

IN THE HIGH COURT OF SOUTH AFRICA
(FREE STATE PROVINCIAL DIVISION)

Appeal No.: A267/2012

In the appeal between:

SOUTHERN STAR ORGANISATION
ENGINEERING (PTY) LTD

Appellant

and

A & J DIESELDIENS

Respondent

CORAM: RAMPAL, J *et* BLOEM, AJ

JUDGMENT: BLOEM, AJ

HEARD ON: 11 MARCH 2013

DELIVERED ON: 14 MARCH 2013

- [1] On 15 April 2010 the appellant issued summons against the respondent in the Magistrate's Court, Kroonstad for the return of a truck and a trailer, alternatively and in the event of the respondent no longer being in possession thereof, payment in the sum of R100 000,00 and R30 000,00 respectively, interest thereon and costs. On 17 October 2011 and after the close of the appellant's case, the magistrate granted absolution from the instance with costs. It is against that judgment that the appellant now appeals.

- [2] The appellant is Southern Star Organisation Engineering (Pty) Ltd and the respondent is A & J Dieseldiens. The appellant is based in Port Elizabeth. It manufactures various steel products, like truck trailers, car carrier trailers, tipper trucks, water tankers and drop-side bodies. It manufactured 90% of the fleet of a ferry company, Southern Star Organisation (SA)(Pty) Ltd. The appellant also leased some of its trucks and trailers to Southern Star Organisation (SA) (Pty) Ltd and Southern Star Organisation (Pty) Ltd, the operational company of the ferry company. The appellant and the other two companies are separate legal entities. The respondent is based in Kroonstad and seems to be in the business of repairing trucks and trailers.
- [3] The appellant manufactured a trailer and had it licensed and registered with the relevant authorities. It also bought a Nissan truck from Truck Busters (Pty) Ltd during April 2006 with the assistance from Wesbank. It entered into an instalment sale agreement with Wesbank in terms whereof, although the appellant had possession of the truck, Wesbank remained the owner thereof until such time as it received the last payment whereupon the appellant would become the owner of the truck.
- [4] The appellant made the truck and trailer available to Southern Star Organisation (SA)(Pty) Ltd (hereinafter referred to as “the company”) on the basis that the company was responsible for all the costs relating to the

licensing, registration renewals and maintenance of the truck and trailer.

- [5] The appellant became aware that proceedings were underway for the liquidation of the company. With the leave of the liquidators it retrieved all its assets from the company, save for the truck and the trailer (hereinafter referred to as “the goods”) which, it was informed, were in the respondent’s possession. All attempts to establish the whereabouts of the goods elicited a response of no co-operation from the respondent. The appellant accordingly issued summons against the respondent, as aforesaid.
- [6] The appellant’s claim is based on the *rei vindicatio* alternatively the *actio ad exhibendum*. The *rei vindicatio* is available to an owner for the recovery of his movable or immovable thing from whomsoever is in possession or has detention of the thing, irrespective of whether the possession or detention is *bona fide*. (LAWSA, First Reissue, vol 27 at paragraph 381 on page 323). To be successful with its claim based on the *rei vindicatio*, the appellant had to prove on a balance of probabilities that he was the owner of the goods (**Dreyer and Another NNO v AXZS Industries (Pty) Ltd** 2006 (5) SA 548 (SCA) at 550I - J) and that the goods were in the respondent’s possession at the time of the institution of the proceedings (**Mehlape v Minister of Safety and Security** 1996 (4) SA 133 (W) at 136F-G).

