



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

REPORTABLE

CASE NUMBER: 10304/23

In the matter between

OCKERT MARAIS

APPLICANT

and

NICHOLAS MELCK

FIRST RESPONDENT

BERNARD VAN VUUREN

SECOND RESPONDENT

JUDGMENT

Date of hearing: 23 October 2024

Date of judgment: 1 November 2024

BHOOPCHAND AJ:

1. Kalahari melons (*Citrullus vulgaris*) have adapted to drought and heat and grow wildly in the semi-arid savanna, spanning Namibia, Botswana, and South Africa. The San peoples of the Kalahari hold the rights of this flora in South Africa. Any person wishing to exploit the wild melon needs the consent of the San and the Department of Environmental Affairs. The oil, processed from its seed, is rich in

linoleic acid, an omega-6 polyunsaturated fatty acid. The oil is used in a variety of cosmetics internationally. The Kalahari melon has been used for over 4,000 years by the San people of the Kalahari. They ground the seed into a paste and used it to protect their skin against the harsh desert elements, while the pulp mixed with water was used as a sunblock or as a potion for a healthy, blemish-free complexion.¹ This is the case of the uncle, a farmer who tilled the soil and toiled relentlessly with his crops until the sun parched the earth, dried the dams and killed his yield. This is the case of the globe-trotting nephew who, together with the uncle, harvested the wild and sold off the oil until each demanded more of what the other had, the nephew the oil and the uncle the spoils.

2. This application concerns the removal of farming equipment used to harvest the wild melon from the Applicant's farm. The Applicant is a farmer in the North West district of Vryburg. It concerns proof of ownership and the vindication thereof, although the means of recovery becomes conflated between founding and replying affidavits. The application commenced *ex parte* on 26 June 2023. The equipment involved included two tractors, two ranking machines and two harvesters ("the equipment"). They were removed on the Second Respondent's instruction with the Applicant's consent and relocated to the First Respondent's farm in the Western Cape. The First Respondent takes no part in this application.
3. The notice of motion commences with the allegation that the equipment was "for the Applicant to use". The Applicant sought its repatriation and undertook to pay the transport costs, keep the equipment in good working order, and not alienate them until the return date of the *rule nisi*. The rule called upon the Second Respondent to show cause why the order for the return of the equipment should not be made a final order.
4. A notice of motion informs the Respondent and the Court of the relief or remedy (i.e., the order) sought by the Applicant. The founding or supporting affidavit to a

¹ From various sources

notice of motion sets out the grounds upon which the relief is claimed. Sufficient facts (the evidence) must be disclosed to prove a cause of action. The founding affidavit contains the core allegations or assertions a party needs to establish to succeed (the *facta probanda*) and the facts or evidence to support those core allegations (*facta probantia*). The Applicant's case stands or falls by the contents of his founding affidavit. New information or issues not included in the founding affidavit may not be raised in a replying affidavit. There are exceptions to the latter rule, but they do not apply to this application. A replying affidavit aims to rebut issues raised by a Respondent in his answering affidavit. It does not constitute an opportunity to include new issues or information the Applicant forgot to include in his founding affidavit, nor is it an opportunity to introduce a whole new cause of action.²

5. The Applicant states that he is a director and shareholder of African Origins Farming (Pty) Ltd ("African Origins"). He cites the First Respondent, Nicholas Melck, a farmer residing on the farm Doornfontein in the Bergriver Municipality, Western Cape Province, as the holder of the equipment removed from his farm. The Second Respondent, Bernard van Vuuren, holds dual citizenship and resides in the United Kingdom. The Second Respondent instructed a moving company to remove the equipment from the Applicant's farm and relocate it to that of the First Respondent.

6. The Applicant alleges that he established a joint venture, African Origins Oil (Pty) Ltd ("African Origins Oil JV"), with the Second Respondent to exploit the Kalahari melon seed for its cosmetic use. He became the equipment owner as part of the Second Respondent's contribution to the joint venture. He would provide the seed oil (Mokate oil) for the Second Respondent to sell internationally through the latter's company, African Origins UK ("Origins UK"). The Second Respondent would provide the equipment to harvest the melon and process the seed to extract the oil. The Applicant alleges that he and the Second Respondent agreed to

² Civil Procedure, A practical Guide, Pete, Hulme, du Plessis, Palmer, New Africa Books (Pty) Ltd, 2005, at pages 132-140

procure the two tractors and the harvesting equipment. He registered the tractors in his name and paid for their licensing, servicing, and insurance. He paid R100 000 to import harvesting equipment sourced from Türkiye. The Applicant valued the equipment at approximately R1.6 million. He alleged that the Second Respondent sold vast volumes of the melon seed oil.

7. On 23 February 2023, the Applicant consented to the Second Respondent removing the equipment used on his farm for about two years since its procurement. The Second Respondent intended to use the equipment to harvest wild melons in the Velddrift area of the Western Cape Province. The Applicant understood that the equipment would be returned to him in time for the harvest of the melons on his farm. The tractors were serviced at the Second Respondent's request, and the equipment was duly moved. The equipment was not returned to him.
8. The Applicant alleges that his relationship with the Second Respondent soured for reasons unrelated to this application. The Applicant holds all permits to plant, harvest, and produce the Kalahari melon seed oil and sell it. The Second Respondent had no permits but unlawfully planted and harvested the melons. The Applicant pays the San people a royalty every six months to exploit the wild melons.
9. The Applicant asked the Second Respondent to return the equipment. The Second Respondent declined and instructed the First Respondent not to return it. The Applicant does not state that the Second Respondent challenged his right to ownership but alleges that the Second Respondent cited some form of storage agreement and third-party contract with an investor known as Trend. The Applicant denied any storage agreement and asserted that he had no contact with any person from an entity known as Trend. These aspects become clearer in the answering affidavit.

