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**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

**REPORTABLE
CASE NO: 9952/2023**

In the matter between:

**BARLOWORLD EQUIPMENT SOUTHERN AFRICA
A DIVISION OF BARLOWORLD SOUTH AFRICA
(PTY) LTD**
(Registration Number: 1946/021661/07)

APPLICANT

and

**MEKGOPAZE NKOSI TRADING ENTERPRISE
(PTY) LTD**
RESPONDENT
(Registration Number: 2018/197495/07)

FIRST

KGOPA MINING AND RESOURCES (PTY) LTD
(Registration Number: 2018/611239/07)

SECOND RESPONDENT

MALONJENI BEE INVESTMENTS (PTY) LTD
RESPONDENT
(Registration Number: 2022/556737/07)

THIRD

JUDGMENT

NOTYESI AJ:
Background facts

[1] On 4 July 2023, the applicant (hereinafter referred to as “Barloworld”), instituted an application against the respondents mainly seeking an order, in the form of the *rei vindicatio*, that the applicant or its agent(s) be authorised to take into possession the applicant’s equipment¹ in the possession of the third respondent (hereinafter referred to as “Malonjeni”). This application will hereinafter be referred to as the main application.

[2] Barloworld alleges that it is the sole licenced distributor of Caterpillar machinery, equipment, trucks and parts in Southern Africa. According to Barloworld, it is also the only preferred and authorised agent to maintain and repair Caterpillar equipment. It is further alleged that Barloworld's scope of business is leasing/renting, retail, servicing, repair and maintenance of new and pre-owned earthmoving equipment, allied machinery as well as providing spares.

[3] According to Barloworld, it owns the machinery and equipment. Ownership of the equipment is allegedly acquired through an exclusive right to purchase from its international Caterpillar supplier in the United States of America and Switzerland. The equipment would thereafter be supplied to the rental division to be rented or leased to potential customers. When acquiring the purchased equipment from Caterpillar, it would be issued with a certificate of registration in respect of new vehicles for each machine. On these facts, Barloworld submits that it is the owner of the machines and the equipment as it had purchased the machines, equipment and trucks.

[4] In its founding affidavit, Barloworld has alleged that in April 2022, it entered into a written application for a trading account (hereinafter referred to as “the

¹ The equipment comprises (I) 2020 CATERPILLAR Dozer (D9), Model/Plant No. D9059 {Serial No: W[...], Vin No: C [...], Colour: Yellow, Value: R14 720 000.00 Incl. VAT}; (II) 2022 CATERPILLAR Excavator, Model/Plant No. 352001, {Serial No: H[...], Vin No: C [...], Colour: Yellow, Value: R8 108 650.00 Incl. VAT}; (III) 2021 CATERPILLAR ART Truck (730), Model/Plant No. 730379 {Serial No: 3[...], Vin No: C[...], Colour: Yellow, Value: R8 660 650.00 Incl. VAT}; (IV) 2021 CATERPILLAR ART Truck (730), Model/Plant No. 730373; Serial No: 3[...], Vin No: C[...], Colour: Yellow, Value: R8 660 650.00 Incl. VAT} and (V) 2022 CATERPILLAR Loader (966), Model/Plant No. 966287, Serial No: E[...], Vin No: C [...], Colour: Yellow, Value: R8 355 900.00 Incl. VAT}.

agreement”) with the first respondent (hereinafter referred to as “Mekgopaze”), the material terms of which were:

“13.1 The customer must pay the full amount owing in terms of the trading account to Barloworld without deduction within 30 days from the date of invoice (viz. clause 5.1);

13.2 If the customer fails to pay any amount payable to Barloworld by the due date for payment, then all amounts owing to Barloworld by the customer from any cause whatsoever will become immediately payable and Barloworld may:

13.2.1 stop/deactivate the Equipment and thereby render the Equipment incapable of operation (viz. clause 10.1(c));

13.2.2 withhold or immediately suspend the performance of any service and/or TES to the customer (viz. clause 10.1(d));

13.2.3 suspend the performance of any of its obligations to the customer in terms of the contract and any other contract with the customer (viz. clause 10.1(e));

13.2.4 restrict and/or stop access to any TES Telemetry Device, website, application program and/or software (viz. clause 10.1(f));

13.2.5 immediately terminate and/or suspend the trading account and/or any other trading facility granted to the customer, whether under the contract or not (viz. clause 10.1(g));

13.3 Notwithstanding anything to the contrary contained in the contract, Barloworld may terminate the contract for convenience by giving the customer not less than 14 days prior written notice (viz. clause 14.1);

13.4 Without limiting its other rights or remedies, Barloworld shall be entitled to forthwith cancel the contract and/or claim immediate payment, and/or performance by the customer of all the customer obligations whether or not the due date for payment and/or performance shall have arrived, by giving written notice to the customer, if the customer:

13.4.1 breaches any term or condition of the contract and such breach cannot be remedied or if such breach can be remedied it fails to remedy that breach within 5 days after receipt of a written notice from Barloworld to do so (viz. clause 14.3.b);

13.4.2 being a juristic person, becomes unable to pay its debts as they fall due (c viz. clause 14.3.e);

13.5 Without limiting the rights or remedies of Barloworld, on termination or cancellation of the contract for any reason:

13.5.1 the customer shall return all of Barloworld's material or equipment which have not been paid for in full by the customer. If the customer fails to do so, then Barloworld may enter the customer's premises and take possession of them. Until they have been returned, the customer shall be solely responsible for their safekeeping and will not use them for any purpose whatsoever; (viz. clause 14.4.b);

13.5.2 For the purpose of exercising its rights in terms of clause 14.4.b, the customer irrevocably and in rem suam authorises and appoints Barloworld with full power of substitution to sign all and any documents in the customer's name or on the customer's behalf and to do all such things as may be necessary or desirable to enable Barloworld to give effect or to enforce its rights under 14.4.b (viz. clause 14.5.a).

