

IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

CASE NUMBER: 60315/2015

MPHAHLELE, J:	
PHILLIP JACOBS	SECOND RESPONDENT
PC BOUERS CC	FIRST RESPONDENT
and	
PC UDINGO JOINT VENTURE (PTY) LTD	APPLICANT
In the matter between:	
OF INTEREST TO OTHERS MADGES: YES/NO REVISED DATE SIGNATURE	10/6/2016

- [1] The applicant seeks an order declaring him to be the owner of certain movable assets listed in the schedule attached to its notice of motion. It further seeks an order directing the respondents to deliver the assets to the applicant forthwith.
- [2] On 05 August 2015 Mavundla J granted an order directing the respondents to forthwith hand to the deputy sheriff the assets in question. According to the applicant, the purpose for obtaining the interim order was to take possession of the assets and retain such assets in safekeeping until such time this application could be determined.
- [3] Notwithstanding the court order, the respondents failed to deliver the assets in question to the sheriff and the first respondent has apparently continued to use same.

Applicant's version

- [4] In 2008 Mr. Kutloano Leballo of Udingo Construction (Pty) Ltd ("Udingo") and the second respondent, a representative of the first respondent entered into a joint agreement to pursue construction business opportunities. As a result of which the applicant was formed. The shareholders of the applicant were the second respondent (holding 45% of the shareholding), Ms. Fadia Marco (with 10%) and Mr. Leballo (with 45%) until 08 January 2015. The remaining directors are currently Ms. Marco and Mr. Leballo.
- [5] The assets of the first respondent and Udingo were thereafter transferred to the applicant. Although the first respondent and Udingo continued to exist, neither entity owned any assets subsequent to the registration of the applicant. The applicant insured all the assets in question with the Brokerage (Pty) Ltd (Mutual & Federal).

- [6] Notwithstanding the formation of the applicant, certain contracts were concluded in the name of the first respondent which was used solely as a conduit. All work performed in terms of such contracts were performed by the applicant using its resources. The client would then pay the contract price or any interim payments into the first respondent's account after which the applicant would issue an invoice for the full contract amount to the first respondent, who would in turn transfer the full contract price or any interim payments into the applicant's account. The first respondent was used in name only.
- [7] The applicant performed various projects either directly or using the first respondent as a conduit. Virtually all the work performed by the first respondent as a conduit is now complete.
- [8] On 18 September 2014 the second respondent indicated that he would be resigning from the applicant citing the applicant's financial constraints as his reasons therefor. Thereafter the second respondent failed to account for the moneys received by the first respondent for work performed by the applicant. Subsequently on 02 February 2015, at a meeting of the board of directors of the applicant, the second respondent was removed as a director of the applicant.
- [9] The work now being performed by the first respondent in its own name is for its own account. The first respondent is using the applicant's resources for this purpose. The applicant is the owner of the assets. In the circumstances where the assets are financed, the applicant is the credit receiver and the person entitled to possession thereof. The second respondent is only in possession of the assets as it was using same for and on behalf of the applicant in the mentioned various building projects. As the second respondent is no longer involved in the business of the applicant, he is no longer entitled to use the assets for his own benefit or that of the first respondent. The respondents have no contractual or other right to use or possess the assets.

[10] The assets forming part of the subject matter of this application were always in the possession of the applicant and were used by the applicant to conduct its business.

Respondents' version

- [11] The respondents deny that the assets in question belong to the applicant. The respondents maintain that they acquired the right to use the assets in question at the commencement of the joint venture. The respondents contend that at the inception of the applicant, it was agreed as follows:
 - 1. That the assets in question would be the assets of the first respondent;
 - 2. That the applicant will continue paying the expenses associated to the bank installments:
 - 3. That the applicant will ensure that all right, title and interest to the assets in question will vest in the first respondent; and
 - 4. That the first respondent would carry out certain contracts in its own name and pay over funds to the applicant.
- [12] The respondents admit that the assets in question are currently in the possession of the first respondent. The first respondent had its own substantial assets before the formation of the joint venture. The respondents concede that the first respondent was used as a conduit by the applicant to secure business with various state organs. The second respondent contends he intends in the future to carry on business in the name of the first respondent as he has no further work with the applicant.
- [13] The respondents submit that there is a dispute of fact in relation to the ownership of the assets in question and therefore the application should be dismissed, alternatively, be referred for oral evidence or for trial.

Analysis

[14] This court has to identify the facts of the alleged ownership of the assets in question on the basis of which the legal disputes are to be decided. The courts have stated that an applicant who seeks final relief on notice of motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such to raise a real, genuine or *bona fide* dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers [See *Plascon-Evans Paints Ltd v Van Riebeeck Paints* (*Pty*) *Ltd* 1984 (3) SA 623 (A) at 634E – 635C]. This principle is analysed further in the matter of *Wightman t'a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) at paragraph 13 whereat Heher JA stated:

'A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.'

