REPORTABLE
IN THE HIGH COURT OF SOUTH AFRICA

(EAST LONDON CIRCUIT LOCAL DIVISION) **CASE NO: EL 886/2008**

ECD 2186/2008

In the matter between:

BRYAN HAYNES **APPLICANT**

and

KIM RHEEDER **FIRST RESPONDENT**

THE REGISTRAR OF DEEDS EASTERN CAPE **SECOND RESPONDENT**

GRAVETT, SCHOEMAN, VAN RENSBURG &

MOODLEY INC **THIRD RESPONDENT**

COASTAL HUBBS CC **FOURTH RESPONDENT**

EAST COAST RETAILERS CC **FIFTH RESPONDENT**

ALJAZZ LIQUORS CC **SIXTH RESPONDENT**

UMGAZANA TRADING CC **SEVENTH RESPONDENT**

COASTAL DIY CC **EIGHTH RESPONDENT**

THE REGISTRAR OF CLOSE CORPORATIONS **NINTH RESPONDENT**

HOMENET RETAIL ESTATE **TENTH RESPONDENT**

MARK WILLIAMS **ELEVENTH RESPONDENT**

CRAIG LINDHORST **TWELFTH RESPONDENT**

PLATINUM MILE INVESTMENTS 207 (PTY)

LTD t/a CROSSWAYS SPAR **THIRTEENTH RESPONDENT**

REASONS FOR JUDGMENT

MAGEZA AJ:

Background

[1] Applicant brought this application on an urgent basis before Pillay J on the 7th November 2008 whereupon a *rule nisi* was granted with a return date of the 25 November 2008.

The terms of the Order are the following:-

> "1. That a *Rule Nisi* do issue calling upon the Respondent to show cause on or before the 25th (day) of November 2008 at 09h30 or so soon thereafter as counsel may be heard why an Order in the following terms should not issue.
>
> 1.1 That the Respondent be and is hereby interdicted and restrained from passing transfer of the following properties:
>
> 1.1.1 the immovable property situate at Coastal Hubbs East London described as 'Remainder of Portion 2 of Farm 742, Division of East London, the Province of the Eastern Cape' and held under deed of transfer T121/2004.

1.1.2 Erf 111 Sunrise-on Sea, East London and held under deed of transfer T513/2008.

pending the finalisation of an action to be instituted for the dissolution of the partnership between the Applicant and the First Respondent.

1.2 That the First Respondent be and is hereby interdicted and restrained from selling or disposing of or dealing in any way with the following assets.

1.2.1 All assets held by Coastal Hubbs CC, East Coast Retailers CC, Aljazz Liquors CC, Umgazana Trading CC and Coastal DIY CC including a Kia light delivery motor vehicle, computer and office furniture previously used in the business trading as Crossways Kwikspar and a Toyota Forklift.

1.2.2 The member’s interest of Coastal Hubbs CC, East Coast Retailers CC, Aljazz Liquors CC, Coastal DIY CC and Umgazana Trading CC,

pending the finalisation of an action to be instituted for the dissolution of the partnership between the Applicant and the First Respondent.

1.3 That the Third Respondent be and is hereby interdicted and restrained from making any payments to anyone whatsoever from the monies held in trust arising out of the sale of the business owned by Coastal Hubbs CC and Aljazz Liquors CC and the property owned by Umgazana Trading CC, save for those payments agreed upon in writing by the Applicant, pending the finalisation of an action to be instituted for the dissolution of the partnership between the Applicant and the First Respondent.

[2] That the action for the dissolution of the partnership between the Applicant and the First Respondent referred to in paragraphs 1.1, 1.2, and 1.3 be instituted by the Applicant within 21 days of the determination of the application, failing which the interdict and *Rule Nisi* will lapse…."

The *Rule Nisi* has since been extended on at least 9 (nine) occasions and the matter stagnated until the 25th of September 2009 when First Respondent filed opposing papers.

It is important to note that at the time of the granting of this *Rule Nisi*, same was unopposed.