- 13.6 The equipment shall at all times remain the property of Barloworld and the customer shall have no right, title or interest in or to the equipment (save the right to possession and use of the equipment subject to these conditions) (viz. clause 45);
- 13.7 The customer may not cede/transfer its rights, delegate/transfer its obligations, assign/transfer both rights and obligations or subcontract all or any of its rights and/or obligations in terms of this contract, without Barloworld's prior written consent (viz. clause 24.1);
- 13.8 The customer agrees to hire, and Barloworld agrees to rent the equipment specified in the hire schedule on the terms and conditions specified in the contract (viz. clause 34.1);
- 13.9 The customer must, before collecting the goods, advise Barloworld in writing of the address where the Goods will be used and stored, provided that the customer shall not be entitled to move the equipment to a new address unless it has obtained the prior written consent of Barloworld for the change of that address; (viz. clause 40.1.a);
- 13.10 Ensure that at all times the equipment remains identifiable as belonging to and owned by Barloworld and wherever possible shall ensure a visible sign to that effect is attached to the equipment (viz. clause 40.3);
- 13.11 The Customer must not allow the goods to be subject to any claims by third parties or to be attached by any -person, including the Lessor, and immediately notify Barloworld of any attempt to attach the goods (viz. clause 40.10);
- 13.12 The customer must not cede, assign, delegate, encumber, alienate or transfer any of its rights or obligations in respect of the goods to any other person, without the prior written consent of Barloworld (viz. clause 40.20);

13.13 The customer acknowledges that Barloworld may be entitled to remotely stop/deactivate the operation of the equipment by written notice to the customer where the customer fails to make immediate payment of any amount that is due to Barloworld within 24 hours of receipt of the written demand to do so, or where Barloworld cancels the contract under circumstances contemplated in clause 14.3 (viz. clause 43.1);

13.14 The stoppage notice will remain in force until all overdue rentals, including interest, are received in full by Barloworld (viz. clause 43.1);

13.15 The customer acknowledges that the right to stop/deactivate the operation of the equipment is a right in addition to, and not in substitution of any other rights which may accrue to Barloworld upon breach or cancellation of the contract and/or hire schedule (viz. clause 43.4).”

[5] The agreement was concluded, so alleges Barloworld, at it’s rental branch situated at Corner Quarry Park Close and 1[...] Q[...] N[...] Drive, Riverhorse Valley, Durban. The same equipment was delivered to Mekgopaze over the period 25 to 28 October 2022. Upon delivery, possession of the equipment passed to Mekgopaze. According to Barloworld, the delivery of the equipment took place at the premises of Malonjeni.

[6] Against this background, the main application was launched.

The main application

[7] Barloworld avers that on 3 January 2023, Mekgopaze breached the agreement. Mekgopaze’s trading facility fell into arrears of R1 455 795.50. According to Barloworld, the arrears were in respect of the outstanding balance of the rental deposit and overdue rentals for November and December 2022. In terms of the agreement, Mekgopaze was given a formal notice to remedy the breach and also

advised of the consequences for failing to remedy the breach. Mekgopaze allegedly failed to remedy the breach. It is apposite to refer to the contents of the letter dated 3 January 2023 issued by Barloworld to Mekgopaze. The relevant part of the letter reads:

“NOTICE OF NON-PAYMENT AND STOPPAGE OF MACHINES

We would like to remind you that according to the Standard Trading Terms and Conditions (Trading Facility for the Rental) of Barloworld Equipment a division of Barloworld South Africa (Pty) Ltd (Barloworld Equipment) executed by yourselves that the payment terms are within 30 (thirty) days from the date of invoice.

We note that your Trading Facility for the Rental is behind with the payment, for the amount of R1 455 795-50 (One Million Four Hundred and Fifty-Five Thousand Seven Hundred and Ninety-Five Rand and Fifty Cents), and the total amount outstanding is R1 678 056-11 as per the breakdown below.

Rental Deposit	R437 551-00 Overdue
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November 2022 (Rental Invoices)	R1 018 244-50 Overdue
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December 2022 (Rental Invoices)	R222 260-61 Due on the 31 st of January 2023
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Kindly be advised that if the payment of R1 455 795-50 is not received by the 9th of January 2023 the equipment will be stopped on Monday the 9th of January 2023 at 18H00.

Please be advised that in the terms of the above mentioned agreements, Barloworld Equipment is entitled to charge interest for any overdue payments, and that we reserve our right to enforce same for any overdue payments. Such right shall be enforced for all the overdue payments as at 1st of January 2023.”

[8] It is further alleged, in the founding papers, that Mekgopaze failed to comply with the notice as no payment was made. The agreement was cancelled and the machines were remotely disabled from operating. Barloworld demanded the return of the equipment. Consequently, a notice to that effect was issued, by Barloworld's legal representatives to Makgopaze on 12 January 2023. The notice is worded as follows:

“On 3 January 2023, Mekhopaze (first respondent) were formally advised by our client of its contractual breach as it failed to meet its payment obligations in terms of the Agreement, with its current and overdue arrears up to December 2022 amounting to R1 455 795-50 (of which R437 551 relates to the deposit) and a further R222 260-61 for the December 2022 rental payable by 31 January 2023.

Our client has subsequently exercised its rights to remotely lock the machines, rendering it immediately non-operational. This was done following a “stoppage notice” that was issued on 3 January 2023, and we now demand that the machines be returned to our client as the lawful owners by close of business on Friday 13 January 2023.

As the mine, where the machines are currently stored, has been uncooperative in granting our client access to its property to collect the machines, we hereby demand that Mekgopaze urgently liaise with the mine management for the release of the machines from its site. Any further delay in releasing the machines will exponentially increase our client's risk and potential for further damages.”

[9] On 12 January 2023, Barloworld received a letter from Mekgopaze. The letter is addressed to the second respondent (hereinafter referred to as “Kgopa”) by Malonjeni's legal representatives. For what will follow, I deem it necessary to quote relevant passages from the letter. It reads:

- “3. We herewith confirm that on 14 October 2022, your office and our client entered into a contractorship agreement, the terms of which you are fully appraised with and a copy of which you are in possession of.
4. We further confirm that in terms of the contractorship agreement you have supplied 5 Machines (the details of which are already in possession of) to our client to date. With regard to the machines you have supplied to our client, it has come to our clients’ attention that due to the fact that you have not furnished the finance agreement held between you and the supplier of those machines, those machines have been disabled.
5. Accordingly, our client is unable to make use of those machines at all as a result of your failure, alternatively, your refusal to properly attend to your obligations.
6. We further confirm that five more machines were due to be delivered to our clients’ site in terms of the contractorship agreement, which you have failed to attend to.
7. In addition to the above mentioned breaches, it also appears that despite having an obligation to pay the operators of the machines on our clients’ site, you have also not attended thereto.
8. Accordingly, you have failed at all to act as per your obligations in the contractorship agreement, the result of which being that our client has suffered immense damage as a direct result of your actions. It is our instruction that our client stands to suffer damages in the amount of R600,000,000-00 (six hundred million rand) as direct losses for failure to meet the terms of its offtake arrangements, we note that our clients’ rights in respect of the damages suffered are reserved.
9. However, should you not settle all financial obligations owed to the supplier of the 5 machines in our clients’ possession by no later than

13h00 on even date, and ensure that all machines are functional by no later than 14h00 on even date, our client will proceed with legal action against you for the recovery of our clients' damages, which we submit is liquidated.

