

[1] On 21 January 2022, this Court, *per* my sister Van der Schyff J in an *ex parte* application issued a provisional order. Given the nature of this application, the order so issued was put into immediate effect. Such an order gave birth to other interlocutory applications. Judgment in respect of one of the interlocutory applications is still pending. The provisional order was extended a few times and ultimately, the present application came before me as a special motion for the final confirmation or discharge of the order. Having heard all the parties involved, judgment in respect of the present application was reserved by this Court.

Background facts

[2] For the purposes of this judgment only the essential facts shall be outlined herein. It is common cause that Bustque 542 (Pty) Ltd (Bustque) and Mashilo Obrien Moloto (Moloto) are as at 31 March 2022 liable to pay the South African Revenue Services (SARS) an amount of R64 404 096.00 and R112 456 900.63 respectively in respect of customs dues (customs liability). In this application, there are fourteen other respondents other than Bustque and Moloto. Some of the respondents opposed the confirmation of the order whilst others did not. The basis of joining the other respondents is that according to SARS, Bustque and Moloto are busy dissipating assets belonging to them by transferring those assets to all these other entities. It being the case of SARS that those assets that are being dissipated are assets that will satisfy a judgment to be obtained against Moloto and Bustque for the custom liability.

[3] It is not in dispute that certain assets moved from Moloto and Bustque to some of the respondents. It is not necessary for the purposes of this judgment to list all the said assets and funds that moved. In a rather elaborative manner, SARS, in its founding papers commendably outlined all the transactions that demonstrates a move of funds and assets. It suffices to mention that the respondents contend that the transactions, which led to the movement of assets, were normal arm's length

transactions. They argue further that these transactions were not effected with the intention to dissipate assets in order to avoid any execution of a judgment related to the custom liability. With regard to the thirteenth respondent, Mohau & Kgaugelo CC (Mohau), it is undisputed that it is not liable towards SARS and that *ex facie* the *Natis* documents, it is the registered owner of the vehicles that SARS seeks to lay a hand on in order to satisfy the liability of Moloto and Bustque. The fourteenth respondent, TR Solutions 877 (Pty) Ltd did not file any opposing papers.

[4] In the main, the defence of Bustque, Moloto and the other respondents was that they were not busy dissipating assets with the intention to defeat the liability of SARS. Most, if not all, of the assets movement occurred before the liability was raised in March 2019, so they contended. It is alleged that, since the liability was raised in March 2019, Moloto and Bustque have not moved any assets and that Bustque has no assets to move. As indicated above, Mohau contends that it is not liable to pay SARS and its assets are not executable for the liability of Moloto and Bustque.

[5] It is common cause that the third respondent, Young Emerging Equities CC (YEE) is liable for other taxes other than customs liability. Such liabilities are collectable in terms of a procedure outlined in section 163 of the Tax Administration Act (TAA)[1]. However, for the purposes of the present application, SARS contends that Moloto has admitted that some of the funds of Bustque were deployed to obtain assets belonging to YEE. For that reason alone, SARS contends that in executing its judgment for the liability of Moloto and Bustque, the assets of YEE shall be executable in due course. Owing to that, it fears that assets held by YEE are likely to be dissipated, given the advice provided to Moloto to move assets. One Joshua Moloto, the brother of Moloto, disclosed the advice received by Moloto to SARS. It remains common cause that a web of legal entities or vehicles were registered, all of whom has Moloto as the common denominator. SARS alleges that in an action it contemplates to institute, it will demonstrate that Moloto abused those legal entities and in due course the corporate veil shall be pierced, which piercing shall expose all

[1] Act 28 of 2011 as amended.

the assets, allegedly, owned by the other respondents, which are liable to execution in order to satisfy the custom liability debt. SARS wishes this Court to preserve those assets as well. Again, it is unnecessary for the purposes of this judgment to list all those assets. It suffices to mention yet again that in its founding papers, SARS elaborately listed those assets and made out a case that in reality those are assets of Moloto and Bustque.

[6] Four counsel appeared before me. A team led by Mr. Snyman represented SARS. Mr Barnard appeared for Mohau and Mr Nondwangu appeared for the majority of the respondents. All counsel provided this Court with helpful written heads of argument. It is unnecessary for the purposes of this judgment to repeat the contents of the written submissions. It suffices to mention that this Court for its own benefit sufficiently debated the relevant legal principles with counsel.

Analysis

[7] Before this Court delve into the legal requirements of the application serving before it, it is important to dispel immediately, the mislabelling of this type of an application. Is it a *Mareva* injunction in its purest form or is it an interdict *sui generis*? Regard being had to the defences raised in this present matter, it is incumbent on this Court to clarify the legal position with regard to a *Mareva* injunction (interdict). Moloto and Bustque seemed to labour under a wrong impression that the present application is only possible under section 163 of the TAA. Before me, SARS disavowed any reliance on section 163. However, for the sake of clarification of the common law remedy involved herein, it is necessary to touch on the provisions of the section. Section 163 (1) references an *ex parte* application for the purposes of obtaining a preservation order in respect of any assets of a taxpayer. Once so granted the taxpayer or another person shall subject to certain conditions and exceptions be prohibited from dealing in any manner with the assets to which the order relates. In my view, these statutory provisions are a codification of a common law remedy of an interdict and perhaps blended adroitly with *Mareva* injunction. More is not to be said about section 163 since it finds no application before me. I must state though

that the bulk of the respondents' defence is that SARS ought to have invoked the provisions of section 163. Reliance on the section having been disavowed, it is self-evident that the respondents are left with very little to sufficiently oppose this application.

The Mareva injunction remedy

[8] The remedy of *Mareva* injunction owes its origin from the English legal system. The remedy is referred to as *Mareva*, but it first emerged in *Nippon Yusen Kaisha v Karageorgis (Kaisha)*[2]*.* Therefore, in reality the remedy is the *Kaisha* injunction. In the *Kaisha* case, the plaintiff company had chartered a ship to the defendants. A large sum was claimed for the hire. The charterers could not be found but there was evidence of funds at a bank in London. An *ex parte* application was then launched for an order restraining the charterers from disposing of or removing from the jurisdiction any of the assets which were within the jurisdiction. The application was refused by the Court *a quo*. On appeal, the order sought was granted. The reasoning behind the granting of the order was that the assets were in danger of being removed from the jurisdiction so as to frustrate a money judgment which the Japanese ship-owners had against the Greek charterers. The charterers had disappeared but had funds in London Banks.

[9] In light of the above, it is perspicuous that what the Court seeks to protect is a money judgment that could be satisfied by attaching the assets that are in the danger of being removed. Owing to the situation in *Kaisha,* it seems to be so that for an applicant to succeed, that applicant must prove the following: (a) There is a money debt and or judgment in its favour; (b) in order to satisfy the debt and or judgment, it must lay execution on the assets owned by the respondent; (c) The assets that could satisfy the debt or judgment are in danger of being disposed of or removed.

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[2] *Nippon Yusen Kaisha v Karageorgis* [1975] 1 WLR 1093.

