

Energy Drive Systems (Pty) Ltd v Tin Can Man (Pty) Ltd 2017 JDR 0301 (GJ)

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Citation	2017 JDR 0301 (GJ)
Court	Gauteng Local Division, Johannesburg
Case no	2014/17307
Judge	JP Coetzee AJ
Hear d	June 27, 2016
Judgment	June 27, 2016
Appellant / Plaintiff	Energy Drive Systems (Pty) Ltd
Respondent / Defendant	Tin Can Man (Pty) Ltd W npl as (Pty) Ltd (in business rescue) Kurt Knoop Kurt Knoop NO Park Village Auctions and Property Sales CC

Summary

Company — Business rescue — Disposal of property over which other person has security or title interest — Companies Act 71 of 2008, s 134(3) — Meaning of 'security' and 'title interest' — Reservation of ownership.

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Judgment

1. This application commenced as an unsuccessful urgent application. There was also an amendment to the notice of motion. The present application is a reclamation by way of which the applicant claims from the first respondent possession of the movable goods ("the goods in contention") which are identified in prayer 1 of the notice of motion.
2. An owner whose property is in possession of another can recover possession by way of the reclamation. That remedy requires that
 - (a) the owner / applicant must prove its ownership of the goods,
 - (b) the goods are in possession of the respondent from whom the goods are claimed at the beginning of the proceedings and
 - (c) the goods are in existence and identifiable. ¹
3. In application proceedings such as the present, the owner must discharge this

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- onus on the basis of facts which are not genuinely in dispute. ² The owner may claim the goods wherever found, from whomsoever holding it. ³
4. The applicant leased a power saving energy driving system ("the equipment") to the second respondent by way of a written lease. The applicant says that the equipment consisted of the goods listed in its founding papers. The lease contained a reservation of ownership clause in favour of the applicant. The value of the equipment is approximately R800 000. The equipment was installed in the plant of the second respondent on the latter's premises.
 5. The second respondent went into business rescue. The fourth respondent is the business rescue practitioner of the second respondent. In that capacity the fourth respondent concluded the written sale agreement with the first respondent. The selling price was more than R35 million. The sale agreement described the goods sold (referred to as "the assets") as "... the items set out in annexures "A to O" hereto, being the subject matter of the sale and all movable items situated in the premises ..." of the second respondent. Elsewhere in the sale agreement the assets are referred with reference to an annexures "A to O", without reference to "... and all movable items situated in the premises ...". It does not follow that I can disregard this phrase in the definition section of the sale agreement. The "movable items situated in the premises" includes the equipment.
 6. The first respondent took possession of all the movable goods on the said premises. The applicant says that this included the equipment referred to above. The first respondent does not admit that all of the equipment was on the premises

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when the first respondent took possession. It does not seriously dispute that some or most of the equipment was on the premises at that time. It claims that it became owner of the goods on the premises in terms of the sale agreement and delivery when it took possession.

7. The first respondent disputes that the applicant acquired ownership of the equipment. That defence would not have been available to the second respondent. ⁴ The second respondent could not transfer more rights than it had.
8. Consequently this defence is also not available to the first respondent who acquired its rights from the second respondent. The common law does not allow the second respondent to transfer ownership of the property of another (the applicant) because a transferor of rights cannot transfer more rights than it has.
9. The first respondent, however, also relies on a statutory right in terms of section 134(3) of the Companies Act 71 of 2008. That subsection provides:
 "(3) If, during a company's business rescue proceedings, the company wishes to dispose of any property over which another person has any security or title interest, the company must-
 (a) obtain the prior consent of that other person, unless the proceeds of the disposal would be sufficient to fully discharge the indebtedness protected by that person's security or title interest; and
 (b) promptly-
 (i) pay to that other person the sale proceeds attributable to

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that property up to the amount of the company's indebtedness to that other person; or
 (ii) provide security for the amount of those proceeds, to the reasonable satisfaction of that other person."

