**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

CASE NO: 38683/2022

DATE: 2022-09-30

**(1) REPORTABLE: NO.**
**(2) OF INTEREST TO OTHER JUDGES: NO.**
**(3) REVISED.**
**DATE: 10 OCTOBER 2022**

**SIGNATURE**

In the matter between

**ACIRE PROPERTY HOLDINGS (PTY) LTD** Applicant

and

**BANZI TRADE 31 (PTY) LTD t/a BRICKIT** Respondent

**J U D G M E N T**

**DAVIS J**:

**Introduction**

[1] The applicant in this urgent application which came before the court yesterday is the landlord of the respondent who trades as Brickit. The premises is a brick-making factory situated in Chloorkop in Gauteng, to which I shall refer to as “the property”. The termination of the lease agreement, which has been operating on a month-to-month

basis since June 2020 is imminent. Brickit is in the process of relocating its five brickmaking plants situated on the property to new premises.

**The Dispute**

[2] The dispute between the parties is whether Brickit is permitted to remove all of the structures erected by it over the years on the property or not. The ownership of the structures is in dispute and forms the subject matter of a pending action in this court in case number 2022-018758.

[3] There is no dispute from the applicant's side that Brickit may remove all its machinery, moveable equipment, including all the machines and equipment referred to in valuation reports of one Alex Kiolos, dated 8 June 2018 and 13 October 2018, but excluding its annexure dated 1 February 2022. The items to be removed include gantries and silos.

[4] From the papers there is also no dispute that the curing chambers of plants 3, 4 and 5, identified as such on Annexure HC2 to the affidavit of one Henry Cockcroft, may be removed. These consist of thermal insulation panels. The racking installed inside these chambers consist of a steel structure bolted together and further bolted to the floor.

The thermal panels are interlocked and can easily be dismantled and removed, together with the internal racking.

[5] The dispute is therefore whether Brickit may dismantle, deconstruct or demolish and remove the structures that make up the remainder of plants 3, 4 and 5. These consist of two warehouse-like steel and mortar buildings per plant, i.e. six in total.

**The terms of the agreement**

[6] The relevant terms of the lease agreement are clauses 10.1 and 10.2. They read as follows:

> "*10.1 The lessee shall be entitled to erect and install and retain in the inside of the premises such said structures, fixtures, installations and equipment as the lessee may reasonably require for its business, provided that plans and specifications thereof shall first be submitted to the lessor for its approval, which are not unreasonably withheld. In particular it is stipulated that no structures or fixtures shall be erected less than 10 metres from any*

*boundary of the premises.*

*10.2 The lessee shall be entitled and obliged to remove such installations and equipment on termination of the lease, subject thereto that any damage occasioned by such removal shall be made good by the lessee on demand*."

**The Contentions of the Parties**

[7] The applicant contends that there are four types of items listed in clause 10.1. Those are structures, fixtures, installations and equipment. In respect of structures or fixtures as opposed to the remainder, these may not be erected less than 10 metres from any boundary of the premises. The applicant contends that these clearly referred to buildings and when it comes to removal of items, the applicant contends that clause 10.2 distinguishes from this list of four of items, only two items, namely equipment and installations, which may be removed. The implication of this distinction is that the remaining two items namely the structures and fixtures may not be removed. They are to remain fixed to the property and becomes the property of the landlord.

[8] Brickit, on the other hand, relies on the affidavit of Cockcroft already referred to above. He is the general manager of the Concrete Manufacturers Association of South Africa and has done extensive studies in industrial installations, as appears from his *curriculum vitae*. He has inspected the plant and he explained that plants 3, 4 and 5, representing the more modern manner of brick manufacturing, consist of installations in the form of purpose built designed enclosures to promote the capacity of manufacture of precast concrete units. He refers to these plants as “bubbles” or “symbiotic environments” in which each component thereof is interdependent on the rest, making it possible for Brickit’s business and employees to, in his words, “flourish”. Plants 3, 4 and 5 are described as advanced production units with intricate control systems and measures. The recommended designs of such plants and the functionality thereof as a complete unit is done to aid the protection afforded by the protective structures which create the essential “outer shell” of the “bubble” which he had described. Part of the “bubble” also includes the curing chambers referred to earlier, which allows for the curing process of the concrete to occur. He then referred to and described in an affidavit how this curing process involves a crystallisation process, with an exothermic reaction.

