**NOT REPORTABLE**

**IN THE HIGH COURT OF SOUTH AFRICA**

**KWAZULU-NATAL, DURBAN**

**CASE NO. 14185/08**

In the matter between :

**PIPE MAKERS (PTY) LIMITED** Applicant

**and**

**SASH CONSULTANTS CC** First Respondent

**THE STANDARD BANK OF SOUTH AFRICA LTD** Second Respondent

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**J U D G M E N T**

**Delivered on 5 June 2009**

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**SISHI J. :**

[1] This is the return day of a rule nisi in an application for an interim interdict to preserve funds pending the outcome of an action to be instituted (as I understand, the action has already been instituted) by the Applicant against the First Respondent for the payment of R732,774.32, interest and costs. The interim order was granted by this Court on the 29 October 2008. However in terms paragraphs 2(a)(i) and (ii) the amount to be preserved in the First Respondent's account is R256,285.31. In terms of this Court order an interim relief has been granted freezing the bank account of the First Respondent.

[2] It is undisputed or common cause that a total of 21 cheques were fraudulently obtained from the Applicant resulting in amounts over R700,00.00 being stolen from the Appellant, and it is undisputed that all those cheques were deposited into the First Respondent's account with the Second Respondent. The scheme that was used to misappropriate the funds from the Applicant is as follows. It transpired that a total of 21 cheques which were purported to be made out in favour of the Applicant's suppliers to whom the Applicant allegedly owed money and as it transpired each of these cheques did in fact not represent funds owing to the suppliers. The Applicant was under false pretences forced into signing those cheques by false entries into the cash ledger book of the Applicant. The money was in fact not owing to the Applicant's suppliers. Mrs. Naidoo under false pretences obtained those cheques from the Applicant totalling to over R700,000.00 and those cheques were then deposited not to the people to whom they are made out, the suppliers, they all ended up in the First Respondent's bank account and this is undisputed.

[3] Mr.Quinlan submitted that our Courts have long recognised that a person whose money has been stolen or obtained by fraud and deposited into the bank account may be entitled to an interim interdict prohibiting the respondent from dealing with the money pending the institution of an action. In this regard he referred to **First National Bank of South Africa Ltd v Perry NO & Others** 2001(3) SA 960 at

968 C-D (SCA); **Henegan & Another v Joachim & Others** 1988(4) SA 361, 365 B-C (DCLD).

[4] He submits that to obtain an interim interdict the Applicant need only establish a ***prima facie*** right though open to some doubt (Prest, The Law & Practice of Interdicts, at 50 (1st Edition 1996), and in the present case in the present circumstances the Applicant need not allege or establish elements such as well-grounded apprehension of irreparable loss or that it has no other satisfactory remedy. (**Fedsure Life Assurance v Worldwise African Investment Holdings** 2003(3) SA 268, at 278 (WLD); **First National Bank of Southern Africa Ltd v Perry NO and Others, *supra*.**

[5] Mr. Quinlan referred to three paragraphs of the First Respondent's Answering Affidavit wherein he concedes that the cheques were deposited into the First Respondent's account. On page 33 of the papers, paragraph 20 where the First Respondent says:

> **"All the cheques that were cashed by Mehmood were deposited into Raza's aforesaid account and were honoured."**

The second is paragraph 22 on page 34 of the papers wherein the First Respondent says :

> **"Accordingly acting in good faith and without any knowledge of anything untoward attaching to the said cheques I accepted them, paid over the full cash amounts appearing on them to Mehmood and deposited the cheques into Raza's bank account."**

The third one is paragraph 34 on page 23 of the papers where the First Respondent says :

> **"I have explained about how it came about that these cheques were deposited into CC bank's account."**

[6] Mr. Quinlan submitted that the Applicant has traced the source and they have traced exactly where the cheques went to. He then submits that the Applicant has satisfied the elements of this type of interdict. He further submits that the Rule should be confirmed with costs.