10. The Applicant attempted to open a case against the Second Respondent with the South African Police Services (“SAPS”). He wanted the SAPS to assist him in retrieving the equipment. The Applicant requested the SAPS to investigate the Second Respondent for theft, unlawful refusal to return the equipment, operating the vehicles without registration or licenses or his consent as the owner, fraudulent misrepresentation to the tractor dealership that the Second Respondent undertook to pay for the servicing of the tractors, and the unlawful planting and harvesting of the melons without the necessary permits and consents. The SAPS declined to assist as the Applicant had consented to removing the equipment. The SAPS advised the Applicant to pursue a civil claim against the Second Respondent. The Applicant instituted this application *ex parte*, fearing the equipment would be moved if he served his papers on the Respondents.
11. It is appropriate to chronicle how the application evolved before the Court addresses the Second Respondent’s answer to the allegations in the Applicant’s founding affidavit. On 25 August 2023, Cloete J ordered that the *ex parte* application be served on the Respondents and that the matter be postponed to 4 October 2023. The Second Respondent filed his notice to oppose on 2 October 2023. The Second Respondent filed his answering affidavit and a counterapplication on 20 November 2023. The Applicant filed a notice to oppose the counterapplication dated 22 November 2023. On 28 November 2023, the Applicant applied for security of costs in terms of Rule 47. The Applicant required that the Second Respondent pay R850 000 into court or provide an attorney’s undertaking for the amount. On 23 January 2024, the Second Respondent filed a security bond of R140 000. On the same date, the Second Respondent made a successful chamber book application to have the Applicant file his replying affidavit to the main application and his answering affidavit to the counterapplication. The application was granted on 20 March 2024 with costs against the Applicant. The Applicant filed his replying affidavit and his answer to the counterapplication on 2 April 2024. The matter was removed from the roll on 2 May 2024. On the 25 August 2024, the matter was postponed to 4 October 2024.

On 4 October 2024, the matter was again removed from the roll. The application was set down for hearing on Wednesday, 23 October 2024. On Monday, 21 October 2024, the Second Respondent withdrew his counterapplication and tendered the wasted costs occasioned by the withdrawal.

12. The Second Respondent filed a lengthy answering affidavit. The Court will focus on the answers pertinent to the adjudication of this application. The Second Respondent confirms that he resides in London. The Second Respondent raised a point of non-joinder on the basis that one ranking machine and one harvester belonged to Origins UK and prayed that the application be stayed until Origins UK had been joined. The Second Respondent abandoned this point when his written argument was filed.
13. The Second Respondent honed down on the Applicant's cause of action. As the Applicant claimed ownership of the equipment, he would be entitled to reclaim possession of the property with the *rei vindicatio*. The Second Respondent states that the central issue in this application is whether the Applicant has proven he is the owner of the equipment. He submits that the Applicant has failed to discharge that onus. The Applicant did not claim that he had purchased the equipment.
14. Counsel for the Second Respondent argued that the onus to prove ownership lies on the Applicant.³ The *rei vindicatio* is premised on the notion that an owner may not be deprived of his property against his will and is entitled to recover property from any person who retains possession without his consent.⁴ Registration of the tractors in the Applicant's name is not proof of ownership. Ownership for the National Road Traffic Act, 93 of 1996, is confined only to that Act and does not prove common law ownership.⁵ Proof of ownership acquisition depends upon five requirements. They are delivery, in the form that the law allows, by a person

³ Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd 1993 (1) SA 77 (A) at 82A, Ruskin NO v Thiergen 1962 (3) SA 737 (A) at 744 C

⁴ Chetty v Naidoo 1974 (3) SA 13 (A) at 20B

⁵ Ronel Noleen Smit v Kleinhans (case number 917/2020) [2021] ZASCA 147 (18 October 2021) at para 11

entitled to pass ownership, that the person passing ownership should have intended to pass ownership, and that the person acquiring ownership should intend to receive ownership.⁶ The requirements apply to the acquisition of the equipment identified by the Applicant. The Second Respondent submitted that the Applicant had not met any requirements for acquiring ownership and had not produced any evidence to discharge the onus.

