



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)
REPUBLIC OF SOUTH AFRICA

CASE NO: 24054/2022

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES
DATE: 17 MAY 2022
SIGNATURE: *N. JANSE VAN NIEUWENHUIZEN*

In the matter between:

GUARDRISK INSURANCE COMPANY LIMITED

Applicant

and

GD IRONS CONSTRUCTION (PTY) LTD

First Respondent

(in business rescue)

ETIENNE JACQUES NAUDE N.O

Second Respondent

DEVCO AUCTIONEERS AND SALES (PTY) LTD

Third Respondent

WIEHAN FORMWORKS SALES AND HIRE (PTY) LTD

Fourth Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J:

1. This is an urgent applicant in terms of which the applicant claims the following relief:
 - “2. *The First and Second Respondents are ordered to immediately restore the Applicant's unrestricted access to the Property known as 843 De Villebois Mareuil Drive, Pretoria and to refrain from spoliating, disposing, or otherwise interfering, with the Applicant's access to the Property.*
 3. *The First and Second Respondents are ordered to immediately restore the Applicant's possession of all of the moveable assets belonging to the First Respondent at:*
 - 3.1. *843 De Villebois Mareuil Drive Pretoria; and/or*
 - 3.2 *corner Dr Mandela Drive and Sondagsrivier St, Middelburg; and/or*
 - 3.3 *Any other address within the Republic where the First and Second Respondent may have subsequently moved the assets of the First Applicant.*
 - and to refrain from spoliating, dispossessing, or otherwise interfering, with the Applicant's possession of any assets belonging to the First Respondent.*
 4. *The First and Second Respondents are further interdicted and restrained from removing any assets from 843 De Villebois Mareuil Drive, Pretoria.*

5. *The First and Second Respondents are ordered to return the assets that were unlawfully removed to the Property.* ("The main application")
2. The first and second respondents oppose the application and also filed a counter application, which application will be dealt with more fully *infra*.

Parties

3. The applicant, Guardrisk Insurance Company Limited ("Guardrisk"), is a registered short-term insurance company.
4. The first respondent, GD Irons Construction (Pty) Ltd ("GDI") is a construction company that was placed in business rescue on 25 April 2022.
5. The second respondent, Etienne Jacques Naude N.O. ("the BRP") is cited in his capacity as the duly appointed Business Rescue Practitioner of the first respondent.
6. The third respondent is Devco Auctioneers and Sales (Pty) Ltd ("Devco"), an auctioneering company.
7. The fourth respondent is Wiehahn Formworks Sales and Hire (Pty) Ltd, a company that sell and rent construction equipment.

Background

8. The facts underlying both the main application and the counter-application are mainly common cause between the parties.

9. GDI, one of the largest construction companies in Gauteng, encountered financial difficulties when its construction work in respect of a shopping centre, The Villa Mall in Pretoria, Gauteng was brought to a standstill by the collapse of Sharemax Investments.
10. Although services were rendered in the amount of R 249 444 435.45, GDI was never paid for the work it had done at The Villa Mall.
11. During these troubling times, Guardrisk advanced money to GDI in order to fund GDI's various construction projects and also furnished construction guarantees for the fulfilment of GDI's obligations in terms of construction agreements.
12. As security for the amounts owed by GDI to Guardrisk, Guardrisk on 20 July 2017, caused a special and general notarial bond for the capital sum of R 1 00 000 000, 00 to be registered over the assets of GDI. The special notarial bond was registered over the assets described in an annexure to the bond, whereas the general notarial bond was registered over all assets wheresoever situated.
13. GDI's financial difficulties did, sadly, not improve and on 23 February 2022 GDI signed an Acknowledgement of Debt and Handover Agreement ("the AOD"), in terms of which GDI acknowledged:
 - 13.1 that it is indebted to Guardrisk in the amount of R 28 700 000, 00;
 - 13.2 its obligation to repay Guardrisk;
 - 13.3 its inability to repay the amount;

- 13.4 that Guardrisk is entitled to sell the movable assets of GDI in order to recover the amount due;
 - 13.5 that Guardrisk may take possession of all the moveable assets and may make an inventory of all the assets that were encumbered in terms of the notarial bond;
 - 13.6 that Guardrisk may place such markings on the assets concerned indicating that the assets stand as security for the debt and also showing that the assets are held by Guardrisk;
 - 13.7 that Guardrisk may arrange for the sale of the assets by private treaty or auction;
 - 13.8 that Guardrisk may collect the proceeds of the sale as set-off against the amount owed by GDI to Guardrisk; and
 - 13.9 that GDI will, at its own costs, provide a storage facility demarcated for the exclusive use of Guardrisk where the assets shall be stored until sold.
14. The assets in question were stored at The Villa Mall ("the property"). On 22 March 2022, Guardrisk appointed and instructed Devco to attend to the auctioning of the assets.
15. The auction was held from 19 to 21 April 2022 and various assets were sold to *inter alia* Wiehahn and 52 other purchasers.