[7] He then referred to the manner in which the First Respondent framed its defence in the opposing affidavit and submitted that that is somewhat different. He submits that he tried in the Heads of Argument to now to shift the goal posts. He submits that the First Respondent has suddenly woken up to the fact that it misconstrued the cause of action made out. The way that the defence was framed in the Opposing Affidavit was on the basis that the application was a Knox D'Arcy type anti-dissipation : interdict or an interdict in ***securitatem debiti*** which is not. He refers to the case of **Smith v Daniels** 1997(4)

SA 711, at 714I – 715E (SECLD) wherein the above case was referred to. In **Smith v Daniels** case ***supra*** at 714 – 715 I – A the Court stated as follows :

> **"In the case of an anti-dissipation interdict the Applicant has to show *prima facie* that the Respondent would be likely to hide or secret assets, possibly by moving them out of the jurisdiction, with a view to defeating the Applicant's claim. In *casu* the Applicant has not made out a case to support this kind of interdict and his counsel did not argue the matter on that basis."**

The case of **Knox D'Arcy Ltd and Others v Jamieson and Others** 1994(3) SA 700 (WLD). 1995(2) SA 579 (WLD); 1996(4) SA 348 (AD) referred to in **Smith v Daniel, *supra*,** dealt with the anti-dissipation interdict ***in securitatem debiti***.

Mr. Quinlan submits that this is not anti-dissipation application. This is a peculiar type of interdict which applies to funds misappropriated or fraudulently obtained and paid into a bank account in the First Respondent's hands.

[8] Mr. Anand-Nepaul submits that the case of **Daniels v Smith**, ***supra*** deals with the principle upon which the applicant based its case which goes back before the 1950's. The one that refers to the case referred to on page 714 at H-I in the **Smith v Daniels**; the case of **Stern and**

**Ruskin NO v Appleson** 1951(3) SA 800 at 811G: where the Court stated as follows :

> **"It is quite true that money, like any other species of property, may be interdicted; but then it must be shown that the money to be interdicted is identifiable with or earmarked as a particular fund to which the Plaintiff claims to be entitled."**

He submits that the Applicant does not have to show that it is entitled to it at this level and the Judge in the same case goes on to say :

> **"It should be noticed that the present application does not fall within the category of what has been called an anti-dissipation interdict or an interdict in securitatum debiti".**

He then goes on to make the distinction referred to above.

[9] Mr. Quinlan submits that in an anti-dissipation interdict what the Applicant has to show is that it has a claim, that the First Respondent has no defence and he is trying to hide his assets to defeat the claim.

That is not the cause of action upon which the Applicant relies.

[10] Mr. Quinlan submitted that the example of the manner in which the First Respondent's defence has been framed is clearly set out on page

40 of the papers paragraph 48 of the Opposing Affidavit and it reads as follows :

> **"I respectfully submit that on a reading of the Founding Affidavit the Applicant has failed to make out a case for the relief which it seeks in that :**
>
> **(i) The Applicant has not even alleged that the CC was wasting or dissipating the attached funds so attached in order to defeat its creditors or that it was likely to do so;**
>
> **(ii) The Applicant has failed to show that the CC has no bona fide defence to the potential claim for damages;**
>
> **(iii) It has failed to allege and show that the CC or its member or any of its agent had a state of mind to get rid of funds, or was likely to do so, with the intention of defeating the claim of the Applicant or the CC's creditors;**
>
> **(iv) It has also failed to make any allegation pertaining to the ability or inability of the CC to honour a claim for damages if the Applicant were successful in such action;**
>
> **(v) It has frozen a substantial amount of the working capital of the CC thereby having the effect that the CC may become insolvent or incapable of trading;**

(vi) **By freezing the funds for the satisfaction of it's possible judgment against the CC, it has preferred itself as a creditor when it is not entitled to in law to such preference above other Creditors;**

**(vii) It has failed to ascertain what defence if any the CC has to its claim;**

**(viii) It has failed to give any detail pertaining to the assets, liabilities and solvency of the CC;**

**(ix) It has failed to allege or prove that the assets of the CC were being secreted with the intention of defeating the Applicant's claim."**

