

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO



**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

CASE NO: 2033/2020

In the matter between:

E .E. BOSHOFF

Applicant

and

TRISTAR CUSTOM FEEDERS (PTY) LTD

First Respondent

ACBP BOERDERY (PTY) LTD

Second Respondent

GRIEKWALAND WES KORPORATIEF (GWK) BEPERK

Third Respondent

JUDGMENT

CHWARO AJ:

Introduction

[1] In this application, Esaias Engelbertus Boshoff, ("*Boshoff*"), the applicant, seeks payment of an amount of R821 869-34, representing the proceeds of the slaughter of seventy-one of his Nguni-cross calves bearing a brand mark "**BE3**", from Tristar Custom Feeders (Pty) Ltd, ("*Tristar*") and Griekwaland Wes Korporatief Beperk, ("*GWK*"), who are cited as the first and third respondents respectively.

[2] This application is a sequel to an urgent *ex parte* application that was launched on 17 November 2020 where Boshoff was granted interim relief in the form of a *rule nisi* effectively securing seventy-three Nguni cross calves (“the calves”) that were delivered and stored at Tristar’s feedlot from being slaughtered or removed pending finalisation of the present application.

[3] On 21 May 2021, being the return date, the opposed application served before my brother Moses AJ who formed a view that since Boshoff’s claim was premised on *rei vindicatio*, the limited issue relating to ownership of the calves could not be resolved on papers. Counsel for the parties were requested to formulate a draft order encapsulating this limited issue for referral to oral evidence in terms of rule 6(5)(g) of the Uniform Rules of Court.

[4] For reasons unknown to me, the referral of the matter to oral evidence could not be finalised then. However, the matter served before me on 13 August 2021 where I granted an order referring the matter to oral evidence on the crisp issue pertaining to whether or not Boshoff was the owner of the calves bearing a brand mark “**BE3**” as at 17 November 2020.

Background

[5] Boshoff is a cattle farmer. On or about 27 August 2020, seventy-three of his calves were delivered to Tristar’s feedlot, following an agreement concluded between his agent, Josua Johannes Truter (“*Truter*”) and Albert Botes, (“*Botes*”) a former employee of Tristar in terms of which the said calves were sold to ACBP Boerdery (Pty) Ltd, (“*ACBP Boerdery*”). Boshoff contends that when the calves were delivered, he retained his ownership over them pending payment of the full purchase price on a future date agreed upon, being 2 November 2020.

[6] Tristar operates a feedlot for cattle in the Hartswater area and GWK is its holding company. ACBP Boerdery had an agreement with Tristar. As part of this agreement, Tristar was to provide keeping space at its feedlot for the animals brought there by and on behalf of ACBP Boerdery. In the event of there being any monies that are owed to it by ACBP Boerdery, Tristar would retain a lien over the same animals.

[7] Both Tristar and GWK oppose the application. They contend that when the calves were delivered to Tristar’s feedlot on 27 August 2020, Boshoff passed ownership of such calves to ACBP Boerdery and thus when he instituted an application on 17 November 2020, the calves were no longer his property.

[8] It follows that the crisp legal issue that ought to be determined is whether Boshoff passed ownership of his calves to ACBP Boerdery on 27 August 2020, being the date when the calves were delivered to Tristar's feedlot for and on behalf of ACBP Boerdery.

Evidence tendered

[9] Only the applicant, Boshoff and his agent, Truter testified. Boshoff's evidence can be summarised thus: He is a cattle farmer, having started to farm with Brahman cattle between 1981 and 1990. He thereafter changed to Nguni-cross cattle from 1992. He registered his own brand mark, "BEE" on 20 May 1996 and since then, brands all his calves, after weaning on 210 days, with this brand mark on the sides.

[10] At the beginning of August 2020, he decided to sell some of his calves. These were seventy-three Nguni-cross calves of mixed sexes and were bred by him from his farm. To that effect, he made a video of the calves that were to be sold and sent it to his appointed agent, Truter. He informed Truter that the payment must be made on 2 November 2020 as he had a financial obligation that he had to honour by that date. Truter obtained the highest offer from Botes, who to his knowledge, was employed by Tristar.

