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**OFFICE OF THE CHIEF JUSTICE  
IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE DIVISION, CAPE TOWN)**

**CASE NO: 16881/2022**

In the matter between:

**ROTA INVESTMENTS CC**

**Applicant**

**and**

**FULL SCORE TRADING 131 CC**

**First respondent**

**TERRENCE CHARLES CLACKETT**

**Second respondent**

**ANTHONY PATRICK STAFFEN**

**Third respondent**

**ASHERSONS ATTORNEYS**

**Fourth respondent**

**DE KLERK & VAN GEND ATTORNEYS**

**Fifth respondent**

**REGISTRAR OF DEEDS, CAPE TOWN**

**Sixth respondent**

**JUDGMENT DELIVERED ON THIS 26<sup>TH</sup> DAY OF APRIL 2023**

## Background to the application

1. The applicant ("**Rota**") conducts business as a credit provider. It has one member, a Mr Botha. In November 2021 a Mr Keating contacted Mr Botha. Mr Keating said that he and the third respondent, a Mr Staffen, were directors of Armour Group (Pty) Ltd ("**Armour**"). Mr Keating also explained that he, Mr Staffen and the second respondent, a Mr Clackett, were directors of AJH Cooling Cape (Pty) Ltd ("**AJH**"). Armour imports air-conditioning and refrigeration equipment which it sells to a wholesalers; AJH is one such wholesaler.
2. Mr Keating told Mr Botha that Armour and AJH required bridging finance of R2,7 million for three months. He showed Mr Botha purchase orders and related documentation. Mr Botha said that Rota would consider an application for finance if Rota could register a bond over an unencumbered property as security.
3. That led Mr Keating to introduce Mr Botha to Mr Keating's attorney, a Mr Youngman. Mr Youngman told Mr Botha that he and Keating were members of Sibenti Business Enterprises CC ("**Sibenti**"). Sibenti, said Mr Youngman, owned an unencumbered property, erf 1[...] Albertville, Extension [...], Gauteng ("**the Albertville property**").
4. On 25 October 2021 Mr Youngman provided Mr Botha with a document which appears to be a CIPC Disclosure Certificate. The certificate showed that Sibenti had been in business since May 2001. Its registered address and postal address were in Bethal and Witbank respectively (though in 2006 Witbank was renamed Emalahleni). Its auditor had resigned. The fields showing the date of its auditor's appointment, resignation and email address were empty. Its members were Mr Keating (with an interest of 1%, appointed on 1 February 2021, and an address in West Beach, Cape Town Mr Youngman (98%, 4 March 2020, Sunning Dale, Cape Town) and a Ms Claire Elizabeth Youngman (1%, 1 October 2021, the same Sunning Dale address as Mr Youngman). It did not show previous members.

5. On 18 November 2021 Mr Botha instructed attorneys to conduct a deeds office search of the Albertville property. The search showed that the Albertville property was last sold on 30 June 2008 at a price of R 1,76 million, a registration date of 26 November 2010, and that Sibenti was owner.

6. The search also showed endorsements on account of four bonds. The endorsement entries are curious. The first reflects next to the bond number, under a column headed "*Institution*", "*FORMERLY PARK*", the second under that column "*FORMERLY PARK1508 [PARK] NOW 1508*". The registration date for the first and second is shown as 1 January 1900. The third and fourth show Sibenti under the "*Institution*" column. The third was registered on 3 September 2020 and the fourth on 19 October 2020. Mr Botha indeed alleges that the property appeared to be encumbered.

#### The advance and the contracts

7. Undeterred, over December 2021 – February 2022 Rota advanced a total of some R2,7 million to Armour. Rota did so in terms of a letter dated 7 December 2021 and headed "*Pre-Agreement on Advance of R806 000*" addressed to AJH, and in terms of two so-called factoring agreements between Rota and Armour dated 8 December 2021 and 4 February 2021 respectively.