The action referred to in the *Rule Nisi* has since been instituted and the parties anticipate that a trial date will be finalised and inevitably the matter will go to trial. Pending the outcome of this action, Applicant asserts that the Order will assist to properly preserve the partnership assets.

Applicant's case

Applicant's case as set out in the papers is that:-

[3] The First Respondent worked as his secretary from the 1990's and, according to the Applicant, due to her administrative and business skills, as well as her competence in sorting out the numerous complexities in his various business affairs, the First Respondent, on his invitation, became involved in his business activities and a partnership was formed between them in November 2001. He avers 'she brought with her administrative expertise whilst I had capital to purchase assets and investments as the partnership progressed' (at paragraph 19 of Applicant's papers). In tandem with the aforegoing, the parties also formed an intimate relationship.

[4] The first property bought by them as a partnership, was an immovable property in Mthatha in the name of Umgazana Trading CC, the Seventh Respondent. They each shared a 50% members interest in it.

[5] Thereafter they bought properties and businesses in the proximity of East London in the name of other Close Corporations which include the Fifth, Sixth and Eighth Respondents. First Respondent does not dispute that Applicant is a 50% interest owner in these Close Corporations.

[6] The Fourth Respondent owns the prized assets – Coastal Hubbs farm property situate just outside of East London, the ownership of which underpins the central dispute between the Applicant and First Respondent who vehemently asserts that she is a 100% owner of the members interest in the Fourth Respondent.

[7] The Third Respondent is a firm of attorneys holding in trust, monies belonging to Fourth Respondent.

[8] The Tenth Respondent is the estate agency employed by the First Respondent to sell the very valuable property owned by the Fourth Respondent.

[9] Applicant's anxiety arose primarily out of the First Respondent's attempts to place the Coastal Hubbs property on the market for a price of R10.6 million without Applicant's approval and agreement. Applicant avers in his papers that First Respondent was attempting to dispose of partnership property without his knowledge and consent.

[10] In the process of the aforegoing and having secured the *rule nisi*, Applicant came upon information which led him to believe that Ixolo Trading CC ("Ixolo") was a tenant of the Fourth Respondent ("Coastal Hubbs"), and he brought an application to join Ixolo and the Twelfth Respondent. Upon learning that Ixolo was no longer a tenant, the Applicant withdrew the application and brought an application to join Craig Lindhorst and Kwikspar (later discovered to be Platinum Mile Investments 207 (Pty) Ltd, trading as Crossways Kwikspar), as the Twelfth and Thirteenth Respondents respectively. This application has since been abandoned but Applicant now seeks an Order that the costs thereof be paid by First Respondent.

Respondent's case

[11] Respondent denies that there exists any partnership, at least, it would appear from a reading of the papers, in so far as the ownership of Fourth Respondent is concerned. She is of the firm belief that she is the sole owner of the assets and that she should thus be unencumbered in the manner in which she deals therewith. She gives a background relating to how negotiations first took place with the previous owner of Crossways Kwikspar, one Christopher Shaw, for the acquisition thereof and how the sale became conditional on the simultaneous purchase of the farm property Coastal Hubbs. She states that a Deed of Sale was signed between herself and Applicant on the one part and Christopher Shaw on the other. Subsequent to this and in the process of raising

the requisite funding, Applicant had to resign as member of the acquiring entity due to an adverse credit record. She also alludes to Applicant's tax related difficulties with the authorities.

[12] Furthermore, First Respondent posits that:-

12.1 to her knowledge, stemming from a bad history with one Mr Deutschmann, a partner who died resulting in interminable difficulties attendant on the dissolution of that partnership, Applicant abhorred partnerships.

12.2 that there is no documentation, minute or correspondence evidencing the existence of a partnership between herself and the Applicant.

12.3 she sets out a background relating to the lead up to the setting up of Coastal Hubbs CC (Fourth Respondent) and the Applicant's resignation as a member of the Fourth Respondent prior to the acquisition of the Coastal Hubbs property and the Kwikspar.

