REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

REPORTABLE

CASE NO: 36661/2010

DATE: 07/04/2011

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

In the matter between:

THE HOLLARD INSURANCE COMPANY LIMITED Applicant

and

WAGENAAR, PAUL t/a RACEDESIGNS Respondent

J U D G M E N T

MOSHIDI, J:

INTRODUCTION

[1] In the Notice of Motion the applicant seeks relief as set out in Part A, and Part B thereof. In Part A, the applicant seeks an order for the return to it of certain motorcycles held by the respondent subject to a determination of the respondent's claim to a lien in respect thereof. In the event of a finding that the respondent indeed has a lien over the motorcycles, the respondent be ordered to accept security as determined by the Court in lieu of its detention of the motorcycles. The relief sought under Part B is twofold. The first, that the respondent renders an account to the applicant as to his dealings in regard to the motorcycles owned by the applicant. The second leg of the relief is that the respondent be ordered to a debatement of such account to be rendered by the respondent to the applicant in respect of applicant's wrecks as listed in Annexure "Z" to the Notice of Motion.

[2] The application is strenuously opposed by the respondent on grounds set out later in this judgment.

[3] Some background is necessary. The papers are rather bulky. A brief overview will suffice. The applicant is an insurance company, and in the context of this case, it was in the business of short-term insurance specific to insurance of motorcycles. The applicant was the underwriter of certain policies of insurance issued on its behalf by an insurance intermediary called Apex Underwriting Managers (Pty) Ltd ("*Apex*") to the erstwhile owners or *bona fide* possessors ("*the insured*") of the motorcycles listed in Annexure "Z" to the Notice of Motion. Apex was appointed as insurance intermediary in terms of the provisions of section 48(2) of the Short-term Insurance Act No.

53 of 1998. These provisions require the appointment of an intermediary on behalf of an insurer such as the applicant, to be made in terms of a written agreement with provisions as prescribed therein. In the present matter, the relevant agreement forms part of the papers as Annexure "RA1" to the replying affidavit. The mandate of Apex, as intermediary, was generally to administer, manage and underwrite in the name of the applicant, certain motorcycle insurance policies underwritten by the applicant on the terms and conditions contained in the agreement between Apex and the applicant.

[4] The duties of Apex in terms of the mandate are provided for in, *inter alia*, clause 5.7.2 of the agreement, as follows:

> "*5.7.2 Apex shall:*
>
> *5.7.2.1* *receive, process and pay valid claims and external claims costs subject to the provisions of clause 5.7.2.2 and 5.7.2.3;*
>
> *5.7.2.2* *not reject any claim or pay any ex-gratia payment without the prior written approval of Hollard;*
>
> *5.7.2.3* *observe the utmost good faith towards insureds and Hollard in the handling of or otherwise dealing with claims, failure of which shall be considered to be a material breach of this agreement;*
>
> *5.7.2.4* *when called upon to do so by Hollard, render to Hollard on demand such assistance as Hollard may reasonably require with respect of the handling, processing or investigation of claims;*
>
> *5.7.2.5* *notify Hollard in writing within one (1) working day of the service on Apex of any legal processes relating to the Policies and/or Hollard, or Apex receiving official notification of impending legal action against them, the cost of such process to be paid from the Hollard/Apex Claims Account;*

5.7.2.6 *not complete or sign any claim form on behalf of an insured save where the insured is unable to do so and/or the next of kin cannot be located to do so in which event Apex shall act as agent of the insured and not of Hollard;*

5.7.2.7 *handle recoveries and salvage arising out of Policies and claims, liaising with Hollard's Group Legal Division where necessary, regarding inter alia, reports, the composition of a panel of attorneys, loss adjusters, and surveyors;*

5.7.2.8 *insert into the System relevant details of all claims as soon as possible after Apex receives notice of a claim from or on behalf of an Insured, whether verbally or in writing, together with estimates, where available, of Hollard's potential liability under such claim. When an estimate is not available Apex shall allocate a realistic estimate to the claim intimated in terms of guidelines agreed from time to time by the parties;*

