2576/03-LR 297 JUDGMENT

IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG CASE NO: 2576/03

2004-02-11

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE YES/NO
(2) OF INTEREST TO OTHER JUDGES YES/NO
(3) REVISED

DATE 26/2/2004 SIGNATURE

In the matter between

AXZS INDUSTRIES Plaintiff

and

A F DREYER & OTHERS (PTY) LTD Respondent

J U D G M E N T

WILLIS J:

[1] The plaintiff claims an order against the first and second defendants in the following terms:

1. Delivery of all the goods more fully described as follows:

1.1 Three dust extraction units and fans including duct extracting ducting;

1.2 One SSR 2000 Ingersoll Rand and one Atlas Copco compressor including connecting compressed air pipes thereto ("the goods");

2. An order authorising and directing the sheriff to seize and deliver the goods to the plaintiff in the event of the defendants failing or refusing to deliver the goods to the plaintiff within a time stipulated by the above honourable court together with costs.

In view of the fact that the first and second defendants have admitted the possession of the goods in question, the plaintiff does not persist with its alternative claim.

[2] The third defendant is the provisional liquidator of A F Dreyer and Company (Pty) Ltd, a company in which the first defendant had a shareholding and was a director prior to its liquidation. The second defendant is the wife of the first defendant. The third defendant was duly served with a copy of the summons and has never entered any appearance to defend. Prior to the appointment of the third defendant as liquidator other parties had been appointed as provisional liquidators. The plaintiff's claim is based on ownership of the goods in question. (I shall refer to these goods as "the goods forming the subject matter of these proceedings"). The action is therefore founded simply on the *actio rei vindicatio*.

[3] Mr Segal who appears for the first and second defendants contends that whether the third defendant is the owner of the goods is irrelevant. He submits in my view correctly that all that is in issue is whether the plaintiff is the owner of the goods. As I have already indicated it is common cause (and has been admitted by the first and second defendants) that the

first and second defendants are in possession of the goods forming the subject matter of this dispute. The first and second defendants are the trustees of a trust into which falls the immovable property where A F Dreyer and Company (Pty) Ltd-the company in liquidation and of which the third defendant is the liquidator-traded as a manufacturer of furniture prior to its liquidation.

[4] Apart from a bare denial of the plaintiff's ownership of the goods forming the subject matter of this dispute, the defence of first and second defendants was, until the eve of this trial, that the goods in question had acceded to the immovable property of which the first and second defendants are trustees by a process of *accessio*. It has now been conceded by the first and second defendants that there was no *accessio*. This concession was made either on the eve of the trial or the morning of the trial but nothing turns on this.

[5] Two witnesses testified on behalf of the plaintiff, namely Tim Baynes ("Baynes") who was an approved creditor in the estate of A F Dreyer and Company (Pty) Ltd (in liquidation) and Gordon Brews ("Brews") a director and shareholder of the plaintiff which was involved in the dealings with the various parties that resulted in the dispute which now stands to be adjudicated by me. According to Brews he had been involved in buying assets belonging to furniture companies before he attended the sale in question. Baynes had requested Brews' opinion on the value of movable assets listed in a valuation

report prepared for the creditors of A F Dreyer and Company (Pty) Ltd (in liquidation). Brews expressed the view that a number of the movables had been seriously undervalued. The values seemed to him to have been misstated to such an extent that Baynes and Brews thought that something untoward had been going on.

[6] Leon Vermeulen ("Vermeulen") who acted on behalf of one Du Plessis who was one of the provisional liquidators originally appointed for A F Dreyer and Company (Pty) Ltd (in liquidation), testified that Dreyer (the first defendant) had also made an offer of R1,8 million to buy the goods through a nominee company. This offer had been submitted to the creditors for approval by the provisional liquidators. Vermeulen conceded during his testimony that the total debt of the company in liquidation amounted to approximately R13 million. The view was expressed by the plaintiff's witnesses that the company had been placed in liquidation as a so-called "friendly" liquidation. The movables listed in the valuation report are identical to those which are listed in Annexure A to a written agreement which was later concluded and to which I shall refer further on this judgment.

