

/EVDM

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT)

18/2/2010

Case Number: 10175/2007

DELETE WHICHEVER IS NOT APPLICABLE

1. REPORTABLE: YES/NO: ☒ YES ☐ NO

2. OF INTEREST TO OTHER JUDGES: YES/NO: ☒ YES ☐ NO

3. REVISED: ☐

DATE: 18/2/2010

SIGNATURE: _____

GRIFFIER VAN DIE HOOGGEREGSHOF VAN S.A.
TRANVAALSE PROVINSIALE AFDELING
PRIVAATSAK/PRIVATE BAG X67

2010 -02- 18

PRETORIA 0001
TRANVAAL PROVINCIAL DIVISION
REGISTRAR OF THE SUPREME COURT OF S.A.

In the matter between:

MUTUAL & FEDERAL INSURANCE
A. BUSH

1st PLAINTIFF
2nd PLAINTIFF

VS

THE MINISTER OF SAFETY & SECURITY

DEFENDANT

JUDGMENT

Delivered on: 18 February 2010

POTTERILL J,

§ 1. The plaintiffs are claiming the amount of R48 000 00 from the defendant. The plaintiff's claim is based on delict alternatively the *action ad exhibendum*. The second plaintiff's vehicle was stolen on 8 October 2001. The first plaintiff compensated the second plaintiff for the loss in terms of an insurance contract. The vehicle was recovered by the South African Police Service and was handed in at Komatipoort. The delict lies therein that the vehicle was released to an unauthorized

person. The employees of the defendant acted negligently in that they released the vehicle to the incorrect person without taking the necessary steps or precautions to ascertain whether the person had the authority to do so. In acting so they would have foreseen reasonable steps to guard against such occurrence. Due to these negligent acts the plaintiffs suffered patrimonial loss. In the alternative the plaintiff's are the owner of the vehicle, the defendant was in possession of the vehicle and the defendant disposed of the vehicle with knowledge of the plaintiffs' ownership.

The defendant raised a special plea of prescription. On the merits the plea is that the plaintiffs were not the owner of the vehicle but that Absa Bank Ltd(t/a Bankfin) was at the time of the theft the owner.

It is further denied that the vehicle was recovered by the SAPS during November 2002 or at any time and was handed in at the Komatipoort SAPS. In the event that the court does find that the vehicle was released, the defendant denies that the vehicle was released to an unauthorised person. If the court should find that it was released by members of the SAPS then it is denied that they acted within the course and scope of their employment. If found that the vehicle was handed to an unauthorized person then the patrimonial loss was caused by the unauthorised person alternatively an act on the part of a member of the SAPS acting outside the course and scope of his employment. The defendant agreed on the quantum being R45 000.00.

Very little of the plaintiffs' evidence is in dispute. Mr Carelse, a member of the SAPS at the time attached the vehicle on 11 November 2002. All the factory numbers on the vehicle were filed off. On the chassis he could however still identify the vehicle by using the electro acid process. He could identify all the numbers except the last one. In his handwriting he wrote the number as AFATDEAO1TR13017 and then the last number a scratched out " 2 "and next to it a "1." He then utilises the wild card process and the computer identified the vehicle as the stolen vehicle of the second plaintiff. He did this by connecting the vehicle to a Boksburg docket MAS 252/10/2001. This vehicle is however red and not white as the second plaintiff's vehicle was. He testified that although the Ford Motor Company told him there was not a vehicle with a number "1 " as the last number, Ford will have to tell the Court if there exists such a vehicle or not. He is however sure that it was the second plaintiff's vehicle. The vehicle is then booked into the SAP13 and the SAP13 camp. He has knowledge of the only process of how the vehicle could be booked out. It must be done in terms of an order of disposal by the commander, a SAP136, an entry in the occurrence book and new SAPVIN numbers must be allocated to the vehicle. It is highly unlikely that a vehicle is booked out a day after it has been identified.

The cross-examination was directed to the fact that a red Ford Courier could not be the second plaintiff's vehicle as he had a white Ford Courier. There must also be doubt because of the "1" or "2" at the end of the chassis number. Mr Carelse was adamant that although there are some difficulties he was sure that the vehicle belonged to second

plaintiff. It was also put that even if it was Mr Bush's vehicle then the SAPS was not negligent in handing over the vehicle to Mr van der Westhuizen as the agent of Mutual and Federal for Hillbank. Mr Carelse could give no comment as he did not have knowledge of what happened after the vehicle was identified by himself as belonging to MAS 252/10/2001.