15. Delivery (*traditio*), as an element of the transfer of ownership, is the transfer of physical control of a moveable to the transferee to enable him to exercise control of the movable with the intention to be the owner (*animus domini*). This had to do primarily with the principle of publicity in that the physical control, in the context of a transfer of ownership, indicates that the transferee receives the movable with the intention of acquiring ownership of the movable.⁷ The development of common law allowed for cases where less publicity is attached to the act of transfer, thereby permitting physical delivery and delivery where there is a lack of a real or clear act of transfer, such as in fictional or constructive delivery (*traditio ficta*).
16. The Applicant alleged that he and the Second Respondent agreed to procure two tractors to assist with the harvesting. The two tractors were registered in the Applicant's name on or about 15 April 2021 and 21 April 2021. Both were procured in Potchesfroom. Procuring the tractors was the Second Respondent's contribution to the joint venture in return for the oil delivered by the Applicant to the Second Respondent. In 2020 and 2021, the harvester and ranking machine arrived in South Africa from Türkiye. The Applicant alleges that he paid about R100 000 to import the equipment. In the latter instance, the Second Respondent partially contributed to the equipment used in the joint venture.
17. The Second Respondent denied agreeing to procure two tractors to assist with the harvesting. As advised and represented by him, Trend Global Corporation Limited,

⁶ ABSA Bank Ltd t/a as Bankfin v Jordashe Auto CC 2003 (1) SA 401 (SCA) at para 16

⁷ Introduction to the law of Property; Van Der Walt, Pienaar, 2nd ed, Juta 1997 at page 171

registered in the British Virgin Islands and referred to as 'Trend' thus far, unilaterally decided to purchase two tractors to use in other farming ventures. The Second Respondent diverted them for the Applicant's use. The Second Respondent decided, as he was not based in South Africa and had, up until 2022, had a good relationship with the Applicant, it would be expedient to register the tractors in the Applicant's name to comply with the National Road Traffic Act. The Second Respondent denied that the purchase of the tractors was his contribution to the joint venture. The joint venture had been dormant for six years when the tractors were purchased. The Applicant had benefited from using the equipment while he explored other ventures where the equipment would be used.

18. The Applicant's reply to the Second Respondent's answer concerning the equipment ownership elicited the response that it was 'an absolute blatant lie'. The Applicant then made scurrilous claims against the Second Respondent, accusing him of using Trend as a money laundering entity and asking rhetorically why the cash-flush Trend disappeared. He volunteers the answer, alleging that the Second Respondent had to close it down to erase its trading history and financial records.
19. The sole cause of action identified in the Applicant's founding affidavit was that he owned the equipment and sought its vindication. There is no indication in his founding affidavit that he relied upon spoliation or a breach of contract or sought a declarator of ownership to substantiate the orders he sought in his notice of motion. He alleges that he became the equipment owner as it was the Second Respondent's contribution to the joint venture. The Applicant does not allege that there was an agreement or that he could rely upon the conduct of the Second Respondent to claim ownership of the equipment. Neither does the Applicant allege co-ownership of the equipment.
20. The test of whether the Applicant has discharged the onus of proving his ownership of movable property, which is not in his possession, is whether, in the result, the probabilities are balanced in his favour. The strength of the evidence

that he has to produce to succeed depends upon the circumstances of the particular case.⁸ Once the Applicant has established acquisition of ownership on a balance of probabilities, a rebuttable presumption that he is still the owner arises. In the case of movable property, the onus of proof is much heavier since there is a presumption that the person in physical control of the thing is also the owner. To satisfy the onus of proof, the Applicant must rebut this presumption.⁹

21. The Applicant did not specify any of the requirements that would have entitled him to acquisition of ownership of the equipment. Whilst the physical delivery of the equipment to the Applicant, and perhaps his intention to receive the equipment as its owner, could be inferred from his allegations, the other requirements were not easily discernible. It could be argued that the Applicant had accepted the ownership obligations by registering, insuring, licensing, and servicing the equipment. He falls short on the requirement that the Second Respondent intended to transfer ownership when he alleges that the equipment formed the Second Respondent's contribution to the joint venture. Even in making the latter allegation, the Applicant fails to equate a contribution to the joint venture to mean the conferral of ownership of the things to him. He may have proved that the Second Respondent, as a representative of the owners, could have transferred the equipment to him, but he disavowed any knowledge or interaction with Trend and doubted whether Origins UK could afford the equipment. By consenting to remove the equipment, the Applicant had effectively jettisoned any reliance on a spoliation order or vindicatory relief.

22. The Second Respondent has not alleged that he clarified the ownership of the equipment with the Applicant during the two years that the Applicant had used it. However, the Second Respondent has provided sufficient information to dispel the Applicant's claim of equipment ownership. The failure of the Applicant to prove ownership of the equipment would have been the end of the application but

⁸ Ebrahim v Deputy Sheriff, Durban 1961 (D)

⁹ Law of Property (supra) at page 192

for the further developments that require the Court to traverse the affidavits further.

23. An action based on the *rei vindicatio* is available to an owner who has been deprived of his or her property without consent or in an unlawful way and wishes to recover it from the one who retains possession. To succeed with any vindicatory action, generally, in addition to ownership, the applicant must prove that the property was in the respondent's possession when the proceedings commenced, it still exists, and is identifiable.¹⁰ An owner will not succeed with the *rei vindicatio* if the person in control of the thing can prove that he is in lawful control of it.

24. The Applicant alleges that on 23 February 2022, the Second Respondent requested that the equipment be moved to Velddrift to harvest melon seeds. The equipment would be returned in time for the Applicant's harvest. The Applicant agreed. The equipment was moved but not returned even though the Applicant asked the Second Respondent to do so. The Second Respondent alleged that the equipment was moved to Velddrift on his instructions. He was the authorised representative of the equipment owners and, therefore, entitled to move the equipment. He arranged and paid for the equipment to be moved. He did not agree that the equipment would be returned to the Applicant, nor does the Applicant have a right to demand their return. The Second Respondent alleged that he had identified several opportunities in the Western Cape and had moved the equipment to be stored with the First Respondent until he could recover the remaining equipment held by the Applicant. The recovery of the remaining equipment was the subject of the counterapplication. The equipment is sitting idle on the First Respondent's farm.

