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

Case Number: 2020/19785

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
29 April 2025	
DATE	SIGNATURE

In the matter between:

STEELEDALE (PTY) LTD (in Business Rescue)

Applicant

and

**SCAW SOUTH AFRICA (PTY) LTD t/a
SCAW METALS GROUP**

First Respondent

REINFORCING STEEL CONTRACTORS (PTY) LTD

Second Respondent

JUDGMENT

Mahomed J

INTRODUCTION

[1] The applicant company ("Steeldale") is in business rescue, in terms of a business rescue plan, its business rescue practitioner has sold items it alleges belong to it to the second respondent. The applicant and first respondent ("SCAW") established business relations back in 1984 and in 2006 concluded a written agreement of lease, which was terminated in 2019. The interpretation and application of two clauses therein is the subject of dispute between the parties. Steeldale complains that SCAW is preventing it from removing items listed on annexure "JFE1" which belongs to Steeldale and SCAW is interfering with the sale and the business rescue process. It approaches this court for an interdict to stop SCAW from interfering with the sale, in the alternative, it applies for an order declaring the property listed in annexure "JFE 1" as Steeldale's property and therefor it may to remove the property. Furthermore, Steeldale asks this court to order SCAW from interfering with the duties of the business rescue practitioner. It was submitted that the second respondent has purchased the assets on the list, Steeldale must remove and deliver the items but is prevented from doing so by the SCAW.

THE SUBMISSIONS

[2] SCAW disputes the ownership of the property on that list and argues that the issues between the parties cannot be decided in motion proceedings, as Steeldale asks this court to make findings on what is moveable and immoveable property which will require the evidence of experts. Furthermore, it is argued, the court is called upon to draw inferences and decide on probabilities in motion proceedings. Daniels SC appeared for SCAW and contended that the Steeldale knew from early on in 2019 about the factual disputes, SCAW's central argument is that certain of the items listed are no longer movables as they have acceded to the leased property, they belong to SCAW and cannot be sold by the business rescue practitioner. Steeldale remains on the premises as it contends it has an enrichment and improvement lien over the property, it claims a value of R11 315 642. SCAW contends Steeldale cannot hold a lien over its own property, a lien can only be exercised over another's property and therefor it lacks a basis for the claim, if it is indeed the owner of the assets. Daniels SC submitted that the business rescue practitioner has no personal knowledge of the facts he deposed to, he was not there at the time that the parties concluded the contract, and no reliance can be placed on

his affidavit. He submitted that SCAW's claims of ownership by accession is sound in law and ought to be accepted.

[3] Steeldale relies on the interpretation and meaning of two clauses in the lease agreement, which the parties concluded in 2006, for its ownership and therefore a right to remove and sell the items.

[4] Blou SC appeared for Steeldale and submitted that the wording of the clauses is clear, he contended that clause 12.1 provides, that only those improvements, alterations or additions not removed by the Steeldale in its capacity as lessee would become the property of SCAW who would not be obliged to compensate Steeldale for them. It was further contended that Clause 12.2 identifies that weighbridges and gantries are movables assets, it can remove those. Counsel submitted that the SCAW simply creates disputes where there are none, he denied the main defence that the assets have acceded to the property and that they had become SCAW's property. Mr Blou submitted the matter is properly in the motion proceedings, the provisions in the contract are clear, and contended that the belated defence raised is an afterthought, after SCAW's offer was rejected and it now seeks to frustrate the finalisation of the business rescue process.

[5] **THE CLAUSES**

12.1 On termination of this lease the lessee shall not be obliged to restore the premises to the condition in which they were at the commencement of this lease and any improvements, alterations or additions not removed by the lessees shall be the property of the lessor which shall not be obliged to compensate the lessee in respect thereof.

12.2 Notwithstanding 12.1 all removable gantries and weighbridges shall at all times continue to be the lessees sole and exclusive property and, on the expiration, or termination of the lease the lessee shall be entitled but not obliged to remove all removable gantries and weighbridges from the premises."

[6] Blou SC explained that Steeldale operates in the steel industry and leased a vacant property from SCAW in 2006 where it commenced its business and operated

the same business throughout the lease period. Over the period Steeldale purchased and installed assets as listed on JFE1. The parties had an arrangement regarding payment of the rentals based partly on Steeldale purchasing a specified amount of raw material from SCAW. In September 2019 Steeldale, appointed Mr John Evans as its business rescue practitioner who sold assets off to Reinforcing Steel Contractors (Pty) Ltd, the second respondent. He must now remove them off the leased property and deliver them.

