IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

REPORTABLE:	NO
OF INTEREST TO OTHER JUDGES:	YES
REVISED:	NO

Date: 20/12/2021 Signature:

CASE NO: 20/23419

In the matter between:

GOSCOR FINANCE (PTY) LTD	Applicant
and	
MASHARA INVESTMENT HOLDINGS (PTY) LTD	Respondent

Coram: **MACHABA AJ**

Heard on: **23 AUGUST 2021**

Delivered: **20 DECEMBER 2021**

Summary:

Return of Rented Equipment: *Rei vindicatio. Application for the return of rented equipment. Applicant rented to the Respondent certain construction equipment for a profit in terms of a written lease agreement called Master Rental Agreement. The lease was cancelled owing to a failure by the Respondent's failure to pay the agreed rental therefor. Applicant asserts that it is an answer of the leased equipment and demands the return thereof.*

Respondent argues first, that the Court lacks jurisdiction and secondly, that the Applicant lacks locus standi as one of the equipment demanded is owned by a third party and not the Applicant. On the merits, the Respondent contends that the Applicant unlawfully terminated the said lease agreement.

Held: *In view of all the facts of this case, the Court is not satisfied that the Respondent's opposing affidavit is bona fide or that it raises any valid point. The lease agreement grants the Court jurisdiction to determine the dispute between the parties. The fact that the Applicant itself leased the equipment and on-leased same to the Respondent is irrelevant for the determination of the dispute between the parties.*

Held: *Viewed in the context of this lease agreement and its provisions, the Applicant is the owner of the leased equipment. If not the real owner, then the Applicant is a Beneficial Owner with Beneficial Interest in the leased equipment. The Respondent accepted the lease agreement and its terms. It cannot now seek to escape its obligations on those bases. It must be bound thereby.*

Held: *The issue of costs is regulated by the lease agreement. There is no reason for this Court to deviate from the agreed position in respect of the said costs.*

ORDER

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1. The Respondent is ordered to return the equipment identified in the Notice of Motion to the Applicant within five (5) days of this judgment:

    1.1. Bobcat B370 Backhoe Loader (Serial Number B45111316);

    1.2. Bobcat B370 Backhoe Loader (Serial Number: B45111495); and

    1.3. Sany SY210 Excavator (Serial Number: 18SEY021244011) ("the Equipment").

2. In the event that the Respondent fails and/or refuses to return to applicant the Equipment, the Sheriff of this Court is hereby authorised to enter into and upon the Respondent's premises, or wherever same may be found, to attach the Equipment, referred to in paragraph 1 above, and to return same to the Applicant; and

3. The Respondent is ordered to pay the costs of this suit on an attorney and own client.

JUDGMENT

MACHABA AJ

"[1] It is indeed the lofty and lonely work of the Judiciary, impervious to public commentary and political rhetoric, to uphold, protect and apply the Constitution and the law at any and all costs."[1]

INTRODUCTION

[1] In this application, the Applicant instituted an application against the Respondent in terms of which it seeks the return of certain identified leased construction equipment being:

a. Bobcat B370 Backhoe Loader (Serial Number B45111316)

b. Bobcat B370 Backhoe Loader (Serial Number: B45111495);

c. Bobcat B370 Backhoe Loader (Serial Number: B45111761); and

d. Sany SY210 Excavator (Serial Number: 18SEY021244011 ("the equipment").

[2] This follows a cancellation of a Master Rental Agreement ("the lease agreement") concluded by the two parties on 6 March 2018 for the lease of the said equipment.

[3] By way of a background, the Applicant submits that on 6 March 2018, it and the Respondent concluded a Master Rental Agreement in terms of which the

[1] Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others [2021] ZACC 18.

Respondent leased certain construction equipment against a payment of monthly agreed fee ("rental amount"). The definition of rental amount and due date for payment thereof form part of the said agreement.