12.4 she admits that Applicant has remained a 50% holder of the members interests in Fifth, Sixth and Eighth Respondents.

The Main Application

[13] The relief sought by the Applicant in its papers is for the preservation of assets pending the finalisation of the action for the dissolution of the alleged partnership which action, it is common cause, has been instituted and is before

this Court. It is not certain when the matter will be heard but safe to say that the parties are desirous of and will ensure that it is attended with urgency.

[14] The fundamental concern of the Applicant in launching the application was precipitated by a belief that the Respondent had not only sold certain assets of the Fifth and Sixth Respondents of which he is an admitted member, but that First Respondent was dealing with the assets of Fourth Respondent in a manner that was detrimental to his rights. The most salient of the First Respondent's acts in this regard was the advertising for sale of the Farm property in Coastal Hubbs CC and the acquisition of Sunrise –on- Sea using in part, the proceeds of the sale of the businesses of Fifth and Sixth Respondents.

[15] Applicant sets out in his papers that he is a partner in Coastal Hubbs CC and that any sale or disposal of, *inter alia*, the said property would cause him irreparable harm in light of his interest therein as alluded to.

[16] On the papers before me, there is much to be said regarding the First Respondent's answer to Applicant's assertion that a partnership exists in Fourth Respondent, whatever its form may be, given the interwoven network of entities to some of which First Respondent concedes Applicant's unchallenged interest.

[17] From a broad assessment of the detail of the papers, there is a great deal to be said about how the First Respondent traversed a life from being a secretary to that of the evidently highly successful businesswoman she is and

the role Applicant played therein. From a perusal of their commercial history, it is not difficult to come to the common sense view that without Applicant, there would not be accumulated over time the assets making up this formidable balance sheet built through the medium of diverse business entities. It is also not yet explained on the papers as to how Applicant could have put in train all this accumulated result if he was not to be, at least, a part owner thereof.

[18] Applicant arranged for the financing of the first property Umgazana CC; invested funds in the acquisition of Coastal Hubbs and Kwikspar; is the admitted 50% owner of 3 (three) Respondent entities. There is no suggestion that First Respondent contributed her own funds in these acquisitions, save for the loan funding associated with Coastal Hubbs. First Respondent, whilst denying that Applicant is a partner, on her own version states the following at paragraph 54.4 of her replying papers

> "I deny that the Applicant and I thereafter purchased properties in any capacity together. On the contrary, Coastal Hubbs CC, with me as the sole member, purchased Portion 2 of Farm 742 in 2003. The Applicant played no role in this purchase whatsoever. On the contrary, Coastal Hubbs CC, with me as sole member ended up as the Purchaser of Portion 2 of Farm 742 in 2003. Although the Applicant could not play a role in obtaining bank financing, by virtue of the indivisible nature of the two transactions namely the purchase of the business and the purchase of the property, certain funds made available by the BACA TRUST (a

> Trust controlled by the Applicant) were applied for the purchase of the property and duly credited in the books of accounting of Coastal Hubbs CC as a credit loan account in favour of BACA TRUST." (my underlining)

It is patent from the aforegoing that First Respondent seeks to play 'fast and loose' with regard to Applicant's role in the acquisition of the Coastal Hubbs property. For purposes of my findings I need do no more than point out that these are precisely the matters a trial Court is better positioned to deal with.

[19] It is also possible in a Close Corporation to hold one's interest through a nominee and the fact that one is not a registered member does not of itself exclude the possibility that some other form of indirect right of ownership exists.

[20] The affidavit filed by Margaret Kuil, the Chartered Accountant casts further doubt on the version deposed to by First Respondent regarding the circumstances pertaining to Applicant's resignation from Coastal Hubbs CC. It is most uncertain how Applicant could give up his interest without, at the very least, selling the same to First Respondent.

All the aforegoing are questions that can best be elicited through oral evidence and cross examination and the view I take of the matter is that I simply need determine whether Applicant had made out a case for Interim Relief pending the action and no more, bearing in mind that an Application for an Interdict may be interim in form but final in nature.

