



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE
Case No: 462/13

In the matter between:

**THE MINISTER OF POLICE
OFFICER COMMANDING, ELSIES RIVIER
POLICE STATION**

**FIRST APPELLANT
SECOND APPELLANT**

and

SA METAL AND MACHINERY COMPANY (PTY) LTD

RESPONDENT

Neutral citation: *Minister of Police v SA Metal and Machinery* (462/13) [2014] ZASCA 95 (1 July 2014)

Coram: Mpati P, Lewis, Bosielo and Theron JJA and Mocumie AJA

Heard: **13 May 2014**

Delivered: **1 July 2014**

Summary: Criminal Procedure — search and seizure — application for return of goods seized by police in terms of s 20 of Criminal Procedure Act 51 of 1977 — interpretation of s 31(1) of the Act — onus on the State to prove on a balance of probabilities that possession of goods seized unlawful — requirements of *actio ad exhibendum*.

ORDER

On appeal from Western Cape High Court, Cape Town (Traverso DJP sitting as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel where so employed.

JUDGMENT

Mpati P and Mocumie AJA (Lewis, Bosielo and Theron JJA concurring):

[1] During April 2010 the respondent, SA Metal and Machinery Company (Pty) Ltd (SA Metal), instituted motion proceedings in the Western Cape High Court against the appellants, the Minister of Police and the Officer Commanding, Elsies River Police Station, for an order directing the appellants to return to it certain items of scrap metal (goods) seized from its premises at Epping 2, Cape Town, on 13 June 2008 by members of the South African Police Service (SAPS). The goods consisted of 142 kilograms of scrap brass water meters (amounting to 135 such meters); 20 kilograms of mixed copper scrap; 31 kilograms of greasy copper wire 1A; 40 kilograms of scrap lead; and one scrap cast iron drain cover.

[2] On 4 June 2010 and prior to filing opposing papers the appellants' legal representatives addressed a letter to SA Metal's attorneys in which they conveyed to the latter that SAPS had already disposed of the goods in terms of s 31 of the Criminal Procedure Act 51 of 1977 (CPA). SA Metal responded by amending its notice of motion and seeking an order, in the alternative, for payment of damages, under the *actio ad exhibendum*, in the sum of R8 611.50, being the value of the goods, together with interest. The application was opposed, but the court a quo (Traverso DJP) granted the alternative relief sought. This appeal is with the leave of this court.

[3] The issue in the appeal is whether SAPS were entitled to dispose of the goods and, importantly, whether SA Metal could recover damages under the *actio ad exhibendum* on motion proceedings. It is not in dispute that the goods were seized by SAPS in terms of s 20 of the CPA, which provides that the State may seize an article which, inter alia, is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence, or which may afford evidence of the commission or suspected commission of an offence.¹

[4] It is common cause that during January 2009 Mr Christo Johan de Klerk (De Klerk), one of SA Metal's former directors, was charged with contravening s 36 of the General Law Amendment Act 62 of 1955, namely, being in possession of property suspected to be stolen in circumstances where the possessor is unable to give an explanation for his or her possession. That charge was subsequently withdrawn. On 9 April 2010 the Director of Public Prosecutions: Western Cape (DPP) gave instructions that De Klerk be charged in the magistrate's court for being in possession of property suspected to be stolen (*besit van vermoedelik gesteelde eiendom*), being 48 water meters, allegedly the property of the City of Cape Town. It is alleged in the answering affidavit, deposed to by Captain Jacobus Albertus van Wyk of SAPS, that 'the charges were withdrawn on 5 August 2010 as a result of difficulty regarding the availability of certain witnesses. It appears, however, that as at 14 April 2010 when SA Metal launched the application the deponent to the founding affidavit, Mr Graham Leslie Barnett, who describes himself as the managing director of SA Metal, was not aware of the DPP's instructions; hence the allegation that there were no criminal proceedings pending against SA Metal or any of its representatives.

[5] The defence raised by SAPS is that SA Metal was neither the owner nor the lawful possessor of the goods because it failed to produce any proof to that effect. It was argued in this court that SAPS was entitled to dispose of the goods in terms of s 31(1) of the CPA. It is common cause that the water meters were 'returned' to the City of Cape Town and the mixed copper scrap wire was handed over to Telkom,

¹ Section 20(a) and (b).

whilst the rest of the goods were sold to Rall Scrap Metals. This occurred without the knowledge of SA Metal.

[6] Section 31(1) of the CPA provides:

'If no criminal proceedings are instituted in connection with any article referred to in section 30(c) or if it appears that such article is not required at the trial for purposes of evidence or for purposes of an order of court, the article shall be returned to the person from whom it was seized, if such person may lawfully possess such article, or, if such person may not lawfully possess such article, to the person who may lawfully possess it.'

