FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 988/2015

In the matter between:-

TSHINAKI SEPTIC TANKC CLEANERS (PTY) LTD	Appellant
And	
MLUNGISI EPHRAEM SOMHLALO	1st Respondent
VICTOROMPIE ENTERPRISE CC	2nd Respondent
MAXIMUS EARTHWORKS (PTY) LTD t/a PHEZULU PLANT	3rd Respondent

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JUDGMENT BY: MOCUMIE, J

HEARD ON: 09 MARCH 2015

DELIVERED ON: 10 MARCH 2015

MOCUMIE, J

[1] The applicant approached this court on an urgent ex parte basis on 3 March 2015 for an order in the following terms:

'1.The applicant's non- compliance with the time periods, service and forms provided for in the uniform rules of court be condoned and that the matter be heard by a Judge in chambers as urgent in terms of Rule 6 (12)(a) of the Uniform Rules of Court

2. That pending action to be brought by the applicant, a rule nisi is issued calling upon the respondents to show cause on 26 March 2015 at

9h30 or soon as thereafter as counsel may be heard why a final order should not be made in the following terms:

2.1 The respondents are interdicted from ceding, pledging, alienating, disposing or encumbering in any way any of their rights to the Volvo BL61 TBLs with registration number DJP 399 FS and DLD 805 FS pending institution of an action by the applicant against the respondents' in the Fee State Division, Bloemfontein;

2.2 The respondents', in particular the third respondent, are directed to deliver the TLBs mentioned in paragraph 201 to the sheriff of the court, Welkom to be kept in his custody and possession pending the final determination of the action to be instituted by the applicant;

2.3 Failing compliance by the respondents' with paragraph 2.2, the sheriff of the court, Welkom is authorized and directed to attach the TLBs mentioned in paragraph 2.1 and keep them in his custody and possession pending the final determination of the action to be instituted by the applicant.

2.4 The sheriff's costs are reserved for determination by the court hearing the action;

2.5 The applicant must institute the action within thirty (30) days of the granting of the order.

2.6 The first and second respondent are ordered to pay the costs of this application, jointly and severally

3. The provisions of paragraphs 2.1, 2.2 and 2.3 shall operate with immediate effect pending the return date.

4. The application papers, as well as this order, are to be served upon the respondents in terms of the Rules of Court.

5. The first and second respondents' are ordered to pay the costs of this application, jointly and severally, the one paying the other to be absolved.

6. In the event of opposing, the third respondent is ordered to pay the costs of this application, jointly and severally with the first and second respondents', the one paying the others to be absolved.

7. Further and /or alternative relief'.

[4] Van Zyl J, who was ceased with the matter, granted the following order:

'1.The applicant's non- compliance with the time periods, service and forms provided for in the uniform rules of court be condoned and that the matter be heard by a Judge in chambers as urgent in terms of Rule 6 (12)(a) of the Uniform Rules of Court

2. That pending action to be brought by the applicant, a rule nisi is issued calling upon the respondents to show cause on 26 March 2015 at 9h30 or soon as thereafter as counsel may be heard why a final order should not be made in the following terms:

2.1 The respondents are interdicted from ceding, pledging, alienating, disposing or encumbering in any way any of their rights to the Volvo BL61 TBLs with registration number DJP 399 FS and DLD 805 FS pending institution of an action by the applicant against the respondents' in the Fee State Division, Bioemfontein;

2.2 The respondents', in particular the third respondent, are directed to deliver the TLBs mentioned in paragraph 201 to the sheriff of the court, Welkom to be kept in his custody and possession pending the final determination of the action to be instituted by the applicant;

2.3 Failing compliance by the respondents' with paragraph 2.2, the sheriff of the court, Welkom is authorized and directed to attach the TLBs mentioned in paragraph 2.1 and keep them in his custody and possession pending the final determination of the action to be instituted by the applicant.

2.4 The sheriff's costs are reserved for determination by the court hearing the action;

2.5 The applicant must institute the action within thirty (30) days of the granting of the order.

2.6 The first and second respondent are ordered to pay the costs of this application, jointly and severally, the one paying the other to be dissolved.

2.7 In the event of opposing, the third respondent is ordered to pay the costs of this application, jointly and severally with the first and second respondents', the one paying the others to be absolved.

3. The provisions of paragraphs 2.1, 2.2 and 2.3 shall operate with immediate effect pending the return date.

4. The application papers, as well as this order, are to be served upon the respondents' in terms of the Rule of Court.

5 The first and second respondents' are ordered to pay the costs of this application, jointly and severally, the one paying the other to be absolved.'

[5] On 6 March 2015 third respondent anticipated the return date having served a notice on the applicant. On 9 March counsel for both applicant and third respondent argued this matter.Although third respondent anticipated the return date, the onus still rested on it to show on a balance of probabilities that it was entitled to the relief it sought.

[6] Applicant's case on the papers is that first and second respondent (the respondents) were not entitled to cancel the original sale agreement it had with the two in respect of the

TLBs referred to. If anything the cancellation of such agreement was unlawful as respondents did not have any agreement with it on repairs and storage of the TLBs. Consequentially, the respondents did not have the right to retain possession of the TLBs, dispose or alinate same to its prejudice. It maintained that it had not breached any of the terms of the original sale agreement.

[7] In the opposing affidavit, deposed to by Mr Cronje, he averred that third respondent bought the TLBs from the respondents when the original sale agreement between applicant and respondents was cancelled.It paid the full purchase price based on the amount respondents owed third respondent arising from services rendered and the amount which had been offered to applicant as purchase price. The TLBs were delivered to it and the sale was perfected. Third applicant had since become the rightful owner of the TLBs and had even leased them out as part of its business operation.