[21] In L F Boshoff Investments (Pty) Ltd v Cape Town Municipality 1969 (2) SA 256 (C) at 267A-F, Corbett J, as he then was, articulated these requirements as follows:

> "Briefly these requisites are that the Applicant for such temporary relief must show-
>
> (a) that the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is prima facie established, though open to some doubt;
>
> (b) that, if the right is only prima facie established, there is a well grounded apprehension of irreparable harm to the Applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;
>
> (c) that the balance of convenience favours the granting of interim relief; and
>
> (d) that the Applicant has no other remedy".

[22] Once an Applicant has shown a *prima facie* right, and an apprehension that such right is threatened, the consideration as to balance of convenience becomes decisive. See: *S A Motor Racing v Peri Urban Areas Health Board* 1955 (1) SA 334 (T).

[23] The Applicant for an interlocutory interdict must show a right which is being infringed or which he apprehends will be infringed. – See Albert v Windsor Hotel (East London) (Pty) Ltd (in liquidation) 1963 (2) SA 237 (E) at 241 C.

[24] In 'The Law and Practice of Interdicts' by Prest at p 50 it is said, "Where the right asserted by the Applicant is, in the terminology of Innes JA (Setlogelo v Setlogelo 1914 AD 221), '*prima facie* established … (though) open to some doubt', the Applicant may be granted an interim interdict if the continuance of the thing against which an interdict is sought would cause irreparable harm". In this regard it becomes necessary for the Court to take account of the balance of convenience. The Court must then consider the nature of the injury to Applicant if the interdict is not granted, as opposed to the injury to Respondent if the interdict is granted.

[25] I am of the view that in this matter Applicant has made out a *prima facie* case and the balance of convenience favours the Applicant and a refusal to confirm this Interdict pending the action will militate detrimentally against Applicant's interests. First Respondent continues to conduct the business of Fourth Respondent and no prejudice is to be suffered by her. Indeed she was happy to have the Interim Order of Pillay J postponed on some 9 (nine) instances without filing opposing papers and having the matter set down for argument.

Contempt of Court

[26] Apart from another Application for joinder of two other Respondents, the Applicant also seeks an order that the First Respondent be held in Contempt of Court, because she (so he argued) in breach of the *rule nisi*, concluded a new lease agreement with Ixolo and the last two Respondents to be joined, in respect of the property at Coastal Hubbs. In addition that she deals with the rental as she pleases and to the detriment of the business.

[27] The Applicant in regard to Contempt of Court, seeks final relief against the First Respondent and, in those circumstances it is clear that the matter must be decided on the facts as stated by the Respondent, together with those facts stated by the Applicant which the Respondent does not deny. – See Plascon-Evans Paints Ltd. V Riebeek Paints (Pty) Ltd 1984 (3) SA (AD) at 634.

[28] The Applicant's application for contempt of Court is based entirely on the Order granted by His Lordship Mr Justice Pillay on the 7th of November 2008, and in particular paragraph 1.2 thereof.

[29] Paragraph 1.2 of the Order reads:

> "1.2 That the First Respondent be and is hereby interdicted and restrained from selling or disposing of or dealing in any way with the following assets:
>
> 1.2.1 all assets held by (Close Corporations itemized), including a Kia light delivery motor vehicle, computer and office furniture . . .

1.2.2 the members interest of Coastal Hubbs CC, etc,"

[30] In the present matter, the words are "*selling of or dealing in any way with*" the following assets. It is important not to lose sight of the fact that the basis of the main Application related to an Interdict against the selling or disposal of partnership property.

[32] According to Principles of Legal Interpretation by E A Kellaway at 148:

> "the rule of construction, concisely stated, is that where "particular words" are followed by "general words", the latter must be construed as *ejusdem generis* with the former, that is to say, the general words should be confined to things of the same kind as those specified."

[33] In *Director of Education (Transvaal) v McCagie* 1918 AD 616 at 623, Innes CJ said:

> "Where general words have a wide meaning their interpretation must be affected by what precedes them; general words following upon and connected with specific words are more restricted in their operation than if they stood alone . . . They are coloured by their context; and their meaning is cut down so as to comprehend only things of the same kind as those designated by the specific words – unless there is something to show that a wider sense was intended."