8. Mr Botha authorised a Mr Hardiman to sign the first factoring agreement for Rota; on 8 December 2021 Mr Hardiman did so. Mr Keating signed for Armour on the same day. Also on 8 December 2021, Sibenti executed a suretyship in respect of the obligations of Armour to Rota. The second factoring agreement appears to be signed by Mr Botha for Rota and Mr Keating for Armour on 9 February 2022.

9. Rota and Armour are parties to the so-called factoring agreements. The so-called factoring agreements identify Armour as borrower, and AJH as the debtor. They provide

for AJH to repay all outstanding amounts to Rota. They go on to stipulate that both Armour and AJH are jointly and severally liable to repay. They set no limit to the amount that might be advanced in terms of them, nor how that might be determined, and no time for repayment of amounts advanced. They stipulate *“Once [Rota is] satisfied with the documentation provided, the agreed amounts will be advanced to the Borrower within 1 – 2 business days”*.

10. They provide that *“[Armour] will be responsible for following up payments as per the normal course of business and the lenders will only contact the debtors directly in the case of non-payment of agreed to terms, or any other concerns around recovery of monies owed”*. They do not provide for a cession of debtors to Rota. It is for this reason that the so-called factoring agreements appear to be factoring agreements in name only. Rota indeed alleges that the amounts advanced are loans repayable by Armour.

11. Both so-called factoring agreements provide that *“By this agreement and your signature, the borrower/ director/s consent to personal surety in lieu of any amounts owed to [Rota] to ensure the return of the advance fees in the case of non-payment by [AJH]”*. Both agreements appear to be signed only once, and only by Mr Keating, above a dotted line under which is printed *“Armour Group Africa”*.

12. The first so-called factoring agreement provides that *“A bond free property will be utilized as additional security for these transactions”*, the second that *“A bond free property [the Albertville property] will be utilized as additional security for these transactions”* (underlining added).

13. Though dated 7 December 2021 by Rota, the letter and a *“Quotation on Bridging finance advance of R806 000”* which is annexure A to the letter appear to have been counter-signed by Mr Keating and Mr Staffen on 9 December 2021. The letter confirms that AJH has applied for an advance of R806 000 *“against the agreed factoring agreement as per the Main-Agreement and Factoring Agreement”*. The letter also sets out the terms of what it refers to as a *“Pre-agreement”*, and incorporates the quotation.

Those terms are that Rota would advance the R806 000 for three months at a “*fee for the 3 months period @ R1.33 per R1000/ day [Total:] R102 392*” and a document fee of R2 000. On the advance of R806 000 that was at an annual rate of the order of 62%. Though the letter refers to a “*Main-Agreement*”, Rota did not adduce one.

#### Events leading to the application

14. In January 2022 Rota registered a bond over the Albertville property. In March 2022 Armour sought to repay Rota R1 090 000. Mr Keating arranged for Armour to repay into Mr Youngman’s trust account. Mr Youngman paid only R197 355 to Rota. At that stage total advances and interest were R2 706 000.

15. In April 2022 it transpired that the Albertville property had previously been owned by the City of Johannesburg (“**the City**”). The City told Rota that the City intended to apply for an order that the Albertville property revert to the City. Mr Botha alleges that he was shocked. Mr Keating and Mr Youngman provided reassurances that the City had no claim to the property, but Mr Botha was not convinced of that.

16. In August 2022 the City applied, in the South Gauteng division, for an order that ownership of the Albertville property revert to it. The City cited Rota, as bond holder. Rota has opposed. The case does not appear to have been concluded. Rota attached only the notice of motion to its founding affidavit. I can only infer that Rota has opposed because it believes there are grounds upon which the application can be opposed.

17. By June 2022 AJH had made no further payments. On 9 June 2022 Rota sent Armour a demand in terms of section 345 of the old Companies Act, for repayment of all amounts advanced. On 8 July 2022 the 21-day period for repayment would have expired. Also in July 2022, Rota made contact with Messrs Keating, Clackett and Staffen regarding repayment.

