150/54

G.P.-S.918—1950-1—2,000. U.D.J. 219.

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(APPELLATE Provincial Division).
Provinsiale Afdeling).

Appeal in Civil Case.
Appèl in Siviele Saak.

S W A AMALGAMEERDE ARBEIDERS (EDMS) BPK. *Appellant,*

versus

GIDEON PETRUS LOUW *Respondent.*

Appellant's Attorney Grosskopf *Respondent's Attorney* Rawde & H.
Prokureur vir Appellant *Prokureur vir Respondent*

Appellant's Advocate C E L Beck *Respondent's Advocate* S. Miller, QC.
Advokaat vir Appellant *Advokaat vir Respondent* Trollip

Set down for hearing on
Op die rol geplaas vir verhoor op Monday, 16th May, 1955.
(First Division)

1, 2, 3

Appeal dismissed from Rule Nisi

Reinstated: Monday, 24th Oct. 1955.

II 4, 5, 6, 8, 9.

5/5/55.

9.45 — 11.45.
2.15 — 4.30.
25/10/55: 9.45 — 12.50. } — C.A.V.
2.15 — 5 p.m.

8-11-1955

v.d. Heever J.A. appeal dismissed with costs

2 — Form G
a/Registrar

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION).

In the matter between:-

S.W.A. AMALGAMEERDE AFSLAERS (EIENDOMS) BEPERK — Appellant

and

GIDEON PETRUS LOUW — Respondent

Coram:- Van den Heever, Fagan, Steyn, Reynolds et de Villiers, JJ.A.

Heard:- 24th October, 1955. Delivered:- 8/11/1955.

VAN DEN HEEVER, J.A. JUDGMENT.

Appellant, a Company carrying on business in South West Africa as auctioneers, instituted an unsuccessful action in the High Court of South West Africa, against respondent for the balance of the purchase price of some cattle bought by respondent at one of appellant's cattle sales on the 9th of September, 1953. Claassen, J., who tried the case, absolved respondent from the instance with costs; hence this appeal. Henceforth I refer to the parties as plaintiff and defendant respectively.

Immediately prior to the commencement of the auction sale a number of conditions governing the

2/ sale .....

sale were read out. I need refer to only four of them:

"(3) Die styging in die biedery sal deur die afslaer gereël word en hy hou die reg uit om enige bod te weier sonder om enige rede daarvoor te gee.

(4) Die afslaer het die reg om kontant te eis vir enige lot op die val van die hamer.

(6) Elke en iedere lot sal beskou word as wettelik afgelewer op die val van die hamer, wanneer alle risiko deur die koper aanvaar word. Geen lot sal van die vendusie verwyder word sonder die toestemming van die afslaer nie."

(7) Terme kontant."

Plaintiff's declaration avers a ~~further~~ further and special condition in these terms:

"But just prior to the commencement of the said auction and at the place thereof, plaintiff through its duly authorised employee and agent Jacobus Johannes de Klerk, informed defendant verbally that plaintiff would not sell any stock on the said auction sale to defendant except on the condition that defendant would be liable to plaintiff personally for the purchase price thereof and that defendant would not claim to set-off the said purchase price against any debts that might be owing to defendant by the seller of the said cattle, one Nell, cattle speculator of Okahandja, whose identity as seller was known to the defendant, meaning thereby and being understood by the defendant to mean that the acceptance of any bids by plaintiff from defendant at the said auction would be subject to the condition that should any of the said cattle be knocked down to defendant,

defendant would be liable to plaintiff personally for the purchase price thereof, and that defendant would not claim to set-off the said purchase price against any debts that might be owing to defendant by the said Nell. It was intended by plaintiff to be understood by defendant, and was so understood, that the conditions as read out as aforesaid, were, so far as defendant was concerned, qualified by the special condition aforesaid."

Defendant denied that the special condition alleged was imposed at the auction sale. He alleged that at the moment when Nell's cattle were knocked down to him at the auction sale, Nell was lawfully indebted to defendant in the sum of £4674.0.0. and that his liability to Nell was extinguished by operation of set-off.