[7] Brews immediately expressed an interest in acquiring the goods. During March 2002 Brews addressed a letter to the provisional liquidators wherein he made an offer to buy the movable assets contained in the auctioneer's valuation report and also said as follows:

"Should there be any assets of the company excluded from this valuation they would be included in the sale. This offer was for R3,3 million excluding Vat."

[8] Brews and Baynes testified that they attended the auction of the goods and other movable assets of the company in liquidation. During the course of the morning of the sale and prior to the commencement of the auction sale the plaintiff and the provisional liquidator represented by Vermeulen and the duly appointed auctioneer concluded an oral agreement in terms whereof it was agreed that the successful bidder would buy all the goods within the walls of the premises excluding only the items which had been specifically excluded. All these persons, including another party who was interested in purchasing the goods were present. Both Brews and Baynes corroborated this version. Vermeulen confirms that discussions in the presence of these persons did take place, but denies that there was an oral agreement.

[9] Mr Segal objected to the evidence of Brews and Baynes as to what had been said by the auctioneer as he was not a witness. He objected saying that this evidence was hearsay. I disagree: it clearly was evidence of what was said and what was said determines whether or not there had been an agreement concluded prior to the holding of the auction. Besides it was alleged that what was said took place in the presence of various persons including Vermeulen who was a witness in these proceedings. After the conclusion of the alleged oral

agreement and at the commencement of the sale the auctioneer confirmed that all the movable assets within the walls of the premises formed the subject matter of the sale excluding such items as had been specifically excluded.

[10] It is common cause that the goods which form the subject matter of this dispute were not excluded in terms of the written agreement, but neither do they appear in Annexure A thereto. It is also common cause that in terms of the oral agreement alleged by the plaintiff the goods which form the subject matter of this dispute were not specifically excluded. Immediately after the sale of the goods on auction the plaintiff signed a written document dated 19 March 2002. This document was not signed by the provisional liquidators or the auctioneers. The purchase price for the goods was R3,4 million and it is common cause that this sum has been paid by the plaintiff.

[11] The evidence goes that the transaction was approved and a further written agreement was signed by the plaintiff on 9 April 2002. The provisional liquidators as well as the auctioneer countersigned this agreement on the same date. The written agreement refers to an Annexure A which is a list of movable items. In terms of the written agreement these were the movable items that were sold at the auction. Clause 8 of this agreement provides as follows:

> "Ownership in and to the assets shall pass to the buyer on confirmation of the sale by the liquidators when the purchase price and all other amounts shall be paid in full

and all other conditions (if any) of the purchase shall be met. Thereafter the assets may be removed and not before."

[12] It is common cause between the parties that the goods referred to in an exhibit marked C do not form part of the goods described in Annexure A attached to the written agreement, but that they had nevertheless been on site at the time of the auction and that the plaintiff took possession thereof after confirmation together with the other items which appear in Annexure A to the written agreement. The items in Exhibit C which were admitted by the first and second defendants are numerous and it would appear that collectively they had a substantial value.

[13] It is clear from the conduct of the plaintiff after the confirmation of the auction that the plaintiff took possession and control of the goods on sale generally and that delivery to the plaintiff did indeed take place. Despite denying an oral agreement prior to the sale Vermeulen says that it had been orally agreed prior to the auction that the goods forming the subject matter of this dispute would be regarded as having acceded to the immovable property to which I have already referred. Quite how they could have been agreed to have been acceded without there being an oral agreement as to the terms of the auction itself is beyond my understanding. Besides, it seems inherent in the nature of an auction that prior to its taking place there must be an oral agreement relating thereto. No one knows in advance

what the price will be and therefore an auction it is incapable of being reflected in a written agreement beforehand. On the other hand there must be an agreement to conduct the auction. Inevitably therefore it must be oral. I therefore disbelieve Vermeulen when he says that there had been no antecedent oral agreement prior to the signing of the written agreement to which Annexure A is attached.

