

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA (Northern Cape Division)

Case Nr: 629/2009
Case Heard: 08/04/2009
Date delivered: 24/04/2009

In the matter between:

RMD Kwikform South Africa (Pty) Limited APPLICANT

and

The Department of Transport Roads &
Public Works RESPONDENT

JUDGMENT

Henriques AJ:

1. This is an urgent application in which the Applicant sought the following relief :-

“(1) Dat de Agbare Hof gelas dat hierdie aansoek as een van dringendheid aangehoor word in terme van Reël 6(12) van hierdie Agbare Hof se reëls.

- (2) Dat die Respondent, of sy verteenwoordiger, beveel word om die Applikant toe te laat om toegang te hê tot die

bouperseel van die Kimberley Konferensie Sentrum om die Applikant se vormwerk en steierwerk toerusting soos vervat in Aanhangsel A hiertoe (hierna "die eiendom") onmiddellik op die bouperseel van die Kimberley Konferensie Sentrum in sy besit kan neem en die eiendom vanaf die bouperseel van die Kimberley Konferensie Sentrum kan verwyder.

- (3) Dat die koste van hierdie aansoek deur die Respondent betaal word."
2. The notice of motion provided that in the event of the Respondent wanting to oppose such application it had to serve and file its notice of opposition by 15h00 on 6 April 2009 and thereafter any opposing affidavit by 14h00 on 6 April 2009.
3. The papers in this matter were served by the Sherriff on the offices of the State Attorney at 8h30 on 7 April 2009 and on the Respondent personally at 8h15 on 7 April 2009. The day before being 6 April 2009, at 15h34 and 15h45 respectively a set of papers had also been served on the offices of the State Attorney and the Respondent, however these set of papers did not have the annexures to the Founding Affidavit attached to them.
4. In essence the Applicant sought a final interdict for the return of its formwork and scaffolding based on the *rei vindicatio*. This may have been to avoid the consequences of having to provide the Respondent with 72 hours notice in terms of provisions of the General Law Amendment Act, No 62 of 1955 as it would have been obliged to comply with the provisions of the Act in the event of its seeking the order in the form of a Rule Nisi.

5. The Applicant claims ownership of the formwork and scaffolding based on the agreement concluded with Khumbula Property Services.
6. The deponent to the founding affidavit, Melt Johannes Malan, avers that the Applicant was engaged in the business of hiring and sometimes the sale of formwork and scaffolding. Khumbula Property Services had contacted it to hire formwork and scaffolding as it was engaged in the construction of a conference centre for the Respondent in Kimberley. In keeping with its business practice, Khumbula Property Services then completed an application for credit, a suretyship attached to the credit application form as well as a contract for the hire of the formwork and scaffolding which also contained the terms and conditions of the hire agreement.
7. An illegible copy of the credit application form together with the terms and conditions of the hiring contract was annexed to the papers as annexure MJM 1. A clear copy was handed in at the hearing of the matter.
8. The Respondent also complained about the fact that an illegible copy of the terms and conditions was annexed to the papers they were provided with. A request by the Respondent's representative to obtain a clear copy of such terms and conditions was met with no response. The Applicant's attorney's attitude was that a legible copy would be provided at the hearing of the matter. Thus at the time of the drafting of the Opposing Affidavit the Respondent was not in possession of a clear and legible copy of the terms and conditions of the hire agreement.

9. In further support of its claim that it was the owner of the formwork and scaffolding on the premises the Applicant relies specifically on the provisions of clauses 33, 38 and 42 of the terms and conditions.
10. Clause 33 of the agreement provides as follows: *"In respect of Equipment for hire the Equipment shall at all times remain the property of the Owner and the Customer shall have no rights to the Equipment other than as hirer and the Customer shall not do or permit or cause to be done any matter or thing whereby the rights of the Owner in respect of the Equipment are or may be prejudicially affected"*.
11. Clause 38 of the agreement deals with the obligation to insure the Equipment. Clause 42 deals with termination of the agreement between the parties. Clause 42 (c) provides as follows; *"In the event that the Customer fails to return the Equipment within 14 (fourteen) days of being obliged to, the owner may forthwith and without notice retake possession of such Equipment and for this purpose shall be entitled freely to enter into and upon any premises occupied by or under the control of the Customer. In the event that the Equipment is situated on premises which are occupied or controlled by a third party, the Customer shall ensure that it has made sufficient arrangements with the third party to enable the owner to enter onto such premises in order to exercise its rights under this Clause to retake possession of the Equipment. Without prejudice to the Owners rights to claim damages the Customer shall on termination or repudiation of that Agreement become immediately liable to pay to the Owner all arrears of Rental, any*

other amounts due in accordance with these Conditions and any other amounts due and payable and any costs and expenses incurred by the owner in locating, repossessing, and recovering and restoring the Equipment or collecting payments due under the Contract.”

