A In my opinion Mr *Van der Merwe*'s contention that a transfer of personal rights constitutes a disposition for the purposes of the Insolvency Act, is correct.

I hold accordingly that for the purposes of the Insolvency Act 24 of 1936 the disposition of both the residence and the plot by the insolvent
B to the first defendant took place on 21 May 1992, ie the date when the written contract of purchase and sale was entered into. The costs of the stated case shall be costs in the cause, as the parties have agreed.

C

D # VRYSTAAT MOTORS v HENRY BLIGNAUT (EDMS) BPK

APPELLATE DIVISION

CORBETT CJ, VAN HEERDEN JA, VIVIER JA, MARAIS JA and VAN COLLER AJA

E 1995 November 6, 27 Case No 145/94
1996 (2) SA 448 (A)

Appeal from a decision in the Witwatersrand Local Division (Van Schalkwyk J). The facts appear from the judgment of Van Heerden JA.

F *J Lubbe SC* for the appellant.
C van der Spuy for the respondent.

Cur adv vult.

Postea (November 27).

G

Van Heerden JA: During February 1993 the appellant brought an application against the respondent in the Witwatersrand Local Division. He claimed *inter alia* payment of the sum of R97 000. The relevant allegations in the founding affidavit may be summarized as follows:

H (1) On 26 May 1992 the appellant had bought four light trucks from the respondent at a purchase price amounting in total to R97 000. (For the sake of convenience I shall refer to these vehicles as 'the Toyota' and 'the other three light trucks'.) The appellant had paid the total purchase price and the vehicles were delivered to him on the following day.

I (2) In the course of a conversation over the telephone on 8 June it was agreed that the purchase of the Toyota would be cancelled because, *inter alia*, its engine was in a bad condition, and that the respondent would give a cheque for the purchase price concerned (R23 250) to appellant's driver who would return the Toyota to
J respondent's business premises in Germiston.

(3) The vehicle had been returned on 10 June, but respondent failed to give the cheque to the driver.

(4) After respondent had failed to comply with a number of promises, he informed the appellant that the Toyota was possibly a stolen vehicle and that the parties first had to await the completion of a police investigation. Appellant thereupon caused a summons to be issued against the respondent in the Orange Free State Provincial Division. He claimed payment of the sum of R23 250 in terms of the alleged contract of 8 June.

(5) The other three light trucks had in the course of time (it must have been prior to 17 July) been sold and delivered to three different persons. At the said date the appellant was informed by warrant-officer Abrams that the three light trucks were presumably stolen vehicles and that he wanted to attach them in order to inspect them. Consequent upon a subsequent arrangement between appellant and Abrams two of the vehicles were inspected in Bloemfontein and the other one in Cape Town. **[454]** This led to the attachment of the three light trucks in terms of s 20 of the Criminal Procedure Act 51 of 1977 ('the Act').

(6) On 27 July the appellant refunded the purchase prices of the three light trucks to the three purchasers, the contracts of sale having been cancelled by agreement.

(7) Prior to the completion of the police investigation, appellant's attorney wrote to respondent's attorney on 24 November, requesting respondent to assist the appellant in the latter's attempt to regain possession of the light trucks. A letter by appellant's attorney to the police was enclosed. In this letter the return of all four light trucks was claimed in terms of s 31(1) of the Act in view of the lengthy period of time which had elapsed since July. The respondent, however, refused to cooperate in any way.

(8) Subsequently the appellant's attorney received a letter, dated 11 December, from the police. In this letter the following was *inter alia* said:

> 'Despite the fact that all facets of the investigation have not been completed, it is already at this stage evident that the said vehicles have been stolen and remain stolen property and that your client may not lawfully possess them. (In this connection you are respectfully referred to the provisions of s 31 of the Criminal Procedure Act 51 of 1977 read with the judgment of Van Heerden JA in *Minister van Wet en Orde en 'n Ander v Datnis Motors (Midlands) (Edms) Bpk* 1989 (1) SA 926 (A).)
>
> Although the South African Police, for fear that the investigation and subsequent prosecution may be hampered, will not provide you with full particulars, it may be mentioned that the code numbers appearing on the vehicles, do not belong to the vehicles. Signs of tampering in the vicinity of the numbers are clearly visible. As the same false numbers also appear on the registration documents, the conclusion can hardly be avoided that the vehicles have been stolen and remain stolen property.
>
> Under these circumstances the grounds on which your client's claim is based, do not take the matter any further and I regret to inform you that the vehicles will not be returned.'

