G.P.-S.59968—1970-71—2 500

contempt of

J 219 1/76

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

(Provincial Division)
(APPELLATE Provinsiale Afdeling)

Appeal in Civil Case
Appèl in Siviele Saak

ARIS ENTERPRISES (FINANCE) (PTY.) LTD. *Appellant,*

versus

WATERBERG KOELKAMERS (PTY) LTD. *Respondent*

Appellant's Attorney / *Prokureur vir Appellant* Lovius, B.M. & S. *Respondent's Attorney* / *Prokureur vir Respondent* Norris & Bennetts

Appellant's Advocate / *Advokaat vir Appellant* Van Schalkwyk *Respondent's Advocate* / *Advokaat vir Respondent* T.T. Spoelstra

Set down for hearing on / *Op die rol geplaas vir verhoor op* 17-11-1976

578 1012

Coram: Trollip, Muller, Hofmeyr, Kotzé ARR et Joubert WNAR

van Schalkwyk - 9.45-11.00, 11.15-11.55, 2.45-3.00

Spoelstra - 11.55-12.45, 2.15-2.45

(J.T.D.)

1. The Court allows CAV
the said appeal and sets
aside the orders of the Court
a quo. The following orders
are substituted -
"(a) Judgment ... (follows page

P.T.O

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

Bills taxed—Kosterekenings getakseer

Date Datum	Amount Bedrag	Initials Paraaf

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

ARIS ENTERPRISES (FINANCE) (PROPRIETARY) LIMITED ..... APPELLANT

AND

WATERBERG KOELKAMERS (PROPRIETARY) LIMITED ..... RESPONDENT

Coram: Trollip, Muller, Hofmeyr and Kotzé, JJ.A. et Joubert, A.J.A.

Heard: 19 November 1976. Delivered: 24 February 1977.

J U D G M E N T

TROLLIP, J.A. :

In the Transvaal Provincial Division the appellant (plaintiff) claimed from respondent (defendant) the return of (a) a Carma deep freezer, (b) a Sumak refrigerator,

and .... /2

and (c) 4 Crolls air-conditioning units. The basis of the claims was that plaintiff had let (a), (b), and (c) to defendant for 3 years for use in its butcher shop in Nylstroom under three separate written agreements of lease, dated respectively 20 October 1969, 20 October 1969, and 1 November 1969, and that the leases had expired by effluxion of time. Originally the claims were made by application on notice of motion. Defendant opposed the application. The Court a quo referred the matter to trial. It also ordered that the plaintiff's affidavit supporting the notice of motion was to stand as summons and that the other pleadings were to be filed in due course. The trial was ultimately heard by COETZEE, J. He granted absolution from the instance on the claims for (a) and (b), but judgment for the plaintiff in respect of (c), and he ordered plaintiff to pay

90% of defendant's costs of suit. Plaintiff has appealed against the judgment of absolution and the order of costs. There is no cross-appeal against the judgment in respect of (c). We are therefore only concerned with the claims for (a) and (b).

The lease for (a) provided that the total rental was R756, payable in equal monthly rentals of R21 over 36 months commencing on 20 October 1969. The lease for (b) stated that the total rental was R2 880, payable in equal monthly rentals of R80 over 36 months also commencing on 20 October 1969. Each lease contained the following terms -

> "9. The Lessee agrees that on the termination of this agreement, whether by effluxion of time or for any other cause, he will at his own expense deliver to the Lessor the goods in good order and condition together with all licence papers, registration certificates and any other relevant documents in possession of the

Lessee .... /4

Lessee at that time, or hold the goods on behalf of the Lessor pending instructions from the Lessor in respect of delivery thereof.

10. Upon termination of the agreement for whatsoever cause the goods shall, after delivery thereof to the Lessor by the Lessee, be sold by the Lessor for the best price obtainable by him, such price however at all times to be in the sole discretion of the Lessor, in which event:

(a) If all rentals, costs and other charges hereinbefore mentioned have been paid in full to the Lessor the Lessor shall pay to the Lessee, as a repayment of rentals already paid by the Lessee, the proceeds of the abovementioned sale less all costs incurred by the Lessor in connection or incidental to the repossession, storage, repair and sale of the goods, and

(b) If all rentals, costs and other charges hereinbefore mentioned have not been paid in full to the Lessor, the Lessee shall pay to the Lessor, as liquidated and pre-estimated damages, the present value of the unexpired rentals at that date together with arrear rentals plus interest thereon, if any, plus any costs incurred by the Lessor in connection with or incidental to the repossession, storage, repair and sale of the goods less the proceeds of the aforesaid sale."

