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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: **1949/2016**

Date heard: **02 - 03 February 2017**

Date delivered: **30 March 2017**

In the matter between:

FREEDOM PROPERTY FUND First Applicant

STEPHEN MARITZ Second Applicant

and

GRAHAM STAVRIDIS First Respondent

NAGENDRA TYRONE GOVENDER Second Respondent

CLIFFORD DANIELL CAWOOD Third Respondent

THE TRUSTEES FOR THE TIME BEING OF THE

NINTH RON JON TRUST (IT: 3050/2008), BEING

JAN FRANCOIS PRETORIUS NO

GRAHAM STAVRIDIS NO

NICO JAN DE VRIES NO Fourth Respondent

THE TRUSTEES FOR THE TIME BEING OF THE

TENTH RON JON TRUST (IT: 3059/2008), BEING

JAN FRANCOIS PRETORIUS NO

GRAHAM STAVRIDIS NO

NICO JAN DE VRIES NO Fifth Respondent

LEUCADIA (PTY) LTD Sixth Respondent

BOND CONNECT PROPERTIES (PTY) LTD Seventh Respondent

STEAMER LANE INVESTMENTS HOLDINGS (PTY) LTD Eighteenth Respondent

EPIC BEACH (PTY) LTD Ninth Respondent

MAKKA PROPERTIES (PTY) LTD Tenth Respondent

COOLUM BEACH (PTY) LTD Eleventh Respondent

NAHOON REEF INVESTMENTS (PTY) LTD Twelfth Respondent

MARVEL GATE PROPERTIES (PTY) LTD Thirteenth Respondent

STORM RIDERS (PTY) LTD Fourteenth Respondent

THE TRUSTEES FOR THE TIME BEING OF THE

NYAMEZELA TRUST, BEING

CLIFFORD DANIEL CAWOOD NO

JOHANNES JACOBUS GRIESEL NO Fifteenth Respondent

HATCHET BAY (PTY) LTD Sixteenth Respondent

SUNSET PISCES (PTY) LTD Seventeenth Respondent

PRODIGY ASSET MANAGEMENT (PTY) LTD	Eighteen Respondent
NEDBANK LTD	Nineteenth Respondent
INVESTEC SECURITIES LTD	Twentieth Respondent
DANIEL TERBLANCHE NO	Twenty First Respondent
MICHAEL TIMKOE NO	Twenty Second Respondent

JUDGMENT

LOWE, J

Introduction:

[1] In this matter and by way of a Notice of Motion, dated 21 April 2016, which has not been stamped by the Registrar, Applicants brought what they referred to as an application on *"… an ex parte, in camera, and urgent basis"*.

[2] Paragraph 1 of the Notice of Motion sought an order permitting the application to be brought in the manner referred to above, seeking condonation of Applicants' failure to comply with the form and service of process. Obviously the matter being launched in the manner in which it was, there was no service this being truly *ex parte*.

[3] The Notice of Motion itself sought relief against no fewer than twenty two Respondents in the form of a *rule nisi* interdicting all of the Respondents in particular respects, save Eighteenth to Twenty Second Respondents who were joined purportedly as they had an interest in the relief sought.

[4] Having regard to what follows it is necessary to set out the Notice of Motion in full below:

"1 Permitting the Applicants to bring this application *ex parte* and as one of urgency, and condoning the applicants' failure to comply with the rules of this Honourable Court in regard to forms and service of process.

2 That a *rule nisi* do issue calling upon the Respondents to show cause, if any, on **9th of June 2016** at **10h00** or so soon thereafter as counsel may be heard, why (save with the leave of the Applicants and failing such leave, the leave of this Honourable Court), pending the outcome of the action referred to in paragraph 4 the following orders should not be granted:

2.1 Interdicting and restraining the First to Third Respondents [**Stavridis, Govender and Cawood**] from selling or in any way disposing of or encumbering any shares in or claims against the First Applicant or any of the Respondents.

2.2 Interdicting and restraining the Fourth and Fifth Respondents [**Nineth Ron Jon Trust and Tenth Ron Jon Trust**] from disposing of any of their shares in or claims against any of the Respondents.

2.3 Interdicting and restraining the Eighth to Fifteenth Respondents [**Steamer Lane; Epic Beach; Makka; Coolum Beach; Nahoon Reef; Marvel Gate; Storm Riders and Nyamezela Trust**] from selling or in any way disposing of or encumbering any of their shares in or claims against the First Applicant or any of the Respondents.

2.4 Interdicting and restraining the Sixth Respondent [**Leucadia**] from selling, alienating or encumbering Erf [...], Stellenbosch, Western Cape Province, held in terms of deed of title [T...], also known as [...] K. S. P..

2.5 Interdicting and restraining the Seventh Respondent **[Bond Connect]** from selling, alienating or encumbering Erf [...] Vredendal, Western Cape Province, held in terms of deed of title [T...], also known as "L.".

2.6 Interdicting and restraining the Sixteenth Respondent [**Hatchet Bay**] from selling, alienating or encumbering Erf [...], Port Alfred, held in terms of deed of title [T...].

2.7 Interdicting and restraining the Seventeenth Respondent [**Sunset Pisces**] from selling, alienating or encumbering Units No's […] and […] in the Wesley Heights Sectional Title Scheme, Port Alfred, held in terms of deed of title [S...], also known as [...] W. H.

2.8 Interdicting and restraining the Second Respondent **[Govender]** from selling, alienating or encumbering the following properties:

2.8.1 Erf [...] B., Gauteng Province, held in terms of deed of title [T...];

2.8.2 Erf [...] B., Gauteng Province, held in terms of deed of title [T...].

2.9 Interdicting and restraining the Third Respondent [**Cawood**] from selling, alienating or encumbering any share in the following properties:

2.9.1 50% share in Erf [...], Port Alfred, Eastern Cape, held in terms of deed of title [T...];

2.9.2 50% share in Erf […], Boesmansriviermond, Alexandria, Eastern Cape, held in terms of deeds of title [T...] and [T...].

2.10 Directing that nothing in paragraphs 2.4 and 2.8 shall have the effect of prejudicing the rights of the Nineteenth Respondent [**Nedbank**] as a secured creditor of the Second Respondent [**Govender**] and as a secured creditor of the Sixth Respondent [**Leucadia**].

2.11 Directing the First to Third Respondents, and any other Respondent(s) or party who opposes this application, to pay the costs of this application, jointly and severally.

3 Directing that the provisions of paragraphs 2.1 to 2.9 herein above shall operate as immediate orders and interdicts, pending the return day of the above *rule nisi*.

4 Directing the Applicants to institute an action against the First to Third Respondents for breaches of fiduciary duty, misrepresentation, fraud remedies in terms of sections 27(9), 22 and 79 of the Companies Act, No. 71 of 2008, related relief, within 45 (forty five) Court days from the confirmation of the above *rule nisi*, failing which the orders sought in paragraph 2 above, will lapse.

5 Directing the Sheriff(s) to act on a facsimile or email copy of this order."

[5] The application served before Jacobs AJ in chambers, an order issuing in terms of which the Applicants were permitted to bring the application *ex parte* and as one of urgency condoning the failure to comply with the forms and service, the order being silent as to the *in camera* aspect, but clearly the matter being held *in camera* in chambers.

[6] Again having regard to what follows it is necessary to set out the order granted in full below:

"**It is ordered that:**

1 the Applicants are permitted to bring this application ex parte and as one of urgency, and the applicants' failure to comply with the rules of this Honourable Court in regard to forms and service of process is condoned.

