THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 794/12

In the matter between | Reportable

GERHARDUS FRANCOIS ROSSOUW NO **FIRST APPELLANT**
(In his capacity as trustee of the SJP Family Trust)

ESTELLE KATHLEEN VAN DER MERWE NO **SECOND APPELLANT**
(In her capacity as trustee of the SJP Family Trust)

and

LAND AND AGRICULTURAL DEVELOPMENT BANK OF SOUTH AFRICA **RESPONDENT**

Neutral citation: *Rossouw NO v Land and Agricultural Development Bank of South Africa* (794/12) [2013] ZASCA 106 (13 September 2013)

Coram: Brand, Leach and Majiedt JJA, Van der Merwe and Meyer AJJA

Heard: **22 August 2013**

Delivered: **13 September 2013**

Summary: Sale agreement – requirements of the *actio ad exhibendum* proved – estoppel not available as a cause of action in our law

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ORDER

On appeal from: North Gauteng High Court, Pretoria (Hiemstra AJ, sitting as court of first instance)

1. The appeal succeeds with costs.
2. The order of the court below is set aside and substituted with the following:

   "The respondents are ordered to pay:

   (a) The sum of R1 026 000.00 to the applicant.

   (b) Interest on the sum of R1 026 000.00 at 15.5% per annum from 22 June 2010, being the date on which the application was launched, to date of payment.

   (c) The applicant's costs".

JUDGMENT

MAJIEDT JA (BRAND, LEACH JA and VAN DER MERWE and MEYER AJJA concurring):

[1] This appeal concerns a vindicatory claim and, in the alternative, a claim in terms of the *actio ad exhibendum* in respect of ten centre pivots and the appurtenances thereto (collectively the pivots). The respondent, the Land and Agricultural Development Bank of South Africa (the Bank), was granted an order in the North Gauteng High Court Pretoria (Hiemstra AJ) against the SJP Family Trust (the Trust) duly represented by its trustees, the appellants, to pay the amount of R1 710 000 in terms of an instalment sale agreement in respect

of the pivots. The Bank's claim was ultimately upheld on the alternative basis of the *actio ad exhibendum*. The appeal is before us with leave of this court.

[2] Central to a determination of the issues are the questions of ownership and possession of the pivots. The Bank lent and advanced the sum of R2 716 737.55 to the Trust for the purchase of irrigation equipment, including the pivots. They were purchased by the Bank from an agricultural equipment supplier, Andrag Agrico (Pty) Ltd (Andrag) for on-sale to the Trust. The written agreement of sale between the Bank and Andrag stipulated that payment of the purchase price was conditional upon the Bank being furnished with two written declarations, one on behalf of the Trust and the other by an Andrag technician. The declaration had to confirm that the pivots had been delivered to the Trust, had been installed and were fully functional. The declarations were purportedly signed on 16 November 2004 by Mr Paul van den Berg, an Andrag technician, and by Mr Cornelis van der Merwe on behalf of the Trust as its only trustee at the time. The second appellant is Mr Van der Merwe's spouse. Van den Berg handed the signed declarations to the Bank on the date of their purported signature, whereupon the Bank paid the full purchase price of the ten pivots to Andrag. Unbeknown to the Bank, however, only six pivots were delivered to the Trust. In the subsequent instalment sale agreement between the Bank and the Trust, the Bank had reserved ownership of the pivots until the purchase price had been paid in full by the Trust. Payment had to be made in ten annual instalments commencing on 15 September 2005. This is a typical tripartite agreement where a financier (the Bank) paid the supplier / seller (Andrag) for the goods which were delivered to the debtor / possessor (the Trust). The financier (the Bank) remained owner until the full purchase price had been paid. The Trust was therefore holding the six pivots delivered to it on behalf of the true owner, the Bank.[1]

[1]See generally: *Air-kel (Edms) Bpk h/a Merkel Motors v Bodenstein* 1980 (3) SA 917 (A) at 923G-H.

[3] The Trust failed to pay any instalments and the Bank consequently applied to the court below for an interdict prohibiting the Trust from disposing of the pivots, and for a mandamus directing the Trust to deliver them to the Bank, alternatively in the event that the Trust had disposed of the pivots, for payment of their value. The Bank was compelled to proceed on the alternative claim since it became common cause that the Trust had sold the six pivots delivered to it to a third party for R171 000 each. The order granted in the court below for payment of the sum of R1 710 000 is computed on the market value of ten pivots, based on the aforementioned sale price.