[8] Advocate Monnahela, for applicant, urged me to come to the conclusion that the sale agreement between the three respondents (the second sale agreement) was a simulated agreement .He further urged me to find that such sale agreement was concluded fraudulently based on the different signatures on the original sale agreement (between applicant and the respondents) and the second agreement. In his mind, although appreciating that the issue would have to be properly ventilated in the action the applicant intends to institute, the signatures were so different for me to draw the only

conclusion that they were forged. On that basis, he submitted, the respondents were not entitled to cancel the agreement between the three.

[9] There is a fundamental problem with applicant's case as argued in court. Primariy, the case argued in court is not as on the papers before me. Mr Monnahela could not direct me, as challenged by Mr Grobler for third respondent, to any evidence that pointed to fraud or forgery or for that matter simulation of the second sale agreement .ie apart from the obviously different signatures on the original sale agreement and second sale agreement purported to be of first respondent.

[10] In the worst case scenario ,as Mr Monnahela strenously argued, the second sale agreement was concluded upon the rule nisi been served on the respondents in order to prevent the applicant from exerting its rights, including the right to specific performance and enrichment lien in terms of the original sale agreement.That argument too is patently flawed because the rule nisi was granted on 3 March 2015.The second sale agreement was concluded on 20 January 2015 ex facie OP1 appended to third respondent's opposing papers.

[11] Mr Monnahela argued that Mr Cronje was aware of the dispute between the applicant and the respondents on the cancellation of the original sale agreement but nonetheless proceeded to conclude the second sale agreement. Thus he

could not be heard to say that his ownership was lawful against the whole world including the applicant as Mr Grobler argued. According to him the doctrine of notice must operate against third respondent. He submitted that applicant's possession must be restored until such stage that the case is properly ventilated in an action to be instituted. If this court does not restore applicant's possession, it will be prejudiced considering that the case to be instituted may take two to three years to be finalised in the ordinary course of the court roll of civil trials in general.The issue of matters taking two to three years to enrol belongs in the past since the pretrial processes have been introduced in this Division during 2014. So,that argument will not stand.The TLBs are insured and will be kept in good condition as third respondent confirmed without any qualms from applicant.

[11] On the doctrine of notice the Supreme Court of Appeal in *Meridian Bay Restaurant v Mitchell* 2011 (4) SA 1 (SCA) had this to say:

'[14] Under the doctrine of notice, someone who acquires an asset with notice of a personal right to it which his predecessor in title has granted to another, may be held bound to give effect thereto. Thus a purchaser who knows that the merx has been sold to another, may, in spite of having obtained transfer or delivery, be forced to hand it over to the prior purchaser. Reverting to my earlier example: if C had purchased with knowledge of the prior sale to B, B would be entitled to claim that the transfer to C be set aside and that transfer be effected from A to B, or B may perhaps even claim transfer directly from C.' (My emphasis)

[12] In motion proceedings parties stand by their case on the papers.In the event that a party introduces new evidence which is detrimental to the other's case,the party who will be prejudiced may ask the court to serve and file replying affidavits to rebut such evidence[1].That is the remedy the applicant had so as to be granted an opportunity to reply to the averments made in third respondent's opposing affidavit.[2] As correctly contended, and applying the *Plascon Evans* rule[3] robustly, I am bound by the unrefuted version put by third respondent in its opposing affidavit i.e. That it bought the TLBs from the respondents upon the original sale agreement between applicant and respondents being cancelled. The TLBs were delivered upon payment of the purchase price. It is now the rightful owner of the TLBs. As owner, its rights take precedence above all others particularly personal rights such as those claimed by the applicant.

[12] In the absence of any evidence on the papers, I may suspect as I do, but I cannot find that the second sale agreement between the respondents and third respondent was fraudulent and concluded upon receipt of the rule nisi with the sole purpose to frustrate the applicant from exercising its legal options under the original sale agreement.

[13] However that is no the end of the case.As I understood Mr Monnahela to finally submitt,albeit begrudgingly so, if

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[1] *Bader v Weston* 1967 1 SA 134 (C).
[2] Rule 6(5)(*e*).
[3] *Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd* SA 623 (A) 634H-635C

applicant's case sees no light of the day light on the submissions made in respect of the allegations of fraud or forgery,third respondent cannot escape the application of the doctrine of notice. I have considered what Mr Grobler has strenously argued that in our law 'a real right generally prevails over a personal right (even if the personal right is prior in time) when they come into competition'[4] but I must say,I am bound by the decision of the Supreme court of Appeal in *Meridian Bay Restaurant* [5]as quoted in the above paragraph to the effect that third respondent had purchased the TLBs with knowledge of the prior sale to applicant.On that basis alone,applicant is entitled to claim that the transfer to third respondent be set aside and that transfer be effected from respondents to applicant and may perhaps even claim transfer directly from third respondent.

[14] In the result, I make the following order.

<u>Order</u>

1. The rule nisi granted by Van Zyl, J on 3 March 2015 is hereby confirmed.
2. Costs to follow the cause.

[4] *Meridian Bay Restaurant v Mitchell* 2011 (4) SA 1 (SCA) *at para* 12

[5] *Meridian Bay Restaurant v Mitchell* 2011 (4) SA 1 (SCA) *at para 12 with reference to Hassam v Shaboodien* 1996 (2) SA 720 (C) at 724H-I;FDJ Brand *Knowledge and Wrongfulness as Elements of the Doctrine of Notice.*

B. C. MOCUMIE, J

On behalf of the applicant: Adv O.I Monnahela/ Adv L. Mfazi
Instructed by:
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On behalf of 3rd Respondent: Adv. S Grobler
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