[7] Mr Doron Barnes ("Barnes") represented the SCAW, he inspected Steeldale's asset register and made three offers on three separate occasions to purchase the items on the list. Blou SC referred the court to emails, in which SCAW offered to purchase the assets on 10 October 2019, for R14 million, then on 18 October 2019, for R19 million and thereafter at a meeting between the parties later in October when SCAW made a further offer to purchase, on terms set out in correspondence dated 30 October 2019. The offer on the last occasion was rejected because according to Evans, the second respondent had made a better offer for a wider range of assets.

[8] Blou SC submitted that each time SCAW made an offer it acknowledged that the applicant owned the assets which it wished to purchase. However, in correspondence dated 4 November 2019, SCAW disputed the ownership of the assets, when it communicated that in its view all structures belonged to SCAW, including building structures, roof sheeting, gantries, cranes, electrical installations and weighbridges, because they have acceded to the property and are fixed property in terms of the law, they are not removable, as set out in the agreement. Included in the communication was a reference to an oral agreement at that meeting between the parties, SCAW stated that it was agreed at the meeting that the gantry cranes, weighbridge and generator remained, they acceded to the premises and will remain SCAW's property. The oral agreement is denied, Blou SC submitted it conflicts with clause 16, the non-variation clause in the agreement, and no variation is recorded as provided for in the lease agreement.

[9] Counsel argued there is no real genuine dispute of fact, SCAW acknowledged Steeldale owned the assets, in its affidavit in support of a rent interdict over movables, in the Germiston Magistrate's Court. In that application, Barnes in his

supporting affidavit informed the court that the “assets belong to Steeldale”, rentals were outstanding, it sought an interdict preventing Steeldale from removing or selling any of its assets on the property. Blou SC reminded the court the evidence was under oath and submitted that the defences raised by SCAW are meritless and stand to be rejected.

[10] Daniels SC argued that the offers to purchase were made simply to avoid unnecessary disputes regarding ownership, his client is a businessman, it is the way they operate, the offer to purchase everything on the premises, included several assets that were not limited to those on its premises in Germiston. Barnes did not think it necessary to point out that some of the items were already owned by SCAW. Counsel contended that according to Barnes, he intended to conclude an all-encompassing transaction, comprising various categories of assets, some of which were owned by SCAW. Furthermore, it was submitted that when Steeldale failed to pay its rentals, SCAW sought the interdict when it noticed Steeldale was removing some of the assets off the property and it was obliged to mitigate its damages. Mr Daniels argued that that there are material disputes of fact which cannot be resolved on the papers, he reminded the court that Steeldale seeks final relief in this application, and it cannot demonstrate a clear right, as SCAW submits that the items the business rescue practitioner claims to have sold belong to it. The moveable items having acceded to the leased property and are immoveable, the respondent’s version must prevail. Counsel proffered that given the nature of some of the items, expert evidence is required to guide the court on whether the items are indeed moveable.

[11] Mr Daniels contended that for accession one must have regard to the nature of the asset, the manner of accession and importantly the intention of the parties, and in casu the court is called upon to infer an intention. The court has no benefit of cross examination. Counsel referred to the court to the judgment in Theatre Investments (Pty) Ltd and Another v Butcher Brothers Ltd 1978 (3) SA 682 (A) at 688 D-H, where it was stated that, “evidence of the annexor’s intention can be sought from various sources, inter alia, the annexor’s own evidence as to his own evidence, the nature of the moveable and of the immovable, the manner of annexation and the cause for and circumstances giving rise to such annexation. The

ipse dixit of the annexor as to his intention is not to be treated as conclusive evidence thereof but, should such evidence have been given, it must be weighed together with the inferences derivable from the other sources of evidence abovementioned, to determine what, in the view of the court, was the annexor's intention."

