



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

- (1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED:

Date: **18th January 2021** Signature: _____

CASE NO: 44600/2020

DATE: 18TH JANUARY 2021

In the matter between:

TRANS KALAHARI GROUP (PTY) LIMITED

First Applicant

TRANS KALAHARI LOGISTICS SA (PTY) LTD

Second Applicant

and

PARAMOUNT TRAILERS (PTY) LIMITED

Respondent

Coram: Adams J

Heard: 15 January 2021 – The ‘virtual hearing’ of this urgent application was conducted as a videoconference on the *Microsoft Teams* digital platform.

Delivered: 18 January 2021 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GLD and by release to SAFLII. The date and time for hand-down is deemed to be 11H00 on 18 January 2021.

Summary: Urgent application – vindicatory relief – factual dispute – respondent’s version cannot and should not be rejected on the papers – urgency not proven – application struck from the roll –

ORDER

- (1) The applicants’ urgent application is struck from the Urgent Court roll due to lack of urgency.
 - (2) The first and second applicants, jointly and severally, the one paying the other to be absolved, shall pay the respondent’s costs of this urgent application.
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JUDGMENT

Adams J:

[1]. The second applicant, Trans Kalahari Logistics South Africa (Pty) Limited (‘Trans Kalahari Logistics SA’), carries on business as a transportation and logistics company and operates a fleet of trucks and trailers cross-border between South Africa, Zambia and the DRC. The first applicant, Trans Kalahari Group (Pty) Limited (‘TKG’), is the Namibian Holding Company of Trans Kalahari Logistics SA. The respondent, Paramount Trailers (Pty) Limited (‘Paramount Trailers’), carries on business manufacturing, selling and from time to time leasing commercial trailers from its business premises in Midvaal. The respondent is in possession of the trailers, which form the subject of the applicants’ vindicatory claim in this application, but not of the trucks, which is in possession of a related, but a distinct and separate company, namely Paramount Trucks (Pty) Limited (‘Paramount Trucks’), which carries on its business selling and leasing of commercial trucks in close proximity to but different from the respondent’s business premises. I shall refer to the latter two entities collectively as ‘Paramount’.

[2]. The applicants and Paramount have been in a business relationship for a considerable period of time during which time the applicants purchased and hired from Paramount the trucks and trailers utilised by Trans Kalahari Logistics SA in their transportation business. Trans Kalahari Logistics SA also conducts its business from a small administrative office at Paramount's business address in Midvaal and they were permitted to park their trucks and trailers at the premises of Paramount at an agreed fee of R350 per day.

[3]. In this opposed urgent application, based partly on the *rei vindicatio* and partly on specific performance, the applicants apply for the return of 39 trucks and 48 trailers, presently in the possession of Paramount. Of the 39 trucks, 22 are owned by the applicants, having been bought from Paramount and other dealerships, and 17 are owned by Paramount – these 17 trucks were sold to the applicants during 2018, but pending payment of the purchase price of these trucks the agreement between the parties was that the applicants would lease them from Paramount at an agreed rental payable on a monthly basis by the applicants to Paramount. The parties labelled these agreements as 'rent to buy' contracts. Of the 48 trailers, 35 are owned by the applicants, having been bought from Paramount, and 13 are owned by Paramount – these 13 trailers similarly were sold to the applicants during 2018 in terms of 'rent to buy' agreements, and pending payment of the purchase price of these trailers, which the applicants were hoping to have financed by a bank or some other Finance House, the agreement between the parties was that the applicants would lease the trailers from the Paramount at an agreed rental payable on a monthly basis by the applicants to Paramount.

[4]. The 22 trucks and 35 trailers owned by the applicants, which had been paid for in full by them as and at the end of January 2020, were purchased for the total purchase price of approximately R40 million, which, in my view, is an indication of the approximate value of these assets belonging to the applicants.

[5]. On the other hand, the purchase consideration payable by the applicants in respect of the trucks and trailers presently still owned by Paramount totals approximately R41 million. From March 2018 / April 2019 the applicants had the

use of these trucks and trailers on the understanding that the applicants would pay the purchase price of about R40 million as soon as they were able to raise the necessary funds to finance the deals. This was not to be as the finance agreements did not materialise. Furthermore, the applicants, according to Paramount, also fell into arrears with their monthly rental, the last payment having been received in February 2019. In these circumstances, it is difficult to understand on what basis the applicants, who are in breach of the arrangement with Paramount in that they have failed to come up with the purchase price in respect of the 17 trucks and 13 trailers, can claim delivery of these trucks and trailers. Moreover, the applicants are in arrears with payment of the monthly rental payable in the interim and until such time as the purchase and sale of these assets were finalised. The applicants' claim for specific performance in respect of these trucks and trailers is ill-advised.