- [15] In an affidavit filed in its application for the winding up of the applicant, the second respondent stated that the plant and machinery belonging to the applicant is available at its various construction points busy with construction activity and that he is not using any of those assets to enrich himself. He denied that the businesses of Udingo and the first respondent were ever merged into one entity, instead the two companies agreed to participate in the joint venture, namely the applicant. He further denied that the assets of the first respondent were ever transferred to the applicant but, in fact the first respondent let its plant / equipment / vehicles to the applicant.
- [16] By his own admission, the plant and machinery used in the construction activity belonged to the applicant. These averments are further not consistent with the terms of the oral agreement purportedly entered into between the second respondent and Mr. Leballo at the inception of the applicant. Needless to say, respondents failed to plead in detail the terms of the purported oral agreement.
- [17] The respondents contend that it was agreed that the assets in question would be the assets of the first respondent. The assets in question were acquired and registered in the name of the applicant after the registration of the applicant.
- [18] It is further alleged that in terms of the oral agreement that the applicant will continue paying the expenses associated to the bank installments. Notably the assets in question which were funded through instalment sale transactions with financial institutions were concluded well after the formation of the applicant. The respondent failed to deal with these issues in its submissions, more importantly, to explain how the parties could have entered into such an agreement prior to the acquisition of the assets. The assets were even registered in the name of the applicant after the date of formation of the applicant which is clearly not in sync with the purported agreement. It is incomprehensible for the applicant to have undertaken to give ownership of assets not yet acquired to the first respondent, and undertake to continue making payments towards installment sale contracts not yet concluded.

[19] In the circumstances, I am of the considered view that the disputes raised by the respondents do not amount to real, genuine or bona fide disputes of fact.

[20] From the evidence before me, which is either undisputed or not the subject of a real, genuine or *bona fide* challenge, the applicant is the owner of the assets in question. Further, the said assets were acquired and registered in the name of the applicant after its inception.

[21] In the result, I hereby make the draft order annexed hereto, marked X an order of court.

SS MPHAHLELE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Counsel for Applicant:

Adv. A.G South SC

Instructed by:

Adams & Adams Attorneys

Counsel for Respondent:

Mr. Z. Omar

Instructed by:

Zehir Omar Attorneys, Johannesburg

c/o Friedland Hart Solomon Nicolson Attorneys,

Pretoria

Date heard:

5 May 2016

Date of judgment:

10 June 2016



IN THE HIGH COURT OF SOUTH AFRICA

[GAUTENG DIVISION, PRETORIA]

BEFORE THE HONOURABLE MPHAHLELE J ON 5 MAY 2016

CASE NUMBER: 60318/2015

IN THE MATTER BETWEEN:-

PC UDINGO JOINT VENTURE (PTY) LTD [Registration No. 2008/028743/07]

Applicant

AND

PC BOUERS CC [Registration No. 1991/031650/23]

First Respondent

JACOBS, PHILLIP

Second Respondent

DRAFT ORDER

HAVING heard counsel for the parties and having read the papers filed, it is ordered that:

- 1. The Applicant is declared to be the owner of the movable assets listed in the schedule which is attached hereto marked "X1" ("the assets");
- The Respondents are to deliver the assets to the Applicant forthwith;
- 3. In the event of the Respondents not complying with paragraph 2 above, the Sheriff and/or his Deputy is authorised and ordered to

take possession of the assets and deliver same to the Applicant;

4. The Respondents pay the costs of the application jointly and severally, the one paying the other to be absolved.

BY ORDER

REGISTRAR

08/06/2015 PCU CONSTRUCTION ASSETS IN THE POSSESSION OF PHILLIP JACOBS

No.	Description	Δth	Reg No.	Official Ownership	Current Value
1	Isuzu 1 Ton Bakkie	1	1 CD01GW-GP	Wesbank	R 120 000.00
2	2 TLB	1	1 YLZ428-GP	Wesbank	R 400 000.00
3	3 Scaffolding	120 m2		PCU Construction	R 700 000.00
4	4 Containers	5		PCU Construction	R 100 000.00
5	5 9.5 ton Hiab Crane Truck	1	1 CX66XF-GP	PCU Construction	R 600 000.00
9	6 10 ton Nissan truck	1	CD34BB-GP	PCU Construction	R 400 000.00
7	7 Toyota Water Tanker	1	BYS9VX-GP	PCU Construction	R 100 000.00
8	8 5000 litre tanks	4		PCU Construction	R 60 000.00
6	9 Bornag	2		PCU Construction	R 140 000.00
10	10 Toyota Fortuner	1	CG31MV-GP	Wesbank	R 350 000.00
11	11 Toyota Hilux	1	1 BH70WR-GP	PC Bouers CC	R 200 000.00
12	12 High Pressure washer	1		PCU Construction	R 20 000.00
13	13 Concrete Mixer	2		PCU Construction	R 50 000.00
14	14 Hyundai 1 Tonner	1	XYT391GP	PC Bouers	R 80 000.00
15	15 Generators	2		PCU Construction	R 30 000.00
				Total	R 3 350 000.00