REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO LOCAL DIVISION, THOHOYANDOU.

CASE NO. 1653/2025

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO THE JUDGES: ~~YES~~/NO
(3) REVISED.
....
....
19.02.2026
DATE........... SIGNATURE. [redacted]

In the matter between:

LUFUNO ARCHIBOLD NEMUKONGWE	FIRST APPLICANT
NEMUKONGWE ATTORNEYS INC	SECOND APPLICANT
IVE STONE CRUSHERS	THIRD APPLICANT
and	
AIRCRAFT ASSET FINANCE CORPORATION	RESPONDENT

JUDGMENT

Heard on: 15 January 2026.

Delivered: this judgment was handed down electronically by circulation to the parties' legal representatives by email and release on SAFLII. The date and time for hand-down is deemed to be at 14:00 on 19 February 2026.

SEMENYA DJP

[1] The applicants instituted an urgent *ex parte* application for the restoration into their possession of a Metso 2018 LT120 Mobile Jaw Crusher, year model 2018 Serial number 79602, and a Metso 2017 Locotrack LT300 Cone Crusher year model 2017 serial number 79408 (equipment) to the first applicant by the respondent. The applicants obtained an order as prayed for with the return date of the *rule nisi* of the 23 October 2025.

[2] The respondent opposes the confirmation of the *rule nisi* in part A of its answering affidavit and had anticipated the return date of the rule nisi. The anticipation was struck off the roll for lack of urgency. Part B is a counter application for the restoration of same equipment into the hands of the respondent. The two claims launched by the applicants and respondent will be dealt with in this judgment.

[3] The *ex parte* application and the counter application arise out of a Master Rental Agreement entered into between the applicants and the respondents. According to the Schedule of the agreement attached to the respondent's answering affidavit, the commencement date of the agreement was 3 December 2024 with the expiry date of 28 October

2025. The agreement was, therefore, about to expire by effluxion of time when the *ex parte* application was instituted. It is not in dispute that the agreement was already cancelled by the respondent.

[4] The applicants state that the equipment was delivered in a defective state and could not be operated for most of the contract period. Despite this fact the applicants made two payments, in December 2024 and May 2025. The applicants further allege that they spent approximately R2 100 000.00 on repairs of the equipment.

[5] The respondent contends that the applicants, particularly the first applicant, who is an attorney by profession, failed to act with utmost good faith when deposing to the founding affidavit. The respondent submits that had the applicants or the first applicant in particular, who is an attorney by profession, disclosed all necessary information, this court would not have granted the interim order.

[6] The utmost good faith principle applicable in *ex parte* applications has been restated in **Recycling and Economic Development Initiative of**

South Africa NPC v Minister of Environmental Affairs[1] where it was said that:

> "[45] The principle of disclosure in ex parte proceedings is clear. In NDPP v Basson this court said:
>
> 'Where an order is sought ex parte it is well established that the utmost good faith must be observed. All material facts must be disclosed which might influence a court in coming to its decision, and the withholding or suppression of material facts, by itself, entitles a court to set aside an order, even if the non-disclosure was not wilful or mala fide (Schlesinger v Schlesinger 1979 (4) SA 342 (W) at 348E-349B)
>
> [46] The duty of the utmost good faith, and in particular the duty of full and fair disclosure, is imposed because orders granted without notice to affected parties are a departure from a fundamental principle of the administration of justice, namely, audi alteram partem. The law sometimes allows a departure from this principle in the 6 National Director of Public Prosecutions v Basson; 2002 (1) SA 419 (SCA) para 21. 17 interests of justice but in those exceptional circumstances the ex parte applicant assumes a heavy responsibility to neutralise the prejudice the affected party suffers by his or her absence.
>
> [47] The applicant must thus be scrupulously fair in presenting her own case. She must also speak for the absent party by disclosing all relevant facts she knows or reasonably expects the absent party would

---
[1] 2019 (3) SA 251 (SCA) at 268A

want placed before the court. The applicant must disclose and deal fairly with any defences of which she is aware or which she may reasonably anticipate. She must disclose all relevant adverse material that the absent respondent might have put up in opposition to the order. She must also exercise due care and make such enquiries and conduct such investigations as are reasonable in the circumstances before seeking *ex parte* relief. She may not refrain from disclosing matter asserted by the absent party because she believes it to be untrue. And even where the *ex parte* applicant has endeavoured in good faith to discharge her duty, she will be held to have fallen short if the court finds that matter she regarded as irrelevant was sufficiently material to require disclosure. The test is objective." Footnotes excluded.

