IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No: A 1090/2002

In the matter between:

B C PLANT HIRE CC t/a B C CARRIERS Appellant

and

GRENCO (SA) (PTY) LTD Respondent

JUDGMENT: 12 DECEMBER 2003

VAN ZYL J:

INTRODUCTION

[1] This is an appeal against the decision of the Magistrate's Court, Kuilsriver, in terms of which the respondent's claim against the appellant in the amount of R62 700,00 was granted together with interest *a tempore morae* and costs. A cross-appeal was noted at a late stage with the leave of the court. It relates to the rejection by the court *a quo* of one of the causes of action raised by the respondent in its amended particulars of claim, and to the court's refusal to grant a special order as to costs. Mr H G McLachlan appeared for the appellant and Mr A Kantor for the respondent. The court expresses its appreciation to them for their helpful submissions and additional arguments arising from difficulties put to them during the presentation of their cases.

[2] It is common cause that the claim arose from an agreement in terms of which the respondent (plaintiff in the court *a quo*) undertook to supply and fit a refrigeration unit ("the

unit") on the trailer of a truck belonging to the appellant (defendant in the court *a quo*). On completion of the installation during March 1997, the respondent duly delivered the vehicle to the appellant. Before payment could be made or finance arranged, however, the vehicle was involved in an accident on 7 May 1997 and the unit was damaged beyond repair. The respondent claimed its value, being R62 700,00, from the appellant. The appellant denied liability, however, and refused to pay.

THE ISSUES

[3] The main issues between the parties are, firstly, what the nature of their agreement was and, secondly, which of the parties must be held to have borne the risk of destruction of the unit. These issues are, of course, materially interlinked.

[4] The appellant has also raised the identity of the party trading as "BC Carriers" as an issue. This is clearly a non-issue in that it is common cause that the entity trading as "B C Carriers" was at all relevant times represented by one Braam Coetzee and was in fact the defendant in the court *a quo*, irrespective of whether or not the close corporation trading as such was B C Earthmoving or B C Plant Hire. In the original particulars of claim the defendant was in fact cited as B C Carriers CC and in his affidavit opposing summary judgment the said Braam Coetzee admitted that, during July or August 1997 he had concluded an agreement on behalf of the defendant as cited. It is common cause that that same defendant took possession of the unit after it had been installed on its truck. If the appellant was hence wrongly cited in later pleadings, it is clearly a simple misnomer that could not have caused the appellant the slightest prejudice. See in general on misnomers the discussion in *Anglo Dutch Meats (Exports) Ltd v Blaauwberg Meat Wholesalers CC* 2002 CLR 292 (C) at 300-314 (par 21-47) and the various authorities cited there. For present purposes it is hence not necessary to consider whether the citation of the appellant in further pleadings was correct or not.

THE PLEADINGS

[5] The pleadings and respective cases of the parties are anything but a model of clarity. The cause of action started off, in the initial particulars of claim, as an oral agreement concluded on 5 August 1997 between the respondent, represented by Johan Coetzee, and the appellant, represented by Braam Coetzee. In terms of this agreement the respondent undertook to supply the said refrigeration unit and install it [on the trailer of one of the appellant's trucks] for the

amount of R62 700,00. The respondent duly performed its obligations but the appellant refused to pay the amount owing "as a consequence of the services rendered".

[6] In his affidavit opposing a summary judgment application brought against the appellant by the respondent, the said Braam Coetzee appears to have admitted that there was an agreement between the parties in terms of which the appellant "ordered" the unit from the respondent. He averred, however, that it was subject to a suspensive condition that payment would be effected by means of a financing agreement to be approved by the appellant's financial institution. The application for financing would be approved only after receipt of an invoice submitted to it by the respondent. The invoice was to contain a correct description of the item sold, its price and the VAT payable in respect thereof. The respondent failed to submit such invoice. Consequently the financing agreement was not concluded and the suspensive condition was not fulfilled. What the consequence was of such non-fulfillment does not appear from the affidavit.