[7] In order to succeed and to have the goods returned to it, all SA Metal had to prove was that it was in possession of the goods at the time SAPS seized them and that no criminal proceedings have been instituted against it. SAPS, on the other hand, bore the onus of proving that SA Metal's possession of the goods was unlawful.² With SAPS having disposed of the goods, it is clear that the goods will not be required for purposes of evidence at any trial. That SA Metal was in possession of the goods when they were seized from it is not in dispute. And, as has been mentioned above, following the withdrawal of the initial charge levelled against SA Metal the DPP gave instructions that it (SA Metal) be charged with possession of only 48 water meters as property suspected to have been stolen. The DPP declined to prosecute in respect of the rest of the goods. It follows that SA Metal would therefore be entitled to the return of the goods, less 48 water meters, provided it could lawfully possess them. But, to an allegation made in the founding affidavit that SA Metal did not anticipate any dispute in its assertion that no further criminal charges would be brought against De Klerk or any one of its employees, SAPS referred, in response, to the DPP's instructions mentioned above. Since no further charge has been preferred against De Klerk after the withdrawal of the one brought on the DPP's instructions it must be accepted, in our view, that there is no reasonable likelihood that De Klerk or any other person employed by SA Metal, will be prosecuted in connection with the 48 water meters in the foreseeable future.

² *Minister van Wet en Orde en 'n ander v Datnis Motors (Midlands) (Edms) Bpk* 1989 (1) SA 926A at 935B-G.

[8] In this court it was accepted by counsel for SAPS that for purposes of s 31(1)(a) the onus of proving that SA Metal may not lawfully possess the goods was on SAPS. It was argued, however, that the question of the onus would only arise in circumstances where the goods had not been disposed of and were in the possession of SAPS on the date the application was launched. That argument is plainly fallacious. SAPS is still required to justify the disposal of the goods, which it could presumably do if SA Metal, from whom they were seized, or any other person, may not lawfully possess them, in which event they would be forfeited to the State (s 31(1)(b)). That justification would entail proof that SA Metal could not lawfully possess the goods. No attempt was made to discharge the onus resting on SAPS in this regard.

[9] The only basis upon which it is denied in the answering affidavit that SA Metal is entitled to the return of the goods is that the latter 'obtained these items through a process of committing criminal offences by virtue of [its] non-compliance with section 6 (read with section 11 of the Second-Hand Goods Act [23 of 1955]', (now repealed). It is then alleged that the goods thus represent the proceeds of unlawful activities as defined in the Prevention of Organised Crime Act 121 of 1998 and that accordingly SA Metal may not possess them. Section 6 of the now repealed Second-Hand Goods Act enjoined a second-hand dealer, unless otherwise provided in the Act, to keep a register which must contain, inter alia, the name and address of the person from whom the second-hand goods were acquired, including the date and hour of acquisition and a full description of the goods.

[10] It was argued before us that SA Metal's employees could not produce any register to verify the legitimacy of its acquisition of the goods. SA Metal therefore contravened the provisions of the Second-Hand Goods Act and may accordingly not lawfully possess the goods, so the argument continued. We cannot agree. The Second-Hand Goods Act does not prohibit possession of second-hand articles by a dealer who does not keep a register as required. Nor does it make such possession unlawful. Instead, s 11 made it an offence to contravene, or fail to comply with, the provisions of that Act, punishable upon conviction with a fine or imprisonment. Thus, even if it were true that SA Metal failed to comply with the provisions of the Second-Hand Goods Act, which is denied by it, that by itself could not found a basis for the

argument that SA Metal may not lawfully possess the goods. It follows that SAPS failed to discharge the onus resting on it and SA Metal would be entitled to an order directing that the goods be returned to it, but for the fact that the goods have already been disposed of.

[11] This brings us to the relief sought under the *actio ad exhibendum*. The thrust of SAPS's case is that once the goods were disposed of in terms of the CPA, it was improper for SA Metal to proceed by way of motion proceedings as the *actio ad exhibendum*, being a delictual claim for compensation, is an action available to the owner of a *res* against a person who has wrongfully disposed of it. Further, so the submission continued, SA Metal was required to allege and prove, inter alia, that it was the owner of the goods at the time SAPS allegedly wrongfully alienated them.

[12] As to the appropriateness of motion proceedings in a claim under the *actio ad exhibendum*, reference may be made to the decision of this court in *Cadac (Pty) Ltd v Weber-Stephen Products Co & others* 2011 (3) SA 570 (SCA), where Harms DP said the following:

'The first issue to decide is whether the proceedings launched by Cadac for an enquiry into damages is competent because, as was argued by Weber-Stephen, it is not at all permissible to bring an illiquid claim by means of motion proceedings. This much was said by Murray AJP in *Room Hire*. The main reason for the statement is, in general terms, unobjectionable. It is that motion proceedings are not geared to deal with factual disputes — they are principally for the resolution of legal issues — and illiquid claims by their very nature involve the resolution of factual issues.'³ (Footnotes omitted)

[13] Three paragraphs later in the judgment Harms DP continued:

'I cannot see any objection why, as a matter of principle and in a particular case, a plaintiff who wishes to have the issue of liability decided before embarking on quantification, may not claim a declaratory order to the effect that the defendant is liable, and pray for an order that the quantification stand over for later adjudication. It works in intellectual property cases, albeit because of specific legislation, but in the light of a court's inherent jurisdiction to regulate its own process in the interests of justice — a power derived from common law and now entrenched in the Constitution (s 173) — I can see no justification for refusing to extend the practice to other cases.