[7] The first applicant deposed to the affidavit filed in support of the application for spoliation application. The sequence of events leading to the alleged act of spoliation, according to the version of the applicants, is that on 17 October 2025, the first applicant informed the respondent in meeting held on WhatsApp, that the second applicant has recently secured certain projects in the amount of R6 600 000.00 and that the work will be done at Giyani. Despite this information the respondent, on the 21 October 2025, engaged the services of Briant Security Company to go and remove the equipment from the applicants' site at Matanda.

They were also sent to remove another equipment which was already at the Giyani site.

[8] The applicants contend that the removal and seizure of the equipment from the Matanda and Giyani site by Brinant Security Company, acting on respondent's instructions on the 21 October 2025, constitute unlawful deprivation of possession of the equipment and amounts to self-help, which is legally prohibited. They further content that the seizure halted performance at the site which resulted in putting the livelihood of the workers at risk.

[9] In answer to the averments made in the applicants' founding affidavit, the respondent state that the applicants deliberately omitted to attach the correct documentation to the founding affidavit and that, had they attached the Schedule to the agreement, the court would have noticed that the lease agreement was about to expire within five days. The respondent states further that the applicants misled the court under oath by stating that they were dispossessed of the equipment when, in truth, the equipment has been in the applicants' possession since the commencement of the agreement and remained in their possession up until the date of the *ex parte* application. In addition, the respondent

contends that the applicants failed to disclose that the lease agreement was already cancelled.

[10] The respondent admits that it attempted to collect the equipment on the 21 October 2025 as alleged by the applicants. However, the security officers and those who were to transport the equipment met with a rowdy community which made the repossession impossible. The applicants later informed the respondent that the riot was caused by the applicants' failure to pay salaries. When the respondent sent armed guards to safeguard the equipment, as opposed to removing it, the people who had gathered there became violent towards them and ordered them to leave.

[11] The respondent states that the applicants attempted to negotiate a new agreement to no avail. On the 18 November 2025, after the failed renegotiation, the applicants decided to serve the applicants with an interim *ex parte* order. The respondent further states that it came to its attention that the equipment has been removed to Giyani site and that its Global Positioning System (GPS) has been disabled. A team of technicians were sent to repair it. On 21 November 2025, the GPS on one of the equipment showed that it was being transported back to

Matanda, where it would have been difficult for the respondent to collect due to possible unrest. The equipment was returned to Giyani.

[12] The respondent states that the applicants offered to withdraw the *ex parte* application and the application and to remove it from the roll of the 12 December 2025, only on condition that the respondent enters into a new lease agreement with them.

[13] The respondent states that the equipment is currently uninsured by the applicants and that the current ongoing operation of the equipment threatens imminent disaster to its mechanical components.

[14] The applicants erroneously contend in their replying affidavit that the *ex parte* application is not opposed. The respondent has structured its answering affidavit in two parts. Part A is an urgent anticipatory application brought in terms of rule 6(8). This application was struck off the roll due to lack of urgency. In Part B, the respondent seeks the restoration of the equipment into its possession. It is clearly stated that the affidavit is filed in support of both applications and will serve as a founding affidavit in the counter application and an answering affidavit in the main application.

[15] There applicants contend in the replying affidavit that the respondent's contention that the applicants failed to insure the equipment is false. They have attached insurance contracts documents (with OUTsurance) as proof that the equipment has been insured. However, as correctly pointed out by the respondent, the insurance contract was entered into on the 26 November 2025, after the filing of the respondent's answering affidavit. In addition, the insurance covers equipment which unrelated to the application before me. The applicants state further that the agreement entered into was for rental with option to purchase. The respondent again brought it to the attention of this court that the written agreement speak about a lease agreement only.