[4] Further, the said lease agreement provides, in clause 11 thereof, that:

"11 OWNERSHIP

11.1. The Customer acknowledges that ownership of the Equipment will remain vested at all time in Goscor or its successors in title and that the Customer will at no stage during or after this Agreement acquire ownership of the Equipment by reason of mere possession of the Equipment or in terms of this Agreement.

11.2. The Customer must at its own expense, return the Equipment in its original conditions, fair wear and tear expected, to Goscor on termination of this Agreement by effluxion of time, or cancellation in terms of clause 12."

[5] The lease agreement also provides for incidences of termination thereof in that it states that:

"12 TERMINATION, CANCELLATION AND SUSPENSION

12.1 Goscor may cancel the Rental Agreement, if the Customer:

12.1.1 commits a breach of the Rental Agreement and fails to remedy such breach within 10 (ten) days of receiving written notice calling upon it to so remedy the breach"

12.2 Should Goscor cancel the Rental Agreement in terms of 12, then it shall be entitled to:

12.2.1 retake possession of the Equipment; and ..."

[6] The other relevant provision in this matter deals with jurisdiction of the High Court in the event of a litigious dispute. It states that:

"15 JURISDICTION AND LEGAL PROCEEDINGS

15.1 In so far as Goscor may elect to institute proceedings in the High Court of South Africa, the Customer hereby consents and submits itself to the jurisdiction of the Gauteng Local Division of the High Court, Johannesburg, notwithstanding that the court may not otherwise enjoy such jurisdiction."

[7] In compliance with the provisions of the above agreement, the Applicant claims to have delivered the said equipment to the Respondent at a mutually agreed location and over a number of days. It has also annexed proof of receipts from the Respondent's representative who has signed therefor.

[8] In breach of the said lease agreement, the Respondent failed to pay the agreed rental on the agreed date. This constituted a breach to which the Applicant issued a notice of breach. The said notice of breach was delivered to the Respondent on 24 March 2021 demanding that the latter remedy same, and to pay the Applicant the agreed rental that has now stood at R857 578.50. The Respondent has failed to pay the Applicant the demanded amount.[2]

[9] On 7 April 2021, and as a result of the above breach of the lease agreement and failure to pay the demanded amount, the Applicant cancelled the said lease agreement. It now demands the return of the leased equipment and has provided the GPS location of where the equipment is.

[10] In opposing the Applicant's claim, the Respondent raised two preliminary objections to the Applicant's claim.

[11] First, the Respondent objected to the Applicant's claim on the basis that this Court lacks jurisdiction to determine the dispute between the parties. However, a casual perusal of clause 15.1 of the lease agreement shows that the parties consented to the jurisdiction of this Court in the event that there is a dispute between the parties. It is in fact the lessor (Applicant) who has the election to bring the suit out of the High Court and it has done so.

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[2] It is noteworthy that the Respondent admits in para 30 of its answering affidavit, that full payment of the Applicant's rental has not been paid.

[12] The Respondent denies that it or the Applicant can consent to the jurisdiction of the High Court. In support of this denial, the Respondent seeks to place reliance on section 34 of the Constitution which provides for the rights of people to have their disputes submitted and determined by Court. It contends that the consent which it freely made is now "unlawful" given recent decisions. This Court was not referred to such decisions.

[13] It is not clear to this Court as to whether or not the above objection was only known to the Respondent during the present litigation, or was this known from the period of the discussions leading towards the conclusion of the above lease agreement. This question is relevant in that one might ask why did the Respondent not object to this Court's jurisdiction prior to the signing of the current lease agreement. Why raise this objection only now?

[14] This Court finds that the fact that the Respondent failed to object then, demonstrates that its present opposition to the Applicant's claim relating to the jurisdiction of this Court is dishonest and frivolous. Accordingly, that objection is hereby rejected.

[15] As a second objection the Respondent argues that the Applicant lacks *locus standi* to seek the relief it seeks. It acknowledges clause 11 in the lease agreement, however, it takes the term of an "owner" to mean someone who is "an owner" of the equipment and not necessarily the Applicant. This objection, appears, to be directed to one out of four leased equipment. In support of its objection, the Respondent submits that a certain annexure (annexure FOE3) to the Applicant's affidavit is an invoice from a third party (Bobcat Equipment SA (Pty) Ltd) to the Applicant.