25. The circumstances relating to moving equipment to the First Respondent's farm are troublesome. The Applicant agreed to its removal from his farm on the

¹⁰ Van Der Merwe and Another v Taylor NO and Others (CCT 45/06) [2007] ZACC 16; 2007 (11) BCLR 1167 (CC); 2008 (1) SA 1 (CC) (14 September 2007) at para 22, Law of Property (supra) at page 190

understanding that it would be used for harvesting melon seeds in Velddrift and returned to him in time for the harvest in the North West province. The Second Respondent avoided answering this specific allegation. The question arises as to whether the Applicant would have consented to the removal of the equipment if he had known that the Second Respondent did not intend to return it. It is highly unlikely that the Applicant would have agreed to service the equipment and agree to its removal from his farm if he did not expect the equipment to be returned to him in time for the harvest. It would, therefore, seem that the Second Respondent had removed the equipment on a false pretext. The Second Respondent's Counsel did not see anything untoward in this form of self-help. The Applicant alleged that removing the equipment under false pretences was unlawful, but the case he relied upon did not exploit this issue.

26. The Second Respondent admitted the jurisdiction of this Court to hear the application. He has been involved with two companies, namely Origins UK and Trend. Trend had given him a power of attorney to act on their behalf and explore investments in the South African agricultural sector. Trend had no interest in the Kalahari melon seed oil project for the cosmetic market. Their interest centred around food commodities with innovative value-added potential.
27. On 2 April 2021, Trend purchased an automatic pumpkin seed harvester and ranking apparatus from Türkiye, which cost US\$ 27,000. Trend intended to acquire ownership; the Turkish company invoiced Trend, and it paid the purchase price. The harvester and ranking machine were shipped to the Durban port and transported to the Applicant's farm by road. It was used to harvest the melons but remained Trend's property. One of the two tractors was purchased for US\$29545.21. The tractor was transported to the Applicant's farm. Applicant used the tractor with the Second Respondent's permission, acting as the authorised representative for Trend.
28. As the Second Respondent was not based in South Africa, he decided that it would be expedient to register the tractor in the Applicant's name. The Second

Respondent referred to other equipment owned by Trend, which was in the Applicant's possession. The Second Respondent supported these contentions with documentary proof. The Second Respondent alleged that the Applicant refused to sign a storage agreement and to allow Trend's equipment to be removed from his farm. Trend decided to cease its business activities. It was necessary to transfer ownership of, among other goods, the equipment to him. Trend and the Second Respondent agreed on the assignment of rights. The documentary proof of the concluded agreement was provided. The Second Respondent contended that he became the equipment owner through the assignment of rights. The Second Respondent also provided proof of purchasing an automatic pumpkin harvester and ranking machine from Türkiye for US\$17 750. The latter equipment belonged to Origins UK.

29. The equipment referred to by the Applicant is part of a much larger stock of vehicles and equipment the Applicant holds. Although the Applicant used them to harvest and process Kalahari melon seed oil, Trend had intended to use them in other ventures as they had broad application. They were intended for use in developing herbs, ferments, certain fruits like dates, olive or castor oil, and alternative proteins as byproducts of soya, castor, and sunflower oil. Kalahari melon seed oil could not be considered a commodity seed oil. The market volume was too small.
30. The Second Respondent stated that African Origin Oils JV had been a dormant company since about 2016, awaiting de-registration due to failure to comply with its annual returns. Proof that the company awaits final deregistration was provided. Four persons had incorporated the company, including the Applicant and the Second Respondent. As the communication and collaboration with the two other participants were not working, all company activities were halted after one year of its inception. There was no joint venture, as the company had been dormant for about seven years. The Second Respondent subsequently incorporated Origins UK. He had independently built up a network of suppliers and international buyers and aimed to trade in cosmetic oils.

31. The Second Respondent had identified and sourced the Kalahari melon seed oil from a farmer in the Free State. This arrangement commenced in 2016 and terminated in 2018 when the European customer he had sourced to buy the oil discontinued the cosmetic range that used the oil. As the Applicant lacked the finances and equipment required to produce the oil, the Second Respondent transferred R523 397 from 2016 to 2018 to the Applicant. Until then, the Applicant had neither contributed nor supplied him with oil. The Second Respondent asserted that he had developed this market and found a producer independent from the Applicant.
32. The Second Respondent advised the Applicant in May 2017 to register a company to obtain an export permit so that he could potentially supply the same oil that the Second Respondent was buying from the Free State farmer. The Applicant eventually registered African Origins Oil. The Applicant started producing oil in 2018 after Origins UK purchased a small oil press from Germany and delivered it to the Applicant's farm. He intended to help his uncle, who was suffering the effects of a prolonged drought, to "find his feet" as a producer and supplier of Kalahari melon seed oil, which was indigenous to his region and more resistant to the extreme weather than other popular local crops like maize, sunflower, and peanuts. In 2019, the Second Respondent obtained an industrial research and innovation grant from the British Government to research melon oil's industrialisation and social impact potential. He involved the Applicant in the project. The Applicant was compensated for his participation in the project. The Second Respondent explained how the research funds were dispersed, the details of which need not be reproduced here.
33. The Second Respondent denied any joint venture between the Applicant and him or that the Applicant was the operations arm of the company and he was the marketing agent. The Applicant did not achieve or do anything to warrant such a status. The Second Respondent contributed significant time and money to the Applicant to establish a semblance of operations on his farm. Only in 2022, when

the Applicant had millions of rands of equipment on his farm which did not belong to him, did he begin making claims of a joint venture between them. The Second Respondent had to employ a consultant to assist the Applicant with all work beyond the planting and harvesting of the oil, namely the general paperwork, certification, packaging, deliveries, exports, and adherence to regulations.