[4] In order to succeed with the *actio ad exhibendum,* the Bank had to prove the following requirements:

(a) that it was the owner of the pivots at the time of its disposal by the Trust;

(b) that the Trust had been in possession of the pivots when it disposed of them;

(c) that the Trust acted intentionally in that it had knowledge of the Bank's ownership or its claim to ownership when it parted with possession of the pivots;

(d) that the Bank would be entitled to delictual damages as well as the extent thereof (taking into account *inter alia* the value of the pivots when the Trust had sold them).[2]

[5] The primary contention by the appellants is that ownership has not passed to the Bank in respect of the ten pivots for which it was held liable by the court a quo. As to four of them their contention was that these were never delivered. I shall come to that. As to the six that were delivered to the Trust the appellants contended that, despite this delivery, ownership had not passed to the Bank. This contention is based in the main on annexure 'G' to the founding affidavit, which is a letter dated 28 December 2004 from

[2]See: *Vulcan Rubber Works (Pty) Ltd v South African Railways and Harbours* 1958 (3) SA 285 (A) at 289A – B.

Andrag's attorneys to the Trust's attorney. The following salient facts emerged in this letter, namely (a) that Van den Berg and Van der Merwe had allegedly connived in perpetration fraud against the Bank by inflating the purchase price of the ten pivots by approximately R900 000; (b) that Van den Berg had no authority to conclude a contract of this dishonest kind on Andrag's behalf with the Trust; and (c) that Andrag consequently regarded the contract as null and void. A brief recital of the relevant facts is required to contextualise this letter and to deal with this contention. Before I do so, it bears emphasis that on the papers the parties were *ad idem* that the instalment sale agreement between the Bank and the Trust was valid. The primary thrust of the appellants' attack was the alleged invalidity of the sale agreement between the Bank and Andrag.

[6] As stated, the Bank was blissfully unaware of the non-delivery of four of the pivots which remained in Andrag's possession. It was also unaware that the ten pivots' price had been inflated. The Bank furthermore relied on the signed declarations, as required in its contract with Andrag, to effect payment of the pivots as invoiced by Andrag. A peculiar feature of the transaction is that Andrag, and not the Trust, paid the 20 per cent deposit and the VAT in respect of the goods. Andrag's attorneys averred in annexure 'G' that this was one of the facets of the alleged fraud against the Bank and that the monies for the deposit and the VAT formed part of the inflated portion of the purchase price. On 24 March 2006 the Bank (as it was entitled to do), in a letter to the Trust terminated the instalment sale agreement and demanded the return of the pivots.[3] In the response and in a letter written by the Trust's attorney, Mr Joop Lewies, it was stated that the Trust had already previously accepted the Bank's repudiation, that the Trust repeats its previous tender to return the six pivots. Reference was also made to a previous letter in which the Trust's damages of about R30 million, allegedly suffered through the Bank's negligence, had been set out.

[3]The agreement stipulated in clause 10.2 that in the event of the Trust failing to pay any instalment when due, the bank has the right to cancel the agreement and to claim the return of the goods.

[7] The matter remained in abeyance, for reasons unknown, until the Bank's attorneys wrote to the Trust's attorney on 15 February 2010 to enquire about an advertisement in the Landbou Weekblad of 15 January 2010 in which pivots were advertised for sale with Van der Merwe's mobile phone number as the contact number. An undertaking was sought that the pivots in respect of which the Bank asserted its ownership would not be sold. If they had been sold, full details were requested of the purchaser and the pivots' present location. This letter met with the response by attorney Lewies by letter dated 17 February 2010 that the Bank had lost its ownership of the pivots through prescription, that ownership had passed to the Trust and that it was therefore fully entitled to deal with the pivots as it deemed fit. It appears from the judgment of the court below that this contention was not pursued in argument, although it was not abandoned. It was not raised at all in this court and nothing more needs to be said about it. As stated, counsel chose instead to develop an argument that the Bank had never acquired ownership of the pivots, based on the abovementioned contents of annexure 'G'. Counsel was furthermore driven to concede during argument that the Trust had never acquired ownership of the six pivots in its possession.

