IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN

Case no. CA197/2016
Date Heard: 3/3/17
Date Delivered: 7/3/17
Not Reportable

In the matter between:

TAVCOR MOTORS (PTY) LTD **Appellant**

and

PARMALAT SA (PTY) LTD **First Respondent**

MPUMELELO KENNETH PHILISO **Second Respondent**

JUDGMENT

PLASKET, J:

[1] This is an appeal against an order made in the Magistrate's Court, Port Elizabeth dismissing the damages claim of the appellant, Tavcor Motors (Pty) Ltd (Tavcor), brought against the respondents, Parmalat SA (Pty) Ltd (Parmalat) and one of its employees, Mr Mpumelelo Kenneth Philiso. That claim arose from a collision between a motor vehicle driven by an employee of Tavcor and one belonging to Parmalat, driven by Mr Phaliso. It was alleged by Tavcor that the cause of the collision was the negligent driving of Mr Phaliso. Tavcor also appeals against the costs order made by the magistrate.

[2] One issue – that of Tavcor's standing to claim damages in terms of the Aquilian action – was separated from the remaining issues. This issue arose in the following manner. Tavcor had pleaded in its particulars of claim that it was, at all relevant times, 'the owner, alternatively the bearer of all risk in respect of the motor vehicle' driven by its employee. It became common cause, however, that Tavcor was not the owner of the vehicle. It was in possession of the vehicle, which belonged to a client. It was to be serviced or repaired by Tavcor when the collision occurred.

The facts

[3] The facts relevant to the separated issue emerge from the evidence of Mr Garrick Bowker, Tavcor's Group Financial Director, and Ms Yolande Bekker, a customer care supervisor employed by Tavcor.

[4] Mr Bowker's evidence was that as part of the standard terms and conditions of Tavcor's contracts with its clients, the risk of damage to vehicles belonging to clients but in the possession of Tavcor lay with the clients. When damage to a vehicle occurred, however, a case by case assessment was done to decide whether to waive reliance on the term placing the risk of damage on the client. In order not to alienate clients – and thereby jeopardise its business – Tavcor usually contacted clients when accidents occurred and undertook to make good the damage to their vehicles. He stated that the 'owner's risk' term was 'there just to cover us should we need it' and in most instances Tavcor would repair a vehicle that had been damaged 'in order to have less inconvenience for the customer'. In other words, Tavcor would assume the risk. For this reason, it was insured against damage to clients' vehicles.

[5] Mr Bowker's reason for Tavcor assuming the risk, apart from commercial rationality, was that once Tavcor had taken possession of a vehicle, it 'had the responsibility to look after the car for that period of time'.

[6] While he could not remember this particular instance he was adamant that 'there would have been verbal agreement between the customer and the party (sic) of Tavcor that we had assumed the risk though our insurance to repair the car'.

[7] Ms Bekker was, in 2009, involved in day-to-day interactions with clients bringing their vehicles in to be serviced or repaired. She testified that it was Tavcor's policy to accept the risk of damage to vehicles in its possession, all things being equal: if damage occurred during the normal course of a service, for instance, Tavcor would make good the damage; if, however, a client did not heed Tavcor's advice to remove valuables from his or her vehicle before a service, and an article was stolen from the vehicle, Tavcor would not make good that loss.

[8] She described the process by saying:

'If my customer's vehicle come[s] in and something happened, it was bumped or scratched or nicked or whatever, I would get involved, escalate it to my immediate manager who will do an inspection of the vehicle, then contact the customer to say the car was damaged on our premises. We normally take responsibility.'

[9] She summed up the position by saying that it 'has always been a company policy, if a vehicle is on our premises and it is damaged then we will repair it'. In other words, she testified, if 'something would happen to the car while on our premises', Tavcor would accept the risk.

[10] From the evidence of the two witnesses it has, in my view, been established on a balance of probabilities that after the collision, Tavcor contacted the owner of the vehicle, accepted the risk of damage and attended to the repair of the damage. This was in accordance with normal practice – Tavcor's policy to make good any damage to a client's vehicle occasioned while it was in Tavcor's possession.

The law

[11] Clearly, the owner of property that is damaged as a result of the intentional or negligent act of another has standing to vindicate the infringement of his or her right. This case concerns a party who is not an owner but a possessor. In a line of cases that stretch back prior to Union, the courts have held consistently that in certain circumstances, a possessor may have standing to recover damages in delict.

[12] The earliest case I was able to find is *Melville v Hooper*.[1] This case concerned the theft by Hooper, and subsequent slaughter, of an ostrich that had been in the possession of Melville but which was owned by a third party. In the claim by Melville for damages, the point was taken that he had no standing, as he was not the owner of the bird. De Villiers CJ held that he had standing:[2]

'It first struck me there was considerable force in this contention; for in a case of *re-vindicatio* the plaintiff would have to prove the ownership to be in him and possession in the defendant. But this is not a case of *re-vindicatio*, but rather in the nature of *condictio furti*. It is clearly laid down in the books that this action could be brought not only by the owner of the thing stolen, but also by a bailee who would be responsible to the owner. That is exactly this case, for the bailee stated that he was responsible to the owner for the bird, and liable to him for any loss to the bird. But it may be said that the present action is rather for the destruction of the bird. Then the *lex aquilia* would apply. And under this law, too, I find that not only the owner, but also a bailee responsible to the owner, could sue.'

