

SOUTH AFRICA / JUDGMENT

Ecsponent Investment Holdings (Pty) Ltd v Skratch Resources (Pty) Ltd and Another (95108/2015) [2017] ZAGPPHC 529 (11 August 2017)

[2017] ZAGPPHC 529

COURT

North Gauteng High Court, Pretoria

BEFORE

HF Jacobs

CASE / FILE NUMBER

95108/2015

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IN

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

Case

No: 95108/2015

Date: 11/8/17

Reportable: Yes
Of
interest to other Judges: Yes
In

the matter between: ECSPONENT
INVESTMENT HOLDINGS (PTY)
LTD
Applicant
and
SKRATCH
RESOURCES (PTY)
LTD First
Respondent
(Registration
No: 2014/088013/07)
ASA
METALS (PTY)
LTD

Second Respondent
(Registration
No: 1996/015726/07)

JUDGMENT

HF JACOBS, AJ:

[1] The applicant (Ecsponent) claims to be the owner of a chromite recovery plant ("the plant"). The plant is used as part of the processing and dry separation recovery of chromium ore. The plant was set up by the first respondent (Skratch Resources) on the second respondent's (ASA Metals) property Mooihoek 225 K.T., Limpopo (Mooihoek). Ecsponent seeks an order for delivery to it by the first and/or second respondents of the plant and ancillary relief, alternatively payment of its value in the sum of R6 000 000.00. In its founding papers the deponent to the applicant's founding affidavit, Mr Andrew Maren, states as follows:

"7.1 The applicant is the owner of the chromite recovery plant set up for the purposes of chromite recovery by the first respondent on the second respondent's premises, situate at Mooihoek 225 KT, Limpopo ('the Premises'). It is certain processing equipment used in a dry separation recovery process ('the Property'), the further technical details of which is not known to the applicant or me.

7.2 The applicant is not entirely sure of the exact description of the goods purchased in terms of the agreement. Both respondents will however be acutely aware of the exact nature and description of the Property. It is however, to the best of my knowledge, the plant and equipment as depicted in the photos contained in a report compiled by Gert Venter, a mechanical engineer, attached hereto as annexure 'AM1'. It should further be noted that the plant consists of two separate working sections."

[2] Ecsponent's ownership, so it alleges, appears from an agreement referred to in the papers as a vendor funding agreement[1] dated 26 February 2015.

[3] Ecsponent's uncertainty is not limited to the description of the res but also its location. In paragraph 7.4 of the founding affidavit Mr Maren states that:

"The applicant is not entirely sure of the location of the Property but it should currently be in possession of the second respondent at the Premises. In any event, the respondents (or at least one of them) should know of the whereabouts of the Property. If it is not on the Premises, the respondents are obligated to advise the applicant of its location."

[4] Ecsponent places a value of R6 million on the chromite recovery plant and alleges in the alternative that Skratch Resources and ASA Metals disposed of the chromite recovery plant with the knowledge of Ecsponent's ownership and that the plant is at present in the possession and under the control of a person unknown to Ecsponent.

- [5] The legal tie between the parties is a written contract termed a Vendor Funding Agreement ("the agreement") and a written cession contract ("the cession").[2] The agreement came into existence during January 2015, after Ecsponent was approached by a company known as Garuda Finance (Pty) Ltd which informed Ecsponent that Skratch Resources and ASA Metals had concluded an agreement and that they require a short term financing facility.
- [6] Skratch Resources did not file an answering affidavit but ASA Metals has. ASA Metals admits that it is "in possession of the property depicted in the photographs set out in annexure 'AM1' to the founding affidavit" but denies that the items depicted in the photographs constitute "the Property or goods as envisaged in the funding agreement". ASA Metals further denies that Ecsponent is the owner of the items depicted by annexure "AM1" either in terms of the funding

agreement or the cession. In the alternative and should it be found that Ecsponent is the owner of the Property concerned, ASA Metals asserts that it has a lien over that Property.