[7] In its plea to the initial particulars of claim, the appellant denied that an agreement as alleged by the respondent had been concluded. In the alternative, should it be held that there was such an agreement, the appellant averred that it had concluded such agreement on behalf and for the benefit of a third party, namely Bankfin ("the bank"). In terms thereof the respondent would sell the unit to the bank, which would become its owner and would pay its purchase price to the respondent. The appellant admitted that the respondent had installed the unit on the trailer of one of its trucks and that it had been delivered on 8 August 1997, after which it was written off in an accident. The appellant had, however, taken delivery thereof on behalf of the bank and was hence not liable to pay the said purchase price.

[8] The appellant subsequently amended this plea to incorporate the allegations that it would conclude a written credit agreement with the bank and that the risk in respect of the unit would not pass from the respondent to the appellant before such agreement had been concluded. The appellant pleaded further that the respondent was, at all relevant times, aware of the fact that the conclusion of the credit agreement was dependent on the respondent's furnishing full details of the unit to the bank. In any event the respondent itself required such details, and also details regarding the credit agreement, for purposes of insuring the unit. The respondent had failed to furnish the required details in that it first sent a wrong invoice and later sent an invoice to the wrong address. As a result the credit agreement was not concluded. A further amendment related to the date when the appellant took delivery of the unit on behalf of the bank.

[9] This plea as amended appears to have prompted the respondent to effect radical amendments to its particulars of claim by introducing a number of alternative causes of action. This culminated in amended particulars of claim containing five claims. The first was based on an oral agreement in terms of which the respondent "undertook to deposit" the unit with the appellant and to install the unit at a price of R62 700,00. The second was based on a finance agreement between the respondent and ABSA Bank, trading as "Bankfin" ("the bank"), in terms of which the bank would buy the unit for R62 700,00 and the respondent would deliver it to the appellant. This agreement was linked to a suspensive condition that the bank would approve the finance agreement. It was also linked to a "delivery agreement" in terms of which the risk in the unit would pass to the appellant on acceptance of delivery and/or the appellant would be obliged

to insure it against the risk of damage. The third claim was apparently based on the appellant's negligence in not exercising a "duty of care" while the unit was in its possession. The fourth claim related to the respondent's delivery of the unit under the "misapprehension" that one or the other of the aforesaid alternative agreements had been concluded. The fifth claim was based on the appellant's alleged enrichment at the expense of the respondent in that the appellant had been paid out for the damage to the unit in terms of an insurance policy. Alternatively the appellant had suffered no loss as a result of the damage to the unit.

[10] Instead of excepting to the amended particulars of claim on the basis that all, or at least some of, the various alternative claims disclosed no cause of action, alternatively were shockingly vague and embarrassing, the appellant chose to plead thereto as before (par 8 above).

THE EVIDENCE

[11] Mr J C J ("Johan") Coetzee, the executive director in the refrigeration division of the respondent, testified that he had, on a previous occasion, sold the appellant, represented by Mr Braam Coetzee, a refrigeration unit. This kind of transaction was normally financed by a bank, to which the respondent would supply an invoice in return for payment of the unit. It was also usual, pending the finalisation of the financing agreement, to deliver the unit to the customer who would insure it forthwith. In the present matter the unit supplied was a rebuilt unit that was fitted, during March 1997, onto the trailer of a truck belonging to the appellant. Initially an incorrect invoice was furnished to the bank, but a new invoice containing the correct information was furnished, apparently to the wrong address, during April 1997. Before the bank could pay

the purchase price of the unit, however, it was destroyed in an accident. The respondent then claimed the amount from the appellant, which refused to pay.

[12] In cross-examination Mr Coetzee testified that, if the financing agreement between the bank and the appellant did not go through, the appellant would be obliged to pay the respondent, or the unit would have to be returned. At no stage was there any discussion about transfer of risk. He emphasised, however, that on delivery of the unit to the appellant, the appellant had to insure it because "he makes money with it" and it was "his unit". It was the accepted norm that the customer should insure the unit the moment he takes delivery of it because from that time on he is responsible for it.

[13] Mr Frans van Vianen, the general manager of the respondent's refrigeration division, testified that the unit in the present matter was mounted under the chassis of the vehicle. He confirmed Mr Coetzee's testimony that the customer would be expected to insure the unit as soon as he took delivery of it. That would be the case even if he simply loaned the unit. If he failed to insure it, he would be personally responsible for any damage caused to it.