[14] Mr Segal criticised the evidence of Mr Brews for being in conflict with the following which appears in an affidavit which it is common cause he signed in other proceedings which nevertheless related to these events:

> "Subsequent to the written agreement of sale entered into between A F Dreyer and Company (Pty) Ltd (in liquidation) ("the company") and the applicant ("AFD 1" to the respondent's answering affidavit), a further oral agreement was entered into between the same parties to the respondent's knowledge and in the presence of Dreyer. The reason for this agreement was that it came to the attention of the application but not all the items which were intended to form part of the sale were listed in Annexure A to the conditions of sale."

Even if this paragraph is to be read as a denial of the antecedent oral agreement before the written agreement (which I doubt) no significance attaches, in my view, to this so-called contradiction. There must, as I have already indicated, have been an oral agreement prior to the holding of the auction. No

suggestion was made by Mr Segal that Brews is a liar and Mr Segal did not argue that he was. Was the evidence of Brews so unreliable because of this contradiction that one cannot believe his evidence as to the terms of the oral agreement? I do not believe so. I find that the oral agreement took the form as testified by Brews himself and as corroborated by Baynes. Brews' evidence is further corroborated by the fact that he took delivery of goods which are admitted in Exhibit C which are not part of Annexure A of the written agreement.

[15] Mr Segal applied for absolution from the instance at the close of the plaintiff's case. I dismissed the application because of the complexity of the issues before me. Mr Segal's argument is simple. The goods forming the subject matter of this dispute do not appear in Annexure A of the written agreement concluded on 9 April 2002. Therefore, according to the parol evidence rule, they were not sold and delivered to the plaintiff. It is clear from the large number of goods which were sold and the fact that an auction itself took place, that delivery of those goods which were sold took the form of *traditio longa manu* and took place at the fall of the auctioneer's hammer. The other alternative construction is that there was *constitutum possessorium* on 9 April 2002, the date of confirmation.

I allowed evidence as to the antecedent oral agreement allegedly entered into prior to the written agreement precisely because it appeared that the plaintiff's case was that what had been agreed between the parties was not correctly reflected in

the written agreement. The first and second defendants were not parties to the written agreement.

[16] Mr Nigrini who together with Mr Kriel appears for the plaintiff, relied on the following quotes from *Phipson on Evidence* 6 ed. page 577 which was referred to with approval by Maritz J with Krause J concurring in the case of *Town Council of Heidelberg v Kerkraad van Nederduitsch Hervormde of Gereformeerde Gemeente, Heidelberg* 1930 TPD 543 at p553 and 554:

> "Where a transaction has been reduced into writing by agreement of the parties extrinsic evidence to contradict or vary the writing is excluded only in proceedings between such parties, or their privies and not in those between strangers, or a party and a stranger since strangers cannot be precluded from proving the truths by ignorance, carelessness or fraud of the parties; nor in the proceedings between a party and a stranger will the former estopped, since there would be mutuality."

(My emphasis) He also relied on the case of *Tschirpig & Another v Kohrs* 1959 (3) SA 387 (N) 287F and 290C-F where Harcourt AJ, as he then was, said as follows:

> "Finally in regard to the admissibility of the evidence, I have the liveliest doubts as to whether reliance upon the parol evidence rule is open to the applicants at all. This is because the present application is not a court proceeding brought between the original parties to the contract but between one such party and the applicants

who were strangers in law to such contract. As I appreciate the position although the applicants may well have had knowledge of the terms of the contract, they were not privy thereto and accordingly are strangers to such contract. If this is so, then the law seems fairly well settled to the effect that the parol or extrinsic evidence rule does not preclude verbal evidence being tendered and received to affect the contract. That this is so is established in my opinion both in English law (see for example *Phipson on Evidence* 9ed. p 602) and the *South African Law* (see for example the cases of *Treasurer General v Lippert* (1) SC 201; *Heidelberg Town Council v Kerkraad van Nederduitsch Gemeente, Heidelberg* 1930 TPD 543; *Cohen v Commissioner of Inland Revenue* 1948 (4) SA 616 (T) 624)."

The author relied on the judgment of Addleson J in *Van der Westhuizen v Santam Versekeringsmaatskappy Bpk* 1975 (1) SA 236 (E) 248 - 241D.