[11] On the morning of the delivery of the calves, he informed Truter that ownership of the calves should remain closed, meaning that he retained ownership over the calves until full payment of the purchase price is made by 2 November 2020. To that effect, he only issued an undated invoice as he normally issues buyers with the original tax invoice after receipt of the purchase price. That practise made business sense to him as he was able to pay value added tax on his next due date.

[12] Botes arranged transport for the delivery of the calves which occurred on 27 August 2020. Before the calves could be delivered, Boshoff ensured that he weighed the delivery truck in its unloaded form and thereafter weighed it again with its various loads of the calves. The weighing was done at the weighing scales found at GWK and CCN Farming respectively.

[13] Boshoff completed a removal certificate in respect of the two loads which were collected at 10h00 and 14h00 respectively by the driver from BW Visser Vervoer. The name of ACBP Boerdery was inserted under the space provided for the details of the client's address on the weighbridge certificates that was given to the driver. The invoice, which the applicant

made out on 23 September 2020, was addressed to ACPB Boerdery after their details were provided to him by Truter.

[14] The applicant testified that, from his previous experiences, he was well versed with formulating a sale agreement to retain ownership of the goods he was selling until the payment of the full purchase price. He would ensure that such an agreement is procured especially in cases where the potential purchaser is unknown to him.

[15] Boshoff further testified that the undated invoice relating to the seventy-three calves was sent to Botes by electronic mail and later by Whatsapp. Boshoff never received payment for the calves.

[16] Truter testified that he was engaged by Boshoff to find a buyer for his calves. He had an understanding with Boshoff that if the purchase of the calves was to be over an extended period, he will always inform the buyer that ownership over the calves is retained in favour of Boshoff until full payment was made, a fact which, according to him, was conveyed to Botes.

[17] Tristar and GWK did not lead any evidence in support of their contention that the calves were, at the time when Part A of the application was launched, not the property of Boshoff but belonged to ACBP Boerdery.

Evaluation

[18] It is common cause between the parties that the claim instituted by Boshoff is based on the *rei vindicatio*, a well-known remedy for the protection of ownership in terms of our law. Accordingly, Boshoff was required to adduce evidence to demonstrate that he was the owner of the calves at the time when he launched the application and that the calves were indeed in the possession of Tristar and GWK.

[19] In the often-cited case of **Chetty v Naidoo**,¹ Jansen JA put the legal position in relation to what is expected of an owner to be successful in pursuing this remedy in the following terms:

“It is inherent in the nature of ownership that the possession of a *res* should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g. a right of retention or a contractual right). The owner, in instituting a *reivindicatio*, need,

¹ 1974 (3) SA 13 (AD) at 20B-D

therefore, do no more than allege and prove that he is the owner and that the defendant is holding the res --- the onus being on the defendant to allege and establish any right to continue to hold against the owner.”

[20] Tristar conceded that it was in possession of the calves on 17 November 2020. After the granting of the interim order, the parties agreed that Tristar would be entitled to slaughter the calves that were deemed ready and the proceeds from each slaughter would be deposited into the trust account of Boshoff’s attorneys. This agreement led to the amendment of the notice of motion by Boshoff, in terms of which his primary relief was to seek payment of the proceeds of all slaughtered calves that bore his registered brand mark.

[21] In assessing whether the applicant managed to discharge the onus placed on him to establish ownership, this Court has to decide the matter on the preponderance of probabilities, a well-established standard applicable in matters of this nature. In **Selamolele v Makhado**² the court held as follows regarding the applicable test:

“Ultimately the question is whether the *onus* on the party, who asserts a state of facts, has been discharged on a balance of probabilities and this depends not on a mechanical quantitative balancing out of the pans of the scale of probabilities but, firstly, on a qualitative assessment of the truth and/or inherent probabilities of the evidence of the witnesses and, secondly, an ascertainment of which of the two versions is the more probable..”

[22] The above assessment will be done on the basis of the oral evidence led considered together with the undisputed evidence contained in the affidavits already filed by the parties and relating to the limited issue of prove of ownership of the calves as at the date of the institution of the application.³

[23] I find it not to be seriously disputed that Boshoff engaged the services of Truter, as an agent to market the calves to potential buyers. Boshoff sent a video of the calves to Truter who eventually concluded a deal with Botes. Though Boshoff and Truter initially thought that the calves were bought by Tristar, it eventually became apparent that they were sold to ACBP Boerdery. The transportation of the calves from Boshoff’s place to Tristar’s feedlot was arranged by Botes, who engaged the services of a separate transportation entity for these purposes.

