THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No:138/13

In the matter between Not Reportable

MOTOWEST BIKES & ATVS **APPELLANT**

and

CALVERN FINANCIAL SERVICES **RESPONDENT**

Neutral citation: *Motowest Bikes & ATVS v Calvern Financial Services* (138/13) [2013] ZASCA 196 (2 December 2013)

Coram: Ponnan, Bosielo, Majiedt JJA, van der Merwe and Zondi AJJA

Heard: **20 November 2013**

Delivered: **2 December 2013**

Summary: Contract of depositum – whether came into existence when respondent left his vehicle to be washed at appellant's car wash – whether subject to owner's risk clause – evidence - appellate court's limited powers of interfering with trial court's findings of fact, particularly credibility and demeanour findings – punitive costs order – no reasons furnished – discretion not judicially exercised and punitive costs order not warranted – appeal upheld in part.

ORDER

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

1. Save to the extent set out in paragraph 2 the appeal is dismissed with costs.
2. The costs order of the court below is set aside and substituted with the following:
   'Die verweerder word gelas om die eiser se koste te betaal'.

JUDGMENT

MAJIEDT JA (Ponnan, Bosielo JA, Van der Merwe and Zondi AJJA concurring):

[1] This is an appeal from the North Gauteng High Court, Pretoria (Vorster AJ sitting as court of first instance), upholding a claim for damages for the loss of the respondent's (plaintiff in the court below) motor vehicle when it was stolen from the appellant's (defendant in the court below) car wash premises. Vorster AJ issued a declarator that the appellant is liable to the respondent for payment of the value of the vehicle, which was to be determined later. The learned Acting Judge also made a punitive costs order on the scale as between attorney and client against the appellant. This appeal, against both the declarator and the costs order, is with the leave of this court.

[2] The proved facts underlying the trial court's judgment are briefly as follows: The sole member of the respondent close corporation in whose name

a VW Golf motor vehicle had been registered, Mr Callie Venter, took the vehicle in to the appellant's car wash to be washed and cleaned during the early part of the morning (the exact time is not clear on the evidence) on 12 June 2009. He left the key in the vehicle and indicated to Mr Thys Leibbrandt, the person in charge there, that he would fetch the car later. Venter also explained to Leibbrandt and one of the workers that he wanted the leather seats and the interior cleaned as well. The arrangement was that he would fetch the vehicle at 1 pm. Just before 2 pm, and before he had fetched the vehicle as per the arrangement, Venter got word from the vehicle tracking company and the police that his vehicle may have been stolen at the car wash. Upon arrival there with his brother, this information turned out to be correct.

[3] The respondent sued the appellant for the value of the vehicle, alleging that an oral agreement of depositum had come into existence between the parties and that the appellant was in breach thereof by failing to return the car upon demand. Although the appellant's plea and the evidence led on its behalf are not entirely clear as to precisely what its defence was, it eventually crystallized into a denial of negligence on its part and, as a further defence, reliance on an owner's risk clause to avoid liability. Importantly it became common cause that a contract of depositum had come into being between the parties.

[4] In his initial plea the appellant admitted the oral agreement of depositum and only raised the owner's risk clause as a defence. The plea was, however, amended subsequently and a further defence was raised, namely a denial that the agreement included the safekeeping and/or storing of the vehicle and an averment that Venter was supposed to remain at the car wash premises for the duration of the vehicle's washing and cleaning, whereafter he had to remove the vehicle.

[5] The trial court had before it two mutually destructive versions of the events in question, in particular the procedure at the car wash. As the learned Acting Judge correctly found, the matter was not capable of determination on the probabilities, but had to be decided on the respective witnesses' credibility. The trial court made adverse credibility and demeanour findings against Leibbrandt and pertinently rejected his version on the procedures followed at the car wash. According to this version the practice was that clients should remain on the premises until their vehicles had been washed, whereafter they had to remove their vehicles.