[14] Mr G A Botha, the national technical director of the respondent, elaborated on Van Vianen's evidence by testifying that the unit in question was designed in such a way that one section would fit underneath the trailer and the other inside the trailer. These two components would then be connected with refrigerant hoses and electric cables. In the present case the unit was "custom fitted" and required "brackets made up" and covers fitted over the refrigerant hoses. During the course of fitting the unit Mr Braam Coetzee inspected it a few times and requested

certain modifications before it was finally bolted to the trailer. When asked what the position would be if the unit were to be destroyed without insurance being arranged for it, his reaction was that it would be “crazy not to insure it”. It was the accepted norm in the industry that the person who uses the unit or the trailer must insure it. Failure to insure it was “like putting warm water into instant coffee, you just don’t do it”. If the unit should be destroyed, however, the supplier would look to the customer for payment and not to his insurer.

[15] The respondent called a number of further witnesses. For present purposes it is not necessary to deal with their evidence other than to mention that it appears that the appellant was indeed paid out by its insurer for damage sustained by it as a result of the destruction of a refrigerated trailer. In this regard Mr D Thompson, a motor vehicle assessor and loss adjuster, testified that the appellant had been paid out for “a refrigerated pup semi-trailer”. This included a refrigerated unit attached to the trailer. He also mentioned various possibilities as to how the unit could have been destroyed.

[16] Mr B G Nel, a business consultant in the employ of the bank, was called to testify for the appellant. He had been involved in the negotiations, during March or April 1997, to conclude a credit agreement (he referred to it as a “lease for use” or “bruikleen”) between the bank and the appellant in respect of the unit. The agreement was never concluded, however, because the unit was destroyed before the formalities had been complied with. In general, he testified, once all the requirements had been met, the bank would sign the agreement, pay the supplier and take transfer of ownership of the unit. It would also sign a ”release note” in terms of which the

supplier would be empowered to deliver the unit to the customer with whom the bank had concluded a credit agreement. One of the requirements with which the customer had to comply before payment was made or the release note was signed, however, was to arrange short term insurance for the unit for the duration of the credit agreement. Once this was done delivery by the supplier on behalf of the bank could take place.

[17] In his testimony for the appellant Mr S B ("Braam") Coetzee confirmed that the unit would be financed by the bank and denied that there had ever been any agreement between the parties that, if the bank should fail to pay, the appellant would be liable personally. It had never been suggested to him that, pending payment by the bank, the appellant would bear the risk of any damage to or destruction of the unit. He admitted that the appellant had been paid out by its insurers for the damage to the trailer, but denied that it had also been paid out for the unit, as testified by Mr Thompson (par 15 above). He would have arranged for insurance of the unit only after the financing agreement with the bank had been finalised.

JUDGMENT OF THE COURT *A QUO*

[18] After satisfying himself that the appellant had been correctly cited as B C Plant Hire CC t/a B C Carriers, the learned magistrate turned to the first claim containing the cause of action based on deposit. It was clear from the evidence that the appellant had taken delivery of the unit with a view to retaining it for his exclusive use. I respectfully agree that there was no question of deposit in the sense of *depositum*, one of the *contractus re* emanating from Roman law and still forming part of our present-day South African law. A contract of *depositum* comes into existence

when one person (the *depositor*) entrusts a movable thing to another person (the *depositarius*) who undertakes to care for it gratuitously and to return it at the request of the *depositor*. The *depositarius* has physical detention of the thing but does not have the right to use it. See *Digest* 16.3 and *Code* 4.34 and the discussion in Van Zyl *History and Principles of Roman Private Law* (1983) ("Van Zyl *Roman Law*") 280-282. These principles were accepted in Roman-Dutch law under the name *depositum* or *bewaergeving*. See Grotius *Inleidinge* 3.7.2; Voet *Commentarius ad pandectas* 16.3.1 and Van der Linden *Koopmans handboek* 1.15.5. On the contract of deposit in South African law see the discussion and authorities cited in Wille's *Principles of South African Law* (8th edition by Hutchison, Van Heerden, Visser and Van der Merwe, 1991) ("Wille *Principles*") 581-583 and the title "Deposit" by C J Pretorius in *LAWSA* vol 8 part 1 (1st reissue 1995) 185-190 (par 123-135).