2 a rule *nisi* do issue calling upon the Respondents to show cause, if any, on **9th of June 2016** at **10h00** or so soon thereafter as counsel may be heard, why (save with the leave of the Applicants and failing such leave, the leave of this Honourable Court), pending the outcome of the action referred to in paragraph 4 the following orders should not be granted:

2.1 Interdicting and restraining the First to Third Respondents [**Stavridis, Govender and Cawood**] from selling or in any way disposing of or encumbering any shares in or claims against the First Applicant or any of the Respondents.

2.2 Interdicting and restraining the Fourth and Fifth Respondents [**Nineth Ron Jon Trust and Tenth Ron Jon Trust**] from disposing of any of their shares in or claims against any of the Respondents

2.3 Interdicting and restraining the Eighth to Fifteenth Respondents [**Steamer Lane; Epic Beach; Makka; Coolum Beach; Nahoon Reef; Marvel Gate; Storm Riders and Nyamezela Trust**] from selling or in any way disposing of or encumbering any of their shares in or claims against the First Applicant or any of the Respondents.

2.4 Interdicting and restraining the Sixth Respondent [**Leucadia**] from selling, alienating or encumbering Erf [...], Stellenbosch, Western Cape Province, held in terms of deed of title [T...], also known as [...] K. S. P..

2.5 Interdicting and restraining the Seventh Respondent **[Bond Connect]** from selling, alienating or encumbering Erf [...] Vredendal, Western Cape Province, held in terms of deed of title [T...], also known as “L.”.

2.6 Interdicting and restraining the Sixteenth Respondent [**Hatchet Bay**] from selling, alienating or encumbering Erf [...], Port Alfred, held in terms of deed of title [T...].

2.7 Interdicting and restraining the Seventeenth Respondent [**Sunset Pisces**] from selling, alienating or encumbering Units No’s […] and […] in the Wesley Heights Sectional Title Scheme, Port Alfred, held in terms of deed of title [S...], also known as [...] W. H.

2.8 Interdicting and restraining the Second Respondent **[Govender]** from selling, alienating or encumbering the following properties:

2.8.1 Erf [...] B., Gauteng Province, held in terms of deed of title [T...];

2.8.2 Erf [...] B., Gauteng Province, held in terms of deed of title [T...].

2.9 Interdicting and restraining the Third Respondent [**Cawood**] from selling, alienating or encumbering any share in the following properties:

2.9.1 50% share in Erf [...], Port Alfred, Eastern Cape, held in terms of deed of title [T...];

2.9.2 50% share in Erf 32, Boesmansriviermond, Alexandria, Eastern Cape, held in terms of deeds of title [T...] and [T...].

2.10 Nothing in paragraphs 2.4 and 2.8 shall have the effect of prejudicing the rights of the Nineteenth Respondent [**Nedbank**] as a secured creditor of the Second Respondent [**Govender**] and as a secured creditor of the Sixth Respondent [**Leucadia**].

2.11 The First to Third Respondents, and any other Respondent(s) or party who opposes this application, to pay the costs of this application, jointly and severally.

3 The provisions of paragraphs 2.1 to 2.9 hereinabove shall operate as immediate orders and interdicts, pending the return day of the above rule *nisi*.

4 The Applicants institute an action against the First to Third Respondents for breaches of fiduciary duty, misrepresentation, fraud remedies in terms of sections 27(9), 22 and 79 of the Companies Act, No. 71 of 2008, related relief, within 45 (forty five) Court days from the confirmation of the above rule *nisi*, failing which the orders sought in paragraph 2 above, will lapse.

5 The Sheriff(s) act on a facsimile or email copy of this order."

[7] It will be noted that the relief sought mirrors the Notice of Motion substantially and directs, as was sought, an order directing Applicants to institute an action against First and Third Respondents within 45 court days from confirmation of the *rule nisi*. It is also worth pointing out and emphasizing that the provisions of the Order which were substantial were ordered to operate as" immediate orders and interdicts", pending the return day – being immediately thus effective, *ex parte* and *in camera*.

[8] It is also necessary to mention that the founding papers, affidavits and annexures were some 952 pages in extent.

[9] The order was granted on 22 April 2016 the same day as the issue of the Notice of Motion, and was supported by a so-called Certificate of Urgency drafted by the attorney representing Applicants which certified that the matter was urgent in six paragraphs spanning a mere 1 ½ pages. The Certificate of Urgency is to say the least brief, desperately short on detail, and as far from

what was required as can be stated. It set out simply that the individual Respondents concerned and entities which they are alleged to control were aware of the fact that Applicants intended instituting action against the Respondents in the application and had embarked upon a process of attempting to divest themselves of assets, or hiding assets with the ultimate purpose of thwarting any claim which the Applicants may have.

[10] There was one three line paragraph which said that it had become evident that assets in the form of shares in First Applicant and fixed properties had been disposed of to thwart the claims of Applicants. Nothing else was said as to the factual basis for this belief, it being further alleged that the application was being launched without notice as the Applicants would show that there was a reasonable inference that the Respondents were in the process of disposing assets to frustrate Applicants' claims and were notice to be given this would result in a considerable delay in the finalization of the application – a remarkable assertion – and secondly that were there to be no interim order, Respondents would be *"highly incentivized to continue to make arrangements to dispose of or otherwise secrete assets"*. It was said that no notice was justified as if a notice was given, same may prove nugatory.

[11] The above only has to be stated for it to be realized that the certificate itself is devastatingly inadequate in the context of this Court's Rules of Practice. Rule 12 provides that in all applications brought other than in the ordinary course in terms of the Rules of Court the practitioner who appears for the applicant must sign a Certificate of Urgency which is to be filed of record before the papers are placed before the judge and in which the reasons for urgency are *"fully set out"*. It is required that the certificate of urgency itself shall set out the grounds for urgency with sufficient particularity that the question of urgency could be determined solely therefrom without perusing the application papers. The Judge concerned is enjoined to make a determination solely from that certificate as to whether or not the matter is sufficiently urgent to be heard at any time other than the normal motion court hours.

[12] It need hardly be said that this Certificate of Urgency fails to comply with the rule entirely, even if the words *"the legal practitioner who appears for the applicant"* include the attorney who signed the certificate but who did not move the application, but entirely failing to sufficiently set out the reasons for

urgency such as to in any way enable the judge receiving same to determine this solely therefrom without perusing the application papers.

[13] It would seem that the learned judge may well not have had the above drawn to her attention, and thus proceeded.

[14] In any event, the order issued *ex parte* as referred to above, the proceedings being held in camera and treated in the registrar's office as such.

[15] It is as well to jump forward at this stage for a moment. After the filing of numerous affidavits and some 1725 pages of papers and on the return day and during argument, I was presented with a suggested draft order by Applicants' counsel reproduced below:

"**It is ordered that:**

1. Pending the outcome of the action instituted by the First Applicant in this Division under case number 3396/2016, the following orders in favour of the First Applicant are made:

   1.1 The Second Respondent is interdicted and restrained from selling, alienating or encumbering Erf [...] B., Gauteng Province, held in terms of Deed of Title [T...];

   1.2 The Sixth Respondent is interdicted and restrained from selling, alienating or encumbering Erf [...], Stellenbosch, Western Cape Province, held in terms of Deed of Title [T...], also known as [...] K. S., Stellenbosch;

   1.3 The Seventh Respondent is interdicted and restrained from selling, alienating or encumbering Erf [...] Vredendal, Western Cape Province, held in terms of Deed of Title [T...];

   1.4 The Fifth Respondent is interdicted and restrained from disposing of any of its shares in or claims against the Seventh Respondent.