(The contents of this letter have been confirmed in a separate affidavit by a police official.)

It should be mentioned that although the appellant does not expressly say so, it is clear that the letter of 11 December also related to the Toyota. As I shall show later, this light truck was also attached by the police.

In summary the appellant's claim for the refunding of the total purchase price is based on the premise that, in view of the theft of the light trucks, the appellant will not regain their possession and has therefore been evicted.

In his opposing affidavit the respondent in the first place relied on clause 2 of the conditions of sale contained in a written document signed by the parties when the four light trucks were purchased. It reads as follows:

'I (the appellant) agree that the owners (the respondent) have given no warranty whatever as to the state, condition or quality of the vehicle, or as to its fitness for any purpose and any implied warranty is expressly excluded and the vehicle is sold "voetstoots".'

As far as the Toyota is concerned, the respondent denied that it had undertaken to refund the purchase price to appellant. It was alleged that it had only been agreed that the respondent would repair the vehicle after its return to respondent's premises. Shortly after its return the police attached the Toyota on the ground that it was a stolen vehicle and subsequently retained the possession thereof.

The respondent further alleged that it had purchased the four light trucks in May 1992 from Markos Investments CC ('Markos') as 'vehicle status number 3' vehicles, ie reconditioned vehicles which had again been registered. Relying on a number of documents, the respondent tried to create a doubt regarding the allegation by the police that the four light trucks had been stolen.

In its replication the appellant relied *inter alia* on an affidavit by Abrams who was a lieutenant at that stage. In summary he says that he has been involved in a comprehensive investigation in respect of 160 vehicles. This investigation concentrated on the large scale theft of especially light trucks by a theft syndicate. Three suspects have already been arrested and are awaiting trial. The false code numbers of the four light trucks in question, which are obviously part of the 160 vehicles, originally belonged to vehicles which are at present total wrecks. The four light trucks are not those wrecks in a reconditioned form and there are further signs of tampering in the vicinity of the code numbers. The same false numbers also appear in the registration documents of the four light trucks. What therefore happened was that after the four light trucks had been stolen, their code numbers were falsely substituted by the code numbers of the wrecks and they were registered with these false numbers.

In the Court *a quo* the respondent apparently relied on various grounds in submitting that the application had to be dismissed. One of the grounds was that even if the appellant had been evicted, the respondent was, in view of the provisions of the abovementioned clause 2 of the conditions of sale, not obliged to refund the purchase sum to the

appellant. The Court held that much was to be said for the construction that the words 'any implied warranty' also covered an implied warranty against eviction. For reasons which are not clear to me, it was further held that, even if the correct interpretation of clause 2 were doubtful, it had been foreseeable that a factual dispute concerning its interpretation could arise, which dispute could only be settled by hearing oral evidence. The application was consequently dismissed with costs. Leave was subsequently granted to the appellant in terms of s 21(2), read with s 20(4)*(b)*, of the Supreme Court Act 59 of 1959, to appeal against the said order to this Court.

It is expedient to commence by noting the effect of clause 2 of the conditions of sale. Even if one were to suppose that it excludes liability for eviction, it would be of no avail to the respondent. A number of our old authors, with reference usually to D 19.1.11.18, are of the opinion that a term which excludes a seller's liability for eviction does not stand in the way of **[456]** the evicted purchaser's claim for repayment of the purchase price. Such a term only entails that the purchaser cannot also recover damages. See *inter alia* Van Leeuwen *CF* 1.4.19.14; *Voet* 21.2.31; *Groenewegen* n 20 on *De Groot* 3.14.4; Matthaeus *De Auctionibus* 1.14.5, and Van der Keessel *Praelectiones* Th 640. *Van Nieustad en Kooren* judgment 68 refer also to a case of the Hoogen Raad van Holland, Zeeland en Wes Friesland which is to the same effect. And in *Alpha Trust (Edms) Bpk v Van der Watt* 1975 (3) SA 734 (A) at 745–6 reference has with apparent approval been made to most of these sources.

Voet's reason for the partial unenforceability of the term concerned is that 'a *bonae fidei* contract does not admit of this covenant that the purchaser should lose the thing and the seller should keep the price'. (*Gane's* translation volume 3 at 686.) Pothier *Contract of Sale* reasons in a somewhat similar way as follows:

> '. . . (A)s the buyer is not obliged to pay and does not in fact pay the price, but in consequence of the seller's promise to cause him to have the thing, if the seller does not fulfil this promise, the cause for which the buyer pays the price no longer subsists, and the seller, being in possession of it without cause, is consequently bound to restore it.'