[19] Regarding the second claim the learned magistrate rejected the allegation that the appellant had contracted with the respondent as agent of the bank, thereby causing a contract to be concluded between the respondent and the bank in terms of which the bank would purchase the unit from the respondent. The evidence did, however, indicate that there was an understanding between the parties and between the appellant and the bank that the bank would finance the transaction by means of a credit agreement between it and the appellant. The bank would then make payment directly to the respondent. It was common cause, of course, that no such credit agreement came into existence. This had nothing to do with any breach of contract arising from the fact that the corrected invoice did not reach the bank in time. It was simply because the unit had been destroyed before such agreement could be concluded.

[20] Of some interest was the learned magistrate's finding, on the basis of Nel's evidence, that the appellant had taken delivery of the unit in conflict with the bank's normal procedure relating to credit agreements. No agreement had been signed, no short-term insurance had been arranged and no release note had been issued. By acting in this way the appellant had created a potential risk situation that became a reality when the unit was destroyed in an accident. Inasmuch as the bank would clearly not be prepared to conclude a credit agreement in respect of a non-existent unit, and for the same reason an insurer would not be prepared to insure it, the appellant was itself the root cause of its inability to perform in terms of the agreement on which it was placing reliance.

[21] It was furthermore clear, the learned magistrate held, that the appellant did not take delivery of the unit on behalf of the bank. By the same token, the respondent could not have been acting on behalf of the bank in delivering it to the appellant. It was well nigh unthinkable that the respondent would, at its risk, deliver the unit to the appellant for its exclusive use pending finalisation of the credit agreement. The appellant was fully aware of the risk that, should the unit be destroyed before conclusion of the credit agreement, it would no longer be able to acquire financing for it and would become personally liable for the payment thereof. This would in fact have been the case if the unit had not been destroyed and the appellant had been unable to arrange financing for its payment. It would either have to pay the purchase price or return the unit to the respondent.

[22] It was true, the learned magistrate held, that the parties had not expressly agreed that the risk in the unit would pass to the appellant on delivery thereof. In this regard, however, the following passage from *Pahad v Director of Food Supplies and Distribution* 1949 (3) SA 695 (A) at 709 (*per* Van den Heever JA) was in point:

> In contract the incidence of such unforeseen loss attributable to neither party depends upon the modalities which the law will read into agreements in the absence of express stipulation; consequently the parties must be deemed to have accepted the risk thereby implied, for they were in a position to guard themselves against it.

This prompted the learned magistrate to hold, on a balance of probabilities, that the appellant, in taking delivery of the unit for use in its transport business, had by implication accepted the risk attaching thereto. On the second claim, and more particularly the "delivery agreement" alleged therein, the court held that the claim should succeed with interest and costs. It refused, however, to rule that advocates' fees should be taxed at High Court tariffs. I am in full agreement with this exercise of the learned magistrate's judicial discretion relating to costs. There is no indication of any misdirection in this regard. The pleadings were atrocious and the facts were simple. Any complexity therein was, in my view, introduced by the parties themselves. No special order was justified. On the contrary, there were eminently good reasons to deprive the parties of their costs.

SUBMISSIONS ON BEHALF OF THE APPELLANT

[23] Mr McLachlan submitted that the respondent had failed to prove the existence of a trade usage, as an implied term of the agreement between the parties, to the effect that the risk in the unit would pass to the appellant on its delivery. The evidence relating to the commercial norm that the unit would be insured as soon as it came into use was, according to Mr MacLaclan, no

proof of such a trade usage. The court had therefore erred in holding that there was an implied term to this effect.

[24] This argument is, to say the least, surprising in that, as I read the learned magistrate's judgment, no mention was made of any alleged trade usage underlying his finding that the appellant had by implication accepted the risk attaching to the unit in taking delivery thereof. Nor was any mention made in the pleadings of any such trade usage.