[12] Counsel submitted this court does not have the full and complete evidence to make a finding on the intention, except for the say so of the business rescue practitioner who was appointed a long time after the agreements were concluded. He proffered that over the years the parties concluded several agreements over the period of the business relations. Furthermore, it was contended that, the professed intention of an owner cannot be the only factor, an intention must be determined and judged within the context of all relevant facts. Mr Daniels submitted that if one has regard to the items which Steeldale wants to remove, if removed, would leave large holes and trenches in the ground and it cannot be that that would have been what the parties had contemplated on conclusion of the agreement. He referred to the judgment in *Unimark Distributors (Pty) Ltd v Erf 9[...] S[...] (Pty)Ltd 1999 (2) SA 986 (T)*, where the court held besides the individual's view, one must consider also "how society or a reasonable member of society would view the situation. He contended that there was no agreement to remove the items and, "the publicity principle" or the impression created with others, how other people are likely to interpret the situation on the factual evidence, must be relevant. Counsel argued that "an intention that is totally insulated from and devoid of reality cannot be recognised." What good would a factory be without its roof or walls, which Steeldale claims is its property, and it is entitled to remove and sell it suggesting that a factory can exist without its roof. Counsel further argued that the DV board built into the walls and connected to electrical points, cables and wires, the geysers connected to pipes and the like are what Steeldale wants to remove and claims to have sold. Counsel contended that Steeldale, remains on the premises, it has commenced action proceedings based on an enrichment lien, its claim is for approximately R5 600 000, the factory estimated at R4.5 million although Steeldale has advised that it has sold the roof sheeting and the walls of that factory. It was further contended that the lists annexed to the particulars of claim in the action includes items on the list before this court. Mr Blou denied an overlap and contended that there was a clear distinction between the

items listed in the action and this application, he directed the court to a side by side list of items pertaining to each leg of the litigation.

[13] Daniels SC, furthermore, contended that Steeldale does not satisfy the irreparable harm requirement for the final interdict, it cannot suffer harm if it sells property that does not belong to it. The ownership dispute is a very real one which Steeldale was aware of back in 2019, it received SCAW's answering papers and nevertheless persisted with motion proceedings an expert will be required to determine if an item is moveable or not. Counsel contended that the declaratory relief cannot succeed, as SCAW is the owner of the movables which have acceded to the property and no creditor or affected persons have the right or the power to dispose of SCAW's property, nor can it be bound to the business rescue plan. Furthermore, it was contended that the dispute was foreseeable, from correspondence in 2019 and referred the court to the principle in the Plascon Evans case, that motion proceedings are not designed to determine the probabilities, the respondent's version must be favoured. The submission was that the application stands to be dismissed, and costs be awarded to SCAW on scale C.

[14] In reply to Blou SC persisted with his submissions that SCAW would not have made three offers to purchase the assets, if it genuinely believed that it owned them. He rejected the contention that Barnes made the offers to avoid expensive litigation, when in fact he increased his offer the second time, by a substantial amount that would have far exceeded the cost of litigation, SCAW's belated claim that it owned many of the assets on FJE1 was because SCAW realised that it was not going to acquire the assets now seeks to frustrate the finalisation of the business rescue process. The accession claims are denied it was contended that the asset can be removed and therefore remain Steeldale's property, it must be permitted to remove its assets off the premises to honour a sale agreement and that SCAW is bound by the business rescue plan.

ANALYSIS

[15] The applicant seeks a final interdict, it must prove a clear right, a harm or threat that is suffered and demonstrate that it has no other remedy. On the facts

Steeldale's claims of ownership of assets on the leased property is strongly disputed, SCAW insists that having regard to the facts and the law, the items listed as movables have acceded to the leased property, they are immovable, they cannot be removed off the property and therefor belong to the lessor.

[16] This court is asked to determine, by reference to two clauses in a lease agreement together with SCAW's conduct, whether Steeldale the applicant is the owner of the items and entitled to remove the assets off the leased property, which it sold to the second respondent.

[17] Good faith underlies our laws of contract, the principle of *pacta sunt servanda* is a primary rule in contract law, and whilst freedom of contract is jealously guarded, it is not absolute. Contracts must still embrace the ethos of our Constitution, be in line with public policy and they must be based on good faith.

[18] Daniels SC argued that the respondent's version is not implausible, his client made the offers to purchase the assets in general, SCAW made an "all-encompassing offer" to purchase assets. In my view evidence will have to be led to understand the meaning of all-encompassing in the context of the business relations between the parties, their long history and the fact that they concluded various agreements over the years.

[19] Having regard to the items that Steeldale seeks to remove, one must inquire into the intention of the parties when the agreement was concluded. I agree with Mr Daniels, motion proceedings are inappropriate, the court is called upon to draw inferences, which inevitably compels a determination on probabilities. There is always the risk of the "court making a contract for the parties." In *Plascon Evans*, the established principle is that motion proceedings are about the resolution of legal issues based on common cause facts, they cannot be used to resolve factual issues because they are not designed to determine probabilities. In *casu* the factual disputes cannot be resolved on the papers before me, the intention of the parties can only be ascertained with the benefit of cross examination. In *Media 24 Books (Pty) Ltd v Oxford University Press Southern Africa (Pty) Ltd*, Wallis JA expressed the view on rejecting facts on the papers, it "*occurs infrequently because courts are*

always alive to the potential for evidence and cross examination to alter a view of the facts and the plausibility of the evidence.”

