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

Case Number: 14866/2022
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES
21 May 2025

In the matter between:

HENDRIE ANDRIES MARAIS N.O.	**FIRST APPLICANT**
CHRISTINA MAURTEEN PENDERIS N.O.	**SECOND APPLICANT**

and

NORTIGER LOGISTICS-SA (PTY) LTD (Registration Number: 2010/022417/07)	**FIRST RESPONDENT**
ADRIANA MARIA VAN WYK (Identity Number: 4[…])	**SECOND RESPONDENT**

In Re:

MARBOE EN SEUNS (PTY) LTD (IN LIQUIDATION)
ESTATE NUMBER: G 1771/2021

JUDGMENT

TWALA, J

Introduction

[1] The applicants, the joint liquidators of Marboe En Seuns (Pty) Ltd (in Liquidation) *("Marboe"),* launched this application seeking an order to cancel and or set aside the written sale agreement of the vehicle known as a Tadano TR – 250 EX with registration letters and number R[…] *("the vehicle")* which was entered into by and between the first and second respondents on 6 November 2020 and other ancillary relief.

[2] Further and as the first prayer in the notice of motion, the applicants sought an order for the extension of their powers since they were still appointed as provisional liquidators. Subsequent to the launching of this application, the applicants were finally appointed and granted the powers necessary to bring this application by the Master of the High Court and they are accordingly no longer seeking relief in this regard.

[3] The application is opposed by the respondents. After filing its answering affidavit, the first respondent brought an application to join the second respondent in the proceedings. The second respondent filed its answering affidavit with a counter application that, if the Court finds in favour of the applicants, then the second respondent must retain the purchase price she received for the vehicle and pay over to the applicants the difference between the purchase price and what is owed to her by Marboe.

[4] In this judgment, I propose to refer to the parties as the applicants and the first and second respondents as the respondents and where necessary to refer to the parties as they are cited in these proceedings.

Preliminary Issues

[5] At the commencement of the hearing, the respondents contended that the applicants should not be allowed to make their case in the supplementary affidavit in which the applicants traversed issues which were not in their founding affidavit. Further, that there is a dispute of fact in this case which cannot be resolved on the papers and the applicants should have foreseen this and not approach the court with motion proceedings which are not suitable for resolving issues of dispute of facts.

[6] The applicants argued that there was no dispute of fact in this case which cannot be determined on the papers filed of record. The issue of proof of ownership of the vehicle which is what the respondents are disputing can be determined on the papers filed on record. Further, the applicants did not know about the cession agreement until it was filed as an annexure to the answering affidavit of the second respondent – hence the applicants simultaneously brought an application for condonation for the filing of the supplementary affidavit to explain issues which were not within their knowledge when they initiated these proceedings.

[7] It is a trite principle of our law that motion proceedings are meant to resolve legal issues based on common cause facts and are simply not designed to determine factual issues between the parties. However, there must be a real, genuine and bona fide dispute of fact and not merely allegations of such a dispute or a version which is far-fetched or clearly untenable that can justifiably be rejected merely on the papers[1]. I hold the view that there is no real, genuine and bona fide dispute in this case as ownership of the vehicle can be determined on the papers.

[8] In *Eke v Parsons*[2] the Constitutional Court defining the purpose of the Rules of Court stated the following:

> "Without doubt, rules governing the court process cannot be disregarded. They serve an undeniably important purpose. That, however, does not mean that courts should be detained by the rules to a point where they are hamstrung in the performance of the core function of dispensing justice. Put

[1] National Director of Prosecutions v Zuma 2009 (2) SA 277 (SCA) para 26
[2] [2015] ZACC 30; 2016 (3) SA 37 (CC), 2015 (11) BCLR 1319 (CC).

differently, rules should not be observed for their own sake. Where the interests of justice so dictate, courts may depart from a strict observance of the rules. That, even where one of the litigants is insistent that there be adherence to the rules. Not surprisingly, courts have often said "[i]t is trite that the rules exist for the courts, and not the courts for the rules."[3]

Under our constitutional dispensation, the object of court rules is twofold. The first is to ensure a fair trial or hearing. The second is to "secure the inexpensive and expeditious completion of litigation and . . . to further the administration of justice". I have already touched on the inherent jurisdiction vested in the superior courts in South Africa. In terms of this power, the High Court has always been able to regulate its own proceedings for a number of reasons, including catering for circumstances not adequately covered by the Uniform Rules, and generally ensuring the efficient administration of the courts' judicial functions."[4] (Footnotes excluded).