5.7.2.9 *alter the claims status and data as appropriate from 'claims reported' to 'claims outstanding' and then to 'claims paid' and reflect such claims onto the System on an ongoing basis.*

[5] Apex was paid an underwriting management fee for the services it provided to the applicant in terms of its mandate calculated on the basis set forth in clause 7.1 of the agreement being a percentage of the total premiums paid in terms of the policies per annum. In terms of the insurance policies the insured owners of the motorcycles were indemnified, *inter alia*, against loss arising from damage to or destruction of the motorcycles.

[6] In the founding affidavit, Mr G E Young, principal of the applicant, then acting managing director of Apex, states that the applicant is a 70% shareholder in Apex. Further that in the event of a claim lodged by an insured, the applicant has several options. Should the applicant declare that

the motorcycle in question is a total loss, the applicant shall be entitled to dispose of the damaged motorcycle in a manner which it considers reasonable and retain the proceeds of such disposal. In the event of the applicant establishing that the cost of settlement of any claim or loss or damage to the motorcycle is more or equivalent to the insured value or market value, the applicant has the option to declare that the motorcycle is uneconomical to repair, and regard the motorcycle as a total loss.

[7] In or during July 2007, the applicant states that the respondent and the applicant, duly represented by Apex, who in turn, was duly represented by a Mr Renier Terry Terblanche ("*Mr Terblance*"), entered into an oral agreement ("*the deal*"). The material terms of the deal were, *inter alia*, that:

7.1 The respondent would pay the applicant 40% for the salvage ("*the 40% salvage value*") of motorcycles, insured by the applicant, which were declared a total loss ("*the wrecks*"). The respondent, a motorcycle mechanic, trading as Race Designs, would rebuild the wrecks and sell same on behalf of the applicant, (via Apex) to third party purchasers. Upon the sale of the wrecks, and receipt of the applicable purchase consideration, the respondent would pay Apex, who in turn, would account to the applicant as follows:

7.1.1 The 40% salvage value;

7.1.2 Half of the profit obtained through the sale of a rebuilt wreck after deduction of;

7.1.3 The 40% salvage value;

7.1.4 The respondent's labour and ancillary cost incurred in rebuilding the wrecks, ("*the respondent's obligation to account*").

[8] Between July 2007 to July 2010, the applicant says a total of approximately 90 motorcycles insured by it (through Apex) on behalf of insured owners were damaged variously in collisions. The damage resulted in the declaration of total loss in respect of such motorcycles under the insurance policy. These damaged motorcycles were given to the respondent to handle in terms of the deal. At the time of the launching of the present application, the applicant reasonably ascertained that there were still about 40 wrecks at the respondent's premises, at Boksburg. These wrecks are listed in Annexure "X" to the founding papers ("*the relevant wrecks*"). The applicant duly settled the insured parties' total loss, whilst the insured parties' objects of risk (i.e. the motorcycles which were involved in the collisions and which were declared a total loss) were still in existence. At the time of the settlement of the total loss, ("*the settled loss*"), the relevant wrecks were in the respondent's possession. Furthermore, at the time of the settled loss, the applicant contends that ownership of the relevant wrecks transferred to it, and the respondent accordingly held same on behalf of the applicant and no longer on

behalf of the insured persons. In the alternative, the applicant argues that, upon settlement of the total loss, it obtained a right to salvage. In or about 13 July 2010, the respondent cancelled the deal by providing notice to Mr Terblanche and Apex, as indicated below.

[9] To all the above, as well as the oral deal, the respondent, although admitting that the motorcycles were delivered to him, puts a completely slanted version on how he gained the possession. In short, the respondent contends that in the first half of July 2007, he was approached by Mr Terblanche with a proposition that the two of them enter into business, which entailed that:

9.1 The respondent would assess motorcycles which were involved in collisions for Mr Terblanche to determine if such motorcycles were capable of being economically repaired;

9.2 If such motorcycles were assessed as uneconomical to repair, the respondent would salvage and proceed to repair the motorcycles; and would sell the rebuilt salvaged motorcycles for the benefit of himself and Mr Terblanche.