10. The argument on behalf of the first respondent is that the fourth respondent had the right to sell the equipment without the consent of the applicant because the proceeds of the disposal was sufficient to fully discharge the indebtedness of the second respondent to the applicant. It follows that I must determine whether the equipment constitute *security or title interest* in terms of section 134(3). This is a matter of interpretation. A number of recent judgments dealt with the correct approach to interpretation. They include the following summary by Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA):
 "[18] ... The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. ¹⁵ The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in

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regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The inevitable point of departure is the language of the provision itself, ¹⁶ read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

11. I commence with a consideration of the words used in the Companies Act. The Act does not define the word *security* as used in section 134. Other statutes assist: The Insolvency Act ⁵ defines the word *security* in relation to the claim of a creditor of an insolvent estate, as property of that estate over which the creditor has a preferent right by virtue of any special mortgage, land or legal hypothec, pledge or right of retention. The Security by Means of Movable Property Act ⁶ does not define the word, *security* but its focus on the legal consequences of special notarial bonds over movable property indicate that special notarial bonds constitute *security*. Section 50(2) of the Deeds Registries Act ⁷ provides that a mortgage bond or notarial bond may be registered to secure payment of specified debts. I conclude that, in general terms, the phrase, "property over which another person has any *security*" in section 134(3) of the Companies Act refers to property of the company under business rescue which secures an indebtedness of the company, for an example property subject to a notarial bond. The applicant's case is not that the equipment was the property of the second respondent over which the applicant held *security*. It follows that the reference to *security* in section 134(3) does not assist the applicant.

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12. The reference to *title interest* in section 134(3) is more difficult to deal with. Counsel have not been able to refer to authority which explains the meaning of this phrase in South African law neither have I been able to find such authority. The comment of *Henochsberg*⁸ is that "The term "title interest" is not one which is used in the South African context, but is a term that tends to be used in countries where security rights have been codified."
13. I accept this to be correct, but it is not helpful. The difficulty in defining *title interest* does not provide a valid reason to disregard the use of this term by the legislature as an alternative to *security*.

14. Separately from each other, the words *title* and *interest* can be defined without too much difficulty. In short, the relevant meaning of the word, *title* is the right or claim to ownership of property ⁹, the basis of such right or the document substantiating such right, such as a title deed. ¹⁰ The word *interest* in property refers to a legal concern, title or right in such property. ¹¹
15. The meaning of the combination of these two words, *title interest* is novel in South African law. The legislature chose to refer to *title interest* as an alternative to *security*. It follows that it must have been intended to mean something other than *security*. The last portion of subsection (a) indicates that, like *security*, *title interest* is something which safeguards the payment of the indebtedness due to the

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creditor of the company under business rescue.

16. In South Africa, it is not unusual for creditors to safeguard their rights by way of reservation of ownership clauses in contracts such as contracts for the sale of goods where the purchase price is paid over time. The use of the word *title* as a synonym or alternative for ownership is also not unusual; for example, ownership of immovable property is based on a title deed. In my view, the term *title interest* would include a reservation of ownership clause such as the one in the lease between the applicant and the second respondent.
17. Section 134(3) of the Companies Act is part of the remedy of business rescue which was introduced into South African Law by means of that Act. The purpose and context of this section is apparent from the definition of business rescue in section 128(1)(b) of the Companies Act:
- "(b) 'business rescue' means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for-
- (i) the temporary supervision of the company, and of the management of its affairs, business and property;
 - (ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and
 - (iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company;"

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18. The purpose and context are not aimed at the destruction of the rights of a secured creditor.
19. I conclude that section 134(3) of the Companies Act allows a company under business rescue to dispose of property which is subject to *security* or a reservation of ownership clause without the consent of the creditor concerned only if the proceeds of the disposal would be sufficient to fully discharge the indebtedness protected by the security. If that is so, section 134(3)(a) authorises a business rescue practitioner to dispose of the property of the company under business rescue by selling and delivering such property. In such event, section 134(3)(b) requires the practitioner to promptly pay the debt due to secured creditor or owner or provide security therefore to the reasonable satisfaction of the applicant.
20. I do not regard the obligation to pay or secure the debt as mere personal right against the practitioner. The effect of such an interpretation would be to destroy the agreed security or ownership and replace it with a personal right against the practitioner. I interpret the obligation to promptly pay or secure the debt and the consideration as a requirement for the valid transfer of ownership by the practitioner by way of a sale and delivery in terms of section 134 without consent of the creditor. The rights of the creditor will only be terminated on payment or the provision of other security.
21. In the present matter the fourth respondent did not pay or secure the debt due to the applicant. On my interpretation of section 134(3) it follows that the practitioner did not validly destroy the right of ownership of the applicant. The applicant is still owner of the equipment.