- [7] The *actio ad exhibendum* is available to the owner of a thing upon proof that he was the owner thereof at the time the defendant disposed of the thing (**RMS Transport v PSICON Holdings (Pty) Ltd** 1996 (2) SA 176 (T) at 181A-B), that the defendant had wrongfully disposed of the thing, that the defendant had knowledge of the owner's claim to the thing and that the owner suffered patrimonial loss as a result of the defendant's wrongful disposal of the thing (**Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd** 1999 (2) SA 986 (T) at 1011I-J).
- [8] To prove its case the appellant called only Anthony Wright, its managing director. He testified how the goods came to be in the company's possession. He testified that the appellant manufactured the trailer, purchased the truck with the assistance of Wesbank, that, when he became aware of the liquidation proceedings against the company, he went to Johannesburg where the company's main depot was. He collected all the appellant's assets which were in the company's possession, save for the truck and trailer. Through the company's operational manager, the appellant discovered that the truck and trailer were at the respondent's premises. The appellant had never had any dealings with the respondent. He and his colleague, Michael Corney, made telephone calls to the respondent but its secretary informed them that the owner was unavailable. She enquired why they wanted to contact the owner. She was informed that it was about the goods. A few days thereafter they telephoned the respondent's offices and spoke to the

same lady who said that the owner could not speak to them and that they should make contact with the respondent's attorneys. When they telephoned the respondent's attorneys, they were informed to contact the respondent directly. The appellant contacted Wesbank "to try and recover the truck" on its behalf. Wesbank demanded that the appellant pay the full outstanding balance in respect of the truck seeing that it had breached the terms of the instalment sale agreement. The appellant paid the outstanding balance to Wesbank on 12 March 2010. Wesbank thereafter informed the appellant that it (Wesbank) would be unable to assist the appellant to recover the truck. The appellant then issued summons against the respondent on 15 April 2010.

- [9] Regarding the appellant's claim based on the *rei vindicatio* in respect of the truck Mr le Roux, counsel who appeared on behalf of the appellant in the magistrate's court, submitted to the magistrate that the appellant could not rely on the *rei vindicatio* because, so the submission went, the appellant was not the owner thereof until 12 March 2010 when the last payment was made to Wesbank. Mr Jooste, counsel who appeared before us on behalf of the appellant, distanced himself from that submission, but nevertheless conceded that the appellant did not make out a case based on the *rei vindicatio* because no evidence was placed before the magistrate to prove that, as at 15 April 2010, the respondent was in possession of the goods. The concession made by Mr Jooste is, with respect, correct because, in order to succeed, the appellant was required to prove not only that it

was the owner of the truck (which it became on 12 March 2010 when it paid the full outstanding balance to Wesbank) but also that, at the time when it instituted the action which gave rise to this appeal, the respondent had possession of the truck. (**Chetty v Naidoo** 1974 (3) SA 13 (A) at 20C). The appellant placed no evidence before the magistrate to prove that the respondent was in possession of the truck when it instituted action.

[10] For the same reason the magistrate correctly found that the *rei vindicatio* was also not available to the appellant in respect of the trailer. Although it proved that it was the owner of the trailer, the appellant failed to prove that the respondent was in possession thereof when it instituted action against the respondent on 15 April 2010.

[11] At the close of the appellant's case the evidence showed that the appellant acquired ownership of the trailer during 2006 and that it became the owner of the truck on 12 March 2010. The appellant leased the goods to the company on 12 July 2008. There was no evidence as to how the respondent came to be in possession of the goods. Instead, when it was put to Mr Wright under cross-examination that the respondent effected some repairs to the goods and exercised its lien over the goods "until such time as the money is paid for the work that was done", Mr Wright had no knowledge thereof. That response serves to prove that Mr Wright was unable to place evidence before the magistrate to prove that the respondent was in possession of the goods,

more particularly that it was in possession thereof when the respondent instituted the action against it on 15 April 2010.