12. In the definition section of the terms and conditions “Owner” is defined as meaning “RMD Kwikform South Africa (Pty) Ltd”.
13. The Applicant alleges that these terms and conditions were accepted by Khumbula Property Services at the time of conclusion of the agreement of hire. The credit application form was signed by the financial officer of Khumbula Property Services, Akhona Ntshiqqa on 15 July 2008.
14. The Applicant avers that credit facilities were extended to Khumbula Property Services and that the written agreement of hire was signed by the parties and to this end it then began hiring formwork and scaffolding to Khumbula Property Services. It avers that the formwork and scaffolding which consisted of heavy steel was delivered to the building site at 10 West Circular Street, Kimberley, on request of Khumbula Property Services.
15. At various times between October 2008 and November 2008 various deliveries of such formwork and scaffolding were made to the building site. Subsequently Khumbula Property Services notified the Applicant that it no longer required the formwork and scaffolding and as a result the Applicant made the necessary arrangements to have its equipment removed from the building site. This occurred at various times namely on 12 February 2009, 19 February 2009 and 16 and 17 March 2009.

16. The Applicant goes on further to explain annexure MJM 2 annexed to the Founding Affidavit which constitutes the record of equipment which was delivered to the building site under the reference "DL" and the equipment which was returned and recovered from the building site as "BR". Malan explains that, having regard to page 3 of such document, there are six columns reflected therein which reflects the formwork and scaffolding belonging to the Applicant which is still on the building site in Kimberley. At no stage prior to deposing to this affidavit was the Respondent provided with a similar record or explanation and consequently not made aware of the specific equipment delivered on site or in respect of which the Applicant had reacquired possession.
17. The Applicant avers that on 16 and 17 March 2009 it gained access to the building site and was able to remove certain of the formwork and scaffolding without hindrance from anybody. These arrangements were made with the representatives of Khumbula Property Services. However, on 20 March 2009, after further arrangements had been concluded with Khumbula Property Services, the Applicant's staff were unable to enter the building site to remove further of the formwork and scaffolding. The driver of the vehicle was told that he could not enter the premises and this was on the instructions of the Respondent.
18. Subsequently Rudi Botha, an employee of the Applicant, was advised telephonically by Mr M Motingoe of the Respondent that the building site was closed and that no further formwork and scaffolding could be removed from the building site. This according to the Applicant was after Rudi Botha had explained to

Motingoe that the Applicant was the owner of the equipment that was on the site. Motingoe advised Botha to provide proof of ownership of the formwork and scaffolding which it wanted to remove from the building site.

19. The Applicant avers subsequently, but does not state the date it faxed such documents, indicating ownership to Motingoe. It indicated that it subsequently followed this up with a telephone call to Motingoe, but does not state the date upon which such telephone call was made to Motingoe. However, Motingoe refused to allow Applicant access to the building site to remove its equipment. Motingoe, the Applicant says, responded by indicating that the Applicant should get a Court order to allow it to remove the equipment from the building site.
20. As a result of what it termed to be the unreasonable attitude of Motingoe the Applicant then consulted with his attorneys who sent annexure MJM 4 to the Respondent on 2 April 2009. Motingoe responded to such letter by way of annexure MJM 5 on 3 April 2009.
21. The Applicant makes much of this letter and indicated that such letter confirms what it termed the Respondents obstructive and unreasonable attitude to its request for the return of its equipment. The Applicant avers that the replacement value of its equipment is some R1 121 103.49 and that there is no adequate security on the building site. In Malan's experience the formwork and scaffolding which is on the premises can easily be removed. In addition, as a result of this equipment lying in disuse on the building site, it is unable to generate an income

and hire out the equipment. In reply Malan estimated that the Applicant was losing the sum of R 120 000,00 per month.