[17] Mr Segal on the other hand relied very heavily on the case of *Traub v Barclays National Bank Ltd; Kalk v Barclays National Bank Ltd* 1983 (3) SA 619 (A) and in particular the following quote which appears from 630A:

"The extract from *Wigmore* quoted by the learned judge reads as follows: -

'it is commonly said that the parol evidence rule, in the present aspect, is *binding upon only those*

persons who are parties to the contract. This form of statement suffices in most instances to reach correct results; but it is not sound on principle. The theory of the rule is that the parties have determined that a particular document shall be the sole embodiment of **their** legal act for certain legal purposes (§2425, supra). Hence, so far as that effect and those purposes are concerned, they must be found in that writing and nowhere else, no matter who may desire to avail themself of it... The truth seems to be, then that the rule will still apply to exclude extrinsic utterances, even against other parties, provided it is sought to use those utterances *for the very purpose for which the writing has superseded them as the legal act.*'

It is clear that from *Wigmore's* treatment of this topic rests on what is conceived to be a proper application of the 'integration rule', which is formulated in para 2425 of his work (it is referred to in the above quoted passage) and which has been quoted with approval by this court *(National Board Pretoria (Pty) Ltd & Another v Estate Swanepoel* 1975 (3) SA 16 (A) at 26C; and see also *Venter v Birchholtz* 1972 (1) SA 276 (A) at 282C-D and *Johnston v Leal* 1980 (3) SA 97 (A) at 938D-F). Corbin on *Contracts* vol 3 para 596 deals with the matter on the same footing, in explicit terms:

'The question has been raised whether the 'parol evidence rule' is applicable in favour of or against a third party who is not a party to the written integration. The answer is definitely in the affirmative if the rule is correctly stated and understood. If two parties have by a complete written integration discharged and nullified antecedent negotiations between them, they are so discharged and nullified without regard to whoever may be asserting or denying the fact.'

With a view to the facts of the present case I have found the following observations in Williston on *Contracts* 3rd vol 4 para 647:

'It is often said that the parol evidence rule is applicable only to the parties to a contract and their privies and does not apply to third persons, or applies to them only when they seek to enforce rights under the contract. Although the statement especially the first part, has led to misapprehension, its repetition has been frequent... But where the issue in dispute, even between third parties, is what are the obligations of A and B to one another, and those obligations are stated in a written contract, the parol evidence rule is applicable... It must be remembered that the written contract represents the truth and the whole

truth of the contractual obligations of A and B in whatever way and between whatever parties an enquiry as to such obligations may become important. To admit parol evidence to the contrary which would not be admitted as between the parties, except for the purpose of showing either fraud against a third person or some invalidating facts which would be available to the parties themselves, is to permit facts to be shown which have no relevancy to the issue of what is the contract between A and B.'

(My emphasis - ie. the emphasis of this court).

Since the question now being considered was not debated in argument in the light of principle or authority, I propose to say no more about it than is requisite for coming to a decision on the particular facts of this case."

It must be pointed out in fairness to Mr Nigrini that he himself very properly referred me to this extract. Mr Nigrini submitted that the facts in that case were distinguishable from the facts in this case and in any event were *obiter*. Clearly the facts were indeed distinguishable. As to whether or not the reference to the authority in that judgment was *obiter,* I shall note that this may be so. Nevertheless despite the cautious approach which was adopted by Botha JA in that judgment (and which was the unanimous judgment of the court) it seems to me that the quote from *Williston* in particular was made with

approval. In any event even if it was not approved I shall deal with the quote to which I have referred as if it does correctly reflect the law. I do so because the position is otherwise as stated in *Town Council of Heidelberg* case and the *Tschirpig & Another v Kohrs* case and the *Van der Westhuizen v Santam Versekeringsmaatskappy* case (supra) all of which favour the plaintiff. It is necessary in my view to emphasise the words quoted from *Williston*:

> "Or some invalidating facts which would be available to the parties themselves."

Brews' evidence was led precisely to show that there were "some invalidating facts". His evidence was led to show that the agreement recorded in writing did not reflect the true intention of the parties. The items in Exhibit C clearly show that the true intention of the parties was that the goods sold to the plaintiff were not confined to those appearing in Annexure A of the written agreement. Had the first and second defendants been a party to the agreement and had the plaintiff sought rectification thereof it seems to me that the plaintiff would have succeeded.