[10] A month later, the Court of Appeal followed *Kaisha* in the matter of *Mareva Compania Naviera SA v International Bulkcarriers SA (Mareva)*[3]. Briefly, what obtained in *Mareva* is that ship-owners were owed money for charter hire and the charterer had money in a London Bank. Similarly, an *ex parte* interim freezing injunction was made stopping the funds from being taken out of the jurisdiction. Both *Kaisha* and *Mareva* were penned by the erudite Honourable Lord Denning. In *Kaisha* he said:

> 'We are told that an injunction of this kind has never been granted before; it has never been the practice of English courts to seize assets of a defendant in advance of judgment or to restrain the disposal of them.
>
> There is no reason why the High Court or this court should not make an order such as is asked here…the High Court may grant a *mandamus* or injunction or appoint a receiver by interlocutory order in all cases in which it appears to the court to be just or convenient so to do. It seems to me that this is just such a case. There is a strong *prima facie* case that the hire is owing and unpaid. If an injunction is not granted, these monies may be removed out of the jurisdiction and the ship-owners will have the greatest difficulty in recovering anything. Two days ago we granted an injunction *ex parte* and we should continue it.' (Own emphasis).

[11] Discernibly, 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. Thus, in my view, for an applicant to succeed, that applicant must establish the existence of those five requirements. Both *Kaisha* and *Mareva* were *ex parte* applications. Years later an opposed matter arose in *Rasu Maritima SA v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina) and Government of Indonesia (as interveners) (Rasu)*[4]. Briefly, in *Rasu*, the plaintiff ship-owner sued defendant charterer for

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[3] *Mareva Compania Naviera SA v International Bulkcarriers SA* [1980] 1 All ER 213 (CA).

[4] *Rasu Maritima SA v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina) and Government of Indonesia (as interveners)* [1977] 3 All ER 324; (1978) 1 QB 644 (CA).

damages arising from a breach. After numerous futile attempts in several countries to attach the defendant's assets, the plaintiff finally found some equipment purportedly belonging to defendant waiting to be shipped from Liverpool. Plaintiff immediately applied *ex parte* for an injunction to restrain the shipping of the equipment. Plaintiff obtained the order but the order was later discharged. Interestingly, the basis of the discharge was that (a) there was a serious question as to whether the defendant held valid title to the attached equipment; and (b) the value of that equipment far outweighed its value to the plaintiff if seized and sold in execution of the judgment. Differently put, it was not just or convenient to issue an injunction on the facts of *Rasu*.

[12] Having clarified the English law position, the remedy ultimately comes to this: A *Mareva* interdict is designed to protect the claimant against the dissipation of assets against which the claimant might otherwise execute judgment either immediately or in the future. For as long as the claimant has a claim against the defendant and that the defendant has assets, which may be used to satisfy the judgment, a claimant may successfully apply for a *Mareva* interdict.[5]

The South African situation

[13] In the South African law, traces of a remedy akin to the *Mareva* injunction emerged long before the innovation by Lord Denning in 1975. In *Fredericks v Gibson*[6] and *Robinson, Miller & Co. v Lennox and Another,*[7] it was confirmed that the property of the respondent may be attached if the respondent threatens to do away with his or her assets. Consummately, the Honourable erudite Hopley J in *Mcitiki and another v Maweni (Maweni)*[8] provided the desired clarity in applications of this nature. Briefly, the facts in *Maweni* are that a father of a daughter gave the hand of the daughter

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[5] See *Falcon Private Bank Ltd v Borry Bernard Edouard Charles Limited* (HCA 1934/2011); *Zimmer Sweden AB v KPN Hong Kong Ltd and Brand Trading Limited* (HCA 2264/2013) and Article by Dr Mohammed Saud Alnasair Alenaze: *The Mareva Injunction as a means of affording protection to the interest of creditors.*

[6] *Fredericks v Gibson* (9 C.T.R. 445)

[7] *Robinson, Miller & Co. v Lennox and Another* (18 C.T.R. 402).

[8] *Mcitiki and another v Maweni* (1913) CPD 684.

into marriage. As dowry (*lobola*) cattle had been given. Later the daughter deserted. The father of the son demanded the return of the cattle. An action was being brought to recover from the respondent father cattle, which had been given to him as dowry since he refused to return them following the desertion of the daughter. The father of the son discovered that the respondent father had moved a number of stock from his kraal, presumably with the intention of hiding them. Apparently, the respondent had told the applicant that he intended delaying the action and disposing of his cattle in order to defeat the claim of the applicant. The applicant father obtained a rule *nisi* that restrained the respondent father from selling or disposing of 15 head of cattle and three horses pending the result of the litigation between the parties. On the return day, the rule was made absolute.

[14] In making the rule absolute, Hopley J felicitously stated amongst others, the following:

> 'In this case I am satisfied that Maweni has acted so that appellants would find nothing to execute upon if they got judgment, and in these circumstances I think it is not a revolution of the practice of the Court, but a confirmation of it, and goes in the spirit in which the Court has always acted to interdict as prayed. Whatever he may do with the rest of his property he should keep sufficient stock to satisfy this judgment if he is in the wrong. The case is coming on. I can see no danger to Maweni. His cattle are left in his possession but the Court says he cannot deal with a specified portion of them till this matter is decided. He would have been very much better advised if he had simply not opposed, but had consented to that, because I do not see that he is in any way damaged, especially as he says he has not a slightest idea of parting with his animals…' (Own emphasis).

[15] What influenced the granting of the interdict in *Maweni* was the desire not to do an injustice to the plaintiff by reason of leaving the debtor possessed funds sufficient to satisfy the claim, when the circumstances show that such debtor is wasting or getting rid of such funds to defeat his or her creditors or is likely to do so. Hopley J went further and clearly stated the law as being the following:

'…The doctrine has been extended a little further where the respondent is a prodigal wasting his money or is purposely making away with funds although remaining an *incola* of the country, so that eventually when his creditor gets a judgment it may be a barren one; and, to use a graphic phrase in one of our old law cases, when he went there with his writ of execution such creditor would find he was "fishing behind the net". It is to protect a *bona fide* plaintiff against a defeat of justice in such a case that such orders are given'. (Own emphasis).

[16] Based on *Maweni*, the sole purpose of orders of the nature sought in the present application is, firstly, to do justice to the plaintiff not to be saddled with a hollow victory and secondly to protect a *bona fide* claim at its embryotic stage. It then seems to me that the requirements of the granting of such an interdict are; (a) presence of a *bona fide* claim; (b) fear of being visited with an injustice, which fear is inculcated by the conduct of prodigality. The Supreme Court of Appeal in *Knox D'Arcy v Jamieson (Knox)*[9] approved this approach with less hesitation. Taking a leaf from *Knox*, Acting Justice Erasmus had the following to say in *Poolman v Cordier and others*[10]:

'[17] A *Mareva* injunction is a species of an interim interdict compelling a respondent/defendant to refrain from dealing freely with his assets to which the applicant can lay no claim. The purpose thereof is to prevent the intended defendant, who can be shown to have assets and who is about to defeat the plaintiff's claim or defeat the plaintiff's claim or dissipating assets, from doing so. To be successful, the applicant must show that the respondent is wasting or secreting assets with the **intention** of defeating the claims of creditors.' (Own emphasis).