[10] The respondent further states that at that stage, he was aware that Mr Terblanche was associated with Apex, and he believed that Mr Terblanche was the owner of Apex. He only discovered in July 2010 that Mr Terblanche was only a 30% shareholder in Apex and that the applicant held 70% of the

shares in Apex. He was, however, aware that Mr Terblanche had business dealings with the applicant. He was informed by Mr Terblanche that Apex would acquire all the salvaged motorcycles from the applicant in return for payment to the applicant of a salvage cost. The respondent says that the terms of the business arrangement between him and Mr Terblanche entailed, *inter alia*, that he assessed the motorcycles, Mr Terblanche would consider his assessment, and would advise the applicant on whether the motorcycle should be written off. The motorcycles that were uneconomical to repair were, on the advice of Mr Terblanche, registered into the respondent's personal name or the name of Race Designs, namely his trade name. The monies forming the profit made from the rebuilt written off motorcycles was deposited into the bank account of either Apex or the applicant.

[11] The respondent states that on termination of the business arrangement between him and Mr Terblanche in July 2010, Mr Terblanche attempted to remove from his premises, all the salvaged motorcycles. However, on the advice of his attorney, the respondent exercised his lien over the motorcycles as he has a counterclaim for, *inter alia*, damages against Mr Terblanche and/or Apex. In short, the respondent denies that he was ever a party to an agreement, written or otherwise, with the applicant. He also disputes that the applicant is the owner of any of the motorcycles in his possession. In the final analysis, the respondent raised certain points *in limine*, namely that the applicant has no *locus standi* to launch the present application; that the applicant has no cause of action against him; and that there are substantial and material disputes of fact which cannot be resolved on affidavit.

[12] In the replying affidavit the applicant, not only denies vehemently the contentions of the respondent, but also proffers evidence which misplaces completely the version of the respondent in various respects. Significantly, is the assertion that the alleged business agreement entered into between the respondent and Mr Terblanche, at that stage Apex's managing director, could not have happened as Mr Terblanche would have breached his fiduciary duties to Apex. The applicant entered into an underwriter management agreement with Apex, and not with Mr Terblanche. In this regard, the applicant attaches to the replying affidavit a copy of the intermediary agreement between the applicant and Apex. Further that, the respondent, on his own volition, concedes that Mr Terblanche was the *alter ego* of Apex, and that the respondent's own version clearly contradicts his allegation that the business proposal was between the respondent and Mr Terblanche in his personal capacity. In addition, that the respondent's concession that salvaged motorcycles would first have to be acquired from the applicant against payment of the salvage costs:

12.1 it corroborates the fact that the respondent was well aware that, at least prior to payment to the applicant of the salvage costs, such salvaged motorcycles were the property of the applicant; and

12.2 that until salvage costs were paid to the applicant, such salvaged motorcycles remained the property of the applicant. Further that he was fully aware that the motorcycles delivered to him were originally insured by the applicant, and therefore the respondent never became the owner of any of the relevant wrecks.

[13] The applicant continues to raise various issues and allegations, which in the view I take in the matter, need not be fully set out. These include that the banking accounts of the intermediary agreement was the property of the applicant; that the respondent made various payments into the applicant's Claims Bank Account in respect of amounts due by the respondent to the applicant in regard to the salvage amounts; the nature of the lien relied upon by the respondent; that the respondent was acutely aware of the applicant's involvement and role as underwriter; the internal audit carried out by the applicant's team at the respondent's premises on 22 October 2009; the documentary proof provided by the applicant comprising schedules of insurance and proof of payment to the insured client; and/or the relevant finance house; and that the relevant wrecks never became the property of Apex, nor did Apex have a right to salvage of the relevant wrecks at any stage. It was never the business of Apex to purchase wrecks for resale by it as contended by the respondent. All of these allegations by the applicant, supported by documentary proof, were necessary, cast serious doubts on the version of the respondent.

