

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 19614/2021

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

Date: 10 May 2021 E van der Schyff

In the matter between:

SV TRADING CC t/a VIRTUAL PRODUCTION

APPLICANT

and

SHAZIA SULIMAN N.O.

FIRST RESPONDENT

THE SHERIFF OF THE HIGH COURT OF  
SOUTH AFRICA. PRETORIA-EAST

SECOND RESPONDENT

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JUDGMENT

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Van der Schyff J

- [1] In this application the applicant by way of *rei vindicatio*, claims from the first respondent, who is the duly appointed liquidator of Audio Logic CC, certain assets (listed in annexures V5 and V6 to the founding affidavit), on the basis that it is the owner thereof (the assets). The only issue for my determination is whether the applicant succeeded in proving ownership of the assets, which were attached and removed by the second respondent at the behest of the first respondent (the liquidator), in terms of an order obtained in terms of s 69(3) of the Insolvency Act. The application was found to be urgent and heard in the urgent court on 30 April 2021. On 3 May 2021, a judgment was handed down, in terms of which the matter was referred for hearing of oral evidence on the limited issue of ownership of the assets. Evidence was adduced on behalf of the parties, on Friday 7 May 2021.
- [2] As stated in the judgment dated 3 May 2021, the facts of this application are mostly common cause. Both parties agree that an oral agreement of sale was concluded between Audio Logic CC ('Audio Logic') and the applicant during 2018. The applicant's case as set out in the founding affidavit, is that the parties agreed in 2018 that the applicant would purchase 'each and every asset' of Audio Logic, for an amount of R13m. The amount would not be paid in a lump sum, the creditors of Audio Logic would be paid and the balance would be paid to Marais, Audio Logic's sole member, by 2023. Pursuant to the conclusion of the agreement, the assets were delivered to the applicant on 6 April 2018. The applicant contends that since this was not a cash sale, ownership passed to it upon delivery to it. The applicant also planned to convert Audio Logic into a company, as a vehicle to run a sound engineering academy.
- [3] Audio Logic's version was set forth by its sole member, Marais. He intended selling Audio Logic and during 2027, met with Van Graan, who is a member of the applicant. In 2018 a meeting was held between Van Graan, Marais and Audio Logic's accountant, Vorster. According to Marais, they discussed that 'Audio Logic' could be sold as a going concern for an amount of R13m. The applicant intended to integrate Audio Logic's business under the name of 'Virtual Productions'. The proposed terms of the agreement were that (i) the applicant

would settle all Audio Logic's creditors before December 2018; (ii) the balance of the purchase price would be paid to Marais over a period of five years; (iii) Marais would remain an employee of Audio Logic for five years at a salary of R50 000.00, until April 2023. He was adamant that ownership of the assets would remain vested in Audio Logic until full payment of the purchase price. The liquidator states in her affidavit: 'No person in his right mind would conclude an oral agreement for the delivery of moveable assets worth R13m without the reservation of ownership'.

- [4] The urgent court application was preceded by an application in the Magistrate's Court in terms of s 69(3) of the Insolvency Act. The founding affidavit to that application was attached to the applicant's founding affidavit in the urgent court application. It is noteworthy that the affidavit deposed to by the liquidator in the s 69 application corresponds largely with the answering affidavit. The terms of the proposed agreement are repeated verbatim, save for the fact that it is not stated in the first affidavit that the parties agreed that ownership of the movable assets would remain vested in Audio Logic until the full purchase price was paid. After considering the affidavits filed of record, together with the annexures thereto, I was of the view that a *bona fide* and genuine dispute of fact exists as to the parties' intention on whether ownership would pass, even if a robust approach was followed as required when the Plascon Evans principle is applied in deciding questions of fact in motion proceedings. As stated, I was of the view that a factual dispute existed regarding the question as to whether the parties' oral agreement contained an ownership reservation clause. In the result, the application was referred to oral evidence on this limited aspect.
- [5] Three witnesses were called to testify. The applicant called Mr. Van Graan, the managing member of the applicant. Mr. Van Graan's evidence was that the sale agreement was concluded in March 2018 when he met with Mr. Marais, the sole member of Audio Logic, Mr. Vorster – Audio Logic's accountant and Mr. Marais' girlfriend at Rhapsody's. He confirmed the terms of the agreement as set out in his founding affidavit. He stated unequivocally that the issue of the reservation of