[17] Proper reading of *Knox* suggests to me that the Justices of the Appellate Division were not particularly happy to adopt the *Mareva* injunction as formulated by Lord Denning. They reluctantly accepted the name but unequivocally stated that the interdict they were dealing with was one *sui generis*. The Court held that such an interdict should not be granted in cases where the respondent is in *good faith*

[9] *Knox D'Arcy Ltd and others v Jamieson and others 1996 (3) All SA 669 (A);* 1996 (4) SA 348 (A).

[10] *Poolman v Cordier and others* (2452/2016) ZANCHC 49 (10 March 2017) (Unreported judgment).

disposing of his assets, or threatening to do so, and has no intent to render the applicant's claim nugatory. The Court asked, 'What then must an applicant show?' The Court went further and referred with approval to what Hopley J said in *Maweni* when he said:

> '…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.' (Own emphasis).

[18] It is clear that the South African position is that such orders are granted under the requirements of an interim interdict.

English law position pre-Mareva.

[19] Returning to the English law position, the earlier position was such that a debtor or defendant could not be restrained from dealing with his property in favour of a plaintiff or claimant in the absence of the plaintiff or claimant having a judgment against the defendant or debtor. The leading case on that position was that of *Lister & Co. v Stubbs*[11], where Cotton L.J had the following to say:

> 'I know of no cause where because it was highly probable that if the action were brought to a hearing the plaintiff could establish that a debt was due to him from the defendant, the defendant has been ordered to give security until that has been established by the judgment or decree.'(Own emphasis).

[20] In *Lister* case, the plaintiff was a manufacturing company which employed the defendant. In his capacity as a foreman, the defendant who was responsible for the purchase of material on behalf of the plaintiff, allegedly received some kickbacks

[11] *Lister & Co. v Stubbs* (1890) 45 Ch.D. 1 (CA).

and bribes from one of the suppliers. The defendant subsequently invested his ill-gotten gains in land and securities. Having discovered what the defendant was doing, the plaintiff brought an action against him. Afterwards, the plaintiff brought an interlocutory injunction, seeking to restrain the defendant from dealing with the real estate in which his ill-gotten gains had been invested. The injunction was dismissed by both the Court a *quo* and the Court of appeal.

[21] Years later, Estey J was incensed about the inequities of the common law position as outlined by *Lister* and in *Aetna Financial Services Ltd v Feigelman*[12], he commented as follows:

> '…the depredations of shady mariners operating out of far away havens, usually on the fringe of legally organised commerce.'

[22] It was against the backdrop of the centuries old position that Lord Denning stepped in to create a new remedy of *Mareva*. Legal scholars lauded Lord Denning for the activism he demonstrated. A new maxim *Ubi Jus Ibi Remedium* – where there is a right, there ought to be a remedy - was developed to champion equity[13]. According to Spry, '*it is certainly with inherent jurisdiction of the courts of equity to grant Mareva injunctions'.*

South African Law position.

[23] Returning to the South African situation, in *Knox*, the Court rejected amongst others the requirement of the presence of an alternative remedy. It is well known since *Setlogelo v Setlogelo*[14] that one of the requirements of an interim interdict is the non-availability of an alternative remedy in due course. The Court in *Knox* resorted to

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[12] *Aetna Financial Services Ltd v Feigelman* [1985] 1 SCR 2.

[13] Snell *Principles of Equity* New Civil Court in action 247 (1948) and Spry: *The principles of Equitable remedies* (5th ed., 1997) 515.

[14] *Setlogelo v Setlogelo* 1914 AD 241.

calling a *Mareva look alike* an interdict *sui generis*. It is either available or it is not. No other remedy can really take its place except in certain circumstances, so opined the learned Grosskopf JA.

[24] To my mind, what appears to be a difficulty for an applicant for a remedy of this nature is the demonstration of a *mala fide* intent of preventing execution in respect of an applicant's claim. Sadly, in my view, *Knox* did not with respect provide sufficient guidance with regard to determining the said intent. This aspect of presence of an intention derives from *Maweni*. I shall in due course return to this aspect. In this case, I am satisfied that SARS has a substantial and *bona fide* claim against Moloto and Bustque. Thus, the first legal requirement of the present application would be satisfied. This Court is acutely aware that SARS intends to demonstrate that Moloto is abusing the corporate veil and it further wishes to have that corporate veil pierced.

Owing to the fact that the purpose of the present application is to protect a *bona fide* claim, it is unnecessary at this stage to resolve the question of who the true owner of the assets to lay the hands on is. It is enough, in my view, at this stage to demonstrate the link between the assets and the debtors (Moloto and Bustque). On the preponderance of probabilities, this Court is satisfied that the majority of the assets identified to be in possession of the other respondents are linked to the debtors. They certainly would be executable, should the piercing of the corporate veil and the disentangling of the web demonstrate that the assets belong to the debtors. At this juncture, the Court will not be authorising execution over the assets, but it will simply seek to preserve those assets in order to protect the *bona fide* claim of SARS. The respondents are not divested of ownership of the assets. It is for that reason that I reject an argument that the granting of this order shall implicate the provisions of section 25 (1)[15] of the Constitution of the Republic of South Africa, 1996 (Constitution).

[15] Section 25 (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

[25] The other reason why this Court takes a view that the ownership of the assets at this stage is irrelevant is that at the execution stage, should the debtors fail to satisfy the judgment debt, the supposed owner of an asset to levy execution upon may join issue with the sheriff of the Court and state that the property upon which execution is laid belongs to it, him or her. The Rules of this Court make provisions for interpleader proceedings[16]. The issuing of interpleader notice suspends proceedings in an action, pending the decision of the interpleader case[17], unless the Court orders otherwise at the request of another party.

[26] The Supreme Court of Appeal (SCA) in *Bassani Mining (Pty) Ltd v Sebosat (Pty) Ltd & others (Bassani)*[18] approved *Knox*. Additionally, the Court approved that the requirements of an interim interdict find application in matters of this nature. In upholding the High Court decision, the SCA, innovatively, in my view, approved the phrase coined by the High Court of a real risk. This 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 judgment should the applicant succeed. This, to my mind, speaks to an intention or state of mind whence the assets are being moved and / or dissipated. I shall in due course return to the issue of intention, which constitute part of the second leg of remedies of this nature. I hasten to mention that the SCA was also concerned that absence of assets to lay a claim on defeats remedies of this nature. I am acutely aware that I earlier took a view that at this stage the ownership of the assets does not play a major role. On the facts of *Bassani,* it was common cause that Bassani had no assets. In this case, the allegation that Bustque has no attachable assets is not common cause. On SARS's version, which may become true after the piercing of the corporate veil, Bustque has assets and Moloto has dissipated those assets, with the solitude mind to defeat the custom liability claim. For an example, there is an allegation that has not been properly controverted, that Moloto used the funds of Bustque to purchase assets of YEE and a further lamely

[16] See *Corlett Drive Estates v Boland Bank Bpk* 1971 (1) SA 863 (C).

