



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No.: 6054/2017

In the matter between:

BLC PLANT COMPANY (PTY) LTD

APPLICANT

and

MALUTI-A-PHOFUNG LOCAL MUNICIPALITY
KWANE CAPITAL (PTY) LTD
KWANE BLC EQUIPMENT (PTY) LTD

1st RESPONDENT
2ND RESPONDENT
3RD RESPONDENT

CORAM: MATHEBULA, J

JUDGMENT BY: MATHEBULA, J

HEARD ON: 22 FEBRUARY 2018

DELIVERED ON: 8 MARCH 2018

[1] These are motion proceedings. The applicant is seeking an order against the first respondent for the return of three (3) earthmoving equipment.¹ The respondent is resisting the application.

¹ Page 2 paragraph 1 of the Notice of Motion

- [2] The factual matrix is not complex. The applicant is the owner of the aforementioned equipment which was handed over to the second respondent.² The latter was a joint venture company between the director of the applicant namely Guiseppe Stravino and one Mcebisi Mlonzi through his Mlango Family Trust 2. The main purpose why the equipment was handed to the second respondent was that the latter will ultimately rent the equipment to the first respondent. The applicant retained and reserved full ownership of the equipment at all times.
- [3] The respondent is denying being in unlawful or illegal possession of the equipment. The basis of his stance is that he concluded an agreement with the second respondent for the use of the equipment for specific purposes for example earth removal, construction etc. An amount of R6 000 000.00 was paid to the second respondent for the right to use it. As a result the first respondent is under no obligation whatsoever to return the equipment.
- [4] The right of ownership is comprehensive and protected but it is not absolute³. In **Gien v Gien** the right of ownership was described as the most comprehensive right a person can have in respect of a thing.⁴ This right is enshrined in section 25(1) of the Constitution of the Republic of South Africa Act 108 of 1996⁵. In matters of this nature for an owner to succeed in his action, he must prove on a

² Annexures "NW 3" to "NW 11" on pages 22 to 32 of the Founding Affidavit.

³ *Gien v Gien* 1979 (2) SA 1113 at 1120 C

⁴ *Van der Merwe and another v Taylor NO and others* 2008 (1) SA 1 (CC)

⁵ Section 25(1) provides that "No one may be deprived of property except in terms of law of general application and no law may permit arbitrary deprivation of property"

balance of probabilities the following viz:- ownership, the property is still in existence and clearly identifiable and lastly that the defendant has possession or detention of it. This right is carefully protected by the courts. However the owner may be estopped from exercising such rights to his property. The legal principles emphasizing the importance of this right and estoppel by conduct were set out clearly in **OAKLAND NOMINEES (PTY) LTD v GELRIA MINING & INVESTMENT CO (PTY) LTD**⁶ as follows:-

"Our law jealously protects the right of ownership and the correlative right of the owner in regard to his property, unless, of course, the possessor has some enforceable right A against the owner. Consistent with this, it has been authoritatively laid down by this Court that an owner is estopped from asserting his rights to his property only - -

(a) where the person who acquired his property did so because, by the *culpa* of the owner, he was misled into the belief that the person, from whom he acquired it, was the owner or was entitled to dispose of it; or

B (b) (possibly) where, despite the absence of *culpa*, the owner is precluded from asserting his rights by compelling considerations of fairness within the broad concept of the *exceptio doli*.

See *Grosvenor Motors (Potchefstroom) Ltd. v. Douglas*, 1956 (3) SA 420 (AD); *Johaadien v. Stanley Porter* (Paarl) (Pty.) C Ltd., 1970 (1) SA 394 (AD) at p. 409.

These two cases relate to estoppel in respect of ownership of movables. There seems no reason for not applying these principles to a case such as the present one where the plaintiff seeks a declaration that it is the 'owner' of shares.

As to the formulation in (b), *supra*, the occasion has not yet arisen for its further development by this Court. Certainly it does not arise in the present appeal, having regard to the pleadings, the evidence, and the arguments in this Court.

As to (a), *supra*, it may be stated that the owner will be frustrated by estoppel upon proof of the following requirements -

E (i) There must be a representation by the owner, by conduct or otherwise, that the person who disposed of his property was the owner of it or was entitled to dispose of it. A helpful decision in this regard is *Electrolux (Pty.) Ltd. v. Khota and Another*, 1961 (4) SA 244 (W), with its reference at p. 247 to the F entrusting of possession of property with the *indicia of dominium* or *jus disponendi*.

⁶ 1976 (1) SA 441 (A) at 452 A-G

- (ii) The representation must have been made negligently in the circumstances.
- (iii) The representation must have been relied upon by the person raising the estoppel.
- (iv) Such person's reliance upon the representation must be the cause of his acting to his detriment. As to (iii) and (iv), see *Standard Bank of SA Ltd. v. Stama (Pty.) Ltd.*, 1975 (1) SA 730 (AD)."

- [5] In this matter the applicant has satisfied the court that he is indeed the owner of the three Caterpillars in the custody of the first respondent. The first respondent is relying on estoppel by conduct. In order to succeed the first respondent must satisfy the court that he relied on the representation of the owner by conduct or connivance. Such representation must have been made negligently which led the respondent to act to his detriment.
- [6] Clearly in this matter there was no connection whatsoever between the applicant and the first respondent. The agreement (if any) was negotiated and concluded between the first respondent and the second respondent. It appears that even the payment (if made) was transacted between the said parties. The basis upon which the applicant must be dragged in this matter remain unexplained. Therefore, there is no basis that the 1st respondent can be availed this remedy. The defence of estoppel was not adequately established. The application ought to be dismissed with costs.
- [7] Accordingly the order is the following:-

7.1. The application is granted.

7.2. The first respondent is ordered to forthwith return the following to the applicant namely:-

- 7.2.1. 1 x CAT 329D Caterpillar Excavator (with serial number DJF01293);
- 7.2.2. 1 x CAT 329D Caterpillar Excavator (with serial number DJF01217); and
- 7.2.3. 1 x CAT CP533E Caterpillar Padfoot Roller (with serial number TLH00279);

7.3 That, in the event of the second respondent failing and/or refusing to return to the applicant the aforesaid property, the sheriff be and is hereby authorized and requested to enter into and upon first respondent's premises or wherever same may be found, to attach and return the aforesaid property to the applicant.

7.4 The first respondent is ordered to pay the costs of this application


M. A. MATHEBULA, J

On behalf of the appellants:
Instructed by:

Adv. S Tsangarakis
AZAR & HAVENGA INCORPORATED
BLOEMFONTEIN

On behalf of the respondent:
Instructed by:

Adv. K Nhlapo
NIEMANN GROBBELAAR ATTORNEYS
BLOEMFONTEIN

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