2. The order in terms of paragraph 1.1 above shall not have the effect of prejudicing the rights of the Nineteenth Respondent as a secured creditor of the Second Respondent.

3. The First, Second, Sixth and Seventh Respondents shall pay the First Applicant's costs of this application, jointly and severally, including the costs of two counsel."

[16] It will immediately be noted that this is a pale reflection of the original Notice of Motion and the *rule nisi*. Firstly, it is made clear that Second Applicant no longer sought any relief, the limited relief now sought being only at the instance and in favour of First Applicant. Further it was now only Second Respondent, Fifth Respondent, Sixth Respondent and Seventh Respondent, against whom relief was sought. Put otherwise, First, Third, Fourth and Eight to Seventeenth Respondents were no longer in issue relevant to the relief sought, as had previously been the case. Further, the ambit of the relief sought was now substantially limited, the relief being only that sought in the original notice in paragraph 2.2 in a single limited respect, and paragraphs 2.4, 2.5, and 2.8.1. The remaining relief sought in the balance of the Notice of Motion and order simply fell away. I will deal in due course with the fact that at a certain stage it became possible for Second Respondent to dispose of his shares in First Applicant which he did, as also to sell Erf [...] B. which he did, and which obviously then made the relief claimed in that particular regard no longer relevant, even assuming it had been correctly sought and granted in the first place, which is an entirely different question. Again put otherwise there was a dramatic limitation of the relief sought on the return day which of itself raises questions as to the basis for and ambit of the initial order sought and granted.

[17] In due course, and much of the papers having been filed, the matter came before Beshe J, who postponed the matter to enable further papers to be filed, found there to be no reason for the *rule nisi* to operate as an immediate order pending the return day of the *rule nisi*, and revoked paragraph 3 of the order accordingly. The matter thus came before me simply in the form of a *rule nisi* and on the issue as to whether or not it should be confirmed or set aside. It was when the provisions of paragraph 3 were struck from the original order that Second Respondent made the sales referred to above, this in perfectly legitimate circumstances.

The Initial Application: Forms and Process

[18] In terms of Rule 6 of the Uniform Rules of Court, an urgent application can be brought either on notice or *ex parte*. Of course, *ex parte* applications may in terms of Rule (4) (a) be brought where the nature of the relief sought is such that the giving of notice may defeat the purpose of the application, for example an *Anton Pillar* – type order. See *Universal City Studios Inc. v Network Video (Pty) Limited (Pty) LTD* 1986 (2) SA 983 (O) at 985A – B.

[19] Good faith is a *sine qua non* in ex parte applications. *Schlesinger v Schlesinger* 1979 (4) SA 342(W) at 349; *Thint (Pty) Ltd v National Director of Public Prosecutions* 2009 (1) SA 1 (CC) at 115A-E; *Berrange NO v Hassen* 2009 (2) SA 339 (N) at 354A-G confirmed on appeal 2012 (6) SA 329 (SCA) at 335 G-H.

[20] If any material facts are not disclosed, in an *ex parte* application, whether wilfully suppressed or negligently omitted, the court may on that ground alone dismiss an *ex parte* application. *Schlesinger* (*supra*) at 349; *Cometal - Mometal Sarl v Corlana Enterprises (Pty) Ltd* 1981 (2)SA 412 (W) at 414 E. Put otherwise, the non—disclosure or suppression of facts need not be wilful or *mala fide* to incur this penalty. In *Trackman v Livshitz* 1995 SA (1) SA 282 (A) at 288 E-F, it was stressed at 288F-G that this principle however does not extend to Motion proceedings when non-disclosure, *mala fide* or dishonesty, and the like, can be dealt with by making an adverse punitive order as to costs but cannot serve to deny a litigant substantive relief to which that litigant would otherwise have been entitled. I know of no authority, and none was referred to which serves to suggest otherwise in application matters.

[21] Referring to the fact that this matter was brought *in camera*, I refer to Section 32 of the Superior Courts Act, 10 of 2013 which provides that:

> "Save as is otherwise provided for in this Act or any other law, proceedings in any Superior Court must, except insofar as any such court may in special cases otherwise direct, be carried on in open court."

[22] The principle that matters are heard in open court has a long history commencing in the Cape in 1813. The basis hereof is that a Court of law serves the public weal and must imprint upon the public the confidence that equal justice is administered to all in the most certain, speedy and least burdensome manner. *Financial Mail (Pty) Ltd v Registrar of Insurance* 1966

(2) SA219 (W) at 220 E-G. Over and above this the Constitution requires that disputes be resolved "in a fair public hearing before court". In *South African Broadcasting Corp. Limited v National Director of Public Prosecutions* 2007 (1) SA 523 (CC) at 538 C-D it was held that this is "… likely to limit high-handed behaviour by judicial offices and to prevent railroad justice and, further, that open justice is an important part of the right entrenched in S 34 and that it serves as a great bulwark against abuse."

[23] The Courts of course have a discretion to be exercised in special cases. This depends purely on the circumstances of each individual case. There are examples in the authorities of what might be considered a special case, for example *Anton Pillar* matters in certain circumstances – but all depends in essence on the proper administration of justice.

[24] It follows, from what I have set out above, that the proper urgency procedure was in no way complied with in this matter, nor should it have been heard *in camera* as I can find nothing in the lengthy papers which justifies this or indicates that for the matter to be called in open court would have been inappropriate or such as to cause prejudice of any sort. Indeed on the contrary it was inappropriate for it to be treated *in camera*, and this is certainly not a *"special case"*. As appears hereafter, the issues are rather what the consequence hereof should be. I have already set out that even if I conclude that the *ex parte* application was deficient in disclosure, this would not serve, on its own, necessarily to justify the dismissal of the application.

[25] The question of urgency, quite apart from the deficient notice, requires some comment. The founding affidavit, paragraphs 79 to 86, purports to set out the basis upon which the matter was indeed urgent. This is in summary as follows: Applicants intend instituting action against *"the Respondents in this application"* arising allegedly from breaches of their fiduciary duty as directors or prescribed officers of First Applicant. It was alleged that actions would lie against the trusts which acquired assets in the knowledge that they were tainted goods; that those involved were and had embarked on a process of attempting to divest himself of assets or hide assets to thwart the claim; that there had been discussions with First Respondent, Second Respondent and one Erasmus (not a Respondent) with a view to securing agreement to restore assets or compensate Applicants for losses incurred due to the conduct claimed; these discussions commenced in February 2016 and a

settlement reached with Erasmus; First Respondent was said to be amenable to reach an acceptable solution but Applicants contended that the prospect of this was becoming *"increasingly remote"*.; that it had recently become evident that shares in First Applicant and fixed properties had been disposed of during the discussions in respect of which one example was given that First Respondent had during the period 21 January 2016 until 26 February 2016 disposed of 1 million of First Applicant's shares. In this litany there is only one reference to the reason for the, disposal, being that the ultimate purpose thereof was to thwart Applicants' claims in due course. What is said must be seen, of course, in the light of the remainder of the Founding Affidavit and the allegation in paragraph 38 thereof that the deponent had been "advised" "that where a person is believed to be deliberately disposing of or concealing his assets to ensure that he will be devoid of property by the time judgment is obtained against him, a court may grant an… an anti-dissipation interdict."