[6] Venter's version was that this particular occasion was the third time that he had taken his car to be washed there. On the first occasion he remained present throughout, not because he was required to do so, but due to the fact that he wanted to observe whether the service was adequately performed. It was common cause that Venter was a very finicky customer and was insistent upon his car being washed and cleaned in strict accordance with his instructions. On the second occasion he left the car there, after handing the keys to Leibbrandt, on the assumption that the latter would keep the keys with him. Venter also left there on the understanding that after having been washed, his car would be parked inside the premises. He was adamant that he would never have permitted his car to be parked outside in the street. According to him Leibbrandt raised no objection on the second and third occasions about him leaving his vehicle there. This aspect is one of the central disputes between the parties, since both Leibbrandt and his brother Piet (the two of them co-owned the car wash) alleged in their testimony that they had on more than one occasion berated Venter for leaving his car there. The trial court found in favour of Venter and against the Leibbrandts on this issue, primarily on the basis of the credibility of the respective witnesses. In respect of Thys Leibbrandt the trial court found him to be an unimpressive, evasive witness who had fabricated the explanation as to why customers' cellphone numbers were recorded by them on the invoices. It was the respondent's contention, which the trial court accepted, that the reason for this was that customers were to be contacted on their cellphones to be

advised when their vehicles which they had left at the car wash had been washed and were ready for collection. Apart from this, the trial court also found that there were a number of contradictions in Thys Leibbrandt's version of where the keys of customer's vehicles were kept in the office.

[7] The respondent also adduced the evidence of two independent witnesses, namely Mr Johan Theron, an assessor who had investigated the respondent's claim on behalf of the insurance company, and Mr Johannes van Wyk, the owner of a signage business. Theron testified that he went to the car wash to ascertain what the procedure was and where the keys to customers' cars were kept. His evidence corroborated broadly Venter's, rather than the Leibbrandts' version. Van Wyk testified that he had also attempted to have his car washed at the appellant's car wash on a previous occasion, but decided against it when it became evident that he was expected to leave his keys in the car for the staff to move it when required. He testified further that shortly after this incident Thys Leibbrandt came to his signage business to have a large board made which indicated that the washing of cars was at the owners' risk and excluded the car wash's liability in the event of damage or loss to the vehicles. Van Wyk's evidence also tends to corroborate Venter's version.

[8] An appellate court's limited powers to interfere with a trial court's finding of fact is well established – see, inter alia, *S v Kekana* 2013(1) SACR 101 (SCA) para 8; *Fourie v First Rand Bank Ltd & another* 2013(1) SA 204 (SCA) para 14. This is particularly so in the case of credibility and demeanour findings. In my view there is nothing at all on the record on which the trial court's factual findings can be faulted.

[9] Depositum is an agreement in terms whereof a thing is delivered for safekeeping, returnable on demand – see F du Bois, *Wille's Principles of South African Law, 9* ed at 962. A depositum agreement imposes upon the

depositary a legal obligation to exercise reasonable care in respect of the goods entrusted to him. In the event of the goods being damaged, lost or destroyed while in his possession, the depositary would be liable in damages to the owner thereof, unless he can show that the damage, loss or destruction occurred without *dolus* or *culpa* on his part (*Stocks & Stocks (Pty) Ltd v T J Daly & Sons (Pty) Ltd* 1979 (3) SA 754 (A) at 762 A-B, *Mercurius Motors v Lopez* 2008 (3) SA 572 (SCA) para 33. In the present instance, once the appellant took possession of the vehicle to be washed and cleaned, it became a depositary with the concomitant duty of care imposed upon it (*Silhouette Chemical Works (Pty) Ltd v Steyn's Garage [Brooklyn] [Pty] Ltd* 1967 (3) SA 564 (T) at 568 H). The appellant conceded that this was indeed the case.