As happens so often in South West Africa, this inherently simple piece of business is set in a vignette of surrounding pacts liable to render it as intricate as an international cambial transaction. The speculator, Nell, bought cattle on a large scale but was, as the learned trial Judge found, a man of straw. He operated largely on credit. Sometimes persons from whom he bought stipulated that the cattle would remain their property until the ~~xx~~ purchase price is paid; in addition plaintiff sometimes guaranteed

that Nell would pay; in some cases plaintiff financed Nell directly. Nell had undertaken not to dispose of cattle so bought otherwise than through plaintiff. It is clear that plaintiff's general manager, one Kovensky, as well as its other officers regarded the undertaking, not to dispose of the cattle through any channel other than plaintiff's business, as constituting in effect, though not in form, a kind of hypothec over movables in plaintiff's favour.

The learned trial Judge came to the conclusion that the alleged special condition was not established at the trial and that defendant bought the cattle subject to the ordinary conditions that were read out at the sale and which are incorporated in the declaration.

Whilst recognising the difficulties in the way of questioning a trial Judge's findings on credibility Mr. Goldblatt, for appellant, made a forceful attack upon the finding to which I have referred. In his reasons for judgment Claassen, J., remarked:

> "It is very difficult to escape the conclusion that the evidence for Plaintiff was designed purposely to fit into what was stated at page 120 of the case of Estate Duminy v. Hofmeyer and Son Ltd., 1925 C.P.D. 115 namely:

> 'The auctioneer can contract, as the defendant in this case attempted to contract, ... that the buyer shall not be able to set-off any claim he may have against the seller, but shall be liable for payment to the auctioneer'".

It was argued that plaintiff's witnesses are not likely to have been aware of that decision. I do not regard the learned Judge's observation as containing an imputation that those witnesses ~~were~~ had been coached by plaintiff's legal advisers in what they had to say. The imputation of grossly unethical conduct on the part of practitioners, where it is without evidential foundation, would be unwarrented. It is possible that witnesses may have seen an opinion of counsel obtained before litigation commenced. Examined more closely the observation objected to appears to me to be nothing more than a rather strongly worded finding expressed, perhaps, not too happily. The evidence in question was adduced in support of an allegation contained in the declaration. It is to be presumed that if there had been no evidence to that effect, the allegation would not have been pleaded. The observation therefore amounts to this, that plaintiff's witnesses designedly

gave false evidence. That is a grave judgment to be passed by a judicial officer and one that should not be pronounced lightly. A witness may give evidence which is not in accordance with objective truth because he has a bad, an optimistic or an imaginative memory; because he was a poor observer or inattentive listener; because he has a confused mind. But if a Judge finds as a fact that a witness deliberately told untruths in the witness-box, it is his unpleasant duty to say so.

Later in his judgment Claassen, J., again stated that the evidence on behalf of plaintiff was designed to "fit into the statement in Estate Duminy's case". That was a finding at which he arrived after an appraisal of the evidence of the witnesses, not a postulate or premise to be built upon. The learned Judge in arriving at that conclusion considered that plaintiff's witnesses were either not independent or were biassed.

But assuming that the trial Court was wrong in thinking that plaintiff's witnesses had given false evidence deliberately, I am not satisfied on the probabilities that its judgment is wrong on this factual issue.

The record comprises four volumes and

argument lasted two days. I am not going to traverse every argument advanced on appeal. It would be sufficient, I think, to deal with the salient considerations that have influenced my conclusion. For this purpose I should mention certain phases of the vignette to which I have alluded.

On the 24th of May, 1953, Nell had bought from defendant over 400 head of cattle for the sum of £7786. It was agreed that the cattle would remain the property of defendant until the price was paid. On account of this debt Nell gave defendant two postdated cheques, one for £3,674 due on 1 July, 1953 and one for £3,500 payable on 31st July, 1953. Apparently some other arrangement was made in respect of the balance of £612.

During June, 1953, defendant agreed to release 250 head of stock from his reservation of ownership, so that Nell could dispose of them at a sale at Karibib. Apparently 285 head were actually removed and sold. Nell did not meet the cheques on due date. It is unnecessary to discuss the requests for, and agreements as to extension of time; it is sufficient to say that at all relevant times up to the 9th of September, 1953 a considerable balance was

still due to defendant. It is clear that defendant became worried, but he was repeatedly reassured by Kowensky that there was no ground for fear. Defendant learnt from plaintiff's officers that Nell would sell some 500 head of stock at plaintiff's sale to be held on the 9th September. On the 29th August Nell was involved in a very serious motor accident and, naturally, his creditors including defendant were alarmed.