18. In August 2022 Rota found out that the first respondent, Full Score Trading 131 (Pty) Ltd (“**Full Score**”) was going to sell a property owned by it in Stikland, Cape Town. Full Score’s directors are Messrs Staffen and Clackett. Full Score used to be a close corporation, with membership split 80% - 20% between Messrs Staffen and Clackett respectively. On 5 October 2021 Full Score became a company. All three of Messrs Staffen, Keating and Clackett became directors. Mr Keating resigned as director on 1 September 2022. Upon learning of the Stikland property sale, Mr Botha asked Mr Staffen if Full Score would be prepared to pay the nett proceeds of the sale to Rota to reduce the indebtedness of Armour. Mr Staffen said not.

19. In late September 2022 Rota found out that: back in October 2021, (1) a company called Imperial Cleaning and Forwarding (Pty) Ltd had obtained a default judgment against AJH; (2) a company called Merchant Capital Advisory Services (Pty) Ltd had issued summons against Armour – Rota initially thought for R3 million in the founding affidavit. Corrected in answer, in reply Rota conceded the correct amount was R1,3 million. Rota – also in late September 2022 – found out that (3) during February 2022 AJH, Mr Keating and Mr Staffen had agreed to pay R2,3 million to a Mr Schultz, and (4) in April 2022 a company called Colcab (Pty) Ltd had applied to wind up AJH. On 3 October 2022 Rota found out (5) that Full Score had sold a second property in Stikland.

#### Ex parte order

20. On 6 October 2022 Rota applied urgently, and *ex parte*, for the issue of a rule *nisi*, with immediate interim effect, (1) interdicting Full Score from terminating its mandate to two firms of conveyancers to register transfer of the two sold Stikland properties from Full Score to purchasers not cited; (2) interdicting the conveyancers from paying the proceeds of the sales to Full Score, pending determination of an action Rota would institute against Mr Clackett and Mr Staffen “*for the payment of R3 498 321,00 plus the agreed interest thereon arising from the Factoring Agreements which were concluded between [Rota] and [Armour] during December 2021 and*

February 2022”; directing the conveyancers to hold “*the said balance of the purchase price in an interest bearing account pending the resolution of the said action*”.

21. On 7 October 2022 the order sought was granted. The return day: 28 October 2022. The court insisted upon amendment of the draft order expressly to permit the respondents to approach the court on notice of just 48 hours to reconsider.

#### Lapse of the rule *nisi*

22. The rule was extended to 4 November 2022. The court declined to hear the matter for want of urgency on that day, and it was enrolled on the semi-urgent roll, on 17 April 2023. On 4 November 2022, the rule was extended to 17 April 2023. The registrar however delivered a notice of set down not for 17 April 2023, but for 20 April 2023. That is when and how the application has come before me.

23. On 17 April 2023 the rule *nisi* was not extended. The rule *nisi* therefore has lapsed. Rule 27(4) permits a court to revive a rule “*discharged by default of appearance by the applicant*”. *Ex parte S & U TV Services (Pty) Ltd: In re S & U TV Services (Pty) Ltd (In Provisional Liquidation)* held that rule 27(4) applies where an applicant fails to appear and there has been “*some oversight or misunderstanding*” of the nature of an “*understandable and excusable error*”, and revival is “*almost immediately after the discharge of the rule, ie while matters are still essentially res integra.*”<sup>1</sup> Regardless of how long or short the lapse, the court should however be satisfied that matters “*are still essentially res integra*” – that is, where the underlying facts probably remain untouched and as they were at the time of the lapse.<sup>2</sup>

24. *Williams v Landmark Properties* held that rule 27(4) does not apply where a rule *nisi* lapses by virtue of the fulfilment of a resolute condition to which the rule *nisi* is subject.<sup>3</sup> The unfulfilled resolute condition was a provision that the applicant institute

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<sup>1</sup> 1990 (4) SA 88 (W) at 90 D/E – E/F and 91A/B.

<sup>2</sup> At 91B – D.

<sup>3</sup> 1998 (2) SA 582 (W) at 586G – H.

an action within 30 days.<sup>4</sup> It was not a case of non-appearance on the return day. The case is best construed as authority that rule 27(4) does not apply where a rule *nisi* lapses by virtue of fulfilment of a resolute condition other than non-appearance on the date set in the rule *nisi*.

