

IN THE HIGH COURT OF SOUTH AFRICA /ES

(TRANSCAAL PROVINCIAL DIVISION)

CASE NO: A1480/2004 /24031/2003

DATE: 15 JUNE 2005

not reportable

IN THE MATTER BETWEEN:

LINDA ANNE CAMPBELL

PLAINTIFF/RESPONDENT

AND

RAM INTERNATIONAL TRANSPORT (PTY) LTD

DEFENDANT/APPELLANT

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JUDGMENT

VAN DER MERWE, J

In this judgment I shall refer to the parties as in the court *a quo*.

The plaintiff instituted action against the defendant for the delivery of eleven coins described in the particulars of claim, alternatively payment of the amount of R500 000,00. After appearance to defend was entered the plaintiff applied for summary judgment for the delivery of the said coins. The alternative claim was for purposes of the summary judgment application, not persisted with.

The defendant filed an affidavit resisting the application for summary judgment. Rule 32(3)(b) of the Uniform Rules of Court *inter alia* requires a defendant to "disclose fully the nature and grounds of the defence and the material facts relied upon therefor". This the defendant did in great detail. In the affidavit the entire history of the matter is set out from the time the defendant became involved until the application for summary judgment was lodged. Correspondence between the parties' legal representatives and other interested parties were annexed referring to facts even before the defendant became involved.

From the defendant's affidavit the following *inter alia* appears:

1. In May 2002 the defendant was instructed by Thee House of Coins (Pty) Ltd (THC) to arrange for the courier of a parcel of coins from the United States of America to THC's place of business in South Africa.
2. The defendant through its sister company in the United States of America arranged for the delivery of the parcel of coins per airline to South Africa.
3. The parcel of coins arrived at the department of Customs and Excise, Johannesburg International Airport.
4. After some delay THC instructed the defendant to arrange for the clearance of the parcel of coins.

5. The department of Customs and Excise was only prepared to clear the parcel of coins on payment by THC of an amount of R41 989,64 as import duties together with a "deposit" of R20 000,00 to cover a possible penalty because the import duties were paid late.
6. The amounts referred to were on request of THC paid by the defendant and it thereafter received the parcel of coins.
7. The defendant invoiced THC for an amount of R70 375,02 made up of the amounts referred to above as well as clearance charges, handling charges and storage charges. A copy of the defendant's standard terms and conditions applicable to the contract of carriage was apparently annexed to the invoice. Clause 6.8 thereof deals with a lien and reads as follows:

"That the customer grants to Ram a general lien on the shipment for sums due at any time from the customer to Ram. Ram shall be entitled to retain possession of the shipment and suspend its further transit without incurring liability until all sums owing to Ram have been paid."
8. It is common cause that the plaintiff's eleven coins as well as coins belonging to other people were contained in the parcel. From the correspondence it appears that ninety three coins were in the parcel.

9. The plaintiff demanded delivery of her eleven coins from the defendant.
10. The defendant contends that:
  - 10.1 it contracted with THC and not with the plaintiff;
  - 10.2 in terms of its contract with THC it has a lien over the parcel of coins until THC has effected payment to it of the amount due by THC;
  - 10.3 should it open the parcel of coins it could be faced with possible claims by THC and/or owners of the coins;
  - 10.4 it is impossible to verify ownership of the individual coins in order to deliver coins to its rightful owners;
  - 10.5 it is not entitled to interfere with the parcel of coins in terms of the Warsaw Convention, Notice concerning Carriers Limitation of Liability.
11. From the plaintiff's attorneys' letter dated 11 July 2003 it appears that prior to the defendant's involvement the plaintiff handed the coins she is claiming to THC "for purposes of grading in the USA". This fact was

confirmed by a letter from an attorney acting for another owner, a certain Mr Brian Long.

In spite of having reserved its judgment, the court *a quo* did not deal with the facts of the matter or with the contentions raised in 10 above. It merely stated that defendant's counsel conceded that it could not rely on a debtor creditor lien. Two points *in limine* were dismissed without indicating what those points were and without giving any reasons for so dismissing them.