This was the situation when defendant attended the auction sale on the 9th September, 1953, with the object of buying a sufficient number of animals sold on Nell's behalf to extinguish Nell's debt to him by set-off. His intention and his object were disclosed to plaintiff's officers at the sale. Plaintiff had assumed obligations towards third parties in respect of some of the cattle to be sold and its officers naturally did not welcome the prospect of defendant buying the stock - admittedly being sold on behalf of Nell - and paying with Nell's cheque. A lengthy argument ensued. The nature and result of the discussion was described by the learned Judge in the following words:-

9/ "On .....

"On the evidence of de Klerk" (one of plaintiff's officers present at the sale) "plaintiff has always followed the same invariable procedure. It sold on behalf of sellers, always received payment from the purchasers and from the amounts so received was deducted its commission and debts to the plaintiff of the seller. It has never happened that a purchaser has settled directly with the seller. The idea of a set-off as between purchaser and seller or of a purchaser paying directly to the seller never entered their minds. They therefore considered themselves perfectly safe and never considered the question of taking extra precautions or altering their conditions of sale in such a way as to afford themselves greater protection. After the argument on the 9th September immediately before the sale de Klerk crowned the argument by saying that the conditions of sale would be read, thereby indicating the source of his authority and the basis of his whole argument."

This conclusion is, I think, supported by all the surrounding circumstances. Relying on "die normierende Kraft des Factischen" de Klerk most probably considered it unnecessary to frame and announce special conditions. He knew exactly on what basis defendant was going to buy. He could have stopped the sale or refused defendant's bids without giving any reasons. If, knowing defendant's attitude, he had imposed the special condition

alleged, it is difficult to understand why he should have allowed the cattle to be removed before they were paid for. Other creditors of Nell attended the sale. No special conditions were imposed on them. True, they were not threatening to set-off, but set-off was discussed at the place of the auction prior to the sale and once a novel remedy has been suggested by one person, others may be expected to follow his example. It strikes me as improbable that defendant should be singled out in that manner. The onus to prove the existence of the special conditions alleged was on the plaintiff.

During the evening of the 9th September in Kovensky's office, after the sale, defendant had a discussion with Kovensky. He admits that he left Kovensky under the impression that he was going to pay. It is not suggested that the cause of that impression amounted to a promise. It is to be remembered, however, that defendant was being told that his claim to set-off was ridiculous and at that time he had not yet taken legal advice. He was under no obligation to disclose to Kovensky what course he was

going to adopt after taking legal advice. I do not think, therefore, that his attitude at this meeting can cast any light on what probably happened at the sale during the day. In my opinion the conclusion of the learned trial Judge that this onus has not been discharged cannot be disturbed.

But, Mr. Goldblatt contended, plaintiff was protected ~~from~~ against set-off by the conditions read out at the sale in regard to cash payment. On principle there can be no doubt that such conditions are binding upon a bidder. They settle modalities of a contract to be concluded very much like a printed form of contract which is later filled in by the parties to it. It was plaintiff's auctioneer who completed the contract by accepting defendant's bid (Wessels on Contract § 209, 2nd Ed. Vol. 1 p. 58). Just as he can stipulate modalities in advance, so can a bidder. The auctioneer had been forcefully made acquainted with the terms of defendant's offer and, if he was not satisfied with them, he should not have accepted the bid.

The conditions relating to cash payment mean no more than that no credit will be extended. Defendant

has not pleaded that payment was not yet due, but that his debt arising out of his purchases at the sale, was immediately discharged by set-off.

Mr. Goldblatt advanced an argument based on English authorities that an auctioneer has a kind of "special property" in the goods he sells and that he has a lien not confined to the goods but also applicable to the proceeds of the sale; that he may consequently sue not only for the amount of this lien but for the whole purchase price. In Marcus v. Stamper and Zoutendyk, (1910 A.D. 58, 76) Lord de Villiers remarked:

> "Whatever the nature of the special property of the auctioneer may be under English law in conferring upon him a right of lien for his charges and a title to sue the purchaser, no English case has been cited in which such special property has been held to confer on him a right to sue third parties in cases like the present. Even if such had been the law of England, I can find no authority for its being the law of South Africa."

At page 82 Innes, J., observed:-

> "Agency is, after all, the fundamental idea which governs the position of any auctioneers."