[8] Closely related to annexure 'G', and an important backdrop thereto, is annexure 'E2', the declaration purportedly signed by Van den Berg and Van der Merwe on 16 November 2004 and handed to the Bank on that date. The appellants' case is that Van den Berg perpetrated the fraud against the Bank and that Van der Merwe was not party to it. It was averred in the answering affidavit that Van der Merwe had on Van den Berg's insistence signed a blank declaration on 15 October 2004. This blank declaration was forwarded to Van den Berg, together with an explanatory note by attorney Lewies (annexure 'E1') confirming that the declaration had been signed provisionally only and that it would be completed and delivered to the Bank once the pivots had been installed and were fully functional. A blank, unsigned declaration (annexure 'E3') which had to be filled in by an Andrag technician certifying that the pivots had been installed and were fully functional, also accompanied

annexures 'E1' and 'E2'. The appellants impute fraud on the part of Van den Berg, suggesting that he must have completed and signed annexure 'E2' and dated it 16 November 2004 as if Van der Merwe had signed the declaration on that date.

[9] It is plain that on the appellants' own case the Trust had never become the owner of the six pivots that it sold to a third party. It is not disputed that the six pivots had been in its possession when they were alienated. The Bank had reserved ownership of the pivots until due fulfilment by the Trust of its contractual obligations in respect of payment for the goods. It is common cause that not a single payment had been made. The Trust's case in respect of the disputed ownership must therefore stand or fall on annexure 'G' above. For the reasons that follow I am of the view that the Bank has succeeded in establishing ownership.

[10] Firstly, if there had indeed been collusion between Van den Berg and Van der Merwe to defraud the Bank, it is trite that the agreement between it and Andrag is merely voidable at the Bank's instance, as the innocent party.[4] The Bank consistently evinced an election to regard the agreement between it and Andrag as valid and asserted its ownership of the pivots in its written demands to the Trust. It was never denied, nor could it be, that Van den Berg had the requisite authority to sell pivots on Andrag's behalf. What he did not have, was the authority to act illegally in selling pivots. Therefore, whatever is contended in annexure 'G' cannot in law detract from the Bank's rights of ownership of the pivots. Counsel for the Trust sought assistance for his contentions in this court's judgment in *Dreyer and another NNO v AXZS Industries (Pty) Ltd.*[5] That reliance is misplaced. If anything, the judgment is against the Trust's submissions. Brand JA restated the requirements for the valid transfer of ownership of movables as follows in *Dreyer*:

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[4]See, generally, Van der Merwe, Van Huyssteen, MFB Reinecke and GF Lubbe, *Contract General Principles* 4th ed (2012) at 87.
[5]*Dreyer and another NNO v AXZS Industries (Pty) Ltd* 2006 (5) SA 548 (SCA).

'Otherwise stated, the validity of transfer of ownership is not dependent on the validity of the underlying transaction, such as, in this case, the contract of sale. . . . Generally speaking, the requirements for the valid passing of ownership of a movable thing are: Delivery – actual or constructive – of the thing by the owner – or someone duly authorised to act on his or her behalf – coupled with a so-called real agreement or 'saaklike ooreenkoms', consisting of the intention on the part of the transferor to transfer ownership and the intention on the part of the transferee of accepting ownership of that thing. . .'.[6]

These requirements have been met in the present matter and ownership of the six pivots had been transferred from Andrag to the Bank.

[11] Secondly and moreover, apart from the general principles outlined above, which are premised on Andrag having been oblivious of its employee's wrongdoing, a completely different picture emerged in the Bank's replying affidavit. Pursuant to investigations into the Trust's denial in its answering affidavit of any participation in the alleged fraud, the Bank came into possession of various items of correspondence between the Trust, its attorney (Lewies) and Andrag. The exchanges of correspondence related inter alia to a dispute between Andrag and the Trust over their sharing of the spoils emanating from the inflated purchase price and resultant overpayment made by the Bank in respect of the pivots. This prompted the Bank to appoint a firm of chartered accountants to conduct a forensic audit. Further investigations unearthed various electronic mail messages between Van der Merwe and Andrag's managing director, Mr Walter Andrag. These messages and other documentation reveal an undisclosed contractual arrangement between the Trust and Andrag to share in the proceeds from the overpayment by the Bank. I do not deem it necessary to elaborate in great detail about the contents of these messages, suffice to state that they and the rest of the documents bear out the conclusion by the chartered accountants that:

'. . . [the transaction] . . . indicates a situation where the purchaser (the Trust) and seller (Andrag) have colluded in order to solicit excess loan financing from the (Bank) . . . which funding was intended in the first instance to be utilised by the seller Andrag to cover the full actual price of the pivots with the remaining surplus to be paid over to the purchaser for its own use.'