16. As stated *supra* GDI was placed in business rescue on 25 April 2022 and on the same date the BRP distributed a letter stating that the assets sold at the auction will not be delivered to any potential buyers.
17. Notwithstanding protestations from Guardrisk, the BRP prevented Guardrisk access to the property and as a result deprived Guardrisk of its possession of the assets.
18. On 28 April 2022 Guardrisk addressed a letter to GDI and the BRP, in terms of which they were informed that their actions unlawfully deprive Guardrisk of its peaceful and undisturbed possession of the assets. The letter, furthermore, demanded the immediate reinstatement of Guardrisk's possession and sought an undertaking that GDI and the BRP would return any assets that were removed and will refrain from disposing or alienating any of GDI's assets.
19. On the same date the BRP removed certain of the assets that formed part of the AOD to a construction site of GDI in Middelburg, Mpumalanga.
20. The aforesaid actions of GDI and the BPR prompted the present application.

The Main Application

21. Although Guardrisk claimed relief based on the *mandament of spolie* together with interlocutory relief, it transpired during the hearing of the application that Guardrisk only persists with the *mandament* relief.
22. It is clear from the papers that Guardrisk is entitled to the *mandament of spolie* relief. Furthermore, and during the hearing of the matter on Friday, 13 June 2022,

I was informed by Mr du Plessis SC, counsel for GDI and the BRP, that the assets that were removed are, on his advice, in the process of being returned to the property.

23. Costs must follow the cause.

Counter- Application

24. The counter-application brought by GDI and the BRP proved to be somewhat more problematic. Initially GDI and the BRP only claimed relief against Guardrisk in the counter-application.

25. On 10 May 2022, the day prior to the hearing of the application, GDI and the BRP amended the relief claimed in the counter-application to include relief against Devco and Wiehahn. The following relief is claimed in terms of the amended counter-application:

- “2. That the Applicant as well as the Third and Fourth Respondents, be ordered to return to the First and Second Respondents all movable assets that were subject to the auction held by the Third Respondent, and have been removed by Applicant and/or Third Respondent and/or Fourth Respondent, immediately.*
- 3. That the Applicant, Third and Fourth Respondents be prohibited from removing or taking into possession any of the movable assets that were subject to the aforesaid auction, and that belong to the First Respondent, pending the finalisation of the business rescue proceedings.*

4. *That the First and Second Respondents be prohibited from selling and/or disposing of any of the movable assets that were subject to the aforesaid auction pending the business rescue proceedings."*

26. In order to place the relief claimed against Devco and Wiehahn in perspective, it is apposite to refer to the litigation history between the parties.

27. On or about 30 April 2022 Devco and Wiehahn launched an urgent application under case number 23467/2022, in which the BRP, GDI and Guardrisk were cited as respondents. In setting out the terms of the order that was granted on 30 April 2022 by Kubushi J and for ease of reference I will refer to the parties in the order, as they are cited herein. The relevant portion of the order reads as follows:

"1. *GDI and the BPR and any person acting on their behalf or at their behest are interdicted and restrained from removing any of the movable property listed in the invoice attached hereto as annexure "A" and situated at:*

.....

2. *GDI and the BPR and any person acting on their behalf or at their behest are interdicted and restrained from interfering with and/or obstructing Devco and Wiehahn from accessing the properties in an attempt to collect the movable property as is listed in annexure "A" hereto.*

3.

4. *Prayers 1 to 3 operate as an interim interdict with return date on 19 July 2022, on which day GDI / the BRP / Guardrisk or any person so opposing can show cause as to why a final order should not be made."*
28. The order was granted in the absence of GDI and the BRP. In the result, GDI and the BRP brought an application for reconsideration and for the anticipation of the rule *nisi*. The application was heard by Kubushi J on 5 May 2022 and judgment was handed down on 10 May 2022. Both the application for reconsideration and the application for the anticipation of the rule *nisi* were dismissed.
29. On the same day, GDI and the BRP filed a notice for leave to appeal the judgment.

Counter-application: Guardrisk

30. In support of the relief claimed against Guardrisk, GDI and the BPR rely on certain sections of the Companies Act, Nr 71 of 2008 ("the Act")
31. They maintain that, in terms of section 133(1) of the Act, a moratorium is applicable, in terms of which no legal proceedings or enforcement processes by any creditors may be made or continued with against the company in business rescue. With reference to the AOD entered into between the parties, GDI and the BRP submit that the agreement and subsequent auction constitute "*enforcement action*" as envisaged in section 133(1) and may not be continued with. On 25 April 2022 transfer of ownership of the assets sold at the auction had not been effected and consequently GDI is still the owner of the assets.