To summarise the evidence in chronological order I next deal with Mr Bush's evidence. He bought the vehicle in terms of an Instalment Sale Transaction financed by ABSA. The vehicle is stolen in October 2001. The first plaintiff in terms of an insurance contract paid the balance outstanding to Bankfin and the balance to Mr Bush. In terms of the agreement of loss it was agreed that the company may dispose of the vehicle if found and whatever monies are obtained therefor shall be retained by the company for its own benefit. Mr Pienaar phoned him to identify the vehicle at Komatipoort. He went to the SAP13 camp and identified the vehicle as being the vehicle he bought. The vehicle was red, not white but he could see that the vehicle was white because he pulled away the rubber in the inside of the car at the door and the white paint was still there. He also identified the vehicle by the unusual tow-bar with step and locking system. He also had a rubber mat made from unusual material from a friend and it was specially cut by his son to fit the vehicle. Although there was in depth cross-examination it can be stated unequivocally that the vehicle that Mr Bush identified was his vehicle. So much is admitted by the defendant in his address to court.

Mr Pienaar testified that he was a major in the SAPS before he in 1998 started Pine Pienaar Invest that has the business of *inter alia* recovery of stolen vehicles for insurance companies. He got instructions from Hillbank on instruction of the first plaintiff to recover this vehicle from Komatipoort. He phoned Mr Bush to identify the vehicle and he did so on 12 November 2002. He then travels to Komatipoort to recover the vehicle, but they could not find the vehicle and he never recovers the vehicle. He is informed that the vehicle was handed over to a Mr van der Westhuizen. He did however not believe this and on 23 October 2002 he requests the defendant to investigate where the vehicle is. He did not believe this version because a vehicle cannot be recovered without the relevant documentation and that documentation was not there. This is confirmed by Inspector S D Malupi, the investigating officer, in a letter to Captain T A Theledi [p21 of A]. Inspector Malupi told him that he thought the vehicle was pressed. Nobody knows what happened to the vehicle and according to him the vehicle was pressed, stolen out of the SAP13 or unlawfully handed over. On 14 August 2003 he discussed it with Daan Swanepoel of the first plaintiff and made his submission that the vehicle being handed over to van der Westhuizen is unfounded. On 23 October 2003 he then writes a letter to the Area Commissioner Nelspruit requesting a report on what happened to the vehicle. On 8 January 2004 he faxed a letter enquiring when the report could be expected. He does not recall the letter addressed to him on 11 November 2005 with the following content:

- "1 A report from Komatipoort SAPS was received which indicated that the mentioned vehicle was handed out to an unauthorised person.
- 2 It is proposed for you to refer this matter to a legal representative for further handling."

This letter emanated from the office of the Deputy Area Commissioner Operational Services Area Lowveld.

In cross-examination it was put to the witness that many vehicles are stolen from the SAP13 camp. It was also put that Inspector Malupi would testify that van der Westhuizen fetched many vehicles from the SAP13 camp.

§ 6. Mr Davis, employed at the first plaintiff as manager of recovery of stolen vehicles, testified. On 19 November 2001 the SAPS informed them that vehicle had been recovered. On 5 December 2002 they instructed Hillbank to recover the vehicle from Komatipoort. They had the vehicle deregistered. The vehicle was never recovered. The first plaintiff knew in 2003 that something was seriously wrong with the recovery of the vehicle.

§ 7. Inspector Malupi, the investigating officer, was then called by the plaintiffs' as the defendant decided not call him. He testified that he never could ascertain what happened to the vehicle; it could still be in the SAP camp, could be stolen or it was pressed as he had said to Mr

Pienaar. There were none of the required documents expected when the vehicle is handed over to an authorized agent. He also does not believe that the vehicle was handed over to van der Westhuizen. He did not look for the vehicle it is not his job. The SAPS has a record of what vehicles were pressed, but it was not before court.

§ 8. No witnesses were called by the defendant.

§ 9. Addressing the plea of prescription first speaks for itself. Mr Bester for the defendant argued that on 14 August 2003 Daan Swanepoel of the first plaintiff knew that the vehicle was recovered but was no longer to be found. In terms of section 12(1) of the Prescription Act 68 of 1969 [hereinafter referred to as the Act] the debt was due. Summons was only issued on 15 March 2007 and served on 26 March 2007, more than 3 years later. He relied on **Truter And Another v Deyssel** 2006(4) SA 168 SCA on 174:

"[19] 'Cause of action' for the purposes of prescription thus means every fact which it would does be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

And also:

"[16] ...A debt is due in this sense when the creditor acquires a complete cause of action for the recovery of the debt, that is when the entire set of facts which the creditor must prove in order to succeed

with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim."

The plaintiffs argue that even after the trial nobody knows what happened to the vehicle. Their cause of action was thus only complete when they for the first time received information from the respondent concerning the vehicle on 3 March 2005; summons was thus issued within the three year period.

They also rely on section 14[1] of the Act, where the running of prescription is interrupted by an express or tacit acknowledgment of liability by the debtor. If prescription had started to run then it was interrupted by the letter dated 11 November 2005. In this letter the respondent acknowledges liability in that they declare that the vehicle was handed out to an unauthorised person and the plaintiffs' agent is instructed to refer the matter to a legal representative for further handling.