² 1988 (2) SA 372 (V) at 374J-375A

³ Vide Lekup Prop Co No 4 (Pty) Ltd v Wright 2012 (5) SA 246 (SCA) at 258H-I

[24] It is similarly not in dispute that the transportation permit was completed by Boshoff and he, in his effort to determine the actual weight of the calves, attended to the pre-load and post-load weighing of the truck, beginning with the initial fifty calves and later twenty-three calves respectively before their transportation to Tristar. The weighing certificates that were eventually provided to the driver who transported the calves indicated ACBP Boerdery as the client of Tristar.

[25] The fact that Truter engaged Botes as instructed by Boshoff, that the calves had a brand mark registered in the name of Boshoff, that he personally participated at the weighing scales before the calves were transported and further that he completed the transportation permit in respect of the calves, all point to an inescapable conclusion that by 27 August 2020, when the calves were delivered to ACBP Boerdery at Tristar's feedlot, they were the property of Boshoff.

[26] During argument, *Mr van Tonder*, counsel for Boshoff, contended that though delivery of the calves from Boshoff to ACBP Boerdery occurred on 27 August 2020, ownership of the calves was not transferred. This is so, since Boshoff, or his agent Truter, had no intention to pass ownership before full payment of the purchase price was made on 2 November 2020. In his view, there was also no intention on the part of ACBP Boerdery and its representative, to become the owner of the calves before full payment was made.

[27] In developing this argument, *Mr Van Tonder* relied on **Legator McKenna Inc and Another v Shea and Others**⁴ where the abstract theory of passing ownership was explained to entail delivery of the item coupled with the real underlying agreement, which encapsulates the intention on the part of the owner to transfer ownership and the intention of the transferee to become the owner of the property.

[28] *Mr Knoetze SC*, counsel for Tristar and GWK, contended that the seventy-three calves were transported, delivered and accepted by Tristar as being the property of ACBP Boerdery as no other documentation that regulated the processing of the calves by Tristar indicated that they belonged to anyone else but ACBP Boerdery.

[29] Placing reliance on the uncontrived fact that Boshoff knew how to reserve his ownership on his property before receipt of final payment, *Mr Knoetze SC* further argued that it was improbable that Boshoff and his agent conveyed a suspensive condition to the actual

⁴ 2010 (1) SA 35 (SCA) at para 22

buyer, who Boshoff later came to know as being ACBP Boerdery , in respect of the ownership of the calves.

[30] In his view and in line with the decision in **Laing v South African Mining Co Ltd**⁵, Boshoff granted credit to ACBP Boerdery until 2 November 2020 but disentitled himself of ownership when the calves were transferred to ACBP Boerdery on 27 August 2020. Resultantly, Boshoff was not the owner of the calves on 17 November 2020, when he launched the application.

[31] The credibility of Boshoff and Truter as witnesses cannot be seriously attacked on any aspect relevant for the determination of the legal issue herein. In my view, it is the probabilities of their versions, as seen against the totality of the undisputed evidence contained in the affidavits filed of record, that should be determinative of the matter.

[32] In my view and having considered the versions of Boshoff and Truter, it cannot be contended otherwise that when the calves were delivered to ACBP Boerdery, Boshoff reserved his ownership over them until full payment was made to him. The evidence tendered indicate that this fact was communicated to Truter, his agent. In all probabilities, Truter conveyed it to Botes.

[33] I am fortified in my view on this aspect by the uncontrived version of Boshoff that he had a huge financial obligation that he wanted to honour by 2 November 2020 and his decision to issue an undated draft invoice later in September 2020, knowing fully well that, as he has indicated, the original invoice will only be issued after full payment has been made.

[34] It cannot be contrasted that his *modus operandi* was that his tax invoices are only issued after payment has been received to enable him to comply with his value added tax obligations once they become due. However, I express no firm view on the appropriateness and/or legality of this practise.