[26] In fact the main thrust of the Founding Affidavit set out the central purpose of the relief sought being to prevent the Respondents from disposing of the assets referred to, as it was said it would be shown Respondents' *prima facie* had no *bona fide* defence to Applicants' claims and had the intention to defeat same by rendering them hollow and secreting their assets or disposing of same.

[27] It is also worth setting out that it was alleged that some of the interdictory relief sought was on the basis of a vindicatory or quasi-vindicatory claim – specifically the shares in First Respondent which had been misappropriated by fraud – not limiting the claim to one based on an anti-dissipation interdict.

[28] If in fact the allegations made had foundation, there could be little doubt that the matter assumed a degree of urgency in respect of the shares of First Respondent in the event that they were to be disposed of in a manner to impoverish the sellers' estate of the proceeds thereof. This was of course not easy to demonstrate, nor was it easy to demonstrate that the movable property would be disposed of on such an urgent basis that there would be no notice thereof well prior to registration of transfer. It is difficult to accept that in the absence of established sales, the matter could be as urgent as was set out, but on the other hand of course it may be that Applicants would have great difficulty in establishing an actual sale pursuing an intention to dispose. In those circumstances, it seems to me notwithstanding the deficient

certificate of urgency, and what was in my view a matter that should not have been brought *ex parte*, and certainly not *in camera*, that as the matter has reached an advanced stage with the full exchange of papers it would be unfortunate to dismiss the matter on this technical basis – and further as any displeasure that is warranted can be dealt with by way of costs. Nevertheless, to add to the above is the fact that the relief was originally sought on a very wide basis against the First to Seventeenth Respondents as summarized above and in respect of the sale of shares in First Applicant in some instances, and in others preventing various of the Respondents as named from disposing of immovable property. The relief which is now sought (although accepting that Second Respondent disposed of his shares in First Applicant and one property (Erf [...] B.) once the immediate operation of the *rule nisi* had been set aside, and as already set out no relief at all is sought against First Respondent; Sixth Respondent is sought to be interdicted from selling Erf [...] Stellenbosch; Seventh Respondent is sought to be interdicted from selling Erf [...] Vredendal; and Fifth Respondent in respect of disposing of any of its shares in and claims against the Seventh Respondent. This constitutes much limited relief from that originally envisaged, there being no relief sought against Third Respondent, and the same relief as was originally sought against Sixth and Seventh Respondents in a limited form. This of itself, though not necessarily conclusive, indicates that the original relief sought was far more extensive and wider than that which could eventually be achieved.

[29] This adds grist to the mill in respect of the proper approach to this matter. The basis for it being suggested that the relief was abandoned against First Respondent was simply, so it was said, that it had not been possible to establish what his assets were.

[30] It was strongly argued before me by Mr Suttner SC that the granting of the *rule nisi* amounts to a subversion of justice and an abuse of the Court. He argued further that Beshe J had been correct in finding that the Applicants had not made out a case, as he put it, though not suggesting I was bound by this finding. He argued that the application was intentionally vexatious alternatively had the effect of being vexatious and that Respondents were entitled to a punitive costs order.

[31] Mr Louw SC for Second Respondent argued amongst other things that Applicants had failed to prove the requisite alienation of his assets, and

secondly had not shown that he had in any event alienated any assets to thwart First Respondent's claims.

[32] It must also be remembered in this entire context that it was fanciful to suggest that Second Applicant had any *locus standi* in the matter, which is clearly not the case, this being recognized in the remaining order that is sought, relief being entirely restricted to that in favour of First Applicant.

[33] A further aspect is that during the exchange of papers it became apparent, a considerable time before argument before me, that only the Second, Fifth, Sixth and Seventh Respondents remained in the relief sought, the remaining, effectively twelve Respondents no longer being joined in the relief sought, excluding Respondents Eighteen to Twenty Second joined as they had an interest. It is indeed difficult to understand why once it became apparent that only a limited amount of Respondents remained, the relief against the others was not simply abandoned and this communicated to all. It must of course be mentioned that costs were eventually sought against First, Second, Sixth and Seventh Respondents, this previously having been a claim for costs against First to Third Respondents as also any party who opposed the application, jointly and severally. This must be more especially so having regard to the fact that once the Particulars of Claim were issued there were claims only against certain of Respondents (First, Second, Sixth and Seventh Respondents). The basis upon which costs are now sought against First Respondent, although no relief is sought against him, is essentially that he was the purported mastermind behind the purported fraud perpetrated against First Applicant.

[34] Much can be said in support of Mr Suttner SC's argument relevant to abuse of the process, as appears from the above, and I am only persuaded to entertain the merits of the matter inasmuch as these are Motion proceedings, and all the above issues can be dealt with by way of an appropriate costs order to demonstrate this court's displeasure as to the manner in which the Applicants' case was launched and thereafter proceeded. I bear in mind, that the principal complaint, being one relevant to an abuse of the process particularly in respect of an *ex parte* application, is unlikely to be such as to justify the dismissal of the application simply on that basis as set out above on the

authorities, in the event that it is demonstrated that applicants have justified any relief at all.

[35] Relevant to this inquiry is of course whether the basis of the relief sought was misconceived in the first instance.

[36] Having regard to the conclusion that I eventually reach in this matter, I prefer to deal with the issues on the merits, and express my dissatisfaction and reservations as to the process in the costs order.

Legal Issues:

[37] I will first set out the legal issues as I see them as they may be relevant in the shortest possible form, and thereafter I will deal with each of the Respondents as against whom relief is sought.

[38] Firstly it must be remembered, that the relief in this matter remains interim, notwithstanding argument to the contrary, and I am satisfied on all the authorities that the proper approach is that usually adopted to the establishment of interim relief. I must deal with this matter; it seems to me simply as to whether the interim interdict sought pending the institution of an action ought to be granted on the usual test.

[39] I stress that such relief as is referred to in this matter, although appearing in instances to have final effect, is most certainly to be dealt with as an interim interdict.

[40] Secondly I am acutely aware of the carefully structured argument of Mr Louw SC relevant to the test to be applied in anti-dissipation interdicts, and having considered same, find there to be no merit therein, if in any event it is necessary to find thereon at all. I do not consider that the establishment of the requisites of an anti-dissipation interdict, in interim interdictory relief, are any different from any other interim relief. Indeed, I could find nothing in the authorities referred to by Mr Louw SC which in fact found this to be the case or which, in my view, supported his careful argument.

[41] It is without question that it is now fully recognized and determined in our law that an interdict to preserve property in the interests of a creditor pending an action to be brought to determine the respective rights of the parties is competent. This interdict is aimed at restraining the dissipation or concealing of assets pending the outcome of an action. *Knox D'Arcy Ltd v Jamieson* 1994 (3) SA 700 (W) (*Knox D'Arcy 1*), and on appeal: 1996 (4) SA348 (A) at 372 A-C (*Knox D'Arcy 2*). It is also recognized, that an interdict of this nature has what has been described as a devastating effect on the affairs of a Respondent and has huge potential for abuse. *Knox D'Arcy 2* at 379E-380 D.

[42] In *Erasmus Superior Court Practice* 2nd edition at D6 – 10 the following appears: "It is, accordingly, considered that the courts should exercise care and circumspection in granting such interdicts, i.e. the balance of convenience should be carefully weighed. The Appellate Division has held that this type of interdict is sui generis. The question of the availability of an alternative remedy does not arise – the interdict is either available or it is not. An applicant must, except possibly in exceptional cases, show a particular state of mind on the part of the respondent, viz that he is getting rid of his funds (or that he is wasting or secreting assets), was likely to do so, with the intention of defeating the claims of his creditors. The Appellate Division has left open the question whether, in principle and on authority, such an interdict should be granted in cases where the respondent is in good faith disposing of his assets, or threatening to do so, and has no intent to render the applicants' claim nugatory. The court did, however, mark that there would not normally be any justification to compel a respondent to regulate is bona fide expenditure so as to retain funds in his patrimony for the payment of the claims against him."