[9] It should be recalled that the applicants are the liquidators of Marboe and relied on the directors of the company and other relevant parties to furnish them with all the relevant documentation and information about Marboe. It is on record that the applicants did not have the registration papers of the vehicle when they deposed to the founding affidavit nor did they have knowledge or possession of the cession agreement between Marboe and the second respondent.

[10] It is accepted that it is a trite principle of our law that an applicant must make out its case in its founding papers and not in reply. However, as indicated above, the rules are for the courts and not the courts for the rules. Where the interest of justice demands a deviation from the rules, the court is obliged to do so as the court has the inherent power to regulate its own processes conferred upon it in terms of section 173 of the Constitution.[5]

[11] I hold the view therefore that, since the applicants had no knowledge and or possession of the vehicle registration papers and the cession agreement between

[3] Id para 39.
[4] Id para 40.
[5] Constitution of the Republic of South Africa, 1996

Marboe and the second respondent at the time of deposing to the founding papers, there is no other way they could have made allegations in their founding papers about these documents. Further, the respondents have failed to demonstrate to this court that if the supplementary affidavit is allowed and admitted, they will be prejudiced thereby. Moreover, the respondents had ample time to file an answering affidavit but chose not to do so. I am of the respectful view therefore that it is in the interest of justice that the supplementary affidavit be allowed to stand.

Factual Background

[12] The facts foundational to this case are mostly common cause and are as follows:

> On 6 November 2020, the first and second respondents concluded a written agreement of purchase and sale whereby the second respondent sold the vehicle to the first respondent. The purchase price was paid by the first respondent to the second respondent on 6 January 2021, and the vehicle was transferred into the name of the first respondent on the 4 March 2021.

[13] On 9 December 2020, an application for the liquidation of Marboe was launched. On 15 April 2021, Marboe was placed under final liquidation by this court under case number 2020/42660, and the applicants were appointed as the joint provisional liquidators.

[14] On 7 June 2022, the applicants received a cession agreement between Marboe and the second respondent from Mr Dustan Barnard of Barco Auctioneers. The cession agreement is dated 5 December 2015 and provided that Marboe ceded all its rights title and interest in the vehicle to the second respondent.

Submission by the Parties

[15] The applicants say that the cession agreement is invalid since the resolution of Marboe authorised Mr DCJ van Wyk to act on behalf of Marboe, but it was Mrs AM van Wyk who signed the cession agreement. Further, so it was argued, the cession is not an out-and-out cession, and it is void or at best for the second

respondent it is a pledge. This is so, so it was contended, because the vehicle remained in the possession of Marboe and it appeared as an asset in the books of Marboe subsequent to the cession agreement up and until the liquidation of Marboe. The sale of the vehicle therefore amounts to a voidable disposition without value and or a preference of one creditor above the other.

[16] Furthermore, so say the applicants, even if the agreement between Marboe and the second respondent were to constitute a pledge, such a pledge is void since the agreement does not contain a provision for the pledged property to be taken over at a fair price when the debt became due by the cessionary. Therefore, so it was argued, the second respondent did not have dominium or security over the vehicle since Marboe was at all relevant times the owner of the vehicle. The second respondent was not entitled to sell the vehicle to the first respondent and that the sale agreement between the first and second respondent is therefore invalid.

[17] The respondents contended that the second respondent was the rightful owner of the vehicle and had the dominium over the vehicle on the basis of the cession agreement since Marboe failed to pay its debt with the second respondent. When the sale agreement was concluded between the first and second respondents, the second respondent was entitled to sell the vehicle on the basis of the out-and-out cession agreement between herself and Marboe. The cession became perfected when Marboe failed to settle its indebtedness to the second respondent.

Legal Framework

[18] Since the case of the applicants is that the sale of the vehicle by one of the former directors of Marboe to the first respondent amount to a disposition not for value and or a preference of one of the creditors of Marboe above others, it is apposite to restate the provisions of the Companies Act[6] which provide the following:

> "Section 340
>
> Voidable and undue preferences —

[6] 61 of 1973

(1) Every disposition by a company of its property which, if made by an individual, could, for any reason, be set aside in the event of his insolvency, may, if made by a company, be set aside in the event of the company being wound up and unable to pay all its debts, and the provisions of the law relating to insolvency shall *mutatis mutandis* be applied to any such disposition."