25. In this case I am satisfied that the lapse was on account of an understandable error. No party had realised the lapse until the hearing on 20 April 2023. Nothing has happened in consequence of the lapse. Things remain as they were before. The parties all seek resolution of the case on its merits. But for my conclusion on the merits, which makes revival unnecessary, I would have revived the lapsed rule *nisi*. In the light of my conclusion on the merits it is however unnecessary to do so.

#### The parties' cases

26. What is the claim of Rota against Full Score? Rota alleges, and its counsel underscored in argument, the common directorships as between Armour, AJH and Full Score. And, that Full Score owns the (same) property that is the registered address of both Armour and Full Score, and another property that is the registered address of AJH.

27. The founding affidavit alleges that *“a director of a company may be declared diligent [sic] under the Companies Act, 71 of 2008 (as amended) in certain circumstances”*. *“Diligent”* is obviously a typographic mistake for *“delinquent”*. Directors, Rota explains, can be held personally liable for carrying on the business of a company recklessly, with gross negligence or to defraud. The crux of Rota’s case: *“In the light of the above and particularly the reluctance by [Mr Clackett] and [Mr Staffen] to take responsibility for the repayment of the bridging finance loan and the interest which has accrued thereon ... I wish to prevent them from receiving any proceeds from the sale of any property owned by [Full Score] pending the resolution of an action which [Rota] intends instituting against [Clackett] and [Staffen].”* And, that as both Mr Clackett and Mr Staffen *“were, directly and indirectly, involved with [Armour] when the bridging finance*

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<sup>4</sup> *Supra* at 584F.



*loan was paid to it, [Rota] reasonably expected them to make whatever proceeds were available from the sale of this property to reduce the said loan amount.”*

28. In answer, Full Score alleges that Mr Keating was on an unauthorised fraudulent frolic, aided or abetted by Mr Youngman – which included the misappropriation of funds advanced by Rota to Armour; Mr Staffen’s signature on the first factoring agreement was photo-shopped; after receipt of Rota’s demand, Armour investigated, and laid a charge against Mr Keating, who has been arrested for fraud. The reply, confirmed by Mr Keating, adduces resolutions and documents to vouch allegations that Mr Staffen knew what Mr Keating was up to, acceded in it, and benefited from it. But, Rota cannot rely on untested allegations in reply.

29. Rota alleges its *prima facie* right lies in that it was induced to loan and advance money to Armour “*based on the express undertaking by its directors, which included [Staffen], that [Armour] would repay the loan amount*”, and that Mr Keating, Mr Clackett and Mr Staffen “*knew or should have known that [Armour] and the other companies were in financial trouble and that Armour would not be able to repay the loan to [Rota]*”. The well grounded harm is allegedly that Rota’s security “*will be brought into question*”.

30. Rota’s claim interim to which the order was obtained was to be against Messrs Clackett and Staffen “*for the payment of R3 498 321,00 plus the agreed interest thereon arising from the Factoring Agreements which were concluded between [Rota] and [Armour] during December 2021 and February 2022*”. Rota did not adopt the salutary practice of attaching the particulars of claim in its anticipated action to the notice of motion. Rota’s practice note however advised that it had instituted an action. The basis upon which it advances the action is relevant to determination of the application for an interdict. Rota provided the pleadings to me.

31. The action is not only against Messrs Clackett and Staffen. It also cites Armour, AJH, Full Score and Mr Keating as defendants. The particulars plead the common directorships, the conclusion of the so-called factoring agreements, the loan of amounts

totalling R2 706 000, that the businesses of Armour and AJH (but not Full Score) were conducted fraudulently, alternatively recklessly, alternatively grossly negligently so as to defraud creditors when the so-called factoring agreements were concluded, in that Armour and AJH (but not Full Score) were insolvent and incurred debts to Rota which could not be repaid, that Messrs Staffen, Clackett and Keating dishonestly failed to disclose the true position, that Armour repaid only R197 355 in March 2022. The particulars request orders – against only Messrs Staffen, Clackett and Keating (and not Full Score): that they be declared jointly and severally liable for the debts of Armour to Rota, and to pay R3 653 288 with interest “as agreed in the ... factoring agreements”.

