

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 39727/2015

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE

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SIGNATURE

In the matter between:

XANDER RESOURCES PROPRIETARY LTD

Applicant

And

TRANSNET SOC LIMITED

First Respondent

**SEBILO RESOURCES PROPRIETARY LTD
(IN BUSINESS RESCUE)**

Second Respondent

ZAHEER CASSIM N.O.

Third Respondent

**NOBLE RESOURCES INTERNATIONAL
PTE LIMITED**

Fourth Respondent

J U D G M E N T

KEIGHTLEY, J:

- [1] For ease of reference I refer to the parties in this matter as follows: I refer to the applicant as “Xander”, the first respondent as “Transnet”, the second respondent as “Sebilo” and the fourth respondent as “Noble”. The third respondent is cited in his representative capacity following Sebilo being placed in business rescue. As Sebilo played no active role in these proceedings, I need not refer to the third respondent.
- [2] The main issue in dispute concerns the competing claims of Xander and Noble to ownership of a certain stockpile of manganese ore (“the ore”). The ore is currently stockpiled at Transnet’s Port Elizabeth Port in two identified Bins.
- [3] In the main application before me, Xander sought an order declaring that it is the owner of the ore. Noble opposed this on various grounds. One of these was that Noble claims that Sebilo sold and transferred ownership of the ore to Noble prior to the transaction upon which Xander basis its claim for ownership.
- [4] The dispute began as an urgent application launched by Xander on 12 November 2015. Xander was granted interim relief in the form of an order restraining second to fourth respondents from moving, alienating or similarly dealing with the ore pending the finalisation of what became the application before me.
- [5] It is necessary to record at this point that Xander originally also sought urgent relief against Transnet. However, it did not pursue that relief when the matter was heard. Transnet actively opposed the relief sought against it. The

urgent court reserved the question of Transnet's costs for determination in the main application. Transnet's continued participation in the matter to date has been restricted to pursuing its order as to costs. I will deal with this issue later.

[6] First, it is necessary to briefly set out what transpired at the hearing before me as regards the main issue.

[7] From the submissions made by counsel for both Xander and Noble it became increasingly clear to me that there were disputes of fact on critical issues which simply could not be determined on the papers. Indeed, counsel for both parties accepted that this was so. The question then became whether the matter should be referred to trial or oral evidence, or, as counsel for Noble submitted, whether I should proceed to consider the matter on the basis of Noble's version in accordance with the principles laid down in *Plascon Evans*.

[8] Perhaps anticipating that there might be material disputes of fact, Xander submitted in its replying affidavit that if the court was unable to determine the issues on the papers, the question of Xander's ownership should be referred to oral evidence or trial.

[9] Mr Graves, for Noble, submitted that Xander had elected to proceed on the basis of motion proceedings when it ought to have anticipated that the matter involved disputes of fact, and that a trial was the more appropriate course of action to follow. He contended that Xander should be held to its election. He also submitted that it was impermissible for Xander to seek a referral to oral evidence or trial only in its replying affidavit.

- [10] I considered Mr Graves' submissions in opposing Xander's request, in the alternative, to the matter being referred to oral evidence or to trial. I advised counsel at the hearing that I was not persuaded by those submissions. This matter began its life as an urgent application. It was in the interests of both Xander and Noble that their competing claims to ownership of the ore (the issue reserved by the urgent court for determination before me) should be determined as soon as possible. In these circumstances, I do not believe that Xander acted unreasonably in electing to proceed by way of application, rather than trial.
- [11] In addition, Xander based its claim for relief largely on documentation. In the normal course, this is a typical feature of application proceedings. It was only as the matter evolved, and particularly as the issues became clarified in the hearing before me that the extent of the factual disputes became starkly evident. It also became evident that Noble's own claim to ownership similarly was vulnerable to factual disputes.
- [12] In my view, the interests of justice require that all of the contested factual issues be ventilated before a court that has the benefit of hearing oral evidence and cross-examination.
- [13] There was a further issue between Xander and Noble regarding whether the matter ought properly be referred to oral evidence or to trial. Xander contended for the former, and Noble for the latter. I requested both parties to discuss the possibility of reaching consensus in this regard. Subsequent to the hearing I was advised that consensus had been reached, and that the parties had agreed that the matter be referred to trial.

- [14] As regards the main issue, I make the order set out at the end of the judgment under the heading “Order A”.
- [15] I turn now to consider the remaining issue, viz. that of Transnet’s costs.
- [16] Transnet submits that it ought to be entitled to its costs in that the relief sought in prayers 4 and 5 of the urgent notice of motion placed Transnet in an impossible position. This is because, if that relief had been granted, it would have obliged Transnet to act in breach of its contract with its customer, Sebilo. Furthermore, the order would have obliged Transnet to release the ore without any provision being made for payment to Transnet for the services it had rendered in respect of storage. Prayers 4 and 5 of the original notice of motion would have caused Transnet to lose its lien over the stockpile of ore.
- [17] Accordingly, Transnet contends that it was justified in opposing the urgent application insofar as prayers 4 and 5 were concerned. It points out that Xander subsequently abandoned this relief, indicating that its opposition was justifiable. In the circumstances, it says that Xander must pay its costs.
- [18] On the other hand, Xander submits that Transnet’s involvement in the urgent application could have been avoided if Transnet had made its position clear from the start. Xander says that Transnet did not squarely raise its real concerns in the correspondence preceding the institution of the urgent application. Had Transnet done so, Xander avers that it would not have included prayers 4 and 5 in the notice of motion.
- [19] In my view, Transnet is entitled to its costs. It was eminently reasonable for Transnet to oppose the relief sought in prayers 4 and 5. The only issue is

whether Transnet has itself to blame for not dealing with its concerns fully enough in the correspondence between Xander and Transnet prior to the launch of the urgent application.

[20] I do not believe that the blame should be placed at Transnet's door. It must be remembered that these were urgent proceedings, and time was of the essence. In those circumstances, issues often become clouded and are only clarified once the proceedings have progressed. This is particularly so in a matter like the present where Transnet was not a direct party to the dispute. Typically, letters fly between the various parties in the run-up to the case. There is no time for careful consideration of the finer issues involved.

[21] At the end of the day, Transnet was drawn into the proceedings as a party in circumstances where it was justified in filing opposing papers and becoming actively involved in the matter. Xander did not pursue the relief that Transnet opposed. To that extent, Transnet's opposition was successful.

[22] Accordingly, Transnet is entitled to its costs. In this regard, I make an order in the terms set out under the heading "Order B".

Order A

1. The relief claimed by the applicant in prayer 3 of its notice of motion dated 10 November 2015 and as between the applicant and the fourth respondent is referred to trial;
2. The applicant's notice of motion will stand as a simple summons and the applicant is to deliver its declaration within 20 days, whereafter the normal Uniform Rules relating to action proceedings will apply;

3. Pending the final determination of the relief sought by the applicant in prayer 3 of the notice of motion, the interdict in paragraph 2.1 as read with paragraph 3 of the order of Lamont J on 12 November 2015 will continue to apply;
4. The costs to date as between the applicant and the fourth respondent are to be in the cause.

Order B

1. The applicant is directed to pay the costs of the first respondent from inception of the application to the date of this order.

**R KEIGHTLEY
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Date Heard: 23 February 2016

Date of Judgment: 8 April 2016

Counsel for the Applicants: B M Gilbert

Instructed by: Hogan Lovells

Counsel for Respondent: N J Graves SC

Instructed by: Bowman Gilfillan

