SOUTH GAUTENG HIGH COURT, JOHANNESBURG

Case No. 06/21636

In the matter between:

MARVANIC DEVELOPMENTS (PTY) LIMITED Plaintiff

and

MINISTER OF SAFETY AND SECURITY Defendant

MEYER, J

[1] The plaintiff has been trying for years to obtain the return or payment of the value of forty four of its tyres and forty of its rims which were seized by members of the South African Police Service ('SAPS') from its mechanical horses and trailers that are utilised in its businesses. The return thereof is no longer possible. The defendant delivered them to another party despite the

plaintiff's claim to ownership. The present issue for determination is their value in order to quantify the plaintiff's damages.

[2] The tyres and rims under consideration were seized on 8 July 2004. Two employees of the plaintiff were criminally charged with the offence of possession of stolen property, but the charges were withdrawn. The plaintiff unsuccessfully demanded the return of its tyres and rims. It instituted action in this division, and obtained default judgment for their return on 17 April 2007. The order was simply disregarded. This court, on 8 August 2007, declared the defendant to be in contempt of court and the defendant was compelled to perform under the order. On 16 November 2007, motion proceedings were instituted by the defendant in this division wherein the rescission of both judgments and orders were *inter alia* sought. The plaintiff opposed the relief. On 27 February 2008, the late Selvan, A.J., *inter alia* rescinded the order of 8 August 2007 in the contempt proceedings, and the following paragraphs of the order are relevant to the present proceedings:

> '3. The judgment granted on the 17th April 2007 under case number: 2006/21636 is not rescinded, but the Plaintiff may claim as a substitute for delivery of the tyres and rims, the value thereof at the date of confiscation.
> 4. In terms of Uniform Rules of Court 6(5)(g) the question of the value of the 44 tyres and 40 rims which were seized by the SAPS on the 8th July 2004, is referred for the hearing of oral evidence to determine the damages proved. The Defendant (Minister of Safety & Security) is entitled to present evidence in opposing this claim for damages.'

[3] The defendant opposed the plaintiff's claim for damages, but did not call any witnesses and hardly cross-examined the plaintiff's witnesses, who were its general manager, Mr. Fernandes, and an expert witness, Mr. Kok, who has been involved in the retail tyre industry for the past 24 years and the manager of a large tyre undertaking for the past 6 years.

[4] The high-water mark of the submissions made on behalf of the defendant in resisting the plaintiff's claim was that the plaintiff has failed to prove its damages. Adv. Joubert, who appeared for the defendant, submitted that the material at hand for an assessment of the damages is scant. This, however, does not mean that the plaintiff should be non-suited. Cf. *Esso Standard SA (Pty) Ltd v Katz* 1981 (1) SA 964 (A), at pp 969H – 970H. There can be no doubt that the plaintiff did suffer a loss. I appreciate the difficulty of the plaintiff in leading evidence on the value of the tyres and the rims five years after they were confiscated. Mr. Fernandes testified that the plaintiff's vehicles were inspected at weekends when they were not in use. Such inspections included an estimation that was made of the condition of the tyres on each vehicle. It could, in my view, hardly have been expected of the plaintiff before the rims and tyres were confiscated to have collected evidence to prove their value in a court at some future date. This, accordingly, is a matter which justifies a resort to 'the rough and ready method of the proverbial educated guess' and for this court to do the best it can on the material that was placed before it. See: *Hushon SA (Pty) Ltd v Pictech (Pty) Ltd and Others* 1997 (4) SA 399 (SCA), at p 412G – H.

[5] Although it is not possible to ascertain the plaintiff's damages with mathematical precision, there is, in my view, sufficient material before me to ascertain the values and accordingly the plaintiff's damages in a manner that is fair to both parties.

[6] It is common cause that two new Kumho tyres, two new Firestone tyres, sixteen used Firestone tyres, fifteen used Kumho tyres, seven used Michelin tyres, two used Goodyear tyres, and forty used rims were seized. They were heavy duty tyres and rims that are suitable for use on mechanical horses and trailers. The plaintiff's manager testified that forty of the used tyres had relatively low wear at the time when they were seized. The tread on ten was worn between 10 – 20%, and on thirty between 30 – 40%. Mr. Kok estimated the values of similar new tyres as at 8 July 2004 to have been R2 180.00 for a Kumho tyre, R2 000.00 for a Firestone tyre, R2 200.00 for a Michelin tyre, and R2, 000.00 for a Goodyear tyre. The defendant did not dispute these values.

[7] Mr. Kok said that it was almost impossible to arrive at a *market value* for the tyres that could still be used for between 80 – 90% and between 60 – 70% of their lifespan. He said that used tyres are purchased and sold for the purpose of using them in the manufacturing process of what is commonly known as re-treaded tyres. The used tyres are the 'casings' that are re-treaded. Only a few millimeters of tread is required on a used tyre to be suitable for this purpose. The

market value of a used tyre accordingly has no relation to the percentage wear of its tread. Mr. Kok estimated the values of similar used tyres that were suitable for use as casings in the order of between R650.00 – R700.00 during the year 2004, and the cost of re-treading between R650.00 – R700.00 per tyre. Such values are, in my view, accordingly not suitable for comparison in the assessment of the values of the plaintiff's used tyres.

