IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 30921/2019

(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES/NO	
(3) REVISED. YES/NO	
……..…….....	14 FEBRUARY 2023
SIGNATURE	**DATE**

In the matter between:

USS GRAPHICS (PTY) LTD
(Registration Number: 1997/00173/07)
First Applicant

FRANTIC VISUAL COMMUNICATION (PTY) LTD
(Registration Number: 205/040258/07) Second Applicant

OMEGA ART 2000 (PTY) LTD
(Registration Number: 1991/004343/07) Third Applicant

and

URBAN PRINT FACTORY (PTY) LTD
(Registration Number: 2013/127287/07)
First Respondent

RALPH BYRON SPYKERMAN Second Respondent

SPYKERMAN INVESTMENT HOLDINGS (PTY) LTD
(Registration Number: 2005/018987/07) Third Respondent

JUDGMENT

KEIGHTLEY J:

INTRODUCTION

1. The parties in this matter are involved in the printing industry. Briefly, at issue is the ownership and return, to one or other of the applicants, of various items alleged to be in the possession of one or other of the respondents. These are: (1) a 1998 Mitsubishi 6F 5SPC 5-COLOUR OFFSET lithographic printing machine (the Mitsubishi); (2) an Iveco delivery vehicle with registration CY33466 (the Iveco); (3) a TCM Forklift vehicle (the forklift); (4) a Kaesar ASK 8,0 bar SCB Compressor with serial number 1302 (the compressor).

2. There is no opposition from the respondents to the return to the relevant applicant of the Iveco and the Forklift, save for an allegation by the respondents that the Iveco is in the possession of a third party who is exercising a lien over the vehicle. The point was not argued very strongly in the hearing before me and in my view the lien should not prevent an order against the respondents in the terms sought, namely, that they be directed to either deliver the vehicle to its undisputed owner, the second respondent, Frantic Visual Communication (Pty) Ltd (Frantic), or to take all necessary steps to retrieve it from its current possessor at the respondents' cost and deliver it to Frantic.

3. The meat of the dispute is to be found in the Mitsubishi and, by extension, the compressor. The first applicant, USS Graphics (Pty) Ltd (USS) asserts ownership of the Mitsubishi, and Omega of the compressor. However, the respondents say that they have acceded to the immovable property upon which they are situated, which property is owned by the third respondent, Spykerman Investment Holdings (Pty) Ltd (Holdings). The respondents also contend that USS has failed to establish its ownership of the Mitsubishi. I should add that the parties are agreed that the fate of the compressor follows the fate of the Mitsubishi as the two operate together.

4. In its amended Notice of Motion, USS seeks an order (in relevant part):

    4.1 Directing the relevant respondent to immediately allow USS access to the Mitsubishi, together with its authorised agents and contractor for purposes of assessing and determining the least disruptive and most cost effective method of removing the Mitsubishi from the premises at 7 Sandberg Street, Denver, Johannesburg.

    4.2 Delivery of the Mitsubishi (and compressor) to USS.

5. In return, USS tenders the reasonable costs of removal and delivery of the items, including the reasonable costs of restoring any part of the Denver premises damaged in the removal to the state prior to such removal. In the founding affidavit the applicants explain that the Mitsubishi is a large machine and that its removal may require the physical alteration to the premises. It is common cause that the Mitsubishi weighs 98 tons. USS avers that it wishes to sell the Mitsubishi to the potential purchaser but cannot do so for so long as it remains on the Denver premises.

FACTS

6. According to the deponent to the founding affidavit, Mr Burger, he has a longstanding relationship with the second respondent, Mr Spyker as, through their various entities, they were both involved in the printing industry. Mr Burger is the sole director of all of the applicants. Mr Spyker is the director of first respondent, Urban Print Factory (Pty) Ltd (Urban) and of Holdings. Mr Burger's businesses operated mostly from Cape Town and Mr Spyker's from the Denver premises. Mr Burger bought the shares in a non-trading entity owned by Mr Spyker, called Printshop Denver (Pty) Ltd (PSD). The idea was for Mr Burger to gain a foothold in Gauteng. Mr Spyker became an employee of PSD. PSD operated from the Denver premises, owned by Holdings, under a lease agreement. Holdings had installed the Mitsubishi in 2007 at the Denver premises.