ownership did not come up at all during the discussions. His evidence was that he wanted to buy all Audio Logic's equipment, all its clients and obtain Mr. Marais' expertise. The latter reason resulted in Virtual Productions offering Mr. Marais employment for the next five years. Mr. Marais was also offered shares and a membership interest in Virtual Productions, but he declined this as he only wanted to focus on the business of sound engineering. Mr. Marais, who was in a bad emotional state and pressed by debts and personal losses wanted to free himself of the stress associated with running a business. He sought financial assistance to tend to personal financial issues as well as Audio logic's debt. The issue of a reservation of ownership only came up at a later stage after Mr. Marais and Audio Logic's immediate financial concerns were addressed and Mr. Marais was in a better position. It was an outright credit sale and ownership was transferred when the equipment was delivered to Virtual Productions. It was a handshake agreement. Although he wanted the agreement to be put in writing some issues needed to be sorted out before a written agreement could be drafted. It was never put to the witness that the contract would only come into existence if put in writing. Mr. Van Graan's evidence that he gave certain equipment to Mr. Marais after the equipment was delivered on 6 April 2018, because Mr. Marais asked whether he could have it, was also not disputed during cross examination. I found it significant that it was not put to Mr. Van Graan that Mr. Marais and / or Mr. Vorster would testify that the parties agreed that the property would remain Audio logic's property until full payment of the purchase price of R13million was affected. Instead it was put to Mr. Van Graan that the witnesses would testify that the words 'ownership' and 'reservation of ownership' was not mentioned or used during the discussion. It could have been the tenor of the discussion but the words were not used.

- [6] Mr. Van Graan was a passionate witness, who was somewhat confrontational during cross-examination. His answers were quick and straightforward. Despite stringent cross examination he never wavered as far as his evidence that the issue of the reservation of ownership was not discussed and never even came up during the meeting, is concerned. Counsel for the respondent did not argue that Mr. Van Graan was not a credible witness. Of importance to me, is the fact

that Mr. Van Graan's evidence as set out in the founding affidavit corresponds with the *viva voce* evidence he gave.

- [7] Mr. Vorster, Audio Logic's accountant testified on behalf of the respondent. He can be described as a very cautious witness who qualified his evidence frequently by stating 'in my view' or 'as I saw it'. He was very soft spoken. I got the impression that he did not want to perjure himself and that he was not in a position to give strong straightforward answers to the questions asked. Mr. Vorster testified that after the meeting it was his impression that the parties came to a 'baseline agreement'. Although he initially said that the meeting was scheduled to discuss a possible sale of Audio Logic's equipment and client base, he continued to state that it was decided at the meeting that the equipment would be sold for an amount of R13 000 000. He emphasised- "that has not changed up to now". He continued to state that it was also decided that the first portion of the payment would be made towards Audio Logic and Mr. Marais's existing creditors and the remainder would be paid to Mr. Marais over a period of five years. Urgent attention was to be given to the existing creditors to settle their claims. He repeated at least three times that the general agreement was that those creditors were pertinent and that they were the first order of business and had to be settled first. The parties wanted to go ahead with the transaction although some minor issues still needed to be ironed out. Mr. Vorster's evidence was that some of the equipment was linked to hire-purchase agreements. Mr. Vorster said the mere fact that Audio Logic's credit agreements were mentioned during the meeting is indicative of the tenor of the agreement that ownership of the property could not pass to Virtual Production unless, at least, the hire-purchase agreements were redeemed. He stated during cross examination that the parties agreed that if the Wildenmar account was taken over and settled by Virtual Productions that the ownership of the equipment linked to that account would be transferred to Virtual Productions. Although the words or term 'ownership was reserved' were not used, the understanding he had from the conversation was that ownership was reserved. Every instance when Mr. Vorster indicated that ownership could not be transferred he linked that to the existence of hire-purchase agreements. However, no evidence was placed before the court



that any of the movable assets, the equipment concerned, is owned by a third party *in lieu* of a hire-purchase agreement. The e-mail dated 11 September 2018, written by Mr. Vorster indicates that the Wildenmar account was indeed settled and that he was of the view that the equipment linked to that account was now owned by Virtual Productions. The agreements uploaded to case lines by agreement between the parties expired before the agreement was concluded. In any event, it is important to note that the liquidator does not state in the answering affidavit or the affidavit filed in support of the s 69 application, that the assets belong to a creditor of Audio Logic. She stated that the assets belonged to Audio Logic. On the facts before me, I am unable to find any hire-purchase agreement that was linked to the equipment that was still effective, except for one Instalment Agreement that expired on 1 April 2018, when delivery of the assets occurred.<sup>1</sup> Mr. Vorster's evidence that the tenor of the discussion was that ownership of the assets would not be transferred because of the existence of hire-purchase agreements linked to the assets, does therefore not make legal sense.

