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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: 77205/2024

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

DATE: 6/8/24

SIGNATURE

In the matter between:

MIATEX (PTY) LTD

First

Applicant

LCNP MALL (PTY) LTD

Second Applicant

and

PAUL LALA

First Respondent

BOKANG STEEL (PTY) LTD

Second Respondent

CHARMAINE NTHABISENG NEMBAMBULA

Third Respondent

VUKA DARKIE CONTAINER MALL (PTY) LTD

Fourth Respondent

THE SHERIFF OF THE HIGH COURT BOKSBURG

Fifth Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 10: 00 am on 06 August 2024.

Summary: *Actio rei vindicatio*. The applicants allege ownership of 31 Containers used to operate a business of running a mall. The fourth respondent (Vuka Darkie Container Mall (Pty) Ltd) also allege ownership of the 31 Containers. The applicants were not divested of ownership of the 31 Containers and thus entitled to *rei vindicatio*. The applicants are entitled to interdictory reliefs. Held: The application was upheld.

JUDGMENT

MOSHOANA, J

Introduction

- [1] When relationships between business persons sours, each business person would take back what belongs to him or her. It is often the case, as it was the case herein that the involved business persons would be quick to allege that if assets are brought into the business operation in order to generate income those assets would belong to the business entity as opposed to the business person who acquired and brought the assets into the business operation. A business does not operate along the lines of a marriage in community of property where the acquired assets belong to a joint estate. The case punted for by the first respondent in this instance is akin to a marriage in community of property.

- [2] The present is an urgent application launched by two legal entities, seeking vindictory and interdictory relief against the first to the fourth respondents. The application is duly opposed by Paula Lala, the first respondent before Court. Although voluminous papers were filed in this application, this matter turns on the question of who the true owner of the 31 containers is. The applicants stake ownership thereof on the one hand and the first respondent on the other hand alleges that the fourth respondent, Vuka Darkie Container Mall (Pty) Ltd (Vuka) is the lawful owner of the aforesaid containers.

Background facts appertaining the present application

- [3] Given the limited basis upon which the present application oscillates, it is obsolete for the purposes of this judgment to punctiliously recant all the facts as gratuitously littered by the parties in their respective affidavits. To do so, will serve no treasurable purpose other than to elongate this judgment unnecessarily. A brief summation of the salient facts shall suffice in this particular instance. The first applicant is in the business of acquiring and rent to buy of containers. The onset of the relationship between the directors of the first applicant and the first respondent commenced when the first applicant and the first respondent concluded a rent-to-buy agreement in respect of 9 containers.
- [4] In due course, the director of the first applicant developed a business interest in the space of what is known as “container mall”¹. A discussion between the relevant persons ensued which culminated in the birth of Vuka as a legal entity. Prior to the birth of Vuka, some oral agreements were reached. Of pertinence in this matter is an agreement to make available 31 containers for the purposes of conducting a business of letting and hiring of premises through Vuka. The terms of the oral agreements were reduced to writing in February 2020. There is no dispute between the parties that in October of 2019 certain agreements were reached. The only

¹ Literally it is a shopping mall created through containers.

point of difference is that, as recorded in the not properly disputed minutes, the 31 containers were availed only for purposes of use and not acquisition by Vuka.

- [5] On the contrary, the first respondent alleges that the 31 containers were transferred to Vuka as an “investment” as a result of which, the first applicant relinquished and Vuka acquired ownership of the 31 containers. Once the 31 containers were availed, they were placed on some land on the strength of a lease of land agreement. It later emerged that the land was not appropriately zoned and the Municipality had imposed some administrative fines. Of particular relevance, in terms of the said lease agreement, by 31 July 2024, all business activities carried out of the containers was required to cease and the lessee was afforded a period of two months (August to September) to rehabilitate the leased land back to its original state prior to the conclusion of the lease agreement.
- [6] Owing to the fact that the commercial operations were to cease on 31 July 2024, the first applicant in June 2024, in order to secure his assets, attempted to remove the 31 containers from the leased premises. This attempt was met with acrimony and fierce resistance. Having failed to secure possession of the 31 containers, the applicants launched the present application. The application is duly opposed.