34. The Second Respondent denied that he and the Applicant had agreed to procure two tractors to assist with the harvesting. Trend took the unilateral decision after he advised them to procure it for other farming projects. He denied that the two tractors were his contribution to the joint venture. The tractors were purchased after the joint venture company had been dormant for at least five years. He allowed the Applicant to use the equipment while exploring opportunities to use the equipment in other ventures. He had made it clear to the Applicant that they would sign some kind of storage agreement to cover the equipment held on his farm. The Applicant was initially receptive to concluding the storage contract but later reneged.
35. The Second Respondent states that the first harvesting machine and ranking apparatus bought by Origins UK arrived around September 2019, not 2022, as the Applicant alleged. He notes that the Applicant did not provide proof that he had paid the alleged sum of R100 000. The Second Respondent paid the Applicant for the oil the Applicant produced. The Applicant was not entitled to the financial statements for Origins UK. He disputed the Applicant's allegations that the latter had produced "vast" amounts of oil. The Second Respondent considered "vast" to mean at least 50-60 tonnes per year. He did not think the Applicant had ever exported more than ten tons over all the years.
36. The Second Respondent admitted that his relationship with the Applicant had strained. The Applicant's farming practices and yields per rand spent were not commercial, and the continuation thereof was in the balance. In April 2022, the Applicant declined to sign a storage agreement. The court notes that the equipment had been removed from the Applicant's farm, and the tentative

agreement probably pertained to the other equipment retained by the Applicant. Trend concluded a storage agreement with the First Respondent in June 2022 for the storage of the equipment removed from the Applicant's farm.

37. The Second Respondent denies that the Applicant holds all the permits to produce melon seed oil in South Africa. He states that there are several other permit holders in South Africa. There are other suppliers of melon seed oil from Namibia, Zimbabwe, and Botswana that do not require permits and who export the oil to international markets. The second Respondent admits that he cannot produce Kalahari melon seed oil. He does not require a permit as he and his company do not intend to produce the oil as they buy it from registered suppliers such as the Applicant and sell it internationally.
38. The Second Respondent sought to introduce a "without prejudice" communication between the Applicant's attorney and the Second Respondent's wife to prove that he owned the equipment. The Second Respondent alleged that he could rely on the letter's content as it was addressed to his wife, Olga Van Vuuren. The letter could not be considered as privileged. The Second Respondent referred to a confirmatory affidavit from his wife. The affidavit could not be found in the court file. Communications marked 'without prejudice' are generally inadmissible in court proceedings. There are exceptions to the rule, but they find no application in this instance. The Second Respondent conflates legal privilege with 'without prejudice' communications. A client can waive legal privilege. The Second Respondent's wife was not the client of the Applicant's attorney, and the Second Respondent was not permitted to disclose the communication. The Court has not relied on its content nor the allegations in paragraphs 69 to 73 of the answering affidavit. The attachment, marked 'AA 19' and those paragraphs are struck from the record.
39. The Second Respondent denies that any invoices from the Landini dealership prove the Applicant's ownership of the equipment. The invoice is not from the dealership where the tractors were procured. He also denies that the payment of

insurance premiums, the costs of licences, or the payment of servicing proves ownership. The Second Respondent denies that he has committed any crime. The application was brought *ex parte*, not to alert the Second Respondent to move the equipment as alleged but to deceive the Court and steal a march on him by obtaining an advantage before he could respond to the application.

40. The Court emphasises that the allegations attributed to the Second Respondent and traversed thus far are entirely from the Second Respondent's answering affidavit. The Court has ignored the affidavits in the counterapplication or the relief sought therein.
41. In his reply to the Second Respondent's answering affidavit, the Applicant takes issue with the allegation made by the Second Respondent that he had not satisfied the requirements for a *rei vindicatio*. He was advised that although the *rei vindicatio* is the mechanism utilised to reclaim possession of an asset, the act itself is referred to as spoliation. He states that although it might be overly technical, the reason a *rei vindicatio* was sought and not a *mandament van spolie* was because the spoliator was hard to define, as it appears the First Respondent acted upon the instructions of the Second Respondent and an agent was used to move the equipment. The burden of proof was exactly the same, i.e., peaceful, undisturbed possession, deprivation of possession, and deprivation occurring unlawfully without his agreement. Counsel representing the Applicant distanced herself from her Client's interpretation of the law equating spoliation to vindication and denied any part in providing this legal advice to her Client. The Court shall merely state, largely for the Applicant's benefit, that the two causes of action are separate with different requirements and leave it there.
42. Counsel for the Second Respondent was not inclined to ignore the Applicant's belated reliance on spoliation and the creative manner wherein it was introduced in the replying affidavit. In his written argument, he stated that an applicant cannot merely make out a *prima facie* case for the order but must prove the facts

necessary to justify the order.¹¹ He stated there was no reason to reject the Second Respondent's version and that it was not agreed that the equipment would be returned to the Applicant's farm. The Second Respondent submitted that it had always been the practice of the Courts to strike out matters in replying affidavits, which should have appeared in the founding papers.¹² The Applicant's case in the founding affidavit is that the tractors are registered in his name, and the equipment belonged to him. The Applicant did not allege in his founding affidavit that he had been wrongfully deprived of possessing the equipment.