### Approach to the papers

32. This application is not to preserve assets of Messrs Staffen, Clackett and Keating, the action-defendants. Rota seeks to preserve a fund established by the sale of Full Score’s property. While Full Score is cited as a defendant in the action, no allegations are made against it, and no relief is sought against it. Rota’s rights (if any) to proceed against Full Score’s assets will not be revisited in the anticipated action. Therefore, the rule I am requested to (revive and) confirm would grant final relief of a limited duration.<sup>5</sup> There are two consequences: firstly, the rule in *Plascon-Evans* applies.<sup>6</sup> Any material disputes of fact are resolved by the evidence of the respondents, unless it is implausible.<sup>7</sup> Secondly, Rota must show (a) a clear right; (b) actual or reasonably apprehended injury; and (c) no alternative remedy – insofar as the ordinary interdictory requisites apply.<sup>8</sup>

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<sup>5</sup> *Cape Tex Eng. Works (Pty) Ltd v S.A.B. Lines Ltd* 1968 (2) SA 528 (C) at 530, *MV Snow Delta Serva Ship Ltd v Discount Tonnage Ltd* 2000 (4) SA 746 (SCA) paragraph 6 at 751F – H/I. In *Knox d’Arcy Ltd v Jamieson* 1996 (4) SA 348 (A) (“**Knox D’Arcy AD**”) at 357C/D the AD regarded the order as appealable because its cause of action was different to the anticipated action and the procedure might introduce new parties.

<sup>6</sup> *Knox D’Arcy WLD* at 604E – G.

<sup>7</sup> *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A), *Grancy Property Ltd v Manala* 2015 (3) SA 313 (SCA) paragraphs 33 and 34 at 325E – 326A.

<sup>8</sup> *Knox D’Arcy AD* at 373D.

### Anti-dissipation interdicts

33. In English law, a plaintiff can apply for a Mareva injunction against a prospective defendant to freeze the prospective defendant's assets, safeguarding the coming claim.<sup>9</sup> South African law has long ago received and developed the procedure, but does not recognise the claim and so rejects the name.<sup>10</sup> A similar species of interdict, but granted upon different requisites, has long been recognised.<sup>11</sup> The seminal judgment is that of EM Grosskopf JA in the (then) AD, in *Knox D'Arcy v Jamieson*; it must be read together with the judgment of Stegmann J *a quo*. EM Grosskopf JA doubted the species should be called an anti-dissipation interdict, as was suggested by Stegmann J.<sup>12</sup> But, that is the name that has stuck.

34. There is seldom justification to compel a respondent to keep money to pay disputed claims.<sup>13</sup> For a court to order that, an applicant must allege and prove that the respondent is dealing with its assets with the intention of defeating the claim.<sup>14</sup> An exception is where the plaintiff has a vindicatory or quasi-vindicatory claim – then, that intention need not be shown.<sup>15</sup> A quasi-vindicatory claim “*is one in which an applicant claims delivery of specific property under some legal right of possession*”.<sup>16</sup> An applicant may also interdict payment of money which is “*identifiable with or earmarked as a*

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<sup>9</sup> *Knox D'Arcy Ltd v Jamieson* 1994 (3) SA 700 (W), referring to *Mareva Compania Naviera SA v International Bulk Carriers SA*; *The Mareva* [1980] 1 All ER 213 (CA).

<sup>10</sup> *Knox D'Arcy AD* at 3711 – 372A.

<sup>11</sup> *Knox D'Arcy AD* at 372C.

<sup>12</sup> *Knox D'Arcy AD* at 372B – C.

<sup>13</sup> *Knox D'Arcy AD* at 372H – I.

<sup>14</sup> *Knox D'Arcy AD* at 372F – G.

