IN THE SUPREME COURT OF SOUTH

AFRICA (APPELLATE

DIVISION)

CASE NO. 106/95

In the matter between

SHEILA DEVI SINGH APPELLANT

and

SANTAM INSURANCE COMPANY LIMITED RESPONDENT

CORAM: CORBETT CJ, FH GROSSKOPF, MARAIS,

OLIVIER et SCHUTZ

JJA DATE HEARD: 5 SEPTEMBER 1996

DATE DELIVERED: 17 SEPTEMBER

1996

SCHUTZ JA

JUDGMENT

SCHUTZ JA

The decision of the Court a quo, reported as Santam Insurance Ltd v Devil 1994(3) SA 763(T), has evoked a good deal of comment in the journals, principally, I think, because the facts were not set out in any detail in the judgments. Once the facts are known the case is an unremarkable one, save in one respect, that the four judges who have so far pronounced upon it are equally divided in their opinions (Gautschi AJ at first instance favouring the appellant ("Singh"), AC le Roux AJ with le Grange J concurring, favouring the respondent ("Santam") a quo, whilst Nugent J dissented.) In terms of the majority decision Singh's

claim for the return of her Mercedes car failed.

Her founding affidavit is terse. She alleges that she is the owner of the car, and that on 5 July 1990 one Lowe, an authorised assessor in Santam's employ "took possession" of it. Santam is still in possession. Those simple and sufficient allegations, cast in a form usually associated with the case of Graham v Ridley 1931 TPD 476, are followed by a final paragraph reading: "I respectfully submit that, by having dispossessed me of my motor vehicle, [Santam] is in unlawful possession of [it]."

The description of Santam's possession as "unlawful" does not in itself attract any additional onus: Chetty v Naidoo 1974(3) SA 13 (A) at 20 D-E. But, on the other hand, unlawfulness being a conclusion of law, and not constituting the entirety of spoliation, there are no facts alleged

sufficient to found spoliatory relief. Dispossession without consent or legal process of one in peaceful and undisturbed possession are the essentials for such relief. I mention these things only so that spoliation, hinted at in Singh's replying affidavit, may be put out of the way. It is not her case. That was accepted on appeal.

Her ownership and Santam's possession were not in issue. The case hinged upon the latter's claim that it was entitled to retain possession under a lien operative against her. The onus of proving such a lien accordingly rested on Santam, and in order to ascertain whether it discharged it I turn to its answering affidavit.

On 9 March 1990 Santam issued a motor dealers' external risks policy to Kenilworth Motors and Motor Sales, a firm owned by

one

Muthusamy. Singh's Mercedes was damaged in an accident in circumstances such that Santam was obliged to indemnify the insured (Muthusamy) under the policy. On 19 March 1990 Santam received a claim in respect of the damage. According to the claim form Singh had been a passenger in the car when the accident occurred (she admitted her presence as a fact.) The cost of repairs was estimated in the form at R15 000.

The affidavit proceeds "Op daardie stadium [when the claim form was received] was die motor reeds afgelewer aan Hutton Paneelkloppers ["Hutton"] te Wynberg, Johannesburg. Die applikante [Singh] was hiervan persoonlik bewus." Because of its liability under the policy Santam instructed Hutton to undertake the repairs. Such repairs were

necessary for the upkeep of the car and constituted necessary repairs. On 4 July 1990 Santam paid Hutton R48 341.09, being the fair and reasonable price for the repairs which Hutton had effected. It was after these events that Lowe took possession of the car from Hutton on behalf of Santam, which has since retained possession in purported exercise of a lien. Those are the facts which Santam sets out with regard to the possession of the car. In her replying affidavit Singh adds that prior to Lowe's actions Muthusamy had paid the excess of R1500 to Hutton, signed a release, removed the car on Singh's behalf, taken it to another firm to have the wheel's balanced, and not being satisfied with Hutton's repairs, returned the car to that Arm.

> Santam proceeds to allege that Muthusamy has paid no
>
> premiums

at all, despite the fact that the first fell due on 1 April 1990. In consequence Santam cancelled the policy on 18 July 1990. It claims that by virtue of the aforegoing it has been impoverished and Singh enriched to the extent of the payment to Hutton, which represented not only the fair and reasonable cost of the repairs but also Santam's actual expenditure.