[18] Mr Segal relied strongly on the case of *Industrial Finance and Trust Co (Pty) Ltd v Heitner* 1961 (1) SA 516 (T) in which Marais J said the following at 522H:

"No logical or practical reason suggests itself why it should not be as capable of reaffirmation as any other written contract, provided the negotiability and transferability of the instrument

is not affected thereby. To fulfil this condition the rectification would have to be strictly limited, in its effect, to the parties concerned in the error sought to be rectified. That is in fact a requirement of the rules as to rectification of contracts other than negotiable instruments. Williston on *Contracts* vol 5 para 1547; re *Statement of the Law of Contract*, para 504; *Weinerlein v Gogh Buildings Ltd* 1925 AD 262 at P291; *Meyer v Merchants Trust Ltd* 1942 AD 254."

Mr Segal submitted that as the first and second defendants were not parties to the written agreement to which Annexure A is attached, that there could be no rectification of the agreement.

[19] Of course it must be correct that rectification can only be sought against the parties to an agreement. Presumably that is why the plaintiff did not attempt to do so. It did not need to do so, but that does not mean it could not lead evidence as to the true nature of the agreement. The plaintiff must be entitled to show "some invalidating facts which would be available to the parties themselves". The plaintiff must in my view be able to show, in the words of *Williston*, "the truth and the whole truth of the contractual obligations" between itself and the provisional liquidators and the auctioneer.

[20] Mr Segal submitted that the test as to whether or not one could go behind a written agreement to establish the true intention between the parties was a high one. He relied on the following quotes in *Weinerlein v Gogh Buildings Ltd* 1925 AD 282 at 292

which quoted with approval the judgment of Trollip J (as he then was) in *Von Ziegler & Another v Superior Furniture Manufacturers (Pty) Ltd* 1962 (3) SA 399 (T):

"In practise our courts rigorously insist upon the party who relies on rectification, pleading all the essentials thereof and proving them on a substantial balance of probabilities."

This quote was recently noted by Ackermann J, then of this division, in *Neuhoff v New York Timbers Ltd* 1981 (4) SA 666 (T) 673H. As I have already said had the first and second defendants been a party to the agreement and had the plaintiff sought rectification thereof it would surely have succeeded. In my opinion the plaintiff has established clearly that Annexure A was a mutual or common mistake between the parties - it did not contain a complete list of all the movable assets that formed the subject matter of the agreement. Such a mistake can very easily arise where, as happened in this case, there was, in effect, an auction "lock, stock and barrel" of innumerable goods which were spread out over a large area of a factory's premises.

Accordingly, in my view, the oral agreement concluded between the parties which took place immediately prior to the holding of the auction determined which goods were indeed sold to the plaintiff and these goods include the goods forming the subject matter of this dispute.

[21] Mr Nigrini raised a further point. He relied on the following quote from *Concor Construction (Cape) (Pty) Ltd v Santam*

Bank Ltd 1993 (3) SA 930 (A) 933B-C:

> "The requirements for the passing of ownership by delivery include, *inter alia*, (a) that the transferor must be capable of transferring ownership; (b) delivery must be effected by the transferor with the intention of transferring ownership and taken by the transferee with the intention of accepting ownership; and (c) payment where the sale is a cash sale."

and *Trust Bank van Afrika Bpk v Western Bank Bpk & Andere* NNC 1978 4 SA 281 (A) 301H-302A where it was held that:

> "Volgens ons reg gaan die eiendomsreg op 'n roerende saak op 'n ander oor waar die eienaar daarvan dit aan 'n ander lewer met die bedoeling om eiendomsreg aan hom oor te dra, en die ander die saak neem met die bedoeling om eiendomsreg daarvan te verkry. Die geldigheid van die eiendomsoordrag staan los van die geldigheid van enige onderliggende kontrak."