- [8] Mr. Marais was the last witness to testify. Mr. Marais testified during his evidence in chief that it was agreed during the discussion of March 2018 that ownership of the assets would remain in Audio Logic until final payment. This evidence corresponds with the statement made by the liquidator in the answering affidavit that it was 'categorically discussed' at the meeting in March 2018 that ownership of the assets would remain in Audio Logic until full payment of the purchase price. It, however, does not correspond with the statement made to the Van Graan that Mr. Marais would testify that the words 'ownership' or 'reservation of ownership' were not mentioned or used at the March 2018 meeting. During cross examination Mr. Marais conceded that 'ownership' and 'reservation of ownership' were not 'mentioned in so many terms'. When Mr. Marais was pressed during

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<sup>1</sup> The Standard Bank (SB) Instalment Sale Agreement uploaded on 0001-0002 expired on 01/04/2018; The Standard Bank (SB) Instalment Sale Agreement uploaded on 0003-0004 expired in 2015; The Standard Bank (SB) Instalment Sale Agreement uploaded on 0005-0006 expired in 2015; The Standard Bank (SB) Instalment Sale Agreement uploaded on 0007-0008 expired in 2017; The Standard Bank (SB) Instalment Sale Agreement uploaded on 0009-0010 expired in 2015; the Business Partner's Agreement is a loan agreement.

cross examination to explain what he meant when he said that ownership and the reservation of ownership were 'not mentioned in so many words' in March 2018, he said 'If they took ownership why did they not honour the debts?' and 'How can you claim ownership if you cannot pay the bills'.

- [9] Of importance is Mr. Marais account of the terms of the agreement as contained in a document dated 5 November 2020 compiled by Mr. Marais. Mr. Marais confirmed during his evidence in chief that this document was drafted by him, and that it is a summary that contains the most important information in relation to the agreement concluded. Mr. Marais confirmed that the purchase was structured as follows:

"Virtual Productions would settle all Audio logic creditors. The balance of the purchase price would be paid to myself over a period of five years. I would be under employment with a salary and benefits for the five years that was over and above the sale of the company. After the five years, that would have ended April 2022 I would be released from employment."

It is noteworthy that no mention is made of any reservation of ownership in this summary. Mr. Marais explained the absence of this information by saying that the document is only a summary. In my view counsel for applicant correctly submitted that the reservation of ownership is an important aspect that one would not neglect to include in a summary that contains the important components of an agreement. Even in the draft agreement prepared by Mr. Vorster that was attached to the e-mail dated 16 September 2018, no mention is made of the reservation of ownership until the full amount of R13million is paid. The draft agreement contains contradictory clauses and requires, amongst others that the purchaser shall provide security for the remaining amount payable after the payment of an amount of R9million to Audio Logic upon signature of the agreement. The agreement was backdated with the effective date being 1 March 2018.



- [10] Mr. Marais's evidence deviated substantially from the respondent's case as stated in the answering affidavit. There is quite a difference between stating that the issue of ownership was categorically discussed and the evidence that 'it was the tenor of the discussions' that ownership was reserved, or that the assets would remain the property of Audio Logic until the purchase price was paid in full. As a result, I am unable to find that Mr. Marais *viva voce* evidence is reliable.
- [11] Both parties attached draft unsigned agreements to their affidavits. It is evident that the relationship between the parties deteriorated after the agreement was concluded in March 2018. As the relationship deteriorated the respective parties drafted written agreements with provisions that would benefit them but were not agreed on during the March 2018 meeting. Neither of the parties submitted that no agreement was concluded. The sole issue for determination is whether I can find on a balance of probabilities that the agreement concluded between the parties during March 2018 did not contain a reservation of ownership. Whether Virtual Productions honoured the terms of the agreement is irrelevant for purposes of this determination. Neither Mr. Marais nor Mr. Vorster could explain the 'tenor' of the agreement that facilitated a mutual understanding that ownership of the assets could only pass to Virtual Productions on payment of the full purchase price. However, since the agreement was concluded Mr. Marais was employed by the applicant and a portion of Audio Logic and his personal creditors were paid – albeit that a dispute exists regarding the amounts that were paid. Virtual Productions was given access to Audio Logic's bank account. These facts show that an agreement was concluded. Mr. Vorster confirmed that Mr. Marais was emotionally distressed when the agreement was concluded, and Mr. Marais confirmed that he found the business of running Audio Logic both mentally and physically draining. He wanted out and he concluded the sale agreement. The evidence does not support a finding that the parties agreed expressly or otherwise that ownership would be reserved until payment of the full purchase price. Mr. Van Graan confirmed that he would not sell assets worth R13million without security but that Mr. Marais had no choice but to sell on this basis in light of the emotional and financial dilemma he was in.