32. Insofar as Guardrisk is entitled to possession of the assets in terms of the AOD, the BRP gave notice on 3 May 2022, in terms of section 136(2) of the Act, of the suspension of the AOD. As a result, any right Guardrisk had to possess the assets of GDI fell away and the assets must be returned to GDI.
33. In opposition of the relief claimed against Guardrisk, Mr van der Merwe, counsel for Guardrisk, raised *in limine* the point that a counter-application may not be brought in *mandament* proceedings.
34. The authority *Willowvale Estates CC and Another v Bryanmore Estates Ltd* 1990 (3) SA 954 W relied upon by Mr van der Merwe in support of the aforesaid contention, unequivocally confirms the principle that Courts will not countenance a counter-application by the despoiler for a *declarator* that the person despoiled had no right to the possession of the property in question (*spoliatus ante omnia restituendus est*).
35. There is, however, an exception to the rule. In an instance where the despoiler claims more than spoliatory relief, the defences of a respondent will be entertained, which in turn, leads to the logical conclusion that a counter-application may also be brought. [See: *Minister of Agriculture Development and Others v Segopolo and Others* 1992 (3) SA 967 T]
36. The only condition is that the despoiler must persist with the further relief during the hearing of the matter. In *casu*, Guardrisk did claim interlocutory relief, but as alluded to *supra* did not persist with the relief.

37. Mr du Plessis agreed with the aforesaid principle and indicated that GDI and the BRP will not persist with the relief claimed in the counter-claim. Mr du Plessis, however, submitted that a case has been made out on the papers for an interim interdict to preserve the assets until further proceedings to determine the ownership of the assets are finalised.
38. I am mindful of the urgent need to reclaim the assets in order for GDI to fulfil its obligations in the Middelburg project. Without being able to utilise the equipment presently in the possession of Guardrisk, the success of the business rescue proceedings is placed in jeopardy to the prejudice of the economic well-being of the construction industry as a whole and more importantly to the livelihoods of the employees of GDI.
39. The principle that a despoiled party must be placed in the undisturbed possession of the despoiled goods, however, militate in my view against the granting of any relief at this stage, albeit mere interim relief.
40. GDI and the BRP are at liberty to assert their rights to the assets with the requisite urgency, if so advised.
41. No relief can therefore be granted at this stage that limits Guardrisk's undisturbed possession of the assets. The costs of the counter-application had, however, been incurred as a result of the fact that Guardrisk initially also claimed interlocutory relief. GDI and the BRP were as a result, within their rights to launch the counter-application.

42. It was only during the hearing of the matter that Guardrisk relinquished the interlocutory relief.
43. Consequently, I am of the view that each party should pay its own costs.

Counter-claim: Devco and Wiehahn

44. Mr du Preez SC, counsel for Devco and Wiehahn, submitted that GDI and the BRP seek final relief against Devco and Wiehahn. GDI and the BRP have, however and according to Mr du Preez, failed to prove the requirements for a final interdict.
45. In respect of the requirement of a clear right, Devco and Wiehahn maintain that the application for leave to appeal is only directed at the reconsideration and anticipation of the rule *nisi* order of 10 May 2022 and not the 30 April 2022 order.
46. The relevant portion of the application reads as follows:

***“PLEASE TAKE NOTICE** that the First and Second Applicants to this application intends toapply for leave to appeal..., against the whole of the order and judgment of the Honourable Madam Justice Kubushi, J dated, the 10th of May 2022, under the abovementioned case number.*

***PLEASE FURTHER TAKE NOTE THAT** this application for leave to appeal is filed as a result of the final effect that the judgment by the Honourable Madam Justice Kubushi, J has in respect of the movable assets referred to in the court order dated, 30 April 2022.”*

