

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 32408/21

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

Date: 16 July 2021 E van der Schyff

In the matter between:

JOMAHIL CRUSHING MERCHANTS

(PTY) LTD

APPLICANT

and

MOPANI CRUSHERS (PTY) LTD

RESPONDENT

JUDGMENT

Van der Schyff J

- [1] The applicant approached the urgent court for an order directing the respondent to permit the applicant to uplift and remove equipment (a Crush Ranger Plant, part number AD1301) which had been let to the respondent by the applicant in terms of a lease agreement entered into between the parties on or about 12 January 2021.

Although it seems as if the respondent disputed the existence and terms of the lease agreement, counsel for the respondent stated unequivocally that the existence and terms of the lease agreement are not disputed, but common cause. The parties are also engaged in previous contracts, the most significant of which is a contract relating to constructing a static crushing plant entered into during 2018.

- [2] The respondent contested the urgency of the application. The respondent was provided with a short period to note its opposition to the application. The court needs to consider whether to condone the fact that the application was enrolled on the urgent court roll and will receive preferent treatment to applications enrolled on the ordinary opposed motion roll and the truncated time period for the filing of papers devised by the applicant. This can only be done on a proper evaluation of the facts.

- [3] The applicant leased out crushing equipment to the respondent. The applicant is not the owner of the property. It has a protectable legal interest in the property. In terms of the agreement between the applicant and the property owner, the applicant is entitled to let out and hire equipment to third parties. In terms of the agreement concluded between the parties, the applicant let the equipment that forms the subject matter of this application to the respondent for a period of 6 months. The respondent paid the deposit, and the applicant delivered the equipment. The respondent did not honour its payment obligations in terms of the contract. The last payment received was on 16 April 2021, and this payment did not extinguish previous shortfalls. After the applicant engaged with the respondent to resolve the breach, the respondent advised that it did not have the funds to meet its contractual obligations. Further discussions were fruitless. The applicant avers that it cancelled the lease on 1 May 2021.

- [4] After cancelling the agreement with the respondent, the applicant advised the equipment owner that the equipment would be available for other contracts. The equipment was leased out to a mining company in Tanzania. The equipment needs to be transported to Tanzania, and operations will commence by no later than 31 July 2021. It will take approximately three weeks to deliver the equipment to Tanzania. Commercial urgency has been held to constitute urgency as contemplated in Rule 6(12). Amidst the economic devastation brought about by the

global Covid-19 pandemic, I am convinced that the protection of commercial interests justifies a ruling that the application is indeed urgent. The applicant will not be afforded substantial redress if the application is heard in the ordinary motion court. In addition, correspondence appended to the founding affidavit indicates that the applicant endeavoured to come to an amicable arrangement with the respondent before approaching the court. This court cannot fault such an approach and therefore condones non-compliance with the time periods provided for in Rule 6(5).

- [5] The respondent disputes that the agreement was cancelled. The respondent avers that the lease agreement concluded between the parties still exists and that the applicant did not cancel it. This submission is based on the fact that the applicant stated in the founding affidavit that the agreement was cancelled on 1 May 2021, but the applicant's attorney, in response to a letter dated 7 June 2021 received from the respondent, stated that the letter constituted a termination of the agreement, which the applicant accepts. The respondent avers that the same agreement cannot be terminated twice, and the court must accept that it was not terminated on 1 May 2021. Respondent's counsel did not clearly differentiate between the lease and the preceding separate contractual arrangement between the parties. The lease is a stand-alone agreement. Counsel submitted that the dispute between the parties regarding whether the applicant terminated the lease agreement, is a material factual dispute and that 'not even the Plascon Evans Rule can save the situation'. I disagree. The Supreme Court of Appeal explained in *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) paras [12] – [13]:

'Recognising that the truth almost always lies beyond mere linguistic determination courts have said that an applicant who seeks final relief on motion, must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real,

genuine or *bona fide* dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers. ... A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact, said to be disputed.'