10. Furthermore, you are herewith notified that in these circumstances, you are to deem this correspondence as notice in terms of section 345 of the Companies Act 61 of 1973, that should you not settle the amount of R600,000,000-00 (six hundred million rand) within 21 days from date hereof, it will be deemed that your office is unable to meet its debts as and when they become due and that your office is indeed insolvent, in which case liquidation proceedings will be instituted against you.
11. Lastly, you are herewith further notified that under these circumstances our client shall exercise its option to hold all machinery in our clients' possession as security for the debt pending resolution of the issues."

[10] In relation to the above - quoted letter, Barloworld avers that Malonjeni expressly admitted that it is in possession of the machines. According to Barloworld, Malonjeni is also aware that the machines belong neither to Mekgopaze nor Kgopa. Barloworld alleges that, on the strength of the letter issued on behalf of Malonjeni referred to above, it caused a letter to be addressed to Malonjeni. In that letter, Malonjeni was informed that the agreement between Barloworld and Mekgopaze had been cancelled. In the same letter, Barloworld sought possession of the machines held by Malonjeni. Malonjeni however refused to release the machines.

[11] Barloworld now seeks to regain possession of the machines alleged to be in possession of Malonjeni. Barloworld contends that the retention of the machines by Malonjeni is unlawful. I quote the relevant passage from the letter addressed to Malonjeni by Barloworld on 20 February 2023. Insofar as it is relevant, the letter is worded:

- "4. We once again place on record that:

- 4.1 Our client has previously terminated its rental agreement with your contractor, Mr Thabo Maripane, whereafter a stoppage notice was issued and the leased machines then remotely deactivated.
- 4.2 These machines now form the subject matter of imminent litigation in the form of a vindicatory action and a simultaneous urgent application for a preservation order.
- 4.3 The unlawful and unauthorised activation and continued operation of these machines and trucks has and will cause further wear and tear, depreciation and possible irreparable damage to sensitive onboard electronics and safety features installed on these multimillion-rand machines.
- 4.4 This state of affairs is completely unacceptable and viewed in a very serious light by our client, who stands to suffer enormous damages, as a direct result of involvement by the mine employees, alternatively, a gross breach of your client's duty of care to our client in relation to the machines.
5. Our client demands that immediate and definite action will be taken to ensure that all operations involving our client's machines are ceased forthwith and an undertaking that there will no further tampering with the machines systems to render them operational."

[12] In a letter dated 21 Ferbruary 2023, Malonjeni responded:

- "1. The above matter and your letter dated 20 February 2023 bears reference.
2. Kindly take note that our client has absolutely no dealings with your client and we suggest that your office address any issues it may have with the persons it contracted with. We would request that you direct

your threats to the appropriate recipient in future, being the party whom contracted with your office.”

[13] Mekgopaze and Kgopa have not opposed the main application; they seek to abide the decision of this court. Only Malonjeni has opposed. The relevant notice to oppose was filed on 25 July 2023. In pursuit of such opposition, an answering affidavit was delivered on 7 August 2023 wherein the main application is opposed on a number of bases, the first of which is that it constitutes an abuse of court process. In this regard, it alleged that Barloworld had previously instituted proceedings against the respondents under case number 4030/2023P, which had been brought on an urgent basis, and was struck off the roll. In the view of Malonjeni, that application has not been finalised.

[14] Secondly, it is contended that Barloworld has always known, from the papers filed in the urgent application, that there was a dispute of fact which cannot be resolved on the papers. In these circumstances, the application ought to be dismissed.

[15] The third ground of opposition is that this court has no jurisdiction to entertain the application. In this regard, Malonjeni contends that Barloworld has wrongly alleged that Malonjeni’s principal place of business is Transasia Minerals Site, Dundee, KwaZulu-Natal, whereas, the principal place of business 4[...] 1[...]th Street, Menlo Park, Pretoria. It is Malonjeni’s further contention that none of the other respondents have their principal place of business located in this court’s area of jurisdiction. There are no other jurisdictional factors, so it is further contended, that establish this jurisdiction.

[16] The fourth ground of opposition is that the equipment was never delivered to Malonjeni’s premises. Malonjeni has no control over Transasia Minerals Site as it lost access after Kgopa failed to perform its obligations under their curatorship agreement as a result of the actions of Barloworld.

[17] Finally, Malonjeni further contends, that the agreement between Makgopaze and Barloworld was not lawfully cancelled, alternatively, the alleged cancellation was contrary to public policy and the Constitution.

[18] Barloworld's replying affidavit was delivered on 22 August 2023.

The interlocutory proceedings

[19] Whilst all the papers in the main application had been delivered, and the matter ripe for hearing, Malonjeni, on 25 August 2023, served Barloworld with a notice in terms of rule 35(12) of the Uniform Rules (the Rules).² In the notice, Malonjeni requested the production of certain listed documents. On 8 September 2023, Barloworld filed a notice of objection alleging that the documents were confidential and irrelevant.

[20] I interpose here to mention that certain documents had been delivered as annexures to the founding affidavit in the main application.

[21] On 11 September 2023, Malonjeni served a notice in terms of rule 30A seeking compliance with rule 35(12) issued by Malonjeni. On 27 September 2023, Barloworld wrote a letter to Malonjeni. In the letter, it was contended that all relevant and available documents were furnished to Malonjeni and an indulgence of 21 days within which to consider the remainder, if any, of the required documents was requested. Malonjeni did not take the matter any further.

[22] Meanwhile, on 16 November 2023, Barloworld set down the main application for hearing for 10 May 2024. Malonjeni thereupon launched an application, in terms

² The rule provides:

'(a) Any party to any proceeding may at any time before the hearing thereof deliver a notice in accordance with Form 15 in the First Schedule to any other party in whose pleadings or affidavits reference is made to any document or tape recording to-
produce such document or tape recording for inspection and to permit the party requesting production to make a copy or transcription thereof; or

...