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[6] Ibid para 17.

One of the many damning items of correspondence is a letter from attorney Joop Lewies to Andrag, dated 26 November 2004, from which it is plain that Van der Merwe knew by then that the Bank had paid the full invoice amount, acting to its detriment on the fraudulent misrepresentation contained in 'E2' (the signed declaration), and yet this fact was disclosed only on 30 June 2010 in the answering affidavit. In the same letter the Trust's attorney refers to the dispute between the Trust and Andrag regarding the amount due to the Trust from the proceeds of the Bank's overpayment. The attorney makes reference in this regard to the fact that 'your company had undertaken to pay a set amount of R390 000.00, which amount was reduced <u>by agreement</u> to R369 052.20 (excluding VAT)'.[7] It is plain from all the documentation that Van der Merwe was a party to the fraud and that attorney Lewies was, at the very least, an active conduit to Van der Merwe and the Trust. This fortifies the conclusion that the Bank had indeed become the owner of all the pivots. I turn to the next element of the *actio ad exhibendum*, the question of *mala fides* on the part of the Trust.

[12] The facts set out in the preceding paragraph plainly demonstrate that the Bank had proved mala fides on the part of the Trust. It can hardly be disputed on the evidence before us that the Trust had full knowledge of the Bank's ownership of the pivots when they were disposed of. To the knowledge of both Van der Merwe (as sole trustee) and attorney Lewies, the Bank had paid in full the inflated purchase price as per Andrag's invoice. Delivery was made of six of the ten pivots to the Trust, as was agreed in the instalment sale agreement between the Bank and the Trust. Full ownership had consequently passed to the Bank, and Van der Merwe knew this. But there are further compelling grounds supporting this finding against the Trust. As set out in para 7 above, the Bank had sought an undertaking from attorney Lewies that the Trust would not dispose of the pivots. The response was set out in para 7 above. Nevertheless, Lewies failed to disclose that the Trust had, by that time (17 February 2010) disposed of at least two of the pivots and he also averred that the Trust could freely deal with the pivots as it pleased qua owner thereof.

[7] Loosely translated; the underlining is mine.

Furthermore the Trust relied on a legal opinion by senior counsel to the Trust to the effect that the Bank's ownership rights had fallen away through prescription. Its cause was that it had sold the pivots on a bona fide reliance on this opinion. The Bank's request for a copy of this legal opinion in order to test the Trust's bona fides was refused. In the premises, I am satisfied that the Bank has proved mala fides by the Trust in disposing of the pivots.

[13] The final requirement for the *actio ad exhibendum* is for the Bank to prove that it had suffered delictual damages and the extent thereof. It is self-evident that the Bank has suffered damages due to the sale of its six pivots. Regarding the extent of its damages, absent any other evidence to the contrary, the market value of the pivots as at the date of its alienation, becomes a compelling factor. The best evidence of their market value is the price at which the Trust had disposed of them to the third party, namely R171 000 each.[8] On the face of it this transaction appears to have been conducted at arms length by a willing seller to a willing buyer, albeit in the course of an unlawful sale. There is nothing in either the papers or the argument before us to controvert this. It must therefore be accepted that the pivots' market value and the extent of the Bank's damages is to be calculated at R171 000 per pivot. The court below, however, erred in ordering the Trust to pay the sum of R1 710 000 to the Bank, based on a total of ten pivots. On the common cause facts the Trust had only received and unlawfully sold six pivots. Judgment should therefore have been granted in the sum of R1 026 000 and the appeal must succeed to this extent.

[14] Counsel for the Trust contended, albeit without much vigour, that the Trust had a claim against the Bank for the costs incurred consequent to the storage and safekeeping of the six pivots, which the Trust was entitled to set off against the Bank's claim. Reliance was misguidedly placed on *Paarlberg Motors (Pty) Ltd t/a Paarlberg BMW v Henning.*[9] That case is distinguishable

[8] *Philip Robinson Motors (Pty) Ltd v N M Dada (Pty) Ltd* 1975 (2) SA 420 (A) at 428H-429E.
[9] *Paarlberg Motors (Pty) Ltd t/a Paarlberg BMW v Henning* 2000 (1) SA 981 (C).

on the facts – there the seller was in breach and had declined the purchaser's tender to return the merx and the court consequently held that the purchaser was entitled to warehouse the merx at the seller's risk and expense. That is not the case here. Moreover, and in any event, storage costs (which, as an aside, defies credulity in respect of the amounts allegedly spent by the Trust) is an unliquidated claim, incapable of being set off against the Bank's claim.