[25] In regard to the passing of risk Mr McLachlan accepted that the general rule was that a thing perishes at the risk of its owner (*res perit domino*). In the present case, however, the risk could not pass to the appellant by delivery of the unit in that the agreement between the parties was not one of purchase and sale and there had been no express or tacit agreement that the risk would pass to the appellant on delivery. The respondent hence remained the owner of the unit and had to bear the risk of its destruction. I shall return to this argument later in considering the true nature of the relationship between the parties.

[26] Mr McLachlan persisted with the defence raised by the appellant that the respondent had failed to furnish the correct particulars to the bank, alternatively had furnished them to the wrong address, thereby breaching its agreement with the appellant or preventing the fulfillment of a suspensive condition thereto. There is clearly not the slightest merit in this argument. There is no suggestion in the plea to the amended particulars of claim that the appellant was relying on any suspensive condition. This was mentioned in Mr Braam Coetzee's affidavit opposing summary

judgment (par 6 above) and never again. Nor was there even a whisper in the plea that the respondent had been in breach of some or other agreement by not furnishing the required particulars to the bank. It is perfectly clear that the furnishing of particulars to the bank was intended, purely and simply, to assist the appellant in acquiring financing from the bank. There was no indication in the evidence that the respondent's undertaking to furnish such particulars was regarded as compliance with a contractual obligation or the fulfillment of a suspensive condition. I find it astounding that no exception was raised to the defences raised by the appellant, just as it is inexplicable that the gobbledygook appearing in the particulars of claim was not the object of an array of exceptions.

[27] In supplementary heads of argument Mr McLachlan reiterated that the agreement between the parties was not one of purchase and sale, but accepted, after a suggestion from the court to this effect, that it might indeed have been one of loan for use (*commodatum*). Inasmuch as this had not been one of the causes of action raised by the respondent in its amended particulars of claim, however, the appellant would be seriously prejudiced if the matter were not referred back to the court *a quo* so that this possibility could be properly ventilated. I shall return below to what I believe was the true nature of the agreement between the parties. At this stage I am quite satisfied that the evidence presented in the court *a quo* was sufficient for purposes of determining the legal relationship between the parties.

SUBMISSIONS ON BEHALF OF THE RESPONDENT

[28] In his argument on behalf of the respondent Mr Kantor submitted that it was the custom

or trade usage in the industry that a party utilising a unit belonging to another would be responsible for it from the time of delivery and should hence insure it. This appeared from the uncontradicted evidence, admitted by agreement, appearing from the summaries of four expert witnesses. Inasmuch as this argument revolves around whether or not there was a trade usage to this effect, I have the same problem as before (par 24 above), namely that there was no mention of this in the pleadings or in the judgment of the court *a quo*.

[29]The argument relating to deposit I have already rejected (par 18 above) inasmuch as there was clearly no question of the appellant's having taken the unit for safekeeping pending finalisation of the credit agreement. It follows that the cross-appeal has no merit on this score or in regard to the court's refusal to grant a special order as to costs (par 22 above).

[30]In supplementary heads of argument Mr Kantor agreed with Mr McLachlan, after a little prompting by the court, that the nature of the cause of action in the applicant's first and second claims could well be loan for use (*commodatum*) rather than deposit (*depositum*). He disagreed with Mr McLachlan's suggestion, however, that the matter should be referred back to the court *a quo* to enable the parties to canvass this possibility fully. It was common cause that the appellant had used the unit for some time before its destruction in the accident. In addition the appellant's "lack of negligence" had always been an issue on the pleadings.

[31]I agree with Mr Kantor that it is not necessary to refer the matter back to the court *a quo*. I do, however, have serious difficulty with the suggestion that the aspect of negligence on the part of the appellant has been properly canvassed, if at all. It appears from both the pleadings and evidence that it is common cause that the destruction of the unit was caused by an accident in the sense of *casus fortuitus*. Nowhere is there even the remotest suggestion that the appellant was negligent in regard to such destruction. Mr Thompson (par 15 above) certainly did not give evidence to this effect. At most he mentioned possibilities as to how the damage could have been caused.