(b) Any party failing to comply with the notice referred to in paragraph (a) shall not, save with the leave of the court, use such document or tape recording in such proceeding provided that any other party may use such document or tape recording.'

of Rule 30A, to compel compliance with the rule 35(12) notice, on 29 January 2024 (the first interlocutory application).

[23] On 31 January 2024, Barloworld filed a notice to oppose the first interlocutory application. No answering affidavit was delivered. Malonjeni proceeded to enrol the first interlocutory application for hearing on 18 March 2024.

[24] On 7 March 2024, Barloworld supplemented its discovered documents. It also requested that Malonjeni withdraw its first interlocutory application.

[25] Malonjeni responded to the request by way of a letter dated 12 March 2024, which, in part, reads as follows:

“1. The above matter and your correspondence dated Friday 8 March 2024 delivered at 14h45, as well as 12 March 2024 delivered at 18h10 bears reference.

...

4. Therefore, the matter remains unopposed and as such no reason exists for our offices not to proceed on the unopposed motion roll on 18 March 2024, in the absence of a condonation application. In fact, if your client persists in its opposition to the costs aspect (being the only issue remaining in this interlocutory application), we will request that the court make an order that your client must file its condonation application within 5 days of the hearing and that the wasted costs occasioned by the removal be paid by your client.

5. However, in view of bringing this interlocutory application to finalisation we note that there exists two options:

5.1 Option 1:

5.1.1 Your client tender the costs of the interlocutory application on a party-party scale and this interlocutory application can be laid to rest on that basis.

5.1.2 Our office will attend to court on 18 March 2024 and make the agreed draft order an order of court.

5.2 Option 2:

5.2.1 Firstly, your client incur further costs by filing a substantive condonation application, our client will reply and enrol the matter on the opposed motion roll for costs only.

5.2.2 Our client will pursue costs on an attorney-client scale against your client, on the basis that it forced the matter to proceed on an opposed basis without their (sic) being any merit in your clients defence against our clients entitlement to costs, our client should not be out of pocket in this regard.

5.2.3 Thereafter, and what can be seen as perhaps worse case scenario for our client, is that our client obtains party-party costs against your clients, however those costs shall include the costs of a full blown opposed motion, including the costs of senior counsel.

6. Kindly let us have your clients decision in relation to the above two options on or before 15 March 2024 so that our client can take the requisite steps.

7. Unless we have your response to the above, the matter shall remain on the unopposed motion roll, which our client is entitled to do in the absence of any proper opposition.”

[26] On 15 March 2024, in line with the contents of the letter of 12 March 2024, Malonjeni removed the first interlocutory application from the roll of 18 March 2024. The costs were reserved.

[27] It bears mentioning that the main application, throughout the brawl about the first interlocutory application, had remained set down for 10 May 2024. The notice of set down, in that regard, had been served on 16 November 2023.

[28] On 10 April 2024, despite having formally confirmed in its letter of 12 March 2024 that all issues regarding the first interlocutory application, save for the issue of costs, the rule 35(12) application had been resolved, Malonjeni issued another interlocutory application (the second interlocutory application). In that application, Malonjeni sought the same documents that were the subject of its first interlocutory application. Upon launching the second interlocutory application, Malonjeni addressed a letter to Barloworld's attorneys in which they advised that the main application should be removed from the roll. Malonjeni's contention was that the second interlocutory application should be resolved first. The request was declined by Barloworld, with contention that there was no basis for the removal of the main application from the roll of 10 May 2024.

[29] On 19 April 2024, Malonjeni launched a substantive application for the postponement of the main application (the postponement application), the basis of which was that the existence of the second interlocutory application was sufficient for the removal of the main application. On 22 April 2024, Malonjeni delivered a notice of set down of the second interlocutory application which was set down for 10 June 2024 on an unopposed basis.

[30] The main application served before this court on 10 May 2024. This court directed that the second interlocutory application and the main application be heard simultaneously. Resulting from this, the parties entered into an agreement regulating the future conduct of the proceedings, which was made an order of court. The applications were postponed to be heard together on 17 May 2024 and the costs

occasioned by the postponement were made to stand over for determination in the second interlocutory application.

[31] It became common cause between the parties that the substantial relief under the first interlocutory application had been resolved and that the only issue that remained in the first application was that of costs. In respect of the second interlocutory application, Malonjeni indicated that there were about 5 documents that were still outstanding.

Issues for determination

[32] The following are the issues for determination by this court:

- (a) whether the court has jurisdiction to entertain these proceedings;
- (b) whether there is a dispute of fact;
- (c) whether a proper case has been made out for the relief sought in the second interlocutory application;
- (d) in the event of the above issue being determined against Malonjeni, whether the relief sought in the main application should be granted; and
- (e) what costs orders should be made in respect of the first and second interlocutory applications, and the main application.

Legal framework

Jurisdiction

[33] Jurisdiction in civil cases either follows the defendant or the action. What this means is that the court that has jurisdiction must either be the court in which the cause of action arose or the court which has territorial jurisdiction over the area in which the defendant resides or is employed.

[34] Barloworld adduced evidence to establish jurisdiction. First, Barloworld has alleged that Malonjeni is conducting business at Transasia Minerals Site, Dundee, KwaZulu-Natal. In response, Malonjeni has “noted” the allegations. This does not constitute a denial of an averment. All that Malonjeni placed in dispute was the allegation that it has a registered address and principal place of business at Transasia Minerals Site, Dundee, KwaZulu-Natal. If this is anything to go by, the denial is bare, bold and general. It cannot stand in view of the overwhelming evidence to the contrary. I accept that Malonjeni conducts business at Transasia Minerals Site, Dundee, KwaZulu-Natal. This is borne out by the assertions made by Malonjeni in its answering affidavit.

[35] Barloworld has also averred that the agreement was concluded at Barloworld’s rental branch situated at Corner Quarry Park Close and 1[...] Q[...] N[...] Drive, Riverhorse Valley, Durban. Malonjeni has not disputed that allegation either. There is no answer to the averments made by Barloworld in this regard. Malonjeni only has this to say:

“Barloworld failed to disclose all the relevant facts and circumstances surrounding the conclusion of its agreements with Mekgopaze. Barloworld did this even though it knew that Malonjeni contested the lawfulness of its purported cancellation of the rental agreement (and ultimately now, the Trading Agreement also). It knew that a dispute of fact would arise that cannot be determined on the papers before the Court.”

