THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 835/2020

In the matter between:

BASSANI MINING (PTY) LTD	**APPELLANT**
And	
SEBOSAT (PTY) LTD	**FIRST RESPONDENT**
MASHALA RESOURCES (PTY) LTD	**SECOND RESPONDENT**
KURT HERMAN	**THIRD RESPONDENT**
ANDREA AVRIL ANDERSON	**FOURTH RESPONDENT**

Neutral Citation: *Bassani Mining (Pty) Ltd v Sebosat (Pty) Ltd & others* (835/2020) [2021] ZASCA 126 (29 September 2021)

Coram: NAVSA ADP, MATHOPO, MOLEMELA, PLASKET and MOTHLE JJA

Heard: 16 August 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the website of the Supreme Court of Appeal and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 29 September 2021.

Summary: Civil procedure – common law remedy – anti-dissipation interdict – whether it was a requirement for an anti-dissipation interdict for an applicant to prove that the dispositions were made with the intention of thwarting an applicant's pending damages claim or whether there were exceptional circumstances where a lesser threshold applied – whether appellant satisfied the requirements of an interim anti-dissipation interdict – foundational requirements of interim interdict not met. Appeal dismissed with costs including costs of two counsel.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Bhoola AJ sitting as court of first instance):

1 The appeal is dismissed.

2 The appellant is ordered to pay the respondents' costs, including the costs of two counsel.

JUDGMENT

Mothle JA (Navsa ADP, Mathopo, Molemela and Plasket JJA concurring):

[1] In 1996, this Court in *Knox D'Arcy Ltd and Others v Jamieson and Others (Knox D'Arcy)*[1] reaffirmed the existence in our law, of a distinctive interdict, which provides a remedy where an applicant has shown on the established basis for an interim interdict: (a) a claim against a respondent; and (b) that the respondent is concealing or dissipating assets with the intent of frustrating the claim.[2] This court, in *Knox D'Arcy*, reluctantly accepted the

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[1] *Knox D'Arcy Ltd and Others v Jameson and Others* 1996 (4) SA 348 (A); [1996] 3 All SA 669 (A).

[2] At 372 D-F and at 373F-H. There is a brief reference at 370 J to a comparable remedy in England, namely a '*Mareva Injunction',* from the English case of *Mareva Compania Naviera SA v International Bulkcarriers* SA [1980] 1 All ER 213, coupled with a warning that using that appellation might suggest that English principles are automatically applicable.

description of this remedy as an 'anti-dissipation interdict'[3]. That description has stuck and it is now in common usage.

[2] Before turning to consider a very specific dictum in *Knox D'Arcy*, on which the appellant in the present appeal relies, it is necessary to have regard to the factual background, which appears hereafter.

[3] On 19 February 2020, the first respondent, Sebosat (Pty) Ltd (Sebosat*),* represented by the third respondent, Mr Kurt Herman *(Herman*)*,* its sole director and shareholder, entered into a written sub-contract agreement with the appellant, Bassani (Pty) Ltd *(*Bassani). The essential terms of the agreement, for present purposes, were that Bassani, as the subcontractor, would mine coal at Wesselton Mine on behalf of Sebosat, as the contractor. Clause 16.5 stipulated that for the first three months, Bassani would only be entitled to payment of its invoices within 48 hours after the coal mined had been sold and Sebosat had received payment from its client, the second respondent, Mashala Resources (Pty) Ltd *(Mashala).* Clause 2.1.11 defines the 'Main Agreement' as an '[a]greement entered into between the Client and Contractor', meaning Mashala and Sebosat respectively. The agreement recorded that Mashala was the holder of the mining rights over the mineral area at the Wesselton Mine. In clause 18 of the subcontract agreement, Sebosat agreed that the coal mined would be used to provide security to Bassani for its obligations, for any amounts due by Sebosat to Bassani for mining operation.

[4] Bassani mined the coal from March 2020 until 31 May 2020. At the end of May 2020, a dispute arose between Bassani and Sebosat. Bassani claimed that Sebosat owed it monies, evidenced by unpaid invoices, while Herman, on behalf of Sebosat, alleged that Bassani had failed to mine the coal as agreed, in that the coal that it mined fell short of agreed tonnage targets. Sebosat, instead of dealing with a contractual breach notice issued by Bassani, terminated the agreement on 1 June 2020. Bassani was adamant that

[3] 372 A-C.

