



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED

DATE

SIGNATURE

CASE NUMBER: 41102/2013

DATE: 2015.06.19

PIETER JANSE VAN RENSBURG

Plaintiff

✓

ALETTE WESSELS KUNSKAMER (Pty) LTD

First Defendant

ALETTE WESSELS

Second Defendant

JUDGMENT

MABUSE J:

[1] This is an action by the plaintiff against the defendants for the return of three original Ruth Everard paintings, alternatively, the payment of their value in the sum of R1,

500,000.00. In addition the plaintiff seeks against the defendants, the one paying and the other to be absolved, payment of the sum of R250, 000.00 and an order in terms of which the defendants are interdicted from making certain accusations against him and other ancillary relief. This action is resisted by the defendants.

[2] The plaintiff is an adult male person and art teacher who works as an artist. He resides at [.....], The Willows, Pretoria. The first defendant is a company with limited liability duly registered as such in terms of the company statutes of this country with its main place of business at Alette Wessels Kunsamer of Maroelana, Pretoria. The second defendant is an adult business woman who conducts business in the name of the first defendant and at the first defendant's business premises.

[3] The parties applied, in terms of Rule 33(4) of the Uniform Rules, for a separation order in terms of which the matter would proceed only on the merits while the issues relating to quantum would be postponed sine die. The application was accordingly. Before leading evidence the plaintiff was confronted by a hurdle in the form of the defendants' point *in limine*, as the plaintiff's counsel called it, and as it was subsequently confirmed by the defendants' counsel. It would appear that the plaintiff had prepared a bundle marked 'bundle 3', which he had planned to use in the trial. The defendants raised what they called a point *in limine* against the said bundle on three grounds, firstly that it was incomplete, secondly that it was delivered late, and thirdly and lastly that it had not been properly bound. The plaintiff thereupon decided to dispense with the use of the said bundle.

- [4] The plaintiff claimed from the defendants the return of the three paintings called, *Standing Nude*, *Seated Nude*, and *Lady in Dressing Gown*, all three of them by Ruth Everard. The plaintiff's claim is based on averments that he is the owner of the paintings; that he had given no one the right to remove them from his house and that the defendants were in possession of them. It is clear from the evidence of the plaintiff and of Moolenbeek that these paintings were unlawfully removed from his house. Moolenbeek testified that he removed the three paintings from the house he shared with the plaintiff without the plaintiff's knowledge and consent.
- [5] Mr. Moolenbeek testified that he handed the paintings to the defendants. The second defendant has admitted that she received the paintings from Moolenbeek; that Moolenbeek had told her that the paintings were his and that she saw them in inventory of Moolenbeek's assets and more importantly that the defendants had these paintings in their possession. The second defendant admitted furthermore that she has sold the three paintings to a certain Van der Merwe. It is the plaintiff's evidence, and this evidence has been confirmed by the defendants, that the defendants have failed or refused to furnish the plaintiff with the necessary details of the said Van der Merwe. The basis of their doing so was their desire to protect the identity of their customers. Failure by the defendant to furnish the plaintiff with the full details of the person to whom they had sold the paintings derailed the plaintiff's chances of taking action against the purchaser for the recovery of the said paintings. It is consequently for this reason that this action was directed against the

defendants. Had the second defendant disclosed the details of the purchaser to the plaintiff in time, the plaintiff would instead have directed his action against such a purchaser. During cross-examination, the second defendant undertook to reclaim the three paintings, wherever they are, if the Court ordered so.

[6] In order to succeed with his action against the defendants, the plaintiff need only satisfy this court that he was the owner of the said paintings and secondly that they were, without his consent, in the possession of the defendants. It is immaterial as to how the defendants gained possession of the paintings.

[7] It is apposite at this stage that I refer to the culpable conduct of the defendants. On 5 April 2013 the plaintiff's attorneys wrote an email to the defendant's attorney. The defendant's attorneys received the plaintiff's attorneys' email dated 5 April 2013 on only 6 April 2013. This is not in dispute.

[8] In the said the following important messages were contained. After the plaintiff's attorneys had, in the preceding paragraph explained the circumstances under which, according to the plaintiff, the three paintings were removed from the plaintiff's house, they continued and stated as follows in paragraph 4 thereof:

“Ten tye van die gebeure en meer spesifiek toe u besit geneem het van die 3 skilderye, was u bewus van die feit dat hierdie 3 skilderye aan ons kliënt behoort het.”