[36] In my view, the cause of action arose within the KwaZulu-Natal area of jurisdiction. The contract was concluded and the breach occurred in Durban, within this court’s area of jurisdiction.

[37] A further basis regarding the jurisdiction of the court is that the machines are located at Transasia Minerals Site, Dundee, KwaZulu-Natal. In my view, that would be sufficient to confirm the jurisdiction of the court. I further take into account that the machinery is operating in KwaZulu-Natal.

[38] In view of the foregoing, this court has the necessary jurisdiction and this matter is properly before it.

Is there a dispute of fact?

[39] I turn to consider whether this case is beset by a dispute of facts.

[40] These are motion proceedings. Mr *Stoop*, who appeared for Malonjeni, correctly so in my view, submitted that the principles set out in *Plascon-Evans*³ should apply. 'According to this rule, an application for final relief must be decided on the facts stated by the respondent, together with those which the applicant states and which the respondent cannot deny, or in relation to which its denials plainly lack credence and can be rejected outright on the papers.'⁴

[41] The undisputed facts are that Barloworld is the lawful owner of the earthmoving equipment, machinery and trucks which have been described in Barloworld's founding affidavit. The equipment, machinery and trucks were rented out in terms of an agreement to Makgopaze. The agreement between Barloworld and Makgopaze was terminated. In my view, the termination of the agreement entitles Barloworld to the equipment, machinery and trucks in the absence of a valid right of the possessor to retain them. Malonjeni has placed no evidence regarding its dispute of lawful termination. The statement was just made in general. In my view, it was not open to Malonjeni to contest the termination of the agreement as it is not a party to the agreement.

[42] I accordingly find that there is no dispute of fact. Because this issue is inextricably interwoven with the merits, more about it is said later in this judgment.

Rule 35(12)

³ *Plascon-Evans (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C

⁴ *Democratic Alliance (as Third Intervening Party): In re Electoral Commission of South Africa v Minister of Co-operative Governance and Traditional Affairs and Others (African National Congress and Others as Intervening Parties and Council for the Advancement of the South African Constitution and Others as amici curiae)* 2022 (1) BCLR 1 (CC) para 40 fn 15,

[43] As stated in *Erasmus*: Rule 35(12) authorizes the production of documents and tape recordings which are referred to in general terms in a party's pleadings or affidavits: the terms of the rule do not require a detailed or descriptive reference to such documents or tape recordings. Reference by mere deduction or inference does not, however, constitute a "reference" as contemplated in the rule. (Footnotes omitted.)

A party is entitled only to those documents to which reference is made. In *Centre for Child Law v Hoërskool Fochville and Another*,⁵ the Supreme Court of Appeal (SCA) held:

"Therefore, I hold that, upon a proper interpretation of rule 35(12), a party called upon to comply with rule 35(12) is excused from so doing, if that party shows that the document sought is irrelevant to the issues in the matter, or is privileged, but cannot refuse on the grounds of confidentiality."

[44] The SCA, in *Hoërskool Fochville*,⁶ after an analysis of the relevant case law, stated:

"This being an application, I would say that the *onus* is to be discharged on the usual basis, ie that the applicant bears the overall *onus* of satisfying the Court that the respondent is obliged to produce the document....Where the respondent files an opposing affidavit... and either denies relevance or avers that he is on ground of privilege not obliged to produce a document...the applicant would, in order to succeed, have to satisfy the Court on a balance of probabilities that the document is indeed relevant or not privileged."

[45] Mr *Stoop* correctly conceded that rule 35(12) includes, in its sweep, documents directly or indirectly referred to in an affidavit or its annexures. In *Democratic Alliance and Others v Mkhwebane and Another*⁷ it was stated:

⁵ *Centre for Child Law v Hoerskool Fochville and Another* 2016 (2) SA 121 (SCA) para 17.

⁶ *Ibid* para 18.

⁷ *Democratic Alliance and Others v Mkhwebane and Another* 2021 (3) SA 403 (SCA) para 41.

“To sum up: It appears to me to be clear that documents in respect of which there is a direct or indirect reference in an affidavit or its annexures, that are relevant, and which are not privileged, and are in the possession of that party, must be produced. Relevance is assessed in relation to rule 35(12), not on the basis of issues that have crystallised, as they would have had pleadings closed or all the affidavits filed, but rather on the basis of aspects or issues that might arise in relation to what has thus far been stated in the pleadings or affidavits and possible grounds of opposition or defences that might be raised, and on the basis that they will better enable the party seeking production to assess his or her position and that they might assist in asserting such a defence or defences. In the present case we are dealing with defamatory statements and defences such as truth and public interest or fair comment that might be raised. The question to be addressed is whether the documents sought might have evidentiary value and might assist the appellants in their defence to the relief claimed in the main case. Supposition or speculation about the existence of documents or tape recordings to compel production will not suffice. In exercising its discretion, the court will approach the matter on the basis set out in the preceding paragraph. The wording of rule 35(12) is clear in relation to its application. Where there has been reference to a document within the meaning of that expression in an affidavit, and it is relevant, it must be produced. There is thus no need to consider the submission on behalf of the respondents in relation to discovery generally, namely that a court will only order discovery in application proceedings in exceptional circumstances.”

[46] I, however, disagree Mr *Stoop*’s reliance on confidentiality as the basis for objecting to the production of the required documents. In reply to the rule the 35(12) notice, Barloworld advanced three bases of objection. First, that some of the documents are not relevant. Second, that some of the required information had already been furnished to Malonjeni as attachments to the founding affidavit. Third, the other unspecified documents requested are confidential in nature. These contentions will be dealt with separately.