[12] The next enquiry is whether the appellant proved that the respondent disposed of the goods. If so, did the appellant prove that such disposal occurred before *litis contestatio*, that it was wrongful and when the respondent wrongfully disposed of the goods, it had knowledge of the appellant's claim thereto? Mr Jooste conceded that the evidence is not clear as to when precisely the goods were disposed of, but submitted that the only reasonable inference to be drawn from the evidence was that the goods were disposed of after the respondent became aware of the appellant's claim to the goods. For that submission he relied on Mr Wright's evidence that the respondent, through its secretary, sent the appellant from pillar to post when he and Mr Corney made enquiries about the whereabouts of the goods. Counsel furthermore relied on an email that Wesbank sent to the respondent on 4 September 2009 wherein Wesbank stated that the truck was "in the name of Southern Star Organisation Engineering (Pty) Ltd", the appellant herein, and that it (Wesbank) was requested by the appellant to assist it to recover the truck.

[13] Mr Van Rooyen, who appeared on behalf of the respondent before the magistrate and us, informed the magistrate that the respondent had no objection to the handing in of the appellant's bundle of documents "op voorwaarde... dat elke dokument behoorlik bewys sal word". The above email

formed part of that bundle. It was Mr Van Rooyen who cross-examined Mr Wright on that email at the conclusion of which he had the email admitted as an exhibit. Accordingly, the evidence shows that on 4 September 2009 Wesbank informed the respondent that the truck was in the appellant's name and that it (Wesbank) was requested by the appellant to recover the truck.

[14] Sight should not be lost of the fact that, as at 4 September 2009, Wesbank was the owner of the truck. At best for the appellant at that stage, it had an interest in the truck. Such interest is insufficient, because the *actio ad exhibendum* is only available to the owner of the *res*. (**RMS Transport** (*supra*) at 182G). As at 4 September 2009 the *actio ad exhibendum* was not available to the appellant in respect of the truck, simply because it was not the owner thereof.

[15] Mr Jooste's submission is furthermore based on the assumption that the respondent disposed of the goods. Mr Wright did not give evidence that the respondent disposed of the goods. If the appellant did not prove that the respondent disposed of the goods, it follows that it also failed to prove that the disposal was wrongful, that it occurred before *litis contestatio* and that, at the time of the disposal the respondent had knowledge of the appellant's claim thereto. Regarding the last factor, on 4 September 2009 Wesbank informed the respondent that the truck was "in the name of" the appellant. That could not have meant and did not mean

that the appellant was the owner of the truck. It indicated only that the appellant had an interest in the truck. There is no evidence to prove that, after 4 September 2009, the respondent was informed that the appellant will become the owner of the truck or that it in fact became the owner thereof on 12 March 2010. The email only dealt with the truck. There is no evidence to prove that the respondent was informed that the appellant was the owner of the trailer. In the circumstances, the appellant simply failed to place any evidence before the magistrate to prove that the respondent disposed of the goods.

[16] Since the appellant failed to prove that the respondent disposed of the goods, its claim based on the *actio ad exhibendum* was also correctly dismissed by the magistrate.

[17] In summary, on the evidence at the close of the appellant's case, no reasonable person could give or might have given judgment against the respondent. Put differently, there was insufficient evidence upon which a reasonable person could find for the appellant. (**Oosthuizen v Standard General Versekeringsmaatskappy Bpk** 1981 (1) SA 1032 (A) at 1035H – 1036B.)

[18] The appellant did not lodge the record of appeal timeously. It accordingly made an application for the condonation of the late lodging of the record of appeal. The affidavit which was used in support of the application explained why the record of appeal was not lodged timeously. I am satisfied that the

explanation is satisfactory. The parties were in agreement that, if condonation were granted in respect of the late lodging of the appeal record, I should consider ordering each party to pay its own costs. That seems to be fair.

[19] In the circumstances, I make the following order:

- 19.1 the late lodging of the record of appeal is condoned;
- 19.2 each party pay its own costs in respect of the application for the condonation of the late lodging of the record of appeal; and
- 19.3 the appeal is dismissed, with costs.

G.H. BLOEM, AJ

I concur.

M. H. RAMPAL, J

On behalf of appellant: Adv P.E. Jooste
Instructed by:
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