(*Cushing's* translation at 115.)

In his supplementary heads of argument counsel for respondent nevertheless submitted that this Court should not follow the above rule. It was in the first place submitted that *Schorer* had adopted the opposite view (note CCCL on *De Groot* 3.14.6). However, the reliance on *Schorer* is totally misconceived. In the note concerned he does in fact not refer to a term excluding liability for eviction, but indeed to the case where the purchaser is aware that the thing does not belong to the seller and fails to see to it that the contract of sale contains a term *expressly* protecting him against eviction. In such a case, *Schorer* says that some authors are of the opinion that if the purchaser is evicted, he may nevertheless reclaim the purchase price from the seller, but that the Hof van Mechelin and the Raad van Brabant have held otherwise.

The reliance by Morice *Sale in Roman-Dutch Law* at 130 on *Schorer* is also misplaced and in passing it may be mentioned that after considering numerous common law authorities Roberts AJ held that even in the case

A referred to by *Schorer*, the purchaser could in general reclaim the purchase price. In *Van der Westhuizen v Yskor Werknemers se Onderlinge Bystandsvereniging* 1960 (4) SA 803 (T), he formulated the following legal rule (at 812A–B):

'Where a puchaser buys a *res aliena* knowingly, in good faith and without
B indicating expressly or by his conduct that he is entering into an *emptio spei,* then, if evicted, he is entitled to reclaim the purchase price, but may not claim the *id quod interest.*'

Mackeurtan *Sale of Goods in South Africa* 5th ed at 172 n 3, and Norman *Purchase and Sale in South Africa* 4th ed at 291, also indicate that *Schorer* deviates from the above point of view of *Voet et al.* However, they
C go further in relying also on *De Groot* 3.14.6. But this text deals even less than *Schorer's* note with a term **[457]** excluding liability for eviction. As far as I could ascertain, there is no common law author who doubts the said point of view.

As far as modern authors are concerned, the point of view is accepted
D as trite law by Wessels *The Law of Contract in South Africa* 2nd ed volume 2 para 4602 and De Wet en Van Wyk *Kontraktereg en Handelsreg* 5th ed volume 1 at 331–2.

While not doubting the above common law position, Mostert *Uitwinning by die Koopkontrak in die Suid-Afrikaanse Reg* (unpublished thesis) volume 1 at 358 and volume 2 at 472–3, is, however, of the
E opinion that it should not be followed today. (See also Mostert, Joubert en Viljoen *Die Koopkontrak* at 154 and Mostert in 1968 *Acta Juridica* at 52.) His main argument—which was initially also relied on on behalf of the respondent—is that the rule in terms of which the seller is usually liable for eviction, belongs to regulatory law, and that
F there is therefore no reason in logic why the parties to a contract of sale cannot exclude same.

The short answer to this argument is, of course, that, according to the common law approach, the rule that the seller is, in case of eviction, obliged to repay *the purchase price*, does not form part of regulatory law.
G However, it must be confessed that the reasons for this legal position are not fully satisfactory in logic. As has often been said, the law is not always completely logical: cf *Du Plessis NO v Strauss* 1988 (2) SA 105 (A) at 143H–I. And it is certainly not unfair that a purchaser who has been evicted, may, even where the said term is present, claim the purchase price—but not damages as well—from the seller. Indeed, the purchaser
H undertakes to pay the purchase price expecting not to be evicted.

There is therefore no compelling reason why this Court should deviate from a rule unanimously accepted by our old authors and moreover applied by the Hooge Raad. Counsel for respondent conceded this at the end of his oral argument. Consequently respondent could not on the
I ground of clause 2 of the conditions of sale, in its supposed meaning, defend itself against appellant's claim for repayment of the purchase price.