<sup>15</sup> *Knox D'Arcy AD* at 371G – I, *Fey NO v Van der Westhuizen* 2005 (2) SA 236 (C) at 249D – E. Nor need the absence of an alternative remedy be shown: *Fedsure Life Assurance Co Ltd v Worldwide African Investment Holdings (Pty) Ltd* 2003 (3) SA 268 (W) paragraph 28 at 278D/E – F.

<sup>16</sup> *Fey NO v Van der Westhuizen supra* at 249E – G, referring to J Cane “Prejudgment Mareva-type Interdicts in South African Law” SALJ (1997) volume 114 page 77.

*particular fund to which [the applicant] claims to be entitled*” in pursuit of a vindicatory or quasi-vindicatory claim.<sup>17</sup>

35. As to the role of the ordinary interdictory requisites: in *Knox D’Arcy EM Grosskopf JA* remarked that “*The interdict with which we are dealing is sui generis. It is either available or it is not.*”<sup>18</sup> He so remarked in evaluating the requisite of absence of an alternative remedy, and concluding that it was met.<sup>19</sup> The necessity to show an intention to render a claim nugatory therefore is something of a special threshold requisite. The other requisites to come into play if it is met. Whether the applicant’s claim of right will be revisited in the anticipated action would determine which ordinary interdictory requisites come into play and how.<sup>20</sup>

36. Rota’s counsel referred to *Nieuwoudt v Maswabi NO*.<sup>21</sup> In that case a construction sub-contractor had not been paid by the main contractor, a joint venture. The main contractor had historically received payment from the employer, the Free State Government. The main contractor had failed to pay over what was due to the sub-contractor, paying its employees and other subcontractors instead. The sub-contractor was granted an interdict to prohibit payment of 1% of the contract value remaining unpaid by the employer to the main contractor, pending determination of the sub-contractor’s claim against the contractor.<sup>22</sup>

37. In *Nieuwoudt v Maswabi NO* the court found that the unpaid balance constituted a progress payment, and therefore an identifiable fund to which the sub-contractor could lay claim.<sup>23</sup> The prospective claim was not vindicatory or quasi-vindicatory.<sup>24</sup> Although it

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<sup>17</sup> *Fedsure Life Assurance Co Ltd v Worldwide African Investment Holdings (Pty) Ltd supra* paragraph 30 at 278H/I.

<sup>18</sup> *Knox D’Arcy AD* at 373D.

<sup>19</sup> *Knox D’Arcy AD*

<sup>20</sup> Footnote 7 above.

<sup>21</sup> 2002 (6) SA 96 (O).

<sup>22</sup> *Nieuwoudt v Maswabi NO supra* paragraphs 3 and 4 at 99C/D – 100E.

<sup>23</sup> *Nieuwoudt v Maswabi NO supra* paragraph 7 at 103A/B – C.

referred to *Knox D'Arcy AD*, the court did not single out and discuss whether the intention requirement was fulfilled.

38. I asked Rota's counsel whether he had noted up *Nieuwoudt v Maswabi NO* or not. He said not. It transpires that *Fedsure Life Assurance Co Ltd v Worldwide African Investment Holdings (Pty) Ltd* held that "*The learned Judge in Nieuwoudt v Maswabi NO ... appears with respect to have overlooked the passage in Knox D'Arcy [requiring intention to defeat a claim] ... and to have confused the remedy considered in that case with a vindicatory or quasi-vindicatory interdict.*"<sup>25</sup> I agree.

#### No interdict

39. Judgment in favour of Rota in its action will give Rota no right to Full Score's money. Rota does not seek somehow to hold Full Score liable for the debts of Messrs Staffen, Clackett which its action would establish. There appears to be no basis to do so. Full Score has owned the Stikland properties since December 2002 and August 2010 respectively. Full Score's assets were not provided as security for Armour's transactions, as they might have been were Full Score involved in the business of AJH and Armour. Full Score did not benefit from the advances made by Rota.