43. The Applicant states that the purpose of a replying affidavit is simply to reaffirm submissions made in a founding affidavit or waylay submissions made in an answering affidavit and answer any new issues raised. The Court reminds the Applicant that the purpose of the replying affidavit is to rebut issues raised by the Respondent in his answering affidavit, if required, and does not constitute an opportunity to create a whole new cause of action. It has been held that a party will not be allowed to canvass a case in its founding papers and then another in reply. Allowing this might prejudice the opponent as it might not have a chance to respond to the case made in reply. In rare instances where this is countenanced, the set of affidavits allowed in motion proceedings might increase from three to five.¹³
44. On the issue of non-joinder, the Applicant understood it to mean that the Second Respondent did not want the application to move forward until Origins UK had been joined. The Applicant alleged that the entity the Second Respondent did not wish him to join no longer existed. The Applicant also took issue with the Second Respondent's chamber book application to compel him to file his replying and answering affidavits. He alleged that the Second Respondent's power of attorney had expired in December 2022. The Second Respondent did not attach any affidavit from the directors of Trend to confirm the allegations relating to them or

¹¹ Erasmus, Superior Court Practice , D7-15, Nienaber v Stuckey 1946 AD 1049

¹² Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd and Others 1974 (4) SA 362 (T) at 368H

¹³ Union Finance Holdings (Pty) Ltd [2001] JOL 7162 (W)

that the company incorporated in the British Virgin Islands ever existed. If Trend no longer existed, it would be the task of the executors, trustees, or liquidators to contact him to request the return of their assets. The Applicant asked that all references to Trend in the founding affidavit be struck out.

45. The Second Respondent's allegations in the answering affidavit were supported by candid and exhaustive replies to the allegations in the founding affidavit, and he provided sufficient documentary proof where required. The replying affidavit is an emotional outburst containing intemperate language, hearsay information, and scandalous, defamatory, and vexatious material. As an example of a contradictory matter introduced in the replying affidavit, the Applicant states that he terminated the joint venture in reply to allegations that the entity was dormant. In contrast, he relies on the existence of the joint venture in the founding affidavit to prove the transfer of ownership by agreement. The Applicant states in his replying affidavit that he was the *bona fide* owner and possessor in terms of the joint venture agreement, and the equipment should be returned.
46. The Court does not intend to traverse the remaining allegations in the replying affidavit. The Applicant has not established any semblance of ownership of the equipment nor made a case for vindictory relief in his founding affidavit. Neither is the relief sought in the notice of motion in sync with the cause of action pursued in the founding affidavit. The Applicant's Counsel was hard-pressed to correlate the orders sought in the notice of motion with the cause of action pursued in the founding affidavit.
47. As alluded to, the Second Respondent filed his counterapplication and answer to the founding affidavit. The second respondent applied on 25 August 2023 to set down this application and the counterapplication for a hearing. At that juncture, the Applicant had not filed his replying affidavit in the main application nor his answering affidavit in the counterapplication. The Applicant complied following the order issued through a chamber book application. However, when the Second Respondent filed his written argument on 11 October 2024, he sought to postpone

the hearing of the counterapplication but insisted that the main application be heard. The Second Respondent alleged that the counterapplication was not ripe for hearing. The explanation provided was that the transfer of ownership of the moveable property, which forms the subject of the counterapplication, is regulated by the laws of the British Virgin Islands. The Second Respondent could not provide evidence of the legal position relevant to the transfer of the moveable property according to the laws of the British Virgin Islands. There was no formal application for the postponement of the counterapplication.

48. The Second Respondent sought to strike out certain material from the Applicant's replying affidavit. These are related to allegations of theft, perjury, fraud, and irrelevant material in the replying affidavit. The Second Respondent indicated that he had abandoned the point on non-joinder of Origins UK, which allegedly owned one of the harvesters. No explanation was offered for why this point raised *in limine* was ditched. The remainder of the Second Respondent's written argument concentrated on the main application, relying largely on the Applicant's failure to make out a case for ownership of the equipment and vindicatory relief and the Applicant's belated reliance on spoliation in the replying affidavit.
49. The Applicant submitted in his written heads of argument that the Second Respondent set the opposed application down prematurely to the prejudice of the Applicant. Despite being unable to proceed with the counterapplication, the Second Respondent insisted that the main application was heard. The Second Respondent had delivered its written argument, index, and practice note late. The Applicant submitted that his application for security for costs had not been finalised. Counsel's written argument was directed more to the Second Respondent's intention to postpone the counterclaim and the prejudice it would cause the Applicant rather than addressing the deficiencies in its founding or replying affidavits. The Applicant did not seek to postpone the hearing of the main application in his written or oral argument. Had the Applicant done so, the Court would have been receptive to the request. The Court was of the view that the Second Respondent had wrongfooted the Applicant with the premature set

down of the application, his failure to comply with the court rules, his subsequent desire to postpone the hearing of the counterapplication, and the withdrawal of the counterapplication on the eve of the hearing.