[34] The contention made by the Applicant that 'selling of or dealing in any way with' includes a curtailment relating to entering into rental agreements, collection of rentals and what I would refer to as the general running of the businesses and so forth is not a construction that can easily be made bearing in mind also that First Respondent is the Managing member. Moreover to rely on such an interpretation to provide a basis for committal for Contempt of Court would be difficult in light of the onus on Applicant to make out a case for such drastic action.

[35] A brief summary of the authorities in this regard can be set out as follows:

In *S v Beyers* 1968 (3) SA 70 (A) Steyn CJ at para 81 E stated:

> "Dat die gesag en aansien van ons Howe doeltreffend beskerm moet word, is onontbeerlik vir regsordelike verkeer en 'n saak van hoë Staatsbelang. Dit is nie sonder rede dat ons skrywers minagting van Hof onder *atroces injuriae* tel nie… Na my mening besit hy wel die bevoegdheid om ook vir siviele minagting te vervolg"

[36] Contempt of court as an offence is fundamental to the administration of justice and the rule of law. It

> "requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained"

Per Sachs J in *Coetzee v Government of the Republic of South Africa; Matiso v Commanding Officer, Port Elizabeth Prison* 1995 (4) SA 631 (CC).

[37] Furthermore,

> "It permits a private litigant who has obtained a court order requiring an opponent to do or not do something *(ad factum praestandum)*, to approach the court again, in the event of non-compliance, for a further order declaring the non-compliant party in contempt of court, and imposing a sanction."

See: *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at page 332 para C-D per Cameron JA (as he then was).

[38] The test for when disobedience of a civil order constitutes Contempt has come to be stated as whether the breach was committed 'deliberately and *mala fide*'. See: *Frankel Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg Co Inc* 1996 (3) SA 355.

[39] In *Fakie NO* (above) the court at p 333 para C-E, went on to state:

> "A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be *bona fide* (though unreasonableness could evidence lack of good faith).

> These requirements- that the refusal to obey should be both willful and *mala fide*, and that unreasonable non-compliance, provided it is *bona fide*, does not constitute contempt – accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute or authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent."

[40] As regards the standard of proof required, the decision of Pickering J in *Uncedo Taxi Service Association v Maninjwa & Others* 1998 (3) SA 417 (ECD) at page 428 para A to the effect:

> "In my view, therefore, insofar as the summary procedure by way of notice of motion places an *onus* upon the offender and requires proof of guilt only upon a balance of probabilities, it is in conflict with the Constitution and such conflict is neither reasonable nor justifiable in terms of s 36. I am in the circumstances satisfied that in motion proceedings the guilt of the offender must be proved beyond reasonable doubt…"

[41] This position has been confirmed by the full bench of this court in *Burchell v Burchell* [2006] JOL 16722 (E). There the court found (a) that 'civil contempt' remains a criminal offence and that a Respondent is an accused person, (b) that whilst the Applicant has to prove the elements of civil contempt beyond reasonable doubt, the application procedure is constitutionally competent to accommodate the altered onus.

In the result Applicant was not able to support the contention that First Respondent knew that the Order covered interdicting her from entering into rental agreements. Indeed such a wide interpretation of the Order is not justified by the wording and the context of all relevant considerations including Applicant's own failure to apply for such rental relief before the Honourable Pillay J.

The Interlocutory re Joinder and costs thereof

[42] Some 9 (nine) months after the Interim Order was granted, Applicant sought to join Ixolo Trading to extend the relief set out in the original Order to include an interdict against First Respondent receiving rentals from the new Lessee. On the papers there is nothing to indicate that any efforts were made to enquire from First Respondent who the actual Lessee was in order to ensure that the correct party was joined.