The facts set out by Santam do not establish a lien, if for no other reason than that any acts which might have given rise to a lien had spent themselves before ever Santam acquired possession. By this I mean, that assuming Hutton had a debtor and creditor lien which availed against Santam, and an enrichment lien which operated against the owner, Singh, those liens ended when Santam paid Hutton. A lien is accessory to a

main obligation and indivisible: See Buzzard Electrical (Pty) Ltd v 158 Jan Smuts Avenue Investment (Pty) Ltd and Another [1996] 3 All SA 1 (A) at 4 g -i. In the case of the debtor and creditor lien the principal right, to payment, fell away, so that the lien also fell away. In the case of the enrichment lien (which is the one that matters), Button's impoverishment was ended, so that any action that there may have been based on enrichment (on which more below) fell away. Loss of possession, when Hutton voluntarily allowed the removal of the car by Lowe, is an additional reason, if there could be more reason, why the Hutton liens could not have survived.

But the suggestion is that in some manner Santam acquired its own lien. Santam's problem is that after it acquired possession on 5 July

1990 it incurred no expenditure on and made no improvement to the car. What the law requires for a lien is that the outlay should occur while the party claiming it is in possession of the subject matter: Van Niekerk v van den Berg 1965(2) SA 525(A) at 539 C-E, 541 F-G; Gazide and Another v Nelspruit Town Council 1949(4) SA 48(T) at 51. Accordingly I agree with what was said by Nugent J in his dissenting judgment (at 770 D-G):

> "The appellant's [Santam's] submission assumes that a salvage lien arises whenever necessary expenditure is incurred on the property of another, provided only that at some time the property comes into the possession of the creditor.
>
> It is trite that the incurring of such expenditure does not by itself give rise to a lien, and I do not share the view that a lien is somehow 'completed' by subsequent acquisition of possession. Recognition of such a principle would seem to me to be an invitation to self help.
>
> A salvage lien, as I understand it, is a remedy which is

> available to the possessor of property of another. In other words, it operates as security for the recovery of necessary expenditure incurred by him in the course of his possession of another's property. This seems to me to be implicit in the treatment of the topic by the authorities, though I have not found it expressly so stated."

The express statement, if it be needed, is to be found in the cases of Van Niekerk and Gazide mentioned above. Also, I think that we are concerned with an improvement, not a salvage lien.

The majority members of the Court a quo did not deal squarely with this simple point, which is, I think, decisive of the case, but allowed themselves to be led into a debate as to whether two separate salvage liens may co-exist over the same property, and whether, accordingly, Santam had established such a lien independently of Hutton's original lien (at 767 G - 768 I). It is sufficient to say that the analogy of the

motor repairer sending out specialised work to an auto-electrician is a misleading one. In that case the repairer is given possession and arguably never loses it, whereas on the facts put forward by Santam it did not acquire possession until all the repairs had been effected and paid for.

Santam sought to overcome its difficulties by contending that it had acquired possession before 5 July 1990 and was already in possession when Mutton performed the repairs. The contention was that Hutton possessed as agent for Santam. It is possible for the possession requisite to a lien to be through another: see De Jager v Harris NO and the Master 1957(1) SA 171 (SWA) at 179. The suggestion was that vicarious possession through Hutton was established by clause 7 of the

insurance policy between Santam and Mutnusamy, which provided that if events giving rise to a claim occurred, Santam was entitled to take possession of the vehicle, either personally or through another. The existence of a power to take possession does not establish that possession was in fact taken. Santam's affidavit does not even attempt to assert that Hutton possessed as its agent. On the contrary it states that Muthusamy placed Hutton in possession, and Singh's reply adds that it was to him that the car was returned, and that he then returned it to Hutton. Santam's own affidavit states "Nadat Hutton Paneelkloppers die motor herstel net, het die respondent [Santam] besff van die motor geneem." And again "Kort daarna [ie shortly after the payment of R48 341,09 by Santam to Hutton] het 'n mnr Row Lowe, 'n werknemer van die

resondent, besit van die motor namens die respodent geneem ..." (own emphasis). These passages are quite inconsistent with Mutton's previously having held on behalf of Santam. The mere fact that Santam authorized Hutton to effect the repairs takes the matter no further, because Hutton could at least as readily have done so while holding the car for Muthusamy as for Santam. Given the fact that it was Muthusamy who had delivered the car, it was necessary for Santam to prove, if it was to succeed, that there had been some form of attornment, a tripartite agreement between Santam, Hutton and Muthusamy, that whereas Hutton had formerly held for him it would thereafter hold for Santam. There was no attempt to prove an attornment. Accordingly the attempt to establish possession prior to 5 July 1990 fails.

