IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

REPORTABLE

CASE NO. 16118/2012

In the matter between:

JA STASSEN-SHERIFF OF THE HIGH COURT, BELLVILLE	**APPLICANT**
And	
DE VILLE CABINET COMPONENT CC	**FIRST RESPONDENT**
ILIAD AFRICA TRADING (PTY) LTD t/a CITYWOOD CAPE	**FIRST CLAIMANT**
GABRIEL G DE VILLIERS	**SECOND CLAIMANT**

JUDGMENT DELIVERED ON FRIDAY, 09 MAY 2014

DLODLO, J

INTRODUCTION

[1] The First Claimant obtained a default judgment against the First Respondent. Pursuant to the said judgment the Sheriff of the Court armed with the necessary writ of execution attached several movable assets at the premises of the First Respondent situated at 40 Willow Road, Stikland. The Second Claimant thereafter made a claim that he is in fact the owner of all the attached movable assets. Acting in terms of the provisions of Rule 58 the Applicant (Sheriff of the Court) issued these proceedings known as interpleader proceedings. Rule 58 provides as follows:

"58 (1) Where any person, in this rule called 'the applicant', alleges that he is under any liability in respect of which he is or

expects to be sued by two or more parties making adverse claims, in this rule referred to as 'the claimants', in respect thereto, the applicant may deliver a notice, in terms of this rule called an 'interpleader notice', to the claimant. In regard to conflicting claims with respect to property attached in execution, the Sheriff shall have the rights of an applicant and an execution creditor shall have the rights of a claimant.

(2) (a) Where the claims relate to money the applicant shall be required, on delivering the notice mentioned in sub-rule (1) hereof, to pay the money to the registrar who shall hold it until the conflicting claims have been decided.

(b) Where the claims relate to a thing capable of delivery the applicant shall tender the subject-matter to the registrar when delivering the interpleader notice or take such steps to secure the availability of the thing in question as the registrar may direct."

[2] In *casu* according to the papers filed in this matter the assets attached are kept under lock and key in the very premises in which the attachment took place. Each claimant must file particulars of claim. Importantly, the content of these particulars always depends on the nature of the claim. Needless to mention that the purpose of the statement is to acquaint the opponent with the tenor of the case so that he or she can decide whether to oppose the claim. There is no need that a claimant in the proceedings like these sets out the claim with precision which is normally required of a pleading.

SCHEDULE OF ATTACHED ASSETS

[3] The movable assets attached the ownership of which is contested are the following:

1 x Griggio Table Saw

1 x Speedy 201 NC Drill

1 x Edgebonder

1 x SCM Table Saw

1 x Spindle

1 x Dikte Plane

1 x Vlak Plane

1 x 6 Sak vacuum Cleaner

1 x 3 Sak vacuum Cleaner

1 x 2 Sak vacuum Cleaner

1 x Overhead Router

1 x Metal Storage racks

1 x De Walt Arm Saw

7 x Work benches

1 x Spray Room (Fixture)

Toshiba Copy & Fax Machine

2 x Office Desks

1 x PC Complete

18 x Wood Clamps

1 x Cannon Printer

THE LEGAL PRINCIPLE AND THE QUESTION OF ONUS

[4] The law in this regard is set out in ***Zandberg v Van Zyl*** 1910 AD at 302. In short and according to the afore-going authority there is a rebuttable presumption in our law that a person in whose possession assets are found

is assumed to be the owner of such assets. Describing the above the court in ***Zandberg v Van Zyl*** *supra* reasoned as follows:

"I quite agree with Mr Justice Hopley that the reasons for the judgment of the majority of the Court in Fivaz v Boswell are by no means satisfactorily founded, as they are on English cases, which again are founded on English statute law. The principle, however, underlying the decision in that case appears to me quite in accord with our law, namely, that possession of a movable raises a presumption of ownership; and that therefore a claimant in an interpleader suit claiming the ownership on the ground that he has bought such movable from a person whom he has allowed to retain possession of it must rebut that presumption by clear and satisfactory evidence. The fact that he has bought a thing which does not require himself, but allows the seller to use, requires full explanation, and in the absence of such explanation a Court is justified in drawing its own reasonable inferences. .....Voet (18, 3, 7 and 8) refers to the pactum de retrovendendo, by virtue of which it is agreed that the seller shall have the right to re-purchase a thing sold by him for the same price which he has received as being a usual legal pact; but Voet appears to assume that, until the exercise of such right, the thing would be in the possession of the original purchaser. If the thing is allowed to remain in the possession of the seller, and it is manifest that the real object of the parties was not to transfer the ownership to the purchaser, but to secure the payment to him of a debt owing to him by the seller, the obvious conclusion is that the intention of the parties was to effect a pledge, and not a sale."

[5] The essence of the above is simply that possession of a movable raises a presumption of ownership, and therefore a person claiming the ownership in an interpleader suit, on the ground that he bought such movable from the person whom he has allowed to remain in possession of it, must rebut

the presumption by clear and satisfactory evidence. Accordingly Mr Smit is correct in starting his submission as follows:

"'n Weerlegbare vermoede in ons reg bestaan dat die persoon wat in besit van goedere is, word geag die eienaar van daardie goedere te wees. In hierdie geval was die Tweede aanspraakmaker wel in besit van die goedere ten tyde van die beslaglegging daarvan deur die Applikant. Hierdie vermoede is wel weerlegbaar indien die ware eienaar voldoende bewyse kan toon dat die goedere wel aan hom/haar behoort."

[6] **Amler's Precedents of Pleadings (7th edition)** has the following exposition of law in this regard:

"ONUS: *A party who relies on ownership in an object must allege and prove the right of ownership.*

MOVABLES: *Transfer of ownership of corporeal movable property requires delivery – the transfer of possession of the property by the owner to the transferee-coupled with a real agreement between the parties. The constituent elements of a real agreement are the intention of the owner to transfer ownership and the intention of the transferee to acquire it. Legator McKenna Inc v Shea [2009] 2 ALL SA 45 (SCA). ……..*

POSSESSION: *Reliance may be placed on the factual presumption of ownership arising from possession. Zandberg v Van Zyl 1910 AD 302; Ruskin v Thiergen [1962] 3 ALL 466 (A), 1962 (3) SA 737 (A); Hefer v Van Greuning 1979 (4) SA 952 (A) 959.*

Unless the matter is raised by the other party on the pleadings, a purchaser who has received delivery need not prove that a predecessor in title was a true owner or that ownership was acquired from a true owner.

Concor Construction (Cape) Pty Ltd v Santambank Ltd [1993] 2 ALL SA 496 (A), 1993 (3) SA 930 (A) 937".

THE EVIDENCE (BY THE SECOND CLAIMANT)

[7] Mr Gabriël De Villiers (hereinafter called "the Second Claimant") testified that he was the sole proprietor of a business called Shopfit during 1975 to about 1996, a business which was started from his home garage. Since about 1996, the same business started to trade under the name and style of De Ville until such time as the business was taken over by Francois, his son. Prior to the take-over of the business, the Second Claimant had purchased several tools of trade and manufactured some assets himself. The majority of these are now the subject of this dispute. The Second Claimant is the owner of the business premises situated at 40 Willow Road, Stikland. Prior to the take-over of the business, the business was run from the larger section of the premises, but subsequent to Francois's take-over, it was moved to the smaller section in order for the Second Claimant to rent out the larger section to a third party.

[8] When Francois took over the business, testified the Second Claimant further, he (Francois) started to conduct the business under the name and style of De Ville Cabinet Components CC (the First Respondent). According to the testimony of the Second Claimant, a written lease agreement was concluded on 17 October 2006 between the Second Claimant and the First Respondent, represented by Francois. In terms of this agreement the premises as well as the movable assets of the Second Claimant was leased to the First Respondent. According to the Second Claimant these assets were the same ones used by the Second Claimant in his business.