I do not understand how the suggested lien can affect the question. If plaintiff had a lien on

the cattle, it parted with that lien when it parted with the cattle. Had the purchase price been paid to plaintiff, the question might have arisen whether it had a lien on such proceeds as against the seller in respect of the auctioneer's charges and commission. If defendant had paid directly to Nell, I cannot see on what ground plaintiff could have complained. In any event the rules of English law in regard to the pursuit of funds obtained from an agent by innocent third parties are very different from those of Roman Dutch law (John Bell and Co. Ltd. v. Esselen, 1954 (1) S.A. p. 147).

Mr. Goldblatt contended that the case of Hofmeyr and Son v. Luyt, (1921 C.P.D. p. 830) was wrongly decided. Whether an auctioneer may sue personally for the purchase price of goods ~~sold~~ sold at his auction sale is not a question which can be answered in the abstract. There is nothing in our law which prevents me from selling the goods of another, whether or not I am authorised by that other to do so. In either event the auctioneer can sue for the purchase price without cession of action from the seller only if in the transaction he sold as principal. In the present case there

is no suggestion that plaintiff at the sale supported such an independent character. The sale was admittedly an auction sale at which Nell was the seller and no special agreement was made according to which plaintiff could figure in the character of seller. There is consequently ample reason for the doubt expressed by the learned trial Judge whether plaintiff was entitled at all in the circumstances to sue for the purchase price.

Mr. Goldblatt advanced authority for the proposition that an auctioneer has legal remedies against third parties who commit wrongs in regard to the property in his custody. That seems to me to have no bearing on the matter. The fuller or shoemaker has a remedy against persons who commit a delict in respect of property in his possession. He will be able to invoke the possessory remedies or have an action in delict to the extent of his remuneration or in so far he is liable to the owner in respect of custodia. But he surely cannot sue for the purchase price if while he has custodia the owner should sell the property to a third party, although he can retain possession against all the world until his charges are paid.

15/ 14-(N) / If

If I understood Mr. Goldblatt correctly, he seemed to suggest that an auctioneer occupied a legal position sui generis between seller and buyer at his sale and that by reason of his peculiar position a bidder can never set-off the purchase price against a debt due to him by the seller.

Matthaeus (de Auctionib. 1.13.7) deals with set-off by the purchaser against the debtor whose property is sold in execution. He shows that there were two schools of thought as to whether set-off was competent. He comes to the conclusion that it is not, on the ground that it is not the debtor who sells; it is a sale in execution (See Holl. Cons. Vol. 3 Cons. 229 n. 2). Nor is there mutuality of obligation, for if a creditor's bid is accepted he owes money not to the execution debtor, but to the latter's concourse of creditors. Otherwise, says Matthaeus, we have the absurdity that all the creditors of the execution-debtor become each other's creditors as well as debtors. From the trend of his argument, however, it is apparent that in his opinion there was nothing to prevent the bidder at a private auction sale (where private auctions were permitted) to set-off the price of his purchase against debts due to him by the owner of the goods sold.

15/ At .....

At the end of the trial, when argument was virtually completed, application was made for leave to amend the declaration by alleging certain arrangements made by plaintiff with former owners of the cattle sold at Nell's sale. It was sought to allege that it was implied in the agreements between plaintiff and such former owners or plaintiff and Nell that plaintiff should be entitled to the purchase price on the resale of the cattle and should account to Nell for the excess over the purchase price. The amendment was sought to serve as foundation for the argument that there was an implied cession to plaintiff of the proceeds of cattle coming from such former owners.

Claassen, J., refused the application and against this refusal appellant also appealed. Mr. Goldblatt, while not jettisoning that ground of appeal, did not argue it, I think wisely. It is unnecessary to consider whether the learned Judge exercised ~~the application~~ a judicial discretion in refusing the application, for the amendment would have availed appellant not at all. Assuming the implication could be justified (and I do not think it can - See Mullin (Pty) Ltd. v. Benade Ltd., 1952 (1) S.A. p. 211) "it may be necessary in the business sense to give efficacy to the contract" as

between plaintiff and Nell or as between plaintiff and the former owners, but it cannot be invoked to create a hypothec over movables as against defendant.

I have come to the conclusion, therefore, that plaintiff had no right of action for the purchase price against defendant and that, even if he had, he could not succeed for the reason that Nell's claim to the purchase price had been extinguished by compensation.

In my judgment the appeal is dismissed with costs.

A.B.S. Heher.

Fagan, J.A.
Steyn, J.A.
Reynolds, J.A.
de Villiers, J.A.
} Concur.