47. I agree with Mr du Preez that the application is not a picture of clarity. The affidavit filed in support of the amended counter-claim does, however, make it clear that the relief is directed at both the 10 May 2022 and 30 April 2022 orders. Mr du Plessis, furthermore, stated that the application can still be amended, insofar necessary, to clear up any uncertainty.
48. In the result, I accept that the application is also directed at the 30 April 2022 order. The question then arises whether the relief granted in the 30 April 2022 order is final in nature. Should GDI and the BRP be correct that the relief is final, the operation of the order is suspended pending the decision of the application in terms of section 18(1) of the Superior Courts Act, 10 of 2013 ("the Act"). If the relief is not final in effect, section 18(2) provides that the operation of the order is not suspended, unless exceptional circumstances for the suspension of the operation of the order are established.
49. In my view the suspension of the operation of the order in terms of section 18(1) or under exceptional circumstances in terms of section 18(2) will not assist GDI and the BRP in obtaining possession of the assets.
50. The question then arises whether GDI and the BRP had, notwithstanding the dispute in respect of the ownership of the assets pending under case number 23467/2022, established a clear right to possession of the assets.
51. I agree with Mr du Preez, that they have not.
52. Faced with the aforesaid difficulty, Mr du Plessis submitted that the facts contained in the papers before court does support the granting of an interim

interdict. Mr du Plessis presented a draft order in respect of the interim relief prayed for by GDI and the BRP and I will only refer to the portion of the draft order that pertains to Devco and Wiehahn. The draft order reads as follows:

"1. *That third and fourth respondents, be ordered to return to first and second respondents all movable assets that were subject to the auction held by third respondent, and which were removed by third and/or fourth respondents, with immediate effect.*

2.

3. *That first and second respondents shall be prohibited from selling or disposal of any of the movable assets that were subject to the aforesaid action, that may be in its possession.*

4. *That paragraphs 1 and 3 above shall be of force and effect pending the finalization of all the appeal procedures by the first and second respondents against the orders of Kubushi J dated 30 April 2022 and 10 May 2022."*

5.

6. ..."

53. The *prima facie* right pertains to GDI and the BRP's contention that section 133(1) of the Companies Act suspends the enforcement proceedings which led to the sale of the assets to Wiehahn. Devco and Wiehahn submitted that the contention cannot stand for the following reasons:

53.1 the provisions of section 133 find application during business rescue proceedings;

53.2 the effective date of the business rescue proceedings is 25 April 2022;

53.3 at the commencement of the business rescue proceedings on 25 April 2022, the assets did not form part of GDI's estate, as:

53.1.1 the assets were already transferred to Guardrisk on 22 February 2022, a date that precedes the effective date, and

53.1.2 the auction was already completed on 21 April 2022, a date that precedes the effective date.

54. As alluded to *supra*, GDI and the BRP maintains that ownership had not passed on the date of the business rescue proceedings because Wiehahn had not taken possession of the assets, which is a requirement for the transfer of ownership in movable assets.

55. The aforesaid contention establishes, in my view, at least a *prima facie* right to possession of the assets.

56. Insofar as a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted, I accept that possession of the assets is vital to GDI's ability to execute the Middelburg project. In order to have a prospect of success in the business rescue proceedings, GDI needs immediate possession of the assets. Should the assets only be returned

to its possession when final relief is eventually granted, it would be too late to rescue the business.

57. The balance of convenience entails the weighing up of the prejudice GDI will suffer if the interim interdict is refused against the prejudice Wiehahn will suffer if the interim relief is granted. I have already referred to the prejudice GDI will suffer if the interim relief is not granted. Wiehahn will, however, suffer similar prejudice in that GDI will be utilising the assets purchased by Wiehahn at the auction which on all probabilities, will diminish the value of the assets through normal wear and tear.
58. In the result, GDI and the BRP has not satisfied all the requirements for interim relief and the counter-claim against Devco and Wiehahn stands to be dismissed.

ORDER

In the result, the following order is granted.

1. The First and Second Respondents are ordered to immediately restore the Applicant's unrestricted access to the property known as 843 De Villebois Mareuil Drive, Pretoria.
2. The First and Second Respondents are ordered to immediately restore the Applicant's possession of the moveable assets that were removed by the first and second respondents from the premises at 843 De Villebois Mareuil Drive, Pretoria.
3. The first respondent is ordered to pay the costs of the application.

4. The counter-application is dismissed.
5. The first respondent is ordered to pay the third and fourth respondents' costs in the counter-application.

A handwritten signature in black ink, appearing to read 'N. Janse van Nieuwenhuizen', is written over a horizontal line.

N. JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE OPPOSED MOTION APPLICATION HEARD PER COVID19 DIRECTIVES:

13 May 2022

DATE DELIVERED PER COVID19 DIRECTIVES:

17 May 2022

APPEARANCES

<i>Counsel for the applicant</i>	Advocate B van der Merwe
<i>Instructed by:</i>	Moll Quibell & Associates
 <i>Counsel for the first and second respondent:</i>	 Advocate R du Plessis SC Adv M Boonzaaier
<i>Instructed by:</i>	WNA Attorneys Incorporated
 <i>Counsel for the second respondent:</i>	 Advocate BD Du Preez SC
<i>Instructed by:</i>	Barnard Inc Attorneys