The thrust of all these defences is all based on a complete misconception of the Applicant's cause of action: The Applicant does not have to show any of those elements or establish any of those elements for it to have the Rule confirmed. The defences referred to by the First Respondent in the preceding paragraph are applicable in the anti-dissipation interdict ***in securitatem debiti.***

[11] Mr. Quinlan also submitted that in the Heads of Argument the First Respondent has tried to make out a completely different defence. He submits that it is not open to the First Respondent now at this stage to change its defence when it has not made out a defence in the

Opposing Affidavit. He submits that it now tries to say that the money in the account is not an earmarked fund, so it should not be interdicted. That is not a defence that has been raised in the Opposing Affidavit. He submits that it is not a defence now open to the First Respondent. He also submits that in any event the case law says that all the Applicant has got to do is to trace the money back and that is what the Applicant has done. The Applicant has shown that all the cheques that were fraudulently obtained were deposited into the First Respondent's bank account.

[12] He submits that it is completely irrelevant at this level as to whether the First Respondent was party to the dishonesty or whether the First Respondent was aware that the cheques were stolen. It is unlikely since there were 21 cheques that he was not aware, but that is irrelevant for the purposes of confirming the Rule. It is a matter which will be dealt with by the Trial Court at a later stage.

[13] Mr. Anand-Nepaul for the First Respondent referred to paragraph 12 of the Founding Affidavit which reads :

> **"… This application is urgent as the funds deposited into the First Respondent's bank account can be withdrawn at any time, and therefore the Applicant has been advised to act expeditiously to protect its interests. In addition, given the scheme outlined above, it is clear that if the First Respondent were given notice of this application**

> **before the Applicant obtained relief, the First Respondent would immediately withdraw all funds from its bank account to negate this application and the relief which the Applicant will seek in the proceedings against the First Respondent."**

Mr. Anand-Nepaul submits that the Applicant's counsel has submitted that the First Respondent misunderstood the ***causa*** and the cause of action in the application papers. If he understands the Applicant's case presently, then it is submitting to Court that what it is entitled to is an interdict as prayed in the Notice of Motion pending the institution of an action. The basis of that is the law as stated in the **First National Bank** case ***supra*** which Mr. Quinlan referred to. If that submission is correct, i.e. if it is to be accepted that the Applicant came to the Court on the basis of that cause of action as set out in the **First National Bank** case, ***supra*****,** then the averments which he referred to in paragraph 12 of the Founding Affidavit are irrelevant. He submits that paragraph 12 of the Founding Affidavit seems to give the application as set out in the Founding Affidavit the character of an anti-dissipation such as that provided for in that case of **Smith v Daniels,** ***supra****.* An ordinary reading of paragraph 12 of the Founding Affidavit would suggest that that is what the Applicant wanted to do hence the response by the First Respondent in his opposing papers deals at some length with the requirements in terms of that case. Mr. Anand-Nepaul submits that he does not agree with Mr. Quinlan and they respectfully differ from his submission that because the First Respondent took issue with the contents of the Applicant's Founding

Affidavit on the basis that it did not comply with the requirements of the anti-dissipation order that therefore the First Respondent was changing its version.

[14] Mr. Anand-Nepaul submits that the Opposing Affidavit deals with the facts in the matter, deals with the challenges of fact stated in the Founding Affidavit and deals, inter alia, with the main requirements of the non-existence of factual evidence by the Applicant in his founding papers to obtain an anti-dissipation order. Now what the Applicant has done in its Heads of Argument is that it has effectively said to the Court that it comes to Court for an interdict based on the **First National Bank** matter, ***supra,*** on the basis that the Court must find on his papers that the funds which it attached and the funds which are interdicted are earmarked. The argument raised by Mr. Quinlan for the Applicant that the Applicant has now traced the funds to its source is not what is relied upon, in the Heads of Argument by the Applicant.