- [6] As it emanates from the papers filed, the main dispute between the parties revolves around the existence of the agreement concluded between the parties during March 2018. This dispute is of no concern for determining the issue at hand, namely whether the lease agreement between the parties was terminated. Despite denying the terms of the lease agreement in the answering affidavit, counsel conceded during argument that a lease agreement was concluded and that the terms thereof correspond with the terms contained in the lease agreement attached to the founding affidavit. This document was signed on behalf of the respondent. The applicant's representative initialed the respective pages of the agreement, although he did not sign in full on the last page. There is no reason to find that the agreement did not come into force.
- [7] Clause 3 of the agreement is the 'rental' clause. It is stated in the definition section that 'rental' means the agreed rate charged in respect of the respective machines, as agreed between the parties to the agreement. The parties agreed that the rental per month would amount to R 300 000.00 excluding VAT. They agreed that the minimum production per month would be 75000 saleable tons. The rental included the costs of the operator, regular maintenance, breakdowns, and spare parts. For the first three months of the agreement, the parties agreed to waive the rental as follows:

‘3.3.1 The first month Rental is an amount of R250 000 + VAT be paid upfront ...

3.3.2 Once the Rock Ranger arrives on site an amount of R100 000.00 shall be made available by Mopani for the first month operations (all inclusive: Diesel, spares, maintenance and labor).

3.3.3 For the subsequent two months only R150 000.00 per month shall be made available for operations.

3.3.4 The amounts in 3.3.2 and 3.3.3 above are budgeted amounts made available for operations. Should these operating amounts not be sufficient for monthly expenses budget overrun shall be agreed to by the parties and paid by the Lessee.

3.3.5 The Lessor shall provide substantiated invoices for the running costs to draw from the monthly budgeted amount.

3.3.6 The parties shall agree on how the debt is repaid.’

- [8] The respondent paid the deposit, and the equipment was delivered. The respondent failed to pay the additional amount of R100 000.00 and only paid R 32 839.80 on 10 February 2021. The respondent failed to pay R150 000.00 in March but paid the said amount in April. The respondent did not pay any further amount.
- [9] In an email dated 1 May 2021, the applicant enquired regarding the outstanding rental payment for April 2021. It stated that the owner wants the respondent to move the unit in the coming week. On 2 May 2021, the respondent’s representative informed that the respondent is low in cash and stated unequivocally that the respondent could not pay the rent. The respondent wanted a meeting to discuss the way forward regarding the equipment. On 3 May 2021, the applicant informed the respondent that the equipment cannot be kept on-site if an amount of R 225 000.00 was not paid over to the owner and that the equipment could not be the subject of any new agreement concluded between the parties. On 5 May 2021, the applicant

informed the respondent that the equipment would be uplifted in the next week and that the respondent's assistance was required to load items.

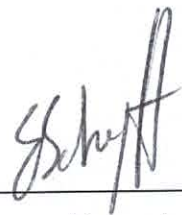
[10] The applicant's representative informed Mr. Kgatle, and two officials, known as Temba and Philemon, that he had no choice but to terminate the existing lease agreement. Mr. Kgatle is the official who signed the lease agreement on behalf of the respondent. Following arrangements made with Mr. Kgatle, the applicant dispatched a transporter to the site to collect the equipment. He was prevented from entering the premises to collect the equipment. It is important to note that the respondent answered this allegation with a bare denial and then elaborate on issues not related to the lease agreement. The respondent's answer confuses the lease agreement with the agreement relating to constructing a static crushing plant. The respondent provides no detailed submissions in support of the bare denial. No affidavit is filed wherein Mr. Kgatle denies these averments. In view of the bare denial and the absence of an affidavit from Mr. Kgatle wherein the opposite is averred, the email communication sufficiently indicates that the lease agreement was cancelled by 5 May 2021.

[11] The respondent avers that the applicant is indebted to it in the amount of R5 841 215.75. It needs to be mentioned that only R370 000 of this amount is allegedly owed in relation to the equipment and the lease agreement. The respondent avers that it has a right of retention on the equipment. It submits that it is the only way to recover its losses and the amounts due to it by the respondent. Professor R Brits explains in his monograph *Real Security Law* (JUTA, 2016) 483, that a lien or a right of retention is the right of one person to retain physical control of the property of another if he had expended money or money's worth on such property while it was under his control. The respondent failed to make out a case that it has a right to retain the equipment.

ORDER

In the result, the following order is made:

1. The draft order marked X, dated and signed by me, is made an order of court.



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 email. The date for hand-down is deemed to be 16 July 2021.

Counsel for the applicant:	Adv. A Lamprecht
Instructed by:	Sporides Attorneys
Counsel for the respondent:	Adv. ME Sebjeni
Instructed by:	Ramulifho Attorneys Inc.
Date of the hearing:	13 July 2021
Date of judgment:	16 July 2021