22. During the course of argument Adv Klopper for the Applicant indicated that insofar as the aspect of urgency was concerned he was specifically relying on paragraphs 21, 25 and 29 of the Founding Affidavit. In essence he was of the view that there was inadequate security on the building site and this was indicated by the fact that the Applicant's employees were able to gain access to the site on 16 and 17 March 2009 and remove some of the Applicant's equipment. Secondly, the fact that the formwork and scaffolding could easily be removed and carried out and thirdly that it was losing approximately R120 000,00 a month in that it was unable to hire out the formwork and scaffolding.
23. I must add that the matter was initially enrolled for hearing at 10h00. Subsequently I was advised by Adv Klopper that he had just received the Respondent's opposing affidavit and needed time to consider what his attitude to same was. I was then advised by the Applicant's representative that they wished to respond to such affidavit and file a reply. Such reply was delivered to me just before lunch and the matter proceeded at 14h00.
24. The Respondent in opposing the application raised 3 preliminary issues namely - the fact that the application was not urgent, secondly the non-joinder of Khumbula Property Services as a party to the application and thirdly requested me to strike out certain portions of the founding affidavit on the basis that same constituted hearsay.

25. The Respondent confirmed that it had concluded a building contract with Khumbula Property Services for the building of the Kimberley Conference Centre. Such building contract was regulated by the Joint Building Contracts Committee (JBCC) and the JBCC issued standard contract forms which were incorporated into all building contracts.
26. At the hearing of the matter I was provided with an example of a principal building agreement together with the voluminous tender documents.
27. In essence the Respondent's defence to the application was the following:
 - 27.1. In terms of Clause 36 of the principal building agreement, the building contract with Khumbula Property Services was cancelled. A copy of the letter of cancellation is annexed as MS1 to the opposing affidavit.
 - 27.2. Such cancellation was done pursuant to the provisions of Clause 36 of the principal building agreement. Clause 36 of the principal building agreement provides for cancellation by an employer where a contractor is in default of the agreement.
 - 27.3. The agreement defines a contractor as ... "*the party contracting with the employer for the execution of the works as stated in schedule.*" An employer is defined as "*the party contracting with the contractor*

for the execution of the works as stated in the schedule." It was common cause that the works referred to the building of the Kimberley Conference Centre.

- 27.4. Material and goods is defined as "*material and goods delivered to the contractor or his subcontractors for inclusion in the works whether stored on or off the site or in transit but not yet part of the works.*"
- 27.5. Where the agreement is cancelled in terms of Clause 36 the following further conditions apply namely, Clause 36.5.1 provides that the employment of the contractor shall be cancelled and execution of the works shall cease. The contractor shall vacate the works and the site subject to the provisions of clause 36.5.6. The contractor shall remain responsible for the works in terms of clause 8.1 until possession is relinquished to the employer.
- 27.6. Clause 36.5.6 further provides as follows: "*The employer may use the contractors material and goods, temporary buildings, plant and machinery on the site for proceeding with the works.*"
- 27.7. In essence the Respondent averred that it had a right of retention of the formwork and scaffolding in terms of the provisions of clause 36.5.6.
28. The Respondent further confirms the telephonic conversation which took place between Motingoe and Botha of the Applicant.

The Respondent denies that it was obstructive and further denies that it advised the Applicant to obtain a Court Order. It was unaware of the contract between Khumbula Property Services and the Applicant.

29. The Respondent avers that certain documents were faxed by the Applicant on 25 March 2009. These documents are annexed as MS 2. According to the Respondent the fax bore the letterhead of RMD, an illegible application for credit made by Khumbula Property Services, a long list of equipment and an acknowledgment of debt signed by Khumbula Property Services. One is unable to determine from the documents the identity of the person who sent the fax and no covering letter was attached explaining the relevance of the documents.
30. The Respondent confirms that Botha subsequently telephoned to enquire whether the fax had been received. Motingoe confirmed receipt of the fax but indicated that he could not make sense of the documents as no letter of explanation was attached. Hence he requested Botha to send a letter explaining the Applicant's claim.
31. The copy of the credit application sent through via fax to the Respondent differs markedly from that put up by the Applicant in its founding papers. Apart from the terms and conditions being illegible, this application for credit appears to have been made on 16 July 2008. In addition annexed to such credit application are documents which are referred to as a picking list.
32. It was for this reason that Motingoe wrote annexure MJN 5 to the Applicant's attorneys in which he asked that the Applicant

stipulate how according to him its ownership to the equipment was established, as submitting invoices made out to Khumbula was insufficient for such purposes. In fact the letter specifically requests the Applicant to *".....explain their claim to the Head of Department, which claim may be supported by the documents they have sent to me. It has never been the attitude of the department to deny any party access to equipment to which they are lawfully entitled, but such title must be properly established and communicated."*

33. The Applicant responded by way of MJM7 on 3 April 2009 at 15:22.

REI VINDICATIO

34. In order to succeed in such an application an applicant must allege and prove:-

- (a) ownership of the item/s in question;
- (b) that the respondent was in possession of the item/s at the time of the commencement of the application;
- (c) that the item/s in question is still in existence and clearly identifiable.