[14] I deal with some of the legal principles applicable to this matter. As correctly argued by counsel for the applicant, reference to *Ivamy: General Principles of Insurance Law*, 5ed, p 473, under the heading Rights (of subrogation) over the subject-matter, is instructive:

> "*Where, notwithstanding the happening of a total loss, there is a sufficient amount of salvage which possesses some value, the assured cannot claim both to receive from the insurers a full indemnity for his loss and to retain the salvage, since he would thus be more than fully indemnified. It is his duty, therefore, on receiving payment in full, to hand over to the insurers the salvage. The title of the insurers thereupon relates back to the date when the loss took place, e.g. the date of the fire in the case of fire insurance, and they become to all intents and purposes owners of the salvage as from that date and are, therefore, entitled to take to themselves any advantage to be derived from such ownership.*"

Indeed, the well-known decision of the House of Lords in *Simpson and Company and Others v Thomson (Thomson, Burrell and Others)* (1877) 3 App. Cas 279 (HL), by way of the speech of Lord Blackburn enunciates the application of the principle in the context of marine insurance, as follows (at p 292 of the report):

> "*My Lord, I do not doubt at all that where the owners of an insured ship have claimed or been paid as for a total loss, the property in what remains of the ship, and all rights incident to the property, are transferred to the underwriters as from the time of the disaster in respect of which the total loss is claimed for and paid.*"

[15] The English law of Insurance continues to have a major influence on South African Insurance Law. For example, in *Trust Bank Bpk v President Versekeringsmaatskappy Bpk* 1998 (1) SA 546 (W), in the context of

allegations by the insurer of non-disclosure by the insured, at p 552 of the judgment, Van Zyl J said:

> "*Dit beteken egter nie, soos ek die geleerde Regter se uitspraak verstaan, dat die Engelse versekeringsreg eweneens as bron van die Suid-Afrikaanse versekeringsreg omvergewerp word nie. Waar dit reeds oor 'n lang termyn as vrugbare regsbron alhier ingeburger geraak het, soos op soveel ander gebiede van die handelsreg, sal dit bly voortbestaan solank as wat die gemeenskapsopvatting dit nodig ag.*"

[16] In *The Modern Law of Insurance*, 2nd ed, the learned author Prof McGee, at p 542 para 40.38 states:

> "*Where the insurer pays for a total loss, either of the whole, or in the case of goods of any apportionable part, of the subject-matter insured, he thereupon becomes entitled to take over the interest of the assured in whatever way remain of the subject-matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in and in respect of that subject-matter as from the time of the casualty causing the loss.*"

Once more, in the South African context, in Gordon and Getz, *The South African Law of Insurance*, 4th ed, at p 252, the learned author states:

> "*The insurer, paying or pre-instating as on a total loss, is entitled to surrender of the thing insured or what remains thereof, by way of salvage.*"

(See also footnote 41 on p 252 and pp 257-258.)

[17] In General Principles of Insurance Law, November 2002, MFB Reynecke *et al*, at p 291, para 404, the learned author states:

> "*The insurer's right to salvage is concerned with those instances where the insurer has paid the insured for a total loss but where the object of risk, or part of it, is still in existence. Where an insurer has paid the insured for a total loss, it is, depending on the circumstances of the total loss, entitled as against the insured to the remains of the object of risk or to the recovered object as a whole. This right is referred to as the insurer's right to salvage.*"

(See also *Amler's Precedents of Pleadings*, 6th ed p 201.)