[13] This judgment was followed, in this division, in *Bower v Divisional Council of Albany*,[3] a matter that will strike a chord with modern-day motorists in and around Grahamstown. Bower was in possession of a horse belonging to one Wheeldon when, while riding on a road that the Council was required to maintain, the horse stumbled in a pot-hole, fell and injured itself. Bower succeeded in a claim for damages in the Magistrate's Court, being awarded the amount of £4. The Council, in an appeal, argued that he, not being the owner of the horse, had no standing. Barry JP rejected this argument. He stated that because there had been a contract between Bower and Wheeldon in terms of which Bower, as bailee, 'became responsible for any accident that might happen to it', he had standing to 'sue for the full amount of damage done to the horse'.[4]

[14] *Spolander v Ward*[5] concerned a motor vehicle that had been purchased in terms of a hire-purchase agreement by a brother in a large family. It was agreed between him and his six brothers and sisters that everyone in the family could use

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[1] *Melville v Hooper* [1884-1885] 3 SC 261.
[2] At 262.
[3] *Bower v Divisional Council of Albany* [1892-1893] 7 EDL 211. See too *Geldenhuys v Keller* 1912 CPD 623
[4] At 212.
[5] *Spolander v Ward* 1940 CPD 24.

the vehicle but whoever was using it at any given time was responsible for its upkeep and any damage done to it. It was damaged in a collision while being driven by a brother other than the person who had entered into the hire-purchase agreement. That brother sued the defendant for damages on the basis of his negligence in causing the collision. Davis J posed the question whether, if the duty to make good the damage done to the vehicle was upon the plaintiff, this vested in him standing to sue the defendant. He answered this question in the affirmative with reference to the cases I have cited above, as well as others.[6]

[15] It seems to me that these cases, involving bailees, are most in point with the position of Tavcor in this case. A more recent line of cases has held that a possessor of property who has not yet acquired ownership, but to whom the risk had passed, had standing to sue for damage caused to it;[7] possessors of property in terms of hire-purchase contracts – credit transactions, in present-day parlance – have a sufficient interest in the property that was still owned by the credit grantor to sue for damages when that property was damaged by the negligence of a third party,[8] and that no cession from the owner is necessary;[9] and that a lessee of property may also have standing.[10]

[16] In *Raqa v Hofman*,[11] Binns-Ward AJ, after a thorough discussion of the cases, boiled the position down to its essence: the standing of a non-owner to sue for damages in terms of the Aquilian action rests on two pillars – possession and 'risk-bearing responsibility'.

Conclusion on the merits

[17] It is far from clear from the evidence that, prior to 2011, Tavcor entered into express agreements with its customers that when they delivered their vehicles into the care of Tavcor, they, the customers, retained the risk of damage to their vehicles.

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[6] At 32.
[7] *Smit v Saipem* 1974 (4) SA 918 (A), 932F-933A.
[8] *Vaal Transport Corporation (Pty) Ltd v Van Wyk Venter* 1974 (2) SA 575 (T) at 577F-578B.
[9] *Lean v Van der Mescht* 1974 (2) SA 100 (O) at 111A-B.
[10] *Refrigerated Transport (Edms) Bpk v Mainline Carriers (Edms) Bpk* 1983 (3) SA 121 (A) at 125B-C.
[11] *Raqa v Hofman* 2010 (1) SA 302 (WCC) paras 18-19.

The job cards used by Tavcor contained no contractual terms at that time and the evidence of Ms Bekker does not establish that this term was agreed to. It does not, however, matter because the general rule is that 'the risk of an object's being damaged normally rests with the owner'.[12] The real issue is whether anything was done to shift the risk to Tavcor because, as was pointed out by Farlam AJA in *Commercial Union*[13] the risk can only pass 'from the owner to another by virtue of some legal rule or by contract'. In my view, that question must be answered in the affirmative. Tavcor has established on a balance of probabilities that it would have and, inferentially, did contact the owner of the vehicle once it was damaged and, by agreement, assumed the risk. If it had not assumed the risk, it would not have repaired the damage to the vehicle.

[18] The magistrate appears to have taken the view that in the absence of a cession, Tavcor could not have had standing. He is wrong in that respect. The conclusion I have reached is that the separated issue ought to have been decided in favour of Tavcor as it was in possession of the vehicle and had assumed the risk of damage to it, albeit after the fact. The appeal must succeed on the merits.

Costs

[19] As the appeal must succeed, the costs order made by the magistrate will fall by the wayside and be replaced by one following the result. There is now no need to consider the arguments that were advanced as to why the magistrate had erred in the costs order he made: those arguments were premised on the appeal failing.

Costs and the record

[20] A great deal of the record is irrelevant to the issue that had to be decided on appeal. Indeed, of a record of 176 pages, 71 pages concerns applications, arguments and rulings that had no bearing on the appeal at all. Both Mr De la Harpe, for Tavcor, and Mr Benade, for Parmalat and Mr Philiso, agreed that the 71 pages should not have been part of the record and that no costs in relation thereto should

[12] *Commercial Union Insurance Co of SA Ltd v Lotter* 1999 (2) SA 147 (SCA) at 155F.
[13] Note 12 at 155F-G.

be recoverable on either a party and party basis or on an attorney and client basis. I intend making an order to reflect that.

The order

[21] I make the following order:

(a) The appeal succeeds with costs.

(b) No costs in respect of pages 34 to 90 and 124 to 139 of the record are recoverable by the appellant on taxation.

(c) Neither party's legal representatives may charge an attorney and client fee for the perusing of pages 34 to 90 and 124 to 139 of the record.

(d) The order of the magistrate is set aside and replaced with the following order.

(i) It is declared that the plaintiff has standing to claim damages from the defendants in respect of the collision referred to in paragraph 4 of the plaintiff's particulars of claim.

(ii) The defendants are directed to pay the plaintiff's costs in relation to the trial on the separated issue of the plaintiff's standing.

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C Plasket

Judge of the High Court

I agree.

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SM Mbenenge

Judge of the High Court

APPEARANCES

For the appellant: D De La Harpe instructed by Netteltons

For the respondent: E Benade instructed by Nolte Smit Inc