REPUBLIC OF SOUTH AFRICA

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

CASE NUMBER: 2021/21686

DELETE WHICHEVER IS NOT APPLICABLE	
1.REPORTABLE:	NO
2.OF INTEREST TO OTHER JUDGES:	NO
3.REVISED	NO

Judge Dippenaar

In the matter between:

CHANGING TIDES 74 (PTY) LIMITED Applicant

and

TRADE PROPERTY VENTURES NO 131 CC First Respondent

LIQUIDITY SERVICES S.A. (PTY) LIMITED Second Respondent

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 11h30 on the 15th of September 2021.

DIPPENAAR J:

[1] This is an opposed application, conducted via a virtual hearing, in which the applicant sought orders (i) upholding an oral contract of sale between the applicant and the first respondent pertaining to certain mechanical cranes; (ii) declaring the applicant to be the owner of the cranes; (iii) directing the first respondent to release the cranes to the applicant against due performance by the applicant of the agreement of sale, together with costs. The relief was couched as "semi urgent vindicatory relief". The first two issues are central to the determination of the application, as the determination of the remainder is predicated on findings in favour of the applicant on those issues

[2] The present application was preceded in Part A by an urgent application for certain interdictory relief launched on 3 May 2021. By consent an interim order was granted on 20 May 2021 in terms of which the respondents were interdicted from disposing of the cranes pending determination of this application. Costs were reserved, to be determined in the present application.

[3] The first respondent opposed the application whereas the second respondent abided the decision of the court.

[4] In summary, the applicant's case is that on 24 March 2021 an oral agreement was concluded between it and the first respondent in terms whereof the first respondent sold certain mechanical cranes to it for a purchase price of R11 million plus VAT, aggregating an amount of R12 650 000. Ownership passed to the applicant immediately. All that remained outstanding was how the purchase price was to be paid, namely whether in two or four instalments. This oral agreement formed the basis of

applicant's claim for declaratory relief, both in relation to the validity of the oral agreement and its ownership of the cranes.

[5] In summary, the first respondent denied that an oral sale agreement was ever concluded and contended that the parties had been negotiating for the sale of the cranes but that no agreement had been concluded. It further disputed that ownership of the cranes was ever transferred to the applicant or that any real agreement was concluded in terms of which ownership thereof could be transferred. Its case was that a third party, Mitsubishi Hitachi Power Systems Africa (Pty) Ltd ("MHI"), was the owner of the cranes at the date the alleged oral agreement was concluded. It was argued that ownership of the cranes could thus not be transferred to the applicant and that the first respondent would not and could not have formed the intention to hold possession of the cranes on behalf of the applicant under the construction of *constitutum possessorium* advanced by the applicant, well knowing that it was not the owner of the cranes.

[6] It is trite that a party is obliged to make out its case in its founding papers so that a respondent knows what case it has to meet. It is also trite that in motion proceedings, the affidavits constitute both the pleadings and the evidence[1].

[7] The applicant seeks final relief. The matter is thus to be determined on the basis of the so called Plascon Evans test[2]. Where there is a genuine dispute of fact, the respondent's version must be accepted. A dispute will not be genuine if it is so far-fetched or so clearly untenable that it can be safely rejected on the papers.[3]

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[1] Minister of Land Affairs and Agriculture v D &F Wevell Trust 2008 (2) SA 184 (SCA); Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others 1999 (2) SA 279(T) at 323G-234A quoted with approval in National Credit Regulator v Lewis Stores 2020 (2) SA 390 (SCA) para [29]

[2] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd, 1984 (3) SA 623 (A) at 634E to 635C; NDPP v Zuma 2009 (2) SA 277 (SCA) para [26]

[3] J W Wightman (Pty) Ltd v Headfour (Pty) Ltd 2008 (3) SA 371(SCA) para 12

[8] A real dispute of fact arises, inter alia, where a court is satisfied that the party who purports to raise the dispute has in its affidavit seriously and unambiguously addressed the facts said to be disputed.[4]

[9] In *Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd and Another*[5], the Supreme Court of Appeal enunciated the approach to be followed in relation to whether disputes of fact are bona fide thus:

> *"The court should be prepared to undertake an objective analysis of such disputes when required to do so. In J W Wightman (Pty) Ltd v Headfour (Pty) Ltd 2008 (3) SA 371(SCA), it was suggested how that might be done in appropriate circumstances. ....*
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> *A court must always be cautious about deciding probabilities in the face of conflicts of facts in affidavits. Affidavits are settled by legal advisers with varying degrees of experience, skill and diligence and a litigant should not pay the price for an adviser's shortcomings. Judgment on the credibility of the deponent, absent direct and obvious contradictions, should be left open. Nevertheless the courts have recognised reasons to take a stronger line to avoid injustice. In Da Mata v Otto 1972 (3) SA 858 (A) at 689 D-E, the following was said:*
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> *In regard to the appellant 's sworn statements alleging the oral agreement, it does not follow that because these allegations were not contradicted – the witness who could have disputed them had died – they should be taken as proof of the facts involved. Wigmore on Evidence, 3rd ed., vol. VII, p.260, states that the mere assertion of any witness does not of itself need to be believed, even though he is unimpeached in any manner, because to require such belief would be to give a quantative and impersonal measure to testimony. The learned author in this connection at p. 262 cites the following passage from a decision quoted:*
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> *"it is not infrequently supposed that a sworn statement is necessary proof, and that, if uncontradicted, it established the fact involved. Such is by no means the law. Testimony, regardless of the amount of it, which is contrary to all reasonable probabilities or conceded facts-testimony which no sensible man can believe-goes for nothing; while the evidence of a single witness to a fact, there being nothing to throw discredit, cannot be disregarded."*

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[4] PMG Motors Kyalami (Pty) Ltd (in liquidation) v Firstrand Bank Ltd, esbank Division 2015 1 All SA 437 (SCA) ; 2015 (2) Sa 634 (SCA); Wightman supra para 13

[5] 2011 (1) SA 8 (SCA) at paras [19] and [20]

[10] The papers are replete with factual disputes regarding the central issue of whether an oral agreement was concluded between the applicant and the respondent on 24 May 2021 as contended by the applicant. It is not necessary to particularise all the factual disputes raised on the papers in detail.

[11] The applicant argued that the first respondent's version should be rejected as untenable on the papers. I do not agree. The first respondent has grappled with the issues set out in the founding papers and I am not persuaded that its version can be rejected as palpably false and untenable on the papers.

[12] There is merit in the first respondent's contention that the applicant should have anticipated material disputes of fact arising prior to the launching of the present application thus justifying its dismissal[6], specifically regarding whether an oral agreement had been concluded between the parties, an issue dealt with extensively in correspondence between the parties. The first respondent urged me to dismiss the application in the exercise of the discretion afforded[7]. Although I could have done so, I decline the invitation and rather determine the application on its merits.

[13] The applicant at no stage sought a referral of the application to oral evidence or trial. Rather, it argued that if it was found that there are irresoluble factual disputes on the papers, the court could *mero motu* exercise its discretion to refer it to evidence, relying on *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*[8]. I am not persuaded that that option is open to me [9]. Much depends on the particular enquiry and its scope. It is trite that oral evidence should not be permitted where the affidavits themselves do not present such evidence. It is trite that a party is not allowed to lead oral evidence in order to make up shortcomings in its own case or to make out a case

[6] Adbro Investments Co Ltd v Minister of the Interior 1956 (3) SA 345 (A) at 350A; Gounder v Top Spec Investments (Pty) Ltd 2008 (5) Sa 151 (SCA) para [10]
[7] Willovale Estates CC and Another v Bryanmore Estates Ltd 1990 (3) SA 954 (W) at 961H-I
[8] 1949 (3) SA 1155 (T) at 1665
[9] Di Meo v Capri Restaurant 1061 (4) SA 416 (N) at 615 H-606A; Hymie Tucker 1081 (4) SA 175 (N) 179E-H

not made out in its papers[10]. Considering the inadequacies in the applicant's case on its papers, I am not persuaded that there is any merit in the contention that the matter should be referred to oral evidence, even if it had been open to me to do so.

[14] The first issue is whether the applicant has established the oral sale agreement contended for. I conclude that in the answering papers, the first respondent seriously and unambiguously addressed the facts averred by the applicant which it disputed. Thus the first respondent's version must be accepted.

[15] On the first respondent's version, at the meeting of 24 March 2021, the applicant had revived an earlier proposal to purchase the cranes and girders, but would revert on a proposed payment plan. The first respondent insisted on a minimum deposit of R5.5 million as it required the funds to settle the last instalment due to MHI for purchase of the cranes. Once that was received a draft offer to purchase would be prepared. No payment proposal was furnished by the applicant and no offer to purchase was ever prepared. That version is corroborated by the documentary evidence attached to the answering affidavit. The applicant did not materially address this version in reply nor provided cogent evidence to the contrary. Rather, it put up broad averments and "confirmatory affidavits" by persons who at best provided irrelevant opinion evidence, rather than primary facts and who were not present at the meeting at which the alleged agreement was concluded facts and which did not take the applicant's case any further.

[16] The applicant's affidavits further provided no supporting facts for the contention that the parties agreed that ownership of the cranes would pass to the applicant immediately, notwithstanding the postponement of the applicant's payment obligations or any facts which would support constructive delivery of the cranes to the applicant. The agreement contended for regarding the transfer of ownership of the cranes is an unusual one and is not borne out by any factual evidence.