[15] I must point out that Mr. Quinlan clearly stated in his argument that the contents of paragraph 12 are merely allegations to justify the urgency of the application and is not the cause of action. He submitted that the cause of action is to be found in paragraphs 7 – 10 inclusive of the Founding Affidavit. The cause of action has been summarised in paragraph 2 of this judgment. It is a summary of what is contained in paragraph 7 – 10 of the Founding Affidavit.

The case for the Applicant is not made out in the Heads of Argument as the argument of Mr. Anand-Nepaul seems to suggest. It is common cause that the stolen money has been traced into the First Respondent's bank account. In the **First National Bank v Perry** case, ***supra***, the SCA stated the principle as follows :

> **"…Our Courts have long recognised that a person whose money has been stolen or obtained by fraud and deposited into a bank account may be entitled to an interdict prohibiting the Respondent from dealing with the account."**

All one has to do is to trace the money into a banking account. It is common cause in this case that the stolen money was indeed deposited into the First Respondent's account. The First Respondent has conceded that all the stolen money was indeed deposited into its account. As Mr. Quinlan correctly submitted it has been traced to that account and that account then constitutes an earmarked fund.

[17] Referring to the case of **Henegan and Another v Joachim and Others** 1988(4) SA 361 at 365 B-D Mr. Anand-Nepaul for the First Respondent submitted that examples of a fund would be where fraudulently obtained and misappropriated money can be traced to its source or where money, such as trust money is kept in a separate account, where specifically sum of money is received, retained or is destined for a designated purpose such as payment of a particular debt.

[18] In the very same case referred to above, the Court clearly stated that now it is firmly established that an interdict can be granted in respect of money if money is identifiable with or earmarked as a particular fund to which the Plaintiff claims to be entitled. The Judge goes on to deal with the examples as referred to above. In the present matter the amounts in question were deposited into an identifiable bank account with a specific account number is earmarked and it is a fund of money. In this regard Mr. Quinlan submitted correctly in my view that in this case it is an earmarked fund because it is an identifiable fund because it is a specific fund. It belongs to the First Respondent and its got a bank account number. So it is earmarked and it is a fund. It is an account with money. It is on any basis an identifiable earmarked fund of money and it is common cause that the Applicant's money ended up in the First Respondent's account. The examples of funds referred to in the **Henegan and Another** case, ***supra,*** are not exhaustive.

[19] Mr. Anand-Nepaul submitted that the First Respondent's version in this regard is that where these cheques were cashed by it and deposited into his account, he gave value for the full amount of the cheques to the person cashing them. Those cheques were not marked in any way, they were bearer's cheques effectively. They appeared complete and regular on the face of it. It had two original signatures. All of this is common cause with the Applicants. There is nothing irregular on the face of the cheques. The First Respondent then deposited these

cheques into its banking account and after depositing those cheques into its banking account they were withdrawn from the bank account. He submits that even the bank statements shows deposits and withdrawals to indicate objectively that all the Court is dealing with here is a bank account of a trading entity. He submits that we are not dealing here with a bank account which is a fund of the stolen money.

[20] Mr. Anand-Nepaul submitted that the facts of this case should be distinguished from the facts of the **First National Bank,** case, ***supra*** in that that case deals with an exception raised to the Summons and the Particulars of Claim. One has the situation where the Plaintiff was claiming in an enrichment case when Defendant at a point in time when monies by way of cheques were paid into a bank and those monies were in the bank. The fraudulently obtained cheques were in the bank. It is different in this case on the basis firstly that in the present case value was given for the stolen cheques. The cheques were deposited and withdrawn from the trading account. He submits that it is not a situation where the Courts can find on the evidence before it that the funds sought to be interdicted are the monies arising from fraudulent cheques.