Eviction usually occurs when the purchaser is deprived of the *res vendita* in whole or in part, either because the seller has not been the owner thereof or because his ownership has been limited. The classical
J example of eviction is of course the one where the purchaser, at the

insistence of the true owner, delivers the thing to the latter. The question now arises whether and, if so, when the attachment of a thing in terms of s 20 of the Act amounts to eviction. A

Section 31(1)*(a)* and *(b)* of the Act reads as follows:

'(1)*(a)* If no criminal proceedings are instituted in connection with any article referred to in section 30*(c)* or if it appears that such article is not required at the trial for purposes of evidence of for purposes of an order of court, the article shall be returned to the person from whom it was seized, if such person may lawfully possess such article, or, if such person may not lawfully possess such article, to the person who may lawfully possess it. B

(b) If no person may lawfully possess such article or if the police official charged with the investigation reasonably does not know of any person who may lawfully possess such article, the article shall be forefeited to the State.' C

Section 30*(c)*, referred to in s 31(1)*(a)*, deals with an object which has been attached in terms of s 20 and which has remained in the custody of, or on behalf of, the police, as was the case with the four light trucks in question.

In terms of s 32 similar provisions apply when criminal proceedings in connection with the object are instituted and the accused admits guilt in terms of the provisions of s 57. D

Section 34(1) applies to the termination of criminal proceedings instituted in connection with an object intended in terms of s 33. Such an object is one mentioned in s 30*(c)* and which is needed at a criminal trial for purposes of evidence or of an order of court. Subject to a proviso which is irrelevant for present purposes, s 34(1) provides that the judge or judicial officer presiding at criminal proceedings shall, at the end thereof, order that such object: E

'*(a)* be returned to the person from whom it was seized, if such person may lawfully possess such article; or F

(b) if such person is not entitled to the article or cannot lawfully possess the article, be returned to any other person entitled thereto, if such person may lawfully possess the article; or

(c) if no person is entitled to the article or if no person may lawfully possess the article or, if the person who is entitled thereto cannot be traced or is unknown, be forfeited to the State.' G

(Such order may also be made at a later stage: s 34(3).)

In *Minister van Wet en Orde en 'n Ander v Datnis Motors (Midlands) (Edms) Bpk* 1989 (1) SA 926 (A) at 933–4, it was held that a stolen object could not, in terms of s 31(1), be returned to the otherwise innocent person who had been deprived of the possession thereof by an attachment in terms of s 20, if he had become aware of the theft. (For the sake of convenience I use the words 'stolen object' to indicate an object the theft of which at an earlier stage continued to the date of attachment, or, as was said in the *Datnis* case, an object which had been stolen and remained stolen.) The reason is that such person may not lawfully possess the object. The above obviously also applies to s 32(1) and s 34(1). But even if the said person could lawfully possess the object, it may in terms of s 34(1) only be returned to him if he is entitled thereto. H I

A purchaser of an object subsequently attached in terms of s 20 as presumably stolen, is obviously not evicted by the mere attachment. The object could perhaps be returned to him. It is just as obvious that a J

A purchaser has in fact been evicted if the object has been forfeited to the State in terms of s 31(1)(b) or s 32(2) or s 34(1)(c) or has been returned to someone else—usually the owner. But is it expected of the purchaser to wait for an indefinite period after the attachment **[459]**, which may be years, before he may sue the seller on the ground of eviction because B such forfeiture or return has taken place? I do not think so. As soon as it appears that the object sold will not be redelivered to the purchaser—or to someone who has acquired a right to possession through him—the purchaser is evicted since his temporary loss of possession of the object resulting from the attachment has now become permanent. In other words, he has now been permanently deprived of the thing, either by the C State or by the person to whom the object is to be returned.

It follows from the above that the appellant had to show in the first place that the four light trucks were indeed stolen objects. I have already referred to statements by police officials that the light trucks were stolen vehicles, because, *inter alia*, they had false code numbers; there were D signs of tampering in the vicinity of the numbers; and the same false numbers also appeared on the registration documents concerned. (The words 'code numbers' obviously refer to machine and chassis numbers.) In his opposing affidavit the respondent tried to counter any suggestion that the light trucks had been stolen by relying *inter alia* on attached motor vehicle clearance forms ('clearance forms'). As already men- E tioned, the respondent in his turn purchased the four light trucks from Markos and presumably these forms had been obtained by the latter from the police in order to have the vehicles reregistered. All that appears from the forms is that the light trucks with certain code numbers, and in three cases with certain registration numbers, have not been *reported* as F stolen to the police. This does not mean that they have not in fact been stolen. In the first place the owner could have failed to report the theft. Secondly, if the code numbers of the four light trucks delivered to appellant had been forged, the theft of vehicles with those numbers would naturally not have been reported. I shall later refer in greater detail to the particulars appearing on the forms.