[17] See rule 58 (7) of the Uniform Rules.

[18] *Bassani Mining (Pty) Ltd v Sebosat (Pty) Ltd & others* (835/2020) [2021] ZASCA 126.

controverted testimony that Joshua Moloto disclosed the advice to move assets to SARS. On application of the well-known *Plascon-Evans* principle, I must accept this allegation that Joshua Moloto disclosed the advice. The respondents resisted the admission of this evidence on the basis that it constituted inadmissible hearsay evidence. No confirmatory affidavit was obtained from Joshua Moloto. Ineluctably, Joshua Moloto by reasons of affinity may not be expected to depose to a confirmatory affidavit. However, section 3 (4) of the Law of Evidence Amendment Act[19], provides that hearsay evidence is admissible in instances where the interests of justice so demand. In my opinion, such evidence must be admitted in the interests of justice

[27] The correctness of *Knox* was also affirmed by the SCA in *Carmel Trading Co Ltd v CSARS and others.*[20] It was in *Carmel,* wherein the statement by Lord Donaldson of Lymington MR in *Derby & Co Ltd and others v Weldon and others (No 2),*[21] alluding to the growing commercial and financial sophistication[22] was endorsed. Likewise, as Erasmus AJ, guided and bound by *Knox,* suggested that to be successful the applicant must show that the respondent is wasting or secreting assets with the intention of defeating the claims of the creditors. It was for that reason that the learned Acting Justice reached a conclusion that an attempt to make out a *Mareva* case has not been made or argued before him. Earlier, I indicated that what pertains in matters of this nature is an interdict *sui generis* as opposed to *Mareva* injunction in its purest form. In order to draw the necessary distinction between *Mareva* injunction and the South African interdict *sui generis*, I now, purely for the sake of posterity and illustration, turn to the requirements of *Mareva* injunction in its purest form and consider them in turn against the facts before me.

***Just, justness or justice*.**

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[19] Act 45 of 1998 as amended.

[20] *Carmel Trading Co Ltd v CSARS and others* 2008 (2) SA 433 (SCA).

[21] *Derby & Co Ltd and others v Weldon and others (No 2)* [1989] 1 All ER 1002 (CA).

[22] See *Metlika Trading Ltd v CSARS* 2005 (3) SA 1 (SCA).

[28] In the understanding of Lord Denning, this requirement simply means equity and fairness. Interest of justice in general terms means that the Court is satisfied that the decision clearly needs to be made. The English maxim alluded to earlier suggests that where there is a right there ought to be a remedy. It is not in dispute that Moloto and Bustque owe SARS; and that certain of the assets of the company are being disposed of under very dubious and questionable circumstances. Without deciding, this Court is sceptical as to whether the transactions were made at arm's length. This issue would certainly arrest the attention of the trial judge in the impending action against Moloto and Bustque.

[29] The argument that some of the transactions occurred before a debt is raised is of no consequences in my opinion. It may well be so that such goes to presence or absence of intention. In my view, the moment Moloto and Bustque engaged in a transaction, contrary to the Customs and Excise Act (CEA)[23], they ought to have known that a liability in favour of SARS would arise. During argument, Mr Nondwangu submitted that the custom liability only arose in March 2019. In complete disagreement, Mr Snyman argued with reference to a schedule prepared and annexed to the founding affidavit that the liability arose around September 2017. It is more probable that where one knows that a liability exists in favour of a creditor, one of the means to avoid that liability, particularly when it is heading to the roof top, as in affordability, will be for a debtor to device some means to avoid any financial haemorrhage on his or her part, considerably to the chagrin of the creditor. One such devisable means is to hive off assets. It is interesting to note that in *Maweni*, Hopley J stated that all the cases before it proceeded upon the wish of the Court that the plaintiff should not have an injustice done to him.

Convenience

[23] Customs and Excise Act 91 of 1964, as amended.

[30] This requirement is linked to the two other requirements, in particular, the one where a party demonstrates a strong *prima facie* claim. In due course, a strong *prima facie* claim may translate into a judgment debt. It must be so that a party armed with a hollow judgment will be inconvenienced if, at a particular point, his or her judgment to be obtained later had the potential of being satisfied through some assets that have been dissipated or secreted. The *Mareva* injunction, as I understand it, is not aimed at taking ownership of the assets away from the owner. It simply seeks to show deference to a potential judgment debt. All it seeks to do is to prevent dissipation of the assets. As a by the way, non-dissipation of an asset may prove to be beneficial to the owner as well. In the event that the strong *prima facie* case does not materialise, it follows axiomatically that the owner will be free to enjoy the use of the asset uninhibited. The other requirement linked to this one is that of clear evidence of the owner disposing of the asset. Clearly, where there is a strong *prima facie* claim, allowing disposition of assets that may satisfy that claim is a great source of inconvenience. In considering convenience, a judge seized with an application for a *Mareva* injunction would, in my view, be required to make a value judgment in as far as convenience is concerned.

[31] The other requirement linked to this one is that of experiencing great difficulty in recovery. A party who demonstrates on a balance of probabilities that he or she will experience a great difficulty in recovering what is owed to him or she is ordinarily inconvenienced by a refusal of an injunction.

A strong prima facie claim

[32] As to what a strong *prima facie* case mean, I can do no better that the Honourable Mr Justice Robert J. Sharpe in his work,[24] when he said:

[24] Sharpe*, Injunctions and Specific Performance*, loose-leaf (Aurora: Canada Law Book, 2005).

> 'While it is difficult to be precise about the strength of case the plaintiff must demonstrate, it is clear that the courts have proceeded cautiously, recognising the risk of substantial harm and inconvenience that may be caused to the defendant. The *Mareva* injunction is one which calls for careful scrutiny of the merits of the claim and refusal of injunctive relief unless there is a good prospects of success at the trial. The Canadian courts have tended to emphasize the importance of the plaintiff establishing a strong *prima facie* case…' (Own emphasis).

[33] The take away from what the erudite Robert J. Sharpe perspicuously states is that a view must be formed that an applicant possesses good prospects of success on the claim to be instituted. Prospects of success is an assumption regarding one's chances of successfully pursuing a case. What the reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that there is likely to be a success.[25] The Canadian Court of Appeal of Manitoba in *Clark et al v Nucare PLA,*[26] took a somewhat hard and uncompromising approach as compared to the one taken by British Columbia in the matter of *Mooney v Orr*[27], where Huddart J stated that 'the overarching consideration in each case is the balance of justice and convenience between the parties'.(Emphasis added).The hard-line approach adopted in *Nucare*, was that *Mareva* injunctions are unavailable against defendants who do not evidence an intention to frustrate the plaintiff's potential judgment. Scott C.J.M writing for the majority concluded that some risk of non-payment must be shown.

