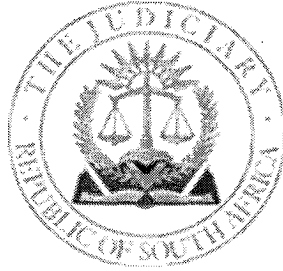


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2022/058

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

[4 May 2022]


SIGNATURE

In the matter between:

RESICHEM (PTY) LTD

APPLICANT

And

POLYWHIZ TRADING (PTY) LTD

RESPONDENT

REASONS FOR J U D G M E N T

MUDAU, J:

1. This application was brought on an urgent basis. The applicant, Resichem (Pty) Ltd seeks an interim interdict to, inter alia, restrain the respondent, PolyWhiz Trading (Pty) Ltd from accessing, selling or in any way using or disposing any of the consignment stock of chemicals situated at the respondent's premises, pending proceedings to be instituted within 30 days of the court order. Central to the interdictory relief is the preservation of the stock so that the rightful owner

thereof will not be deprived of the rights and entitlements consequent upon ownership. The respondent opposes the relief claimed on a number of grounds: that the application is not urgent; alternatively, the urgency is self- created; and that the applicant has failed to meet the requirements for an interim interdict.

2. The requirements for the granting of an interim interdict are trite. The test requires an applicant establishes:

- 2.1 a *prima facie* right, even if it is subject to some doubt;
- 2.2 a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted;
- 2.3 the balance of convenience must favour the granting of the interdict; and
- 2.4 the applicant must have no other remedy.¹

3. On 29 April 2022, having heard counsel and considered the documents filed on record, I ordered that:

“1. The applicant’s failure to comply with the Uniform Rules of Court (“URC”) pertaining to forms, time periods and service is condoned, and the matter is heard as an urgent application in accordance with URC 6(12).

2. Pending the finalisation of such legal proceedings as provided for in paragraph 3 below and subject to paragraph 3 below, the respondent is interdicted and restrained from accessing, selling, or in any way using or disposing of any of the consignment stock of chemicals which is situate in the respondent’s warehouse at its premises at Unit 7, Harbour Park, 1061, Schooner Avenue, Honeydew.

3.

3.1 The interdictory relief set out in paragraph 2 above shall stand as interim relief pending the finalisation of the legal proceedings which the applicant intends to bring, and which legal proceedings the applicant is directed to institute within 30 days of the date of the order sought under this application.

3.2 All and any of the interim relief granted under prayer 2 shall lapse with immediate effect upon the expiration of the period of 30 days from

¹ *Setlogelo v Setlogelo* 1914 AD 221.

the date of the order granted under this application in the event that the applicant fails to institute legal proceedings for such further relief as the applicant intends to pursue within 30 days of the order.

4. Costs in the cause”.

Background

4. Pursuant to a written application for credit, on 10 December 2015, the applicant granted the respondent a 30-day credit facility with a credit limit of R3 million, subject to the applicant's standard terms and conditions regulating all orders and sales of goods between the parties. Some of the most salient provisions of the Credit Terms are as follows: in terms of clause 1.1 “Any quotation, tender, order, or contract of sale between the applicant and the respondent in respect of any goods shall be subject to the credit terms”. Clause 3.2 provides that should the respondent fail to pay an invoice within 30 days, it forfeits its right to credit facilities and all amounts outstanding to its account shall become immediately due and payable.
5. Clause 3.16 of the Credit Terms provides that “the respondent is not entitled to sell or dispose of any goods unpaid for without the prior written consent of the applicant. The respondent shall not allow the goods to become encumbered in any manner prior to the full payment thereof and shall advise third parties of the applicant's rights in the goods”. In terms of clause 7.1 ownership in the goods shall not pass to the respondent until they have been paid for in full.
6. Pursuant to said agreement, the applicant has since December 2019, delivered consignment stock comprising raw chemicals utilised in the industrial process of producing a two-part polyurethane system to apply LDV linings used in the automotive market, to the respondent which took possession in its warehouse facility situated in its business premises. The consignment stock has been kept separate from any of the other goods of the respondent.
7. On 2 December 2019 the parties concluded a Consignment Stock Agreement during the currency of the relationship and in the pursuit of what the applicant terms “finding a pragmatic and efficacious means of overcoming various logistical impediments” such as (i) avoiding delays associated with the procurement of stock; (ii) the cost of warehousing; and (iii) the incurrence of double transportation