[16] In reading the said invoice, which appears to be stating that the sale between Bobcat Equipment SA and the Applicant was subject to a suspensive risk basis and that ownership of the sold item passes upon receipt of full payment.

[17] The Respondent then submits that the Applicant has failed to state if the said suspensive condition has been fulfilled i.e. that it had paid the full purchase price therefor.

[18] The Respondent then argues that it is only the owner of an equipment that can lease the said equipment and since the Applicant was not yet the owner thereof, it could not lease same. It accordingly argues that the Applicant does not have the necessary *locus standi.* However, in reply, the Applicant insists that it is the owner of the said equipment and annexed proof thereof.

[19] This contention by the Respondent again lacks merit and is opportunistic. This Court was not, in any event, told as to when the Respondent uncovered this invoice and why has it never raised the presence or contents thereof with the Applicant prior to this case. If it saw this invoice for the first time during this litigation, then does the Respondent seek to suggest that there is thus no agreement between itself and the Applicant and that it now has an agreement with Bobcat Equipment? Or does it suggest that because of its said argument (on the Applicant's lack of *locus standi*), it is now entitled to use the said equipment *ad infinitum* until the Applicant fully pays therefor (Court's rhetorical questions).

[20] This Court is mindful of the provisions of the leased agreement wherein the Respondent accepted that the Applicant is the owner of the leased equipment and that in the event of breach or cancellation thereof, it is entitled to the return thereof.

[21] From the facts of this matter and the specific nature of this lease agreement, I find that it does not matter and it does not concern the Respondent as to how the Applicant secured the said equipment. What matters herein is that the Respondent agreed to lease the said equipment from the Applicant and took delivery of the said equipment on the stated basis that the Applicant was the owner thereof. It used the said equipment for its own benefit and paid rental therefor. It further accepted that the Applicant is the owner of the leased equipment for the purposes of this lease agreement that in the event of any breach thereof, the Applicant would be entitled to the return thereof.

[22] I am prepared, in the event that the Respondent is correct that the Applicant, *vis-à-vis* Bobcat Equipment SA, is not the owner of the said equipment, to accept that the lease agreement contemplated the Applicant to be what is referred to as a Beneficial Owner as opposed to the real owner of the equipment. Evidently, the Applicant held Beneficial Interest in the equipment it leased to the Respondent and the parties

accepted this position and concluded the agreement on those bases. In any event, the Applicant asserts ownership thereof.

[23] Furthermore, the Respondent's objection becomes even more disingenuous when it is raised as though it affects all of the equipment only to find that it actually affects one of the four lease equipment. Accordingly, the Applicant is entitled to an order for the return of the other remaining equipment. The Applicant makes the same submissions and this Court agrees therewith.

[24] This is not, however, to suggest that the Respondent's objection in relation to the targeted equipment is well-founded. Having found that it matters not, for the purposes of this lease agreement, as to whether the Applicant purchased or leased and on-leased same to the Respondent, the latter happily leased same after accepting that the Applicant was in the business of leasing equipment. It bound itself to pay for the said rented equipment and to return same to the Applicant in the event that it breaches the said agreement. It does not lay in its mouth, when it has to be held liable for its own actions to raise the said defence.

[25] Accordingly, the Respondent must return the said equipment to the Applicant.

[26] In any event, the Applicant has asserted in its Replying Affidavit, that it is the owner of the said equipment. It has, in support of its contention, annexed a proof of payment of a Bobcat Equipment.

[27] As the Applicant correctly contended in argument of the matter, the Respondent's above objection is discredited by its admission of the lease agreement and its terms. It is also on that basis, that this Court finds that it does not lay in its mouth to now seek to escape its obligation on the stated objection.