[43] It must be remembered, that this action is to secure property to which the Applicants can lay no claim.

[44] In *Carmel Trading v Commissioner, South African Revenue Service* 2008 (2) SA 433 SCA at [3] the court held that "To obtain the order the applicant has to satisfy the court that the respondent is wasting or secreting assets with the intention of defeating the claims of creditors. Importantly, the order does not create a preference for the applicant to the property interdicted."

[45] In *Knox D'Arcy (2)*, the court in summing up the position at 372D - 373H held as follows:

“As to the nature of the interdict, this was dealt with by Stegmann J in 1994 (3) SA at 706B-707B and in 1995 (2) SA at 591A-600F. The latter passage was largely devoted to showing that it is not necessary for an applicant to show that the respondent has no *bona fide* defence to the action. This conclusion was not attacked before us and I agree with it.

What then must an applicant show in this regard? In the passages mentioned above, Stegmann J quoted the relevant cases in our law and I do not propose dealing with all of them. For the most part they were decided on their own facts without providing any theoretical justification for the interdict. However, in *Mcitiki and Another v Maweni* 1913 CPD 684 at 687 Hopley J stated the effect of earlier cases as follows:
'. . . (T)hey all proceed upon the wish of the Court that the plaintiff should not have an injustice done to him by reason of leaving his debtor possessed of funds sufficient to satisfy the claim, when circumstances show that such debtor is wasting or getting rid of such funds to defeat his creditors, or is likely to do so.'

See also *Bricktec (Pty) Ltd v Pantland* 1977 (2) SA 489 (T) at 493E-G.

The question which arises from this approach is whether an applicant need show a particular state of mind on the part of the respondent, ie that he is getting rid of the funds, or is likely to do so, with the intention of defeating the claims of creditors. Having regard to the purpose of this type of interdict, the answer must be, I consider, yes, except possibly in exceptional cases. As I have said, the effect of the interdict is to prevent the respondent from freely dealing with his own property to which the applicant lays no claim. Justice may require this restriction in cases where the respondent is shown to be acting *mala fide* with the intent of preventing execution in respect of the applicant's claim. However, there would not normally be any justification to compel a respondent to regulate his *bona fide* expenditure so as to retain funds in his patrimony for the payment of claims (particularly disputed ones) against him. I am not, of course, at the moment dealing with special situations which I might arise, for instance, by contract or under the law of insolvency.

In the judgment *a quo* Stegmann J dealt with this topic as a part of the enquiry whether the petitioners' claims for damages 'will not be a satisfactory remedy in the absence of the interlocutory interdict *in securitatem debiti*' (1995 (2) SA at 637E-638C). In my view this is not a correct way of looking at the matter. It is often said that an interdict will not be granted if there is another satisfactory remedy available to the applicant. In that context a claim for damages is often contrasted with a claim for an interdict. The question is asked: should the respondent be interdicted from committing the unlawful conduct complained of, or should he be permitted to continue with such conduct, leaving the applicant to recover any damages he may suffer?

That is not the question which arises here. In the present circumstances there is no question of a claim for damages being an alternative to an interdict. The only claim which the petitioners have is one for damages. There is no suggestion that it could be replaced by a claim for an interdict. The purpose of the interdict is not to be a substitute for the claim for damages but to reinforce it - to render it more effective. And the question whether the claim is a satisfactory remedy in the absence of an interdict would normally answer itself. Except where the respondent is a Croesus, a claim for damages buttressed by an interdict of this sort is always more satisfactory for the plaintiff/applicant than one standing on its own feet. The question of an alternative remedy accordingly does not arise in this sort of case. The interdict with which we are dealing is *sui generis*. It is either available or it is not. No other remedy can really take its place (except, possibly, in certain circumstances attachments or arrests). The question here is purely whether, in principle and on authority, such an interdict should be granted in cases where the respondent is in good faith disposing of his assets, or threatening to do so, and has no intent to render the applicant's claim nugatory.

In view of the manner in which the present proceedings were brought it is however not necessary to pursue this matter further. The basis of the petitioners' claim as set out in the petition for leave to appeal and their heads of argument is that they have proved *prima facie* that the respondents had an intention to defeat the petitioners' claims, or to render them hollow, by secreting their assets. It was common cause that if these facts could be proved, together with the other requirements for an interim interdict, the petitioners would have a good case, and for the reasons given above I agree with this approach. There was some argument on whether the fact that assets were secreted with the intent to thwart the petitioners' claim had to be proved on a balance of probabilities or merely *prima facie*. However, it seems to me that here also the relative strength or weakness of the petitioners' proof would be a factor to be taken into account and weighed against other features in deciding whether an interim interdict should be granted."

[46] In *Investec Employee Benefits Limited The Electrical Industry Kwazulu Natal Pension Fund* 2010 (1) SA446 (W) para 121-123 the following was held:

"[121] The main thrust of the argument advanced on behalf of the interdicting parties is that the law should be developed so that an applicant is entitled to an asset-preservation order where it is demonstrated that the respondent is disposing of property in a way that will defeat the applicant's right to levy execution upon it. It is submitted that what should be of paramount importance is the effect of the conduct, namely whether the likely effect of the conduct will be to leave the respondent with

insufficient assets to satisfy the judgment that the applicant hopes to obtain. It is submitted that this court has the inherent power to develop the law, as well as the statutory power to do so in terms of s 173 of the Constitution.

[122] In support of their argument for the development of the law, counsel for the interdicting parties referred to English and Australian law. They referred to *Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH* [1984] 1 All ER 398; *Ketchum International plc v Group Public Relations Holdings Ltd and Others* [1996] 4 All ER 374; *Derby & Co Ltd and Others v Weldon and Others* D (No 2) [1989] 1 All ER 1002 (CA); *Dixon & Webster v Liddy* [2002] SADC 143; and *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612.

[123] No point would be served in dealing with these judgments in any detail. The applicable law in South Africa was reinstated by the Supreme Court of Appeal as recently as November 2007. In the short space of time that has elapsed since then, it is inconceivable that the law would require development of the kind suggested by the interdicting parties. Moreover, the relief sought makes substantial inroads into the rights of a party to deal with his or her assets as he or she deems fit, in circumstances where it may well be established that the applicant for the relief is not entitled to any award at all from the party against whom the award was made. In circumstances such as these, potentially irreversible and prejudicial consequences can be caused to the party against whom the order is made. In these circumstances the interdicting parties' invitation to develop the law in the manner suggested must be declined."

[47] I am in agreement with the *Investec* matter (*supra*) and apply the law in this matter as requiring Applicant to show that Respondent is wasting or secreting assets with the intention of defeating the claims of creditors.

[48] It must be mentioned, of course, that in respect of certain of the relief sought as outlined above, Applicant purports in its papers, and at late stage in argument, to rely on a so-called vindicatory or quasi-vindicatory claim as the basis therefore, it being in such a claim in an interim interdict unnecessary to show that the Applicant will suffer irreparable harm if the interdict is not granted. The basis therefore is that the Court must ensure that the object, which is the subject of the dispute, will be preserved until the dispute is decided. There can thus be no question of an alternative remedy.