[16] Contrary to the well-established principle that the applicant must make out a case in the founding affidavit,[2] the applicants in this case introduced a completely new case in reply Subsequent to the order obtained *ex parte* and the filing of the answering affidavit and the counter application launched by the respondent, the applicants instituted civil action against the respondent based on the same agreement. The particulars of claim in the action proceedings are attached to the replying

---

[2] My Vote Counts NPC v Speaker of The National Assembly 2016 (1) SA 132 (CC) at paragraph [177]

affidavit. The applicants argue that the respondent's counter application cannot be granted before the resolution of the issues raised in the action.

[17] The issues raised in the action proceedings are, firstly, that the agreement concluded by the parties provided for rent with an option to purchase and that they are entitled to keep the equipment on that basis. Secondly, they have extensively repaired the equipment at great expense with a view of purchasing it at a later stage. They argue that should the court have a different view with regard to the exact nature of the agreement, the applicants will then rely on *negotiorum gestio*. Thirdly, the applicants argue that the respondent misrepresented the facts and that the misrepresentation led to the joinder of the first and second applicants to the lease agreement. They further allege that the respondent is opportunistic and blackmailing them for something the respondent has lured them into and now seek to rely on the written agreement which excludes the option to purchase.

[18] The applicants argue that the issues raised in action proceedings establish a genuine dispute of fact which cannot be determined on paper. They further argue that they have a lien right over the equipment

and that the respondent's counter application should be dismissed with costs on that basis. I fail to find any dispute of fact which cannot be resolved on paper filed by the parties. The applicants simply seek to introduce new facts in reply, without offering any explanation why those facts were excluded in the founding affidavit.

[19] The applicant who seeks a spoliation order must prove (i) that he or she was in possession of the property, (ii) that the respondent deprived him or her of the possession forcibly or wrongfully against his or her consent. The parties agree that the applicants were in possession of the equipment before the date of the *ex parte* application. It is the requirement of wrongful and forceful deprivation of possession which is in dispute. The respondent contends that the applicants failed to prove this requirement.

[20] Counsel for the applicants contend that deprivation of possession does not mean that the possession of the property must have physically passed over to the respondent. He argues that the applicants have succeeded in proving that the respondent's actions deprived the applicants of peaceful and undisturbed control of the property when it

sent security guards and arranged for transportation of the equipment from the sites.

[21] The general rule in applications is the applicant must stand and fall by the founding affidavit and the facts alleged therein because those are the facts that the respondent is called upon to either affirm or deny.[3] The applicants' case, as stated in the founding affidavit, and that the respondent was called upon to answer, is that the respondent 'forcibly seized' the equipment from the two sites. The applicants seek relief in terms of which the Sheriff of the court is directed and authorized to 'seize' and to 'restore to the applicants' its *ante omnia* undisturbed possession of the equipment.

[22] It appears nowhere in the applicants' founding affidavit that they retained physical control of the equipment. Their case was that they were physically dispossessed of the equipment which made it impossible for them to fulfil their responsibilities in terms of contracts they had secured. They further contend that the dispossession exposes them to the risk of being held liable for damages by those they have contracted with. It is only in reply where it is stated that they have a lien right to the

[3] National Council of Societies for the Prevention of Cruelty to Animals v Openshaw 2008(5) SA339 (SCA)

equipment. The respondent's contention that it was impossible for the Sheriff to execute the order by seizing the equipment from the respondent and restoring it to the applicants has merit in that the equipment was never with the respondent.

[23] The order granted *ex parte* stands to be discharged in that the applicants failed to prove the requirement of wrongful dispossession of the equipment. The applicants' reliance on the pending civil action is equally misplaced. The *negotiorum gestio* was never relied upon in the founding affidavit in the *ex parte* application. Furthermore, the issue of rent with the option to purchase was not raised in the founding affidavit. In any case, there is no clause to that effect in the written agreement signed by the parties.

