

THE HIGH COURT OF SWAZILAND

GODFREY ZACHARIA GAMEDZE

Applicant

And

YVETTE RENNIE CARDOSO

~ 1st Respondent

R. C. CONSTRUCTION (PTY) LTD

2nd Respondent

Civil Case No. 1790/2003

Coram
For the Applicant For
the Respondents

S.B. MAPHALALA - J
MR. S. SIMELANE MR. P.
DUNSEITH

JUDGMENT

(25/06/2004)

The relief sought

The application before court is for *res vindicatio* directing the Respondents to return to the Applicant the goods namely; 400 Harvey tiles, *alternatively* that the Respondent pay to the Applicant jointly and severally the one paying the other to be

absolved, the sum of E13, 980-00 or such other amount as may be determined to be the current value of the goods stated in prayer 1; **alternatively** that The Sheriff or his Deputy for the district of Hhohho seize, attach and return to the Applicant the goods mentioned in prayer 1. Further that the Respondents pay the costs of this application, jointly and severally the one paying the other to be absolved.

The Applicant has filed a founding affidavit to form the basis of his claim. He attaches various annexures which are pertinent to his case.

The Respondents oppose the granting of this application and has filed the affidavit of the 1st Respondent.

The Applicant in turn filed a replying affidavit to the 1st Respondent's answering affidavit.

2. The facts

On the 9th February 2001, the Applicant purchased 400 Harvey roof tiles from Cashbuild (Pty) Ltd, Mbabane, for the sum E13, 980-00. After purchasing the tiles, he placed them at his home at Somnjalose area as the house for which they had been purchased was still not complete. The tiles remained at his house at Somnjalose area until the 2nd May 2001 when he discovered that the tiles had been stolen from his home. Subsequently the matter was reported to the Royal Swaziland Police at Lobamba Police Station. The police after investigations arrested one Melusi Accurate Matsaba who led them to the house of the 1st Respondent at Thembelihle. Melusi had stolen the tiles and sold them to the 1st Respondent, for a sum of E8, 000-00. He was then charged with the crime of theft. He appeared before the Magistrate at Mbabane where he pleaded guilty to the theft of the tiles and was duly convicted. The court made no order for the return of the tiles to the Applicant. The said Melusi is Applicant's nephew and resided with the Applicant at the material time.

The Applicant in his founding affidavit avers that since he is the lawful owner of the tiles and did not consent to their removal or taking, no one could acquire any better title than him to the tiles. He contends that Respondents have no right to the tiles and

they should be returned to him. However for purposes of convenience, he is prepared to accept a sum of money that would be enough to enable him to purchase another set of tiles, as he still require them for his house.

The 1st Respondent in her answering affidavit related at great length the circumstances in which she purchased the tiles from Melusi. She explains that she was acting on behalf of the 2nd Respondent which is a construction company. On the 28th April 2001, she proceeded to Cashbuild - Mbabane to order Harvey tiles for the construction of a house for a customer of the 2nd Respondent. One of the staff members at Cashbuild introduced her to a certain man by the name of Melusi Matsaba, who was selling Harvey roof tiles at a discount. The reason Melusi gave for selling the tiles was that his mother was being helped to build her house by a Canadian man, who had bought and paid for the roof tiles. Thereafter the Canadian man left Swaziland. Subsequent to that his mother died before she had roofed her house. He said he was now orphaned and needed money to live. He had decided to sell the tiles which he inherited from his mother. Melusi showed her a receipt from Cashbuild for the tiles together with a quotation from Cashbuild showing the current price. She was persuaded that this was a ***bona fide*** transaction.

The 2nd Respondent thereafter used the tiles to roof a house at Thembelihle. The house was later sold to one Simon Mallrat. The tiles were affixed to the roof timbers and became part of the structure. The 1st Respondent avers that they cannot be removed without causing damage to the structure. The tiles themselves would be considerably depreciated by such removal. The owner of the house has acquired ownership of the tiles by accession. The owner of the house and the Respondents are innocent and ***bona fide*** parties in this matter. Further that the tiles cannot be returned to the Applicant because they are no longer in the possession of either of the Respondents.

On the 22nd April 2004, 1st Respondent tendered to pay a sum of E5, 980-00 to the Applicant in order to settle the matter but Applicant rejected such tender.

3. The arguments

According to the Applicant the issue for determination in this case is whether it may be said that under the present circumstances the doctrine of accession does come into operation in such a way as to defeat the owner's right to vindicate his property. It is contended that the principle *nemo dat quod non habet* cannot be defeated by the doctrine of accession. Further, it is contended for the Applicant that this application as based on the *res vindicatio* entitles the Applicant to the remedy sought. Furthermore it is submitted that even if it were to be agreed with the Respondents that the Applicants' claim is based on enrichment, the Applicant would still be entitled to the alternative remedy as the Respondents acquired the tiles *ex causa lucractiva*.

The argument advanced on behalf of the Respondents is based on the *ratio* in the case of *Sumatie vs Venter 1990 (1) S.A. 173 at 174* and that of *CIR vs Les Sueur 1960 (2) S.A. 708 A*. The roofing tiles in question were used in constructing a house. The roof is part of the permanent fabric of a house, and therefore the roofing tiles have acceded to the house and become part of the immovable structure. By virtue of the accession, the roofing tiles belong to the owner of the house, and the Applicant has lost ownership thereof. As a result, he cannot vindicate the tiles and is not entitled to recover them from the owner of the house or the Respondents. In any event, it is contended the tiles are no longer in the possession of the Respondents.