[10] I turn to consider whether the owners risk provision was indeed a term of the contract. In *Essa v Divaris* 1947 (1) SA 753 (A) at 768-769, Tindall JA stated:

'In the case of an ordinary contract by a parking-garage owner to garage a car for consideration (that is, an ordinary contract of deposit for a consideration), the *onus* which lies on the bailee arises as an inference from the nature of the contract which places him under an obligation to return the article or to prove the reason why he has failed to do so. Where, however, an owner's risk clause is part of such a contract, the effect of such a clause is that, though the garage owner undertakes to take care of the car in the garage, the parties also agree that the car will be kept in the garage at the risk of the owner of the car.'

An owner's risk clause undermines the very essence of a contract of deposit and should therefore be pertinently brought to a customer's attention – *Mercurius Motors v Lopez*, supra at para 33; see also: *Durban's Water Wonderland (Pty) Ltd v Botha & another* 1999 (1) SA 982 (SCA) at 991D-J. The trial court correctly found that the evidence had failed to establish that an owner's risk clause was a term of the agreement. In any event on the appellant's version the notice to this effect was placed at an obscure spot on a table in the car wash office, instead of being prominently displayed, for

example, on the wall. Venter testified that he had never entered that office and that his attention had never been drawn to it, while Leibbrandt testified to the contrary. The trial judge preferred Venter's testimony to that of Leibbrandt on the basis of credibility and the probabilities. Again, this finding cannot be faulted in my view. It should perhaps be added that the notion that vehicles would be left at the risk of their owners is not entirely compatible with the other evidence that it was the policy of the car wash that owners were to be in attendance throughout whilst their vehicles were being washed.

[10] On the proved facts the court below correctly found in my view that the appellant's negligence was manifest. The car wash is located in a part of the Krugersdorp CBD where crime was rife. The gate to the car wash was left open for the entire day and there were no access control measures in place. A suspicious looking vehicle had been observed close to the premises by Thys Leibbrandt but, apart from asking one of the workers to jot down the car's registration details, no measures were taken to safeguard the vehicles on the premises. The finding of negligence cannot be faulted in my view. The appeal on the merits must therefore be dismissed.

[12] This brings me to the punitive costs order. It is trite that the rationale for a punitive attorney and client costs order is more than mere punishment of the losing party. Tindall JA explained it as follows in *Nel v Waterberg Landbouwers v Ko-operatiewe Vereeniging* 1946 (1) AD 597 at 607:

'[t]he true explanation of awards of attorney and client costs not expressly authorised by Statute seems to be that, by reason of special consideration arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation.'

And see further:*Swartbooi v Brink* 2006 (1) SA 203 (CC) para 27. Costs is a matter for the discretion of a trial court. Smalberger JA elaborated on the

nature of this discretion as follows (in the context of an agreement between parties that attorney client costs be paid) in *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA) para 25:

'The court's discretion is a wide, unfettered and equitable one. It is a facet of the court's control over the proceedings before it. It is to be exercised judicially with due regard to all relevant consideration. These would include the nature of the litigation being conducted before it and the conduct before it and the conduct of the parties (or their representatives). A court may wish, in certain circumstances, to deprive a party of costs, or a portion thereof, or order lesser costs than it might otherwise have done as a mark of its displeasure at such party's conduct in relation to the litigation.'

[13] The court below did not furnish any reasons at all for its punitive costs order. Absent such reasons this court is left in the dark as to the basis for such an order. It is thus difficult to conclude that there was a proper judicial exercise by the trial court's of its discretion on costs. The punitive costs order must therefore be set aside.

[14] I make the following order:

1. Save to the extent set out in paragraph 2 the appeal is dismissed with costs.
2. The costs order of the court below is set aside and substituted with the following:
   'Die verweerder word gelas om die eiser se koste te betaal'.

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S A MAJIEDT
JUDGE OF APPEAL

APPEARANCES

For Appellant:	J du Plessis with P J Theron
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