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SWAZILAND HIGH COURT

Jones General Suppliers (Pty) Ltd
Plaintiff

Mocambique Hotel and Restaurant (Pty) Ltd
Defendant

Civ. Case No. 2150/99

Coram

SAPIRE, CJ

For Plaintiff
For Defendant

S.C. Simelane
L. Khumalo

JUDGMENT (04/07/2000)

The plaintiff says in its particulars of claim that during 1995 and at Manzini represented by Thembisa Matsebula entered into a written agreement of lease in terms of which the defendant let to the plaintiff a shop at the premises at the address given. In terms of the lease agreement, the rental was to payable monthly. In the event, the rental was not paid on due date or remained unpaid for 14 days the defendant was entitled to cancel the lease forthwith and retake possession of the premises. The plaintiff agreed to these conditions and took occupation.

The plaintiff fell into arrears and the defendant ejected the plaintiff by locking it out of the premises and taking into its possession the fittings, stock, books of accounts and furniture in the premises the value of which is E73 500. All this without an order of court.

It is alleged that defendant as land lord did not institute any eviction proceedings. The plaintiff claims in the premises that defendant is truly and

lawfully indebted to the plaintiff in the sum of E73 000.00 which amount is said to be due and owing.

The plaintiff's cause of action is essentially that the defendant has taken possession of and remained in possession of the plaintiff's goods. It is a species of "wrongful holding over"

The provisions of the lease are irrelevant. On the other hand, a purchase of the goods cannot be forced upon the defendant. The plaintiff has not asked for return of its goods, which *prima facie* is the relief to which the plaintiff may be entitled. The plaintiff has not alleged that the defendant has refused to hand the goods, or that he has incapacitated himself from doing so.

The history and present application of the *actio ad exhibendum* and the *actio re vindicatio* are described in *Law of South Africa Vol 27* as follows

In Roman law the *actio ad exhibendum* was usually instituted in conjunction with the *rei vindicatio* to compel the possessor of a thing which was to be vindicated to produce it. If the defendant produced the thing, the *rei vindicatio* was proceeded with. If he did not produce the thing he was ordered to compensate the plaintiff for its value. In addition, this action could be brought against a defendant who had fraudulently ceased to possess the thing to recover its value. In this sphere the *rei vindicatio* and the *actio ad exhibendum* overlapped. In Roman-Dutch law the *actio ad exhibendum* was regarded as an action for compensation which could be instituted against a thief or any other *mala fide* possessor who had fraudulently alienated, consumed or destroyed the thing. Voet based this action on the fraud of the *mala fide* possessor and laid down that the measure of compensation to be paid had to be equal to the value of the thing. In South African law the *actio ad exhibendum* has been accepted as a general action against a *mala fide* possessor. It is not only available against a *mala fide* possessor who has alienated, consumed or intentionally destroyed the thing but also against any possessor who has treated the thing in the above manner after he has become aware of the title of the owner. *Mala fides* has been held to be the very basis of liability under the *actio ad exhibendum*; it must consequently be alleged and proved by the plaintiff. Whether mere awareness by the defendant of his own tainted title suffices or whether he must have been aware of the plaintiff's claim to the property at the time of parting with his possession is unclear.

The courts do not distinguish clearly between the fields of application of the *rei vindicatio* and the *actio ad exhibendum*. This confusion can be traced back to Voet where the *rei vindicatio* instead of the *actio ad exhibendum* was granted where a possessor had fraudulently alienated a thing after he had become aware of the owner's title. Strictly speaking, the *rei vindicatio* as a reipersecutory action should only be applied where the thing still exists and is in the possession of the defendant. If the thing has been alienated, destroyed

or consumed, the actio ad exhibendum should be applicable. Because of the close connection of the two actions the actio ad exhibendum is sometimes employed erroneously to claim restoration of the thing or its value. The actio ad exhibendum should rather be treated as a true delictual action aimed at compensating the plaintiff for patrimonial loss. The amount of compensation should be calculated in accordance with the value of the thing at the moment the delict was committed, that is, at the moment when the thing was consumed, destroyed or alienated.

If a mala fide possessor has alienated a thing, the owner can institute the rei vindicatio against the possessor and an actio ad exhibendum against the lienor. The rei vindicatio need not necessarily be instituted first in such circumstances. In cases where it is difficult to trace the thing the actio ad exhibendum will normally be preferred. Once this action is instituted the owner is not permitted to proceed with a rei vindicatio against the possessor.

The interaction of the rei vindicatio and the actio ad exhibendum have recently been discussed in

Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd 1999 (2) SA 986 (T)

In the absence of an allegation that the items claimed are irrecoverable or that the defendant will not or cannot return them no action for damages representing the market value of the items can be maintained. The summons therefore lacks averments necessary to maintain a cause of action.

The exception is accordingly upheld and the plaintiff afforded an opportunity of 7 days within which to lodge amended particulars of claim failing which the action will be deemed to have been dismissed with costs. The plaintiff must pay the costs of the exception.


Sapire, CJ