The second leg of the argument for the Respondents is that they acted in good faith and without any knowledge of the Applicant's rights in the roofing tiles. The Applicant has no claim against the Respondents *ex delicto* or *ex contractu*, and because the Respondents acted in good faith, no consideration of natural equity arises.

Mr. Dunseith relied on what was said in the case of *Morobane vs Batetnan 1918 A.D. 460 at 467* to the following effect:

"A bona fide purchaser of the property of a third party, who re-sells it without knowledge of any defect in the title, is not liable to account to the true owner for the value of the property or for the profits from the re-sale."

4. The court's analysis and the conclusions thereon.

In the Transvaal Provisional Division case of *Unimark Distributors (Pty) Ltd vs ERF 94~Silvertondale (Pty) Ltd 1999 (2) S.A.* page 986 in the headnotes the following appears at page 987H — J:

"...The Plaintiff, in order to succeed with the *rei vindicatio*, had to prove that it was the owner of the said articles that they were in the possession of the Defendant at the commencement of the action and that they were still in existence and clearly identifiable. If the Plaintiff was able to prove ownership, but it appeared that (some of) the items were no longer in the Defendant's possession, the *actio ad exhibendum* would come into play so as to compel the Defendant to compensate the Plaintiff for the value of those articles. If the Plaintiff had lost ownership of (some of) the items due to *accessio*, the requirements of unjust enrichment would have to be applied in order to determine whether the Defendant had been unjustly enriched at the expense of the Plaintiff, (my underlying)

In the instant case it is common cause that the Plaintiff is the owner of the roof tiles. It is further common cause that they were sold to the Respondents by a third party. It is furthermore common cause that the tiles were affixed to a certain house which was sold to another party. As we speak the roof tiles are no longer in the possession of the Respondent. Therefore on the basis of what was held in the *Unimark Distributors (Pty) Ltd* case (*supra*) the Applicant cannot succeed in respect of the *rei vindicatio*. Then according to the *Unimark* case (*op cit*) "***the actio ad exhibendum would have to come into play so as to compel the Defendant to compensate the Plaintiff for the value of articles" and further " if the Plaintiff had lost ownership of (some of) the items due to accessio, the requirements of unjust enrichment would have to be applied"***

It would appear to me on the facts that the Applicant cannot succeed under the *actio ad exhibendum*. For this action to succeed it must be proved that the Respondent has fraudulently disposed of the physical control over the thing, in which case he is ordered to compensate the owner of its true value. The requirements for the action were stated in *Alderson and Flitton (Tzaneen) vs EG Duffeys Spares 1975 (3) S.A. 41 (T) 44 - 46* and may be paraphrased as follows:

"a) The thing must have been destroyed or alienated on purpose. The destruction or alienation could have taken the form of consumption or any other form.

2) The Defendant must have been *mala fide* at the time of the destruction or alienation. That includes the thief and any other *mala fide* holder or possessor who knew when he received the thing that his control was *mala fide*, or who realised it at a later stage.

3) Originally the claim was limited to the extent of the claimant's interest in the thing, which did not necessarily amount to the full market value".

In the instant case no allegations are made that the Respondents acted fraudulently in this matter. Even the facts presented before court do not in anyway suggest that the Respondents acted fraudulently. This therefore disposes this aspect of the matter.

On the issue of "*accessio* " it appears to me that it is for the third party to allege it against any claim for possession of the tiles by the Applicant and therefore for present purposes it does not arise.

Coming to the question of damages based on unjust enrichment. The evidence advanced on affidavits clearly shows that the 1st Respondent acted in good faith in her dealings with Melusi. There is no suggestion whatsoever on the evidence that she acted in bad faith.

In the case of *Morobane vs Bateman, 1918 A.D. 460* at page 465 and cited with approval in the case of *John Bell's & Co. Ltd vs Esselen 1954 (1) S.A. 147* at page 153 Innes CJ stated the following:

"The English doctrine of conversion finds no place in our law (Leal and Co. vs Williams 1096 TS 554; Feitelberg vs Coetzee 1907 T.H. 62); but the purchaser of property belonging to a third person who has re-disposed of it may nevertheless under certain circumstances be held accountable to the true owner. Voet ad Pand 6.110 discusses the remedies which one who has been unlawfully deprived of his property has against a

third person through whose hands it has passed. If the latter acquired and re-sold the property *mala fide* and with knowledge of the theft, then he would be liable to the owner, because he would virtually be a party to the *delict*, and would be regarded in the same position as if he had fraudulently parted with possession. But if the acquisition and the re-sale had been *bona fide* then there would be no liability to make good the value. Because the good faith of the purchaser would protect him against a claim *ex delicto*, and there would be no contractual relationship and no consideration of natural equity, (see also *Van der Westhuizen vs Macdonald* and *Mondel 1907 T.S. 933*)"

In the present case in my view, the Applicant has no claim against the Respondents *ex delicto*, and because the Respondents acted in good faith, no consideration of natural equities arises in *casu* neither does a claim *ex contractu* arise in the present case.

In *Morobane vs Bateman (supra)* the court held as follows:

"A bona fide purchaser of the property of a third party, who re-sells it without knowledge of any defect in the title, is not liable to account to the true owner for the value of the property or for the profits from the re-sale".

It would appear from the facts on affidavits that the Applicant has not laid the basis for a claim for unjust enrichment and there is no assessment of how the claim ought to be quantified.

The Respondents have not withdrawn their tender to compensate the Applicant although strictly speaking in law they would be entitled to judgment in their favour.

In the totality of what I have said above and in the interest of fairness I would order that the tender be made an order of this court, and it is so ordered.

I further order that the Applicant is to pay all legal costs subsequent to the date of the tender.


S.B. MAPHALALA
JUDGE