

**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE LOCAL DIVISION BHISHO]**

CASE NO.433/2018

In the matter between:

LITHA ODWA TSHATSHU

Plaintiff

And

MINISTER OF SAFETY AND SECURITY

First Defendant

WARRANT OFFICER JONAS

Second Defendant

JUDGMENT

TOKOTA J

[1] The plaintiff instituted an action against the defendants seeking an order for payment in the amount of R145 000.00 being damages arising out of the alleged unlawful seizure of his vehicle by the police. In the pleadings, it is alleged that whilst his vehicle was in police custody it was broken into and parts thereof were stolen. The vehicle was allegedly damaged beyond repairs (Claim 1). In claim 2 the plaintiff sought payment of R1, 800 000.00 as damages for loss of income. Claim 1 was settled in the amount of R80 000.00 and the settlement agreement was made an order of court on 19 November 2019. The issue relating to claim 2 was postponed *sine die*. It is the latter claim that I am called upon to determine. The defendants deny that they are liable to pay any damages to the plaintiff as claimed or at all.

[2] The plaintiff was the only witness at the trial. His evidence can be summarised as follows: He is a taxi businessman. He is the owner of an Avanza taxi which was operating at the taxi rank. On 23 September 2017, he was in Johannesburg when he received a call from his driver who informed him that he had been high jacked by unknown people. That was a lie because on that day his vehicle was used by his

driver and two others to convey the stolen carcass of a cow. The police arrested him and seized the vehicle in terms of section 20 of the Criminal Procedure Act 51 of 1977 (the CPA).

[3] At the commencement of the trial, the plaintiff conceded that the seizure of the vehicle on 23 September 2017 was lawful. He contended however that the defendants were not entitled to keep the vehicle after the driver was convicted and that retention thereof was unlawful. The defendant contended that the vehicle was seized in terms of section 20 of the CPA and consequently it was the responsibility of the prosecuting authority and not of the police to dispose of the vehicle after the driver was convicted of stock theft.

[4] It is not in dispute that there were three occupants of the vehicle when it was seized. They were all charged with stock theft. Two of them pleaded not guilty and the driver of the plaintiff pleaded guilty and was convicted of stock theft. The trial was separated and it is not in dispute that the case of stock theft against the remaining accused is still pending before the magistrate's court.

[5] The plaintiff testified that he was told by one Jonas that his vehicle was broken into and its parts, including the engine, seats, and dashboard, were stolen. He testified that he was claiming damages for loss of income because his vehicle has been damaged beyond economic repairs. Although in the particulars of claim the plaintiff pleaded that he found his vehicle scrapped and damaged beyond repairs he testified that he never saw his vehicle but was only told by Jonas that it had been damaged. Jonas was never called as a witness.

[6] As alluded to above the vehicle was used to convey the stolen carcass of a cow. Under cross-examination, the plaintiff conceded that the seats that were removed were removed in order to make space for the carcass of the stolen cow. He could not deny that the criminal case was still pending against the two accused who were charged with his driver.

[7] The plaintiff closed his case without calling any witnesses.

Mr *Malunga* who appeared for the defendants applied for absolution from the instance. Ms *Bacela* for the plaintiff opposed the application.

[8] An application for absolution may be considered at the end of the plaintiff's case if the plaintiff fails to prove one of the elements necessary for the cause of action.

[9] The plaintiff's claim falls under the delictual claim for pure economic loss. Pure economic loss relates to financial loss that does not arise directly from damage to the plaintiff's person or property but comes about as a result of the negligent act itself, such as a loss of profit, being put to extra expenses, or the diminution in the value of property.¹ That being the case the plaintiff must allege and prove all the elements of a delict. In the event, that one element is lacking the action cannot succeed.

[10] In order to avert absolution at the end of its case, a plaintiff has to make out a *prima facie* case for its claim. Although the standard of proof is slightly less than that at the end of the entire case, which requires proof on a balance of probabilities, a plaintiff must at least show that it has a prospects of succeeding with its claim at the end of the entire case.

