IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 015457/2024

DATE: 01-03-2024

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO.
(3) REVISED (on 11 April 2024)
DATE 1 March 2024 (*ex tempore* judgment)
SIGNATURE

10 In the matter between

CHOPPIES SUPERMARKETS (SA) (PTY) LIMITED Applicant

and

HERIOT PROPERTIES (PTY) LIMITED Respondent

EX TEMPORE JUDGMENT

Per GILBERT, AJ:

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20 The applicant seeks to vindicate racking and shelving that is situated in premises in Denver. It does so on an urgent basis. The contended for bases for the urgency is that the applicant has sold that shelving and should it be unable to vindicate the shelving it will lose the sale and its benefits.

The respondent resists the urgent application on two

primary grounds. The first primary ground is that the matter is not sufficiently urgent for it to be enrolled in the urgent court for hearing by me. The second primary ground is that although the applicant may have been the owner of the shelving, the shelving has acceded to the immovable property upon which it was erected and therefore the applicant is no longer the owner of that shelving. Of course, if there has been accession, then the applicant would no longer be the owner and it must fail in its
10 vindicatory claim.

Mr Mathiba for the respondent made persuasive submissions as to why the matter may not be sufficiently urgent for it be enrolled, both in relation to the urgency of the matter itself and self-created urgency and by way of whether the applicant will be afforded substantial redress at a hearing in due course.

On the other hand, the matter is ripe for hearing. A full set of affidavits has been delivered as have heads of argument. Full argument has been made by counsel. No prejudice is
20 contended for by the respondent should the matter be determined in the urgent court. It is so that the respondent was placed under truncated time periods to produce an answering affidavit, but it has done so. As the matter is ripe for hearing and I find myself in a position to hear the matter on its merits, it cannot be in the interest of justice

and court administration generally to now burden another court with the matter if this court is in a position to deal with it. Of course, I am not obliged as the urgent court to hear the matter simply because it is ripe for hearing as I do have a discretion not to enrol the matter on my urgent roll should I form the view that it was not sufficiently urgent to justify its enrolment. But it does not follow that if the matter is ripe for hearing but there are serious concerns as to the urgency aspect of it that I have no discretion to hear it.

10 It is in the interest of the parties themselves, including the respondent, that the matter should be determined sooner rather than later. There can be no legally cognisable prejudice to the respondent if the matter is heard sooner rather than later. If what the respondent seeks is to delay the litigation and to then benefit from that delay in litigation, that benefit can hardly constitute legally cognisable prejudice. In a perfect world, a case should be able to be heard as soon as possible. And so should a court find itself in the fortunate position that it can 20 determine the matter sooner rather than later, then it should do so, in its discretion, as a step closer to that perfect world of litigation.

I do not suggest that the respondent deliberately raises the issue of urgency to create delay for its own benefit. As I have said, Mr Mathiba has made forceful

arguments as to why the matter should perhaps not be enrolled on the urgent court roll. I therefore in no way fault the respondent for raising urgency and attribute no *mala fide* to it in standing steadfast that the matter is not urgent, and should not be enrolled. The point I wish to make is that if the matter can be dealt with expeditiously, and there is no prejudice to the respondent, then it should. The respondent should not be permitted to cry foul because that happens.

10 Mr Louw SC who appeared for the applicant with his junior Mr Desai reminded me that that requirement of urgency is actually a threshold requirement, a determination of which would then result in a decision as to whether the matter is to be enrolled in the urgent court. This is demonstrated, for example, by the appropriate order being to strike a matter from the roll if it is not urgent, rather than to dismiss it. Whether to enrol a matter on a court roll falls within the domain of a court's inherent jurisdiction in relation to the regulation or conduct of its own court, and
20 entails an exercise of discretion. And if the court finds that it will permit a matter to feature on its roll, notwithstanding serious concerns about urgency, that is a matter fully within its domain in the conduct of its own court.

As I am in a position to determine this matter and as no legally cognisable prejudice has been raised by the

respondent, I exercise my discretion in enrolling the matter on the urgent court roll. This obviously must not be taken as a license, or as a precedent, to enrol matters that are not urgent and is no way to be seen as a deviation from the long-standing practices as are often repeated as to what is required of an applicant in urgent court proceedings.

Turning then to the merits of the matter. Mr Mathiba to his credit confined his argument on the merits to the real issue in the matter, which is whether the shelving has
10 acceded to the immovable property.

I was referred to the decision of *Unimark Distributors (Pty) Limited v Erf 94 Silvertondale (Pty) Limited 1999 (2) SA 986 (T)* where three factors are identified as being relevant, namely the nature of the article, the manner of its annexation and the intention of the owner of the annexed article at the time of annexation. The judgment further points out that these factors are not independent of each other, and particularly that the first two factors are not independent of the intention aspect of the test and that the
20 intention is to be determined in the context of all relevant facts. The judgment also points out the importance of common sense or reasonableness and the prevailing standards of society as determinant factors.

It is trite that vindicatory relief is final relief and therefore the test to be applied is the well-known *Plascon-*

Evan test in relation to any factual dispute that may arise. It is in this context that Mr Mathiba for the respondent submits that there is a relevant *bona fide* factual dispute as to whether the shelving has acceded to the property and therefore the *Plascon-Evan* test is in the respondent’s favour, with the result that the application should be dismissed because of that factual dispute, alternatively, as the respondent seeks, a referral to oral evidence.