G As far as the three other light trucks are concerned, the respondent further relied on attached documents having the following caption: 'Notice of theft or permanent unsuitability of registered motor vehicle' (hereinafter referred to as 'documents of notification'). These documents have apparently, in view of the provisions of the Road Traffic H Ordinance 21 of 1966 (N), been completed by three persons in connection with three light trucks, been signed and handed to the police. A document of notification which has not been completed makes provision for notifying that a vehicle has been stolen ('reason (a)') or has permanently become unsuitable for use as a motor vehicle ('reason (b)'), I and contains two squares in which the person giving the notice may indicate by a mark, such as a cross, which reason is applicable.

The first document of notification concerns a light truck ('light truck (1)') with registration number NP 30145 and both squares have been marked with a cross. The relevant date, as far as both reasons for notification are concerned, is stated to be 1 January 1992 and one is J given to understand that the theft of that light truck had on that day been

reported to the Hilton police. Under square (b) the following appears in handwriting: 'Accident/Wright [460] off'. (The word 'Wright' is probably the result of a spelling error where 'Write' was intended.) The only acceptable conclusion is either that the person giving the notice marked square (a) *per errorem* or that the light truck had in fact been stolen and was involved in an accident—probably when it was driven by the thief or his accomplice. Be that as it may, in the document dated 21 January 1992 it is stated that the registration certificate of the light truck has been annexed.

One of the invoices of Markos refers to a vehicle with registration number NP 30145, ie the same as the one appearing on the abovementioned certificate of notification and on one of the clearance forms. The invoice, however, does not mention any code numbers. The engine number on the certificate of notification differs totally from such number appearing on the clearance form in question, as well as from the engine number of each of the four light trucks delivered to the appellant.

The second certificate of notification refers to a light truck ('light truck 2') with registration number NR 10155. As appears from an invoice of Markos a light truck with this registration number had been sold to the respondent on 22 May 1992 and according to the latter this is one of the other three light trucks which have again been sold to the appellant. The invoice makes no mention of any code numbers but both the engine and chassis number of vehicle NR 10155 have been filled in on the certificate of notification and correspond to that of a second light truck of the three light trucks delivered to appellant. The same numbers also appear on one of the clearance forms and the registration number on that form is also NP 10155.

Only square (a) has been marked on the second certificate of notification and the relevant part of the document indicates that light truck 2 had been stolen on 11 November 1991 and that the theft had been reported to the Howick police. Under square (b), however, the following appears in handwriting: 'Vehicle burnt out back.' This causes one to wonder whether the owner did not intend to report the light truck as permanently unsuitable rather than as stolen. If one now takes into consideration that the person making the report on the document also indicated that the registration certificate in question had been annexed, which probably only needs to be handed in when notification takes place for reason (b); that the code numbers and the registration number mentioned in the second document of notification are the same as those appearing on one of the clearance forms; and that it is indicated on that form that a vehicle with the said numbers had not been reported stolen, it is to me more acceptable that light truck 2 had been reported on the form of notification as permanently unsuitable rather than as stolen.

This brings me to light vehicle 3. According to the third document of notification its registration number is NIX 2293. This number also appears on one of the invoices of Markos, dated 22 May 1992, and on one of the clearance forms, and according to the respondent the light truck referred to is one of the other three delivered to the appellant. The code numbers of one of those light trucks correspond to those mentioned in the clearance form and the engine number of that light truck

corresponds to the one filled in **[461]** on the third document of notification. (In that form no mention is made of a chassis number while the invoice contains no particulars about the code numbers.) The reason for making the report clearly appears from the document of notification, viz permanent unsuitability for use as a motor vehicle. The cause of the unsuitability reads as follows: 'involved in an accident, damaged beyond repair'.

According to a fourth invoice of Markos, dated 7 May 1992, a further light truck was sold to the respondent. The invoice makes no mention of code numbers but only of a Transvaal registration number which had apparently been allocated when the vehicle was reregistered. On the clearance form on which the respondent relies no registration number appears; in the appropriate space there has only been filled in 'For Right' (apparently meaning 'for registration'). The code numbers on the clearance form are, however, the same as those of the Toyota delivered to the appellant.