7. Mr Burger avers that in December 2015 the third applicant, Omega Art 2000 (Pty) Ltd (Omega) entered into a written sale agreement with Holdings to purchase the Mitsubishi. Holdings issued a pro forma invoice to Omega in the amount of R4,8 million. It is attached to the founding affidavit. The acquisition was to be financed by Absa. However, according to Mr Burger, Absa did not consider Omega's credit history to be suitable. Accordingly, he says, it was agreed that USS would step in as purchaser of the Mitsubishi. It did so, and paid the requisite monthly instalments to Absa, which financed the acquisition of the machine. Attached to the founding affidavit is a letter from Absa, dated 16 March 2019, addressed to USS. It relates to the Mitsubishi, and expressly confirms that the account has been paid in full. The letter reserves ownership to Absa only in the event that any recent payment was returned to it unpaid. The letter ends by authorising any licensing authorities to register USS as title holder. On this basis, USS asserts ownership of the Mitsubishi.

8. The business relationship between Mr Burger and Mr Spyker, as conducted through PSD broke down in 2017 and has never been resolved. Ultimately, Mr Spyker left PSD and continued to conduct business through his entity, Urban, from the Denver premises. The applicants aver that Urban is using its equipment, being the Iveco, the forklift, the Mitsubishi and the compressor for its financial gain. They say repeated requests for the return of this equipment have been spurned. Consequently, they turned to the courts.

OWNERSHIP

9. The applicants' cause of action is the rei vindicatio. Some attempt was made by the respondents to argue that this cause of action was only introduced through the amendment to the Notice of Motion. There is no merit in this submission. It is clear from the founding affidavit that the applicants based their claims on their respective alleged ownership of the items in question, and that the relief they claimed was vindicatory in nature.

10. It is trite in our law that an owner may institute the *rei vindicatio* to recover her property from any person who retains possession of it without her consent. She must prove: (1) that she is the owner of the property; (2) that the property is in the possession of the respondent; and (3) that it is still in existence and clearly identifiable. In this case, the latter two requirements are not in dispute. The focus of the dispute lies in the question of ownership.

11. I earlier outlined the facts the applicants rely on to assert their claim to ownership of the Mitsubishi. In the answering affidavit, Mr Spyker, who deposed to the affidavit on behalf of all of the respondents, denied that USS was the owner. It is necessary to pay specific attention to the nature of this denial. From the answering affidavit it appears the primary basis for the denial of ownership is the alleged accession of the Mitsubishi to the Denver premises owned by Holdings. The respondents say that through accession, Holdings has become owner of both the Mitsubishi and the compressor. As to the sale of the Mitsubishi averred by the applicants, the respondents simply record that on the applicants' own version, the written sale agreement between Omega and Holdings came to nought. They note the absence of particulars concerning the alleged agreement. They say that: 'Whatever may have been construed by the third applicant (as) a purchase agreement is denied.' Further, that the alleged agreement is

'incompetent in law'. They also aver that the applicants derived a benefit from the instalments 'paid by it' by using the Mitsubishi. Finally, they deny that all the instalments were paid by USS and that 'significant intermittent payments were made by' Urban.

12. It is noteworthy that the only claim to ownership in the answering affidavit is in respect of Holdings, through accession. Apart from a denial about the existence of the alleged sale agreement between Holdings and Urban, the respondents offer no alternative version. Critically, they fail to address the involvement of Absa and the evidence of an agreement by that bank to finance the purchase of the Mitsubishi. No comment is made about the letter giving the go-ahead to USS to assert itself as titleholder on the basis that the bank was satisfied that all instalments had been paid.

13. The respondents submit that the applicants had failed to make out a case of ownership in its founding affidavit. According to them, the law requires an applicant to plead the primary facts relied upon with sufficient particularity and clarity for any conclusion of law upon which it relies. They say that USS has failed to allege primary facts from which the legal conclusion of a change of ownership can be reached.

14. It is trite that where a material dispute of fact exists in motion proceedings in the case of a conflict on the facts the version of the respondent will prevail. However, for this principle to apply the version of the respondent must give rise to a real, genuine and bona fide dispute of fact.[1] As explained in the frequently cited judgment in *Wightman*:[2]

> *'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. <u>When the facts averred are such that the disputing party must necessarily possess</u>*

1 *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E - 635C.
2 *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) at para 13.