[9] The evidence of the Second Claimant and what appears in Annexure "SCB10" on 17 October 2008 a written lease agreement, specifically intended to deal with the assets, was concluded between the Second Claimant and Francois. This agreement had a schedule annexed to it in which the Second Claimant's assets were listed ("the schedule"). The schedule also contained an agreement in terms whereof Francois could purchase the assets at a purchase price of R200 000.00. This, however, according to the Second Claimant, was never paid and as such the assets were never sold to Francois. The Second Claimant testified and this is also documented that later, on about 13 August 2009, the Second Claimant and the First Respondent once again concluded a further lease agreement for the same premises and the same assets.

[10] During cross-examination Mr Smit on behalf of the First Claimant referred the Second Claimant to clause 15 of the latter agreement and made a statement or an assertion to him that the entire clause was inserted only recently as a result of the attachment. This was denied by the Second Claimant and he replied that the clause contained two sub-clauses and that the first sub-clause was inserted on about 1 October 2010 when the parties renewed the agreement. This explanation was later on confirmed by Francois when he testified.

[11] According to the Second Claimant the agreement or understanding between himself and Francois was that the First Respondent and/or Francois will lease the assets on condition that (a) the Second Claimant will at all times remain the owner thereof; (b) any item that breaks must be restored or replaced; (c) any replaced item becomes the property of the Second Claimant. The Second Claimant was then referred to each item

that was attached by the Sheriff, as per the interpleader summons, during which he confirmed that he was the owner of all the assets.

[12] The Griggio Table Saw included as item 2 on the schedule (according to the Second Claimant) was bought by him from funds obtained from ABSA Bank in terms of a loan. Indeed a letter from ABSA Bank dated 2 May 1996 was submitted as proof of his loan – this is Annexure "SCB17" in the papers before Court. The Speedy 201 NC Drill according to the Second Claimant, is in fact a Speedy 207 NC Drill and on the schedule it is item 3 and was purchased from the same ABSA loan.

[13] The 6, 3 and 2 bag vacuum cleaners are collectively indicated as item 12 on the schedule. According to the evidence by the Second Claimant these were purchased from the funds obtained from the ABSA loan. The overhead router is item 5 on the schedule, evidence also shows that this was also purchased from the ABSA loan by the Second Claimant. The spray room (fixture) according to the evidence by the Second Claimant was purchased and erected from the funds obtained from the ABSA loan. It was installed due to the demands of the Second Claimant's business. The Second Claimant explained that the spray room is fixed to the premises, which belong to the Second Claimant himself.

[14] According to the Second Claimant's evidence the spray room had to have been installed prior to the take-over of the business because a compressor is used with it and two compressors are listed in the schedule. Francois, who testified after the Second Claimant, testified that there were only two compressors. One was used for general purposes and the other was used in the spray room. According to the evidence, the assertion that above items were purchased from the ABSA loan is supported by the Second

Claimant's pencil handwritten note that was (according to evidence) made on the ABSA letter in 1997.

[15] According to the Second Claimant the item known as the Edgebounder is a replacement item. He testified that he had purchased a Hebrock machine from A Hüster Machine Tool Company as evidenced by the invoice received from them. The invoice concerned is Annexure "SCB8" in the Founding papers. According to the evidence this machine later broke and it had to be replaced. Thus the Edgebounder was the machine with which the Hebrock was replaced and as per the agreement with the First Respondent and/or Francois it became the property of the Second Claimant. The SCM Table Saw which is item 10 on the schedule was purchased by the Second Claimant in 1983 from National Trading Co Ltd as per their invoice Annexure "SCB22".

[16] The spindle is item 4 on the schedule and was purchased by the Second Claimant in 1992 from Architecnic as per their invoice – Annexure "SCB21". The "dikte plane" and the "vlak plane" items 7 and 8 respectively on the schedule also belong to the Second Claimant. According to the evidence the Second Claimant had purchased similar planes at an auction in 1977. These are the first two items on the letter from the Controller of Customs & Excise – Annexure "SCB23". These were later replaced by the Second Claimant (and not Francois) but the Second Claimant testified that documents pertaining to these items were destroyed. The Second Claimant had also purchased the metal storage racks in about 1980 from Acrow Engineering; the record supporting this claim has also been destroyed.