50. The Second Respondent tendered the Applicant's wasted costs occasioned by the withdrawal of the counterapplication. The parties did not seek the Court's involvement in the withdrawal of the application or in making it an order of the court.

51. The Applicant submitted that claims and counterclaims should be heard simultaneously. The *pari passu* rule in motion proceedings relates to the principle that all parties should be treated equally and without preference. The Latin phrase "*pari passu*" means "equal footing". When it comes to counterapplications, this rule ensures that counterapplications are heard and decided on the same basis as the main application without giving undue advantage to any party. If a Respondent files a counterapplication, it should comply with the same procedural rules as the main application. The counterapplication should be dealt with *pari passu* on equal footing with the main application.

52. A situation had arisen where the counterapplication was withdrawn before the hearing. The Second Respondent insisted that the main application be heard. All the Applicant wanted was for the matter to be referred to trial. It was alleged on behalf of the Applicant in written argument, which was repeated in oral argument, that it had become apparent that the matter was no longer suitable for motion proceedings. Subrule 6(5)(g) of the Uniform Rules of Court ("URC") pertains to a prayer of this nature. As a general rule, an application for the hearing of oral evidence must be made *in limine*, not once it becomes clear that the Applicant is failing to convince the Court on the papers.¹⁴ The circumstances must be exceptional before a Court will permit an Applicant to apply in the alternative for the matter to be referred to evidence should the main argument fail.¹⁵ At the outset

¹⁴ Law Society Northern Provinces v Mogami 2010 (1) SA 186 SCA at 195C (para 23)

¹⁵ De Reszke v Maras [2005] 4 AllSA 440, 2006 (1) SA 401 (C) at paras 32-33,

of the hearings, the applicant's counsel applied for the matter to be referred to trial and handed up a draft order.

53. A court will refer a matter to trial if the dispute of fact is incapable of resolution on the papers and too wide-ranging for resolution by referring to oral evidence.¹⁶ Suppose a dispute of fact is such that the provisions of Rule 6(5) (g) regarding the hearing of oral evidence cannot properly be invoked. In that case, the court will order the parties to trial so that it may have an opportunity to see and hear the witnesses before coming to a conclusion.¹⁷ When a question of mixed law and fact is involved, the matter will be ordered to trial.¹⁸
54. Referral to trial is an alternative to dismissing the application in such circumstances. It is appropriate where the Applicant, when launching his application, could not reasonably have foreseen that a serious dispute of fact, incapable of resolution on the papers, was bound to develop.¹⁹ The Applicant would be hard-pressed to allege that he did not foresee a serious dispute arising on the facts material to this application if regard is had to the soured relationship between him and the Second Respondent and the vile he vented in his replying affidavit. The Applicant's Counsel submitted that the possibility of the matter being referred to trial was first raised in the Applicant's application for security for costs against the Second Respondent, a peregrinus of this Court. The Applicant submitted that as the papers currently stand, the ownership of movable property is at issue.
55. Before a dispute in motion proceedings can be referred to a hearing of oral evidence, it must be clear that there is a real or genuine dispute in the affidavits.²⁰

¹⁶ Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155(T) at 1162

¹⁷ Frank v Ohlsson's Cape Breweries (Pty) Ltd 1924 AD 289 at 294, Petersen v Cuthbert & Co Ltd 1945 AD 420 at 428, Joubert v Stemmet 1965 (3) SA 215 (O), Pautz v Horn 1976 (4) SA 572 (O), De Villiers v Pyott 1947(1) SA 381 (C) at 387

¹⁸ Conradie v Kleingeld 1950 (2) SA 594 (O)

¹⁹ Standard Bank of SA Ltd v Neugarten 1987 (3) SA 695 (W) at 699A

²⁰ Wightman t/a JW Construction v Headfour (Pty) Ltd 2008 (3) SA 371 (SCA) at 375, Van Wyk v Botha [2005] AllSA 320 (C) at 328, Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949(3) SA 1155 (T) at 1162-1163

It is improper to bring applications to the Court on disputed issues of fact and then to turn them into trial actions by invoking the provisions of the Rules in the hope of inducing the Court to apply those rules to what is essentially the subject of an ordinary trial.²¹ By doing so, Applicants obtain a considerable advantage over litigants who have proceeded by way of action and may have to wait many months to get their cases before the Court. Such applications turning into trials interpose themselves, occupy the time of judges and delay the hearing of legitimate trials.²² A Court will refuse to order oral evidence when it is clear that oral evidence would enable an applicant to amplify affidavits with additional evidence where the affidavits themselves, even if accepted, do not make out a clear case but leave the case ambiguous, uncertain, or fail to make out a cause of action at all.²³

56. The Second Respondent opposes the referral of this matter to trial. Counsel for the Respondent submitted that the Applicant did not make out a case that he owned the equipment and wanted a second bite of the cherry. If the Applicant's case is dead, it cannot be resurrected. Unless concerned with interim relief, motion proceedings resolve legal issues based on common cause facts. Unless the circumstances are special, they cannot be used to resolve factual issues because they are not designed to determine probabilities.²⁴
57. It was apparent from the heads of argument that the Applicant did not address the relief sought in the main application and resisted the invitation to address it in oral argument. The Applicant had focussed entirely on technical issues regarding why the main application should not be heard but rather referred to trial. The Applicant dealt with the Second Respondent's failure to comply with the Court's rules, the premature set down of the application for hearing, the *pari passu* rule, and material in the answering affidavit that should be struck out.

