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

Case number: 2913/2024P

In the matter between:

LANDTO RESOURCES COMPANY LIMITED

APPLICANT

And

MOTECH LOGISTICS RSA (PTY) LTD

RESPONDENT

JUDGMENT

P C BEZUIDENHOUT J:

[1] On 27 February 2024 Applicant brought an application for the return of 8 horse and trailers (trucks) which it alleged are in the possession of Respondent. Further that in the event of Respondent not complying with the order that the Sheriff be entitled to remove the said trucks where they may be found and costs. The application is opposed by Respondent.

[2] On 25 September 2023 Applicant and Respondent entered into a transport and delivery agreement. A copy of which is attached to the papers.

[3] Applicant alleges that Respondent was indebted to it for \$949 780.00 due to non-payment. On 20 January 2024 Applicant informed Respondent that it was not taking any new bookings. On 7 February 2024 Respondent unlawfully took possession of 8 of Applicant's trucks. On 27 February 2024 Applicant brought this application.

[4] On 28 February 2024 Respondent brought an *ex parte* application on an urgent basis before Z P Nkosi J to attach certain trucks of Applicant to confirm jurisdiction as Applicant is a peregrines being a company registered in Zambia. Respondent wanted the security for a contractual claim of R 80 00 000.00 that it had against Applicant due to breach of an agreement between them. On 28 March 2024 Applicant brought an application to have the order of Z P Nkosi J reconsidered before Pitman A.J. An order was granted that the order by Z P Nkosi J be set aside and that the vehicles which were in the possession of Respondent be returned to Applicant.

[5] On 7 March 2024 Applicant's attorney, by letter, informed Respondent that the agreement was cancelled as Respondent was informed by Applicant on 20 January 2024.

[6] On 22 May 2024 an order was granted by consent after Applicant brought an application that 8 specific trucks mentioned in the application be removed from the possession of Respondent and be held in storage by the Sheriff of the High Court, Camperdown. The trucks are thus at present under the control of the Sheriff.

[7] Respondent also brought an application to strike out certain of the paragraphs in Applicants founding affidavit and a further application to file further affidavits. It was contended that the matters raised in these affidavits only came to its knowledge after it had filed its answering affidavit. Answering and replying affidavits were filed herein. These issues were not opposed at the hearing by Applicant as will be set out below. Respondent however persisted therewith.

[8] It was submitted on behalf of Applicant that in volume 1 page 18 it sets out its ownership of the vehicles and that at page 106 of Respondent's answering affidavit Respondent admits the ownership of the trucks but only contends that it is not in unlawful possession thereof. It was submitted that ownership is therefore confirmed. It was further submitted that the contract had been cancelled and that Respondent elected to sue for damages. I was referred to the application to confirm jurisdiction

wherein it was set out that the trucks had to be attached as security for the contractual damages claim to be instituted by Respondent against Applicant. It was alleged that Applicant had reneged on its contractual obligation, had breached the agreement and had brought to an end the income generating capacity of Respondent and therefore a contractual loss to Respondent.

[9] It was further submitted that Respondent had elected to claim damages and not specific performance and therefore was bound by its election. It could therefore at this stage not demand to have the vehicles in its possession after it made the election to sue for damages as appears from the application to confirm jurisdiction. It was submitted that in terms of the decision in *Chetty v Naidoo* 1974 (3) SA 13A, the contract had been terminated and Applicant was entitled to the return of the trucks.

[10] In respect of the application by Respondent to strike out certain paragraphs, namely paragraphs 2, 9, 10, 22, 24, 25, 26, 27, 29, 30, 31 and 34 of Applicant's founding affidavit it was submitted on behalf of Applicant that it did not attack its ownership of the said trucks and that even if those paragraphs were struck out it would not take the matter any further. It was also submitted that the further affidavits which Respondent wished to file will not take the matter any further and they were not relevant and of no assistance. It was submitted that even if the "Plascon Evans Rule" had to be applied it does not take the matter any further as Applicant remains the owner of the said trucks.