[34] On the contrary, Lord Denning indicated that the case did not have to be so strong as to justify the Court issuing a summary judgment. He stated that it is sufficient for the applicant to demonstrate a good arguable case.

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[25] See *Smith v S* 2012 (1) SACR 567 (SCA).

[26] *Clark et al v Nucare PLA* 2006 MBCA 101.

[27] *Mooney v Orr* [1994] B.C J. No 2652 (S.C).

Assets may be removed

[35] This require a call for some speculative evidence that assets may be removed. Such implies that the applicant may present some evidence that demonstrates the removal of assets or the potential of them being removed. In *Maweni*, it was concluded that the likelihood to defeat creditors by removing assets is a factor to be considered in this type of remedy. In the present circumstances, there is probative testimony that Moloto has already received an advice that in order to defeat the claim of SARS, moving assets away is an available means to do so. As I have already pointed out, on the evidence before me, the transactions that saw a bulk of the assets of Bustque being moved away to some of the respondents before me are dubious and appear not to have been made at arm's length. Differently put they were not made in good faith.

Difficulty of recovery

[36] An applicant would establish this requirement by demonstrating the potential of obtaining a hollow judgment. Although in *Nucare* mention was made that some risk of non-payment need to be shown, it is, in my view, difficult to show such a risk. However, it may be easy for an applicant to demonstrate that he or she shall seat with a hollow judgment given the behaviour of the defendant in removing assets.

What then is a Mareva injunction?

[37] There is no doubt that the remedy was developed and fashioned by Lord Denning under the English law. Therefore, in order to understand the remedy, one must defer to the English cases more than any other cases. Dr Alenaze, in his article, after surveying jurisdictions like Canada, Hong Kong, USA, Australia and Nigeria with regard to their application of *Mareva* injunction reached the following conclusion:

> 'The initiative taken by Lord Denning in the Court of Appeal by creating *Mareva* injunction has made history in the matter of protecting interests of creditors in commercial transactions… In other words, the work of the Court of Appeal was a measure, on the one hand, to protect creditors in the commercial world and a work, on the other hand to protect the majesty of English Law as well…'[28](Own emphasis).

[38] It seems to me that the correct approach to take, with regard to the remedy, is to say, the *Mareva* injunction forms part of our common law. All that is required is to develop it with the view of protecting the interests of creditors. The revolutionary approach taken by Corbett CJ in *Administrator of Transvaal and others v Traub and others*[29] in accommodating yet another innovation by Lord Denning of the doctrine of *legitimate expectation* may require repetition. This may not be the appropriate case for such call for the adoption of *Mareva* since Mr Snyman submitted that the *Mareva* injunction in its purest form is not what SARS seeks before me.

***Further analysis of the South African legal position*.**

[39] As indicated earlier, the remedy contemplated in this matter was available as far back as 1913 or earlier. However, it does seem that the territorial marking in South Africa arises from, the leading authority of *Knox.* When *Knox* is carefully considered, it does seem that the *Mareva* injunction was not openly welcomed in the South African legal system. The SCA preferred a home brewed remedy as suggested by Hopley J. As an opening gambit, Stegmann J, although he granted an interdict prohibiting the respondents from freely dealing with their assets, he later described it as a draconian remedy. Stegmann J did not like the name *Mareva*-type interdict and he said giving the interdict that name suggested that English principles are automatically applicable. The Appellate Division agreed with the criticism of suggesting automatic application of the English principles. Ultimately, the Appellate Division rejected names proposed by Stegmann J (interdict in *securitatem debiti* and

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[28] Alenaze, "*The Mareva Injunction as a means of affording protection to the interest of creditors*" Page 49.

[29] *Administrator of Transvaal and others v Traub and others* 1989 (4) All SA 924 (AD).

anti-dissipation interdict). The Appellate Division chose not to propose a name but stated that it is an interdict *sui generis*.

[40] Thus, the Appellate Division adopted the approach by Hopley J and added that an applicant need to show a particular state of mind on the part of the respondent, which is that he or she is getting rid of the funds, or is likely to do so with the intention of defeating the claims of creditors.

[41] Therefore, the conclusion to reach is that the present application is a form of an interdict. Since *Setlogelo v Setlogelo*[30], it is known what an interdict seeks to prevent an unlawfulness. Effectively, it seeks to protect legally protectable rights. In *Setlogelo*, the right that was protected by way of an interdict was the right to possess land, albeit in terms of the laws of the land at the time, Setlogelo could not own land. Regard being had to the sentiments of Hopley J as approved by *Knox*, the requirements of this type of an interdict seem to be the following:

a. The plaintiff should not have an injustice done to him/her;

b. The debtor is possessed with sufficient funds to satisfy the claim;

c. The debtor is wasting or getting rid of such funds, or he is likely to do so, to defeat the creditors; and

d. He or she is wasting or getting rid of such funds or likely to do so with the sole mind (intention) of defeating the creditors.

[42] Once all of these requirements are proven on the balance of probabilities, the interdict *sui generis* ought to be granted. All of these requirements must be present in order to grant the relief. Absence of one ineludibly leads to the refusal of the interdict. With regard to the intention or state of mind, the Court in *Knox* spoke, in my respectful view, in forked tongues. It said:

[30] *Setlogelo v Setlogelo* 1914 AD 221.

> '[67] …There was some argument on whether the fact that the assets were secreted with the intent to thwart the petitioner's 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 petitioner's proof would be a factor to be taken into account and weighed against other features in deciding whether an interim interdict should be granted.' (Own emphasis).

[43] In my view the debate around the issue of proof, whether on the preponderance of probabilities or mere *prima facie,* was, with respect not resolved with absolute certainty. It remains unclear whether the intention must be proved on balance of probabilities or by mere *prima facie* proof. However, it seems to me that the proof must be a mere *prima facie* one. I say so because; the Court referenced 'other' features of an interim interdict. The primary feature of an interim interdict is a *prima facie* right even though open to some doubt. Additionally, the Court agreed with the approach that the petitioner's claim was that they have proved *prima facie* that the respondent had an intention to defeat claims or to render them hollow by secreting their assets. *Prima facie* means based on the first impression, accepted as correct until proven otherwise.

[44] Stegmann J discharged the rule *nisi* that granted what he termed a draconian order. On appeal, his order discharging the rule was upheld. In rejecting the presence of the *Mareva* injunction, the Court in *Knox*, referenced *Polly Peck International Plc v Nadir and others (No 2),*[31] particularly where the Court of Appeal stated that *Mareva* injunction is not available in the absence of a claim against the defendant. For two reasons below, Lord Justice Scott rejected the continuance of the *Mareva* injunction. Those were; (a) the case against the defendant was speculative; and (b) since liability had not been established, the protection will be against a speculative cause of action.