[8] I can do no better than cite from the judgment of Innes, J.A. in *Pietermaritzburg Corporation v. South African Breweries, Ltd.* 1911 AD 501, at p 516, wherein he said this:

> 'It may not be always possible to fix the market value by reference to concrete examples. There may be cases where, owing to the nature of the property, or to the absence of transactions suitable for comparison, the valuator's difficulties are much increased. His duty then would be to take into consideration every circumstance likely to influence the mind of a purchaser, the present cost of erecting the property, the uses to which it is capable of being put, its business facilities as affording an opportunity for profit, its situation and surroundings, and so on. There being no concrete illustration ready to hand of the operation of all these considerations upon the mind of an actual buyer, he would have to employ his skill and experience in deciding what a purchaser, if one were to appear, would be likely to give. And in that way he would to the best of his ability be fixing the exchange value of the property.'

[9] The measure of a plaintiff's damages in a case such as the present one is the value of the property to a plaintiff. The *value to a plaintiff* may differ from or coincide with the *market value* depending on the circumstances of the particular case. See: *Mlombo v Fourie* 1964 (3) SA 350 (T), at p 358; *Philip Robinson Motors (Pty) Ltd v N.M. Dada (Pty) Ltd* 1975 (2) SA 420 (AD), at p 428G. I

proceed to an assessment of the market value of the tyres and rims in accordance with the principles enunciated in the above passage of Innes, J.A.

[10] Mr. Fernandes was unable to furnish the make of the ten tyres that had tread wear of between 10 – 20 %. Their make accordingly could have been Kumho, Firestone, Michelin or Goodyear. The lowest estimated new value of these tyres is R2 000.00, and it will, in my view, accordingly be fair to take that lowest value as the deemed value of similar make new tyres. The average tread wear of the ten tyres was 15%. This means that on average 85% of the use to which similar new tyres are capable of being put remained available. A fair basis for determining the value seems to me to be to deduct an amount equivalent to the average percentage wear from the market value of a similar new tyre. The difference between a particular make new and the same make used tyre, in the absence of any damage to it, seems to be the tread wear. A new tyre has no tread wear and therefore 100% remaining tread. The value of 85% remaining tread should therefore logically be calculated with reference to the value of 100% remaining tread. This calculation yields a sum of R17 000.00 for the ten tyres. A 10% contingency deduction from this amount will, in my view, abate the possibility of an overvaluing. The sum is then R15 380.00. A similar calculation for the thirty tyres that had a tread wear of between 30 – 40% yields a sum of R35 100.00.

[11] The assessment of the market values of the remaining two new Kumho and two new Firestone tyres as well as the used rims creates no problem. Mr. Kok's valuation of the market values as at 8 July 2004 of a similar new Kumho tyre in the sum of R2 180.00, of a similar new Firestone tyre in the sum of R2 000.00, and of a similar used rim in the sum of R350.00, were not challenged nor contradicted. On this basis the value of the four new tyres and forty used rims is R22, 360.00. No contingency deduction is required.

[12] In the circumstances of this matter and the method followed in determining the values I do not think that the exchange or market values differ from the values to the plaintiff. On the above basis the value of the forty four tyres and forty rims is R72 760.00, which the plaintiff is entitled to payment.

[13] This brings me to the determination of the scale on which costs should be awarded. The plaintiff's claim for damages falls comfortably within the jurisdiction of the Magistrates' Court. The *prima facie* view which I have conveyed to counsel was accordingly that the plaintiff ought to have proceeded in the Magistrates' Court and that the scale for costs applicable in that forum should apply. The submissions made by Adv. Shepstone, who appeared for the plaintiff, did not persuade me otherwise, but the preparation of this judgment did. There are unusual problems in this matter. See: *Keyter v De Wet* 1967 (1) SA 25 (O), at p 27; *Bhika v Minister of Justice* 1965 (4) SA 399 (W), at p 402. Counsel did not address me on this issue. It is accordingly open to the defendant or his

counsel to apply within a reasonable time to be heard on the issue of the scale of the costs award. See: *Estate Garlick v C.I.R.,* 1934 A.D. 499 and especially at pp. 503 and 505; *Hart v Broadacres Investments Ltd* 1978 (2) SA 47 (NPD), at pp 49H – 50B.

[14] There will therefore be judgment for the plaintiff against the defendant for payment of:

a. the sum of R72 760.00;

b. interest on the said sum at the rate of 15.5% per annum from 26 November 2004, being the date when demand was made, until the date of payment; and

c. the costs of suit incurred after the court order of 27 February 2008.

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P.A. MEYER
JUDGE OF THE HIGH COURT

19 October 2009

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