THE LEGAL RELATIONSHIP BETWEEN THE PARTIES

[32] It is common cause that the parties have both concluded, rightly or wrongly, that they never entered into any agreement of purchase and sale with each other inasmuch as their intention was that the bank would be the purchaser and would acquire ownership from the respondent, as seller, subject to a credit agreement being concluded between the bank and the

appellant. If, as I believe, it cannot simply be accepted that they are correct in their perception, and indeed assumption, of the legal relationship between them, the question must inevitably arise what the true nature of their relationship was at the relevant time. In this regard it must be borne in mind that none of the witnesses who testified on behalf of the one or the other of the parties was legally trained. Yet much of the evidence led in chief and elicited in cross-examination was of a legal nature, requiring knowledge of the relevant law and applicable legal principles. Not surprisingly a confused and obfuscating picture emerges. Eventually it must be resolved judicially with reference to all the relevant facts and circumstances, regardless of what the parties or their witnesses may think this relationship is.

[33]This approach accords with the well known Roman legal maxim that *plus valet quod agitur quam quod simulate concipitur* ("greater value is attached to what is done than to what appears to be done") (see *Code* 4.22). In simple language this may be rendered as "true facts have more value than apparent facts" or "substance bears more weight than form". Frequently, as in the present case, relatively simple facts are interpreted in an unnecessarily complex way, conjuring up legal relationships that simply do not exist. The parties may even, intentionally or unintentionally, be concealing or disguising the true nature of their agreement. As Innes J said in the famous case of *Zandberg v Van Zyl* 1910 AD 302 at 309:

> Now, as a general rule, the parties to a contract express themselves in language calculated without subterfuge or concealment to embody the agreement at which they have arrived. They intend the contract to be exactly what it purports; and the shape which it assumes is what they meant it should have. Not frequently, however (either to secure some advantage which otherwise the law would not give, or to escape some disability which otherwise the law would impose), the parties to a transaction endeavour to conceal its real character. They call it by a name, or give it a shape, intended not to express but to disguise its true nature. And when a Court is asked to decide any rights under such an agreement, it can only do so by giving effect to what the transaction really is; not what in form it purports to be. The maxim then applies *plus valet quod agitur quam quod simulate concipitur*. But the words of the rule indicate its limitations. The Court must be satisfied that there is a real intention, definitely ascertainable, which differs from the simulated intention. For if the parties in fact mean that a contract shall have effect in accordance with its tenor, the circumstances that the same object might have been attained in another way will not necessarily make the arrangement other than it purports to be. The inquiry, therefore, is in each case one of fact, for the right solution of which no general rule can be laid down.

See also *Kilburn v Estate Kilburn* 1931 AD 501 at 507 (*per* Wessels ACJ):

> It is a well known principle of our law that Courts of law will not be deceived by the form of a transaction: it will rend aside the veil in which the transaction is wrapped and examine its true character and substance. *Plus valeat quod agitur quam quod simulate concipitur*.

Further authorities are collected in Wille *Principles* 464-465 under the sub-heading "Disguised contracts". See also Christie *The Law of Contract* (4th edition 2001) 222-224.

[34]Any attempt to establish from the pleadings the nature of the legal relationship between the parties is a frustrating, thankless and fruitless exercise. If the respondent had stood by its original particulars of claim, that described a simple contract of purchase and sale of a refrigeration unit that the respondent, as seller, would install in the vehicle of the appellant, as purchaser (par 5 above), it would have been far better off than it was after radical amendments, introducing an array of vague or non-existent causes if action, were effected at a later stage (par 9 above). The same applies to the appellant. If it had simply pleaded that the agreement of purchase and sale was subject to its acquiring financing from a bank, it could have presented a defence based on a suspensive condition that, should it, for whatever reason, fail to acquire such financing, the agreement would be regarded as null and void *ab initio*. Yet it insisted, in the affidavit resisting summary judgment (par 6 above), to link the non-fulfillment of the suspensive condition to the respondent's failure to furnish certain information to the bank, when it was clear that the reason why no credit agreement was ever concluded between the appellant and the bank was, purely and simply, because the unit that was to be financed no longer existed. This relatively uncomplicated plea was clothed with all manner of complexity when the appellant apparently chose, in its plea as amended, to jettison the suspensive condition and to suggest that it had concluded the agreement with the respondent on behalf and for the benefit of the bank and that the respondent's failure to furnish certain information to the bank had scuttled its envisaged credit agreement with the bank.

[35]When the evidence presented by the respective parties is considered, one would be forgiven if the thought should occur that they were involved in another case than that set forth in the pleadings. Although both the Coetzee's entertained the same understanding, namely that payment of the unit would be effected by means of a credit agreement between the appellant and the bank, it was never suggested that the conclusion of such credit agreement was a suspensive condition attaching to the agreement to supply and install the unit. There was no question of any agreement between the respondent and the bank, or of the appellant's acting as the bank's agent in concluding an agreement with the respondent for the benefit of the bank. Nor was a word spoken about the risk of damage attaching to the unit should it be damaged while in the possession of the appellant pending the finalisation of the credit agreement. There was, indeed,

no discussion of the appellant's taking delivery of the unit installed on its vehicle prior to this event. It was simply a fact that the appellant took delivery of the unit before the respondent had been paid and was using it gratuitously in its transport business at the time of its destruction.

[36]In considering the judgment of the court *a quo*, it is, with respect, remarkable that the learned magistrate was able to avoid becoming hopelessly confused by the pleadings. I am in substantial agreement with his findings based on the evidence presented before him and have no difficulty in associating myself with the result to which he has come. I would, however, in view of the above considerations, approach the matter somewhat differently.

[37]On the initial assumption that the parties were correct in rejecting the notion that their agreement was one of purchase and sale, I put to counsel, during the course of argument, the possibility that the appellant's gratuitous use of the unit prior to its destruction and prior to payment having been made for it, could be regarded as a form of loan for use or *commodatum*, as it was known in Roman and later legal historical sources. Although there was no question of any "delivery agreement", as suggested by the respondent in its amended particulars of claim, the facts could be construed as a tacit agreement that the appellant would make use of the unit gratuitously until such time as its envisaged credit agreement with the bank was finalised. While using the unit the appellant would then be burdened with a strict obligation to take good care of it. In classical Roman law that would have included meticulous care (*custodia*), a strict form of liability incorporating liability for loss or damage arising from an act of God (*vis maior*) or fortuitous circumstances (*casus fortuitus*). In the post-classical Roman law of Justinian, however, the burden on the borrower was lightened somewhat and no longer included *custodia* liability (see J A C Thomas *Textbook of Roman Law* (1976) ("Thomas *Roman Law*") 274-276; Van Zyl *Roman Law* 278-279). This was also the case in Roman-Dutch law (see Grotius *Inleidinge* 3.9.7; Voet *Commentarius ad pandectas* 13.6.5; Van Leeuwen *Censura forensis* 1.4.5.4; Van der Linden *Koopmans handboek* 1.15.4) and South African law (see Wessels *Contract* par 2090; Wille *Principles* 579-580; *LAWSA* 15 (first reissue 1999) s.v. Loan by D J Joubert 152-153 (par 263)).

[38]On reconsideration of the facts in the present matter, I am quite satisfied that the parties at no stage gave the slightest thought to the possibility that their legal relationship had anything remotely to do with the loan of the unit for the appellant's use pending the finalisation of the credit agreement between the appellant and the bank. The appellant simply took delivery of the unit as installed in its vehicle and proceeded to use it as its own. There was no discussion as to any "delivery agreement" and even less of a loan for use. There was no indication from their conduct that they regarded the delivery of the unit as a temporary loan for use, thereby demonstrating their intention to conclude a contract to this effect. The respondent was simply performing in terms of its agreement with the appellant, namely to supply and fit the unit, and was clearly quite happy to wait for its money, knowing that it would be forthcoming as soon as the appellant had finalised its credit agreement with the bank.