40. Rota's claim in the action is not a vindicatory or quasi-vindicatory claim. Rota's counsel correctly so conceded. Rota cannot obtain an anti-dissipation interdict without alleging the requisite intention. Rota has not alleged that Full Score sold with the intention of defeating Rota's claim against Messrs Staffen, Clackett and Keating. Rota's case is merely that Full Score refused to apply to the sale proceeds to reduce Armour's indebtedness, when Rota had a "*reasonable expectation*" that Messrs Staffen and Clackett, as its directors, would enable it to do so. A reasonable expectation of payment does not a correlative claim make. There can be no intention to defeat a not-established claim. Also, the expectation was scarcely reasonable. Why should Full Score have

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<sup>24</sup> *Nieuwoudt v Maswabi NO supra* paragraph 7 at 102E.

<sup>25</sup> *Supra* paragraph 45 D – D/E.

discharged the obligation of Armour? Full Score is not surety for Armour. Its properties are not bonded to Rota. Mr Botha did not have any contact with Mr Staffen until July 2022; it is not clear whether he ever met Mr Clackett.

41. Further as to harm: a plaintiff cannot by the grant of an anti-dissipation order obtain security for its claim for which it did not contract.<sup>26</sup> Harm feared on account of imminent insolvency is therefore scarcely relevant. Rota's fear that its security is questionable would not be dispelled by the grant of the order. On alternative remedies: Rota has the bond over the Albertville property; Rota is opposing the City's application; Rota has taken action against Messrs Staffen, Clackett and Keating.

#### No oral evidence

42. Rota's counsel pointed out that there are disputes on the papers about whether Messrs Staffen and Clackett's conduct was fraudulent or not. On the strength of that, Rota's counsel submitted that if I were not to find for Rota, I should refer the application for oral evidence. It is correct that I cannot make findings about whether Messrs Staffen and Clackett's conduct was fraudulent or not. I need make no such findings to decide whether Rota can succeed. Save in exceptional cases an application to refer for oral evidence should be made prior to argument on the merits.<sup>27</sup> This was not an exceptional case.

#### Costs

43. The founding affidavit is full of sound and fury. Upon analysis it signifies no claim to the sale proceeds. The clamour conceals fundamental disconnects. The proceeds of the Full Score property sales have nothing to do with the claim made against Messrs Staffen, Clackett and Keating as Armour directors.

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<sup>26</sup> *Knox D'Arcy Ltd AD* at 372B: "The interdict prevents the respondent from dealing freely with his assets but grants the applicant no preferential rights over those assets."

<sup>27</sup> *De Reszke v Maras* 2006 (1) SA 401 (C) paragraphs 33 at 413F/G – H.

44. I agree with the respondents' submissions that Rota should not have proceeded *ex parte*. Rota alleged it brought the application *ex parte* because Rota feared that if it gave notice to Full Score, Full Score would terminate the mandate of the conveyancers and proceed with transfer anyway. It seems improbable, as Full Score alleges, that Full Score could terminate the mandate of two firms of conveyancers mid-stream in attending the imminent transfers – and then appoint new conveyancers seamlessly so as to proceed with the transfer anyway.

45. In proceeding *ex parte* and urgently Rota placed its case before the urgent court without opposition, and obtained an order to which it was not entitled – the harm of which Full Score has suffered now for almost six months. The order moreover was overbroad: it interdicted payment of the full proceeds from the sales, not only the proceeds to the extent of the anticipated claim. The order caused severe prejudice to Full Score.<sup>28</sup> An adverse costs award on the attorney and client scale is warranted.

Order

46. The application is dismissed with costs on the scale as between attorney and client.

**PATRICK, AJ**

DATE OF HEARING: 20 APRIL 2023

DATE OF JUDGEMNT: 26 APRIL 2023

COUNSEL FOR APPLICANT:

ADV WJ VAN DER MERWE

INSTRUCTED BY:

JOHN SMITH ATTORNEYS

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<sup>28</sup> *Knox D'Arcy AD* at 379F - H.

PER: JOHN SMITH

COUNSEL FOR 1<sup>ST</sup> – 3<sup>RD</sup> RESPONDENTS: ADV M VAN DER BERG

INSTRUCTED BY:

ASHERSONS ATTORNEYS

PER: ANDREW GOLDSCHMIDT