[9] Cockcroft then concludes that the structure, that is now the outside or protective shell creating the bubble surrounding the precast concrete product plants, are not mere buildings housing occupants and equipment, but they form a "*symbiosis of structure and plant operation in an essential close interdependence*". Cockcroft then explains in his affidavit that he has been advised that the short question arising from the facts is whether the outside housing or protective shell of plants 3, 4 and 5, i.e. the structures which create and sustain the bubble, form part of the land or rather form part of the plant. He then expressed an opinion which he called a "firm" opinion that the housing or protective shells form part of the three plants. So far his affidavit.

[10] It appears that Brickit interprets Cockcroft's opinion as meaning that once an outer shell or housing forms part of a plant, then it remains the property of Brickit and therefore does not form part of the land.

**Evaluation**

[11] Firstly, Cockcroft is not an expert and neither is he a lawyer and of course the question of law is for the court and not for an expert. Secondly, whatever Cockcroft might explain as to what forms part of a plant or not does *ipso*

*facto* answer the question of whether a part of a plant forms part of the land once it was constructed thereon or not. Cockcroft's conclusion is simply based on the fact that the outer shells or buildings contribute to creating bubbles or internal areas which provide for a seamless production of the concrete products until they are placed in the curing chambers for curing. There is a manifestly different method of construction and construction material utilised in the outer shells than that used in the curing chambers. The "outer shells" consist of standard concrete slabs, upright metal or iron I-bars bolted to the floor and thereafter built into overhead metal structures and covered by a roof, as well as side coverings and partial walls constructed of bricks and mortar. On the other hand, as already explained earlier, the curing chambers are something completely different and comprises of interlocking and removable isopanels for the walls and the roof coverings, as well as the bolted internal metal racking. There are fundamental differences of construction between the two, and as the valuator explained, last-mentioned can easily be removed.

[12] Although the iron uprights and roofs can notionally also be removed, their different nature must be considered. Counsel for Brickit referred to numerous case law citing English law, wherein extensive examples of decisions of what

constitutes a “plant” feature and judgments were pronounced on what may or may not in certain circumstances constitute an integral part of a lessee’s operation and whether he may therefore remove it or not. These examples range from swimming pools to the basins of dry-docks. However, despite what these English examples may indicate, the starting point will be the facts of the specific case, and in this instance in particular the terms of the agreement between the parties. The case law dealing with interpretation of such terms are, inter alia on *Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) 593 (SCA)* and the long line of subsequent cases, applying in particular paragraph 8 of that judgment, the most notable recent decision being *Minister of Finance v Afribusiness NPC 2022 (4) SA362 (CC).*

[13] Applying the principles of interpretation set out in these cases, it is apparent that there is a reasonable prospect that the applicant may be correct that the parties had, irrespective of whether the structures formed part of the “bubble” referred to by Cockcroft and required for a modern brickmaking process or not, intended to make a distinction between structures on the one hand, in respect of which ownership will vest with the landlord, whether through the application of the common law principles of *accessio* or

through contract, and equipment and machinery on the other hand, which may be removed and relocated by the tenant. This court need not finally determine that issue, particularly as it forms the subject matter of a pending action. For purposes of the interim relief sought by the applicant, is sufficient if the applicant has indicated a *prima facie* right, even if open to some doubt. I find that the applicant has established such a right.

[14] I shall now briefly deal with the remainder of the requirements for an interim interdict. The argument was made that the applicant will not receive substantial redress if the application was heard in normal course and that the applicant has a clear right to preserve that which constitutes the subject matter of a triable issue in the action. This can only be alone by preventing Brickit from demolishing the structures referred to above. The applicant contends that if the interdict is not granted the applicant will suffer irreparable harm as ownership of the disputed subject matter of the action would have been rendered moot by the removal and destruction of that over which ownership is claimed in the action. The dispute would then become largely academic. The applicant further says it will in the interim lose the benefit of a substantial improvement to its property and therefore in the meantime suffer irreparable harm. This

irreparable harm is linked of course to the issue of the balance of convenience.