[6]. Paramount Trailers oppose the application by the applicants on a number of grounds, including on the basis that Paramount Trucks, which is not before Court, should have been joined in these proceedings. In light of my findings below relating to the other grounds of opposition, it is not necessary for me to deal with this issue. The point is that, even if Paramount Trucks had been joined in these proceedings, the application would still have failed for the reasons dealt with below.

[7]. Paramount also opposes the application on the basis that there is no urgency and on the basis of the merits of the application. These two aspects of the matter are inter-related in that if the version of the applicants are accepted, then the application is urgent. Conversely, if the facts as averred by Paramount are accepted, then the application is not urgent.

[8]. Prior to the issue of the urgent application by the applicants the parties were engaged over an extended period with regard to the release of certain of the trucks and trailers to the applicants. The applicants are indebted to Paramount for a substantial sum of money in respect of the arrear rental, commission payable, repairs and maintenance, parking and the purchase price in relation to the 17 trucks and 13 trailers which the applicants had purchased

from Paramount. This debt, according to Paramount, amounts to over R60 million.

[9]. The applicants claim return of the trucks and trailers on the basis that Paramount is in unlawful possession thereof. This is denied by Paramount, who alleges that during early July 2020 there were discussions between the parties about the prior representations, the defaults on payment and the impact of the Covid-19 pandemic on the business of the second applicant. The applicants indicated that the first applicant was not able to make any payments to Paramount. It was then proposed by the applicants that, as security for the amounts owed by the applicants to Paramount, the entire fleet of trucks and trailers would be retained by Paramount in its possession and under its control at the Midvaal premises. This retention would have served, so it was understood by all concerned, as security for the amounts owed to Paramount until the applicants obtained a funding facility.

[10]. The amounts due at the time by the applicants to Paramount included monthly rental arrears of over R13 million, the outstanding sale price of about R50 million for the Paramount vehicles, as well as the VAT liability.

[11]. This proposal, so Paramount avers, was orally accepted by it, resulting in a 'fleet retention agreement' being concluded between the applicants and Paramount, in terms of which the entire fleet of vehicles would be retained in the possession of Paramount and would serve as security in favour of Paramount for amounts due. This, so Paramount contends, explains why all of the trucks and trailers which the applicants claim should be returned to them, were parked at the premises of Paramount in Midvaal. The applicants however suggest that this was no more than an incident of the agreement in terms of which Paramount allowed the applicants to park the trucks and trailers at the premises of Paramount and that the second applicant would pay rental to the respondent.

[12]. It is clear that the main dispute between the parties is a factual one. The question is this: Which one of the two versions is to be accepted? In deciding that question, it should be borne in mind that this is an application for final relief and factual disputes are to be decided on the basis of the principles enunciated in

Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Limited, 1984 (3) SA 623 (A).

[13]. The general rule is that a court will only accept those facts alleged by the applicants which accord with the respondent's version of events. The exceptions to this general rule are that the court may accept the applicants' version of the facts where the respondent's denial of the applicant's factual allegations does not raise a real, genuine, or *bona fide* dispute of fact. Secondly, the court will base its order on the facts alleged by the applicant when the respondent's version is so far-fetched or untenable as to be rejected on the papers.

[14]. In *Room Hire Co (Pty) Limited v Jeppe Mansions (Pty) Ltd*, 1949 (3) SA 1155 (T0, it was held that:

'A bare denial of applicant's material averments cannot be regarded as sufficient to defeat applicant's right to secure relief by motion proceedings in appropriate cases. Enough must be stated by respondent to enable the Court to conduct a preliminary investigation ... and to ascertain whether the denials are not fictitious and intended merely to delay the hearing.'

[15]. It is necessary to adopt a robust, common-sense approach to a dispute on motion. If not, the effective functioning of the Court can be hamstrung and circumvented by the most simple and blatant stratagem. A Court should not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavits.

[16]. The applicants submit that the version of the respondent, which the applicants deny on the basis that no *fleet retention agreement* was concluded or authorised, should be rejected on the papers presumably on the basis that same is 'so far-fetched or untenable as to be rejected on the papers'. Mr Hollander, Counsel for the applicants, submits that this conclusion can and should be drawn from the fact that this version, as a defence, is raised for the first time in the answering affidavit. None of the correspondence preceding the application, so the applicants contend, refers to the alleged fleet retention agreement.