[18] Based on the above legal principles, and in the context of the present matter, it is clear that the applicant became the owner of the salvaged motorcycles once it paid out the insured persons concerned. It was insured through the intermediary, Apex. The evidence is overwhelming in this regard. The applicant has plainly succeeded to the title of the previous owners/possessors of the motorcycles in consequence of its position as insurer in respect of the non-marine insurance. As argued, correctly in my view, by counsel for the applicant, the vesting in the applicant of its salvage rights to the motorcycles follows ineluctably from the facts and circumstances of this matter, and have not been effectively challenged by the respondent. The bald, and unsubstantiated assertions of the respondent to the contrary, and that he was not aware of the involvement of the applicant when he dealt with Mr Terblanche, are without merit at all. There are apparently some 40 motorcycles held by the respondent at his premises in relation to which the applicant has exercised its rights of salvage. Indeed, there is more incredible in the version of the respondent on other aspects of this matter as shown below.

[19] I deal briefly with the respondent's contention that there are disputes of fact which cannot be resolved on affidavit. The approach of the Courts in matters of this nature has been set out in various decided cases, notably, *Stellenbosch Farmer's Winery Limited v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C), and *Wightman t/a J W Construction v Headfour (Pty) Limited and Another* 2008 (3) SA 371 (SCA). It is unnecessary to repeat the trite principles, but it suffices to apply same to the facts of this matter briefly. The exercise will show undoubtedly that there are no such disputes of fact as alleged by the respondent. The respondent viciously denies ever having been a party to any agreement with the applicant. This, in spite of the content of paragraph 2 of the letter by the respondent's attorney, Annexure "FA6", where the fact of the applicant's privity to the agreement is plainly admitted. However, the relief sought by the applicant in terms of Part A of the Notice of Motion, as stated at the commencement of this judgment, plainly does not depend on the question whether the applicant was a party to the agreement or not. On the respondent's own version as to the terms of the agreement he had with Mr Terblanche and/or Apex, there was always due recognition of the rights of the applicant in the motorcycles in any event. The applicant's salvage rights are in no way affected by the agreement alleged by the respondent. On the contrary, these rights are acknowledged therein. The respondent himself cancelled the alleged agreement and as far back as July 2010.

[20] I have already dealt with the applicant's ownership of the wrecks. The respondent's version, once more, is a bare denial of such ownership. The nature of the relief sought by the applicant is final in form. The applicant's entitlement to the relief, as correctly argued by its counsel, must accordingly be adjudicated by reference to the facts as stated by the respondent together with the admitted facts in applicant's affidavit. Where it is clear that facts, although not formally admitted, cannot be denied, they must be regarded as admitted. This well-known rule was qualified in an even well-known *dictum* by Corbett JA in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C. In addition, in my view, the approach set out in *Soffiantini v Mould* 1956 (4) SA 150 (E) is pertinently applicable to all the bald and large unsubstantiated allegations of the respondent. At p 154G-H of that judgment, Price JP, said:

> "*It is necessary to make a robust, common-sense approach to a dispute on motion as otherwise the effective functioning of the Court can be hamstrung and circumvented by the most simple and blatant stratagem. The Court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavits.*"

[21] Looked at very closely, the respondent's version plainly reveals that the alleged disputes of fact are neither real, genuine or *bona fide*, as envisaged in *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another (supra)* 371 (SCA) at para [13]. There are numerous examples on the papers which so characterise the version of the respondent. In the heads of argument, the

applicant rather eloquently sets out such examples. It is unnecessary to repeat such for present purposes. The upshot is that the version of the respondent on the alleged disputes of fact qualifies to be rejected merely on the papers. This conclusion naturally impacts on the other alleged disputes which are clearly also not real, genuine or *bona fide*.