[28] On the merits, the Respondent contended that it made an offer to settle the demanded amount of money which the Applicant rejected. The Respondent further seeks to blame the Applicant for its the accumulated arrears or failure to honour its obligations in terms of the lease agreement. It argues that it took one of the machines in for service and the Applicant refused to release same leading to a loss of income. These objections are not sustained by the lease agreement. Further, if

the said loss of income was genuine, the Respondent would have pursued its own rights accordingly. Secondly, the Applicant is not forced to accept any settlement offer from the Respondent. In any event, this issue was correctly not pursued during the hearing of this matter. Accordingly, these contentions must fail.

[29] Finally, the Respondent complains that the Applicant has unlawfully cancelled the lease agreement but has failed, other than the above objections, to point to any fact or event in support of its so-called complaint. The Applicant in reply denied this and explained that it first delivered a letter of demand for the amounts owed to it and upon same not being honoured, it cancelled the said agreement. This Court could also not follow the basis of the Respondent's contention herein. It must thus fail.

[30] During the argument of the matter, the Court was informed that the Respondent had returned one of the equipment (Bobcat B730 Backhoe serial Number B45111761) and the Applicant does not persist with the recovery thereof.

[31] Finally, the Applicant contended that the punitive costs it argues for are provided for in the lease agreement. The Respondent stated, in its answering affidavit, that it shall address same later in its affidavit to demonstrate why it should not be ordered to pay punitive costs. It averred that the Applicant has not favoured it with an affidavit to justify the relief sought. It has however not done so. I therefore accept the Applicant's contention in this regard. The lease agreement provides for punitive costs in the event of a litigation between the parties.

ISSUES ARISING

[32] In this case, the Applicant has to make out a case for the relief sought herein. In particular, the question is whether the Applicant has made out a case for *rei vindicatio*. Of course, it bears the onus to prove its case.

[33] Ordinarily, the party who bears the onus can discharge it only if that party has adduced credible evidence, particularly where there are mutually destructive versions. The assessment of the witnesses and general probabilities will usually

be decisive. Eksteen AJP in ***National Employers General Insurance v Jagers***[3] formulated the following approach when there are mutually destructive versions:

"It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the scene that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendants version is false."

[34] In the matter of ***SFW Group & Another v Martell et Cie & Others*** the court expounded the following technique as the basis for resolving two mutually destructive versions:

"On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarized

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[3] 1984 (4) 437 (E) at 440D-G.

as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of A subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

[35] Accordingly, the partying who alleges must, on the balance of probabilities, prove its case and such a party would have discharged the onus of proof laying on him or her.

[36] Van der Linde J, in an appeal of ***South African Bank of Athens Appellant v 24 Hour Cash CC***[4] held as follows:

"[6] In civil cases the measure of proof is a preponderance of probabilities. When the two competing versions intersect the question of credibility comes into play as well..."

APPLICABLE LEGAL PRINCIPLES ON REI VINDICATIO

[37] I find that the issues raised in this matter are not overly complicated and that they exclusively fall to be resolved on the terms of the lease agreement. The Court is called briefly to determine whether a claim for *rei vindicatio* has been made. Secondly and again briefly, this Court would deal with the concept of *pacta sunt servanda* and interpretation of the said agreement.

[38] The Applicant and Respondent signed the lease agreement and therewith intended to be bound thereby. This is a classic case of *pacta sunt servanda*.

PACTA SUNT SERVANDA

[39] The starting point for any contract that has been entered into freely and voluntarily is that contracts bind the parties thereto in terms of the principle of "*pacta sunt servanda*", save that all legal rights and obligations, including the common law of contract, are now subject to constitutional control.[5]

[40] The above position was set out in ***Barkhuizen v Napier***[6] by Ngcobo J (as he was) where the Court stated that:

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[4] Unreported Case Number A3027/2016.
[5] See Beadica 231 CC and Others v Trustees 2020 (5) SA 247 (CC).
[6] 2007 (5) SA 323 (CC).