[17] The Second Claimant testified that the De Walt Arm saw was given to him by his friend, Charl du Plessis, several years ago when he started Shopfit. According to his testimony this was one of the first machines that he had used. The 7 work benches were manufactured by the Second Claimant himself during about 1985 to 1988. According to the evidence the Toshiba Copy & fax machine was a replacement item. The Second Claimant had leased a copier and a separate fax machine to the First Respondent, but they later replaced same by the combination Toshiba Copy & fax machine unit.

[18] Asked about the two office desks the Second Claimant testified that these were initially one large office desk that was used by himself in the reception in the large section of his premises. He explained that when the First Respondent moved to the smaller section, his large office desk was cut in half to make the two office desks. According to the evidence the 18 wood clamps were purchased by the Second Claimant as and when he needed it. He explained that it merely remained on the premises to be used by the First Respondent and/or Francois.

[19] The Canon printer was identified also as a replacement. The Second Claimant testified that he had leased a printer to the First Respondent but when it could no longer be used, the Canon printer was purchased to replace the old one. According to the Second Claimant this replacement printer belongs to himself as per the agreement he had with Francois and/or the First Respondent. The very last item to be dealt with is the computer. This item appears to be in dispute. The Second Claimant testified that he had leased a computer to the First Respondent. He added that if this item was replaced then the replacement computer would belong to him.

[20] Mr Francois De Villiers (the Second Claimant's son) testified that he was the sole member of the First Respondent. At first Francois was employed by the Second Claimant but later he took over the business when the Second Claimant took a decision to retire. Francois confirmed the three agreements referred to by the Second Claimant above and annexed to the papers in this matter. He also confirmed the agreement with the Second Claimant in terms whereof the latter would remain the owner of leased assets and that in the event of any item breaking he had to restore or replace same and that the replaced item remained the property of the Second Claimant.

[21] Francois confirmed in his evidence that all the assets that were attached belong to the Second Claimant. With particular reference to the Edgebounder, the Toshiba copy and fax machine and the Canon printer, Francois confirmed that these were all replacement items that became the property of the Second Claimant as per their agreement. Francois testified that he was present at the time that the Sheriff came to attach the assets. According to Francois at the time there was a complete PC standing on the counter, which was used by the First Respondent. He testified that this PC was stolen during the second burglary subsequent to its attachment. He told the Court that he now uses his personal laptop to conduct business.

[22] He explained that at the time of the attachment, the old decommissioned PC that was rented from the Second Claimant was standing under a counter at the premises, but that this was not the PC that was attached by the Sheriff and it therefore do not form part of the assets in dispute. Francois further explained that since December 2013 he no longer trades

under the First Respondent and that the latter entity is now dormant. He testified that the First Respondent has no assets. Francois now trades under a newly formed registered company.

[23] According to Francois, a new lease agreement was concluded between the newly formed company and the Second Claimant in terms whereof both the premises and the items that were attached are leased. In order to prove that the lease of the assets is not a mere sham, both the Second Claimant and his son Francois confirmed that the rental was paid, but that some indulgences have been granted due to the family relationship between them. Francois also referred to the bank statements that are attached to the papers in this matter evidencing payment of rentals. Strangely the First Claimant presented no evidence. On its behalf Mr Smit rose to announce closure of its case in these interpleader proceedings.