[22] The allegations contained in paras 14 to 19 of the founding affidavit, as dealt with earlier in this judgment, are plainly crucial to the relief sought. The respondent's response thereto has also been sketched extensively above. What is of particular significance in the respondent's response to the crucial allegations as displayed in para 27 of his answering affidavit, which reads as follows:

> "*Save to admit that the motorcycles were delivered to me in terms of my arrangement with Terblanche, the remainder of the allegations is* [sic] *denied and the Applicant is put to the proof thereof.*"

Flowing therefrom, counsel for the applicant argued, correctly in my view, that the manner in which the respondent deals with applicant's pointed allegations is wholly inadequate. This, having regard to the trite procedure that a party to motion proceedings is bound to deal clearly and unambiguously with every material allegation of fact. Once more, the conclusion that the respondent's denial of the allegations in this regard can hardly be labelled as raising a real, genuine, and *bona fide* dispute of fact. There are indeed numerous other shortcomings in the version of the respondent, which can be identified randomly. For example, in para 16 of the answering affidavit, the respondent simply disputes that the applicant is the owner of any of the motorcycles in his

possession. This tactic is a complete reversal of his version. On 21 July 2010, barely a week after the respondent, on his own version, had cancelled the alleged business arrangement with Mr Terblanche, his attorneys addressed a letter to Apex, for the attention of Mr Terblanche. The letter is Annexure "FA2" to the founding affidavit. There are two visible and remarkable paragraphs in the letter. In para 2.1 of the letter, the relationship between the respondent and Mr Terblanche is described as being a "*verbal salvage-contract relationship*", and in para 3.3 of the same letter, the assurance is given that the respondent will complete the repairs to the motorcycles in terms of the relationship described in the paragraph above, "*to the satisfaction of Hollard Insurance Company*". The latter, of course, refers to the applicant. From this, it can reasonably be inferred that, the respondent, as an active participant in the insurance salvage industry, was at all material times well aware of the meaning of salvage. It can also be so inferred that at all material times respondent was well aware that the rights to salvage in relation to the motorcycles reposed in the applicant.

[24] It is also noteworthy, as pointed out on behalf of the applicant during argument, that in none of the respondent's correspondence addressed to the applicant, does the respondent pertinently dispute the applicant's ownership of the wrecks as contended for by the applicant. Nor does the respondent dispute the applicant's entitlement to the return thereof, save for the respondent's alleged lien, which issue I deal with later below. The respondent also makes no allegation at all that the salvage costs for the wrecks in his possession were paid for by either the respondent, or Mr Terblanche or Apex ,

in order to allow ownership to pass from the applicant to Apex or Mr Terblanche. The applicant's right to the motorcycles has been established overwhelmingly and more than on a balance of probabilities. In any event, the applicant's rights equate at least to those of a *bona fide* possessor. This, because the applicant succeeded to the position of the various insured persons who, in turn, were either out and out owners or *bona fide* possessors of the *merx* subject to credit agreements. In either event, the applicant is entitled to the return of the motorcycles.

[25] I deal with the respondent's allegedly lien over the wrecks. In para 10 of the answering affidavit, the respondent describes the lien in the following terms:

> "*I exercised a lien on the motorcycles as I have a counter-claim for inter alia damages against Terblanche and/or Apex. I am still in the process of quantifying my claim.*"

This ambiguous allegation does not provide an adequate basis for the existence of a lien. In relying on a lien, the respondent must allege and prove, *inter alia*, the actual expenses and extent of the enrichment of the applicant. See, for example, *Brooklyn House Furnishers (Pty) Ltd v Knoutze and Sons* 1970 (3) SA 264 (A). In *King's Hall Motor Co v Wickens and McNicol* 1931 (N), 37, Hathorn AJ, at p 44 said:

> "*In Abelman v Weeber, (1928) T.P.D., 398, it was held that the person claiming a salvage lien for useful expenses must prove the actual amount expended. In my opinion that is clearly the case also in respect of a salvage lien for necessary, because there is no difference in principle between the two kinds of expenses. The respondents did*

not prove that they were put to any expenses whatever. They did not even attempt to do so. The first essential, therefore, is lacking."