[39]The possibility of transfer of ownership in the unit by accession (*accessio*) to the appellant's vehicle did arise. The evidence of Mr Botha indeed created the impression that the unit, once

installed, was of a permanent nature and not easily removed. This usually has the effect that ownership of the principle thing (in this case the truck trailer) extends to ownership of the accessory (the unit), in which event the owner of the principle thing becomes the owner of the composite thing (see Thomas *Roman Law* 169-170; Grotius *Inleidinge* 2.9.1; Voet *Commentarius ad pandectas* 41.1.14; Van der Linden 1.7.2.2; Van der Merwe *Sakereg* (2nd edition 1989) 239-232 and 241-243). It would appear that the relevant vehicle was in fact insured as a "refrigerated vehicle" and not as a vehicle and a (separable) unit. Because this possibility was not properly canvassed in evidence, however, it would not, I believe, be appropriate to make any finding in this regard.

[40]After careful consideration of the facts and circumstances set forth above, I am of the view that the substance of the agreement between the parties was one of purchase and sale (*emptio venditio*), subject thereto that the seller (the respondent) was required to install the thing sold (the unit) in the trailer of a vehicle belonging to the purchaser (the appellant). Inasmuch as this entails work or labour in addition to the mere supply of the unit, it may be said that the agreement has the complexion of a contract of letting and hiring of work (*locatio conductio operis*). The work (*opus*) let out would be the installation of the unit. The lessor (*locator*) would be the appellant who let out the work and was obliged to pay for it, whereas the lessee (*conductor*) would be the respondent, who did the installation. On the other hand there is authority that, if the person doing the work also supplies the material, the agreement would be one of purchase and sale rather than letting and hiring of work. See Gaius *Institutes* 3.147; *Institutes* 3.24.4; *Digest* 18.1.20; 19.2.2.1; Pothier *Traité du contrat de louage* ("Treatise on the contract of letting and hiring") par 394.

[41]In so far as the respondent, in the present case, has both supplied and fitted the unit, I would incline to the view that the agreement should, strictly speaking, qualify as one of purchase and sale. For purposes of establishing liability for the destruction of the unit in this matter, however, it is really of no consequence whether it is the one or the other. On the basis that it was a contract of purchase and sale the risk passed to the purchaser (the appellant) as soon as the contract was *perfecta*, namely when the thing (the *merx*) and the price (the *pretium*) had been determined and the agreement was, as we have already established, unconditional. It is then said that the risk falls on the purchaser (*periculum est emptoris*). See *Digest* 18.6.8pr; *Institutes* 3.23.3; Grotius *Inleidinge* 3.14.34; Voet *Commentarius ad pandectas* 18.6.1; Van Leeuwen *Censura forensis* 1.4.19.5; Pothier *Traité du contrat de vente* ("Treatise on the contract of sale") par 309; Van der Linden *Koopmans handboek* 1.15.9; Wessels *Contract* par 2108 and 4900; Wille *Principles* 533; *LAWSA* 24 (first reissue 2000) s v "Sale" by A J Kerr 93 (par 123).

[42]Similarly, should the agreement have been one of letting and hiring of work, the risk was that of the appellant, as lessor, once the work had been done (the unit installed), even if the unit had not yet been delivered. See *Digest* 19.2.13.5; 19.2.36; 19.2.37; 19.2.59; 19.2.62; Voet *Commentarius ad pandectas* 19.2.37; Pothier *Traité du contrat de louage* ("Treatise on the contract of letting and hiring") par 433. So much the more would it be the case if, as here, the lessor (appellant) took delivery after obviously approving the installation of the unit and using it for a considerable time before its destruction in the accident. It would be absurd if, under such circumstances, the lessee (the respondent) should be deprived of its cost of supplying and fitting

the unit onto the appellant's vehicle. If the appellant was foolish enough not to insure the unit as part of its vehicle, it has no one to blame but itself. One does not need to rely on any trade usage or custom in this regard. It is simply a matter of common sense. Anything to the contrary would be in conflict with the most fundamental principles of justice, fairness and reasonableness.

CONCLUSION

[42] It follows from the above that the appeal must be dismissed. In the event the following order is made:

1. The appeal is dismissed with costs.

2. The cross-appeal is dismissed with costs.

D H VAN ZYL

Judge of the High Court of South Africa

I agree.

M H E ISMAIL
Acting Judge of the High Court of South Africa