[20] Mr Daniels highlighted certain items if removed, would render the property valueless, or useless, if assets are removed, for example, the removal of carports would leave large gaping holes on the property, there would be no factory if its walls and roof sheeting is removed, no electrical source if the DV boards are removed, or even water supply if geysers are removed. In *Beadica*, supra Froneman J in his explanation of fairness in contract quotes Collins,

“No one enters a transaction voluntarily unless he or she expects to benefit from it, so that every voluntary bargain must be fair, because it should leave each party better off than before.”

[21] Would SCAW be “left better off”, once items are removed, Mr Daniels, proffered that some of the items have been cemented into the ground, if removed would leave gaping holes.

[22] What is fair and reasonable must be tested against a broader context which is not before this court. When determining disputes of fact in motion proceedings, the test set out in *Plascon Evans Paints Ltd v Van Riebeek Paints (Pty) Ltd* established that the disputes should be adjudicated based on facts averred in the founding papers which have been admitted by the respondent together with the other facts alleged by the respondent, that would justify the relief sought. The respondent in *casu*, raised a material dispute of fact, to my mind a genuine dispute that cannot be resolved on the papers and additionally, would require expert evidence on whether the items are indeed moveable. I have only Evan’s say so, more is needed, and I noted Blou SC’s submission in heads of argument, that the respondent has failed to place sufficient facts to support the accession defence, therefor it argues that motion proceedings cannot satisfy the inquiry into intention of the parties, Evans was not present at the date the contract was concluded. The applicant was alerted to the dispute, it chose to proceed by way of motion, it takes the risks or must itself in reply attempt to minimise the risk.

[23] It is noteworthy that three offers to purchase supposedly “their own property” was put by SCAW on three different occasions, each time at a substantially higher price. The parties specifically agreed that weighbridges and gantries, “which are moveable” may be removed. Regarding the offers put, Mr Daniels proffered businessmen work in that way, this fact remains to be tested and whether in the circumstances of this business relationship the items are moveable. Also, to be tested is the meaning of an all-encompassing offer as in casu.

[24] In motion proceedings the question of onus does not arise, and the approach set out in Plascon Evans applies irrespective of where the legal or evidential burden lies. It is accepted that the more serious the allegation or consequences, the stronger must be the evidence before a court may accept the allegation as established. SCAW has raised a serious allegation, the consequences for SCAW appear onerous, where Steeldale seeks to act strictly within the language and confines of the clauses in the agreement.

[25] In my view, a declaratory order sought by the Steeldale can only be granted if Steeldale owns the items, it depends on which of party has “established ownership” over which of the items, best determined by establishing the intention of the parties to prove accession.

[26] It is noteworthy that an action is pending in which Steeldale, claims it holds an improvement lien, the value of this factory comprises a major part of its claim, however the evidence is that it seeks to remove the roof and walls of the same factory. In my view the motion court cannot be called upon to determine ownership of the assets as listed on JFE 1, based on the offers to purchase the items, whilst it may carry much weight, it cannot be decisive, given that Steeldale, also seeks to claim in terms of an improvement lien.

[27] The central issue of ownership of the assets is still unclear, this court cannot be drawn into an inquiry of probabilities in the motion court. For the reasons and anomalies set out above, the application must fail and is dismissed.

COSTS

[28] Earlier in this judgment I referred to the risk that applicant must bear, the evidence is that the dispute was obvious way back in the correspondence sent in 2019 to Steeldale, and thereafter in SCAW's answering papers. The applicants chose to proceed on motion and there are multiple disputes to be determined.

[29] I see no reason to deviate from the usual approach that costs must follow the successful party and one of the factors to be considered in determining the scale, is the dispute and complexity of issues raised and foreseeable.

ORDER

Accordingly, I make the following order:

1. The application for an interdict is dismissed.
2. The declaratory order sought is refused.
3. No order is made regarding the business rescue process.
4. The applicant shall pay the first respondent's costs on Scale C.

Mahomed J
JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of hearing: 9 February 2025

Date of Judgment: 29 April 2025

For the Applicant:

Adv Blou SC and Adv C Bester instructed by Fluxmans Inc

For the Respondent:

Adv Daniels SC instructed by Eversheds Sutherland Inc