

**¹IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA**

CASE NO: 12338/2010

In the matter between

ANDRE MULDERY

APPLICANT

And

**DCF CONCRETE PRODUCTS CC
t/a DURBAN CONCRETE FENCING**

RESPONDENT

JUDGMENT

Date: 4 November 2011

PLOOS VAN AMSTEL, J

[1] The applicant and the respondent are both involved in the concrete fencing industry. They use moulds to cast the panels which are used to make up a concrete fence. The dispute between them concerns the ownership of a number of moulds.

[2] Counsel for the respondent submitted that the matter should be referred to oral evidence because there is a dispute of fact on the papers. Counsel for the applicant submitted that there is no real dispute of fact and that the matter can be dealt with on the papers, adopting what has been referred to as a robust approach.²

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² See Buffalo Freight Systems v Crestleigh Trading 2011 (1) SA 8 (SCA) at 14 A-D

[3] The matter started as an urgent application for a rule nisi and interim relief designed to ensure that the moulds did not disappear. On 21 October 2010 Theron J made an order by consent relating to the photographing and identification of the moulds and an undertaking by the respondent not to alienate them. All that was sought before me was an order that the applicant be allowed to remove the moulds in question from the respondent's premises.

[4] It is not disputed on the papers that the manufacture of moulds such as the ones involved in this matter is a specialised activity which requires a great deal of experience. It is also not disputed that the applicant has considerable experience in the manufacture of concrete products and that he has specialised in the manufacture of moulds.

[5] In July 2008 the applicant and one Bryant van der Merwe, who was then one of the members of the respondent, signed a document³ which recorded their intention to start a business with the name Universal Moulds. Their intention was to form a close corporation with four members, each owning a twenty five percent interest. The proposed members were the applicant, Van der Merwe, Holm (who deposed to the respondent's answering affidavit), and one Van Aswegen. The document records that the proposed close corporation would take over all the moulds and equipment, which would 'be allocated to loan accounts until the business is in a position to repay them'.

[6] The applicant says in anticipation of the new venture he took all his moulds to the respondent's premises, where they are still today. These, he says, are the moulds reflected on the inventory which forms part of the papers⁴. The proposed business arrangement never materialised and the close corporation was never formed. It appears from the papers that the applicant nevertheless remained with the respondent. There is a dispute between them as to whether he was an employee or a business partner, but that is not relevant for present purposes. The applicant says because the proposed close corporation was never formed and did not take his moulds over, he remained the owner of them. He manufactured further

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moulds while he was there, but does not seek any relief in respect of them. This is presumably because he manufactured them in the course of the business of the respondent, or their joint venture, and does not claim ownership of them.

[7] In or about September 2010 the applicant had a fall-out with Holm and parted company with the respondent. He wanted to go back in order to collect his moulds (those on the inventory) but the respondent would not allow him on the premises.

[8] On 1 October 2010 the applicant's attorney wrote to the respondent's attorney⁵ and stated, inter alia, that the applicant would make arrangements to go to the respondent's premises in order to collect his tools and moulds. The respondent's attorney responded as follows on 4 October 2010⁶:

'We refer to the above matter and confirm that our client advises that there are various moulds on our client's premises, some of which belong to your client and some of which belong to our client. As such, kindly forward us an inventory of which moulds your client alleges are his, together with a statement of what tools your client alleges are his.

Once we receive this from you, we will take instructions from our client, and then your client can arrange to uplift his equipment and tools.'

[9] On 5 October 2010⁷ the applicant's attorney supplied the respondent's attorney with the inventory which forms part of the papers. On 6 October 2010⁸ the respondent's attorney stated in an email that his client had looked at the inventory but required more particulars of the moulds which the applicant alleged to be his. He said the applicant needed to provide them with sufficient evidence 'so as to properly identify those moulds which your client brought with him when he joined our client in Pinetown'.

[10] On 7 October 2010⁹ the applicant's attorney said in an email that the applicant was prepared to go to the respondent's premises and point out the moulds which

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belong to him. This was met by a further request¹⁰ for a 'detailed list, itemizing those goods and moulds which he believes belong to him.' The respondent's attorney went on to say: '...most of the moulds in our client's possession belong to our client and, whilst we are aware that your client did bring certain moulds with him when he joined our client, we require specific details and identification of those moulds which he believes are his...our client is in no way seeking to prevent you (sic) client from trading, but is only protecting its own interests, and has already agreed to releasing your client's goods once they are properly identified'. The applicant's attorney responded¹¹ by pointing out that a detailed list had already been supplied, that it was not possible to identify the moulds further in writing. He suggested again that the applicant should be given an opportunity to point his moulds out.

[11] There was presumably no positive reaction to the request for a meeting, because the urgent application was launched on 21 October 2010. It was recorded in the consent order that the respondent acknowledged that the moulds described in the inventory were in its possession, but claimed ownership of them.

