

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

CASE NO: A 240/07

NOT REPORTABLE

DATE: 29/4/2009

In the matter between:

WILLEM CHRISTIAAN BOSCH

Appellant

and

JEAN-PIERRE DU PLESSIS

Respondent

JUDGMENT

MOTHLE A J

1. Appellant instituted action against the Respondent in the Pretoria Magistrate's Court for the return of his motor vehicle BMW 330 registration NRZ 958 GP (*"the vehicle"*) and/or payment of an amount of R100, 000.00. At the end of the trial, the Court ordered the Respondent to return to Appellant the vehicle (*"in the condition it appeared on the photograph"*) and each party to pay its own costs. Appellant now comes before this Court on appeal against the judgment and order of the Magistrate's Court.

2. Appellant alleges in the particulars of claim that he is the owner of the vehicle and that "*the Defendants*" (the Respondent) are in possession of the vehicle. In the alternative, and if it is found that the Respondent is no longer in possession of the said vehicle, the Appellant alleges that the Respondent disposed of the vehicle with the knowledge of the Appellant's ownership, and that the value of the vehicle is R100,000.00. He then claims delivery of the vehicle, payment of the amount of R100, 000.00 and cost of suit.
3. The Respondent in his plea admits Appellant's ownership of the vehicle, and further that he is in possession of a vehicle which, however, is not a complete motor vehicle, but a wreck in the same condition as it was found on the premises. Respondent further tenders the vehicle in the same condition as it is to Appellant.
4. It may be mentioned that the Respondent had issued a counter-claim, suing for the costs of storage of the vehicle on its premises, which counterclaim was, however, withdrawn.

5. Appellant testified and called Conradie as well as an expert, Mr Cloete as witnesses.
6. The Appellant testified that he purchased the vehicle which was damaged from an accident, from Conradie. He then engaged the services of Conradie to repair it. At that time, Conradie was operating a business of repairing vehicle on the premises belonging to the Respondent. He further testified that the vehicle which, at the commencement of the trial was located on the Respondent's premises, was no longer in the condition in which it was when Conradie, was locked out and denied access to the premises. It was stripped of its parts.
7. It is Conradie's evidence that apart from certain doors, automotive glass, wheels and bonnet of the vehicle, he left the vehicle at Respondent's premises fully fitted with an engine, steering wheel, gearbox and drive train, electrical harnesses and computers, seats and was, for all purposes, a fully fitted vehicle which was mechanically sound, having been started and checked by way of computer. The outstanding parts of the vehicle were on the premises and Conradie was about to finalise the restoration of the vehicle.

8. The Appellant further testified that the vehicle was now a total wreck. As it appears from the photographs which Appellant handed to Court, it has been stripped of many parts, some of which were lying around next to the body of what was Appellant's vehicle. For that reason, it is no longer in the condition it was when the Respondent evicted Conradie from the premises and it is no longer restorable. He could not accept Respondent's conditional tender to collect the vehicle, subject to the Respondent being indemnified of any claim on the vehicle.
9. Cloete, an expert in the determination of the value of a motor vehicle and spares, testified that according to the description of the condition of the vehicle as explained to him by Conradie, it was worth R100 000.
10. On the other hand, the Respondent, supported by Rankert Radefit, testifies that the vehicle is in the condition in which it was when Conradie was locked out and there is nothing that was done to the vehicle to result in the state in which it was at commencement of the trial. The Court a quo also heard the evidence of Radefit who was a workshop manager in Conradie's workshop. He testified for the Respondent that he

had been working at the premises for almost two months before Conradie was locked out. He saw that the vehicle was stripped of its part to be repainted. After repainting, the parts were not restored, up to the time when Conradie was locked out. The vehicle on the photograph was in the same condition Conradie left it.

11. The dispute between the parties seems to centre on the condition of the Appellant's vehicle. It is common cause that Appellant purchased the vehicle from one Conradie who was conducting business of repairing motor vehicles on the Respondent's premises. It is also common cause that as at the time of the purchase of the said motor vehicle, it was damaged from an accident and Conradie was to effect repairs. It is further common cause that the Respondent locked out Conradie from the premises and thereby took possession of all the vehicles that were on that premises, including the Appellant's vehicle.

12. The Court a quo accepted the evidence of Radefit and found that the Appellant had not succeeded to prove that the vehicle was non restorable and that the Respondent had a duty of care of the vehicle, to the Appellant. The Respondent was

ordered to return the vehicle *“in the condition it appeared on the photograph”*

13. It is contended for Appellant on appeal that his cause of action was one of *rei vindicatio* and in the alternative *actio ad exhibendum*. It is trite that an owner of a property such as the Appellant is entitled to reclaim it with *rei vindicatio*. In such instance, it is always advisable to claim *actio ad exhibendum* as alternative relief for damages, in case the property sought is no longer available or has been disposed of.
14. Appellant contends that by the end of the trial it was clear that *“depending on the Court’s finding as to the condition of the vehicle, he no longer had to rely on the return of the vehicle in that it was not in the same condition it was when the Respondent took possession of it.”*
15. Appellant further submits that Respondent’s tender of restitution is ineffective in law in that it was not an unconditional tender, as the Respondent demanded to be indemnified of any damages to the vehicle.