[15] There was a valiant, completely misguided attempt to establish liability on the part of the Trust for the additional undelivered four pivots by relying on a startlingly novel principle which I shall conveniently refer to as 'deemed transfer of ownership to the Bank through estoppel'. The argument in respect of this novel concept failed to get out of the starting blocks. It is well established in our law that estoppel is a defence and not a cause of action. Junior counsel for the Bank sought to transform it from a shield to a sword by relying on annexure 'E2', the signed declaration. As far as I could discern, the argument went along these lines – Van den Berg was the Trust's agent and he was clothed with ostensible authority; alternatively Van der Merwe had provided the 'scenic apparatus' that enabled Van den Berg to commit the fraud on the Bank; and consequently 'considerations of policy and fairness require that the Trust be held to the contents and consequences' of the signed declaration. Reference was made to a number of authorities, including this court's recent judgment in *Bester NO v Schmidt Bou Ontwikkelings*[10]. As is the case with all the other authorities cited in the heads of argument, this case was one in which estoppel was invoked as a defence. There is not a single authority in which it was ever employed as a cause of action. In the end counsel abandoned the argument, which was in any case stillborn.

[16] I deem it necessary to express my disquiet about the manner in which the Bank, funded by taxpayers' money, went about the litigation in this matter. Apart from the lengthy delays in enforcing its rights of ownership, it shunned an offer from Andrag which would have resulted in a considerably more

[10]*Bester NO v Schmidt Bou Ontwikkelings CC* 2013 (1) SA 125 (SCA). Reliance was placed on paras 21 and 22 of the judgment.

expeditious and less costly resolution of the dispute. I have already shown why annexure 'G' does not assist the Trust in its denial that ownership of the pivots had passed from Andrag to the Bank. But that letter, written by Andrag's attorneys to attorney Lewies, also contained a sensible proposal to resolve the matter. This proposal entailed the repayment by Andrag of all amounts received from the Bank, that Andrag would then take cession of the Bank's right of action against the Trust and that the Trust would return the six pivots while Andrag would retain the four undelivered pivots. This proposal was repeated in a letter from Andrag's attorneys to the Bank's attorneys, dated 16 March 2005 (it will be recalled that annexure 'G' is dated 28 December 2004). The Bank declined, for reasons unknown, to accept this sensible course of action. This occurred long before the pivots were sold by the Trust during early 2010. This perplexing attitude adopted by the Bank not only resulted in drawn out and costly litigation, but is also inimical to the objects of a commercial enterprise such as the Bank.

[17] Lastly, there is the question of costs. The Trust has succeeded on appeal in respect of the reduction of the amount of the judgment granted. But it ran its case below on an all or nothing basis advancing several spurious defences. If it had conducted its case on the basis that four pivots had in fact never been in its possession and that the Bank is not entitled to judgment in a sum equal to ten pivots, it would have been a much simpler case. I am of the view that, in the premises, the costs of only one counsel is warranted on appeal. The Bank was compelled to assert its ownership rights by bringing the application in the court below and is therefore entitled to its costs.

[18] In the premises, the following order is made:

1. The appeal succeeds with costs.
2. The order of the court below is set aside and substituted with the following:

   "The respondents are ordered to pay:

   (a) The sum of R1 026 000.00 to the applicant.

(b) Interest on the sum of R1 026 000.00 at 15.5% per annum from 22 June 2010, being the date on which the application was launched, to date of payment.

(c) The applicant's costs".

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JUDGE OF APPEAL

APPEARANCES

For Appellant: T Strydom SC (with J J Botha)
Instructed by:
Joop Lewies Incorporated, Pretoria
Vermaak & Dennis Attorneys, Bloemfontein

For Respondent: N Kades SC (with D Goodenough)
Instructed by:
Gildenhuys Malatji Incorporated, Pretoria
Honey Attorneys, Bloemfontein