[17]. Additionally, so it is argued by Mr Hollander, the alleged agreement makes no commercial sense. With the applicants' entire fleet placed in the hands of the respondent, how would the applicants have conducted its business if its fleet was not operating and how would it have been able to repay its debts to the respondent, asked the applicants rhetorically. There is also no indication regarding the details of the terms agreed upon as to how the respondent would perfect its security. This version, so the applicants contend further, is at variance with a previous story where the respondent asserted that it was entitled to be in possession of the trucks and trailers in terms of which a *lien* for work done in respect of those vehicle. There would be no need for the respondent to assert a *lien* if the alleged retention agreement was in place, so the argument is concluded.

[18]. I disagree with these contentions. At the relevant time the applicants were indebted to Paramount for amounts in excess of R60 million. It makes eminent sense that Paramount would require that the debt be secured and what better way to do that than to take possession of the assets of the applicants. Paramount had threatened to repossess all of its trucks and trailers and it is understandable that the applicants, rather than to lose some of their vehicles, would pledge all of the trucks and trailers whilst still trying to come up with the funds to settle their debt with Paramount. Paramount had already in June 2020 threatened re-possession of the vehicles due to non-payment.

[19]. I agree with the submissions by Mr Subel SC, who appeared on behalf of the respondent, that the respondent's version is neither improbable nor far-fetched and must prevail in motion proceedings for final relief.

[20]. Mr Subel also submitted that this application was launched strategically and cynically by the applicants, in the middle of the annual vacation period and unjustifiably seeking enrolment on the urgent roll. I agree. The trucks and trailers sought to be recovered have been in the lawful possession of Paramount since mid-2020 in terms of a contractual arrangement aimed at affording Paramount security for its legitimate claims against the applicants for a sum in excess of R65 million owed to it. Having failed to negotiate a release of a limited number of

trucks, the applicants launched this application for which no sustainable legal basis has been laid.

[21]. If regard is had to the evidence before me as a whole, it cannot be said that the version of the respondent is so far-fetched that it can be rejected on the papers. It follows that the applicants are not entitled to the relief claimed or to claim that relief on an urgent basis. At best for the applicants, there are factual disputes, and if those disputes are not at this stage decided in favour of the applicants, it means that they have not demonstrated that the matter is urgent.

[22]. In any event, even on the applicants' own version, Paramount has been in possession of their trucks and trailers from about July 2020 and they do not explain why attempt were not made earlier to regain possession thereof. I am therefore not convinced that the applicants have passed the threshold prescribed in Uniform Rule of Court 6 (12) (b) and I am of the view that the application ought to be struck from the roll.

[23]. Accordingly, the applicants' urgent application stands to be struck from the urgent court roll.

Costs

[24]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so. See: *Myers v Abramson*, 1951(3) SA 438 (C) at 455.

[25]. I can think of no reason why I should deviate from this general rule.

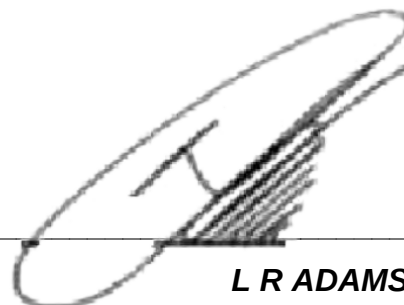
[26]. Mr Subel has also urged me to grant a punitive costs order on the scale as between attorney and client to show the court's displeasure with the conduct on the part of the applicants. I am not persuaded that in this matter a case has been made out for punitive costs.

[27]. I therefore intend awarding cost against the first and second applicants in favour of the respondent.

Order

Accordingly, I make the following order: -

- (1) The applicants' urgent application is struck from the Urgent Court Roll due to lack of urgency.
- (2) The first and second applicants jointly and severally, the one paying the other to be absolved, shall pay the respondent's costs of this urgent application.



L R ADAMS

Judge of the High Court

Gauteng Local Division, Johannesburg

HEARD ON:	15 January 2020 – in a 'virtual hearing' during a videoconference on the <i>Microsoft Teams</i> digital platform
JUDGMENT DATE:	18 th January 2021 – judgment handed down electronically
FOR THE APPLICANT:	Adv L Hollander
INSTRUCTED BY:	DM5 Inc, Sandton
FOR THE RESPONDENT:	Advocate A Subel SC
INSTRUCTED BY:	Fluxmans Incorporated, Rosebank, Johannesburg