As far as the Toyota is concerned, the respondent did not annex a document of notification but relied on a document purportedly issued by the KwaZulu Department of Finance on 16 October 1991. According to this document a light truck ('light truck 4') had been sold to an unnamed person at a so-called 'Kwazulu redundant motor vehicle sale' on 16 October 1991. The document makes no mention of a registration number or of the condition of the vehicle but the code numbers appearing thereon are the same as those of the Toyota delivered to the appellant.

In summary, it is the respondent's case that light trucks 1 to 4 are the same light trucks which, albeit rebuilt to a certain extent, were delivered to the appellant. Supposing the documents on which respondent relies to be admissible in his favour, they, however, do not prove that the four light trucks delivered to the respondent had not been stolen. The opposite seems to be true. Assuming that light truck 1 has been reported stolen and is one of the abovementioned four light trucks, the position is that light truck 1 had been sold by Markos to the respondent four months after the notification mentioning the same registration number (NP 30145) and was a few days later sold and delivered, with a false engine number, by the latter to the appellant. In view of the short period of time, I find it improbable that the police would have traced and returned light truck 1, after the theft and falsification of the engine number, to its Natal owner and that the latter subsequently sold it in such a way that it came into the possession of Markos in the Transvaal prior to 22 May 1992. In short, on the above supposition, light truck 1 was a stolen object when it was delivered to the appellant. If, however, this light truck was merely reported as permanently unsuitable, the same applies to it as is said below concerning light trucks 2 and 3.

The latter two light trucks were practically wrecks at the time of the respective notifications. This fits Abrams' description of the *modus operandi* of the syndicate, viz to substitute the code numbers of stolen vehicles by those of wrecks. And if light trucks 2 and 3 had been acquired after the notification by Markos or by someone else who innocently rebuilt them, it would of course not have been necessary to tamper in the

vicinity of their code numbers. The indications are therefore that light trucks 2 and 3 are not the same light trucks as **[462]** those with corresponding code numbers delivered to the appellant but that the latter light trucks were stolen objects, the code numbers of which had been falsely substituted with those of light trucks 2 and 3.

The documents on which the respondent relies and which refer to light truck 4 do not throw much light on its vicissitudes. However, it is somewhat strange that Markos' invoice which is applicable to light truck 4 according to the respondent, does not contain any code numbers and also not the previous Natal registration number. Be that as it may, one does not know whether light truck 4 had already practically been a wreck at the time of the auction or whether it subsequently became one, and if this light truck had merely been rebuilt by an innocent person after the auction, it would, as in the case of light trucks 2 and 3, have been equally unnecessary to tamper in the vicinity of the code numbers thereof. The tampering which in fact occurred in the vicinity of the Toyota's code numbers suggests that it was a stolen vehicle and that this vehicle's original code numbers have falsely been substituted with those of light truck 4.

The matter is further settled by Abrams. As I have already indicated, he says that the code numbers of the four attached light trucks are those of other vehicles which have become total wrecks and that the four light trucks could not, prior to any possible rebuilding, physically have been such wrecks; in other words that the code numbers of the four light trucks have been falsified. We further know that the machine numbers, and in two cases also the chassis numbers, of three of the light trucks delivered to the appellant, are the same as those of light trucks 2, 3 and 4. The notifications in respect of light trucks 2 and 3 and the auction sale of light truck 4, as well as the theft of light truck 1 (if it had in fact been stolen), had occurred in Natal between October 1991 and March 1992, and if they are the same vehicles as those delivered to the appellant, all four must rather fortuitously have come into the possession of Markos in the Transvaal prior more or less to 22 May 1992.

In view of all the above considerations I do not think that it can realistically be said that the four light trucks delivered to the appellant had at an earlier stage been stolen; that their code numbers had then been falsified and that they were subsequently returned to their owners; and that due to later alienations by their owners, Markos eventually required all four. To summarize: it is probable that the four light trucks in question are stolen objects.

In passing it should be mentioned that the fact that light truck 1 was reported as stolen—assuming that this was indeed the case—does not necessarily cast a doubt on Abrams' statement that the false code numbers of the four light trucks which have been attached were those of four wrecks which could not have been built up to the light trucks delivered to the appellant. I say this because light vehicle 1 could, of course, after the presumed theft as the result of, let us say a collision, have become a wreck.