Of course, the *Plascon-Evans* test applies where
10 there are different factual versions. Should one version be capable of being rejected as farfetched and fanciful, then there would only be one version before the court and so the *Plascon-Evan* test does not come into play. It is therefore necessary to ascertain whether in this matter there is a competing factual version put up by the respondent to the applicant's factual version. This must obviously be done in the context of the requirements of accession.

As to the factor as to the intention of the owner of the annexed thing at the time of annexation, which in this
20 instance is the intention of the applicant in relation to the shelving that the respondent contends became affixed to its immovable property, I was directed to a letter written by the respondent's attorneys to the applicant on 11 December 2023. In that letter the respondent's attorneys complain at the applicant having only partially vacated the immovable

premises in that certain assets have not yet been removed, namely the shelving and racking. The respondent's attorney wished to know as a matter of urgency, in that letter, when the racking and shelving will be removed and the premises will be vacated. This is strong evidence in support of the applicant's contention that the intention was that the shelving and racking would not accede to the property. Of course, this is a letter written on behalf of the respondent and not on behalf of the applicant and the
10 intention we are looking at is that of the applicant. The applicant’s position is that its intention is that the shelving does not accede to the property. The probative, or rather the evidential, value of the letter is that at least at that stage the respondent was of the same mindset as the applicant.

Moving to the objective factors as to whether *accessio* has taken place, and bearing in mind what needs to be considered is the nature of the thing and the manner that its annexation applying common sense and reasonableness,
20 what factors are there that support a factual version that there has not been accession, and factors are there that support a factual version that there has been accession?

Photographs have been attached to the papers showing the shelving and racking. The applicant states under oath that those photographs, which are annexed to its

founding affidavit, demonstrate that the shelving and racking can be removed i.e., that there has not been accession. This is the version given by the deponent under oath for the applicant (being the sole director of the applicant) as to his interpretation of those photographs.

The respondent, on that other hand, states that the shelving and racking cannot be removed. Notably the deponent to the respondent's affidavit is the attorney, rather than some from the respondent who may have personal
10 knowledge. This does cast considerable doubt on the probative value of what the attorney says under oath to counter the factual averments made by the applicant. Indeed, what is to be made of these photographs is something that was expounded upon by the respondent counsel in his argument rather than something that appears from the respondent's affidavit.

In my view, applying common sense, these photographs, if anything, demonstrate that the shelving and racking is capable of being removed. Applying common
20 sense, it is not at all unusual for shelving of this kind to be erected on leased premises.

Lest it be said that I am going beyond the papers in making that finding, I move on to the other factors that appear from the affidavits as demonstrative of shelving and racking having not acceded to the property.

The applicant attaches to its founding affidavit a quotation to remove the shelving and racking. This constitutes evidence that it can be removed because someone is prepared to be paid to do just that. The value of the quotation or the amount of the quotation, Mr Mathiba for the respondent submits, being over R100,000, demonstrates that the goods are not removable. I do not find that the fact that it is going to cost a large sum of money to remove the good as being indicative of them not
10 being capable of being removed. Again, there is no rebutting evidence in the answering affidavit to counter the quote to remove the goods as being indicative of the goods being capable of being removed.

We also have the offer to purchase that the applicant, *inter alia*, relied upon to justify urgency. There is a purchaser who is prepared to buy for the shelving and racking once it has been removed. This is a further indication that the goods can be removed.

It is common cause between the parties that the
20 shelving and racking fell within the ambit of a covering notarial bond. This too is indicative of the shelving and racking being capable of being moved.

There are therefore multiple factors indicating that the shelving and racking is capable of being removed and has not acceded to the property. To the extent that the

respondent contends in its answering affidavit that the goods cannot be removed, this is not supported by any countervailing evidence of any probative value. As to the submission made by the respondent counsel that there is no evidence from the applicant that the goods cannot be removed without, to use the phraseology of Mr Louw SC, "violence to the building", there is also no evidence that violence will be done to the building. As it is the respondent who raises *accessio* as a defence, it would have 10 been expected of the respondent to attach or adduce evidence to support that averment.

I recognise that these are motion proceedings but nonetheless the respondent would have to do more by way of countervailing evidence in order to gainsay the factual version put forward by the applicant supported by the photographs and other contemporaneous documents to which I have referred.

I therefore am unable to find that the respondent has put up a sufficiently cogent factual version of accession that 20 would require the application of the *Plascon-Evans* test. In the absence of a countervailing factual version, the *Plascon-Evans* test does not come into play.

In the circumstances, I find that the defence of *accessio* cannot be sustained.

There is therefore no obstacle standing in the way of a

finding that the applicant is entitled to vindicate the shelving and racking.

The following order is made:

[1] the respondent is ordered to;

[1.1] allow the applicant access to the premises situated at Erf 737 Denver, Extension 1, Johannesburg, with street address at 65 Mimetes Avenue, Denver, Johannesburg ("the premises") in order to
10 remove the racking and shelving installed within the premises and to remove same within a period of 30 days from date of this order;

[2] directing the respondent to pay the costs of the application.

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20 **GILBERT, AJ**

ACTING JUDGE OF THE HIGH COURT

DATE: 1 March 2024