Sebosat's termination of the agreement was without foundation. It asserted that at the time of the termination Sebosat owed it an amount of R14 530 824-90.

[5] Following on the termination there were attempts by the parties to settle the dispute amicably. It appeared, at first, that these attempts might bear fruit, with Bassani of the belief that the parties were on the brink of settling amounts owing and the terms of a handover, including the retrieval of its equipment. Communications then broke down.

[6] During July 2020, according to Bassani, it discovered for the first time, through its attorneys, certain crucial facts, which Herman allegedly failed to disclose at the time the parties concluded the subcontract agreement. These were that: (a) Mashala had been under business rescue since 20 November 2014; (b) the 'Main Agreement', supposedly concluded between Sebosat and Mashala, purporting to be the authority for Sebosat to act as contractor, did not exist; (c) Sebosat was a shelf company with no business address and assets, and was allegedly interposed by Herman for the purposes of the subcontract agreement, to shield Mashala from any liability; (d) Bassani had thus mined the coal for the benefit, not of Sebosat, but of Mashala; and (e) as a consequence, Bassani at all material times never had security for payment of its amounts due in terms of clause 18 of the subcontract agreement.

[7] Consequently, Bassani alleged that Herman had fraudulently misrepresented facts relating to his relationship with Mashala, and also Mashala's relationship with Sebosat. Further, that as a result of the alleged fraudulent misrepresentation, Bassani was induced to conclude the sub-contracting agreement with Sebosat. Bassani further alleged that Herman fraudulently interposed Sebosat as a contractor, in what it described as an unconscionable abuse of juristic personality, with the intent to prevent or shield Mashala from any liability that would arise from the mining operations.

[8] Herman's alleged fraudulent misrepresentation moved Bassani to institute an urgent application for an interdict in the high court, seeking relief *pendente lite*, against Sebosat, Mashala, Herman and his co-director, Andrea

Avril Anderson *(*Anderson), cited as the fourth respondent. Bassani sought an order restraining the respondents from alienating, encumbering or removing directly or indirectly coal, to the value of R25 million from Wesselton Mine, pending an action for damages. There was a further claim for the return of equipment, which is not significant to this appeal as that aspect was settled before the hearing in the high court.

[9] In opposing the relief sought, Sebosat and Herman contended as follows. First, that the contract was terminated because Bassani had failed to meet certain production targets; second, that the coal mined by Bassani had been sold; third, that Bassani had refused to submit the dispute to arbitration, provided for in terms of the agreement; and fourth, that Bassani could not prove that the coal had been sold with the intent to thwart execution on the pending damages claim.

[10] The high court considered that Bassani first, had to meet certain 'threshold' requirements in relation to an interim interdict, which it identified as: (a) a prima facie right, albeit open to some doubt, (b) a well-grounded fear of irreparable harm were an interim interdict to be refused, and (c) the absence of a satisfactory alternative remedy.

[11] The high court took into account that the coal that was mined for Sebosat had already been disposed of by Mashala in the ordinary course of its business and that there is no further coal on the premises that had been mined by Bassani. Essentially, the high court found that Bassani had failed to prove that there was '*a real risk',* that in the intervening period before the damages claim was heard, that the respondent would '*dissipate and/or diminish their assets in order to avoid the efficacy of a court order and to leave it with a hollow judgment, should it succeed.'* The high court stated the following: '…this means that [Bassani] has not met the second threshold requirement for obtaining an anti-dissipation interdict'. Thus, it dismissed Bassani's application. It is with leave of the high court that this matter is before us.

[12] Sensing the problems it faced in establishing the foundational requirements for the grant of the relief sought, Bassani relied on the following passage in *Knox D'Arcy*:

'The question which arises…is whether an applicant need show a particular state of mind on the part of the respondent, ie that he is getting rid of the funds, or is likely to do so, with the intention of defeating the claims of creditors. Having regard to the purpose of this kind of interdict, the answer must be, I consider, yes, except possibly in *exceptional* cases. As I have said the effect of the interdict is to prevent the respondent from freely dealing with its own property to which the applicant lays 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.'[4] (Emphasis added).