DISCUSSION OF EVIDENCE AND APPLICATION OF LAW

[24] Mr Smit made *inter alia* the following submission:

"Bogenoemde, tesame met my submissie in paragraaf 14 hierbo, bring my by my argument dat die derde huurooreenkoms 'n gesimuleerde huurooreenkoms is, wat nie die ware bedoeling van die partye weerspieel nie. Die ware bedoeling was dat Francois eienaarskap van die goedere kan kry en kan voortgaan om die besigheid te bedryf. Die byvoeging van die twee paragrawe in klousule 15 van die derde huurooreenkoms op 'n latere stadium en nie ten tyde van die aangaan van die huurooreenkoms nie, bewys dit. Die latere byvoeging van hierdie paragrawe maak dit baie gerieflik vir Francois om enige siviele aanspreeklikheid vry te spring tot nadeel van krediteure, meer spesifiek, die Eerste Aanspraakmaker."

I do not necessarily agree with Mr Smit in what he contends *supra*. I undertake, however, to deal with his submissions exhaustively hereunder.

[25] It is of importance that Mr Smit concluded his submission by making the under-mentioned assertion, namely:

"Vanweë die gesimuleerde aard van die derde huurooreenkoms asook die ontbreking van 'n Bylaag 1 tot die derde en huidige huurooreenkoms is dit my submissie dat die bedoeling van die partye tot die derde huurooreenkoms was dat Francois eienaar sal wees van die goedere gelys in paragraaf 8.6 hierbo."

I have not gathered from the written agreement that the Second Claimant had at any stage relinquished ownership of these assets.

[26] As a rule the parties to a contract express themselves in language calculated without subterfuge or concealment to embody the agreement at which they have arrived. Ordinarily the parties would intend the contract to be exactly what it purports and the shape which the contract assumes is normally what the parties meant it should have. It does happen, however, that the parties to a transaction endeavout\r to conceal its real character. The reason may be to secure advantage which otherwise would not legally be accorded to them or even to escape some disability or even liability. As Innes J (as he then was) in ***Zandberg v Van Zyl*** *supra* said:

"They call it by name, or give it a shape, intended not to express, but to disguise its true nature. And when a court is asked to decide any rights under such an agreement, it can only do so by giving effect to what the transaction really is, not what in form it purports to be."

I fully agree with the above. The maxim then really enjoys application, namely *plus valet quod agitur quam quod simulate concipitur.*

All in all the Court must be satisfied that there is a real intention ascertainable which does differ from the simulated intention.

[27] Importantly the agreement(s) between the parties is (are) written in an uncomplicated language. They are written in a rather plain language. It is clearly discernible from these agreements that the understanding and therefore the real intention between the contracting parties, namely, the Second Claimant and his son Francois was that the Second Claimant was not at any stage to relinquish ownership of these attached assets. The uncontested evidence is also that the exceptional item was replaced by the First Respondent or Francois, but that it was always the agreement that such replacements would become the property of the Second Claimant.

[28] I find nothing wrong or suspicious about the aforesaid arrangement particularly if one considers that the Second Claimant cannot resell a broken item if it cannot be restored. Importantly, if it was not for the First Respondent's need to use the items, the Second Claimant could have either sold it and received some value for or kept it. In my view, the agreement is in place to prevent any loss to the Second Claimant. It must be borne in mind that the evidence of the Second Claimant regarding the purchase of these assets could not seriously be challenged.

[29] The only other issue raised with both witnesses who testified in the instant matter was when the terms in clause 15 of the written agreement of 13 August 2009 was inserted. It is common cause that it was put to both the Second Claimant and Francois that it seems that: (a) this clause 15 was not initialed by two witnesses; (b) had the first sub-clause been inserted on 13 August 2009 when the agreement was signed initially, the two signatures currently reflected at the handwritten insertion would have

been found next to or shortly after the first sub-clause. This is actually what Mr Smit is referring to in his quoted submission. Based upon the above reasoning Mr Smit for the First Claimant told the Second Claimant and Francois in cross-examination that it seems that the entire clause was inserted at some time after the attachment. Mr Smit also claimed that at some stage prior to the insertion the First Respondent had become the owner of the assets.