costs to name but a few. On the applicant's version, the Consignment Agreement provided numerous practical advantages to the parties. It facilitated an ability to deliver consignment stock into the possession of the respondent directly such that as and when the respondent made a purchase or drawdown, and was invoiced by the applicant, the respondent would have instant access to stock and would be entitled to physically take such stock into its possession.

8. On the applicant's version, since the commencement of the relationship between the parties in 2015 and its subsequent extension through the Consignment Agreement in 2019, all consignment stock was delivered into the possession and control of the respondent on the basis that ownership of that stock remained vested in the applicant until the respondent made payment in full in respect of such stock. The applicant asserts that ownership in the consignment stock it delivered to the respondent's warehouse as well as stock drawn and purchased by the respondent, has throughout the relationship between the parties remained vested in the applicant until such stock is paid for by the respondent. The applicant alleges that despite the 30-day provisions of the credit facility extended to the respondent in 2015, the latter has, at least since November 2021, defaulted in respect of its payment obligations.
9. As at 17 March 2022 the respondent was indebted to the applicant in an amount of R 17 650 257.50, of which an amount of R 8 946 310.00 has been outstanding for a period in excess of thirty days. Stock to the value of R19 873 800.00 remains in the respondent's possession, being over and above the respondent's already outstanding account of R17 650 257.50. The respondent has contested its breaches and the applicant's entitlement to cancel the agreements between the parties. The dispute in this regard is the subject of the relief sought in the intended litigation process.
10. As to the question of urgency, according to the applicant, whereas the parties have since the commencement of their relationship in 2015, and the expansion of that relationship in 2019, conducted their business on the basis that ownership in and to all of the consignment stock in the possession of the respondent at its warehouse facility remains vested in the applicant, as does the stock purchased and drawn down by the respondent. But the respondent has in its recent communications dated 22 March 2022 (and later on 25 March 2022) contended

that it has become the owner of the consignment stock in its warehouse on the basis of clause 1.3 of the Consignment Agreement which according to the respondent, accords unto it the ownership of all of the consignment stock and that it can do with it as it deems appropriate. This sparked the urgent application. This was after the applicant indicated its desire to uplift the stock as the respondent had alleged that the stock had expired as per the written correspondence dated 17 March 2022.

11. Clause 1.3 of the Consignment Agreement reads as follows:

“1.3 The (Debtor) shall store the Goods in a suitable building at its premises, in accordance with acceptable storage conditions, taking physical property of the product types into account and applying the diligence of a prudent businessman. (Debtor) shall always draw the Goods stored by the earliest date (first in first out method). Any Goods not drawn by the (debtor) within 2(two) months following the delivery date of the Goods to the consignment stock area, shall be deemed to be drawn and purchased by (debtor) at the end of the 2(two) month period and shall be invoiced by the Supplier to the (debtor)”.

12. The question of ownership, as the applicant stressed, need not be determined at this stage, but falls for determination in the next phase of the litigation process. The applicant contends that its prima facie right is established by the existence of the Credit Terms which were at all relevant times extant and regulated the relationship between the applicant and the respondent.

13. In opposing this matter, the respondent points out that the stock that forms the subject matter of the application was delivered to the respondent's premises during September to December 2021. Discussions regarding payment, use of the stock and invoicing had been ongoing since then. The stock is securely stored at its premises and used in the normal course of the respondent's business for the manufacturing of spray-on polyurethane elastomers used for bakkie linings in the automotive industry. The stock is comprehensively insured by the respondent against theft and damage. The respondent contends that the applicant has an adequate alternative remedy and there is no suggestion in the founding papers that the respondent will not be in a financial position to make payment for the stock.