Plaintiff duly delivered and installed the

appliances .... /5

appliances (a) and (b) in defendant's butcher shop; defendant duly paid all the stipulated rentals; and the leases expired by effluxion of time. The defendant, however, has refused to return the appliances to plaintiff in terms of the above clauses. In the proceedings claiming their return defendant raised various defences. They can be summarized as follows:

(i) At the time the leases were entered into, Jacobs, the sole director and shareholder of defendant, and Kondopulos, a director of plaintiff, verbally agreed that on expiry of the leases plaintiff would not physically take back the appliances, they would remain in defendant's possession, and Jacobs, or any company in which he had an interest, could, in terms of the abovementioned clause 10, purchase them at a nominal price, which would then be paid over to defendant.

(ii) .... /6

(ii) The common and actual intention of the parties at the time of entering into the leases was that, on due payment by defendant of all the so-called rentals, it (defendant) would become the owner of the appliances; that the true agreements between them were therefore hire-purchase contracts, disguised so as to evade the provisions of the Hire-Purchase Act, No. 36 of 1942; and that the leases should therefore be treated as accordingly rectified.

(iii) Alternatively to (ii), the defendant pleaded the exceptio doli. The basis of this defence was that, because of the verbal agreement of the parties alleged in paragraph (i) above, it was mala fide and unconscionable of plaintiff to invoke and enforce by these legal proceedings the provisions of clauses 9 and 10 of the leases according to their strict tenor.

At .... /7

At the trial the defence in paragraph (ii) was abandoned by defendant. The reason was, so counsel informed us, that, even if the verbal agreement or the common intention of the parties alleged in paragraphs (i) and (ii) were established, that did not render the leases hire-purchase contracts, since Jacobs or his nominee, and not defendant, would then, in accordance therewith, become the ultimate owner of the appliances. Hence, defendant relied only on paragraphs (i) and (iii).

COETZEE, J., preferred the testimony of Jacobs to that of Kondopulos. He said that the former was "a simple and straightforward man", he was "an honest and truthful witness", his version was "infinitely more probable than that of Kondopulos", and where their versions conflicted, he accepted Jacobs's. He therefore held that in substance the verbal agreement

alleged...../8

alleged in paragraph (i) had been established. As to the exceptio doli, the learned Judge recorded his strong view that it did not form part of our law, but, he said, he was bound by the decision or assumption by the Full Bench of the Transvaal Provincial Division in Otto en 'n Ander v. Heymans 1971 (4) S.A. 148 to the contrary. On the supposition that the exceptio doli still prevails in our law, he considered that the present case was a clear one for its application. He consequently absolved defendant from the claims for the return of the 2 appliances in question.

On the view we take of the facts it becomes unnecessary, for reasons that follow, for us to enter upon the interesting dispute about whether or not the exceptio doli is still available in our law.

Counsel .... /9

Counsel for plaintiff criticized the acceptance by the Court a quo of Jacobs's version. But I am unpersuaded that it erred in doing so except on one particular aspect (about to be mentioned) on which Kondopulos's version is clearly far more probable than Jacobs's.

According to Jacobs he wanted to acquire these appliances on hire-purchase contracts; but Kondopulos explained that the plaintiff had also a leasing scheme available that had the advantage of avoiding the need to pay an initial, substantial deposit on account of the purchase price; he was therefore persuaded to enter into the two leases. He (Jacobs) denied (as Kondopulos asserted) that they also discussed the further advantage that the monthly rentals would be deductible expenses for income tax purposes. But, I think, that must

also .... /10

also have featured in their discussion, being so powerful an argument in favour of such leases; indeed, according to defendant's subsequent financial accounts returned for income tax purposes, these rentals were shown as deductions. Jacobs naturally asked Kondopulos what would happen to the appliances on the expiration of the leases, since he was anxious that he or defendant should then retain them. Kondopulos proposed that he could take them over for "a nominal amount" according to a valuation which plaintiff and Jacobs would make and agree upon, which amount Jacobs had to pay over to the defendant. Jacobs, acting both for himself and defendant, agreed to that proposal.