[24] The deponent to the founding affidavit and, by extension, the applicants clearly lied about these facts. The applicants were never dispossessed of the equipment since the commencement of the lease. The respondent correctly argues that, had the applicants disclosed the correct facts, this court would not have granted the order.

[25] On the counter application, counsel for the respondent contends that the applicants have failed to prove the requirements of *negotiorum gestio*. For the applicant to obtain relief based on *negotiorum* gestio, he must prove that the act was performed in the respondent's interests in his absence, without the respondent's knowledge and consent.

[26] The basis for reliance on spontaneous agency is that the applicants were forced to repair and maintain the equipment. The applicants' reliance on this aspect is misplaced. It is agreed in terms of the lease agreement that the applicants will maintain and insure the equipment. They were not doing it out of favour. Furthermore, it cannot be said that they were doing same in the interests of the respondent. The applicants' argument that they did so based on the alleged misrepresentation that the agreement was for rental with option to purchase, is without merit. As already stated above, the parties agreed to reduce their agreement into writing and are therefore bound by it. The rent with an option to purchase is not part of the written agreement. This contention is without merit also on the basis that it does not form part of the founding affidavit. The applicants further failed to attach invoices in support of the monies they allegedly spent on repairs.

[27] The respondent, as the applicants in the counter application, are entitled to the return of the equipment. They remain the owner in terms of the agreement. Furthermore, the agreement expired by effluxion of time and has already been cancelled.

[28] The remaining issue is whether the first respondent should be reported to the Legal Practice Council for deliberately misleading the court. Counsel for the parties do not agree on this point. Counsel for the applicants contends that the contents of the founding affidavit were made by a litigants who honestly believed that their rights to possess the equipment are threatened and that the *ex parte* application was one of the remedies available to them. Counsel for the applicants submits that the respondent's contention that the first applicant is an attorney of court who is required to act with utmost good faith, particularly in *ex parte* litigation is misplaced. On this point, counsel for the applicants contends that this court should view the first applicant as an ordinary litigant who acted on the advice of his lawyers, and not as someone who was performing his functions as a legal practitioner.

[29] It cannot be disputed that the applicants failed to do what an applicant in an *ex parte* application is expected to do as stated in **National Director**

of Public Prosecutions v Basson, referred to in Recycling case above.[4] However, I find that it would be unfair to put the blame on the shoulders of the first applicant simply because he is a lawyer by profession. The first applicant is not representing himself, as it appears clearly from the papers filed of record. He and his co-applicants sought the services of an attorney who was part of the drafting of papers. He clearly acted on the advice of his attorney. I do not agree that this is a case where he should be reported for dishonesty. This is an issue that can best be dealt with by a cost order.

[30] The respondent is a successful party. The general rule on costs applies. However, I am of the view that the *ex parte* application was not warranted. I am further of the view that had the applicants served the respondent, the matter would have been held differently and costs effectively. It is on this basis that I find that the respondent is entitled to punitive costs.

[31] In the result I make the following order:

i. The *rule nisi* granted by this court in the *ex parte* application dated the 23 October 2025 is dismissed and set aside.

---

[44] 2002 (1) SA 419 (SCA) par 21

ii. The Sheriff of the court or his deputy is directed and authorized to restore into the possession of the respondent the equipment described herein being:

Item 1: One Metso 2018 LT120 Mobile Jaw Crusher year model 2018 serial number N3F02548.

Item 2: One Metso 2017 Locotrack LT300 Cone Crusher year model 2017 serial number N5F01067.

iii. The applicants are ordered to pay the costs of the *ex parte* application jointly and severally, the one paying the other absolved on an attorney and client scale inclusive of counsel's costs to be taxed on scale C in so far as applicable.

iv. The applicants are ordered to pay the costs of the counter application jointly and severally, the one paying the other absolved on attorney and client scale C in so far as applicable.

[redacted]

MV SEMENYA
DEPUTY JUDGE PRESIDENT
LIMPOPO DIVISION

For the Applicants: Adv MS Sikhwari SC with Adv S Mathabathe

Instructed by: Sibanda M Attorneys

For the Respondent: Adv L Franck

Instructed by: Etiene Van Der Merwe

c/o SVN Attorneys