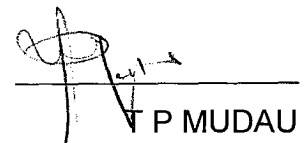
14. The parties intended to vary the terms of the Credit Application to suit their needs and therefore concluded the Consignment Stock Agreement in 2019 to meet the

respondent's need to have higher volumes of stock available and on order, on a continuous basis. The respondent contends that the Consignment Stock Agreement, on a proper interpretation, superseded the Credit Application and the terms thereof and the former agreement takes precedent.

15. In terms of the deeming provisions of the Consignment Stock Agreement, according to the respondent, ownership of the stock passed to it no later than 2 months after date of delivery of the stock. Ownership of the stock as a result vests in it. The respondent disputes that the terms of the Credit Application are incorporated in the Consignment Stock Agreement and contends any assertion to the contrary is entirely misplaced and untenable in law.
16. The respondent contends further that it tendered to provide the applicant with security for its claim in relation to the stock purchased. This tender was repeated in paragraph 6 of the letter dated the 25 March 2022. The respondent contends that the applicant has failed to prima facie establish that it has a right in relation thereto, not even a prima facie right open to some doubt. The respondent contends that the applicant has an adequate alternative remedy in that the latter has a contractual remedy to claim payment for the stock purchased, which is more than an adequate and effective means to recover any monies that may be due to the applicant.
17. In reply, the applicant points out that the catalyst to the urgent application as pointed out, is the fact that the respondent with effect from 22 March 2022 accorded unto itself an entitlement to usurp the ownership and all attendant rights of the applicant's stock warehoused at the respondent's premises and to treat that stock as its own. It is concerned that once the stock is used by the respondent or any other third person or franchisees, its rights of ownership are, through the industrial processes described by the respondent's deponent, destroyed and supplanted by rights of recourse in a debtor and creditor relationship.
18. Whereas the respondent contends that the contractual relationship between the parties is exclusively regulated by the Consignment Agreement with no Credit Terms, in its version, it accepts that it enjoyed credit after the Consignment Agreement was concluded. As the applicant pointed out, on 4 and 14 March 2022 respectively, the respondent placed orders with the applicant for chemicals from

the warehoused stock. In so doing, the respondent ordered part of that stock and did so contrary to the position which it expressed in the communication of 22 March 2022 referred to above.

19. The existence of a prima facie right, even if open to some doubt, is established in *casu*. The Credit Terms provide that the applicant remains the owner of all stock until paid for in full. It is clear from a reading of the Credit Terms and Consignment Agreement, as well as the conduct of the parties thereafter, that the two agreements, prima facie, operated in conjunction with one another and that the Credit Terms continued to remain applicable and enforceable.
20. It is common cause that the respondent's use of the raw chemicals destroys the chemicals in question and converts them into another completed product. Consequently, the use by the respondent of the chemicals in this fashion holds the result of causing the applicant irreparable harm. The substance of the rights to be preserved in this instance, is the protection of the stock. I am persuaded that there exists no substitute remedy for the preservation of the raw chemicals and the prevention of their destruction through their conversion into another end-product if ownership and shelf life span remains in issue.
21. As for the balance of convenience, I am also persuaded by the contention that no one is entitled to do business by using the property, in this case stock, which belongs to another and in respect of which the respondent has not ordered or acquired. At the very least, ownership remains in dispute. Given the circumstances, I reached the conclusion that the balance of convenience in this instance favours the applicant. These constitute my reasons for the Court order.

A handwritten signature in black ink, appearing to read 'T P MUDAU', is written over a horizontal line.

[Judge of the High Court]

Date of Hearing: 12 April 2022

Date of Judgment (Reasons): 4 May 2022

APPEARANCES

For the Applicant: Adv. N Konstantinides SC and Adv. F Sangoni

Instructed by: Marlherbe Riggs and Ranwell Attorneys

For the Respondent: Adv. B H Swart SC and Adv. M T Shepherd

Instructed by: Bento Incorporated