That the valuation of and their concurrence upon "the nominal amount" and the payment of it to defendant were fundamental to Jacobs's entitlement to retain or acquire

the .... /11

the appliances, appears from the following passages in his evi-

dence (the reference to "Industrial and Mercantile" can be taken

to mean the plaintiff, and "Waterberg Koelkamers" is the defendant):

"Nou goed, laat ek nou woord vir woord hoor wat sê hy?.... Mnr. Kondopulos het aan my gesê dat die goedere, die manier wat hulle dit werk, ná die tydperk verstreke is, moet daar 'n waardasie gemaak word van die yskaste. Dit sal 'n nominale bedrag wees, dit kon enige bedrag wees .... ek kan die yskaste dan op my eie naam sit en ek moet net daardie bedrag oorbetaal aan Waterberg Koelkamers .....

Wat kan oorbetaal word aan Waterberg Koelkamers?..... Die waardasie wat ons op ooreenkom of die bedrag wat ons ooreenkom .... (Ek betaal dit) in my privaat persoon .....

.....

U het vertel dat Kondopulos sê vir u daar moet eers sekere dinge gedoen word? .... Ja, dit is net die kwessie van die betaling van my aan Waterberg Koelkamers en dan is die saak afgehandel.

Daar word eers 'n waardasie gemaak? .... Dit is reg.

Wie maak die waardasie? .... Industrial Mercantile en ek sal ooreenkom op 'n bedrag.

Het hy dit ook gesê? .... Dit is reg.

Dan stel ek die vraag weer aan u: Met ander woorde hy het vir u beduie, wat ek nou maar noem, sekere prosedures wat julle moet ooreenkom op 'n bedrag, 'n waardasie maak en sulke

dinge .... /12

dinge. Dit moet eers gebeur voordat die goed u eiendom kan word?.... Dit is reg.

Dit is nie 'n geval dat hy gesê het: as u klaar betaal het oor 36 maande dan is dit u eiendom nie? ... Dit is reg.

.....

Is daar enige nominale betaling gemaak deur uself hetsy aan Waterberg Koelkamers of aan die eiser? .... Daar is nie gemaak nie, want volgens wat Industrial Mercantile aan my gestel het, moes ons saam 'n waardasie maak van die goedere. Ek kon nie alleen sê wel, goed, ek betaal R100-00 of R200-00 oor nie.

So u en Industrial Mercantile sou saam 'n waardasie gemaak het? .... Dit is reg.

En as gevolg daarvan, wat sou dan gebeur?.... Dan sou die goedere my eiendom gewees het.

Teen daardie prys?.... Teen die bedrag wat ons op ooreengekom het."

From further passages in Jacobs's evidence it appears that, provided the valuation was made and "the nominal amount" was agreed upon and the amount was paid over to defendant, then either Jacobs, defendant, or some other company nominated by him could

retain .... /13

retain possession of the appliances.

For plaintiff it was contended that the evidence of that contemporaneous verbal agreement was inadmissible as being contrary to the express provisions in clauses 9 and 10 of the leases quoted above. For defendant it was argued that the verbal agreement was not contrary but complementary to those provisions and evidence of it was therefore admissible. The purpose of the verbal agreement, so it was argued, was to implement clauses 9 and 10 in a particular manner: on termination of the leases, instead of defendant having to return the appliances to plaintiff for it to sell them to anyone it chose and to pay the net proceeds to defendant, plaintiff would sell them to Jacobs for a price to be evaluated and agreed upon between plaintiff and Jacobs and he (Jacobs) would pay

that .... /14

that price to defendant. It is, however, unnecessary to determine whether or not the verbal agreement conflicted with clauses 9 and 10. I shall assume without deciding in favour of defendant that it did not, and that parol evidence of it was therefore admissible.

So the nub of the real dispute can be circumscribed thus: on termination of the leases plaintiff, as the lessor of the appliances, was entitled in terms of clauses 9 and 10 to their return from the defendant, unless defendant proved that the verbal agreement between them and Jacobs barred such recovery. Now for that agreement to operate as such a bar, defendant had to show that it was an effective or enforceable agreement. In my view, for reasons that follow, it failed to do so.