16. The Court a quo's finding is that Appellant should have sued Conradie with whom he had a contract for the repair of the vehicle. The Court held that Conradie, and not the Respondent, had a duty of care towards the Appellant in regard to the repair and condition of the vehicle.

It is clear that Appellant, at least on appeal, no longer relies on the *actio rei vindicatio* as he contends that the vehicle is no longer restorable. He now seeks relief in terms of the alternative *actio ad exhibendum*, and refers this Court to **Alderson & Flitton (Tzaneen) Limited v EG Duffeys Spares 1975 (3) SA 41 (T) at 46** and **Phillip Robinson Motors (pty) Ltd v NM Dada (Pty) Ltd 1975 (2) SA 420 AD**, in support of his contentions.

17. It is my view that the authorities on which Appellant relies do no support his case. As submitted by Respondent's counsel, and correctly so, in an *actio ad exhibendum* it is necessary for Appellant to prove that Respondent disposed of the vehicle; at the time of such disposal he knew that Appellant is owner of the vehicle and that Respondent acted *mala fide* in disposing of the vehicle or any of its parts. **See: Unimark Distributors (pty) Ltd v Erf 94 Silvertondale (pty) Ltd 1999**

(2) SA 986 (T). The Respondent admits that he knew that the Appellant was owner of the vehicle. However, the requirement of *mala fide* disposal of the vehicle was neither cited in the pleadings nor presented as evidence during the trial.

18. Counsel for Appellant argues that we should infer *mala fide* conduct and disposal of the vehicle from the evidence that Respondent was in possession of the motor vehicle and that that he disposed of it knowing that Appellant is the owner thereof.

19. There are two problems with this argument. Firstly, there is no evidence of what was disposed of. The photographs which are annexed as exhibit show the body of the vehicle and parts of a vehicle on the floor. No inventory was presented as to which parts of the vehicle were missing. In the absence of such evidence, this Court cannot infer from the photographs that disposal of the vehicle or any of its components occurred, to an extent that the vehicle cannot be restored, to effect restitution.

20. In my view, for a party to successfully claim that there was a disposal of property, such property must have been disposed

of as a whole alternatively there has to be substantial or material component of that property disposed of, and extent that the restoration of the property, necessary to effect restitution, is not possible

21. Radefit's evidence concerning the condition of the vehicle at all material times, contradicts that of Conradie. The Court a quo accepted the evidence of Radefit concerning the condition of the vehicle that at the time of Conradie's lock out, the vehicle was in the same condition as it appeared in the photographs. There is no basis, in my view, for this Court to interfere with the decision of the Court a quo in this regard. **See R v Dhlumayo 1948 (2) SA 677 (AD).**

22. Secondly, even if this court may be inclined to infer that there was a disposal of either the vehicle or any of its significant components, there is no evidence to support how, when and by whom the disposal was affected. These are essential requirements for *actio ad exhibendum*, in that Appellant had to prove that substantial or significant components of the vehicle were disposed of, they cannot be replaced and that there was either intentional or negligent conduct on the part of Respondent, to conclude that he acted *mala fide*. The "When"

part is relevant in establishing the value of the vehicle. The *actio ad exhibendum* requires one to prove the value of the vehicle as at the date of disposal of the property by the Respondent. **See: *Philip Robinson Motors (pty) Ltd v NM Dada (pty) Ltd supra***

23. In regard to the claim for damages of R100 000, Appellant led evidence by Mr Cloete, who was presented as an expert in the determination of values of motor vehicles and spares. He testified that he was giving an opinion of the value of the motor vehicle prior to it being stripped, based on the opinion of “*the previous witness*” regarding the condition of the vehicle. He testified after Bosch and Conradie. His estimate value of R100 000 was not linked to any date of the alleged disposal; as such date is neither alleged nor proved.

24. Again the authorities cited and relied upon by the Appellant do not support his contention. In the matter of **Phillip Robinson Motors (pty) Ltd v N M Dada (Pty) Ltd supra**, the Court, repeating the need to prove allegations of *mala fides* on the part of the Respondent in disposing of the property, also made it clear that the time at which to measure the delictual damages was the date of the delict, in this instance,

when the vehicle was disposed of, and not, as would be the case in a vindictory action, at the date of the trial or of judgment.

25. It is therefore my view that on the *action ad exhibendum* as relied upon by the Appellant; no case has been made out to sustain the Appellant's claim for compensation in the form of damages.

26. The Appellant also appeals against the order by the court that each party has to pay its own costs. The Respondent did not lodge a counter appeal on costs, even though his Counsel argued for costs in the court *a quo*. The issue of costs is within the discretion of the trial court. Considering the conspectus of the evidence, there is no reason for this court to intervene with the decision of the Court *a quo* in this regard. I will therefore not temper with the cost order of the Court *a quo* as I find it fair and reasonable under the circumstances.

27. In light of my conclusion above, I am of the view that this appeal cannot succeed. I find it unnecessary to deal with other issues such as the validity or invalidity of the tender

offered by the Respondent or the question concerning the
duty of care of the vehicle.

I accordingly make the following order:

The appeal is dismissed with costs;

MOTHLE AJ

I agree

MURPHY J