[49] In the result, there is the need to consider the anti-dissipation interdict with great care having regard to the potential effect on the affairs of the Respondents and the potential for abuse, the balance of convenience thus to be carefully weighed, the question of an alternative remedy not arising. In the other vindicatory instance the principle is that the court protects the subject of the dispute until the dispute is decided. In *Erasmus* [*supra*] D6 – 21 it is set out that there are applications for interdicts pending vindicatory and possessory actions, the latter being quasi-vindicatory. A vindicatory action is one in which the plaintiff claims delivery of specific property as owner or lawful possessor, whilst a quasi-vindicatory action is one in which delivery of specific property is claimed under some legal right to obtain possession. See *Stern and Ruskin NO v Appleson* 1951(3) SA 800 (W) at 810 – 811; *UDC Bank Limited v Seacat Leasing and Finance Co (Pty) Limited* 1979 (4) SA682 (T) at 688G.

The Appropriate Test:

[50] Accordingly, in this matter, Applicants must show in essence in both instances a *prima facie* right; a well grounded apprehension of irreparable harm in the anti-dissipation interdict; a balance of convenience in favour of the granting of the interim relief and the absence of any other satisfactory remedy.

[51] As to a *prima facie* right to the interim interdict, this will exist if the court is satisfied that the applicant has a right established upon a balance of probabilities and that Respondents violates that right or threatens to do so. The court will come to Applicants' aid in this respect upon a degree of proof less stringent than that required for the grant of a final interdict. It is trite that in respect of a dispute of fact on the affidavits the court must take the facts as set out by the Applicants together with any facts set out by the Respondents, which the Applicants cannot dispute, and consider whether, having regard to the inherent probabilities the Applicants should (not could) obtain final relief at the trial. The facts set up in contradiction by Respondents should then be considered. If serious doubt is thrown upon the case of the Applicants they should not succeed in obtaining temporary relief, for his right *prima facie* established may only be open to some doubt. But if there is mere

contradiction or unconvincing explanation the matter should be left to trial and the right protected pending same.

[52] As to irreparable harm this is referred to as the loss of property in circumstances where its recovery is impossible or improbable. This is an objective test, put otherwise the court must decide on the basis of the facts presented to it whether there is any basis for the entertainment of a reasonable apprehension of injury by Applicants. *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* 2008 (5) SA339 (SCA) at 347D-E.

[53] As to the balance of convenience the court must weigh the prejudice to the Applicants, if the interlocutory interdict is refused, against the prejudice the Respondents will suffer if it is granted. *Erasmus* (*supra*) D6 – 20 state "Usually this will resolve itself into a consideration of the prospects of success in the main action the balance of convenience – the stronger the prospects of success, the less need for the balance of convenience to favour the Applicants; the weaker the prospects of success, the greater the need for the balance of convenience to favour him."

[54] The *prima facie* right that must be established refers to *prima facie* proof of facts that establish the existence of a right as a matter of substantial law. It is a right which if not protected may cause the Applicants to suffer irreparable harm. The right can be *prima facie* established, even if open to some doubt, this on the test referred to above relevant to the approach to the facts averred on the affidavits, and it must be emphasized, as I have set out above, that whether or not there is to be irreparable harm, requires the facts to be viewed objectively, that is whether a reasonable man would apprehend the probability of harm. This is closely linked to the balance of convenience. If vindicatory or *quasi-vindicatory* as pointed out above, it is presumed that Applicants will suffer irreparable harm if the interdict is not granted unless the contrary is shown.

[55] In respect of the anti-dissipation interdict the well grounded apprehension of harm is undoubtedly satisfied if it is established that *prima facie* Respondents have no intention of defeating Applicants' claims by dissipating his assets, that is whether a reasonable man confronted by the facts would apprehend the probability of harm. This must be decided from all the circumstances.

[56] It seems to me that it must be accepted that in respect of the anti-dissipation order it must be shown on the above test that Applicant has a claim against Respondent; Respondent must be alienating or threatening to alienate its asset; the Respondents' intention with respect to the alienation must be to thwart the ultimate execution of the Applicant's claim.

[57] I have given Mr Louw SC's argument that the interim interdict issues relevant to the establishment of the requirements described above requires a nuanced approach, that differing according to which element of the remedy is tested, he suggesting that as to the claim Applicant must show it has against Respondent the quantum is the *"low prima facie standard"* as Applicant must prove that Respondent has no *bona fide* defence, but if it is whether the Respondent is alienating his or her assets with the requisite intention, the proof must be on a balance of probabilities.

[58] I have given careful thought to this argument, it can find no support in the authorities therefore, notwithstanding the attempt to persuade me to the contrary, and I have no hesitation in rejecting the argument where it contradicts the principles and test set out above.

[59] I should stress that Mr Louw SC argued clearly that the acceptance of his argument on this issue was not crucial to the success of Second Respondent's defence, inasmuch as on the standard test he argued, in any event the necessary had not been established by Applicants.

[60] In respect of Mr Suttner SC's argument on the issues as to the relevant standards of proof, once again, although these were closer to the traditional position, I have no difficulty in rejecting same insofar as they deviated therefrom.

The Factual Issues:

[61] I propose to deal with the remaining Respondents and the relief sought against them separately below.

Second Respondent:

[62] First Applicant (Freedom) was established in 2012, its promoters being First and Second Respondents, Erasmus, Franky Pretorius, Sean Rule and C J Alexander. Its objective in its listing on the JSE was said to be a property portfolio holding company indirectly holding properties across the commercial industrial and residential sectors of the property industry. It listed on the JSE on 12 June 2014.

[63] Second Respondent was held out as the CEO of Freedom, although it is alleged by Applicants that First Respondent was primarily instrumental in the management and strategic direction taken by Freedom. Indeed it is Applicant's case that First and Second Respondents together with Third Respondent, and others, conspired to defraud Freedom and its shareholders, this going back to making misrepresentations during the listing of Freedom.

[64] It is common cause that First Respondent was at no time a director or shareholder of Freedom. First Respondent was at no time employed by Freedom as an employee and was, he says, a sub-contractor to Freedom Business Development (Pty) Limited (FBD) which he alleges was in turn a sub-contractor to Freedom. It is further common cause that at all times relevant hereto First Respondent was an insolvent.

[65] Applicants contend that First Respondent, although not an appointed director of Freedom, being insolvent, was certainly a prescribed officer as contemplated in section 1 of the Companies Act as he excised control over the management of the business of Freedom and participated to a material degree excise of executive control over that business and management.

[66] Second Applicant became a shareholder in Freedom, and prior to his appointment as a director and CEO thereof and commenced what he calls investigations in late November 2015 in respect of the erstwhile directors of Freedom as well as its consultants acting as a concerned shareholder. He says that there were questionable transactions including the misappropriation of Freedom Funds to pay debts, the influencing of the valuations of properties acquired by Freedom that had been grossly overvalued; diverting corporate opportunities away from Freedom by transferring properties to entities which

were not Freedom subsidiaries, and that the application was to ensure that the assets of certain of the Respondents were not dissipated or disposed of, and safeguard assets which had been wrongfully appropriated. He alleges that it came to Freedom's attention recently that First Respondent and certain of the other Respondents had disposed of or were attempting to dispose of Freedom shares, certain of the immovable properties and other assets and that it was a "fair inference" that they were doing so in an attempt to these assets beyond the reach of Freedom and to defeat Freedom's claims.