In the defendant's heads of argument filed for the hearing of the matter before the court *a quo*, counsel dealt with a defence based on a salvage lien. No mention was made thereof in the court *a quo*'s judgment.

I am at a total loss as to the reasons for the court *a quo*'s findings.

An application for leave to appeal was dismissed with costs. The Supreme Court of Appeal granted leave to appeal to this court and ordered that the costs of the application for leave to appeal to that court and the court *a quo* be costs in the appeal.

The grounds of appeal are set out as follows in the notice of appeal:

- "1. The learned judge erred in finding that the respondent was entitled to the return of the coins, in the possession of the appellant;

2. The learned judge erred in finding that the appellant did not disclose a defence against the respondent's *rei vindicatio*;
3. The learned judge erred in finding that the appellant did not have a lien enforceable against the respondent;
4. The learned judge erred in finding that a lien could only be enforced by the appellant against the respondent if an agreement existed between the parties;
5. The learned judge erred in not finding that the appellant has a salvage lien over the coins in question enforceable against the respondent; and
6. The learned judge erred in finding that the appellant could not rely on a lien *in casu* as it has other remedies at its disposal, and failed to exercise same."

In my judgment only grounds of appeal 2 and 5 need be discussed in this judgment. Ground of appeal 1 is dependent on our finding on the two mentioned grounds of appeal. Grounds of appeal 3, 4 and 6 are not based on any reasoning of the court *a quo*. In so far as those grounds are based on what the court *a quo* might have had in mind they will also be answered once a decision is made on grounds of appeal 2 and 5.

Ground of appeal 2 will be dealt with on the basis that it refers to a defence other than a defence based on a salvage lien (ie ground of appeal 5).

The plaintiff's claim is based on a *rei vindicatio* in which it is simply alleged that the plaintiff is the owner of the goods and that the defendant is in possession thereof.

From the facts before us it appears that the plaintiff (and apparently the other owners of coins) entered into an agreement with THC in terms of which she handed possession of the coins to THC in order to deal with it in a certain manner and for certain purposes. In terms of correspondence annexed by the defendant (eg plaintiff's attorneys' letters dated 11 July 2003; 31 July 2003 and 21 August 2003; THC's attorneys' letters dated 15 August 2003 and 9 September 2003) it is clear that the plaintiff and other owners of the coins would be and are in fact indebted to THC for services rendered to them by THC. It is also clear that at least the plaintiff and Mr Long have not paid THC. (See letter dated 9 September 2003 written by THC's attorney.)

It also appears that the plaintiff would regain possession of the coins on payment to THC of whatever amount is owing by her to THC.

Nothing in the agreement between the plaintiff and THC apparently prohibited THC from entering into the agreement with the defendant referred to above. It is clear that in terms of the agreement between the defendant and THC, the defendant would

arrange for the transfer of the parcel of coins from the USA and be responsible for the clearance of the parcel with the department of customs and excise. The defendant would then in terms of that agreement have a lien over the parcel until payment is effected by THC to it of what is owing by THC, whereafter possession of the parcel would be given to THC. In terms of the agreement between the defendant and THC, defendant was not entitled to open the parcel and to deal with any of the coins at will or at the request of an alleged owner. If it did that, the defendant would be in breach of its obligations in terms of the agreement with THC.

Rule 32(3) of the Uniform Rules of Court provides *inter alia* that upon the hearing of an application for summary judgment the defendant may satisfy the court by affidavit that he has a *bona fide* defence to the action. Rule 32(5) in turn provides that the court may enter summary judgment for a plaintiff if a defendant does not satisfy the court that he has a *bona fide* defence to the action. The court therefore retains a discretion to refuse summary judgment even if the court is not so satisfied. Where a *bona fide* defence is made out the court has no discretion and is bound to refuse summary judgment.