"I do not understand the Supreme Court of Appeal as suggesting that the principle of contract 'pacta sunt servanda' is a sacred cow that should trump all other considerations. The Supreme Court of Appeal accepted that the constitutional values of equality and dignity may, however, prove to be decisive when the issue of the parties' relative bargaining positions is an issue ... All law, including the common law of contract, is now subject to constitutional control. The validity of all law depends on their consistency with the provisions of the Constitution and the values that underlie our Constitution. The application of the principle 'pacta sunt servanda' is, therefore, subject to constitutional control."[7]

[41] The established principle in relation to the interpretation of contracts was set out in ***Wells v SA Alumenite Co***[8] where Innes CJ held:

"But neither on principle nor authority is there any ground for thus restricting the plain and general language used. No doubt the condition is hard and onerous; but if people sign such conditions they must, in the absence of fraud, be held to them. Public policy so demands. 'If there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice' per Jessel, MR ..."[9]

[42] This principle has been reaffirmed in several subsequent decisions.[10] *Pacta sunt servanda* still holds to this day, subject to constitutional scrutiny. On the present facts, both parties contracted freely and voluntarily, and there was no suggestion anywhere that the Respondent had not done so. There was also no allegation that the Respondent was in a weaker bargaining position than the Applicant. The

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[7] At para [15].
[8] 1927 AD 69.
[9] At para [23].
[10] S A Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere 1964 (4) SA 760 (A) and Brisley v Drotsky 2002 (4) SA 1 (SCA).

question of the parties' relative bargaining positions as referred to in ***Barkhuizen*** *supra* is thus not an issue before this Court.

[43] In the case of ***Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd***:[11]

"[30] Mathopo JA, writing for the court, said that what had to be decided was whether the 'implementation' of the breach clause was manifestly unreasonable or unfair 'to the extent that it is contrary to public policy'. This, he said, called for a 'balancing act and weighing up of two considerations, namely the principle of pacta sunt servanda and the considerations of public policy, including of course constitutional imperatives'."

[44] The above view is trite and had been followed in numerous Courts in the country.[12] But as Mathopo JA held in Mohamed, following Harms DP in ***Bredenkamp***, the Constitutional Court in ***Barkhuizen*** did not introduce a principle that the enforcement of a valid term must '*be fair and reasonable even if no public policy consideration found in the Constitution or elsewhere is implicated*' (***Mohamed*** para 14, 25 and ***Bredenkamp*** para 50). Had it been otherwise, said Harms DP, Ngcobo J would not have said in *Barkhuizen*, para 57):

'Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity. The extent to which the contract was freely and voluntarily concluded is clearly a vital factor as it will determine the weight that should be afforded to the values of freedom and dignity. The other consideration is that all persons have a right to seek judicial redress.'

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[11](183/17) [2017] ZASCA 176 (1 December 2017).
[12] Woolworths (Pty) Ltd v Escom Pension and Provident Fund 1987 (2) SA 67 (A) at 71B-E.

[45] In carrying out this analysis, this Court relied on the decision of the Full Court in ***V v V***.[13] The fundamental consideration in determining the terms of a written contract or its application to an event that arose during the course of their relationship is to discern the intention of the parties from the words used in the context of the document as a whole, the factual matrix surrounding the conclusion of the agreement and its purpose or (where relevant) the mischief it was intended to address.[14]

[46] Since at least ***Swart en 'n Ander v Cape Fabrix (Pty) Ltd***[15] and ***List v Jungers***[16] the Supreme Court of Appeal and its predecessor have stated that one considers the contentious words by having regard to their context in relation to the contract as a whole and by taking into account the nature and purpose of the contract. While there have been some hiccups along the way, in ***Natal Joint Municipal Pension Fund v Endumeni Municipality***[17] Wallis JA said:

'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.* ***The process is***

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[13] (A5021/12) [2016] ZAGPJHC 311 (24 November 2016).
[14] (KPMG Chartered Accountants (SA) v Securefin Ltd and Another 2009 (4) SA 399 (SCA) at para 39 and Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd 2016(1) SA 518 (SCA) at paras 27, 28, 30 and 35).
[15] 1979 (1) SA 195 (A) at 202C.
[16] 1979 (3) SA 106 (A) at 118G-H.
[17] 2012 (4) SA 593 (SCA) para 18.

***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 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, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'*[18] [Own emphasis]

[47] Put another way, a Court is now at liberty to depart from the words used, even when they are clear and unambiguous when considered in the context of the document as a whole if, having regard to admissible background and surrounding factors, it is evident that they would lead to a result contrary to the purpose and intention of the parties or the legislature as the case might be.

[48] The Court in ***Bhana v Dönges NO and Another***[19] referred to it as *'excessive peering at the language to be interpreted without sufficient attention to the historical contextual scene'*.[20]

[49] While the object is to determine the meaning to be given to the words used, it remains the primary function of the Court to gather the intention of the parties or the legislature by reference to those words; and this can only occur if the object and purpose of the contract or the legislation (in which case it would include the

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[18] Wallis JA in Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk 2014 (2) SA 494 (SCA); Auction Alliance v Wade Park (342/16) [2018] ZASCA 28 (23 March 2018), para [9] per Madjiet JA. Coopers & Lybrand & others v Bryant [1995] ZASCA 64; 1995 (3) SA 761 (A) at 767E-768 E; Venter v Rex; Commissioner For The South African Revenue Service v Bosch and Another 2015 (2) SA 174 (SCA) at para 9 per Wallis J; Educated Risk Investments 165 (Pty) Ltd and Others v Ekurhuleni Metropolitan Municipality and Others [2016] 3 All SA 18 (SCA) at para 19, per Wallis JA.
[19] 1950 (4) SA 653 (A) at 664G – H.
[20] See also Firstrand Bank Limited v Land and Agricultural Development Bank of South Africa 2015 (1) SA 38 (SCA) at para 27, Novartis at para 28 and Endumeni at para 19.

mischief sought to be remedied) are brought into consideration when examining the words used in the context of both the document as a whole and the context or factual matrix in which the document came to be produced.[21]

[50] Finally, in the recent case of ***Novartis***[22] Lewis JA maintained that the process of interpretation is to ascertain the intention of the parties or the legislature. In ***Novartis*** at para 27, it was held that:

"[27] I do not understand these judgments to mean that interpretation is a process that takes into account only the objective meaning of the words (if that is ascertainable), and does not have regard to the contract as a whole or the circumstances in which it was entered into. This court has consistently held, for many decades, that the interpretative process is one of ascertaining the intention of the parties – what they meant to achieve. And in doing that, the court must consider all the circumstances surrounding the contract to determine what their intention was in concluding it." [Underlining mine]

[51] Nonetheless in both cases, the SCA described the process as requiring the words used to be read in the context of the document as a whole and in the light of all relevant circumstances.[23] The decision of this Court is wholly based on the contexts of the lease agreement as a whole and in light of the relevant circumstances thereof.

[52] *The* ***Endumeni*** case at para 18 and the more recent case of ***Novartis do not appear to have questioned the objective approach to determining what is***

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[21] Jaga at 662G-H. See also KPMG Chartered Accountants (SA) v Securefin Ltd and Another 2009 (4) SA 399 (SCA) per Harms DP at para 39; Wallis JA in Bothma-Batho at para 12.

[22] Novartis v Maphil (20229/2014) [2015] ZASCA 111; 2016 (1) SA 518 (SCA); [2015] 4 All SA 417 (SCA) (3 September 2015).

[23] See Endumeni at para 24; Novartis at para 27.

businesslike in the context of the commercial relationship established by the parties.

In a nutshell,

[53] The principles regarding interpretation of contracts are well settled in our law and it is unnecessary to recite them again. The same approach applies in considering the ambit of the lease agreement and the principle of *pacta sunt servanda*. The Court must ascertain what the parties intended by having regard to the purpose of their agreement, and interpret it contextually so as to give it a commercially sensible meaning.[24] This view is trite and had been followed in numerous Courts in the country.[25]

[54] The Court will thus resolve this matter on the basis that the parties intended to conclude a commercial lease/rental agreement for their mutual benefit. This was done until the Respondent breached the said agreement.

THE LAW ON *REI VINDICATIO*

[55] The law has long conjured instruments to resolve issues of the onus and *rei vindicatio*.

[56] In order to succeed with this real right remedy an applicant need to allege and prove that:

(a) he or she is the owner of the thing;

(b) the thing was in the possession of the respondent when proceedings were instituted; and

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[24] See North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd 2013 (5) SA 1 (SCA) at paras 24 – 25 and the cases referred to therein.
[25] Woolworths (Pty) Ltd v Eskom Pension and Provident Fund 1987 (2) SA 67 (A) at 71B-E.

(c) the thing which is vindicated is still in existence and clearly identifiable.[26]

[57] The *rei vindicatio* is a remedy available to the owner to reclaim his property from whomever is in possession of it. The remedy is available to the owner in respect to both moveable and immoveable property. The remedy merely restores proprietary interest, it does not award damages.

[58] An applicant must prove that he or she was the owner of the thing and that the defendant was in possession of the property when the action was instituted.[27]

[59] In ***Chetty v Naidoo***[28] Jansen JA set out additional rules to be considered when proceeding by way of the *rei vindicatio* action namely, that if the owner:

"... concedes in his particulars of claim that the defendant has an existing right to hold (e.g., by conceding a lease or a hire-purchase agreement, without also alleging that it has been terminated...) his statement of claim obviously discloses no cause of action. If he does not concede an existing right to hold, but, nevertheless, says that a right to hold now would have existed but for a termination which has taken place, then ex facie the statement of claim he must at least prove the termination."

[60] The latter case suggests that if the Respondent has an existing right arising from any agreement, then the Applicant must, in addition to proving its ownership and the Respondent's possession of the goods, prove that the rights that the Respondent enjoyed in terms of the agreement have terminated. If he does not so allege and prove, then an application for *rei vindicatio* will fail.

[61] The owner of a thing has a right to possess, use, enjoy, destroy and to alienate it. If any of these things are in any way infringed, he has appropriate legal remedies

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[26] Introduction to the Law of Property, A J van der Walt et al, Juta, 7th Ed, at 164; Silberberg and Schoeman's The Law of Property, 5th Ed, LexisNexis at 243.
[27] LTC Harms- Amler's Precedents of Pleadings, page 392-393.
[28] 1974 (3) All SA 304 (AD) at page 309.

like in the case of *rei vindicatio*. In the South African law context, the *rei vindicatio* action's importance is clearly articulated and flows from ***Chetty v Naidoo***.[29] It is inherent in the nature of ownership that possession of the *res* should normally be with the owner upon which it follows that no other person may withhold it from the owner unless he is vested with some rights enforceable against the owner. The owner in instituting a *rei vindicatio* need therefore do no more than allege and prove that he is the owner and that the defendant is holding the res. The onus will then be on the defendant to allege and establish any right to continue to hold against the owner.

[62] An applicant who brings a *rei vindicatio* or vindicatory action needs therefore to prove two facts, namely, that he is the owner of the thing and that the thing is in the possession of the respondent. It does not make any difference whether the possessor is *bona fide* or *mala fide*. The owner of the movable property found in the possession of a third party may recover it from any possessor without having to compensate him even from a possessor in good faith who gave value for it.[30]

[63] This Court is satisfied that the Applicant has, in accordance with the lease agreement, proved that it is the owner of the equipment – a fact that the Respondent accepted and conducted itself accordingly, until this litigation. The Court has further accepted that even if it is wrong and the Applicant is actually not a real owner, then the Applicant can easily be found to have been a Beneficial Owner of the leased equipment.

[64] In its heads, the Respondent sought to argue that each and every equipment was not owned by the Applicant but by third parties.

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[29] 1974 (3) SA 12 (A) 208 – D.
[30] Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd [1992] ZASCA 186; 1993 (1) SA 77 (A) at 82 Concor Construction (Cape) (Pty) Ltd v Santambank Ltd 1993 (3) SA 930 (A).