[30] It remains of importance to note that both the Second Claimant and Francois denied the above and confirmed that the first sub-clause to clause 15 was inserted at the time when the lease agreement was concluded. According to these two witnesses, the second sub-clause was inserted on about 1 October 2010 when the two decided to renew the lease agreement. According to these two witnesses it was then that they both signed next to the later insertion.

[31] I need to re-iterate that the inference sought to be drawn by Mr Smit on behalf the First Claimant is also not supported by the evidence because: (a) Both witnesses told the Court that the second sub-clause was inserted on about 1 October 2010. It must be remembered that the attachment took place on 22 August 2013; (b) The parties similarly did not effect or append their initials to clause 2 and 3 of the same agreement; (c) If one compares the similar clause 15 in the lease agreement of 17 October 2006 it emerges that that clause was also not initialed by the parties; and (d) If one compares the handwritten insertions at clause 15 (c) of the agreement concluded between the Second Claimant and Francois on 17 October 2008, one will find that no initials appear next to it.

[32] In my view, the parties merely did not find it necessary to initial next to each and every handwritten insertion. Notably Francois confirmed that, due to the father and son relationship, they did not find it necessary to have an addendum that was inserted as the second sub-clause to clause 15 initialed by two witnesses. I accept this as a perfectly logical explanation. The evidence presented before me is sound and cogent. The Second Claimant's version is not only corroborated by the testimony of Francois, but it also finds support in the various lease agreements signed between these parties. In my view, the Second Claimant has produced credible and satisfactory evidence to demonstrate that he is indeed the owner of the items attached by the Sherriff. The First Respondent and/or Francois never acquired ownership over these assets. The First Respondent and/or Francois could have acquired ownership of these items if they exercised the option given to them to buy them for an amount of R200 000.00. There is no proof that this payment was ever made to the Second Claimant. In fact it appears that it was hardly contemplated by the First Respondent and/or Francois. Therefore, the presumption set forth supra has successfully been rebutted by the Second Claimant's credible evidence.

[33] Except perhaps for the PC, I hold that all the assets attached by the Sheriff still belong to the Second Claimant. There is sufficient satisfactory evidence tendered. The Second Claimant is a particularly careful person. I say so because he was able to produce documentation in the form of invoices to prove the ownership of his movable assets. It is only in respect of one or two items that the invoices to substantiate his ownership had reportedly gone missing. Even in the latter instance, satisfactory evidence was forthcoming from the Second Claimant to enable this Court to make a finding that he is indeed the owner of those

items also. Importantly, the Second Claimant is in law competent (by reason that he is owner) under the *rei vindicatio* to demand his property from anyone who cannot invoke a right against him as owner to keep the property. See: ***Hefer v Van Greuning*** *supra*.

COSTS

[34] It is trite that a successful party is entitled to recover its costs. As mentioned by Mr Walters it would appear that the First Claimant was at some stage furnished with an Affidavit in which the Second Claimant asserted ownership in detail. In this Affidavit the various invoices proving how the Second Claimant acquired ownership were attached as annexures. This matter should have been settled at that stage. It is simply beyond my comprehension that despite this, the First Claimant chose to persist with the interpleader proceedings. When the matter was a fully blown hearing before the Court, the First Claimant surprisingly chose to present no evidence. I do not find it strange that Mr Walters contended that it would be unreasonable to expect an innocent party such as the Second Claimant (who is a pensioner) to bear the costs of this litigation.

ORDER

[35] In the circumstances I make the following order:

(a) The Second Claimant is hereby declared the owner of all the movable assets attached by the Sheriff and enumerated in the schedule save for the PC.

(b) The First Claimant shall pay the costs of the Second Claimant associated with these interpleader proceedings.

DLODLO, J

APPEARANCES:

For the Applicant	:	NO APPEARANCE
For First Claimant	:	**ADV. E. SMIT [021] 422 5948**
Instructed by	:	C & A Friedlander Attorneys
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For Second Claimant	:	**ADV. A. WALTERS [021] 424 4104**
Instructed by	:	Hickman Van Eeden Phillips Inc.
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