These words should have warned the defendants about the ownership of the three paintings. With this warning it behoved the defendants to confront Moolenbeek and to investigate his claim of ownership of these paintings. The defendants still could have verified this information by calling the plaintiff and getting from him more information about ownership of the paintings. This the defendants failed to do.

[9] The said email went further at paragraph 5 stated as follows:

“Ons wil op rekord plaas dat ons kliënt nie bewus was van die feit dat Mnr. Moolenbeek skilderye van sy erf af verwyder en aan u oorhandig het nie en het hy dit eers na die tyd gehoor. U het ook nadat u in besit van die drie skilderye gekom het ons kliënt telefonies gekontak en probeer oorreed om ‘n sekere dokument by u of man te kom teken, wat ons kliënt heeltemal tereg geweier het om te doen. Ons plaas op record dat u blykbaar, volgens Mnr Moolenbeek, daarop aangedring het da tons klient sekuriteit aan u verskaf, waarna Mnr Moolenbeek blykbaar ‘n sms boodskap aan u gestuur het tot die effek dat Mnr Janse van Rensburg bereid is om sekuriteit te verskaf. Ons klient was te alle revante tye onbewus was van hierdie gebeure en kommunikasie en het nie teenoor enige person aangedui da thy bereid is om sekuriteit te verskaf nie. Hy het ook nie die versending van die sms boodskap gemagtig nie en was trouens ook nie daarvan bewus nie.”

Again the first part of this paragraph should have been the cause for concern for the defendants as far as it related to the ownership of the three paintings. Instead, without Moolenbeek having furnished them with verifiable proof of his ownership of the three paintings, the defendants persisted that the plaintiff was not the owner of

the paintings and that the paintings belonged to Moolenbeek. They furnished no valid reason why they believed that an inventory of assets Moolenbeek had given them constituted sufficient proof of Moolenbeek's ownership of the three paintings. They did not take the matter up with Moolenbeek but simply chose to bury their heads in the sand and to insist that Moolenbeek was the owner. This conduct is unreasonable and does not demonstrate any honesty on the part of the defendants. The defendants also claimed that because the plaintiff *"en Mnr Moolenbeek is na my wete lewensmaats vir die afgelope ongeveer veertig jaar"* the paintings belonged to their universal partnership.

[10] In paragraph 8 of the plaintiff's attorneys' email, the defendants were requested to keep these three paintings in their possession if they still had them or, if they had sold them and did not have them, to furnish the plaintiff's attorneys with the full details under which they were sold to a third party and the physical address of the third party. The request was framed as follows:

"8. U word versoek om binne 24 uur skriftelik die volgende te bevestig.

8.1 Indien die skilderye in the besit van 'n derde persoon is, 'n uiteensetting van die omstandighede waaronder dit in die derde persoon se besit gekom het en wat die fisiese adres van daardie persoon is."

Instead of furnishing the plaintiff with the information requested, the defendants responded as follows in paragraph 1.8 of their email dated 8 April 2013:

"Kragtens die skriftelike o.a pandgewingsooreenkoms, was ons geregtig om die 3 skilderye te verkoop, wat ons gedoen het en ek is nie bereid om vertroulike inligting

van ons klant, aan u te openbaar nie, behalwe om u meet e deel dat die 3 skilderye teen die markwaarde daarvan, naamlik R300,000.00 verkoop is en welke waarde ek hieronder mee verder handel;”

[11] This request was repeated in the plaintiff's attorneys' email dated 24 May 2013 to the defendants. Still the defendants refused to furnish the plaintiff with the necessary information. The defendants persisted with their attitude that the paintings did not belong to the plaintiff but to Moolenbeek and that the plaintiff had consented to pledging them. This is despite the fact that knew before the suspension of Moolenbeek on 12 October 2012 that Moolenbeek was dishonest and that he had the tendency of claiming ownership of other people's art works. It is now clear from the evidence of Moolenbeek that the plaintiff was correct in all respects and that the defendants have no leg to stand on with regard to the ownership of the paintings.

[12] In their plea, the defendants had pleaded that they had no knowledge that the plaintiff was an artist and an art teacher. This was not true for, during adroit and insidious cross-examination, the second defendant admitted that the plea contained information that was not correct. She admitted furthermore she knew that the plaintiff was an art teacher and an artist. It must be pointed out this stage that the second defendant, as a witness, did not, in many respects, make a good impression to the court. She had a tendency of making unsubstantiated allegations. She refused to make simple admissions, was evasive in answering some of the crucial questions put to her and on occasions would give long winded answers.