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[10] Minister of Land Affairs and Agriculture v D &F Wevell Trust 2008 (2) SA 184 (SCA) at paras [57] -[59]

[17] A further lacuna in the applicant's case is the absence of a real agreement between the parties to transfer and receive ownership of the cranes. As pointed out by the first respondent, it is trite that there are three juristic acts involved in the transfer of ownership: (i) the agreement which creates the obligation to transfer the cranes (i.e. the contractual obligation); (ii) the real agreement between the parties to transfer and to acquire ownership of the cranes and (iii) the actual transfer of ownership of the cranes, being movable property, by way of delivery. [11]

[18] Central to these issues was the ownership of the cranes at the time the alleged oral agreement was concluded on 24 March 2021. It is trite that a person cannot transfer ownership of a thing if it is not the owner thereof [12]. On the papers it was not disputed that MHI was the owner of the cranes and thus that no real agreement could be concluded for the transfer of ownership as the first respondent was not at the time the owner thereof. The applicant did not dispute the averment that it knew of MHI's ownership of the cranes in its papers. In the applicant's papers, MHI's ownership was phrased as a "representation" and in its supplementary affidavit, it was contended that applicant had no knowledge of such alleged ownership. No direct allegation was made to put MHI's ownership in dispute.

[19] This in my view creates various unsurmountable obstacles for the applicant. First, the first respondent, as it was not owner of the cranes at the time of the alleged oral agreement of 24 March 2021, could not transfer ownership of the cranes to the applicant. Second, the first respondent, knowing that it was not the owner of the cranes, on its version did not, and in the circumstances could not form any intention to transfer ownership of the cranes to the applicant.

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[11] LAWSA2nd edition Volume 27, par 213, p263

[12] Based on the maxim *nemo plus iuris ad alieam tranferre potest, quam ipse haberet.* See Absa Bank Ltd t/a Bankfin v Jordache Auto CC 2003 (1) SA 401 (SCA) par [17]

[20] There is a third obstacle which faces the applicant, being delivery of the cranes. It is trite that ownership of movables is transferred by delivery[13]. The applicant has relied on constructive delivery in the form of *constitutum possessorium* [14]. Central to this form of delivery is a change in intention on the part of the possessor of the movable, the first respondent, being from an intention to hold possession for itself to an intention to hold possession for the applicant.

[21] The applicant's case was in terse terms and rested on the averment that although it would have acquired ownership of the cranes immediately upon the conclusion of the agreement, possession of the cranes in the interim would remain with the first respondent. I am not persuaded that the applicant has established delivery, required for the transfer of ownership of the cranes.

[22] The common cause fact that at the time of the alleged agreement and transfer of ownership of the cranes to the applicant, MHI was, to the knowledge of the parties, the owner of the cranes until it received full payment of the purchase price from the first respondent, puts pay to any contention that the first respondent thereafter could or did retain possession of the cranes for the applicant. It was undisputed that the last payment to MHI only occurred on 16 April 2021, well after conclusion of the alleged oral sale agreement. I agree with the first respondent that the undisputed inability of the first respondent to transfer ownership of the cranes to the applicant, constitutes an insurmountable obstacle to the applicant's case.

[23] For these reasons I conclude that the applicant has not established that it is either entitled to a declaratory order that an oral sale agreement was concluded on 24 March 2021, or to a declaratory order that it was the owner of the cranes. It follows that the application must fail.

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[13] Dreyer and Another NNO v AXZS Industries (Pty) Ltd 2006 (5) SA 548 (SCA)
[14] Vasco Drycleaners v Twycross 1979 (1) SA 603 (A)

[24] I turn to the issue of costs. The first aspect is the reserved costs of the urgent application. Both parties blamed the other for the need to pursue the urgent application pursuant to an appropriate undertaking not being provided timeously. In considering all the facts, and the respective stances adopted by the parties, it would be appropriate to direct that the costs follow the result. Regarding the remainder of the costs, there is no reason to deviate from the normal principle that costs follow the result. In relation to this application, it follows that as the applicant has been unsuccessful, it is to be held liable for the costs.

[25] I grant the following order:

The application is dismissed with costs, including the reserved costs of the urgent application.

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EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

DATE OF HEARING	: 12 August 2021
DATE OF JUDGMENT	: 15 September 2021
APPLICANT'S COUNSEL	: Adv. B. Ford
APPLICANT'S ATTORNEYS	: Ooni & Wadia Inc. Attorneys
RESPONDENT'S COUNSEL	: Adv P. de B Vivier SC
RESPONDENT'S ATTORNEYS	: Enderstein Van Merwe Attorneys