[31] *Polly Peck International Plc v Nadir and others (No 2)* [1992] 4 All ER 769 (CA) at p 785g-h

[45] If a return to *Maweni* is made, it shall be observed that the sole state of mind is contemplated. The veritable question becomes how is an applicant to demonstrate a state of mind with regard to the dissipation of an asset. As a matter of law, the owner of a property is entitled to dispose of his/her property, either in order to be liquid or to deal with any of his debts. Thus, the legal position is such that a sale of own asset or disposition thereof is not an unlawful act *per se*. Moloto argues that in instances where there is clear evidence of disposition of assets, he did so in the normal ordinary course. Differently put he acted in good faith. Therefore, in the event that the Court accepts Moloto's argument, then SARS must fail because it would have failed to demonstrate that the sole mind of Moloto was to defeat the legitimate claim of SARS.

[46] In our law, there are three forms of intention; namely; (a) *dolus directus* (direct intention); (b) *dolus indirectus* (indirect intention); and (c) *dolus eventualis* (legal intention). Regard being had to *Maweni* as approved in *Knox,* the intention must be linked to the disposition of the funds or assets or the likelihood to dispose of the funds or assets to be preserved. Mr Snyman submitted that the intention contemplated is not the same intention as in a criminal sense but it is actually the reason to believe by the applicant. The suggestion being that if the applicant holds a view that the debtor is disposing of the asset with one frame of mind – to defeat the action – such is sufficient. I do not agree. The SCA in *Knox* was very clear. It said:

> 'The question which arises from this approach[32] is whether an applicant need to 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 the creditors. Having regard to the purpose of this type of interdict, the answer must be, I consider yes, except 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.'(Own emphasis).

[32] The approach in *Maweni* and other cases mentioned above, including *Bricktec (Pty) Ltd v Pantland* 1977 (2) SA 489 (T) at 493E-G (*Bricktec*)

[47] To my mind, in order to succeed, an applicant must show an intention as opposed to forming a reason to believe. It is clear that the applicant must on the preponderance of probabilities show that the respondent acts with a *mala fide* intent. In *Bassani,* the Court approved the showing of the real risk. Rogers J in *CSARS v Tradex (Pty) Ltd and others*[33], dealing with a section 163 of the TAA matter reached a conclusion that at common law, the applicant must establish *prima facie* that the respondent will dissipate his assets with the intention of defeating the applicant's claim. He further concluded that when section 163 (3) refers to 'required' it entails proof of such intention on the part of the taxpayer. When Rogers J referred to such intention, he was referring to the intention alluded to in *Knox*; namely the intention to defeat the claim. However, he concluded that 'required' suggests that SARS is to show that there is a material risk that assets which would otherwise be available in satisfaction of tax will, in the absence of a preservation order, no longer be available. Mr Snyman urged this Court to take a similar approach as Rogers J did. I am not to succumb to that urge because Rogers J made it perspicuous that he was not dealing with the intention alluded to in *Knox*. Perhaps a case which, with less ambivalence, demonstrate the intention required in this instance is that of *Bricktec*[34]. McEwan J concluded that the following are the applicable principles:

a. If the applicant can show that the respondent intends to dispose of his property in a way that will defeat any ultimate right that the applicant may have to levy execution upon it, the applicant may be able to obtain an interim interdict restraining the respondent from disposing of the property;

b. It is by no means clear that the applicant is entitled to such an interdict if he can show no more than a fear that the respondent may so dispose of his property;

c. In my view, further, the mere fact that the respondent has ceased to reside permanently in this country does not necessarily give rise to an inference that he intends to dispose of the properties concerned. (Emphasis added).

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[33] *CSARS v Tradex (Pty) Ltd and others* (Unreported judgment) (12949/2013) dated 9 September 2014.

[34] *Ibid* (n 29) above.

[48] Of importance, in coming to the conclusion that the rule *nisi* must be discharged, the learned McEwan J concluded that assuming that the test laid in *Maweni* was the correct one – wasting or getting rid of (his assets) to defeat his creditors or is likely to do so, proof is required that the respondent is doing so or likely to do so. *Bricktec* was quoted with apparent approval in *Knox*. In refusing to uphold the appeal against Stegmann J's order of discharging the rule *nisi*, Grosskopf JA, sharply stated the following:

> 'In view of the above circumstances, the petitioners' contention that they have proved an intention on the part of the respondents to frustrate any judgment against them by secreting their assets rests on very flimsy grounds.' (Own emphasis).

[49] This conclusion suggests that the applicant must prove intention to defeat on very firm grounds. McEwan J suggested that a mere fear is not enough. Regard being had to *Knox*, the need to demonstrate intention is predicated on the principle of justice, given the effect of the interdict sought. *Bassani* referred to a real risk. In my view, quintessentially, that implies demonstration of intention. The conclusion I reach is that, an applicant must demonstrate an intention to defeat the action.

[50] This Court does appreciate and do sympathise with SARS or similarly placed applicants that it seems to be an uphill to with certainty show an intention required. It was for that reason that Mr Snyman opted for 'reason to believe', as employed in section 25 (1) of the Prevention of Organised Crimes Act (POCA)[35]. With considerable regret, I do not believe that the statutory test and or requirement must be applied to a common law remedy of an interdict *sui generis*. In his written heads of argument, Mr Snyman suggested that the second requirement of an order of this type is that '*the applicant must show that there are reasonable grounds to suspect that the respondent is getting rid of his assets in order to defeat his creditors*'. (Emphasis added). As correctly submitted by Mr Barnard, the above quoted submission does not truly reflect the second requirement as suggested in *Maweni* and accepted by *Knox, Bricktec* and *Bassani*. The addition of 'reasonable grounds

[35] Prevention of Organised Crimes Act 121 of 1998, as amended.

to suspect', seeks to replace 'intention' as required. Then the question, I must quintessentially turn to is whether the second requirement of an intention to defeat or the likelihood to defeat has been shown or not. This will require this Court to carefully analyse the case as pleaded by SARS in particular.

Did SARS show an intention to defeat the claim or not?

[51] In motion proceedings, a party makes its case in the founding affidavit. It is trite that an affidavit serves two purposes; namely, it is a pleading and it is also serves as evidence. A party is not allowed to make its case in reply. In its founding affidavit, SARS dedicated almost eighty-four paragraphs to demonstrate the assets to be preserved and their movement from one entity to the other over a period of about two to three years. At a particular stage, Bustque had nine trucks registered in its name. In a matter of a year or so, six of those vehicles were transferred to Mohau, Mashakgomo and TR Solutions, in the circumstances where already about 118 transactions resulted in a custom liability. Most importantly, on or about 24 October 2018, SARS commenced probing those transactions, which spurn a period from 2 September 2017 up to and including 5 September 2018.