[21] What is clear is that the stolen cheques went into the same account. It is irrelevant whether the amounts of those cheques were withdrawn at a later stage or shortly thereafter. The fact that the cheques went in and payments came out of the account is not relevant for the purposes

of obtaining an interdict of this nature. The test is clearly set out in the case of **First National Bank v Perry, *supra*.**

[22] Mr. Anand-Nepaul then submitted that the position is that once funds are mixed in a bank account one is not entitled to then interdict the balance from the monies in that account on the basis that at some stage illegally obtained money went into the bank account. He submits that once that money is mixed with the accumulated funds the interdict cannot be obtained. He then referred to the case of **Stern and Rusken NO v Appleson** 1951(3) SA at page 811 paragraph J where the Courts stated as follows :

> **"It is quite true that money like any other species of property may be interdicted, but then it must be shown that the money to be interdicted is identifiable with or earmarked as a particular fund to which the Plaintiff claims to be entitled."**

This is well brought out in **Hawkins Trustees v Corio Saw & Planning Mills Ltd** 1923 LLD 125**.**

In the case of **First National Bank of SA Ltd, *supra*,** SCHUTZ, J.A. held that:

> "**What the Applicant must do in the present case is to trace the money back to the stolen money, to**

**identify it as a 'fund' of stolen money in the Defendant's hands".**

[23] Mr. Anand-Nepaul submits that the if the Applicant wants to succeed in this application then it must show that the funds which it seeks to be interdicted is its money. Applicant cannot show that because the fund which is interdicted on its own version is physically not its money. The Applicant is also obliged to show that the funds were earmarked. Mr. Anand-Nepaul's argument merely boils down to the fact that those funds were not earmarked. This aspect has been dealt with elsewhere in this judgment.

[24] Mr. Anand-Nepaul submits further that it is common cause that if one looks at the Applicant's own version it came to Court to interdict approximately R200000.00. In its Replying Affidavit it says that there were numerous other cheques in fact it comes to R700,000.00. He submits that clearly the money that is lying in the bank account is not R700,000.00 plus nor can it be found on the papers before Court that it R250,000.00 plus. The Applicant is obliged to try and show the Court that the funds that it seeks to attach now are the funds that are earmarked. He submits that the funds in the First Respondent's account is a trading account. It certainly has no funds earmarked. Does it indicate ***prima facie*** that those funds are earmarked for the Applicant? Secondly, probably on the Applicant's version one cannot find that it was earmarked because the Applicant's version is firstly that the First Respondent has no title to these funds, and was not entitled

to it. Secondly, that if it did not come to Court to interdict these funds they would be dissipated, would be used or they would be withdrawn and utilised by the First Respondent. This aspect has been dealt with earlier on in this judgment. This allegation was made merely to substantiate the urgency of the application and that the Applicant's cause of action lies elsewhere.

[25] Mr. Anand-Nepaul refers to the **Smith v Daniels and Another** 1997(4) SA 711 at 715B where the Court said the following :

> "**What remains for a decision therefore is whether the Applicant has proved that the balance of the money owing and payable by the Second Respondent to the First Respondent is part of an identifiable or earmarked fund out of which the First Respondent is obliged to pay the Applicant."**

Mr. Anand-Nepaul submits that in **Daniels'** case the Court found that it was not, that there were no identifying features that it was earmarked. He submits that the matter before Court is simpler. He submits that he cannot lie in the mouth of the Applicant, suggest that the Respondent was dealing with the funds obtained fraudulently would be earmarked for return to the Applicant.

[26] It is important to distinguish between the facts of the present case and those in **Smith v Daniels and Others, *supra*. Smith v Daniels case**

***supra*** concerned the return day of a Rule Nisi which operated as an interim interdict calling upon the Respondent to show cause, inter alia, why pending the final determination of an action to be instituted by the Applicant in the Magistrate's Court, the Second Respondent should not be ordered to pay all further amounts which are due to the First Respondent in terms of a consent paper to the Applicant's Uitenhage attorneys and why the Respondent should not be restrained from amending the terms of paragraph 4 of the said Consent paper.

[27] The Rule also requires the First Respondent to pay the nett proceeds of the sale of certain fixed property to the Applicant's Attorneys in the event of her selling it. In the present application deals with the preservation of an amount of money which was deposited into the First Respondent's account pending the institution of an action to recover same.