Analysis

- [7] Before this Court can deal with the limited question pertinent to this matter, it suffices to briefly deal with the preliminary objections raised by the parties. The applicants contend that the answering affidavit of the first respondent is not properly commissioned since the purported commissioner (Admin Clerk) is not a designated commissioner of oaths. Despite the point being pertinently raised at an opportune time, the first respondent has failed to confirm that the named Admin Clerk is a designated commissioner of oaths. It was at the tail end of the submissions that Mr Mpshe, appearing for the first respondent, stated that the Admin

Clerk was a commissioner of oaths in terms of section 6 of the *Justices of the Peace and Commissioners of Oaths Act* (Commissioners Act)². Section 6 of the Commissioners Act deals specifically with *ex officio* commissioners of oaths. The section provides that the Minister may, by notice in the *Gazette*, designate the holder of any office as a commissioner of oaths for any area specified in such notice, and may in like manner withdraw or amend any such notice.

- [8] Therefore, regard being had to the provisions of section 6, when challenged, the first respondent was required to produce at the very least a notice designating the Admin Clerk as a commissioner of oaths. The first respondent failed at the opportune time to produce such a notice. This Court is, under those limited circumstances, constrained to conclude that the named Admin Clerk is not designated as a commissioner of oaths. However, that is not the end of the enquiry. It remains in the discretion of a Court whether to admit or reject a non-complaint affidavit. Although the affidavit *ex facie* suggests that the designated person is an Admin Clerk, an official stamp of the office of the Clerk of Court in Boksburg was affixed. On 10 July 1998, the Minister of Justice issued a notice³ designating Clerk of the Court and Assistant Clerk of the Court as commissioners of oaths in terms of section 6 of the Commissioners Act. In this particular instance, the official stamp of the designated office was affixed. Impliedly, the affidavit was commissioned before a designated commissioner of oaths, namely, the Clerk of Court Boksburg. On application of the maxim *omnia praesumitur rite essa acta* (it is generally presumed that acts or events which occur regularly or routinely have followed a regular or routine course), and in the exercise of my discretion I must conclude that the affidavit is acceptable.⁴

² Act 16 of 1963 as amended.

³ Designation of Commissioners of Oaths in terms of section 6 GN 903 in GG 19033 10 July 1998.

⁴ See *Cibi and others v PSC and others* (3703/2019) [2022] ZAECKMHC 44 (28 July 2022)

[9] At a broad level, there is no basis in law or otherwise for this Court to conclude that an Admin Clerk is not a Clerk or Assistant Clerk of the Court. The *onus* lies on the applicants to prove that the affidavit is defective. The conclusion to reach is that the affidavit is acceptable and was properly commissioned, even though the official notice designating Clerks of Courts as *ex officio* commissioners was not produced upon the respondents being challenged. Nevertheless, the notice published in a Gazette is a public document which the applicants ought to have known of. The applicants, despite this objection, nevertheless replied to the alleged defective affidavit and no prejudice was demonstrated.⁵

[10] With regard to the *locus standi* challenge of the first respondent as pleaded by the applicants, it is by now settled law that a party does not require authorisation to depose to an affidavit⁶. Accordingly, the objection by the applicants is not upheld. The first respondent also raised three objections; namely (a) non-joinder of the various occupiers of the containers; (b) the lack of urgency; and (c) the existence of the dispute of fact. Regarding the non-joinder, this Court takes a view that those tenants have no direct and substantial interest in the relief sought by the applicants. It may well be so that the occupiers may have a spoliation claim against their lessor. However, the relief that the applicants are the owners and according them full ownership rights have nothing to do with the occupiers. No rights of theirs, if any, shall be affected by the relief sought. Joinder relief is not a matter of convenience but it is a matter of substantial interest being demonstrated. In relation to urgency, there is no dispute that the holding of the containers against the will of the owner amounts to an unlawful act which unless corrected by this Court will continue. Where there is continuing unlawfulness, urgency is self-evidently inherent. The applicants continue to suffer commercially should the Court not intervene. Accordingly, urgency has been shown to exist. The applicants unless they

⁵ See *S v Msibi* 1974 (4) SA 821 (T).