[47] Insofar as Barloworld alleges that the documents are irrelevant to the issues, it is entitled to object on that basis. I agree that ‘confidentiality’ cannot be a valid defence to a request made under rule 35(12). This question was settled in *Centre for Child Law v Hoërskool Fochville*.⁸

[48] Whilst I agree with Mr *Stoop* regarding the principle enshrined in rule 35(12), the conduct of Malonjeni is unsatisfactory. Upon receipt of supplementary documents from Barloworld, Malonjeni issued a letter on 12 March 2024 incorporating these terms:

“Therefore, the matter remains unopposed and as such no reason exists for our offices not to proceed on the unopposed motion roll on 18 March 2024, in the absence of a condonation application. In fact, if your client persists in its opposition to the costs aspect (being the only issue remaining in **this** interlocutory application), we will request that the court make an order that your client must file its condonation application within 5 days of the hearing and that the wasted costs occasioned by the removal be paid by your client.”

[49] In my view, this letter conclusively confirms that the issue of the discovery of documents was settled. This conclusion is beyond doubt when regard is had to the following statement :

“[i]n fact, if your client persists in its opposition to the costs aspect (being the only issue remaining in **this** interlocutory application)...”

[50] Following the letter of 12 March 2024, Malonjeni, on its own, had removed the application from the roll of 18 March 2024. That was consistent with the letter of 12 March 2024. The costs were reserved, which serves as confirmation that it was the only outstanding issue. In my view, the dispute about the production of documents was resolved on 12 March 2024. The rule 35(12) notice was therefore complied with.

⁸ *Centre for Child Law v Hoërskool Fochville* above fn 4 para 17.

[51] The second interlocutory application should fail. To begin with, the initial application was preceded by a rule 35(12) notice, followed by a rule 30A notice and thereafter an application. A supplementary discovery of documents was made. On receipt of the supplemented discovery, Malonjeni became satisfied and removed the first interlocutory application from the roll. When removing the application, a concession was made that the rule 35(12) notice had been complied with. Malonjeni became unhappy with the issue of costs. In my view, had Malonjeni sought further discovery under rule 35(12), the correct procedure ought to have been followed. The procedure would have been to issue a notice under rule 35(12), followed by a rule 30A notice and ultimately an application under rule 30A. That was not done.

[52] For these reasons, I agree with Mr *Nxusani*, counsel for Barloworld, that rule 35(12) only envisages a notice to produce for inspection, and by seeking to reissue the same application, Malonjeni compromised its application when accepting the response offered and agreeing that the only issue remaining for consideration was that of costs. Therefore, Malonjeni is precluded from raising this issue again. It does not matter that it sought to reserve its rights, which rights were not even explained. If this were so, it would have issued a fresh notice and sought inspection of the documents that were neither provided nor included in the supplementary discovery.

[53] In *Hoërskool Fochville*⁹ it was stated that:

“In general terms, the rules exist to regulate the practice and procedure of the courts. Their object is to secure the “inexpensive and expeditious completion of litigation before the courts” and they are not an end in and of themselves. Ordinarily, strong grounds would have to be advanced to persuade a court to act outside the powers provided for specifically in the rules. Here, having given notice in terms of rule 35(12) that has not been complied with, it was for the School to give notice in terms of rule 30A that it intended, after the lapse of 10 days, applying for an order that its rule 35(12) notice be complied with. That the School did not do. Nor did it apply to court in terms of rule 30A to

⁹ Ibid para 17.

compel production of the documents sought. That, in and of itself, may have been fatal to the application.” (Footnotes omitted.)

[54] I conclude, on this aspect, that Malonjeni’s failure to deliver further rule 35(12) and 30A notices prior to launching the second interlocutory application was fatal. Consequently, the second interlocutory application must fail.

[55] There is yet another reason why the second interlocutory application should fail. In my view, the documents sought are irrelevant. The dispute between the parties involves the *rei vindicatio*. In its letters addressed to Mekgopaze and Kgopa, Malonjeni acknowledged that the equipment belonged to the supplier. It hardly lies with Malonjeni to contest the manner of acquisition of the equipment. The documents sought by Malonjeni, which Mr *Stoop* identified as five documents at the hearing, have no relevance in a determination of the main application.

The rei vindicatio

[56] ‘The principle that owners cannot be deprived of their property against their wills means that an owner is entitled to recover property from any person who retains possession of it without his or her consent... one of the incidents of ownership is the entitlement to “exclusive possession of the *res*, with the necessary corollary that the owner may claim his property wherever found, from whosoever is holding it”.¹⁰ The principle being that ‘whenever I find my property I assert my claim to it’ (*ubi rem meam invenio ibi vindico*).¹¹

[57] *Rei vindicatio* is the remedy through which an owner, who is out of possession sues to recover possession of his property. It is used both for movable and immovable property.

[58] An owner in *rei vindicatio* proceedings is required to allege and prove that:¹²

¹⁰ Silberberg and Schoeman’s *The Law of Property* 6 ed (2019) at 269.

¹¹ *Ibid*.

¹² *Ibid* at 270.

- (a) 'he or she is the owner of the thing;
- (b) the thing was in the possession of the defendant at the commencement of the action; and
- (c) the thing so vindicated is still in existence and clearly identifiable.'

[59] In *Chetty v Naidoo*¹³ the court held:

"It is inherent in the nature of ownership that possession of the *res* should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g., a right of retention or a contractual right). The owner, in instituting a *reivindicatio*, need, therefore, do no more than allege and prove that he is the owner and that the defendant is holding the *res* - the *onus* being on the defendant to allege and establish any right to continue to hold against the owner."

[60] In proving ownership for *rei vindicatio*, 'the burden rests on the vindicator, in the absence of an admission on the pleadings of his or her title, to prove it. Once the acquisition of ownership has been proved by the plaintiff on a preponderance of probability, its continuation is presumed... It is not necessary for the vindicator either to allege or prove that he or she has a personal right against the defendant to demand the return of the property or that the latter retains possession of it "unlawfully" and "without his consent". It follows that the onus to establish any right to retain possession of the thing always rests on the defendant as long as the owner does not go beyond alleging his or her ownership and the fact that it is in the possession of the defendant.'¹⁴

[61] 'The defendant may, among other things, raise the defence that the plaintiff is not the owner of the thing concerned or that the defendant was not in possession of

¹³ *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20B-D.