[52] Around May 2018, at which time, the flagged 118 transactions had been occurring, an amount of about R2.7 million flew out of the account of Bustque. For a period, January 2017 up to and including March 2021, Moloto had about eight vehicles registered in his name. As at the hearing of the current application Moloto had no vehicles registered in his name. About 109 transactions were already conducted by Moloto, which resulted in a custom liability against Him. During the period of 2017 to 2021, Moloto transferred those vehicles to Nulane Investments (Nulane) and Mashakgomo. Moloto made huge payments out of his account and acquired properties for Mohau, Nulane and Moyahabo Family Trust (Moyahabo). In 2019, YEE acquired about six vehicles. Moloto admitted that he used funds of Bustque to acquire vehicles for YEE. However, he later attempted to recant the admission. Shortly after the acquisition of those vehicles, about eight of the vehicles registered in the name of YEE were transferred to Siyagopha Trading 417 (Pty) Ltd

(Siyagopha). For a period February 2018 to September 2019, funds to the value of about R6.8 million were moved out of the YEE bank account.

[53] During 2017, Moloto transferred two immovable properties in Soshanguve to MOM Estate (Pty) Ltd (MOM). In 2018, YEE provided funds to Moyahabo in order to acquire immovable properties from Corallo Resources (Pty) Ltd (Corallo). There is clear evidence that assets moved from Bustque and Moloto to several of the respondents before me. On the evidence before me, all of these funds and property movements happened at the time when Bustque and Moloto had amassed a sizeable amount of liability in custom debt.

[54] Intention is nothing but a state of mind (*mens rea*). SARS alleged in the founding affidavit that all the transfers and movement of funds and assets were made with the sole purpose to evade or delay and frustrate its attempts to recover outstanding debt. Additionally, it alleged that Joshua Moloto had warned it that Moloto received an advice to move assets with the sole intention to frustrate it. SARS alleged that the bulk of the movement that happened during 2018 and 2019, took place after SARS had advised Moloto and Bustque of a possible liability.

[55] In my view, the acts of Moloto and Bustque demonstrates an intention to defeat the claim of SARS. The old rule of evidence is that a man is presumed to intend the natural and probable consequences of his acts[36]. In his answering affidavit, all what Moloto did other than raising a technical defence regarding the applicability of section 163 of the TAA was to be vague and ambiguous. He placed no facts to controvert the acts from which this Court will certainly infer intention on his part. Intention is always determined by objective means[37]. Unless epiphany kicks in, the actor will not readily confess its intention. However, circumstantial evidence more often than not shall reveal an intention. There can be no 'direct' evidence of intention except perhaps if the respondent is prepared to admit to having held the required

[36] See *Giles v California* 128 S. Ct. 2678 (2008).

[37] See *Devenpeck v Alford* 543 U.S 146 (2004)

intention. Otherwise intention is inferred from the circumstances and all other available evidence to determine what it is that the respondent 'must have' been thinking. In this way, the law relies on the 'must have' inference in determining the intention.

[56] Regard being had to the undisputed conduct of Moloto and Bustque, the most plausible inference to be drawn is that the movement of funds and assets happened with one sole intention and that is to defeat the claim of SARS. On a consideration of the undisputed evidence before this Court, I am satisfied that SARS has shown on the preponderance of probabilities that the movement of funds and assets was made with an intention to defeat the claim of SARS. Furthermore, I am convinced that there exists the likelihood that Moloto and Bustque will continue on the same path of dissipation. Unless an order sought by SARS is issued, by the time execution inevitably arrives, given the strong *prima facie* case against Moloto and Bustque, SARS will only then learn that it was indeed trawling with a damaged net or 'fishing behind the net'. The interests of justice demands that SARS should not be saddled with an injustice of being armed with a hollow judgment to the tune of about R200 million, in the circumstances where the granting of this order would protect its legally protectable rights.

Conclusion

[57] The conclusion to reach is that undoubtedly, SARS has a *bona fide* claim against Moloto and Bustque. There is, before this Court, incontrovertible testimony that the assets and funds of Moloto and Bustque moved into the hands of all of the cited respondents like blood streaming into the veins. Out of such movement, the only plausible inference to be drawn is that the intention of Moloto and Bustque was to defeat the on-coming and undisputable claim which arose out of the custom liability. Accordingly, in my view, SARS managed to meet the requirements of the interdict *sui generis*. Axiomatically, the interim order must be confirmed and an appropriate order must, in the circumstances and on the unique facts of this case, be made. *En passant*, I must mention that the evidence tendered by SARS was materially detailed

and well elaborated, and it must have gone through a painstaking process to present its testimony before Court.

Order

[58] For all the above reasons, the following order is made:

1. The provisional anti-dissipation order granted on 21 January 2022, in the terms set out below, is hereby confirmed and to the extent that the provisional order has not yet been given effect to, it must be give effect to, forthwith.

2. The respondents are hereby interdicted and restrained from dealing with, encumbering or disposing of any of their assets, pending the outcome of the action instituted under case number 13584/2022 ("*the action*").

3. Kobus van Niekerk of JI van Niekerk Incorporated, is appointed to act as curator ***bonis*** in whom the rights, title and interest in the moveable, immovable and incorporeal assets of the respondents vest, and without derogating from the generality of these class of assets, the assets under preservation include cash found at any of the respondents' premises and the assets listed in Schedule **A** hereto ("*the respondents' known assets*"), pending the outcome of the action and pending any execution against the assets of the respondents in terms of any court order entitling the applicant to execute against these assets for the tax debts of the first and second respondents.

4. The curator ***bonis*** is authorised to immediately take control of the respondents' assets.

5. No-one, except the curator ***bonis*** may deal with the respondents' assets, subject to the conditions and exceptions contained in this order, save with the prior written consent of the applicant, which consent may not be unreasonably withheld.

6. The powers of the curator ***bonis*** relating to the vested assets be exercised with the objective of preserving the respondents' assets.

7. To ensure that the value of the respondents' assets are maintained, the curator ***bonis*** is authorised to take control of all bank accounts of the respondents in order to manage the flow of funds.

8. The respondents and the present directors, shareholders, members of the close corporations, and trustees of the respondents are ordered to:-

    8.1 immediately deliver to the curator ***bonis*** all financial records and books of account ("*books and records*") in the respondents' possession or under their control, that relate to the affairs of the respondents;

    8.2 inform the curator ***bonis*** as to the whereabouts of books and records that are not in the possession of or under control of the respondents, to the extent that the respondents are aware of the whereabouts of such books and records of the respondents, or how it can be ascertained where they are and to assist the curator ***bonis*** to obtain access thereto, and if possible, possession thereof;

    8.3 to comply with the legislation regulating the director's / shareholder's / member's / trustee's functions and obligations;

    8.4 to comply with the requirements of section 75 of the Companies Act 2008, concerning personal financial interests of the director / member / trustee or related person;

    8.5 to assist, and co-operate with the curator ***bonis*** as may reasonably be required and to provide the curator ***bonis*** with information about the respondents' business and tax affairs as may be reasonably required, including full particulars of all insurance contracts in respect of the assets of the respondents, this information must be furnished to the curator ***bonis*** forthwith;

    8.6 to continue to exercise the functions of directors / members / trustees, subject to the authority of the curator ***bonis*** and to continue to exercise any management function within the respondents in accordance with the express

instructions or directions of the curator ***bonis*** to the extent that it is reasonable to do so and as long as he or she remains to be a director / member / trustee.