Even if prescription had started to run in August 2003, without making such a finding, then I find that prescription was interrupted as contemplated in section 14(1) of the Act. On the facts of this matter the debtor intended to admit that the debt existed and that it was liable therefore. This letter was written in response to a report requested by the agent of the first plaintiff informing what had happened to the vehicle. The letter refers to the report written by Inspector Malupi which after investigation informs that the necessary documentation was never completed and thus begs the inference that the vehicle was handed out

to an unauthorized person. In the letter dated 11 November emanating from the office of the Deputy Area Commissioner the first plaintiff is informed that the vehicle was indeed handed out to an authorized person. The intention of the defendant can thus only be to inform the plaintiff that a debt existed. If the defendant's employees handed the vehicle to an unauthorized person without the necessary documentation then the defendant is liable therefore. The intent of the debtor is made even clearer when it goes as far to inform Mr Pienaar that they should take this matter to a legal representative. This is to admit liability. The fact that the liability is not quantified is not a bar for the application of Section 14(1). In the words of **Benson v Walters** 1984(1) SA 73 (A) on 90G "*It is sufficient if it capable of ascertainment by calculation or extrinsic evidence without the further agreement of the parties.*" *In casu* the quantum is so capable.

I accordingly dismiss the special plea of prescription.

- § 10. The first plaintiff before *litis contestatio* was the owner of the vehicle. The first plaintiff's ownership flows from the agreement of loss. In **Santam Beperk v Potgieter** 1997(3)SA 415 on 423 the court found "*In practical terms the insurer's right to salvage against the insured entails a right to claim the transfer of ownership in the object of risk or its remains from the insured and, consequently, the right to claim such property from third parties.*"

It is not in dispute that the plaintiffs suffered patrimonial loss of which the quantum is admitted.

It is however argued that the plaintiff has not proven negligence on the grounds as set out in the summons. There is very little doubt that the plaintiffs have established negligence. The vehicle was at the SAPS Komatipoort and now it cannot be found. The SAPS can give no explanation for this. The plaintiff has accordingly proven negligence. Whether the vehicle was stolen, pressed or handed over to an unauthorized person is irrelevant.

The defendant criticises the plaintiff that the plaintiff's evidence now in fact is that the vehicle was pressed or stolen and their cause of action should have been based on an unlawful omission. The evidence was that the necessary documentation was not completed. The defendant's records, SAP 13, p41 of annexure A, show that the vehicle was handed over to van der Westhuizen on 12/11/2002. The investigation officer in writing informed the complaints office on 3/10/2005 that the vehicle is still not cancelled on the circulation system. He also informed that office that no disposal order was completed. On 11 November 2005 the Deputy Area Commissioner informed Mr Pienaar that the vehicle was handed out to an unauthorized person. In the defendant's further particulars it is denied the vehicle was recovered, but if recovered then the vehicle was released on 12 November 2002 to a person, Johannes Nicolaas van der Westhuizen, an unauthorized person. At trial it is common cause that the vehicle was recovered and identified. It is further common cause that nobody knows what happened to the vehicle. The defendant did not guard against the occurrence of the vehicle disappearing. The evidence corroborates just how negligent the

defendant was; it is basically impossible to have handed the vehicle to van der Westhuizen within the time-span and without the documents. It thus calls for an inference that perhaps it was stolen. The defendant even put it to Mr Pienaar that many vehicles are stolen from the SAP13 camp. This in no way negates the defendant's negligence, in fact it compounds their negligence. It also calls for an inference that the vehicle was pressed because Inspector Malupi had a hard time denying that he thought he had seen on records that the vehicle was pressed and had told Mr Pienaar so during the trial. All of this is however not proven, what is proven is that the vehicle disappeared. The SAPS was negligent in not guarding against the vehicle disappearing.

§ 11. I accordingly find it not necessary to address the cause of action founded on the *actio ad exhibendum*.

§ 12. As for costs, the quantum of the claim is well within the Magistrate's Court jurisdiction. Although the trial took 4 days I can not find that the issues were so complex that a Magistrate could not preside over the matter. If punitive costs were requested due to the way the defendant changes their stance from plea to trial and even within the trial then the appropriate submission would have been attorney and client costs on the Magistrate's Court tariff. This submission was however not made.

§ 13. I accordingly make the following order:

§ 13. 1. The plaintiff's claim is granted in the amount of R45 000;

§ 13. 2. The defendant is to pay interest on the amount of R45 000 ex 4 April 2006 a tempore morae.

§ 13. 3. The defendant is to pay the costs on the Magistrate's Court tariff.

§ 13. 4. The defendant is to pay the first plaintiff the claim and interest amount.



S. Potterill Judge of the High Court

Delivered on: 18 February 2010

Attorney for the Plaintiff:

GILDENHUYS LESSING & MALATJI
INC.
Pretoria
012 427 3779
(Ref: HENK KRUGER / SVR
01366190)

Attorney for the Defendant:

THE STATE ATTORNEY
Pretoria
Tel: 012 309 1579/1500
(Enq: P. N. MBATA
(Ref: 2042/2007/Z23/kfm)