⁶ *Ganes and Another v Telkom Namibia* 2004 (3) SA 615 (SCA).

resort to self-help have no other substantial relief in due course other than to approach this Court.

Who is the owner of the 31 containers?

[11] Turning to the crisp question, this Court must decide who the owner of the containers is. It is common cause that Vuka was only registered as an entity on 25 May 2020. As at that time, an oral agreement relating to usage and availing of the 31 containers was already concluded in October 2019. Clearly, the existence of the 31 containers predates the birth of Vuka. As such logic dictates that someone and not Vuka acquired the existing 31 containers. Acquisition by purchase is the most common way to acquire personal property. The applicants expressly alleged that the containers were purchased by them although they are unable to produce the records of the acquisition. The first respondent admits that the list annexed contained properties of the applicants which are held at the leased premises. Simply because the applicants played open cards that they were unable to submit proof of acquisition, the first respondent proverbially jumped on the bandwagon, and sought to deny ownership because the applicants are unable to produce proof. To my mind, this is an opportunistic stance on the part of the first respondent. In the circumstances of this case, unless it can be demonstrated that the containers were a *res derelicta* leading to October 2019 oral agreements, it follows axiomatically that since the director of the first applicant was in possession of the containers he was the owner. It must be remembered that the other means to prove ownership of a property is through possession⁷. A person in possession of a thing (immovable property) is presumed to be the owner. Thus, even in the absence of the proof of purchase, by mere possession, the first applicant is presumed to be the owner.

[12] Other than a bare denial, the respondents do not allege that the containers were purchased by Vuka or at any stage before the oral agreement the

⁷ See *Zandberg v Van Zyl* 1910 AD 302.

containers were in the possession of Vuka. The respondents suggest that there is a genuine dispute of fact and this Court is unable to resolve such a dispute on the papers. I disagree. There is no genuine dispute of fact created in this instance. The first respondent simply raised open ended and rhetoric questions. Such does not raise a genuine dispute of fact contemplated in the law applicable to disputes of fact. On the first respondent's own version, the containers were brought into Vuka as a form of an "investment" which secured the director of the first applicant a 45% stake and directorship in Vuka. Ordinarily, a person makes or secures an investment (an action of investing money for profit) using his or her own property. On the allegations made and admitted by the first respondent, this Court, on application of the *Plascon Evans* principle must, on the probabilities accept that the containers were purchased by the applicants as alleged. Otherwise, how would the containers have mushroomed to have secured the applicants a stake and directorship in Vuka? On the preponderance of probabilities, the applicants are the owners of the containers.

- [13] The version of the first respondent that the applicants relinquished ownership of the containers by delivering them to Vuka with no consideration is not only improbable but is inconsistent with the usual manner of conducting business. The version that the containers were availed for use and not ownership is more probable and is consistent with the manner in which business is conducted. It is not unusual in the business world for a property owner to avail it for use whilst at the same time reaping profits out of such use. The applicants availed the containers for use without rental but took 45% shareholding in the business of Vuka. This type of a move makes business sense. On the contrary, it makes no business sense for a business person to lose ownership of a pricey property without any consideration just to acquire a stake in a business the profitability of which is unknown. For all the above reasons, this Court concludes that the applicants are the owners of the 31 containers.