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.' (My emphasis)

15. In this case USS's claim to ownership is squarely placed on an agreement between Holdings and USS. It is so that part of the history of the alleged agreement was a written contract between Holdings and Omega. However, USS does not rely on that written agreement to establish its ownership. The purpose of annexing the written agreement is to provide the necessary factual detail to support its averment that there was a subsequent agreement between Holdings and USS in terms of which USS took the place of Omega in purchasing the Mitsubishi. The obvious inference is that this was for the same price, with Absa remaining the financier. There is primary evidence in the 16 March 2019 letter from Absa that it financed USS's acquisition of the Mitsubishi and that by that date all payments had been made in full. Absent a different version, raising a bona fide dispute, this is sufficient to establish a case for ownership. It is common cause that Mr Spykerman controlled the respondent entities and that he engaged with Mr Burger. Thus, this is not a case where the disputing parties is unable to provide an answer. On the contrary, the founding affidavit called for an answer. Regrettably, there was none, or at least no answer beyond a bare denial together with ambiguous averments regarding instalments.

16. In these circumstances, the respondents' version cannot prevail. The answering affidavit did not reach the bar of establishing a bona fide, genuine and material dispute of fact regarding USS's acquisition of ownership of the Mitsubishi. Subject to what I have to say on the issue of accession, I conclude that Mitsubishi has satisfied the requirement of ownership.

ACCESSION

17. In our law of property, the principle *superficies solo cedit* applies, meaning that where a structure is permanently attached to land it accedes thereto such that the owner of the land becomes the owner of the structure. As far as movables are concerned, the question is whether the movable has acceded to the immovable, losing its independent identity and becoming an integral part of the immovable. In that case, the principle

applies and the owner of the immovable will acquire ownership of the movable through accession.

18. There are three factors relevant to the inquiry: (1) the nature of the thing; (2) the manner of its attachment; and (3) the intention of the owner of the movable at the time of its annexation. The first two factors are objective and the latter is subjectively determined.[3] However, each case is determined on its own facts.[4]

19. The intention requirement is often described as being the most important of the three. However, this is so because it is the determining element whenever the first two criteria produce and equivocal result. In fact, the requirements are interlinked and the importance of the first two requirements should not be underestimated. They point to what may be called the objective intention and if a clear inference of intention can be drawn from them, there is no need to consider evidence pointing to a contrary subjective intention.[5]

20. Many of the objective facts are common cause between the parties. Each side filed an affidavit by experts to assist their case. The respondents filed a report by an engineer, Mr Randelhoff. He averred, among other things, that:

    20.1 The machine is a large format lithographic printing press weighing 98 tons.

    20.2 It was installed in the building with the intent of running it in its present location for the duration of the life of the machine, estimated to be approximately 10 years or more.

    20.3 The owner of the building made substantive changes to the layout of the building in order to accommodate the machine in its existing position.

    20.4 Due to the weight of the machine it is not held down by bolts. The walkways on the sides of the Mitsubishi and the cabinets are free standing.

    20.5 Should the Mitsubishi be uplifted from its location a lengthy process of decommissioning and dismantling the machine will need to be undertaken, taking up to two weeks. Reassembly and recommissioning will also take between 3 weeks to two months.

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3 Badenhorst *et al* Silberberg and Schoeman's The Law of Property (4ed) p140
4 *McDonald Ltd v Radin NO and the Potchefstroom Dairies and Industries Co Ltd* 1915 AD 454 at 466
5 Badenhorst, above p141, citing, among others, *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986 (T) 998G-I and *MacDonald*, above 467.

20.6 It would be 'near impossible' to route the Mitsubishi past another press machine (the Heidelberg) standing in the location due to limited spacing. However, it appears that this could be done, although the Heidelberg would have to be shut for a period of time and possibly partially dismantled.

20.7 Mr Randelhoff expressed the opinion that:

> 'The operation of the machine however, (sic) does not have a direct impact on the building as would be anticipated from say an air conditioner or a security access control system. The machine in its operation is intrinsic to the business, but not to the functioning of the building.' (My emphasis)

21. The applicants commissioned Mr Kühl, a print and packaging consultant as their expert. He based his opinion on Mr Randelhoff's report, photographs and illustrations. He did not digress from Mr Randelhoff's views in many respects, although he pinpointed those aspects with which he did not agree. It is not necessary to discuss the details save for noting the following views expressed by Mr Kühl:

21.1 The purpose of the attachment was not to serve the building on a permanent basis because the building can continue to exist and to be profitable without the Mitsubishi remaining in its present location.

21.2 It is not unusual for structural changes to be made to buildings before installing or moving printing presses of this nature. These changes may include removing or replacing walls or windows and strengthening foundations.

