REPUBLIC OF SOUTH AFRICA

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

CASE NO: **24615/2015**

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

_____ _____
Date: **WHG VAN DER LINDE**

In the matter between:

Edcar Rubber Liners CC (In Liquidation)	**First Applicant**
Surmany, Albert Ivan N.O.	**Second Applicant**
Buwa, Patrick Dumisani N.O.	**Third Applicant**
Cowin, Monica Gezina N.O.	**Fourth Applicant**
And	
Rema Tip Top Holdings SA (Pty) Ltd	**First Respondent**
John Davies Pipeline Services CC	**Second Respondent**
Marques, Miguel	**Third Respondent**
Davies, John Robert	**Fourth Respondent**
Problast (Pty) Ltd	**Fifth Respondent**

Judgement

Van der Linde, J:

Introduction

1) This is an application by the liquidators of an insolvent close corporation for an interim interdict to prevent the first respondent from using, or giving permission to others to use, an autoclave and boiler pending an action to determine their ownership. The liquidators assert ownership in their representative capacity, but the first respondent contends that it is the owner.[1]
2) An autoclave is an oven which is used for heating rubber to enable it to be moulded into shape. The boiler provides the heat.[2] The equipment is large and heavy, and can be moved only with extreme difficulty. It is attached to the surface on which it sits by bolts and cement, and to remove it would require destruction of the brick room within which it is located, a heavy duty crane, and an abnormal load truck. This particular autoclave and boiler combination has been at its present location since approximately 2009.[3]
3) The applicant applies not to attach[4] and remove the equipment, nor simply to attach it. It seeks merely to interdict its user, on the basis that this will expose the equipment to risk of destruction or, at least, to diminution in value. These aspects are disputed, the respondent asserting that the equipment is made of steel, does not wear out, was manufactured in 1975, and has been in use since then.[5]

[1] It also owns, it says, many other autoclaves and boilers at many other locations; answering affidavit page 169, paragraph 8.4.
[2] Answering affidavit, page 169, paragraphs 8.8 and 8.9.
[3] Answering affidavit, page 170, paragraphs 8.10 to 8.13.
[4] It is not an application for an attachment of goods pending a vindicatory action, as to which see SA Taxi Securitisation (Pty) Ltd v Chesane, 2010 (6) SA 557 (GSJ) at [6].
[5] Answering affidavit, page 178, paragraphs 38, 39.

A prima facie right: the test

4) But the discussion starts with earlier, around the disputed issue of ownership. Since the relief sought is interim the applicants need only establish a prima facie right, although open to doubt. More specifically, the applicants must show that on their version, together with the allegations of the respondents that they cannot dispute, they should obtain relief at the trial. If, having regard to the respondents contrary version and the inherent probabilities serious doubt is then cast on the applicants' case, the applicants cannot succeed.[6]

5) This tried and tested approach was significantly qualified by a full bench of this court in Ferreira v Levin, NO and Others; Vryenhoek and Others v Powell, NO and Others.[7] Ferreira, which received the imprimatur of the Constitutional Court,[8] materially lowered the bar set by Gool. The latter required that on the asserted case the applicant *"should"* obtain final relief at trial; the former requires only *"a"* prospect of success, albeit *"weak."*

6) The correct perspective, however, of these ostensibly dichotomous positions is, in my view, captured by Holmes, J (then) in Olympic Passenger Service (Pty) Ltd v Ramlagan,[9] approved by Holmes, JA in Erikson Motors (Welkom) Ltd v Protea Motors, Warrenton, and Another,[10]in turn followed by Ferreira, and approved by the Constitutional Court:

[6] Webster v Mitchell, 1948 (1) SA 1186 (W) at 11189, as qualified by Gool v Minister of Justice and Another, 1955 (2) SA 682 (C) at 688E.
[7] 1995 (2) SA 813 (W).
[8] South African Informal Traders Forum and Others v City of Johannesburg and Others, 2014 (4) SA 371 (CC) at [25].
[9] 1957 (2) 382 (D) at 383 D.
[10] 1973 (3) SA 685 (A) at 691.