[3] First Respondent opposed the Application primarily because the wrong party had been joined. Equally importantly however, the relief sought (rental interdict) had been omitted in the main application brought before this Court with which I have dealt above. Applicant on becoming aware that he was seeking the joinder of a wrong party withdrew the application.

[44] He now seeks an order that First Respondent pay the costs of the joinder application.

I am unable to make such a finding in light of the fact that if the rentals were a consideration at the outset, then any Lessee sought to be joined should have been joined at the time. Not only was this not done by Applicant as *dominus litis* but no Order relating to the rent was sought before the Honourable Pillay J.

In the result I made the following Order:

Having heard Advocate Rowan SC for Applicant and Advocate Cole for First Respondent, Court makes the following Order:

1. That the *rule nisi* granted on the 7 November 2008, in terms of which the following interdicts as reflected in paragraphs 1.1, 1.2 and 1.4 hereunder has been extended pending the finalisation of the action instituted under Case No EL 716/09 and ECD 2616/09:

    1.1 That the Respondents are interdicted and restrained from passing transfer of the following properties:

        1.1.1 the immovable property situate at Coastal Hubbs, East London described as ‘Remainder of Portion 2 of Farm 742, Division of East

London, the Province of The Eastern Cape' and held under deed of transfer T121/2004;

1.1.2 Erf 111 Sunrise-on-Sea, East London and held under deed of transfer T513/2008.

1.2 That the First Respondent be interdicted and restrained from selling or disposing of or dealing in any way with the following assets pending the finalisation of the action instituted under Case No: EL 716/09 and also referred to as ECD 2616/09.

1.2.1 All assets held by the Coastal Hubbs CC, East Coast Retailers CC, Aljazz Liquors CC, Umgazana Trading CC and Costal DIY CC including a Kia light delivery motor vehicle, computer and office furniture previously used in the business trading as Crossways Kwikspar and a Toyota Forklift;

1.2.3 The member's interest of Coastal Hubbs CC, East Coast Retailers CC, Aljazz Liquors CC, Coastal DIY CC and Umgazana Trading CC;

1.3 The First Respondent in managing the letting out and the rental of the assets in 1.2.1 and 1.2.2 heretofore, pending the conclusion of the action in Case No EL 716/09 and ECD 2616/09, is ordered to do so only in a manner consonant with the ordinary scope of the business of letting and must to that end, maintain standard books of account;

1.4 That the Third Respondent be and is hereby interdicted and restrained from making any payments to anyone whatsoever from the monies held in trust arising out of the sale of the business owned by Coastal Hubbs CC and Aljazz Liquors CC and the property owned by Umgazana Trading CC, save for those payments agreed upon in writing by the Applicant, pending the finalisation of an action to be instituted for the dissolution of the partnership between the Applicant and the First Respondent;

1.5 That the First Respondent be and is hereby interdicted and restrained from drawing any funds against Mortgage Bonds over the properties mentioned in paragraphs 1.1.1 and 1.1.2 above or from extending any existing bonds or taking any further bonds over the said properties for any

purpose whatsoever, unless agreed to by the Applicant and the First Respondent in writing.

2. That the Contempt of Court Application instituted under the second further Interlocutory Application is dismissed;

3. That the Application relating to an Order to Compel the First Respondent to pay the costs of the interlocutory Application is dismissed;

4. That the costs of the main Application hereunder stand over for decision by the court hearing the action instituted under Case No: EL 716/09 also referred to as ECD 2616/09;

5. That the costs of the First and Second Interlocutory Applications, to wit, the Joinder and Contempt of Court applications be paid by the Applicant.

PT MAGEZA

MATTER HEARD ON	**:**	**23 FEBRUARY 2010**
ORDER MADE ON	**:**	**01 MARCH 2010**
REASONS DELIVERED	**:**	**25 MARCH 2010**
COUNSEL FOR APPLICANT	**:**	**ADV ROWAN SC**
ATTORNEYS FOR APPLICANT	**:**	**COX YEATS ATTORNEYS** **c/o DRAKE FLEMMER &** **ORSMOND INC.** **22 St James Road,** **Southernwood** **East London.**
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