[67] Second Applicant became CEO of Freedom in January 2016; whilst Second Respondent, who has a long history as a senior asset manager, was responsible for the asset management of commercial properties, took up his position in October 2013 prior to the listing of Freedom. Freedom was listed in June 2014 and many of the transactions that were brought to First Applicant commenced prior to Second Respondent's involvement in its affairs. He became a director and Chief Executive Officer of Freedom, he having a close relationship with First Respondent, a chartered accountant with many years experience in the structuring of commercial property transactions. First Respondent has previously mentioned a contract with FPD that rendered professional services to Freedom, he was invited to attend board meetings of Freedom and was the receptacle of the knowledge of the acquisition of the transactions of the Freedom Property Fund he also sat on a number of the internal committees of Freedom.

[68] Second Respondent received 10 million shares in Freedom when he became CEO.

[69] There is no case made out that he was not entitled to the shares.

[70] He further purchased 860,000 shares in Freedom after he became the CEO utilizing his own funds.

[71] He acquired Erf [...] B. known as "Villa La Vita" (paragraph 2.8.1 court order) for use before he became the Chief Executive Officer of Freedom and in which property he and his family resided.

[72] After being employed as CEO he acquired ERF [...] B. known as the "Shepard Road Property" (refered to in paragraph 2.8.2 of the order).

[73] He maintains that after his mother-in-law died, in August 2015, his family dissipated somewhat and he decided in September 2015 to sell this property intending to relocate to a less expensive property, this at the time he was still CEO.

[74] He resigned his position as CEO in November 2015 giving notice on 23rd of November 2000, 60 days being required, he being employed until 23 January 2016.

[75] Second Applicant having acquired shares in Freedom in November 2015 was appointed in his place as CEO. There is nothing to gainsay that Second Respondent had by then placed the Shepard Road Property on the market. When he left, Second Applicant withheld his January 2016 salary and says, embarrassed by this financially, he was obliged to sell some of the shares that he held in Freedom. He sold 1, 243, 700 shares in 2 tranches, the first on 1 March 2016 and second on 17 March 2016. He denies explicitly that he sold the shares as a consequence of claims made against him by the Applicants, he pointing out that at that time no claims had been made against him and that he accordingly could not have sold same with the requisite purpose alleged.

[76] Second Respondent informed him in January and February 2016 that he wanted to meet with him but this did not eventuate, it being apparent to him only during March 2016 that something was amiss, he finally meeting Second Applicant on 16 March 2016. There was a general discussion and no threat or allegations made against him or any alleged misconduct raised let alone fraud or breach of fiduciary duty.

[77] In due course, and as summarized above the urgent application was brought and the order granted on 22 April 2016, restraining Second Respondent as already summarized above, the immediate interim relief granted then later being uplifted.

[78] It is not contested that in between the issue of the order by Jacobs AJ and it being uplifted, Second Respondent received an offer for the Shepard Road property at a good price, he alleges. He could not proceed with the sale and once the order was lifted received a new offer which he accepted, the sale

being executed. He and his family were obliged to vacate the property but were unable to move into Villa La Vita as this had been leased out. He rented another property but the Villa La Vita property became available at the end of November 2016, he being able to terminate his lease as at 31 January 2017, then executing some renovations to Villa La Vita, moving in some two weeks prior to 27 January 2017. He says under oath: "It is my intention to remain there indefinitely. I have no intention to dispose of this property; it is my family's home."

[79] In respect of the Freedom shares that he still held, it is apparent that he sold the balance of these once the interim order preventing him from doing so was uplifted doing so at an average price of 10.5c per share he stating that the value thereof was decreasing rapidly and that he feared the worst, this being confirmed when the JSE suspended all trading in freedom shares on 1 July 2016. He denies that he sold the balance of the shares with the intention of thwarting any claim that might succeed against him.

[80] At the end of the day, accordingly, the only remaining relief sought against Second Respondent relates to Villa La Vita. It is sought to interdict him from selling, alienating or encumbering that property pending the outcome of the action now instituted.

[81] The question is whether against the background above, this claim which rests fairly and squarely in the realms of anti-dissipation interdicts, has been substantiated on the usual test as set out above.

[82] I am mindful of the fact that I must exercise care and circumspection in granting such an interdict, the balance of convenience to be carefully weighed. The question arises as to whether Applicants have succeeded in showing the requisite state of mind on the part of Second Respondent, that put otherwise, that he is getting rid of funds or wasting or secreting assets or is likely to do so with the intention of defeating the claims of his creditors. This is no exceptional case in which it is unnecessary to show the state of mind. I am not at all satisfied on the papers viewed appropriately that Second Respondent is shown to be acting *mala fide* with the intent of preventing execution in respect of the Applicants claim. There is indeed nothing to counter Second Applicant's statement under oath that he had any intention to sell his family home.

[83] I am also not by any means persuaded, on a proper approach to the papers, that it is demonstrated that Second Respondent disposed of his then assets *mala fide* withthe intention to defeat Applicants claims, or in the circumstances of the Villa La Vita that there is any question of any intention to dispose hereof let alone with the necessary intention to frustrate claimants' claims against him. Indeed it would seem to me that he should not have been initially restrained from selling those assets, and was perfectly justified in doing so once the order was lifted. I again am not satisfied that those assets were sold in any context which would have justified interdictory relief such as that which was sought let alone in the manner in which this was sought.

[84] In the result the relief sought against Second Respondent is dismissed with costs, the exact costs order and scale will be dealt with at the end of this judgment.

Fifth Sixth and Seventh Respondents:

[85] It must be remembered that Applicants in persisting in a much limited claim, against these Respondents in respect of shares, claims against the Seventh Respondent; Erf[...] Stellenbosch in respect of Sixth Respondent – the Krige Street property; and in respect of Seventh Respondent Erf [...] Vredendal –the L. Transaction, allege and argue that First Respondent was a prescribed officer and *de facto* director of Freedom, he having what was referred to as the total responsibility for business development at Freedom and involved in all purchase, sale and capital transactions for the fund. It is alleged that several of the companies named in the application, of which Cawood is the sole director, are alter egos of First Respondent, Erasmus and Second Respondent and entities under their control. It is alleged that Freedom enjoyed a number of claims against First Respondent, Second Respondent and/or corporate entities under their control, it being necessary to focus only on three directly for the purposes of the order sought. In respect of Sixth Respondent this was a property at K. S. being a viable income producing property. It is alleged that First Respondent acquired the property through Sixth Respondent instead of acquiring it for Freedom. This was in breach, so it is argued, of his fiduciary duty to Freedom not to divert corporate

opportunities and the statutory duty to Freedom in relation to good faith and an improper purpose in gaining advantage for himself and others. It is alleged that Freedom suffered damages in the sum of R7.2 million Rand. It is alleged that Sixth Respondent is the alter ego of First Respondent that Sixth Respondent knowingly participated in the transaction and received the benefit. Freedom also claims entitlement to transfer of the property from Sixth Respondent.

[86] In respect of Seventh Respondent relating to the L. Transaction and on the same basis legally as that relating to the K. S. property, but in respect of Seventh Respondent, Freedom claims entitlement to the transfer of that property from Seventh Respondent.

[87] In respect of Fifth Respondent, which is the holder of shares in Seventh Respondent, of which First Respondent is a director, and for obvious reasons, Applicants wish to protect and maintain that Respondent shareholding in Seventh Respondent in relation to the L. Transaction.

[88] It is argued that the above summary is the foundation for the claim initially proposed and now instituted in respect of these particular Respondents.

