



IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

Case number: **5597/2011**
Date 24 Oktober 2013

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO	☒ YES ☐ NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO	☒ YES ☐ NO
(3) REVISED	☐
24.10.2013	
DATE	SIGNATURE

In the matter between :

WONDER AIR (PTY) LTD

Plaintiff

and

DODSON INTERNATIONAL PARTS
SOUTH AFRICA (PTY) LTD

Defendant

JUDGMENT

JANSE VAN NIEUWENHUIZEN AJ

- [1] The plaintiff, in its capacity as owner and/or possessor of two Pratt & Whitney PT6A65AR Turbine Engines, instituted action against the

defendant for the delivery of the engines *alternatively* for payment of the amount of \$ 1 600 000, 00 with interests and costs.

- [2] The plaintiff alleges that the two engines were installed in a Dakota DC3-651P belonging to the defendant and that the defendant refuses and/or neglects to return the engines to the plaintiff.

SEPARATION OF ISSUES

- [3] At the inception of the trial I was informed by Mr ~~Janse~~ van Rensburg, counsel for the plaintiff, that the parties have agreed to separate the issue pertaining to the defendant's special plea of prescription from the remainder of the issues in dispute.

- [4] Consequently I made an order in terms of rule 33(4) of the Uniform rules of Court, ordering the separation agreed upon by the parties and postponing the remainder of the issues *sine die*.

SPECIAL PLEA

- [5] The plaintiff, in its initial particulars of claim issued on 8 February 2011, made, *inter alia*, the following averments in support of its claim for the return of the engines and/or payment of the amount claimed:

"

3.

At all relevant times, Plaintiff was the owner of twoturbine engines..."

4.

On or about July 2008:

4.1 *and after Plaintiff ferried a Dakota, the property of or
belonging to Defendant from Lanseria Airport to
Wonderboom Airport at the instance and instructions of
Defendant;
and whilst*

4.2 *the engines belonging to Plaintiff were still installed in
Defendant's Dakota,*

*Defendant there and then, acting through its Director, one Robert Lee
Dodson (Snr), unlawfully, whilst knowing that he is not entitled to do so
and without the knowledge and/or consent of Plaintiff removed,
alternatively gave instructions for the said Dakota aircraft to be removed*

from Wonderboom Airport to Ottawa in Kansas, in the United States of America."

[6] I pause to mention that the plaintiff also has a second claim for damages, which claim is, however, not relevant to the issue to be decided herein.

[7] On 13 March 2013, the plaintiff affected an amendment to its initial particulars of claim, in terms of which amendment the following averments were introduced:

" 3.

At all relevant times, Plaintiff was the owner of twoTurbine Engines, alternatively and if it is found that the Plaintiff is not the owner of the engines the Plaintiff was the possessor of the engines and possessed the engines by virtue of one or more of the following facts:..

4.

On or about July 2008:

4.1 *and after Plaintiff ferried a Dakota, the property of or
 belonging to Defendant from Lanseria Airport to
 Wonderboom Airport at the instance and instructions of
 Defendant;
 and whilst*

4.2 *the engines*

4.2.1 *Belonging to Plaintiff; alternatively*

**4.2.2 *The possession of which Plaintiff was entitled to,
 were still installed in Defendant's Dakota"***

*Defendant there and then, acting through its Director, one Robert Lee
 Dodson (Snr), unlawfully, whilst knowing that he is not entitled to do so
 and without the knowledge and/or consent of Plaintiff removed,
alternatively gave instructions for the said Dakota aircraft to be removed
 from Wonderboom Airport to Ottawa in Kansas, in the United States of
 America."*

(own emphasis)

- [8] The defendant filed an amended plea and counterclaim and raised a special plea of prescription to the amended particulars and more particularly to the allegations emphasised *supra*.

[9] The special is premised on the basis that the plaintiff introduced a new cause of action and the relevant portions of the special plea reads as follows:

" 2.

The Plaintiff's alleged claim (in the alternative) against the Defendant arose by the latest during July 2008.

3.

The Plaintiff effected the Amendment to include the alternative cause of action, namely to rely on a right of possession to the aircraft engines, during February 2013.

4.

In terms of Section 11(d) of the Prescription Act, 68 of 1969, the applicable period of prescription is a period of three years.

5.

Because a period of more than three years has lapsed since the alleged (alternative) claim of the Plaintiff arose, to the date of Plaintiff effecting the Amendment, the Plaintiff's claim has become prescribed by virtue of the provisions of Section 10(1) of the Act. "

SUBMISSIONS:

[10] Mr Pelser SC, counsel for the defendant, first of all submitted that the plaintiff's initial claim was based on a *rei vindication* and an *actio ad exhibendum*.