³ Para 10.

Once the principle is accepted for trial actions, there is no reason why it cannot apply to application proceedings. In *Modderklip*, which was brought on notice of motion, this court issued an order for a determination of the quantum of damages based on the formulation used in *Harvey Tiling*.¹⁴ (Footnotes omitted)

On the issue of the quantum of damages the court below held that because there was no bona fide dispute as to the value of the goods it saw no reason why it 'cannot entertain the claim in these application proceedings'. We agree.

[14] However, counsel for SAPS submitted that in the instant matter there was, inter alia, a significant factual dispute relating to the lawfulness of the dispositions of the goods, which was raised but not canvassed in evidence. He contended further that in light of the onus on SA Metal to allege and prove the elements of the *actio ad exhibendum*, SAPS had not been required to adduce evidence of the basis upon which it was determined who the lawful possessors of the goods were. Clearly SAPS disposed of the goods because of the conclusion it reached that SA Metal could not lawfully possess them for the reason that it had failed to comply with the provisions of the Second-Hand Goods Act. We have already shown that possession of second-hand goods is not made unlawful by the failure to keep a register as required by that Act. The inescapable conclusion is that the disposition of the goods was wrongful. No evidence is required to prove this; it is a legal issue in this particular case.

[15] To succeed in its damages claim SA Metal was, in addition to proving ownership of the goods, also required to allege and prove that:

- (a) SAPS wrongfully alienated the goods before *litis contestatio*;⁵
- (b) SAPS were aware, at the time of alienating the goods, of its (SA Metal's) claim thereto;⁶ and
- (c) it suffered patrimonial loss as a result of the wrongful alienation of the goods.⁷

We have found that the disposition (alienation) of the goods was wrongful. As alluded to above, before SAPS filed an answering affidavit the State Attorney

⁴ Paras 13 and 14.

⁵ *Lawsa* 2 ed vol 27 para 385.

⁶ *Frankel Pollack Vinderine Inc v Stanton NO 2000* (1) SA 425 (W) at 429G-I.

⁷ *RMS Transport vs Psicon Holdings (Pty) Ltd 1996* (2) SA 176 (T) at 182.

advised that the goods had been disposed of. The goods were therefore alienated before *litis contestatio*.

[16] In the letter advising of the alienation, it is recorded that the scrap brass water meters were returned to the City of Cape Town on 23 December 2009 and had been subsequently destroyed; that the mixed copper scrap was handed over to Telkom on 25 November 2009; and that the greasy copper wire, scrap lead and pieces of drain cover were sold to Rall Scrap Metals on 4 December 2009. As at those dates SAPS knew of SA Metal's claim to the goods. Mr Barnett, SA Metal's managing director, sent a letter to Captain van Wyk dated 17 June 2008, advising that SA Metal had no reason to believe that the goods had been stolen and demanding their return 'unless a court of law finds that any of it has been stolen'. Receipt of this letter was confirmed in the answering affidavit. SAPS denied that five further letters, the last dated 14 November 2008 making the same demand, were received by it.

[17] It is not in dispute that SA Metal, being a dealer in scrap metal, suffered patrimonial loss as a result of the wrongful alienation. That leaves the question of ownership. It is clear from the founding affidavit that SA Metal did not claim return of the goods as a mere possessor, but as owner thereof. It alleged, for example, that it 'makes every possible effort to check that all metal it purchases is the legitimate property of the seller and does not buy any metal if it has reason to suspect that it has been stolen'. From this allegation it is clear that SA Metal purchased the goods and there is no allegation or evidence to suggest that it did not also acquire ownership. The only query proffered by SAPS in this regard is that SA Metal took no steps to produce details of the acquisition of the goods 'to show that they were legitimately acquired'. In our view, this challenge does not disprove the evidence that SA Metal acquired ownership of the goods, particularly since the basis of SAPS's claim of unlawfulness of the possession of the goods by the former has been rejected. There is thus no reason why SA metal was not entitled to an order in terms of the *actio ad exhibendum* for payment of the value of the goods, which was never disputed by SAPS — R8 611.50.

[18] In the result the following order is made:

The appeal is dismissed with costs, including the costs of two counsel where so employed.

L MPATI P and B C MOCUMIE AJA

Appearances

For the Appellant:

A C Webster SC (with him H Cassim)

Instructed by:

State Attorney, Cape Town

State Attorney, Bloemfontein

For the Respondent:

E W Fagan SC

Instructed by:

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