See: Silberberg and Schoeman's, The Law of Property, 5th Edition at pages 243 and 244.

35. In **DREYER AND ANOTHER NNO v AXZS INDUSTRIES (PTY) LTD 2006 (5) SA 548 (SCA)**, Brand JA held as follows at paragraph 4*"A party who institutes the rei vindicatio is required to allege and prove ownership of the thing. Since one of the incidents of ownership is the right to possession of the thing, a plaintiff who establishes ownership is not required to prove that the defendant's possession is unlawful. In that event, the onus to establish any right to retain possession will rest on the defendant, as long as the plaintiff does not go beyond alleging ownership. But if the plaintiff fails to establish ownership, the possessor is to be absolved. This principle was recognised in Voet 6.1.24 and has been consistently applied by our Courts, at least since Kemp v Roper NO (1886) 2 Buch AC 141 (at 143) which was decided in 1886. (See also Ruskin NO v Thiergen 1962 (3) SA 737 (A) at 744; B Chetty v Naidoo 1974 (3) SA 13 (A) at 20A - C; Van der Merwe Sakereg 2 ed at 347 et seq; Badenhorst, Pienaar and Mostert Silberberg and Schoeman The Law of Property 4 ed at 255 et seq.)"*
36. The onus rests on an applicant to prove ownership on a balance of probabilities.
37. The Applicant has succeeded in discharging the onus on a balance of probabilities of proving it is the owner of the formwork and scaffolding. I come to this decision based on my reading of the terms and conditions together with annexure MJM2 and the explanation provided in the papers of MJM2.
38. I now propose to deal with the issues raised by the Respondent in opposition to the application.

NON JOINDER OF KHUMBULA PROPERTY SERVICES

39. Having regard to the principles in cases that I have considered regarding joinder of parties it would appear that same is dependant on the extent to which the order I would make may affect the interests of third parties. The test as highlighted in Erasmus Superior Court Practice is whether or not a party has a **direct and substantial interest** *in the subject matter of any order that the Court might make, or such an order cannot be sustained or carried into effect without prejudicing that party, unless the Court is satisfied that he or she has waived his or her right to be joined.*

40. I am of the view that Khumbula Property Services does not have a direct and substantial interest in the subject matter of this litigation nor is it a party that may be affected prejudicially by any judgement I may make in this matter. This view is reinforced by having regard to the Replying Affidavit of the Applicant to which is attached a letter from Khumbula Property Services. Such letter is dated 8 April 2009 and reads as follows.

"Re: Collection of materials on KCC site

This is to certify that the materials on the abovementioned project in Kimberley is not currently in use and can be collected by yourselves with immediate effect."

41. There was therefore no need to join them in these proceedings.

APPLICATION TO STRIKE OUT HEARSAY EVIDENCE

42. In urgent matters a court is entitled to admit hearsay evidence in an affidavit provided that the belief in the truth of such affidavit are stated as well as the source of such information.

43. It was never disputed by the Respondents that the Applicant was at various times after the cancelling of the contract with Khumbula Property Services able to remove certain of the formwork and scaffolding. In addition neither was it disputed that the Applicant's driver was denied access to remove the remainder of the formwork and scaffolding.

44. It is for this reason that I cannot uphold the second point in limine.

URGENCY

45. The principles which an applicant ought to consider when bringing an urgent application were highlighted in the matter of **LUNA MEUBEL VERVAARDIGERS (EDMS) BPK v MAKIN AND ANOTHER (t/a MAKIN'S FURNITURE MANUFACTURERS) 1977 (4) SA 135 (W)**. These principles have been consistently followed by our Courts.

46. During the course of argument Advocate Knoetse for the Respondent referred me to an unreported judgment in the Free State Provincial Division of **PALO PHANUEL MODIBEDI EN DEPARTEMENT VAN KORREKTIEWE DIENSTE**, Case number 2958/2005 delivered on the 4 August 2005. In such judgment

Kruger J dismissed the application with costs based on inter alia the aspect of urgency. Having regard to such judgment it would appear the Applicant was also in the wrong forum which may have also influenced him in dismissing the application.