(My emphasis). He also relied on the case of *Air-Kel (Edms) Bpk h/a Merkel Motors v Bodenstein & 'n Ander* 1980 (3) SA 917 (A) 922E-F:

> "Blote ooreenkoms kan dus nie eiendomsreg oordra nie - *traditio* (oorhandiging) moet ook geskied; en omgekeerd. Blote oorhandiging is ook nie voldoende nie - dit moet gepaard gaan met 'n ooreenkoms tussen oorhandiger en ontvanger dat daarmee eiendomsreg gegee en geneem word."

And at 923H:

> "Dat *traditio* neer kom op 'n besitsoordrag - hetsy met 'n verskuiwing van die regstreekse daadwerklike beheer van een persoon na 'n ander hetsy daarsonder. In laasgenoemde geval geskied daar geen verandering van persoon wat die regstreekse beheer betref nie, maar daar vind nog 'n besitsverskuiwing plaas deur ooreenkoms, op grond van toepassing van die leerstuk van onmiddellike besit. Om eiendomsreg van 'n roerende saak oor te dra moet daar dus die nodige saaklike ooreenkoms wees (soos hierbo genoem) en ook *traditio* in die sin in die vorige paragraaf verduidelik."

The fact that the plaintiff took possession of all movables at the premises of the company in liquidation (save for those goods which were excluded and which do not cover the goods which are the subject matter of this dispute) after confirmation and with the full knowledge and approval of the third defendant and his predecessor's in title shows that there had indeed been *traditio* "wat gepaard gaan met 'n ooreenkoms tussen oorhandiger en ontvanger dat daarmee eiendomsreg gegee en geneem word". In other words the "nodige saaklike ooreenkoms" did not have to be the written agreement containing Annexure A. Even if the written agreement containing Annexure A was a valid and binding agreement between the plaintiff and the parties thereto, it did not have to be the "nodige saaklike ooreenkoms" that gave rise to the

transfer of ownership. The plaintiff's claim, it must be emphasised, is not based on contract. It is based on a claim of ownership which could have arisen and in this case did arise independently of the written agreement containing Annexure A. A real right, such as ownership is, as every first year law student knows, enforceable as against the whole world (See *Smith v Farrelly's Trustee* 1904 TS 949 at 958; *Johannesburg Municipal Council v Rand Townships Registrar* 1910 TS 1314 at 1320). As against the whole world, a person asserts and proves ownership by relying upon any number of available facts.

[22] Yesterday the case was adjourned early to allow the parties time prepare a full argument before me. Mr Nigrini received the assistance of a junior Mr Kriel. He has asked that if successful the costs of two counsel for today be included and that the qualifying fees of the experts Albert Beukes and David Sparrow be allowed. The experts' evidence was to relate to the question of *accessio* which was abandoned, as I have said, on the eve of the trial or the morning thereof. It is clear from the heads prepared by Mr Nigrini in this difficult matter that the services of junior counsel in addition to himself were not extravagantly employed and were most useful to the court in deciding this difficult case.

[23] Insofar as the time period which was left in the discretion of the court in the plaintiff's particulars of claim for the delivery of the goods in question is concerned I believe that a period of two weeks from the date of this order would be fair to all parties.

[24] The following order is made against the first and second defendants:

1. They are to deliver to the plaintiff the goods more fully described as follows:

   1.1 Three dust extraction units and fans including duct extracting ducting;

   1.2 One SSR 2000 Ingersoll Rand and one Atlas Copco compressor including connecting compressed air pipes thereto ("the goods);

2. The sheriff is authorised to seize and deliver the goods to the plaintiff in the events of the defendants failing or refusing to deliver the same to the plaintiff within two weeks of the date of this order.

3. The first and second defendants are jointly and severally liable to pay the plaintiff's costs in the action, including the costs of two counsel for 11 February 2003 and the qualifying fees of the experts Albert Beukes and David Sparrow, the one paying the other to be absolved.

ON BEHALF OF THE PLAINTIFF:	ADV D K NIGRINI, with him ADV H KRIEL
Intructed by:	Christie Attorneys
ON BEHALF OF THE FIRST AND SECOND DEFENDANTS:	ADV M M SEGAL
Instructed by	Mashiane Moodley & Monama Inc
DATES OF HEARING:	6 February 2004 to 11 February 2004
DATE OF JUDGMENT:	11 February 2004