¹⁴ See Silberberg above fn 10 at 270-271; *Ndlovu v Ngcobo*; *Bekker and Another v Jika* 2003 (1) SA 113 (SCA) para 46.

the thing at the commencement of the action. The defendant may also prove the existence of some or other right to possession (*ius possidendi*) in terms of a contract.¹⁵ This defence can be defeated by the plaintiff proving that the contract relied on by the defendant is invalid or has been terminated.¹⁶ 'Owners who have been deprived of their property against their wills are, as a general rule, entitled to vindicate it from any person who is in possession of it. This is so irrespective of whether that person is a *bona* or a *mala fide* possessor or occupier and the owner need not compensate the possessor for its value even where the latter has acquired it for consideration (*ex causa onerosa*). In instances such as, for example by lending or leasing it to a person who subsequently alienated or pledged the property it to the , it is further more irrelevant whether the owner parted with the possession of his or her property of his or her own accord defendant.'¹⁷

[63] It is on these principles, that I turn to consider the merits of the main application.

[64] Barloworld submitted that in the absence of opposition by Mekgopaze and Kgopa, the question relating to its ownership of the machinery cannot arise. Mekgopaze and Kgopa elected to abide the decision of the court. Mr Nxusani submitted that on this ground alone, the application should be successful. He submitted that the contract with Mekgopaze was lawfully terminated.

[65] Insofar as Malonjeni is opposing the grant of the *rei vindicatio*, Mr Nxusani submitted that the opposition lacked merit. He contended that this court should consider the admission by Malonjeni that they were in possession of the property, which admission is underpinned by the acknowledgement that Barloworld had passed possession to Mekgopaze and Kgopa, who had, in turn, passed such possession to Malonjeni. The submission in this regard was that on the principles of settled law, Mekgopaze and Kgopa could not pass any more rights over the machines than the rights that they have. As I understand the submission, on

¹⁵ *Chetty v Naidoo* above fn 13.

¹⁶ Silberberg above fn 10 at 272; *Lourensford Estates (Edms) Bpk v Grobbelaar* 1996 (3) SA 350 (O).

¹⁷ Silberberg *ibid*.

Malonjeni's own version, Malonjeni is bound to accept that its own rights stem from Barloworld's initial right as owner of the property.

[66] Mr *Nxusani* further contended that the equipment is still in existence and that it can easily be identified. The submissions that all five machines are visibly branded with Caterpillar branding and logos; they are easily identifiable and their identification numbers have been admitted by Malonjeni.

[67] Mr *Nxusani* contended, regarding the control of the property by Malonjeni, that Malonjeni had in several emails and letters acknowledged that it was utilising the equipment. It was pointed out during **MALONJENI BEE INVESTMENTS (PTY) LTD** argument that Malonjeni has admitted that it has physically overrode the electronic mechanisms which enabled Barloworld to remotely disable the machines.

[68] In summary, it was submitted that Barloworld has met all the requirements for the grant of the *rei vindicatio*.

[69] On the other hand, Mr *Stoop* contended that Barloworld failed to discharge the onus resting upon it to prove ownership of the equipment. He pointed out that the documents that Barloworld relies upon demonstrate a different entity known as Barloworld Equipment (Pty) Ltd as the owner of the machinery. He strenuously argued that the discrepancy in relation to the registration certificates had not been properly explained. Insofar as Barloworld alleges that Malonjeni was in possession of the equipment, Mr *Stoop* submitted that Barloworld has dismally failed to adduce evidence that at the commencement of the proceedings, Malonjeni was in possession of the property. In advancing that argument, Mr *Stoop* submitted that Barloworld has merely relied on correspondence and emails exchanged between the parties and their legal representatives.

[70] Mr *Stoop* further submitted that in these proceedings, there is a material dispute of fact and that motion proceedings were not appropriate. Mr *Stoop* stressed that the dispute of fact was foreseeable by Barloworld in view of the previous court

litigation involving the parties and, accordingly, the application should fail. He invited this court to invoke the well-known *Plascon-Evans*¹⁸ rule.

[71] Malonjeni gained possession of the machinery from Mekgopaze and Kgopa. I agree with Mr *Nxusani*'s submission that in such circumstances, Malonjeni cannot have more rights than the rights of Mekgopaze and Kgopa. The case of Malonjeni is not immediately clear. On the documents and correspondences, Malonjeni does accept that the machines did not belong to Makgopaze or Kgopa. In this regard, I refer to the extract of their letter of 12 January 2023, which reads:

“We further confirm that in terms of the contractorship agreement you have supplied 5 Machines (the details of which are already in possession of) to our client to date. With regard to the machines you have supplied to our client, it has come to our clients' attention that due to the fact that you have not furnished the finance agreement held between you and the supplier of those machines, those machines have been disabled.”

[72] The evidence is overwhelming that the supplier in question was Barloworld. Barloworld has set out sufficient evidence on how it acquired the equipment and machinery. The issue about the registration of the machinery and equipment and the contradiction of registration documents does not take Malonjeni's case any further. There is undisputed evidence under oath that Barloworld acquired ownership of equipment through an exclusive right to purchase from its international Caterpillar suppliers in the United States of America and Switzerland. The evidence relating to the purchasing of the identified machines was not disputed in the answering affidavit. There was not even a response to these allegations. In my view, the evidence of purchase is sufficient in proving ownership. Accordingly, Barloworld has established ownership of the equipment. Registration of Caterpillars is not a legal requirement and, therefore, registration documents on their own would not confirm ownership more than proof of purchase.

¹⁸ *Plascon-Evans (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C.

[73] The defence by Malonjeni that Barloworld is not the owner or has not discharged the onus of proving ownership must be rejected. From Malonjeni's own version, these machines were supplied to Mekgopaze and Kgopa and they always knew that the machines belonged to the supplier hence they were disabled by the supplier when there was non-payment. To borrow from the case of *Plascon-Evans*, the allegations of Malonjeni are 'far-fetched or clearly untenable that the court is justified in rejecting them right out of hand papers'.¹⁹

[74] I accept that the machines, at the time of the commencement of the proceedings, were in the possession of Malonjeni. I come to this conclusion in view of the correspondence between Malonjeni's legal representatives and Barloworld. In the correspondence, it appears that, after the termination of the agreement between Barloworld and Makgopaze, the machines were disabled by Barloworld. Malonjeni activated the machines. The correspondence from Barloworld reads:

"These machines now form the subject matter of imminent litigation in the form of a vindictory action and a simultaneous urgent application for a preservation order.

The unlawful and unauthorised activation and continued operation of these machines and trucks has and will cause further wear and tear, depreciation and possible irreparable damage to sensitive onboard electronics and safety features installed on these multimillion-rand machines."