[89] As background to Applicants' argument that there is a reasonable apprehension of intention to defeat Freedoms' claims, it is argued that First and Second Respondents had known for some time prior to the launch of the application that Freedom intended to institute claims against them, in First Respondent's case from 25 January 2016, the date he received a letter from Freedom's attorneys setting out several of what was referred to as questionable transactions, and in Second Respondent's case from late February 2016. It was argued that even prior to this, when his salary was withheld the Second Respondent would have been alerted.

[90] It was argued that First Respondent with this knowledge had factually been disposing of assets and that in March 2016 he instructed his broker to sell all Freedom's shares held by the Respondents under his control on an urgent basis. What is left at this stage are the two properties referred to above in respect of Leucadia and Bond Connect, and Fifth Respondents' shareholding in Seventh Respondent.

[91] It is argued that an interim interdict in this regard will have limited effect on those Respondents and will not compromise their respective businesses or income. The fundamental basis of this is that First Respondent, against whom presently no relief is sought in the interdict, has always had control of the business dealings of Freedom, and in respect of whom Sixth and Seventh Respondents are his alter ego.

[92] I will set out below First, Sixth and Seventh Respondents stance in respect of the above, and in dealing with the relief sought will attempt, insofar as is possible, not to impinge on the final issues to be raised in the action, bearing in mind, that this relief is interim only, and to set out views thereon at this stage would be undesirable.

[93] It is initially pointed out that an order of the nature sought in respect of the anti-dissipation relief, is only given when there is, at the very least, a real and genuine cause of action against the Respondents and a deliberate disposing or concealing of assets to evade the judgment. In this context it was pointed out that the relief originally sought against Third, Fourth, Fifth, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, Fifteenth, Sixteenth, Seventeenth and Eighteenth Respondents has been abandoned, and that in the Action only First, Second, Third, Fourth, Fifth, Sixth and Seventh Respondents are Defendants, together with Nineteenth, Twenty-First and Twenty Second Respondents, as they have an interest therein.

[94] I pointed out, that the application should be dismissed forthwith against Third, Fourth, Seventh, Eighth, Ninth, Tenth, Twelfth, Thirteenth, Fourteenth, Fifteenth, Sixteenth and Seventeenth Respondents, and that it is extraordinary that this had not been formally abandoned against these Respondents well before the matter was argued. Against this, there was in my view no compelling argument, which has with it cost implications.

[95] It is further pointed out that insofar as the shares of Freedom are concerned the JSE has suspended this process which immediately, at that time, suspended the sale of any Freedom shares in any event.

[96] It is argued that in respect of the alleged association between the remaining Respondents, against which relief is sought, Applicants' fail to explain what is

meant by the reference to *"association"* or how the First or Third Respondents are in fact associated with any of the Fourth to Seventeenth Respondents.

[97] It is unnecessary to deal with First Respondent personally as no relief is sought against him at the present time in the interdict, save costs.

[98] I have no intention in this application of impinging upon one of the main issues that would have to be decided in the trial and that is whether the First Respondent was a prescribed officer of Freedom or *de facto* Director thereof. It is sufficient to say that Applicants make out what they contend is a strong case herefor, and I have taken this carefully into account in reaching the decision which I have, also carefully considering the strong attack made on the submissions. In respect of the relief sought against Fifth, Sixth and Seventh Respondents in essence this amounted to submissions that First Respondent did not explain in either case who on behalf of the First Applicant, apart from himself, was not willing to pay the asking price for each property referred to, or why in due course, on behalf of another company partly owned by Third Respondent in respect of K. S., and Seventh Respondent in the other, were prepared to pay a much higher price. This it is argued constituted the diversion of two corporate opportunities from First Applicant to Sixth and Seventh Respondents. First Respondent answered these allegations on the face of it in my view, although leaving a lack of explanation on certain of the issues outlined above and why the eventual buyer paid therefor in First Applicant's shares.

[99] In respect of Fifth and Sixth Respondents it was pointed out that they had no connection or anything to do with the remaining disputed transactions in respect of Allendale, Bonsmara, Nassau, Green Oaks, Elm Drive and Witgatboom. It is pointed out that the crux of Applicants' contentions in respect of these Respondents is that the two properties concerned were purchased by entities associated with First Respondent, and Third Respondent. These were, so it is alleged (as I have said), corporate opportunities diverted from Freedom. It was argued that the basis herefor was a bald assertion which was substantively answered.

[100] It is argued on behalf of these Respondents that applying the appropriate test, I am obliged to accept the explanation put forward by the Respondents. I have already set out however, that in my view, in this regard, the usual test in

respect of interim applications is to be applied to this matter. Nevertheless, applying that standard I must be persuaded that the basis for the relief sought is established. In this regard I bear in mind that Second Applicant, who had no *locus standi* to bring the application at all, at best has indirect knowledge of the events or issues relied on, each in turn challenged by Respondents. In reply he admits that he has no direct knowledge of the facts.

[101] Having carefully weighed the arguments for and against and the very detailed analysis of the allegations in the papers in argument, I am unable to reach the necessary conclusion on the appropriate test such as is required to substantiate the relief sought. I most certainly am not satisfied that these Respondents have been shown to have had the necessary intention to dispose of assets in this matter at all, let alone to defeat claims made against them. As to the quasi –vindicatory claims, I am not satisfied at all that the necessary basis for the relief is laid, in the sense described above, taking a proper approach to the allegations on the appropriate test, and particularly I am not satisfied that the entitlement to the ownership of the property is sufficiently established on what is before me.

[102] That being so, the relief sought cannot be granted on either basis.

The Result:

[103] It is thus clear that the application falls to be dismissed overall, on the basis set out above, and that the issue of costs requires to be considered.

[104] In my view, in considering the appropriate costs order, it is necessary to take into account the manner in which the application was initially brought as fully dealt with already above. Having regard to Applicants complete failure on the merits, it is clear that the matter could be disposed of simply arising from the Applicants' inappropriate conduct and procedure.

[105] Not only have Applicants been unsuccessful, but it has been demonstrated that Second Applicant had no *locus standi* in the matter. The relief in respect of many of the remaining Respondents should have been abandoned and this made clear prior to argument. The application should not have been brought *ex parte* and *in camera*, the matter was inadequately placed before the presiding Judge by way of an entirely unconvincing Certificate of Urgency

which failed to deal with the necessary issues and factual allegations which should have been contained therein in accordance with the Rules of Practice.

[106] I am satisfied that in the above regard, a proper case has been made out by all the opposing Respondents for a costs order on a punitive scale as between attorney and client, including, where appropriate, the cost of two counsel where same were utilized, this having been a wise and reasonable precaution.

[107] In this regard, and although second Applicant had no *locus standi*, he persisted in the application to a very late state, and must similarly be liable by way of an appropriate costs order.

The Order:

[108] In the result, the application is dismissed, First and Second Applicants, jointly and severally the one paying the other to be absolved, to pay the First, Second and Third to Seventeenth Respondents costs on the scale as between attorney and client which shall include the costs of two counsel where same were utilized.

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M.J LOWE
JUDGE OF THE HIGH COURT

Obo the Applicant: Adv. J Muller SC and Adv H.L Du Toit
Instructed by: Wheeldon Rushmere & Cole
119 High Street Street
Grahamstown

(Ref: Mr Brody/Glyn/S19090)

Obo the 1st, 3rd, 4th and 17th Respondents: Adv. J Suttner and Adv P Cirone

Instructed by: Netteltons Attorneys
118A High Street
Grahamstown

(Ref: I Pienaar/Daisy)

Obo of Second Respondent: Adv P Louw SC
Instructed by: Netteltons Attorneys
118A High Street
Grahamstown

(Ref: I Pienaar/Daisy)