[13] The submission on behalf of Bassani was that this was an 'exceptional' case, as envisaged in *Knox D'Arcy*, and that in such instances a lower bar applied and that an interdict might be granted even when there was a bona fide disposition of property. This submission was with reference to what is said, in those terms in *Knox D' Arcy* at 377 A-E. It was also submitted on behalf of Bassani that this lower bar was recognised in *Carsten and Another v Kullmann and Others*.[5] It was contended that this was a case in which the respondents structured their affairs in such a way so as to leave Bassani with a hollow judgment in the event of it being successful in the prosecution of its claim.

[14] There are several problems with Bassani's quest to overturn the order of the high court. First, the conclusion by the high court that there are no longer any identifiable assets belonging to Sebosat against which execution could be levied, is irrefutable. On Bassani's own version of events it is a shell company and it was common cause that the coal Bassani had mined had been disposed of. Bassani has no claim of any kind against any of the mine's assets, especially in the light of the Business Rescue proceedings.

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[4] 372F-H.

[5] *Carsten and Another v Kullmann and Others* (49174/2017) [2018] ZAGPJHC 2 (4 January 2018) at paras 25 and 33.

[15] Second, Bassani had no contractual nexus with Mashala. It had made no representations to Bassani and had no contractual links with it. According to the business rescue practitioners they had given no permission for mining activities during the period in question, contrary to what was asserted by Herman. Mashala could thus, as a corporate entity, have made no representations of any kind while it was under the control of the business rescue practitioners. This must be so, on Bassani's own version, as set out in its replying affidavit.

[16] Third, at para 8 of its founding affidavit, Bassani stated emphatically that the application for the interdict was brought urgently to restrain the respondents from concealing or dissipating assets 'ie coal that was mined by Bassani'. As pointed out above that horse has bolted.

[17] Fourth, the fraud on which Bassani relied, was allegedly perpetrated by Sebosat and Herman. Bassani did not implicate Mashala as a corporate entity, other than stating that Mashala is now reaping the rewards and that in the envisaged damages action it will feature as a defendant. From that factual premise, it appears to involve an enrichment claim. No evidence was placed before the high court, indicating what Mashala's financial position was and which assets, if any, it had or presently has, at its disposal.

[18] Fifth, it is unclear from the papers, following the business rescue process, whether Mashaba continues to conduct mining operations. There are no details about which company now holds a controlling stake in it and there is no clarity concerning its financial state, including whether it has assets and how it is dealing with them. Equally, there is no clarity or details concerning Herman's assets and how he might be dealing with them.

[19] Sixth, the difficulty for Bassani in placing reliance on the aforesaid passage in *Knox D'Arcy* is that there, this Court was speculating about circumstances in which it might possibly be argued that the base requirements for an anti-dissipation interdict might be relaxed. The possible 'exceptional' circumstances were not identified. Moreover, it was not for the purposes of that

case necessary for this Court to have engaged in that exercise. There, the base requirements for the interdict had not been met and it was considered unnecessary to take the discussion on exceptional circumstances any further. The same applies to *Carsten and Another v Kullmann and Others.* I hasten to add that I have great difficulty, in circumstances where the base requirements have not been met, imagining what such 'exceptional' circumstances might be. It must be borne in mind that the application was premised on the dissipation of assets, which in light of the facts set out above, has not been proved. Simply put, the jurisdictional facts for the grant of the remedy sought were conspicuously absent.

[20] Bassani, as demonstrated above, was not out of the starting stalls in establishing the right to an interim interdict. It certainly did not, for all the reasons aforesaid, establish that it was entitled to an anti-dissipation interdict against any of the respondents.

[21] In the result, I make the following order:

1 The appeal is dismissed.

2 The appellant is ordered to pay the respondents' costs, including the costs of two counsel.

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SP MOTHLE

JUDGE OF APPEAL

APPEARANCES:

For the appellant:	A J Eyles SC
Instructed by:	Hogan Lovells, Inc, Johannesburg
	Webbers Attorneys, Bloemfontein
For the respondent:	N Cassim SC
Instructed by:	Hulley & Associates Inc, Johannesburg
	Peyper Attorneys, Bloemfontein.