[75] The response by Malonjeni was:

"Kindly take note that our client has absolutely no dealings with your client and we suggest that your office address any issues it may have with the persons it contracted with. We would request that you direct your threats to the appropriate recipient in future, being the party whom contracted with your office."

¹⁹ *Plascon-Evans* above fn 18 at 635C.

[76] On a proper scrutiny of the correspondence and the conduct of Malonjeni, I am satisfied that Malonjeni is in possession of the machines. It is evident that Malonjeni sought to retain possession as a form of retention until its payment by Makgopaze or Kgopa is made. There is no objective evidence to support the denial of possession of the five machines, equipment and trucks. On this point, I find that the machines, equipment and trucks are in possession of Malonjeni and were in its possession at the commencement of the proceedings.

[77] Barloworld has identified the five machines with descriptions. All five machines are branded with Caterpillar branding and logos. The identification numbers of the machines were not denied by Malonjeni. I accept this evidence. In addition, Malonjeni, in its own version based on the letter of 12 January 2023, confirmed being in possession of the equipment in the following terms:

“...We further confirm that in terms of the contractorship agreement you have supplied 5 Machines (the details of which are already in possession of) to our client to date.

....

Lastly, you are herewith further notified that under these circumstances our client shall exercise its option to hold all machinery in our clients’ possession as security for the debt pending resolution of the issues.”

[78] There can be no doubt that the identified machines, equipment and trucks are in the possession of Malonjeni. I accept the version of Barloworld in placing reliance on the authority of *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*,²⁰ where the SCA held:

“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. There

²⁰ *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) para 13.

will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say “generally” because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.”

[79] To sum up, Barloworld has established that it is the owner of the machines, equipment and trucks; which were in possession of Malonjeni at the commencement of the proceedings; and that they do exist and are identifiable as five machines branded with Caterpillar branding and logos and bear identifying numbers. Malonjeni has not raised any defence to justify possession of these machines. On the authority of *Chetty v Naidoo*²¹ and the principles set out in *Silberberg*²² as set out above, I am satisfied that Barloworld has made out a case. I also reject Malonjeni’s contention that Barloworld has abused the court process. It is normal for parties to bring before court urgent applications and once those urgent applications are struck from the roll,

²¹ *Chetty v Naidoo* supra footnote 13

²² *Silberberg* supra footnote 10

it would be open to a party to supplement the struck application or to institute a fresh application. That cannot be said to be an abuse of court process.

[80] For all the reasons stated, Barloworld has made out a case for the grant of the relief based on the remedy provided by *rei vindicatio*. Barloworld is entitled to possession of its own property and therefore, possession must be restored accordingly.

Costs

[81] I cannot think of any reason, and none has been suggested, as to why the costs should not, as a general rule, follow the result.

[82] Both parties have sought costs of two counsel. I agree. The matter is fairly complex and the employment of two counsel was justified. The costs should include those of the second interlocutory application. Malonjeni should also be held liable for the costs occasioned by the postponement of 10 May 2024.

[83] The application for postponement was merely intended to delay the hearing. Malonjeni had not filed its heads of argument which would have resulted in an unnecessary postponement. Malonjeni was furnished with supplementary documents and confirmed that the issue of the first interlocutory application had been resolved. It then removed the application from the roll of 18 March 2024. In a bizarre and unacceptable procedure, Malonjeni launched the second interlocutory application, a few days prior to the hearing of 10 May 2024. The inference is irresistible that the application for postponement was a stratagem to avoid the hearing on 10 May 2024. In my view, that conduct would have ordinarily attracted a punitive costs order. Because such order was not sought, I will award costs on the ordinary scale.

Order

[84] **In the result, the following order is made:**

1. The applicant or its agent(s) or nominee(s), is hereby authorized and directed, duly assisted by the Sheriff of this Court, and where necessary, members of the South African Police Service, to enter Transasia Minerals Site or wherever the applicant's equipment may be found in Malonjeni Bee Investments (Pty) Ltd or any other person's possession, and forthwith take into possession such equipment, machines and trucks, to wit–

- (i) 2020 CATERPILLAR Dozer (D9), Model/Plant No. D9059
Serial No: W[...],
Vin No: C[...],
Colour: Yellow,
Value: R14 720 000.00 Incl. VAT;**
- (ii) 2022 CATERPILLAR Excavator, Model/Plant No. 352001,
Serial No: H[...],
Vin No: C [...],
Colour: Yellow,
Value: R8 108 650.00 Incl. VAT;**
- (iii) 2021 CATERPILLAR ART Truck (730), Model/Plant No. 730379
Serial No: 3[...],
Vin No: C [...],
Colour: Yellow,
Value: R8 660 650.00 Incl VAT;**
- (iv) 2021 CATERPILLAR ART Truck (730), Model/Plant No. 730373; Serial No: 3[...],
Vin No: C[...],
Colour: Yellow,
Value: R8 660 650.00 Incl. VAT; and**
- (v) 2022 CATERPILLAR Loader (966), Model/Plant No. 966287,**

**Serial No: E[...],
Vin No: C [...],
Colour: Yellow,
Value: R8 355 900.00 Incl. VAT.**

- 2. The third respondent, their agent/s or nominee/s or any other person/s holding the machines, equipment and trucks referred to in paragraph 1, is and/or are directed to release immediately the five machines, equipment and trucks to the applicant or its agent/s or nominee/s who shall take possession forthwith upon release.**
- 3. In the event of the third respondent resisting the release of the machines, equipment and trucks to the applicant, its agent/s or nominee/s, the Sheriff, duly assisted by members of the South African Police Service, shall seize the equipment, machines and trucks and hand the same over to the applicant, or its agent/s or nominee/s.**
- 4. Malonjeni's application in terms of rule 35(12) read with rule 30A launched during April 2024 is dismissed.**
- 5. The third respondent shall pay costs of the main application, the rule 30A application, and the reserved costs occasioned by the application for postponement on 10 May 2024, such costs to include those of two counsel, where incurred, and payable on scale C.**

**M NOTYESI
ACTING JUDGE OF THE HIGH COURT**

APPEARANCES:

Counsel for the applicant:

J Nxusani SC (together with P T Nortje)

Instructed by:

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Counsel for the third respondent:

B C Stoop SC

Instructed by:

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c/o Lister and Lister Attorneys
Pietermaritzburg

Heard on:

17 May 2024

Judgment delivered on:

18 July 2024