[13] The power of this Court to make orders is unlimited. This Court may make orders of any possible nature. It may also make orders that are designed to protect a right. In terms of our common law, the principle embodied in the *maxim ubi jus ibi use ibi remedium* still applies. In terms of the law an absolute owner of property who is unlawfully deprived of possession is entitled, by means of *vindicatio* to recover its possession from any person in whose possession such property is found. See **Henning v Petra Meubels 1947(2) SA 407(T) at p.412**. In order to succeed with this remedy, the owner, or in this case the plaintiff, needs only prove two facts namely that he is the owner of the property in question and secondly that the said property is in the possession of the defendants. The owner of the property may recover his property from any person, without having to compensate him, who has it in his possession irrespective of the circumstances under which such a person gained possession of such a property, in other words, whether he became the possessor *bona fide* or *mala fide*.

[14] The defendants in this case no longer have possession of the three paintings. The defendants may, however, be ordered to restore possession under the following circumstances only:

1. On the ground that the defendants have undertaken to do so if ordered by the Court to recover possession of the property wherever it is. The implication here is that restoration of possession of the plaintiff's property is still possible.

2. That the defendants have unjustifiably withheld vital details of the purchaser from the plaintiff and had thereby made it impossible for the plaintiff to reclaim possession of the three paintings from the possessor.

“Where my thing is found, there I have indicate it.”

See **Heuning v Van Greuning 1979 (4) SA 952A at 959.**

3. The defendants knew before they suspended Moolenbeek on 12 October 2012 that Moolenbeek was dishonest and had employed the same pattern of giving some people other people’s paintings and claiming them to be his own paintings.

[15] It was never the defendants’ case that the three paintings were irreclaimable.

At any rate in view of the evidence that the paintings have now been sold and delivered to someone else, which means that they are no longer in the possession of either of the defendants, the owner of the property or the paintings may, if he so chooses, claim the value of the paintings from Moolenbeek, as the person who stole them from his house or, still if he so chooses from the defendants as the persons who parted with the three paintings with the full knowledge that they belonged to the plaintiff or as a persons who undertook during trial, to comply with an order of Court to recover them, if so ordered. See **John Bell and Company Ltd v Esselen 1954(1) SA 147(1) at 153 AD.** In this case the defendants had no justifiable reason to believe that the three paintings belonged to Moolenbeek. On the contrary there is evidence that they should have had a reasonable suspicion of Moolenbeek’s authority to deal with the paintings in the manner in which he did so in this

matter. According the defendants could not be said to be bona fide in accepting the paintings from Moolenbeek.

[16] CLAIM TWO

The plaintiff has set out his cause of action as follows in respect of his second claim. He has alleged that he is an artist and art teacher whose income is at least partially dependant on a segment of the public and that the public found him as a person who has specific trades and acceptable personal qualities. Since October 2012 the defendants have, on times without number, wrongfully, intentionally and maliciously, in the alternative, negligently, made misrepresentations about him. In addition the defendants have made false accusations against him and have communicated both these misrepresentations and false accusations to the plaintiff personally, as the defendants have admitted, and to members of the South African Police Services in Pretoria and to other people.

[17] The impact of such misrepresentations and false accusations was that –

17.1 the plaintiff was living in a homosexual relationship with Moolenbeek;

17.2 Mr. Moolenbeek was a thief and a fraudster;

17.3 that the plaintiff was also guilty of the crime they alleged Mr. Moolenbeek had committed; and,

17.4 that the plaintiff had shared with Mr. Moolenbeek the proceeds of the crimes Moolenbeek had committed.

[18] It was furthermore pleaded by the plaintiff that by making such afore going accusations to the plaintiff personally and communicating the misrepresentations to other people, the defendants have unlawfully and intentionally and maliciously impaired his dignity, hurt his feelings, caused him to suffer substantial distress and anxiety and caused substantial damage to his good name, diverted custom from him which resulted in him suffering damages with the potential of the plaintiff suffering further damages. It is for the above reasons that the plaintiff claimed the said amount of R250, 000.00 from the defendants.

[19] The plaintiff complained about the contents of some of the emails from the defendants. In the email dated 8 April 2013, the defendants had this to say:

19.1 “*1.9 U kliënt en Mnr. Moolenbeek is na my wete, lewensmaats vir die afgelope ongeveer 40 jaar.*”

19.2 The defendants continued in paragraph 10 of the same email where they stated that:

“*1.10 Verdermeer is ek deeglik bewus daarvan dat daar bowendien ‘n universele vennootskap tussen hulle bestaan ten opsigte van al hul bates en meer besonder, ook die kunsversameling.*”

19.3 The word “*lewensmaat*” appears again in paragraph 8 of the defendants’ email dated 8 April 2013. It was used in that paragraph in the following manner:

“8. Indien u kliënt enige skade gelei het soos hy beweer en wat ek ontken, moet hy sy skade gaan soek waar hy dit verloor het en dit is by sy lewensmaat.”