"It thus appears that where the applicant's right is clear, and the other requisites are present, no difficulty presents itself about granting an interdict. At the other end of the scale, where his prospects of ultimate success are nil, obviously the Court will refuse an interdict. Between those two extremes fall the intermediate cases in which, on the papers as a whole, the applicants' prospects of ultimate success may range all the way from strong to weak. The expression 'prima facie established though open to some doubt' seems to me a brilliantly apt classification of these cases. In such cases, upon proof of a well-grounded apprehension of irreparable harm, and there being no adequate ordinary remedy, the Court may grant an interdict - it has a discretion, to be exercised judicially upon a consideration of all the facts. Usually this will resolve itself into a nice consideration of the prospects of success and the balance of convenience - the stronger the prospects of success, the less need for such balance to favour the applicant: the weaker the prospects of success, the greater the need for the balance of convenience to favour him. I need hardly add that by balance of convenience is meant the prejudice to the applicant if the interdict be refused, weighed against the prejudice to the respondent if it be granted."

7) The approach approved then by these authorities is that *"a prima facie right, though open to some doubt"* conveys that the strength of the right is allowed to fluctuate from strong to weak: if it is strong, the other requirements for an interim interdict may be weak; if it is weak, the other requirements for an interim interdict may be strong.

8) The perspective of the meaning of *"a prima facie right, although open to some doubt"*, as collected by Ferreira from Erikson Motors and Olympic Passenger Service and approved by the Constitutional Court, seems to me to render future reliance on

Webster and Gool otiose. Of course, the remedy remains *"an extraordinary remedy within the discretion of the Court,"* as Erikson Motors underscored,[11]but that is a description apt for the entire discretion-exercising process, not only the first element of it.

The applicants' case

9) The case mounted by the applicants is that Edcar concluded an oral agreement with Specialised Rubber Products (Pty) Ltd ("SRP") in terms of which it would borrow the equipment from SRP for two years to manufacture rubber linings. In terms of this agreement, if Edcar then purchased rubber worth R2m from SRP during the two years of the lease, Edcar would acquire ownership of the equipment.[12]

10) The witnesses relied on by the applicants are the two members of Edcar, De Bruin as to 30% and Marques as to 70%. The respondent argues that their versions are thoroughly unsatisfactory for a number of reasons, one of which is that the versions are inherently contradictory. De Bruin says in one place that the R2m was not achieved,[13]but Marques disputes this asserts that the purchase volume was in fact achieved.[14]In other places De Bruin alleges that the R2m mark was obtained.[15] His subsequent evidence at an insolvency enquiry was ambivalent.[16]

11) These two witnesses do not date their oral agreement. That is important, because one does not know then when the two year period commences running. It must have been concluded before September 2009, however, as that is when according to

[11] At 691.
[12] Founding affidavit, page 14, paragraphs 33.1.1 and 33.1.2.
[13] Op cit, page 12, paragraph 10.
[14] Op cit, page 13, paragraphs 5, 6.
[15] Op cit, page 18, paragraph 39.
[16] Op cit, page 31.

Marques, the business of SRP, including the agreement between the first applicant and SRP, was sold to the first respondent.[17]

12) And it is likely that the agreement was concluded in 2008, probably 29 October 2008, because that is the starting date for Marques' calculation of an aggregate of R2678262.48 purchases by 15 September, 2010.[18] This period is said to include the purchases of both SRP and, subsequent to the sale of the business to the first respondent, the latter.

13) The difficulty for the success of this version is that on 16 September 2009, SRP (the written agreement says *"Specialised Rubber and Industrial (Pty) Ltd"*, but that is probably a misnomer[19]) entered into a written agreement with the first respondent for the acquisition of this equipment.[20] This agreement, properly interpreted,[21]provides for the transfer of ownership of the equipment to the first respondent Remus on that date.

14) Since by 15 December 2009, which is a date after 16 September 2009, the first applicant had – on its own version – purchased only R1986925.85 worth of rubber from SRP,[22]the first applicant could not have acquired ownership before the written agreement in terms of which SRP sold the equipment and transferred ownership to the first respondent.[23]

15) The applicants' answer to this agreement is that the respondents' affidavits do not say when in terms of this agreement ownership passes. But in my view, as a matter