[19] It is also necessary to mention the provisions of the Insolvency Act[7] which find application in this case, which state the following:

"Section 29

(1) Voidable preferences **-**

Every disposition of his property made by a debtor not more than six months before the sequestration of his estate or, if he is deceased and his estate is insolvent, before his death, which has had the effect of preferring one of his creditors above another, may be set aside by the Court if immediately after the making of such disposition the liabilities of the debtor exceeded the value of his assets, unless the person in whose favour the disposition was made proves that the disposition was made in the ordinary course of business and that it was not intended thereby to prefer one creditor above another."

Discussion

[20] The nub of this case is the ownership of the vehicle. The respondents contend that the second respondent was entitled to sell the vehicle as her own based on the cession between herself and Marboe. This is so because Marboe failed to pay the debt owing to the second respondent when it became due.

[21] To put matters in the correct perspective, it is necessary to restate the terms of the cession of agreement which are relevant for the purposes of the discussion that will follow which are as follows:

"1. Cession

[7] 24 of 1936

The Cedent hereby cedes, transfers and makes over to the Cessionary her right, title and interest in and to the equipment as security for the payment of the loan account of the Cessionary by the Cedent.

2. Duration

The cession which is the subject matter of this agreement shall endure and be of force and effect until the Cedent has paid the loan account to the Cessionary in full.

3. Undertaking

The Cedent hereby undertakes and warrants that he:

3.1 has not entered into any agreement restricting or excluding the transferability of the equipment that form the object of the cession;

3.2 has not prior to this cession ceded the equipment that forms the object of this cession to any other person of concern. But if it should happen that the Cedent is in breach of this, then this cession shall operate as a cession of the Cedent's reversionary right including all rights of action against the Cessionary. against the prior Cessionary.

3.3 during such time as the cession which is the subject matter of this agreement remains of force and effect, the Cedent will not allow the equipment to be sold, rented out or removed from its possession.

4. Authority

The Cessionary authorizes the Cedent during the currency of this agreement from time to time to inspect the equipment and t have it valuated.

[22] It is trite that cession is a method of transferring a right of the cedent to the cessionary. However, if the agreement between the cedent and the cessionary does not demonstrate a clear intention to make a complete surrender of the right, then it is not an out-and-out cession.

[23] The author Christie[8] describe as cession as follows:

[8] *Law of Contract in South Africa*, 8th edition

"A cession of the cedent's right, title and interest as well as ownership in the goods, although passing the cedents contractual rights, will not however, pass ownership without delivery.[9]

The essence of cession by way of security is that the cedent retains as against the cessionary, expressly or impliedly, a reversionary interest to receive back any surplus remaining from the enforcement of the ceded right after the debt in respect of which the security was given has been paid.[10]"

[24] In *Grober v Oosthuizen* [11] which was quoted with approval in *Engen Petroleum Ltd v Flotank Transport (Pty) Ltd* [12], the Supreme Court of Appeal, dealing with the differences between the cession and a pledge, stated the following:

" …The one theory is inspired by the parallel with a pledge of a corporeal asset and is thus loosely referred to as 'the pledge theory'. In accordance with this theory, the effect of the cession *in securitatem debiti* is that the principal debt is 'pledged' to the cessionary while the cedent retains what has variously been described as the 'bare dominium' or a 'reversionary interest' in the claim against the principal debtor.[13] (Footnote excluded)

Critics of the pledge theory have difficulty with the concept of a real right of pledge over the personal rights arising from the principal debt (see eg De Wet & Yeats *op cit* 416; Van der Merwe *Sakereg* 683). Concomitantly they also have difficulty with the description of the interest retained by the cedent in the personal right against the debtor as that of 'ownership' or 'dominium'. This difficulty is well formulated in the following dictum by Broome JP in *Moola v Estate Moola*:

'The word "dominium" is therefore out of place, and it does not help much to describe plaintiff as the "owner" of the ceded rights. Ownership of a right of action would seem to imply the right to sue, and if the right to sue has passed to the cessionary it is difficult to imagine what can remain with the cedent. The truth probably is that the cedent by way of security retains only his

[9] Page 564
[10] Paga 570
[11] [2009] ZASCA (5) SA 500
[12] [2022] ZASCA 98
[13] Id para 15

"reversionary right", that is to say his right to enforce the ceded right of action after the [secured debt] . . . has been discharged.'[14] (Footnote excluded)