The ..... /15

The verbal agreement itself did not fix "the nominal amount" that Jacobs had to pay defendant to entitle him, defendant, or some other company of his to retain the appliances. It merely provided that the amount would be fixed by valuation and agreement by both plaintiff and Jacobs on termination of the leases. As already pointed out compliance with that provision was a sine qua non to any effective bar to plaintiff's recovery of the appliances. True, it may at the first blush seem to be highly unnecessarily technical, if not fatuous, for plaintiff and Jacobs to have to fix "the nominal amount" which Jacobs then had to pay to defendant, his own company, at a time when plaintiff would seemingly have no further interest in the matter. But that was the parties' verbal agreement that defendant relied on; no doubt, too, it

was .... /16

was designed by them in good faith to preserve the essential nature of their written contracts as true leases for income tax purposes; it cannot be inferred from Jacobs's testimony that "the nominal amount" would be so minimal that the maxim de minimis non curat lex applied and it could be ignored as a factor; on the contrary, it appears that it had to bear some relation to the then actual value of the appliances, especially as the verbal agreement was to complement clause 10 of the leases; and consequently due compliance with the verbal agreement must have been regarded by them as the only way in which plaintiff could ultimately divest itself effectively of its rights as the lessor of the appliances. Hence, unless the plaintiff and Jacobs fixed "the nominal amount" and Jacobs paid it to defendant, plaintiff remained the lessor of the

appliances .... /17

appliances under the leases and the verbal agreement did not become effective to bar plaintiff from recovering them in terms of the leases. It was common cause that this "nominal amount" was never fixed or paid to defendant. The verbal agreement was therefore no defence to plaintiff's claim for recovery of the appliances. Cf. Biloden Properties (Pty.) Ltd. v. Wilson 1946 N.P.D. 736 especially at pp. 744-5.

The defendant did not plead that Jacobs was prepared to enter upon discussions with plaintiff in order to fix "the nominal amount" and to pay it to defendant, and that, pending the outcome of those discussions, it was entitled to retain the appliances. But I do not think that such a plea would have availed defendant. For plaintiff could not have been compelled to enter upon the discussions or to agree upon

any .... /18

any amount. And that brings me to consider another approach to the problem leading to the same result. It can be inferred from the evidence about the verbal agreement that, on termination of the leases, Jacobs would be entitled, but not obliged, to take over the appliances. In other words, the verbal agreement conferred an option on Jacobs to take over the appliances for "a nominal amount" to be fixed by valuation and agreement by both plaintiff and Jacobs; as they might never agree upon "the nominal amount", the price was uncertain and the option of no force or effect, and it was therefore no bar to the plaintiff recovering the appliances on termination of the leases. The reason is that it is essential for the validity, not only of a contract of sale, but also of an option to purchase, that the price must be fixed or determinable

by the parties' agreement. (See Voet 18.1.23, Gane's Translation, vol. 3, pp. 277-279; MacKeurtan, The Law of Sale, 4th ed., p. 57 read with p. 45; and, for example, Faatz v. Estate Maiwald 1933 S.W.A. 73 at pp. 90-91; Hattingh v. van Rensburg 1964 (1) S.A. 578 (T) at pp. 582 C to 583 A; Globe Electrical Transvaal (Pty.) Ltd. v. Brunhuber and Others 1970 (3) S.A. 99 (E)).

That being so, the defendant's defence based on the exceptio doli also falls away. Counsel for defendant rightly conceded that, if the verbal agreement between the parties' and Jacobs was ineffective or invalid, the exceptio doli, which was based on it, could not be upheld. The reason is that the plaintiff, in pursuing its action to recover the appliances in terms of its rights under clause 9

in ..../20

in order to deal with them under clause 10 of the parties' written leases, could then not be held to be acting with any dolus (see Union Government v. Vianini Ferro-Concrete Pipes (Pty.) Ltd. 1941 A.D. 43 at p. 50; Paddock Motors (Pty.) Ltd. v. Ingesund 1976 (3) S.A. 16 (A.D.) at p. 28 E - H; and cf. Universal Stores Ltd. v. O.K. Bazaars (1929) Ltd. 1973 (4) S.A. 747 (A.D.) at p. 762 H).