21.3 Machines of this nature can be de-constructed, moved and re-built elsewhere.

> 'Even Web Offset or Newspaper presses which may occupy several floors of a building, are not considered to be permanent fixtures, but rather separate moveable entitles which can be moved and re-assembled elsewhere.'

21.4 Any good printers' engineer with experience in large format lithographic printers would be able to undertake the de-construction and moving of the Mitsubishi.

21.5 He agreed that the Heidelberg would have to be shut down and properly protected during any deconstruction and removal of the Mitsubishi, but he did not agree that there was only one route through which this could be achieved.

21.6 He concluded that:

> '…although (Mr Randelhoff's) assessment is basically correct, the Mitsubishi is not a permanent fixture and it can still be dismantled, removed and re-commissioned elsewhere. This may be costly because of building alterations required to restore the building to its former condition, but this is often

standard procedure within the printing industry for heavy and large format equipment.'

22. This is not a case in which the first two requirements unequivocally point to a definitive result. Thus, all three of the requirements should be examined. Both sides agree that the Mitsubishi is a large and heavy piece of equipment. While it is not easily capable of removal, this is possible. The building had to be altered to accommodate it and its removal will require destruction and subsequent reconstruction of at least one wall of the building. The Mitsubishi will have to be decommissioned and recommissioned in its new location. Moving it will involve heavy duty equipment, including a heavy duty crane. All of this will require substantial time and will be expensive. However, it is not impossible.

23. Here, the context of the industry in which the machine is used is important. Large format lithographic machines are by nature big, heavy and complex machines. Significantly, Mr Kühl, who is an expert in the field of printing, states that despite this, they are not treated as immovables in the industry and that moving them and restoring the buildings in which they were housed is not unknown, but is 'standard procedure' in the industry. It is also significant that although Mr Randelhoff's report supported the respondents' case he concluded that the Mitsubishi was intrinsic to the business and not to the building. This conclusion chimes with Mr Kühl's point that machines of this nature are not regarded as permanent fixtures in the printing industry.

24. The respondents submitted that it ought to be clear from Mr Randelhoff's report on the nature of the Mitsubishi and the manner and degree of its attachment that it is not a movable item and that it now forms an inextricable part of the building. This submission does not take sufficient account of the specialised nature of the machine and of the industry in which it is used. If, in the printing industry, it is not unusual that machines of this nature are decommissioned, removed and recommissioned, even if this requires structural restoration to the building in which they were previously housed, it must surely be less significant that structural restoration work will have to be undertaken after its removal. Despite the weight of the Mitsubishi and the effort that will be required to move it, in the context of this case, this does not point unequivocally to it having acceded to the building.

25. On the aspect of the subjective intention of the annexor, it is common cause that the Mitsubishi was installed in 2015. At this time, Holdings was already the owner of the building. Mr Spyker does not dispute that he was the controlling mind of Holdings at the time the machine was installed. Despite this, he gives no hint in the answering affidavit as to what Holdings' intention (through Mr Spyker) was at the time of installation. Nor does he give any explanation as to how he (on behalf of Holdings) could have signed an intended sale agreement with Omega for the Mitsubishi if Holdings had intended the machine to become permanently affixed to the building on installation. If it was the intention for the Mitsubishi to become permanently affixed, then it could not have been sold as a separate item. A purchaser would have had to acquire the whole building if it wanted to acquire the Mistubishi.

26. Indeed, once it is found, as I have done, that USS established that it acquired ownership by agreement with Holdings, the inevitable conclusion is that it could never have been the subjective intention of Holdings to affix the machine permanently to the Denver premises. Consequently, none of the requirements for accession point in favour of respondents' case that Holdings retains ownership of the Mitsubishi by virtue of accession.

27. Before leaving the issue of accession it is necessary to deal with a further point argued by the respondents. This is that the Mitsubishi acceded to the Denver premises by virtue of the lease agreement entered into between Holdings and Printshop Denver (Pty) Ltd, represented by Mr Burger. Clause 11.4 of the lease agreement which states that:

> 'Save for any improvement that is removed from the Premises as required by the Lessor in terms of clause 11.2, all improvements made to the Premises shall belong to the Lessor and may not be removed from the Premises at any time. The Lessee shall not, whatever the circumstances, have any claim against the Lessor for compensation for any improvement to the Premises, whether or not such improvements were made with the Lessor's prior written consent, nor shall the Lessee have a right of retention in respect of any improvements.'