- [7] ASA Metals also states that the present application is the third application in a series of applications launched by Ecsponent against Skratch Resources and ASA Metals. The first application was launched as an urgent application early September 2015 and was set down on the urgent roll of 15 September of that year. ASA Metals filed an answering affidavit in the urgent application and the urgent application was postponed sine die. On 19 October 2015 Ecsponent launched a second application against Skratch Resources and ASA Metals under the same case number as the urgent application. On 9 December 2015 the applicant served a notice of withdrawal and a tender for wasted costs for both those applications. On the same day Ecsponent served the present application. During November 2015, a short while prior to the issue and service of the present application, Ecsponent was informed

in writing by attorneys claiming to represent NST Chrome & NST Minerals ("NST") that Skratch Resources concluded two written agreements with NST. The agreements concluded between NST and Skratch Resources ("the NST agreement"), so ASA Metals alleges, provided for the plant to be supplied to ASA Metals under a chromite recovery agreement

and management contract ("the recovery agreement") a copy of which is attached to the founding papers as annexure "AM11" which was concluded between Skratch Resources and ASA Metals, was purchased from NST and that there was a reservation of ownership of the plant supplied by NST until full payment of the purchase price to it. The letter thus received further indicated that the purchase price was not fully paid. A copy of the letter was also transmitted to the attorneys for ASA Metals and, relying on its content, raised non-joinder of NST in this application and alleged that NST has a direct and substantial interest in the outcome of this application and that Ecsponent was aware of NST's interest prior to the launch thereof.

[8] During argument counsel for Ecsponent, correctly in my view, conceded that the cession does not lend support for its claim for the vindicatory relief. Counsel for Ecsponent was driven to rely on the agreement and to submit that the wording of clause 7.1.10 of the agreement, interpreted in context, shows Ecsponent to be the owner of the plant. Counsel for ASA submitted that clause 7.1.10 only records a warranty of Skratch Resources (referred to in the agreement as the "Borrower"). That clause reads as follows:

"7. BORROWER WARRANTIES

7.1 The Borrower represents, warrants and guarantees, which shall all be deemed as material upon which the Lender has relied in concluding this Agreement, that:

7.

1. 1

7.1.10 ownership in relation to the goods will transfer from the manufacturer to the Lender upon date of

payment of the purchase price and the Lender shall remain owner of the goods until payment therefore by ASA METALS (PTY) LTD."

[9] I agree with the submission of counsel for ASA Metals. The papers filed by the parties in these proceedings reveal many disputes of fact relevant to the ownership of the plant. Determining ownership of a res, especially one manufactured by one of the parties concerned, is a complex issue. Industrial accession of a movable takes place according to certain requirements and acquisition of ownership by specification almost in the same way. [3] I am of the view that the disputes of fact and in particular those around the rights of the parties recorded in the agreements, including the alleged right of NST (of which the evidence is rather scant) does not allow for the granting of final relief in the present instance. I hold the view mindful of the judgments in Wightman, Lombard, Buffalo, Mokala and National Scrap Metal and conclude that the dispute about the ownership of the plant cannot be resolved on these papers and for the same reason a claim based on the actio ad exhibendum cannot be resolved.

[10] The chronology mentioned in [7] above compels me to exercise my discretion against the applicant and to dismiss the application and that the costs of the application should be determined accordingly.

ORDER:

I therefore make the following order: The application is dismissed with costs, including the costs of two counsel.

H F JACOBS

ACTING JUDGE OF THE HIGH COURT

PRETORIA

EC Sponent Investment Holdings (Pty) Ltd v Scratch Resources & ASA Metals Judgment

- [1] Annexure "AM2" to the founding affidavit.
- [2] Annexure "AM2".
- [3] Cooper v Jordaan (1884) 4 EDC 181; JL Cohen Motors SWA (Pty) Ltd v Alberts 1985 (2) SA 427 (SWA) at 433; Silberberg & Schoeman's: The Law of Property. 5th Ed, p 154, par 8.3.2.3 - p 159, par 8.4.

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Prepared on 14 October 2026 · Esheria