[11] Mr Pelser SC, further submitted that the amendment effectively removed the plaintiff's reliance on ownership and on an analysis of the new allegations the plaintiff is now relying on an enrichment claim without specifying such action.

[12] In the premises, the amended claim is a new debt and the debt has prescribed.

[13] Mr ~~Janse~~ van Rensburg did not agree. He submitted, that the plaintiff's cause of action was and is still based on the *condictio furtiva*. Mr ~~Janse~~



van Rensburg, furthermore, submitted that only the capacity in which the plaintiff claims relief has been amended.

- [14] In response to the aforesaid submissions, Mr Pelser SC, in additional heads of argument made the following submission after referring to various case law and text books:

"What is stated above reinforces the argument of the Defendant that the condiction furtiva is not available to the Plaintiff once he has established that he cannot prove ownership. He cannot change tack so as to rely upon having been in possession. It is a new debt that the Plaintiff is trying to recover."

PLAINTIFF'S CAUSE OF ACTION:

- [15] It is clear from the plaintiff's initial particulars of claim that the plaintiff relied on the *condictio furtiva*. The necessary allegations in this regard are contained in the particulars of claim.

- [16] The same allegations sustaining a cause of action based on the *condictio furtiva*, are alleged in the amended particulars of claim.

- [17] The only question to be determined is whether the fact that the plaintiff initially claimed as owner and in terms of the amended particulars of claim as possessor, constitutes a new debt.

PRESCRIPTION ACT - DEBT

- [18] Section 10(1) of the Prescription Act, 68 of 1969 ("the Act"), provides as follows:

*"Subject to the provisions of this Chapter and of Chapter IV, a **debt** shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such **debt**"*
(own emphasis)

- [19] A "debt" as it appears in section 10(1) of the Act, has been succinctly defined by Trollip JA in *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 AD at 825 F - H:

"I prefer to use the term "right of action" to "cause of action" because, I think, the former is strictly and technically more legally correct in the present context (cf Mazibuko v Singer 1979 (3) SA 258 (W) at 265D-G). "Cause of action" is ordinarily used to describe the factual basis, the set of material facts, that begets the plaintiff's legal right of action and, complementarily, the dependant's "debt", the word used in the Prescription Act."

- [20] "More recently, Jones AJA defined "debt" as follows in *CGU Insurance Ltd v Rumdel Construction (Pty) Ltd* 2004 (2) SA 622 SCA at 628C:

"The debt is not the material set of facts. It is that which is begotten by the set of material facts."

- [21] The rationale behind the provisions of the Prescription Act has (with reference to its predecessor) been explained by Holmes JA in *Santam Insurance Company Ltd v Vilakazi* 1967 (1) SA 246 AD at 253H as follows:

"In my opinion it is clear that the service referred to in sec. 6 (1) (b) must be a service whereby action is instituted as a step in the enforcement of the claim or right. The underlying reason why such service interrupts prescription is that the creditor has thereby formally involved his debtor in court proceedings for the enforcement of his claim"

- [22] The debt the plaintiff intended to enforce in its unamended particulars of claim was the return of the engines *alternatively* payment of an amount equal to the value of the engines. The plaintiff claims the same debt in its amended particulars of claim, albeit that the plaintiff has added another capacity in which it claims the debt. In other words, what the plaintiff "begets" prior and subsequent to the amendment remains the same.

[23] I am, furthermore, satisfied that the defendant knew at all relevant times, what the claim, the plaintiff endeavors to enforce, is.

CONCLUSION

[24] In the premises, the amendment effected by the plaintiff on 13 March 2013 did not introduce a new 'debt' as envisaged by the Act and the defendant's special plea of prescription falls to be dismissed.

ORDER:

I make the following order:

The defendant's special plea of prescription is dismissed with costs.



N Janse van Nieuwenhuizen

Acting Judge of the North Gauteng High Court, South Africa

For the applicant: Van Zyl Le Roux Inc
Counsel for applicant: Adv ~~Jane~~ Van Rensburg

For the Defendant: Coetzer & Partners
Counsel for Defendant: Adv Q Pelser SC

A handwritten signature in black ink, appearing to be a stylized 'J' or 'K' with a long horizontal stroke.A small, handwritten mark or signature in black ink, possibly a stylized 'S' or 'Z'.