[35] It is an established principle of our law that ownership of movable property does not pass by the making of a contract, it only passes if delivery is accompanied by the intention of the transferor to pass ownership and the corresponding intention of the transferee to accept ownership⁶.

⁵ 1921 AD 387 at 389-395

⁶ See Commissioner of Customs and Excise v Randles Brothers & Hudson Ltd 1941 AD 369 at 398 and Weeks and Another v Amalgamated Agencies Ltd 1920 AD 218 at 230

[36] The above position was also applied with approval in **Cornelissen NO v Universal Caravan Sales (Pty) Ltd**⁷ where the majority of the Appeal Court held as follows:

“The words “sold and delivered” do not necessarily connote that ownership in the goods has passed to the purchaser, for it is trite law that mere physical delivery of property, unaccompanied by an intention to transfer ownership, does not give the recipient *dominium*.”

[37] The contention made on behalf of Tristar and GWK to the effect that it was legally possible for ownership of the calves to have passed from Boshoff to ACBP Boerdery on 27 August 2020 in the sense that the former gave ACBP Boerdery credit, cannot be sustained. In **Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and Another**⁸ the court held that the general rule that in a sale on credit, ownership passes on delivery is not an irrefrangible principle of law. The determining factor is the conspectus of the facts which will indicate whether the parties intended ownership to pass or not. In other words, the nature of the sale, be it cash or credit, is a relevant factor to be considered but is not conclusive.

[38] In the present case, the evidence tendered on behalf of the applicant indicate that though the payment of the purchase price was deferred to a later date, the seller, Boshoff, did not intend to pass ownership with the delivery of the calves. In this regard, Boshoff was very clear in his testimony that he never had any intention of passing ownership of the calves when they were delivered to the buyer. He informed his agent, Truter, that ownership “*stays closed*”.

[39] Boshoff’s intention was confirmed by Truter, who though not forthright with the clear instructions given to him in respect of this very aspect, confirmed that he and Boshoff always had an understanding that if the sale is a down payment or it is an extended payment, ownership remained with Boshoff.

[40] In the premises, it is my finding that at the time of institution of the application that was launched on 17 November 2020, Boshoff was the owner of the calves that were delivered to ACBP Boerdery and kept at Tristar’s feedlot. He reserved his ownership of the calves and had no intention to transfer ownership of the said calves before receipt of full payment of the purchase price on 2 November 2020.

⁷ 1971 (3) SA 158 (A) at 179D-E

⁸ 1973 (3) SA 685 (A)

Costs

[41] The applicant has urged this Court to award a punitive costs order against Tristar and GWK, jointly and severally, the one paying the other to be absolved. It was contended that their opposition of the application was without merit, especially since they did not suggest any impropriety on the part of Boshoff in relation to his claim to the calves.

[42] I am of the view that the opposition by Tristar and GWK was not without merit. This view must be seen against the agreement between Tristar and ACBP Boerdery providing for a lien over the live animals that were kept at the feedlot under the name of the latter as well as the vexed legal question relating to the actual passing of ownership of the calves. The usual principle, which I have no intention to depart from, is that costs follow the result. The applicant is successful, and he is entitled to his costs.

Order

[43] In the premises, the following order is made:

1. The first and third respondents are ordered to release the proceeds of the slaughter of seventy-one of the applicant's seventy-three Nguni-cross calves with brand "BEE", in the total amount of R821 869-34,(eight hundred and twenty-one thousand eight hundred and sixty-nine rand and thirty-four cents) currently held in the trust account of the applicant's attorneys of record, which proceeds are to be paid to the applicant.
2. The first and third respondents are ordered to pay the costs of the application, inclusive of the hearing of oral evidence, on a party and party scale, jointly and severally, the one paying the other to be absolved.


OK CHWARO
ACTING JUDGE OF THE HIGH COURT

DATES OF HEARING:

25-26 April 2022 and 12 September 2022

DATE OF JUDGMENT:

30 September 2022

APPEARANCES:

For the Applicant:

Adv. A.G. Van Tonder
Instructed by:
Haarhoffs Inc, Kimberley

For the First and Third Respondent:

Adv B. Knoetze SC
Instructed by:
Van De Wall Inc, Kimberley