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[17] Op cit, page 13, paragrapg 4.
[18] Op cit, page 13, paragraphs 6,7.
[19] Op cit, page 14, paragraphs 30, 31.
[20] Answering affidavit, annexure SF 3, pages 184 and following.
[21] Clauses 3.1 to 3.3; 4.1; 4.5; 5.1; 5.1.1 to 5.1.4; and 6.1 .1 to 6.1.3.
[22] Founding affidavit, page 13, paragraph 6.
[23] Whether there lies a breach of contract action by the first applicant against the first respondent, as successor to SRP, is another matter, but it need not detain the present enquiry.

of law, such evidence was not only unnecessary but probably inadmissible as offending the parol evidence rule. The written agreement is the legal constitution of the parties' rights and obligations. It deals expressly with what the purchaser acquires on the defined effective date. The clauses identified in an earlier footnote convey, in my view conclusively, that ownership was intended to pass on the *"Effective Date"*, as defined.

16) Add to this the following: the equipment is, on the admissible factual matrix,[24] massive. Assuming it is legally a movable, delivery – a necessary constituent for the passing of ownership – will likely take the form of *constitutum possessorium.* The written agreement expressly reposes physical possession of the equipment in the purchaser on the effective date.[25] That feature adds to the conclusion that the agreement was intended to transfer ownership.

17) The applicants argue that the annexure A was not initialed. But that is not a requirement for the validity of the agreement. They say that other annexures referred to in the agreement were not included in the papers, and that these may

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[24] As to which, see KPMG Chartered Accountants (SA) v Securefin Ltd and Another 2009 (4) SA 399 (SCA): "*[39] First, the integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning (Johnson v Leal 1980 (3) SA 927 (A) at 943B). Second, interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses (or, as said in common-law jurisprudence, it is not a jury question: Hodge M Malek (ed) Phipson on Evidence (16 ed 2005) paras 33 - 64). Third, the rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent (Johnson & Johnson (Pty) Ltd v Kimberly-Clark Corporation and Kimberly-Clark of South Africa (Pty) Ltd 1985 BP 126 (A) ([1985] ZASCA 132 (at www.saflii.org.za)). Fourth, to the extent that evidence may be admissible to contextualise the document (since 'context is everything') to establish its factual matrix or purpose or for purposes of identification, 'one must use it as conservatively as possible' (Delmas Milling Co Ltd v Du Plessis 1955 (3) SA 447 (A) at 455B - C). The time has arrived for us to accept that there is no merit in trying to distinguish between'background circumstances' and 'surrounding circumstances'.*
The distinction is artificial and, in addition, both terms are vague and confusing. Consequently, everything tends to be admitted. The terms 'context' or 'factual matrix' ought to suffice. (See Van der Westhuizen v Arnold 2002 (6) SA 453 (SCA) ([2002] 4 All SA 331) paras 22 and 23, and Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd and Another 2008 (6) SA 654 (SCA) para 7.)"

[25] Annexure SF 3, page 193, clause 6.1.1.

through a different light on the agreement. They may, or not; that is, with respect, speculative.[26] It is improbable that they do, since the the express wording of the clauses dealing with what is transferred to the purchaser do not refer to these annexures.

18) The applicants argue that the payment clause envisages that a portion of the purchase price is payable in instalments, and that one would have expected that ownership would have been reserved until the price was fully paid. But it is not so reserved in terms of the agreement, and on the parol evidence rule that is the end of the matter. If anything, the law is that in credit sales ownership passes on delivery, and not only on full payment; that applies to cash sales.

Conclusion

19) In these circumstances the applicants have not shown a prospect of success at trial on these papers, and thus have not shown a prima facie right, although open to some doubt. Even weighing in the requirement of a favourable balance of convenience, assuming in the applicants' favour that they need not show a reasonable apprehension of irreparable harm and no other satisfactory remedy, I cannot conclude that the relief sought ought to be granted, for these reasons.

20) The equipment is, in local parlance, going nowhere. It is by virtue of its size such a presence that if that should happen, the applicants will get to know about it.

21) The risk of total destruction is difficult to visualize. But if there is such a risk, it will remain, even if the relief is granted, because the equipment will remain. The risk of value deterioration through user during the time it takes for this matter to get to

[26] These could have been obtained under the High Court rules.

trial is, with respect, speculative. The convenience is therefore not balanced in favour of the equipment being frozen.

22) It follows that in my view the application cannot succeed, and it is dismissed with costs.

WHG van der Linde
Judge, High Court
Johannesburg

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