[14] *Actio rei vindicatio* is the action through which an owner who is out of possession sues to recover possession of his or her property. In such an action, the claimant must allege and proof that (a) he or she is the owner of the property; (b) the other party is holding the property; (c) that the property still exists and is clearly identifiable⁸. On the available evidence, there is no doubt that the applicants are the owners of the 31 containers and that other parties are holding the containers. Similarly, there is no dispute that the 31 containers still exist and are identifiable. In the absence of an enforceable right the holders of the containers cannot continue to hold the containers against the will of the owners.

Interdictory reliefs

[15] Owing to the undisputed incidents of 19 June 2024, the applicants seek interdictory reliefs. It is common cause that when the applicants wished to exercise control over their property, they were met with some unlawful resistance. The respondents contend that the applicants resorted to self-help on 19 June 2024. This is incorrect. The holders of the containers were not in unlawful possession. The applicants allowed the use of the containers and upon termination of the use, the applicants were entitled to demand the return of the containers. A *usufruct* is a right to enjoy the use and advantages of another's property. On termination of the usufruct the property must be restored to the owner. When the applicants demanded the return of the property at the end of the *usufruct*, they were not resorting to self-help. Now that the respondents have refused to return the containers, it would have amounted to self-help had the applicants not approached this Court for a relief.

[16] Undoubtedly, the applicants have demonstrated a clear right to have the containers returned to them. Any resistance thereto is an unlawful conduct which is remediable through the special remedy of an interdict. For all the

⁸ *Van Der Merwe and Another v Taylor NO and others* 2008 (1) SA 1 (CC) para 14.

above reasons the respondents or any other person associated with the respondents must be restrained and interdicted from interfering with the removal of the containers; accessing the containers; and or taking control of the containers.

Conclusions

[17] *Initially*, the applicants sought a *rule nisi*, which was returnable on 19 September 2024. However, since the application was fully argued, counsel for the applicants was not averse to a proposition that a final relief, if justified, be made. Counsel for the respondents did not offer any resistance to this proposal from the bench. In summary, the answering affidavit of the first respondent is admitted and accepted. The other preliminary objections are not upheld. The applicants are entitled to the *rei vindicatio* relief as well as interdictory reliefs. With regard to costs, in the exercise of this Court's wide discretion, the first respondent is ordered to pay the costs of this application on a party and party scale with counsel's fees to be taxed or settled on scale B.

Order

1. The 1st; 2nd; 3rd; and 4th respondents are forthwith ordered to restore possession and control of 31 Containers identified in Annexure "A" to the notice of motion to the first applicant;
2. The 1st; 2nd; 3rd; and 4th respondents are ordered to permit, with immediate effect the first applicant; and/or any third party trucking service provider nominated by the first applicant; or the sheriff of this Court to load and or take control of the identified Containers from the premises known as Vuka Darkie Container Mall situated at 8[...] N[...] B[...], corner of North Boundary Road and Rondebult Road, Klippoortjie, Boksburg, Gauteng Province to have those Containers delivered to the first applicant's nominated address.

3. The 1st, 2nd, 3rd, and 4th respondents and/or any other person associated to and/or instructed by these respondents are hereby interdicted and restrained from interfering with removal of the Containers as ordered in 2 above; blocking or causing the blocking of the entrance and/or exits of Vuka Darkie Container Mall premises when the Containers are removed as ordered in 2 above.
4. Forthwith, the 1st; 2nd; 3rd; and 4th respondents are interdicted and restrained from interfering with the first applicant's control, use and possession of the Containers;
5. The first respondent is to pay the costs of this application on party and party scale to be settled or taxed at scale B.

GN MOSHOANA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES:

For Applicant:	Ms A Van der Merwe
Instructed by:	Pretorius Law Incorporated, Pretoria
For Respondents:	Mr KH Mpshe
Instructed by:	AS Seroka Attorneys, Vosloorus
Date of the hearing:	02 August 2024
Date of judgment:	06 August 2024