²¹ Room Hire supra at 1162, *Bhorat v Lalla* 1974 (2) SA 336(RA)

²² *Garment Workers Union v De Vries* 1949 (1) SA 1110 (W) at 1133

²³ *Carr v Uzent* 1948 (4) SA 383 (W) at 390, *Liss Shoe Co (Pty) Ltd v Moffet Building & Contracting (Pty) Ltd* 1952 (3) SA 484 (O)

²⁴ *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA) at 290D-E

58. It is trite that an applicant must make out its case in its founding affidavit. Due to the nature of applications, the affidavit plays a dual role in the application, forming both pleadings and the evidence upon which the applicant relies.²⁵ An applicant's pleadings contain the legal basis of the claim under which an applicant has chosen to invoke the court's competence. In other words, the formal terminology of the notice of motion and the supporting affidavits must be interpreted to establish the legal basis of the applicant's claim.²⁶ The applicant must establish sufficient facts in the founding affidavit to disclose a cause of action; the founding affidavit must be self-contained. The replying affidavit cannot augment the applicant's case.²⁷ Permitting such will mean that the Respondent would not have had the opportunity to address those issues sufficiently, which amounts to gross prejudice to the Respondent who would have filed the answer. This will also transgress the Respondent's constitutional rights.²⁸
59. Applicant's Counsel was not receptive to the suggestion that defined aspects could be referred to oral evidence. The Applicant's Counsel insisted that the matter be referred to trial. The Applicant's papers are replete with allegations that go way beyond the relief he initially sought. A referral to trial has the risk of expanding those issues similarly. It would be a travesty if the Applicant used the opportunity to traverse issues relating to the machinations of the joint venture, his alleged fifty per cent profit share, his rights to exploit the Kalahari melon seed oil, and whether he was entitled to a share of the international sales of the oil.
60. The Court is not inclined to grant this request, as the Applicant has failed to make a case for either ownership of the equipment or vindicatory relief in his papers. It would serve no purpose to prolong this matter. Applicant's Counsel stated that the matter had gotten out of hand and that a referral to trial would resolve the issues.

²⁵ Transnet Ltd v Rubenstein [2005] 3 All SA 425 (SCA), Kham and Others v Electoral Commission and Another 2016 (2) SA 338 (CC) par [46]

²⁶ Gcaba v Minister for Safety and Security and Others 2010 (1) SA 238 (CC)

²⁷ Airports Company of South Africa (SOC) Ltd v Tswelokgotso Trading Enterprise CC[2022] ZAGPJHC 410 at para 9

²⁸ Business Partners Ltd v World Focus 754 CC 2015 (5) SA 525 (KZD)

The Court cannot agree with this submission. The Applicant chose motion proceedings to litigate his case and failed to prove the core issue identified in his founding affidavit. Counsel indicated that the Applicant would appeal this judgment if the matter were not referred to trial. This Court will not be deterred by the latter submission in adjudicating this matter fairly and equitably.

61. Counsel's repeated reliance on the Second Respondent's failure to adhere to the rules is of no consequence, given that the Applicant declined to postpone the matter. The issue of security for costs fell away once the counterapplication was withdrawn. A tender for costs accompanied the withdrawal of the counterapplication. Counsel alleged that the Second Respondent's answering affidavit constitutes a disguised counterapplication. That may be so, but the counterapplication, in whichever form it reappears, allows the Applicant to take good counsel and mount a considered challenge to it. The answering affidavit is what it is. The Court could not ignore it, and its content was informed by the allegations made in the founding affidavit. Counsel's submission that the Applicant was kept in the dark about Trend, the alleged equipment owner, is hard to fathom. Counsel argued finally that it would be in the interests of justice to refer this matter to trial and a miscarriage of justice if it was not. The Court does not agree. Neither party persisted with their applications to strike out matters from the opponent's papers.
62. This is an inordinately lengthy judgment, considering that the issues for determination had crystallised early on from the allegations or lack thereof, evident in the founding papers. A judgment is primarily for the benefit of the parties. They should be satisfied that the issues raised have been addressed as fully as possible and the adjudication thereof, even if it goes against them, is not due to any lack of effort on the part of the Court in discharging its duties. The Court makes the orders that follow.

ORDER

63. The application is dismissed with costs.

64. Counsel's fees, agreed or taxed, will be determined on the B scale.



Ajay Bhoopchand
Acting Judge of the High Court
Western Cape Division
Cape Town

Judgment was handed down and delivered to the parties by e-mail on Friday, 1
November 2024, at midday.

Applicant's Counsel: Advocate C J Mouton, Mossel Bay Chambers

Instructed by JNS Attorneys, Randburg

Counsel for the Respondents: Advocate Melt Kruger

Instructed by Scholtz Attorneys, Roodepoort