The case did not involve stolen money or money fraudulently obtained and deposited into an account sought to be preserved as in the present case.

Mr. Anand-Nepaul again referred to the case of **First National Bank SA Ltd v Perry NO and Others, *supra*** at 967 paragraph 60 where the following is stated :

> **"It might seem a simple thing to recover stolen money from one found in possession of it but the**

> **matter is complicated by the rule in our law an inevitable rule, it seems to me, flowing from physical reality that once money is mixed with other money without the owner's consent then ownership passes by operation of law.**"

[28] Mr. Anand-Nepaul then submits that this judgment supports his earlier submission that what he was dealing with here when one analyses the First Respondent's bank account, are mixed funds and there is nothing on the papers before Court for a finding that the money sought to be interdicted derive exclusively from or are earmarked or constitute a fund for the Applicant's benefit. He then refers to paragraph 17 where the Judge stated the following :

> "**If we had been dealing with identifiable and identified bank notes, the matter would have been simple. Then the owner could have his claim on ownership which, being a real right which avails against a will or could be asserted against a party found in possession, even if the possessor had acquired the notes in good faith, the action is not delictual."**

In the same paragraph 17 of the same case he refers to the following passage :

> "**If the possessor parts with possession in good faith before gaining knowledge of the owner's title he escapes liability: Leo and Company v Williams 1906 TS 554. But if he in bad faith, parts with**

> **possession after gaining such knowledge, he is liable for the value of the owner's property: Aspeling NO v Joubert 1919 AD 167 at 171".**

[29] Mr. Anand-Nepaul pointed out that in the affidavit of the First Respondent the First Respondent explained how he came to be in possession of these cheques, what he did with them and what happened thereafter. He submits that what is clear is that the banking account of the First Respondent and the monies deposited into and withdrawn from it all occurred in the normal course of trading. He submits that this is clear from the bank statements which are attached to the Answering Affidavit and the Applicant has not put up any prima facie evidence to gainsay the contents of the bank statement. Mr. Quinlan has already pointed out that the bank statements are not properly authenticated and that they are not in an admissible form. Furthermore this defence has not been raised on the First Respondent's Answering Affidavit. It was raised for the first time in Court.

[30] All the paragraphs referred to by Mr. Anand-Nepaul in the **First National Bank** case above were, uttered by the Supreme Court of Appeal when it was dealing with the enrichment claim against the Nedbank in that action. It is also clear as Mr. Quinlan submitted that Mr. Anan-Nepaul misconstrued the Supreme Court of Appeal case **The First National Bank v Perry, *supra*.** The submission is that the First Respondent's bank account was operated in the normal course of

trading, that the First Respondent gave value of the cheques and whether the First Respondent was aware that the cheques were stolen are all irrelevant. All these issues are matters to be dealt with in the main action for trial. All the Applicant had to do was to trace the stolen money into an identifiable fund of money made in the account which the Applicant has done and the Trial Court will decide the rest.

[31] Mr. Anand-Nepaul also raised the question of whether the First Respondent has been enriched. Mr. Anand-Nepaul's argument fails to appreciate that in that part of the case the **First National Bank v Perry, *supra*,** the Court was not dealing with the application similar to the application before Court. It was dealing with another aspect of the matter and there was an exception to the Particulars of Claim and the Court also dealt with the main action. The Applicant does not have to show that the First Respondent has been enriched at this stage. It is clear from the Particulars of Claim which have been issued that the claim by the Applicant herein in those Particulars of Claim is based on enrichment. A copy of these Particulars of Claim is annexed to the Applicant's Heads of Argument.