47. Our courts have held that urgency can exist in relation to commercial matters. See in this regard **TWENTIETH CENTURY FOX FILM CORPORATION V ANTHONY BLACK FILMS (PTY) LTD 1982 (3) SA 582 (W)** and **BANDLE INVESTMENTS (PTY) LTD V REGISTRAR OF DEEDS 2001 (2) SA 203 (SECLD)**. For reasons which will become evident hereinafter I will not make a finding in regard to this aspect.
48. It is my view that at the time the Applicant was denied access to the site the Respondent's officials were entitled to refuse them access to the premises to remove the formwork and scaffolding in light of the fact that the Respondent was not aware of the contract between Khumbula Property Services and the Applicant. Until such time as the Applicant established its ownership of the formwork and scaffolding the Respondent was entitled to deny the Applicant access to the site and prevent the Applicant from removing the formwork and scaffolding.
49. In light of the fact that an illegible copy of the terms and conditions was supplied to the Respondent it was not in a position to adequately determine and satisfy itself of the Applicant's ownership of and therefore entitlement to the formwork and scaffolding. However, once a clear and legible copy of the terms and conditions was supplied, it would be obvious to any person reading such document that the Applicant was the owner of the formwork and scaffolding and was thus entitled to possession thereof, unless the

Respondent raised a defence like for example the right of retention.

50. It appears to be common cause that the Respondent is going to advertise for tenderers for the completion of the Kimberley Conference Centre and appoint a new contractor to complete the works.
51. Clause 36 of the agreement provides for the Respondent to retain the materials and goods on the site for proceeding with the works. It is clear from the Affidavit put up by the Respondent that it is not intent on proceeding with the works any time soon and is only intent on doing so once a new contractor is appointed.
52. The Applicant appears to have disregarded the contents of the letter sent by the Respondent's representative on the 3rd of April 2009. It has misconstrued the contents of that letter to suit its own purposes, namely to bring the application as a matter of urgency. The letter from Motingoe clearly asks the Applicant to establish its ownership and prove ownership of the goods in question. The Applicant's response thereto was to initially send a picking list together with the terms and conditions which are not legible and a copy of a credit agreement which differs to the one put up in the Founding Affidavit.
53. In addition the application papers were served on the same day as the Respondent was required to file its notice of opposition and opposing affidavits. In addition, when the Respondent's representative requested a clear and legible copy of the terms and conditions, same was not provided by the Applicant's attorney. It would have been a simple matter for the Applicant's attorneys to

have enlarged the copy in their possession and have faxed same through to the Respondent's representative. The Respondent's representatives were required to draft the opposing affidavit in the absence of such terms and conditions.

FINAL INTERDICT

54. There are three requisites for the granting of a final interdict, all of which must be present for an applicant to succeed in obtaining such relief namely a clear right, an injury actually committed or reasonably apprehended and the absence of any other satisfactory remedy.
55. As regards the aspect of a clear right, the authorities have defined same to mean a right established on a balance of probabilities.
56. The Applicant for reasons mentioned above has established that it is the owner of the formwork and scaffolding on a balance of probabilities.
57. In relation to whether or not an injury was committed or reasonably apprehended the test to be applied is an objective one. What is required is proof of an actual injury committed or a well-grounded apprehension that an injury will occur. Given the averments contained in the founding affidavit I am of the view that the Applicant has not objectively shown that its apprehension is well grounded. It has merely asserted what its fears are. All the Applicant says is that the formwork is such that it can be easily removed and carried away by a person and in the same breath says that the nature of the equipment is that it is heavy. In addition the Applicant has not placed any facts before this court which justifies

the view that its formwork and scaffolding is in danger of being removed or stolen. It appears that from 20 March 2009, no one has been allowed to gain access to the building site to remove any equipment from the site and that the Respondent has security in place.

58. The Applicant has also not convinced me that it has no other remedy. It has the right to institute a vindicatory action as well as a claim for damages.

59. It is for these reasons that I make the following order:-

The application is dismissed with costs.

**J I HENRIQUES
ACTING JUDGE
NORTHERN CAPE DIVISION**

For the Plaintiff:	Adv Kloppe
Instructed by:	Engelsman Magabane Inc, KIMBERLEY
For the Respondent:	Adv B Knoetse SC
On behalf of:	State Attorney, KIMBERLEY