[11] The question a court needs to ask at the end of the plaintiff's case, therefore, is whether there is such evidence before court upon which a reasonable court might (not should or ought to) or could give judgment for the plaintiff.²

[12] The plaintiff must therefore at the end of its case make out a *prima facie* case in the sense that there is evidence relating to all the elements of the claim since without such evidence no court could find for the plaintiff. The material facts upon which a plaintiff relies in support of its claim must be set out in its particulars of claim

¹J Neethling, J M Potgieter and P J Visser Law of Delict 4 ed at 295 et seq; Stair Memorial Encyclopaedia The Laws of Scotland (1996) vol 15 para 273.; Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v ASASA 2006 (1) SA 461 (SCA) ([2006] 1 All SA 6; [2005] ZASCA 73) para.1

²Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403 (A) at 409G – H

in a clear and concise statement' and his evidence must then elaborate to establish his claim.

[13] The Constitutional Court in **Country Cloud Trading CC v MEC, Department of Infrastructure Development** 2015 (1) SA 1 (CC) (2014 (12) BCLR 1397; [2014] ZACC 28) para 23: said:

'So our law is generally reluctant to recognise pure economic loss claims, especially where it would constitute an extension of the law of delict. Wrongfulness must be positively established. It has thus far been established in limited categories of cases, like intentional interferences in contractual relations or negligent misstatements, where the plaintiff can show a right or legally recognised interest that the defendant infringed.'
[Footnotes omitted.]

The plaintiff's claim being based on delict all the elements of a delict must be proved for a successful claim. Delict is an act (or omission) of a person that in a wrongful and culpable manner causes harm to another.³

[14] It is common cause that the vehicle was seized in terms of section 20 of the CPA. It is also common cause that criminal proceedings commenced after the seizure of the vehicle. It is also common cause that the vehicle was used in the commission of the offence for which the plaintiff's driver was convicted. Section 35(1) of the CPA provides:

"A court which convicts an accused of any offence may, without notice to any person, declare-
(a) any weapon, instrument or other article by means whereof the offence in question was committed or which was used in the commission of such offence; or
(b) if the conviction is in respect of an offence referred to in Part 1 of Schedule 2, any vehicle, container or other article which was used for the

³See Neethling, Potgieter&Visser Law of Delict 5 ed (LexisNexis 2006) at 3 (Law of Delict.)

purpose of or in connection with the commission of the offence in question or for the conveyance or removal of the stolen property, and which was seized under the provisions of this Act, forfeited to the State: Provided that such forfeiture shall not affect any right referred to in subparagraph (i) or (ii) of subsection (4) (a) if it is proved that the person who claims such right did not know that such weapon, instrument, vehicle, container or other article was being used or would be used for the purpose of or in connection with the commission of the offence in question or, as the case may be, for the conveyance or removal of the stolen property in question, or that he could not prevent such use, and that he may lawfully possess such weapon, instrument, vehicle, container or other article, as the case may be.”

[15] The concession by the plaintiff that the vehicle was lawfully seized by the police was therefore correctly made. For as long as the criminal proceedings are still in progress this court has no jurisdiction to make an order relating to that vehicle. In order for the plaintiff to succeed in his claim for pure economic loss, he would have to prove all the elements of delict. If the vehicle was lawfully seized and is an exhibit in criminal court being an instrument by which the offence was committed this court cannot make the order of compensation for loss of earnings prior to the conclusion of those proceedings.

[16] Moreover, the plaintiff made no effort in his evidence to show that the retention of the vehicle pending the conclusion of the criminal case was wrongful. As a matter of law, the retention of the vehicle is lawful. Any claim in relation thereto can only arise once the trial court has made an order in terms of the CPA. The order may be forfeiture to the state or an order releasing it to the lawful owner. Once an order to release the vehicle to the lawful owner is made and the police fail to release it for any reason including damage beyond repairs, the owner may then claim damages based on pure economic loss. This has not happened. Consequently, the first element of delict is lacking and therefore there is no prospect that this court might give judgment in favour of the plaintiff on the evidence tendered by the plaintiff. Accordingly, the application for absolution will have to succeed.

[17] The general rule is that costs should follow the event unless the court finds exceptional circumstances justifying a departure from the rule. I find no exception in the matter.

[18] In the result the following order will issue:

1. The application for absolution from the instance is granted with costs.

B R TOKOTA

JUDGE OF THE HIGH COURT

Appearances:

For the plaintiff: Ms Bacela

Instructed by Bacela Bukula & Associates

For the Defendants: S Y Malunga

Instructed by State Attorney

Date of Hearing: 9 June 2022

Date delivered: 13 June 2022.