

HIGH COURT OF SWAZILAND

CIVIL CASE NO. 1065/95

In the matter between:

SIZA PLANT HIRE (PTY) LTD PLAINTIFF

VS

RECLAMATION GROUP (PTY) LTD DEFENDANT

CORAM MATSEBULA J

FOR PLAINTIFF MR. NKOSI

FOR DEFENDANT MR. MADAU

RULING OF AN EXCEPTION IN TERMS OF RULE 23(2)

2nd JULY 2004

Plaintiff issued summons against the defendant claiming the following:

1. Payment of an amount of E200.000-00 (two hundred thousand Emalangeni);
2. Interest thereon at the rate 9% per annum a tempore morae;
3. Costs of suit;
4. Further and/or alternative relief.

The action arises out of paragraph 4 - 5.3

4. During on or about June 2003 the said bulldozer which was at the time hired to Inyatsi Superfos, broke down at

2

Mehlwabovu along the public road where it remained parked, pending repairs.

5. During on or about August 2003 the defendant's employees being Bernard Dlamini, Jabulane Nkambule and Mkhulisi Dlamini, who at all times material were acting within the scope and cause of their employment with the defendant, and using cutting torches, cut up the vehicle into pieces and disposed of the vehicle,

5.1 The defendant's acting of cutting up the vehicle and disposing thereof was unlawful in that defendant acted without any authority from the plaintiff.

5.2 As a consequence the plaintiff has suffered damages in the amount of E200.000-00 (two hundred thousand Emalangeni) value of the vehicle at the time that defendant unlawfully possessed the vehicle.

5.3 The plaintiff has demanded to defendant that amount of E200.000-00 (two hundred thousand Emalangeni) which amount despite demand the defendant refuses to pay.

On the 12th May 2004 defendant entered its intention to defend and on the 22nd June 2004 plaintiff filed notice of bar. This was not dealt with by the defendant but instead it filed the notice in terms of

Rule 33(2) Notice of Exception. The matter served before on the 25th of June 2004 and the respective counsel argued the matter of the exception.

Mr. Madau who appeared for the defendant and Mr. Nkosi appeared for the plaintiff. Mr. Madau's submission was that since the max has already been disposed of by the defendant's bulldozer and was no longer in existence plaintiff's action being a dilatory one instituted as

3

an alternative to rei vindicatio. The plaintiff's action should fail on that basis. This, Mr. Madau argued is because in such an action as used by the plaintiff it is important and a must that plaintiff alleges the following:

- (a) it is the owner of the property;
- (b) the defendant was in possession of the plaintiff's property;
- (c) when defendant lost possession of the plaintiff's marx it has knowledge of the plaintiff's ownership;

Mr. Madau referred the court to VULCAN RUBBER WORKS (PTY) LTD VS SAR & H 1958(3) SA 285 (A). Mr. Madau further argued that it was insufficient for the plaintiff to allege that defendant should have known of the plaintiff's ownership if it is pursuing its right under the rei vindicatio. It is Mr. Madau's argument that plaintiff has failed to make the necessary averments aforesaid and as such his particulars of claim are defective.

Mr. Nkosi on the other hand argued that the plaintiff's action was based not on rei vindicatio but in fact on conditio furtive. Mr. Nkosi referred the court to its particulars of claim. Mr. Nkosi also referred the court to the MINISTER VAN VERDEDIGING V. VAN WYK EN ANDERE 1976(1) SA 397 and to ACQUISITION AND PROTECTION OF OWNERSHIP BY CAREY MILLER JUTA 1986 at pages 331-332.

In terms of an action based on conditio furtive which is a personal action, the plaintiff can sue the defendant for payment for damages. If, plaintiff, has suffered as a result of theft committed by the defendant or employees of the defendant, in terms of this action defendant is obliged to pay the plaintiff the highest value of the property since the commission of the theft. The action also covers the use of and cause of damage to the property. Plaintiff can also sue the

4

thief or is as although the thief may not be in possession of the stolen property any longer.

I have considered the arguments advanced by both counsel and I am of the view that the exception is ill conceived. It follows that it must be dismissed with costs.

Mr. Nkosi has asked the court to order the costs on attorney and own client scale. He argued that this, the court should do in order to show its displeasure in that defendant embarked on a cause which is clearly dilatory in nature and which therefore amounts to an abuse of the court's process. The court is of the view that only on very exceptional case does a court order punitive costs. The court is of the view that this is not one of those. Accordingly the costs will be on party and party scale.

J.M. MATSEBULA.

Judge