The appeal must therefore succeed and the return of the appliances to plaintiff must be ordered. Of course, when plaintiff receives them, it must deal with them and their net proceeds in terms of clause 10 of the leases.

In fairness to the learned trial Judge I should say that the abovementioned point does not appear to have been raised before him. However, plaintiff was entitled

to .... /21

to raise it on appeal for the first time, for it is purely a point of law, the factual foundation for which was raised by the pleadings (i.e., the parties' and Jacobs's verbal agreement), and it was fully canvassed in the evidence. Nor should the successful plaintiff be deprived of the costs of appeal for having belatedly raised the point on appeal. After all, the plaintiff might well have succeeded on appeal on the other points of substance argued on its behalf, and it is by no means clear that, if it had raised the point in the Court a quo, that would then and there have finally disposed of the dispute between the parties, thereby saving the costs of an appeal (see Cole v. Union Government 1910 A.D. 263 at pp. 281/2; Durban Corporation v. Estate Whittaker 1919 A.D. 195 at p. 203; contra Argus Printing and Publishing Co. Ltd. v.

Die .... /22

Die Perskorporasie van Suid-Afrika Bpk. 1975 (4) S.A. 814 (A.D.) at p. 823 E - H, which is clearly distinguishable on the facts).

The plaintiff should, however, be deprived of some of the costs of appeal on another ground. Certain parts of the record of the proceedings in the Court a quo were unnecessarily included in the record for the appeal. Counsel for defendant submitted that the costs thereanent should be disallowed; counsel for plaintiff could not challenge the correctness of the submission. The unnecessary parts are -

(a) Volume 1 of the record. This comprises the whole of the opposed proceedings on notice of motion. As the matter was referred to trial, which was commenced afresh with both parties filing pleadings, and as viva voce evidence was thereafter fully

adduced .... /23

adduced, the motion proceedings became superfluous for the purposes of the appeal. True, in referring the matter to trial the Court did order plaintiff's founding affidavit to stand as summons and it forms part of volume 1. But as the pleadings for the trial started with a full declaration by plaintiff, this affidavit, even though it served as the summons, was also rendered superfluous.

(b) Pages 136 to 154 of volume 2 contained counsel's written arguments that were apparently submitted to the Court a quo. There is no reason why they should have been included in the appeal record.

(c) Volume 3 contains exhibits C, D, and E (pages 266-281), being copies of the leases and appurtenant documents relating to the 3 appliances. These documents were also contained in volume 2

as .... /24

as annexures A, B, and C to the plaintiff's declaration. It was therefore unnecessary to repeat them in volume 3. This Court's Rule 5 (12) says "no documents shall be set forth more than once" in the appeal record.

I am quite sure that defendant would have agreed to the omission of the abovementioned parts from the appeal record had it been approached. The costs of appeal relating to them should therefore be disallowed.

In the result the following orders are made:

1. The appeal succeeds, the orders of the Court a quo are set aside, and the following orders are substituted -

"(a) Judgment is granted in favour of the plaintiff and defendant is ordered to deliver to plaintiff -

(i) the Carma Deep Freezer Model 700 VS;

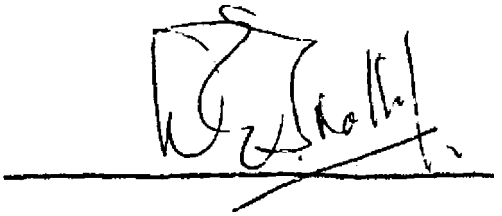
(ii) .... /25

(ii) the Sumak FTS-SB-SM 12 foot Refrigerator;

(iii) the 4 Crolls Air-Conditioning Units Models 220 N and 330 R.

(b) Defendant is ordered to pay the costs of suit."

2. The respondent is ordered to pay the costs of appeal, excluding those in respect of (a) volume 1 of the record, (b) pages 136 to 154 inclusive of volume 2, and (c) pages 266 to 281 inclusive of volume 3.



W.G. TROLLIP, J.A.

MULLER, J.A.)
HOFMEYR, J.A.) concur.
KOTZÉ, J.A.)
JOUBERT, A.J.A.)