[11] It was submitted on behalf of Respondent that various portions of the affidavit had to be struck out as it was hearsay. It was submitted that Respondent's version had to stand. It was admitted that Applicant cancelled the agreement but that Respondent was entitled to hold the trucks in terms of the agreement. It was submitted that it has not made an election but it was only contemplating to summons. It was submitted that the version of Applicant was hearsay. I was referred to the affidavits of the drivers who stated that they had to face disciplinary hearings after they had left the vehicles at Respondent's premises. It was submitted that the contractual terms were not in

dispute, that the agreement was at page 28 of the papers and that there was indeed a contractual relationship in terms of which Respondent was entitled to hold the vehicles until September 2024. It was further submitted that as the matter was to be taken further that the attachment still stands. The further affidavits should be allowed to ensure that all the facts are placed before Court.

[12] It is common cause that indeed an agreement was entered into between Applicant and Respondent for the transportation of various goods. The agreement was signed on 25 September 2023. It states on the front page that it is a 12 months contract. Respondent further relies on a letter at page 151 of the papers where it sets out the names of 38 drivers and 38 trucks signed by the operations manager and director of Applicant setting out that the trucks loaded under Motech Logistics RSA, which is Respondent will be under their responsibility and supervision during transportation.

[13] Applicant stopped transporting goods for Respondent during January 2024. It is common cause that the contract has been cancelled. According to Respondent it was due to the breach thereof by Applicant and that it wants to sue it for damages. The attachment of the trucks has been set aside on reconsideration and no summons has as yet been issued. It is apparent from the application to attach the trucks that Respondent elected to sue for damages and not for specific performance.

[14] As submitted by Mr Broster, even if the paragraphs which Respondent wishes to have struck out are struck out the fact remains that there is enough in the affidavit setting out ownership of the trucks which is conceded by Respondent. The further affidavits will also not take the matter any further as they set out why the vehicles were left there and under what conditions. This does not entitle Respondent to hold the said trucks. The matter is therefore considered on the basis that the paragraphs in the founding affidavit as set out in paragraph 10 above are struck out and leave is granted to Respondent to file the further affidavits.

[15] It is not disputed that the vehicles belong to Applicant and are being held by Respondent. They have however now been moved for storage by the Sheriff. I have perused the agreement between the parties and can find no clause that Respondent is to be in control of the trucks. The contract is for the provision of transport services and how billing and payment is to be done. The contract has been cancelled, the attachment of the trucks set aside on reconsideration and leave to appeal against that judgment refused. There is nothing in the papers or any supplementing affidavit that any further steps in this regard have been taken. There is thus no right for Respondent to retain the vehicles.

[16] Respondent having made its election to sue for damages and not specific performance, can therefore not rely on the terms of the agreement to refuse to return the vehicles to Applicant. See *Bekazaku Properties (Pty) Ltd v Pam Golding Properties* 1996 (2) SA 537 (CPD) at 549 E. Applicant is accordingly entitled to the said vehicles and an order is therefore necessary for the said vehicles to be returned to Applicant from the Sheriff.

[17] Although Respondent succeeded on the striking out application and the filing of further affidavits which were not opposed Applicant was successful at the end and costs should follow this result.

The following order is therefore made:

1. The application by Respondent to strike out certain paragraphs of the founding affidavit is granted.
2. The application by Respondent to file further affidavits is granted.
3. The Sheriff of the High Court, Camperdown is instructed to immediately release the trucks and trailers listed below to Applicant:

	HORSE REG.	HORSE VIN/CHASSIS NO.	TRAILER REG.	TRAILER VIN/CHASSIS NO.

1	A[...]	L[...]	A[...]	L[...]
2	A[...]	L[...]	A[...]	L[...]
3	A[...]	L[...]	A[...]	L[...]
4	A[...]	L[...]	A[...]	L[...]
5	A[...]	L[...]	A[...]	L[...]
6	A[...]	L[...]	A[...]	L[...]
7	A[...]	L[...]	A[...]	L[...]
8	A[...]	L[...]	A[...]	L[...]

4. Respondent is to pay the costs of the application on an attorney and client scale.

P C BEZUIDENHOUT J.

JUDGMENT RESERVED:

6 JUNE 2024

JUDGMENT HANDED DOWN:

21 JUNE 2024

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