[12] The first issue which I have to decide relates to which moulds the applicant took with him when he joined the respondent. The second issue concerns the ownership of such moulds.

[13] The applicant says in the founding affidavit¹² that after he and Van der Merwe had signed the document pertaining to the proposed business arrangement¹³ he took all the moulds which he then owned to the respondent's premises. He did this in anticipation of the new arrangement, which provided that a close corporation would be set up, which would take the moulds over. He says these moulds are reflected on the inventory.¹⁴ The close corporation was never set up and he says he accordingly remained the owner of his moulds.

[14] The respondent does not dispute that when the applicant joined it he brought

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some moulds with him. Holm says in the answering affidavit¹⁵ that any moulds brought by the applicant to the respondent's premises were the property of Elastomould Engineering. No basis was laid for the acceptance of this hearsay evidence, and it is inadmissible. It is also denied by the applicant. Holm says that he was told by two of his managers that the applicant arrived at the respondent's premises with a maximum of ten moulds, some tools and a toolbox. The two managers, Wellington Mbatha and Sheldon Miller, made confirmatory affidavits in which they merely confirmed what Holm had said in his affidavit relating to them.

[15] In his replying affidavit the applicant says he made the moulds in question during 1986 and they were and remain his personal property. He says they never formed part of the assets of Elastomould Engineering CC, of which he and his father were members. With regard to the allegation that he only took ten moulds with him to the respondent's property and that his vehicle was too small to carry more, the applicant says he used a transport company, Apcon Freight, to convey his moulds to the respondent's premises. Annexed to his affidavit are copies of a waybill and a delivery note which he says reflect the signature of Sheldon Miller, who acknowledged having received the moulds (23 pieces) in good order and condition.

[16] There is no real dispute on the papers that the applicant took the moulds reflected on the inventory with him to the respondent's premises, and there is no reason not to accept this evidence. The respondent's assertions in this regard are not supported by any acceptable evidence.

[17] The remaining issue relates to the ownership of those moulds. There is nothing to contradict the applicant's evidence that he made the moulds and that they were his property. The basis on which the respondent contests his ownership is that it bought the moulds from him.

[18] Holm says in the answering affidavit that in 2007 the applicant, ostensibly on behalf of Elastomould Engineering, offered to sell moulds to the respondent which belonged to Elastomould. The respondent paid the applicant a sum of R63 000 for such moulds. Annexed to his affidavit is a printout which he says reflects the payment of three amounts to the applicant on 2 March 2007, 8 June 2007 and 21

June 2007, the total of which is R63 000. He says the moulds were never delivered and he and Van der Merwe confronted the applicant about this. The applicant was remorseful and in compensation for the R63 000 offered them a concrete mixer, which they accepted.

[19] Holm does not dispute that he told the respondent's attorney that some of the moulds on the respondent's premises may have been the property of the applicant. He says he subsequently realised, after he had been reminded by Van der Merwe, that the respondent had paid the applicant for those moulds, and he refers to the printout which reflects the three payments totalling R63 000 in 2007. This assertion seems to be based on Holm's belief that the moulds which the applicant brought with him belonged to Elastomould and were the moulds which the respondent had paid for the previous year. The applicant disputes this, and there is no evidence that this is so. The applicant says the respondent ordered moulds from Elastomould in 2007, which it had to manufacture. It did not do so as it was unable to obtain steel. Elastomould had a concrete mixer which it wanted to sell, which the respondent accepted in lieu of the R63 000. Holm does not dispute this.

[20] There is no evidence whatsoever that when the applicant joined the respondent there was an agreement that the respondent would acquire the moulds which he had brought with him, either as a quid pro quo for the R63 000 or on any other basis. In fact, the respondent did not rely on any payment other than the R63 000 which was made a year before the parties signed the document pertaining to the proposed business venture¹⁶. The contention that the respondent purchased the moulds from the applicant seems to me to be an afterthought. Not only is there no evidence to support it, it is also inconsistent with the correspondence in which the respondent's attorney said that according to the respondent some of the moulds on its premises belonged to the applicant and some to the respondent. That was the reason why the attorney asked for a list of the moulds which the applicant claimed belonged to him.

[21] The result is that the applicant has established on the papers that he took the moulds which are listed on the inventory with him when he joined the respondent,

and that he owned them. Nothing has changed that. The assertion that the respondent acquired ownership of the moulds by paying the applicant for them is no more than an assertion which is unsupported by the evidence. There is no evidence that the R63 000 which was paid the year before related to the moulds which are reflected on the inventory, nor is there any evidence that the applicant at any stage intended to transfer ownership of the moulds in question to the respondent.

[22] I accordingly make the following order:

The respondent is ordered to allow the applicant to remove from its premises the moulds which are reflected on the inventory which is annexed to the notice of motion and marked 'A'. The respondent is ordered to pay the costs of the application.

PLOOS VAN AMSTEL J