Counsel for the respondent contended, however, that Abrams did not expressly say where he got the information that the code numbers

A referred to by him had at a prior stage been those of total wrecks and that the light trucks which had been attached could not have been those wrecks which had been rebuilt. **[463]** That is so, but it does not mean that Abrams' statement is not based on personal knowledge or that the evidence in question could only have been given by an expert—which
B Abrams possibly is not. So, for instance, it is not far-fetched that Abrams could personally have inspected the four light trucks and that his observations were those which even a layman could have made. And if the respondent had doubts about the admissibility of the relevant statements of Abrams, it could have applied for leave to have Abrams give oral evidence or to submit a further appropriate affidavit.

C It was also contended on behalf of the respondent with reference to the decision in *Westeel Engineering (Pty) Ltd v Sidney Clow & Co Ltd* 1968 (3) SA 458 (T) that even if the attached light trucks were stolen objects the appellant had not been evicted in respect of those light trucks (with the exception of the Toyota). This reference is misplaced. In *Westeel* there
D was no eviction of—or a threat of eviction against—the final purchaser of a thing who was in possession thereof at a stage when his indirect predecessor paid an amount equal to the alleged value of the thing to the owner thereof. It was therefore held that the predecessor had also not been evicted. (See also *Louis Botha Motors v James and Slabbert Motors (Pty) Ltd* 1983 (3) SA 793 (A).) In the present case the contracts of sale
E of the other three light trucks had, however, been cancelled before it became evident that they were stolen objects. After the cancellations the three purchasers therefore no longer had any interest in the three light trucks. Had it not been for the cancellations, the three light trucks would not have been returned to the three purchasers because they would
F probably have been informed that the light trucks were stolen objects and could therefore not lawfully have obtained possession of them. Because of the cancellations the appellant became entitled to the possession of the three light trucks as against the three purchasers. He is, however, aware of the thefts and there is no possibility of the light trucks being released from attachment and delivered to him. In short, after the
G cancellations no one but the appellant had a claim to the three light trucks by virtue of a title which could directly or indirectly be linked to the contract of sale between him and the respondent and the said claim has been frustrated by the provisions of the Act. The effect is that the appellant has therefore been evicted.

H It is still necessary to take a closer look at the question of eviction as far as the Toyota is concerned. It will be recalled that this vehicle was attached on the premises of the respondent after, according to the appellant, the sale thereof had been cancelled and it had been returned to the respondent. If this is so, there could of course be no question of
I eviction of the appellant in respect of the Toyota. The respondent, however, denies the appellant's allegations. According to the former the sale had not been cancelled and it possessed the Toyota on behalf of the appellant at the time of the attachment. If this was the case, the appellant was in view of the above of course evicted. It therefore follows that whichever of the above conflicting allegations is the correct one, the
J appellant is entitled to repayment of the purchase price of the Toyota,

albeit on different grounds. It should further be said that respondent's counsel correctly did not rely on the defence of *lis alibi pendens* [464] concerning the action which the appellant had instituted before he brought the application for repayment of the purchase price concerned.

The appeal succeeds with costs and the order of the trial court is substituted with the following:

'The application succeeds with costs and the respondent is ordered to pay the sum of R97 000 as well as *mora* interest at 18,5 % *per annum* to the applicant.'

Corbett CJ, Vivier JA, Marais JA and Van Coller AJA concurred.

LESATI BOERDERY BPK v ADEN LANDGOED BK EN 'N ANDER

TRANSVAAL PROVINCIAL DIVISION

PREISS J, LE ROUX J and MYNHARDT J

1994 June 15 Case No A841/93

1996 (2) SA 482 (T)

Appeal from a decision of a single Judge in the Transvaal Provincial Division (Joffe J). The facts appear from the judgment.

F Bezuidenhout for the appellant.
E Bertelsmann SC for the first respondent.

Le Roux J: This appeal deals with a dispute which has arisen between the owners of two farms in the former North-West Transvaal concerning the erection of a give-and-take line between their properties as well as with the type of fence which should be erected on the new give-and-take line.

The two farms are the farm Aden belonging to a close corporation, Aden Landgoed CC, as represented by its only member and director, Mr L J van Tonder, and the farm Leniesrus belonging to Lesati Boerdery CC of which Mr L H Joubert is the member and representative in this case.

Because the parties appeared in various capacities during a number of law suits which eventually led to this appeal, I shall in this judgment, for the sake of clarity, refer to them as 'Aden' and 'Lesati' respectively.

The two farms have as one of their common borders the Mogalakwena River. This border covers a distance of 2,4 kilometres and runs according to the Deeds Office in the middle of the river. The river is, however, not perennial although it does at times flow after rain and it is common cause