[65] This Court does not accept this argument and its potential consequences or implications that have already been raised hereinabove. There cannot be any commercially sensible answer to the Court's rhetorical questions asked above should the Respondent's contention be accepted. In other words, the Court cannot accept that the nature of the lease agreement was such that it does not make commercial sense between the parties or to any one of them.

[66] This Court accordingly, finds that the equipment belonged to the Applicant and the Applicant was entitled to demand the return thereof.

[67] As stated above, the Respondent sought to attack ownership of one of the four equipment. It thus has accepted that the rest of the equipment can be returned to the Applicant. However, in its heads, it sought to point all of the equipment as belonging to third parties and demanding that the Applicant to prove its ownership thereof. This new argument is not accepted and will be ignored.

SUNDRIES

[68] Regarding the Respondent's denial of this Court's jurisdiction, this Court agrees with the Applicant's submission, in its heads of argument, that parties can agree to consent (not confer) to a jurisdiction of a Court which would otherwise not have such jurisdiction. This is, in any event, done frequently in this division, unless the facts of a case patently demonstrate that the Court lacks jurisdiction to determine same.

CONCLUSION

[69] As may be gleaned from the above authorities, the Court is capable of binding the Respondent to a contract it has freely concluded and from which it seeks to resile on frivolous grounds.

[70] In this case, the Respondent signed an agreement to which it must be bound. It has agreed to rent the Applicant's equipment and to return same upon the breach of the said agreement. This Court has no reason to deviate from the above well-established legal principles. Instead, it has a duty to follow those principles and apply them to this case. The Respondent must be ordered to comply with the said agreement.

THE COSTS

[71] In this case, the Court could not find any reason to depart from the provisions of the Master Rental Agreement in relation to the legal costs.

[72] Accordingly, the scale of the said costs is contained in the Master Rental Agreement itself.

[73] Having found that the Respondent is liable to return the leased equipment to the Applicant, it follows that the Respondent is liable for the costs of this application as per the relevant provisions of the Master Rental Agreement.

ORDER

[74] Having considered the circumstances of this case and the documents placed before this Court, I make an order in the following terms.

1. The Respondent is ordered to return the equipment identified herein below to the Applicant within five (5) days of this judgment being handed down;

    1.1. Bobcat B370 Backhoe Loader (Serial Number B45111316);

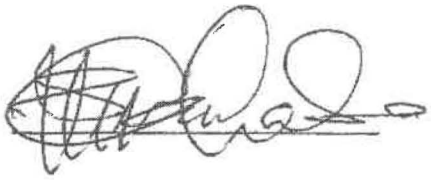
    1.2. Bobcat B370 Backhoe Loader (Serial Number: B45111495); and

    1.3. Sany SY210 Excavator (Serial Number: 18SEY021244011).

2. In the event that the Respondent fails and/or refuses to return applicant the Equipment, the Sheriff of this Court is hereby authorised to enter into and upon the Respondent's premises, or wherever same may be found, to attach the Equipment, referred to in paragraph 1 above, and to return same to the Applicant

3. The Respondent is ordered to pay the costs of this suit on an attorney and own client.

It is so Ordered.



T J MACHABA

Acting Judge

Gauteng Local Division

Delivered: This judgment was handed down electronically by circulation to the parties and/or their legal representatives via email and uploaded to Caseline and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 20 December 2021

HEARD ON:	23 AUGUST 2021
DATE OF JUDGMENT:	20 DECEMBER 2021
FOR THE APLICANT:	C VAN DER LINDE (cvanderlinde@counsel.co.za)
INSTRUCTED BY:	KNOWLES HUSSAIN INC. (011 669 6101 and KMA@khl.co.za)
FOR THE RESPONDENT:	W P MEINTJIES (iti03500@mweb.co.za)
INSTRUCTED BY:	MEINTJIES KHOZA ATTORNEYS (013 752 5449)