[32] In support of an argument that the applicant must also establish a well-grounded apprehension of irreparable harm if no interdict is granted, Mr. Anand-Nepaul referred to the following passage in **Stern and Ruskin NO v Appleson, *supra* :**

> **"The claims now under consideration being neither vindicatory nor quasi-vindicatory the Applicants cannot obtain an interdict unless they prove in addition to a *prima facie* case an actual or well-grounded apprehension of irreparable loss if no interdict is granted. In the case of vindicatory or quasi-vindicatory claims, this is presumed until the contrary is shown. In the case of all other claims it must be established by the Applicant for the interdict as an objective fact. It is not sufficient to say that the Applicant himself bona fide fears such loss.**
>
> **The present application being *quasi-vindicatory* the well-grounded apprehension of irreparable loss is presumed until the contrary is shown. It need not be established by the Applicant."**

[33] The submission on behalf of the First Respondent that the application is not vindicatory nor ***quasi-vindicatory*** is entirely incorrect in law. This is indeed a ***quasi-vindicatory*** application. Mr. Quinlan's explanation that it is a ***quasi-vindicatory*** because the Applicant is part of the money that was stolen from the Applicant so it is vindicatory and the Applicant is saying that it is its money i.e. ***quasi-vindicatory*** i.e partly vindicated because one cannot own that money in that bank

account so therefore it is ***quasi-vindicatory*****.** (See **Fedsure Life Assurance**, ***supra*** at paras 33 and 40)***.***

[34] The test for an interim interdict is well-established and it is trite as has been referred to earlier on in this judgment. And that is all the Applicant has to satisfy in order to succeed in this case. Perhaps it would be convenient to repeat the test herein. To obtain an interim interdict the Applicant need only establish a ***prima facie*** right though open to some doubt and Mr. Quinlan submitted, correctly in my view, that in the present circumstances the Applicant need not allege or establish elements such as well-grounded apprehension of irreparable loss or that it has no other satisfactory remedy in the light of the decision of **Fedlife Assurance v Worldwide African Investment Holdings, *supra*.** In the light of the above the argument by Mr. Anand-Nepaul that the Applicant has not demonstrated a well-grounded apprehension of irreparable loss if no interdict is granted is misplaced.

[35] The First Defendant cannot be allowed to rely on the defence raised for the first time in the Heads of Argument. The main defence of the Respondent on the Answering Affidavit is that referred to in paragraph 48 of the Answering Affidavit. This has been set out in full in paragraph 10 of this judgment. It would appear as Mr. Quinlan pointed out that there is nothing said in the opposing affidavit about the mixed funds, the withdrawals from the said bank statements of the money in question. The defence raised by the First Respondent in paragraph 48

of the Answering Affidavit has been adequately dealt with in this judgment.

[36] The issue therefore in this case is whether the Applicant has in fact established a prima facie case in the matter to enable the Court to exercise its discretion in favour of confirming the Rule. In my view taking into consideration all the material placed before me, I am satisfied that the Applicant has made out a case for the confirmation of the Rule in this matter.

[37] Although Mr. Quinlan did not apply for the amendment of the amounts reflected in paragraphs 2(a)(i) and 2(a)(ii) of the interim order i.e. R256,285.31, it would not serve any purpose to confirm the rule in its present form. Evidence established that the total amount of cheques stolen from the Applicant and deposited into the account of the First Respondent is R732,774.32. It is therefore necessary to amend paragraphs 2(a)(i) and 2(a)(ii) of the interim order to reflect the amounts of R732,774.32 wherever the amounts of R256,285.31 appears in these two paragraphs. These paragraphs are amended accordingly to reflect amounts of R732,774.32 . The interim order dated 29 October 2008 is amended accordingly.

For the reasons given, the Rule should be confirmed and there is no reason why the First Respondent should not be ordered to pay the Applicant's costs.

In the result I make the following order :

1. The Rule as amended is confirmed with costs.

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**SISHI, J.**

**Judge of the High Court**

**KwaZulu-Natal, Durban**

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| Date of hearing | : | 25 March 2009 |
| Date of Judgment | : | 5 June 2009 |
| Applicant's Attorneys | : | Shepstone & Wylie<br>Scotswood<br>35 Aliwal Street<br>DURBAN |
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