The possession upon which reliance is placed to establish a lien must have been lawfully acquired: Brooklyn House Furnishers (Pty) Ltd v Knoetze and Sons 1970(3) SA 264 (A) at 275 B. This requirement creates a further problem for Santam, because on the evidence available it is difficult to understand what right Santam had to take the car on 5 July, or for that matter, what right Hutton had to surrender it to Santam. However, in the light of what I have said so far it is unnecessary to pursue this point further.

There may be a yet further difficulty in Santam's way. I do not make a finding on it, but as it is important I shall indicate briefly what it is. An enrichment lien does not exist in vacuo. It serves merely to secure or strengthen an underlying cause of action based on unjust

enrichment: Buzzard Electrical (Pty) Ltd v 158 Jan Smuts Avenue Investments (Pty) Ltd and Another (above) at 4 g - h. Absent the enrichment action there is no lien. I shall assume that the impoverishment of Santam and the enrichment of Singh have been established. That notwithstanding, was the enrichment sine causa?

In the Buzzard case Van Heerden JA distinguished two types of enrichment claim of common appearance. The first arises when A effects improvements to the property of an owner but not pursuant to a contract with him but pursuant to a contract with B, and A then sues the owner for enrichment. The second arises when the owner contracts with B for improvements to his property, but B, instead of doing the work himself, sub-contracts it to A, and A sues the owner once he has

completed the work. The two types were styled type one and type two. Buzzard dealt with a type two situation. It was held that the subcontractor had no enrichment action and consequently also no lien. Emphasis was placed on the contract between the owner and B, and it was reasoned "... die eienaar het weens A se werksaamhede niks meer verkry as dit waarvoor hy met B beding het nie. Daarom was sy verryking nie sine causa nie. Inteendeel was sy ooreenkoms met B die oorsaak van sy verryking" (at 7 b - c). Similar reasoning might apply in the present case, if Singh was a party to the arrangements between Muthusamy and Santam. In her reply to the defence of lien she said that Muthusamy had told her that his insurer was liable for the damage to the car, and that although she had no knowledge of the details, she left it to

him to make the necessary claim. From this it might be reasoned that her enrichment flowed from Muthusamy's insurance policy and not from Santam's payment. If anyone was entitled to be enriched gratuitously it was she.

But even if the facts in this case are not akin to type two the question remains whether her enrichment was unjust. In argument Mr van Niekerk, for Santam, readily conceded that if all had gone according to plan, if Muthusamy had paid his premiums and Santam had paid pursuant to an extant policy, there could have been no enrichment claim. But, it was contended, Muthusamy had paid no premiums, with the consequence that a clause in the policy had operated so as to have nullified the policy by the time that the payment was made. I have

difficulty with this contention, because Santam's own affidavit reflects that the policy was cancelled by conscious choice only on 18 July, that is a fortnight after the payment to Hutton. It therefore seems as if the payment was made pursuant to the policy.

But even if the policy had perished automatically, Santam's evidence indicates that it made the payment in the belief that it was still alive. This, it was suggested, was done in error. There is no evidence of such error. And even if there were one I find very strange the suggestion that under the guise of unjust enrichment the consequences of that error should be visited upon Singh, the party entitled to have her car repaired for nothing. So that it may well be that Santam's claim to a lien should founder also for lack of an underlying enrichment action.

In the upshot Santam has not proved an enrichment lien, and Singh, as owner is entitled to the return of her car.

The appeal is upheld with costs and the following order is substituted for that of the Court a quo: "1. Santam Insurance Company Ltd is ordered to return to Sheila Devi Singh the motor vehicle Mercedes Benz 280 SE registration number ND 407196. 2. Santam Insurance Company Ltd is ordered to pay the costs of the application heard before Gautschi AJ in the Witwatersrand Local Division.

3. Santam Insurance Company Ltd is ordered to pay the costs of appeal."

WPSCHUTZ JUDGE
OF APPEAL

CORBETT CJ)
GROSSKOPF JA) F H
) CONCUR
MARAIS JA)
OLIVIER JA)