[20] The plaintiff took umbrage to being referred to as homosexual who lived in such a relationship with another man.

[21] Finally, the plaintiff contends that his dignity was violated by the defendants. It is contended by the plaintiff that the defendant violated his dignity when they made the following utterances in their correspondence dated 8 April 2013:

“Mnr. Moolenbeek, wat in ons diens was as bestuurder, het reeds skuld erken ten aansien van die “verdwyning”, diefstal, bedrog en vervalsing en word die klagte deur die Handelsmisdaad-tak van SAPD ondersoek (volgens mededeling aan my, is hy reeds gearresteer). Dit sal in alle waarskynlikheid uit die ondersoek, aan die lig kom dat u kliënt ook gedeel het in die geld wat Mnr. Moolenbeek wederregtelik verkry het uit sy misdrywe, soos wat Mnr. Moolenbeek my ook meegedeel het, “dat hy en Pieter die geld nodig gehad het”. U sal sekerlik u kliënt adviseer oor die strafregtelike gevolge, wat dit vir hom inhou.”

In their email dated 16 June 2013 the defendants stated that:

“Dit is egter insigewend dat u nie reageer op die versoek, soos vervat in my skrywe van 8 April 2013, om my in kennis te stel of u kliënt in die omstandighede, soos hy genoodsaak is om te doen, ‘n klag van diefstal teen Mnr. Moolenbeek aanhangig gemaak het nie. In hierdie verband moet u kliënt voor of op sluiting van besigheid

op Vrydag 21 Junie 2013 my in kennis stel of hy voortgaan met sy aksie teen ons soos vervat in u dreigemente, by gebreke om my in kennis te stel of indien u kliënt volhard om sy dreigement uit te voer, ek genoodsaak sal wees om 'n verdere klag van bedrog teen Mnr. Moolenbeek, en in die omstandighede, ook 'n klag teen u kliënt, aanhangig te maak.”

In their email dated 29 June 2013 this is what the defendants stated:

“Ons kan slegs 'n negatiewe afleiding daaruit maak dat u kliënt geensins op my skrywe antwoord nie. Dit is duidelik dat die SAPD u kliënt se betrokkenheid as moontlike medepligtige of andersins, moet ondersoek veral in die lig van Mnr. Moolenbeek se mededelings aan my, dat u kliënt gedeel het in van die geld ter sprake.”

The implication of all these utterances portray, and so unjustifiably, the plaintiff as a criminal. Accordingly the plaintiff's dignity was violated by such utterances. I am satisfied therefore that the plaintiff has made out a good case against the defendants in respect of both his claims.

[22] Accordingly I make the following order:

1. The plaintiff's action on the merits is hereby granted.
2. With regard to the First Claim the Defendants are hereby ordered to return the Plaintiff's three Ruth Everard paintings, namely, Lady In A dressing Gown; Standing Nude With Red Hair On A Green Cloth and Nude, within thirty (30) days from 19 June 2015, failing which the Defendants are hereby ordered to

pay, the one paying and the other to be absolved, and still to be proved or agreed, the value of the aforementioned three paintings;

3. With regard to the Second Claim, the Defendants are hereby ordered to pay, the one paying and the other to be absolved, the Plaintiff's proven damages (including a *solatium* and financial damages);
4. The Defendants are hereby ordered, jointly and severally, to pay the Plaintiff's costs pertaining to the merits trial (which shall include the costs incurred pertaining to the quantum until the date of the pre-trial conference where the agreement was finalised that the merits and quantum be separated), on a High Court party-and-party Scale, which costs shall include the costs consequent upon Plaintiff's counsel attending the pre-trial conference and his preparation for the pre-trial conference as well as the costs of counsel.

P.M. MABUSE
JUDGE OF THE HIGH COURT

Appearances:

<i>Counsel for the Plaintiff:</i>	<i>Adv. L Kok</i>
<i>Instructed by:</i>	<i>Christo Botha Attorneys</i>
<i>For the Defendants:</i>	<i>Attorney S Bester</i>
<i>Date Heard:</i>	<i>24-26 February 2015</i>
<i>Date of Judgment:</i>	<i>2015 June 19</i>