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22. The rule of law requires that a court order must be couched in clear terms and its purpose must be readily ascertainable from the language of the order. ¹² Applied to the present matter, this means that my order must be formulated such that the Sheriff can with reference to the order identify the equipment to be returned to the applicant. The notice of motion does not describe all of the equipment sufficiently for this purpose. The equipment includes, for example, a reference to 100m cable. The applicant is not owner of any 100m unidentified cable on the erstwhile premises of the second respondent. The applicant's papers do not identify the specific 100m cable which is part of the equipment. Other items are clearly defined, for

example by reference to serial numbers. My order is aimed at allowing the delivery of the identifiable items.

23. I grant the following order:

(1) The first respondent is hereby directed to deliver to the applicant the movable property identified as:

o 2 x Double Door Switch panels (orange) as illustrated by "Image 1" in annexure "EDR" to the founding papers.

o 3 x Large Double Door Drive Panels (grey with vents) as illustrated by "Image 2" in annexure "EDR" to the founding papers and containing:

5 x VSD Drives with serial numbers:

- Drive 1 Serial Number : 55038200004, 132kW, LSI S;

- Drive 2 Serial Number : 5502C060375 , 55kW, LSI S;

- Drive 3 Serial Number : 55037220524 , 45kW, LSI S;

- Drive 4 Serial Number : 55037220528 , 45kW, LSI S;

and

- Drive 5 Serial Number : 5503617003C , 18.5kW, LSI S.

o 5 x Elster Meters with serial numbers:

- 88523631 ;

- 88522427 ;

- 88523811 ;

- 88522426 ; and

- 88224286

o 1 x PLC Panel (with HMI panel) (orange) as illustrated by "Image 3" in annexure "EDR" to the founding papers.

o 4 x freestanding Elster Meter units located throughout the premises situated at 24 Botha Street, Arode Extension 4 Gauteng, being used to ascertain the feasibility of installing similar VSD Drives on other machinery of the first respondent, bearing serial numbers:

- 88502943

- 88522903

- 88501321

- 88501323

(2) The first respondent is ordered to pay the applicant's costs.

JP Coetzee AJ

Acting Judge of the High Court

Gauteng, Local Division

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APPEARANCES

For the Applicant:

Advocate J. MacDonal d

Instructed by:

Norton Rose Fullbright South Africa
Incorporated

For the First Respondent:

Advocate M Silver

Instructed by:

David Oshry & Associates

Second, Third and Fourth
Respondent:

Not represented

Foot note - 1

1 *Van der Merwe v Taylor* NO 2008 (1) SA 1 (CC) [22]

1 *Van der Merwe v Taylor* NO 2008 (1) SA 1 (CC) [22]

Foot note - 2

2 *NDPP v Zuma* 2009 (2) SA 277 (SCA) [26]

2 *NDPP v Zuma* 2009 (2) SA 277 (SCA) [26]

Foot note - 3

3 *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20B-C

3 *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20B-C

Foot note - 4

4 *Van der Westhuizen J in Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd* 2016 (1) SA 621 (CC) [28]

4 *Van der Westhuizen J in Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd* 2016 (1) SA 621 (CC) [28]

Foot note - 5

5 24 of 1936

5 24 of 1936

Foot note - 6

6 57 of 1993

6 57 of 1993

Foot note - 7

7 47 of 1937

7 47 of 1937

Foot note - 8

8 ??

8 ??

Foot note - 9

9 *The Concise Oxford Dictionary*

9 *The Concise Oxford Dictionary*

Foot note - 10

10 *Collins Concise Dictionary*

10 *Collins Concise Dictionary*

Foot note - 11

11 *The Concise Oxford Dictionary*

11 *The Concise Oxford Dictionary*

Foot note - 12

12 *Eke v Parsons* 2016 (3) SA 37 (CC) [64]

12 *Eke v Parsons* 2016 (3) SA 37 (CC) [64]