28. The respondents' case is that clause 11.4 does not only apply to improvements made by the lessee, but also to those made by the lessor, Holdings. The effect of the clause

was that it reserved ownership of the Mitsubishi, which was an improvement effected by Holdings, for Holdings. I have my doubts about the correctness of the respondents' interpretation of the clause. It seems to me that read in context, the clause is directed at dealing with the situation where the lessee, and not the lessor, makes improvements to the leased premises. Be that as it may, the lease agreement was signed on 2 November 2015. The intended sale agreement with Omega, which was substituted subsequently with USS as the purchaser, was signed on 17 December 2015. Even if the respondents' interpretation of clause 11.4 is correct, there was nothing to prevent Holding, as the owner under clause 11.4, from selling the Mitsubishi to USS and divesting itself of ownership.

CONCLUSION AND ORDER

29. I conclude that the respondents' defence of accession must fail. This result follows from an application of the long-established principles, as discussed in our jurisprudence, to the particular facts of this case. It is perhaps apt also to note that this court has previously expressed the view in *Opperman v Stanley and Another*[6] that matters of this nature should, in addition, be decided with 'a liberal sprinkling of common sense, fairness and practicality'. In this case, the application of the principles align with common sense, fairness and practicality. It cannot genuinely be disputed that USS paid over R4 million to Holdings (under a finance agreement with Absa) for the Mitsubishi. Urban has continued to use the machine from 2017 until the present day. While Holdings' premises will be affected by the removal of the Mitsubishi, USS has tendered the reasonable costs of removal and restoration.

30. For these reasons, I make the following order;

1. The First and/or the Second and/or Third Respondent ("**the Respondents**") shall deliver to the Applicants the following:

    1.1. the 1998 Mitsubishi 6F 5SPC 5-COLOUR OFFSET lithographic printing machine including the rollers, the control desk, and the cabinet ("**the Mitsubishi**");

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6 Unreported decision of the North Gauteng High Court, Pretoria in Case no.19539/2008, dated 9 December 2010, per Makgoba J.

1.2. the Iveco delivery vehicle with registration number CY 33466 ("**the Iveco**");

1.3. the TCM forklift vehicle ("**the forklift**"); and

1.4. the Kaesar ASK 8,0 bar SCB compressor with serial number 1302 ("**the Kaesar**")

2. The Respondents shall deliver the aforementioned to the Applicants by:

2.1. making the Iveco and the forklift available for the Applicants' collection at the premises of the Respondents at 7 Sandberg Street, Denver, Johannesburg, Gauteng ("**the premises**") within 24 hours of this order; and

2.2. allowing the First Applicant and/or its contractor(s) access to the premises to remove the Mitsubishi and the Kaesar in the least disruptive manner possible in accordance with the following:

2.2.1. the Respondents shall forthwith allow the First Applicant and/or its contractor(s), access to the premises and the Mitsubishi and the Kaesar for purposes of assessing and determining ("**the determination**") the least disruptive and cost and time effective method of removing same from the premises;

2.2.2. within 20 days of the contractor(s) accessing the premises the First Applicant shall inform the Respondents of the contractor(s) determination;

2.2.3. within 3 days of receiving the determination the Respondents shall inform the First Applicant which consecutive period of days, per the determination, within the following 10 days, the First Applicant and its contractor(s) can remove the Mitsubishi and the Kaesar; and

2.2.4. the First Applicant will be liable to restore the premises to its state prior to removal immediately after the Mitsubishi and Kaesar are removed.

3. Should any of the Respondents fail to comply with this Court Order the Sheriff of this Court is authorised and directed to take all necessary steps on behalf of the Applicants to give effect to this order.

4. The Respondents are liable jointly and severally, the one paying the others to be absolved, to pay the Applicants' costs of this application on the scale as between attorney and client.

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R.M. KEIGHTLEY
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date for hand-down is deemed to be 14 FEBRUARY 2023

APPEARANCES

Counsel for the appellant:	ADVOCATE R WILLIS
Attorneys for the appellant:	BLIDEN CAMPBELL ATTORNEYS
Counsel for the respondents:	ADVOCATE L MORLAND
Attorneys for the respondents:	WARRENER DE AGRELA & ASSOCIATES INC
Date of hearing:	24 JANUARY 2023
Date of judgment:	14 FEBRUARY 2023