In my judgment the defendant has, in view of the foregoing, made out a *bona fide* defence. The court *a quo* should have dismissed the application for summary judgment. By granting summary judgment the court *a quo* ordered the defendant to commit a breach of the agreement between itself and THC. Once the defendant had complied with the court's order it would have been unable to honour its obligation to



THC to hand to it the parcel of coins with its content intact. The defendant would under such circumstances not have been able to claim from THC what was owing by it to the defendant. By granting summary judgment the court in effect ordered the defendant to give possession of the coins to the plaintiff where such possession was by agreement given to THC.

The court *a quo* should have refused summary judgment on a further ground. As stated above even where a defendant does not disclose a *bona fide* defence to the action, the court retains a discretion to refuse summary judgment.

In *Soil Fumigation Services Lowveld CC v Chemfit Technical Products* 2004 6 SA 29 (SCA) at 35, para [11] the following is said:

"With regard to the court's overriding discretion to refuse summary judgment even where the defendant's affidavit does not measure up to the requirements of Rule 32(3)(b), it has been said that, in view of the extraordinary and stringent nature of the summary judgment remedy, that discretion may be exercised in a defendant's favour if there is doubt as to whether the plaintiff's case is unanswerable and there is a reasonable possibility that the defendant's defence is good. (See eg *Maharaj v Barclays National Bank Ltd* 1976 1 SA 418 (A) at 425H; *Tesven CC and Another v South African Bank of Athens* 2000 1 SA 268 (SCA) ([1999] 4 All SA 396) at 277H-J (SA).) The reason why the remedy of summary judgment is referred to as 'stringent' and 'extraordinary' is because it

effectively closes the door of the court on the defendant without affording an opportunity to ventilate the case by way of a trial."

See too *Arend and Another v Astra Furnishers (Pty) Ltd* 1974 1 SA 299 (C) at 304F-305 *in fin*; *Dowson and Dobson Industrial Ltd v Van der Werf and Others* 1981 4 SA 417 (C) at 419B-E; *AE Motors (Pty) Ltd v Levitt* 1972 3 SA 658 (T); *Gruhn v M Pupkewitz & Sons (Pty) Ltd* 1973 3 SA 49 (A) at 58D-E; *Breitenbach v Fiat SA (Edms) Bpk* 1976 2 SA 226 (T) at 229F *in fin*.

In the court *a quo*, and also before us, the defendant also relied on a salvage lien. As stated earlier the defendant paid certain sums of money in respect of import duties, possible penalties, clearance charges, handling charges and airline storage fees. The defendant states that storage charges are being incurred on an ongoing basis. The defendant alleges that the expenses were, and are, incurred for the benefit of the owners of the coins. The defendant further concludes that the plaintiff has been enriched at its expense and that it therefore has a salvage lien over the plaintiff's coins.

We do not have all the relevant facts before us to finally conclude on the validity of the defendant's reliance on a salvage lien. It is, however, clear that the defendant has at least an arguable case based on a salvage lien. This is a clear arguable question of law and summary judgment should have been refused on that ground too. See *Shingadia v Shingadia* 1966 3 SA 24 (RS) at 25F-26A; *Hollandia Reinsurance Co Ltd v Nedcor Bank Ltd* 1993 3 SA 574 (W).

In my judgment the court *a quo* was clearly wrong in granting summary judgment.

The appeal succeeds with costs which shall include the costs for the applications for leave to appeal both in the court *a quo* and in the Supreme Court of Appeal. The court *a quo*'s order is set aside, and the following is substituted therefor: Summary judgment is refused. Leave is granted to the defendant to defend the action. Costs of the application for summary judgment shall be costs in the cause.

W J VAN DER MERWE  
JUDGE OF THE HIGH COURT

I agree

S J MYNHARDT  
JUDGE OF THE HIGH COURT

I agree

W R C PRINSLOO  
JUDGE OF THE HIGH COURT

A1480-2004

FOR THE PLAINTIFF: ADV  
INSTRUCTED BY:  
FOR THE DEFENDANT: ADV  
INSTRUCTED BY:  
HEARD ON: