**Of Interest**

**IN THE HIGH COURT OF SOUTH AFRICA**
**EASTERN CAPE LOCAL DIVISION – PORT ELIZABETH**

Case No: 1303/2015

In the matter between:

**KAYMAR LOGISTICS CC**
**(Registration no. 2010/153841/23)** First Applicant

**PETRUS JACOBUS PRETORIUS** Second Applicant

and

**DANIKA PRETORIUS (BORN LOTZ)** Respondent

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**JUDGMENT**

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**REVELAS J**

[1] This matter was set down for the determination of the reserved costs in an application that was settled. The applicants, in *ex parte* and *in camera* proceedings, obtained certain urgent relief of an anti-dissipatory nature against the respondent. On the anticipated return day, the parties settled the matter on the basis that the First Applicant ("Kaymar") be liquidated. In terms of the court order made by agreement between the parties, the order previously obtained *ex parte,* was set aside and the question of costs was reserved.

*Background*

[2] Kaymar is a close corporation which provides transport brokerage services. The second applicant ("the applicant") is a 50% co-holder and member of Kaymar. Prior to the registration of Kaymar, the applicant had been involved in the transport brokerage business since 2003. In 2006, he became the sole owner of a transport consultancy business. In 2009, the applicant decided to convert his business into a business which would include the respondent as she had just become unemployed. He then registered a close corporation in 2010, which is the present Kaymar, with himself and the respondent (whom he had married in the interim) as members with equal interests in the business.

[3] Each member had specific functions in the running of the business. The applicant was the managing member and the respondent fulfilled several functions of all administrative nature. The services of the respondent's father, who was also involved in the transport business sector, was subcontracted (on an informal basis) by Kaymar from time to time.

[4] The applicant and the respondent were married to each other out of community of property for some years and they have a minor daughter. During December 2014, the applicant and the respondent began experiencing problems, which affected their marital and business relationship to the extent that the respondent instituted divorce proceedings during March 2015. Their relationship deteriorated into an acrimonious one, culminating in a legal battle regarding the applicant's rights to contact with their daughter. It all started as follows:

[5] The applicant left town to attend a national fishing competition in Hartenbos for the period 7 March to 13 March 2015. Prior to his departure, and also since December 2014, the applicant had made certain tentative observations which led him to believe that something was amiss in the business, particularly with regard to the conduct of the respondent and Kaymar’s newly appointed bookkeeper (who is presently in the employ of the respondent). According to the applicant, they were acting secretively and with duplicity in relation to certain aspects of the business. The applicant’s staff also reported to him that the respondent's father had taken petrol from Kaymar for his own transport business with the knowledge of the respondent who, on a previous occasion when the same thing had occurred, vehemently

protested to the applicant that the petrol pinching in question was unacceptable. Other examples were also referred to but are, for present purposes not necessary to list.

[6] While in Hartenbos, the respondent notified the applicant in a text message that all future contact with her should be through her attorney. The applicant immediately left Hartenbos on receipt of this news, and when he arrived home, he found that the respondent had vacated the marital home and had taken the keys of the Kaymar premises with her. On his subsequent arrival at Kaymar, the applicant found the premises devoid of all its furniture and fittings. On 16 March 2015, the applicant was served with a divorce summons.

[7] Thereafter the applicant established that the respondent was in possession of all Kaymar's books of account of the business and its entire computerized bookkeeping system. The respondent had, on the pretext that the applicant was no longer a member of Kaymar, managed to close Kaymar's business bank account and transferred all the funds in that account into her own personal bank account. The respondent simply moved the entire Kaymar business operation, lock stock and barrel, to a different location (her father's house) where it would all be under her sole control. She did so, on the basis that she

was entitled to continue with the business operations for her own account and with the former clients of Kaymar. She was also in possession of the necessary documentation which would enable the applicant to prove the contrary. This was the case presented to Goosen J consequent upon which the anti-dissipatory relief was granted.

[8] The respondent was clearly not entitled to remove all the assets of Kaymar, including all information pertaining to Kaymar's business operations from its premises. She had also done so, surreptitiously. The respondent had also acted unlawfully, *mala fide,* and contrary to her duty of good faith to Kaymar.

[9] It was submitted in the applicants' papers, that having regard to the aforesaid history of events, it was as evident that, should the respondent be given any prior notification of an attempt to obtain information regarding Kaymar, she would ensure that all and any relevant information helpful to the applicants in the assertion of their rights, be destroyed. In the circumstances, this was a valid assertion.

[10] The applicant also indicated that it intended to institute an application in terms of section 36 of the Close Corporation Act, No 69

of 1984, for the removal of the respondent as a member of Kaymar as a result of her unlawful actions. In order to bring the aforesaid application, the applicant required information that was unlawfully removed by the respondent.

[11] The *ex parte* relief granted by Goosen J differed in several respects from the relief sought in the applicants' Notice of Motion and was to the effect that:

(a) The Sheriff, together with an independent attorney, as well as two computer technicians, be authorized and directed to enter and search the premises occupied by the respondent at 53 Boom Street Despatch;

(b) That some of the 70 items (which included three computers, several documents and information) as listed in the schedule annexed to the Notice of Motion, be handed to the Sheriff for safekeeping or be returned to Kaymar's premises;

(c) Certain ancillary relief was also granted and directives building in "checks and balances" (several in fact) as to how the process should proceed (and to exclude the

possibility of a raid being executed) were also included in the order.

[12] During the argument on costs, the respondent submitted that the applicants abused the process of court and launched an application premised on an Anton Piller type injunction when the clear remedy was to bring an urgent application for liquidation of Kaymar.

[13] The respondent submitted, as I understood it, that the order made by Goosen J was not competent for the reasons as outlined below, and in this regard relied on the clear distinction between a Mareva[1] injunction for the preservation of assets (pending finalization of the main action) and an Anton Piller order for the search and seizure of items to *preserve* evidence pending the final relief.

[14] Counsel for the respondent enumerated the reasons why a liquidation application, as opposed to an Anton Piller order, would have been more appropriate in the circumstances of this case. These were the following:

[1] It derives its name from the judgment in *Mareva Compania Naviera SA v International Bulk Carriers SA; The Mareva* [1980] All ER 213 (CH)

(a) No evidence whatsoever had to be preserved in order to obtain a liquidation order.

(b) The appointment of a liquidator would have immediately placed the liquidator in a position to take possession of all the assets of Kaymar.

(c) There are several cases in which practitioners are warned against bringing applications for Anton Piller orders where the applicant has not demonstrated an identifiable cause of action which supports the assertion that the documents sought to be preserved and/or seized would serve as vital evidence.[2]

(d) In this day and age, the application was brought recklessly and was of the kind where an attorney and client costs order would be justified and the legal representatives of the applicants ought to be deprived of their entitlement to charges fees.

[15] The respondent's counsel also provided me with a very learned and widely distributed dissertation on the kind of anti-dissipatory relief

[2] The paucity, highly technical nature and the necessary compliance with strict requirements of these types of applications were understood.

envisaged in Anton Piller orders and Mareva injunctions, both having their origins in English law.

[16] It is also useful to have regard, for present purposes to the following excerpt from the judgment in *Pohlman and Others v Van Schalkwyk and Others:*[3]

> "There is both a fundamental and a practical reason to start with s 173 of the Constitution of the Republic of South Africa Act 108 of 1996. It reads:
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> > 'The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.'
>
> The fundamental reason is that this Court's powers and competencies as a High Court is founded on the Constitution. Where previously the inherent powers of superior Courts were developed under the common law to control, amongst others, the exercise of public power and also its own process, these are now regulated by the Constitution (cf *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) (2000 (3) BCLR 241) para [41]). The practical reason is that s 173 allows for the inherent power of the Court to be used by taking into account 'the interests of justice'. It appears to me that this provision allows for flexibility and builds upon the previous superior Courts' inherent powers - powers which in cases of this kind were expressly stated to be exercised 'in the interests of the proper administration of justice' (*per* Corbett JA (as he then was) in *Universal*

[3] 2001 (1) SA 690 ECD at 697 C – F.

> *City Studios Inc and Others v Network Video (Pty) Ltd* 1986 (2) SA 734 (A) at 754G - 755E; cf *Knox D'Arcy and Others v Jamieson and Others (supra*)).
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> In *Shoba's* case *supra* at 7I - 8B, Corbett CJ referred to four different components of *Anton Piller* orders granted in South African Courts by then. Some of these had their roots in the common law, some were innovations. The same mix of the old and the new appeared in the 'freezing' asset orders (*Knox D'Arcy (supra* at 372A - C)). In a dynamic society this is to be expected. It is simply unrealistic to expect that new and often unexpected ways will not sometimes be sought by unscrupulous debtors to frustrate the judicial process, be it before it is set in motion, or whilst it is being set in motion, or in the process of execution. Section 173 of the Constitution provides the flexible and equitable foundation to deal with these kind of problems."

[17] It is indeed so, that not all the items to be seized in terms of the order would, in the normal course be covered by an Anton Piller order. Some items would have been more appropriately included in a Mareva injunction and others in a *mandement van spolie.* The order obtained by the applicants was a hybrid of the aforesaid. The launching of three different types of applications for the sake of legal form only, would have been prohibitively impractical and illustrates the artificial basis of the respondent's complaint against the order granted.

[18] A liquidation application, on notice to the respondent, would also have been a futile exercise in circumstances where the respondent had

appropriated the entire business for herself. Given the history and peculiar facts of this matter, coupled with the constitutionally conferred *"flexibility"* regarding these type of orders (referred to above by *Froneman J* in *Pohlman's* case), the order made was not irregular by any means. The fact that it bore the characteristics of different types of legal remedies is of no great moment as it suited the case where the facts cried out for the restoration of the *status quo* by means of anti-dissapatory relief.

[19] The respondent had, without recourse to any lawful means, acted as if she herself had obtained a Mareva injunction. She seized the entire business for herself, just as she was about to institute divorce proceedings, thus disabling the applicant, as a litigant in the divorce proceedings and the inevitable consequent proceedings relating to the future of Kaymar as a business entity.

[20] The respondent's high-handed and unlawful seizure of Kaymar's assets necessitated the application in question. The respondent's insistence that the applicants should have brought a liquidation application instead, coupled with her call for a punitive costs order is unfounded, considering the chicanery of her past conduct.

[21] The order made by Goosen J was entirely justified. Furthermore, in circumstances where the order (obtained by agreement) provides that the respondent resigns as a member of Kaymar and that all Kaymar's assets be returned to its business premises, the applicants' choice of remedy has been vindicated.

[22] For all the reasons set out above, the following order is made:

The respondent is to pay the costs of the application.

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**E REVELAS**
**Judge of the High Court**

Appearances:

Counsel for the applicants, Adv S Potgieter, instructed by Anthony Incorporated, Port Elizabeth

For the respondent, Adv P E Jooste, instructed by Greyvensteins Incorporated, Port Elizabeth

Date Heard: 18 June 2015

Date Delivered: 29 October 2015