- [12] The common cause facts indicate that the parties agreed that the equipment be sold on credit. Counsel for the applicant argued with reference to *Norman's Law of Purchase and Sale in South Africa*, that a presumption exists that where a seller gives delivery of the *res vendita* to another, the intention is to make the purchaser the owner of the goods. Fouche states in *Regsbeginnels van Kontraktereg en Verhandelbare Dokumente* (1995:156): 'Waar die saak roerend is en vir kontant verkoop word, moet die koopprys betaal word' (alvorens eiendomsreg oorgaan) 'By kredietkope hang die oorgang af van regswerking, byvoorbeeld die "huurkoopkontrak", of van die bedoeling van die partye, hoewel eiendomsreg gewoonlik by lewering van die saak oorgaan.' The legal position is succinctly set out in *Wille's Principles of South African Law* 521-522. It is explained that ownership of movable property does not pass by the making of a contract alone. Two requirements must be satisfied for the transfer of ownership. In the first place, the parties must intend for the ownership to pass and secondly they must affect delivery. In *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton* 1973 (3) SA 685 (AD) Holmes JA held that the 'general rule' that in a sale for cash ownership does not pass until the price is paid, even if delivery has been given, and that in a sale on credit, ownership passes on delivery, is not an 'irrefragible principle of law. It is basically a question of fact in each case. It depends whether the totality of the circumstances shows, by inference or otherwise, that the parties intended ownership to pass or not to pass.'
- [13] Although this court is on face value faced by two mutually destructive versions, I am for the reasons stated above, of the view that the applicant discharged the onus that was on him on a balance of probabilities. The parties concluded a credit agreement and ownership was not reserved until the full purchase price was paid. Although the parties discussed Audio Logic's liability towards its creditors there is no evidence before the court that the full settlement of the creditor's claims, or the full payment of the purchase price, was a pre-condition to the passing of ownership.

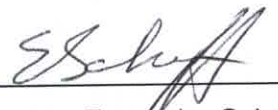
[14] For purposes of clarity it is necessary to explain that 'SV5' and 'SV6' are annexures attached to the founding affidavit where the second respondent indicated with a 'tick' which of the assets listed were attached. The finding made relates to all the assets listed on 'SV5' that were delivered to the applicant irrespective as to where they are, with the exclusion of the unidentified assets that were given to Mr. Marais as per Mr. Van Graan's evidence.

[15] As to the appropriate costs order, the liquidator is not to be held liable for costs in her personal capacity and the costs are to be costs in the liquidation of Audio Logic CC.

## ORDER

In the result, the following order is made:

1. The applicant is declared the owner of the assets listed in annexure 'SV5' and 'SV6' to the applicant's founding affidavit;
2. The second respondent is ordered to release the assets from attachment and to return the assets to the applicant;
3. The costs are costs in the liquidation of Audio Logic CC.



E van der Schyff

Judge of the High Court, Gauteng, Pretoria

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by e-mail. The date for hand-down is deemed to be 10 May 2021.

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|-----------------------------|--------------------------|
| Counsel for the applicant:  | Adv. A J Venter          |
| Instructed by:              | UMS Attorneys            |
| Counsel for the respondent: | Adv. A Rossouw SC        |
| Instructed by:              | Jaco Roos Attorneys Inc. |
| Date of the hearing:        | 7 May 2021               |
| Date of judgment:           | 10 May 2021              |