9 Any person having books and records or assets of any one or more of the respondents in his/her possession, must, subject to what is provided for below, when this order comes to that person's knowledge, notify the curator ***bonis*** of the fact that such are in his/her possession and hand such to the curator ***bonis*** on demand, or within such time as the curator ***bonis*** may allow and, should that, for any valid reason, not be possible, or should the person have a right to retain possession, then such person must make the documents or assets available to the curator ***bonis*** for inspection and supply the curator ***bonis*** with copies of any document pertaining to any one or more or all of the respondents, on demand by the curator ***bonis***.

10 No person may remove any item from any property owned or premises occupied by the respondents, without the permission of the curator ***bonis***, such permission may not be withheld unreasonably.

11 The curator ***bonis*** is authorised, in order to give effect to this order, to interview the respondents and/or employees of the respondents, who are obliged to furnish the curator ***bonis*** with full particulars of all the respondents' assets and how such assets were acquired, within seven days of service of this order on the respondents.

12 That, to give effect to this order, the curator ***bonis*** is authorised, to interview any person, who may have knowledge of the whereabouts of the assets of the respondents.

13 The curator ***bonis***, will, in his sole discretion, be entitled to replace any guards at any gates or elsewhere on properties with guards under his command, provided that any guard in the employ of the respondents, will be entitled to continue to receive compensation or remuneration and other benefits in accordance with his or her conditions of employment until such is duly terminated in terms of the applicable laws

and only if the curator ***bonis*** is of the opinion that such termination is necessary in the interests of the respondents concerned.

14 The guards will have those powers that the curator ***bonis*** entrust to them, within the bounds of what is reasonable and generally acceptable.

15 The curator ***bonis*** is entitled, on behalf of the respondents concerned, to apply to a competent court for the eviction of any person in occupation of any portion of any premises belonging to the respondents.

16 Pending such eviction, the person so occupying any premises will be entitled to such of the furniture and equipment as are required for functional occupation of any portion of the premises, provided that the curator ***bonis*** may, if required for purposes of disposing of assets of the company, replace such furniture or other moveable items as may be concerned, with other items of less value that fulfil the same function. Any items to be removed that are in use in the household concerned will only be removed with five days prior written notice.

17 Any removal of any item from any premises occupied for domestic purposes will be at a time that takes into account the reasonable requests of the occupant.

18 Within seven days of the granting of this order all motor vehicles belonging to the respondents must be delivered to the curator ***bonis***. Pending such delivery such motor vehicles may be used by the person presently entitled to use such vehicle, provided that before any such use the curator ***bonis*** be satisfied, by presentation to him of such proof as he may reasonably require that the vehicle is properly insured in favour of the respondents and that the vehicle will only be used in terms of the restrictions of such insurance policy. In case of no insurance existing, the curator ***bonis*** may obtain such insurance, after which the said vehicle may be utilised as provided for above.

19 In addition to any other powers set out elsewhere herein, the curator ***bonis*** will be entitled on 24 hours' notice to the occupant in control to access any dwelling belonging to the respondents, occupied by anyone for the purpose of inspection of the premises and the making of an inventory of all movable items and fixtures and fittings. The curator ***bonis*** may take photos and may make a video recording. The curator ***bonis*** will be entitled to request any person to give him information, if any, and to give information in respect of any claim of right to possess any article.

20 The said inspection may only be conducted during normal office hours with due regard to any reasonable request by the occupant and for the dignity and privacy of the occupants.

21 Any occupant whose residence is to be inspected in terms hereof, must be furnished with a copy of this order and his or her attention should be drawn to the relevant provisions hereof.

22 The curator ***bonis*** may not proceed with the disposal of assets in satisfaction of the customs and tax debts of the first and second respondents, unless the applicant is entitled to execution against such assets in accordance with the laws of the Republic of South Africa, which includes an order of court order.

23 In order to give effect to this order, the curator ***bonis*** is authorised to dispose of the respondents' assets, by means of auctions or out of hand sales, in order to secure the collection of taxes and in satisfaction of the tax debt and to pay the net proceeds to the applicant.

24 The auctions and/or out of hand sales referred to above must take place as follows:-

24.1 any auction sale must, at the very least, be advertised in the manner required in the event of a sale in execution, and in the case of movable assets, an advertisement must be published at least five business days prior to the auction.

24.2 Any sale out of hand sale may take place without prior notice, but such sale will only take effect after expiry of four business days after notice of the sale has been given to any respondent who may have an interest in the said asset.

25 An aggrieved party may approach the relevant Court for relief.

26 The curator ***bonis*** must exercise the above powers in the interest of the respondents and with the objective of ensuring that the maximum value of the assets be maintained and/or recovered.

27 The powers of the curator ***bonis*** will continue, subject to the provisions of this order, pending the finalisation of the action and pending any execution in terms of any court order authorising the applicant to execute against the assets forming the subject of this order.

28 The powers of the curator ***bonis*** may be amended or terminated on application by any interested party.

29 The costs of the curator ***bonis,*** occasioned by and incurred in the implementation of this order, be paid by the respondents jointly and severally. That such costs to include:-

29.1 Costs occasioned by the curator ***bonis*** in respect of services rendered by him in the execution and implementation of this order;

29.2 The curator ***bonis'*** fees; and

29.3 Costs occasions by the curator ***bonis*** for monies disbursed by him in order to obtain support and advisory services in his capacity as curator ***bonis***, in the execution and implementation of this order.

30 The curator ***bonis*** will be liable for any damages caused by him as result of acting ***ultra vires*** or unreasonably in executing his duties in terms of this order and the applicant will be responsible to ensure that any damage suffered as a result of the curator ***bonis*** not having put up security for compliance with his duties in terms, will be mitigated.

31 The respondents are ordered to pay the costs of this application jointly and severally, the one paying the other to be absolved, which costs to include the costs occasioned by the appointment of two counsel.

32 If a respondent satisfies the Court that: -

32.1 He/she has made full disclosure under oath of all his/her direct or indirect interest in assets that are subject to the order; and

32.2 He/she cannot meet his/her reasonable living expenses or that of his/her legal dependants out of his/her unrestrained assets;

32.3 Then, the curator ***bonis*** shall release such of the realisable property within his control as may be directed by the Court to meet the reasonable current and prospective living expenses of such respondent and his/her family or household.

33 The applicant is granted leave to, if required, approach this court to vary this order on the same papers and to file whatever additional affidavits that may be required.

GN MOSHOANA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES:

Counsel for the Applicant	: Adv. H.G.A Snyman SC & Adv. C. Haudé
Instructed by	: Macrobert Attorneys
Counsel for the 1st, 7th, 9th, 12th, 14th to 16th Respondents	: Adv. K. Nondwangu
Instructed by	: Vilakazi NLV Attorneys
Counsel for the 8th & 13th Respondents	: Adv. T. Barnard

Instructed by	: VFV Attorneys
Date of the hearing	: 20 to 21 October 2022
Date of judgment	: 02 November 2022