[15] As the Constitutional Court has indicated, one should adopt a common-sense and practical approach to assessment of the factual issues[1]. Objectively, should these structures in question be removed, that is the upright steel structures, the roofs, the roof covering and the wall panels and should the concrete portions of the walls be reduced to rubble, then the applicant will be left for the foreseeable future, and until such time as an action may one day in due course be resolved, with an open piece of land but with cement slabs or concrete slabs thereon, without any structures. Not only will the removal thereof result in a loss of the value of the structures, but the property will conceivably be much more difficult to re-let in the interim.

[16] Brickit tried to counter this obvious consequence by arguing that the applicant can simply erect new warehouse-type structures. On the other hand Brickit says that the structures were purpose-built for it and would cost it approximately R3 million each. Even if the last mentioned assessment is correct and even if the total then thereof might be R12 million, the amount thereof largely pales in

[1] See for example *National Treasury v Outa* 2012 (6) SA 223 (CC) and *Tshwane City v Afriforum* 2016 (6) SA 279 (CC) at para 56

significance when compared to the total value of that which Brickit seeks to remove and relocate, being no less than R65 million on Kiolos's own valuation. The additional cost for Brickit to replace these purpose-built structures, in my view, compares unfavourably and is outweighed by the practical loss for the applicant. I therefore find that the applicant has indicated a sufficient reasonable apprehension of an imminent and irreparable loss and that the extent thereof, outweighs the inconvenience which Brickit might suffer, if it may not remove those structures and have to replace it.

[17] Brickit's last counter to the effect that the applicant should furnish guarantees in the amount of R138 million within a scant number of days should it wish to retain the structures, is unreasonable and constitutes a grossly overstated position. I am convinced that the exception of imposing such a security measure is not applicable in this case.

[18] I am satisfied that the applicant is entitled to the relief sought and insofar as the dispute has been narrowed as to what may or may not be removed, it is appropriate to insert in the order that which the applicant concedes may be removed by Brickit.

[19] As to the issue of costs, this is one of those cases where a court, after having heard evidence regarding ownership, and having made a finding in respect thereof, would be in a better position than this court to determine whether the applicant had an actual right which it had been entitled to protect by way of this application, urgent or otherwise, and whether it had been justified in bringing the application. Apart from the general principle of costs that it should follow the event, the more overriding principle of costs orders and the exercise of a court's discretion in respect thereof is that it should be fair to both parties. For these reasons I find that it would be fair to both parties if the issue of costs is reserved for determination by the court hearing the action.

[20] **ORDER**

1. The respondent is interdicted from removing the buildings indicated on Annexure X by the letter 'P' or any roof or wall or any similar part or component or element of such buildings, which are referred to as "the buildings", but excluding any machinery or moveable equipment and excluding the curing chambers of plants 3, 4 and 5 as depicted on

Annexure HC2 in the papers, the silos, gantries and equipment and the machinery referred to in Annexure S4, being the valuation prepared for Standard Bank on 13 October 2021, from the applicant's property situated at Portion 7 of the farm Mooifontein 14, registration division IR, street address 7 Marsala Road, Chloorkop, Kempton Park, pending the finalisation of the action instituted by the applicant against the respondent on 26 August 2022 under case number 2022-018758, wherein a declaratory order regarding the ownership of the buildings and related ancillary relief is being sought.

2. The order contained in paragraph 1 above will operate as an interim order with immediate effect.

3. The respondent is ordered to, within three days from date of this order, allow the applicant or its duly appointed professional advisor access to the property and to the buildings for purposes of an inspection.

4. The costs of this application are reserved for determination in the action mentioned in paragraph

1 above.

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**DAVIS J**

**JUDGE OF THE HIGH COURT**

**GAUTENG DIVISION, PRETORIA**

**DATE ON WHICH JUDGMENT WAS HANDED DOWN: 30 SEPTEMBER 2022**