In the light of these problems associated with the pledge theory, an alternative theory had been preferred by the majority of academic authors and even in some earlier decisions of this court. According to this theory a cession *in securitatem debiti* is in effect an outright or out-and-out cession on which an undertaking or *pactum fiduciae* is superimposed that the cessionary will re-cede the principal debt to the cedent on satisfaction of the secured debt. In consequence, the ceded right in all its aspects is vested in the cessionary. After the cession *in securitatem debiti* the cedent has no direct interest in the principal debt and is left only with a personal right against the cessionary, by virtue of the *pactum fiduciae,* to claim re-cession after the secured debt has been discharged. It is readily apparent that if the *pactum fiduciae* theory were to be applied to the facts of this case, the plea of prescription must be upheld, because Grobler's case would then depend on a claim for re-cession which arose in August 1991. But despite the doctrinal difficulties arising from the pledge theory, this court has in its latest series of decisions – primarily for pragmatic reasons – accepted that theory in preference to the outright cession/ *pactum fiduciae* construction. In the light of these decisions the doctrinal debate must, in my view, be regarded as settled in favour of the pledge theory[15]. (Footnote excluded)

[25] It is apparent on record that the vehicle remained in the possession of Marboe and no delivery to the second respondent took place after the cession was concluded. Further, the vehicle had been used by Marboe during the currency of the cession and has remained in the financials or books of Marboe until the concursus creditoram. The vehicle was only transferred into the name of the first respondent in March 2021 barely a month before Marboe was finally liquidated on 15 April 2021.

[26] In interpreting the cession agreement, I am of the considered view that, from the wording of the cession agreement, the starting point was that Marboe retained its reversionary right and only lost/ceded that right to the second respondent upon it

[14] Id para 16
[15] Id para 17

having ceded the equipment to a third party, that the agreement would automatically come to an end upon payment of Marboe's debt to the second respondent, and that there would have been no need for a re-cession back to Marboe.

[27] I am unable to disagree with the applicants that the cession agreement is invalid in that it was not signed by the authorised person in terms of the resolution of Marboe. Further, the cession is invalid in that it is not an out-and-out cession to entitle the second respondent to sell or deal with the vehicle any how on the failure of Marboe to pay and settle its indebtedness in full in favour of the second respondent. This is so for there was no delivery of the vehicle by Marboe to the second respondent and Marboe remained the owner of the vehicle as it remained and was retained in its financials or books up until it was liquidated.

[28] It is my respectful view therefore that Marboe received no value for the disposition of the vehicle and therefore the disposition amount to preference of one creditor of Marboe above the others. The disposition was actuated on the basis of an invalid cession agreement which did not transfer the right of ownership from Marboe to the second respondent. The sale of the vehicle occurred not more than six months of Marboe being unable to pay its debts. Therefore, the unavoidable conclusion is that the agreement of sale between the first and second respondent is invalid and falls to be cancelled and set aside

[29] I now turn to deal with the counter-application of the second respondent that if the court finds that the cession agreement is invalid and that the disposition was of no value to Marboe, then the court should grant her the relief that she retains the equivalent of the amount owed to her by Marboe and that she pays over to the difference to the applicants.

[30] I disagree with this proposition. There are other creditors of Marboe who are cueing for payment of their proven claims. If the second respondent were to pay herself and settle the debt between herself and Marboe from the proceeds she received for the vehicle, she would be at an advantage than the other creditors for she would have been paid in full instead of the R650 000 being equally distributed amongst the creditors of Marboe.

[31] In the result, the following order is made:

1. The applicants are granted leave to file their supplementary affidavit;
2. The sale of the vehicle, Tadano TR-250 EX Crane with registration number R[…] sold by the second respondent to the first respondent is set aside;
3. The Sheriff is authorized to attach and remove the vehicle described as a Tadano TR-250 EX Crane with registration number R[…] and VIN number F[…] from the first respondent or where the vehicle may be found and hand same to the applicants.

3.1 Should a person or entity who/which is in the possession of the vehicle refuse to hand over same to the Sheriff, the Sheriff is authorized to make use of the services of the SAPS to attach and remove the vehicle from the person or entity in which possession the vehicle is and to hand it over to the applicants.

4. The second respondent's conditional counter-claim is dismissed with costs.
5. The second respondent is granted leave, in as far as it may be necessary, to prove her claim against Marboe in terms of section 44(1) of the Insolvency Act 24 of 1936.
6. The second respondent shall pay the costs occasioned by the late proving of her claim.
7. The first respondent is to pay the costs of the application, on scale C.

TWALA M L
Judge of the High Court of South Africa
Gauteng Division, Johannesburg

Date of Hearing: **5 May 2025**

Date of Judgment: **21 May 2025**

For the Applicants: Advocate JC Carstens

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Delivered: This judgment and order was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the order is deemed to be the 21 May 2025.