[26] In the present matter, in the absence of any other lien expressly identified and raised by the respondent, he has no valid grounds for retaining possession of the wrecks. In the letter addressed by the respondent's attorneys on 21 July 2010, Annexure "FA2", referred to above, no mention at all is made of an alleged ground for his lien. In any event, it is not in dispute that the wrecks sought to be returned to the applicant, save for 3 of them, have not been worked on or rebuilt, and accordingly no lien can exist in respect thereof. See in this regard *Lamontville African Transport Co (Pty) Ltd v Mtshali* 1953 (1) SA 90 (N), 93F-H. At best for the respondent, on a proper construction of his rather problematic version, it would seem, as argued on behalf of the applicant, that he intends to refer to a debtor creditor lien, which, not being real in nature, whilst enforceable against Apex or Mr Terblanche, is not so enforceable against the applicant. On the objective facts, there is simply no lien whatsoever in existence.

[27] In view of the finding that no lien of whatsoever nature exists, it is unnecessary to consider the applicant's offer that the respondent be ordered to accept security in lieu of its detention, of the motorcycles. However, I do find it necessary to consider the applicant's other relief sought. That is that the respondent be ordered to render an account to the applicant as to his dealings in regard to the motorcycles belonging to the applicant, and a debatement of such account. I proceed to do so instantly.

[28] In *Amler's Precedence of Pleadings (supra)* at p 1, the learned authors state:

> "*The object of a claim for an account and debate is to enable the claimant to establish whether the other party is indebted to the claimant. The typical claim is for delivery of an account, a debate thereof and payment of the amount found to be due. A final order cannot issue before debatement. Brown v Yebba CC t/a Remax Tricolor 2009 (1) SA 521 (D).*"

Counsel for the applicant referred the Court to a passage in *Doyle and Another v Fleet Motors P.E. (Pty) Ltd* 1971 (3) SA 760 (A) at p 762F, which reads:

> "*The plaintiff should aver –*
>
> *(a) his right to receive an account, and the basis of such right, whether by contract or by fiduciary relationship or otherwise.*"

He placed emphasis on the words, "*or otherwise*", in the passage just quoted. Counsel for the applicant proceeded to submit that the words emphasised suggest that there is no *numerus clausus* of grounds on which to base an action for an account. It was therefore submitted that the applicant is entitled to an account from the respondent, even upon an acceptance of the respondent's version. I agree.

[29] Indeed the proven facts show that the respondent was aware of the applicant's rights in the rights of salvage in the motorcycles. He must therefore have been aware that Apex dealt with him in a representative capacity, and not as a principal. If so accepted, the respondent is in possession of the motorcycles with knowledge of the applicant's rights in

relation thereto. The applicant's right to demand an account from the respondent in relation to the respondent's dealing with the applicant's property becomes indisputable. In the letter of 17 August 2010 addressed by the applicant to the respondent, Annexure "FA5" to the founding affidavit, the applicant demanded, *inter alia*, an accounting. In response thereto, and in a letter addressed by the respondent's attorneys to the applicant on 19 August 2010, Annexure "FA6" to the founding affidavit, the respondent indeed undertook to provide an account by 27 August 2010. The undertaking was accepted by the applicant, and is accordingly binding on the respondent. He is not at liberty to simply ignore it as now contended by the applicant.

[30] The attempt made by the respondent subsequently to render such account proved hopelessly inadequate. This is clear from the subsequent letter addressed by the respondent's attorneys to the applicant's attorneys, Annexure "FA11" on 6 September 2010, which stated, *inter alia*, that:

> "*My client is still busy with these calculations.*"

As at the date of the hearing, the respondent appeared to be no closer to a conclusion of his calculations, and the accounting, as promised, was still outstanding. The argument advanced by the applicant that the respondent is plainly using his possession of the motorcycles as a means of holding the applicant to ransom, has merit. He is yet to institute his threatened action for damages against Apex. The same may easily and reasonably be said about his undertaking to render an account. In my view, the applicant has made out a case for an accounting. The respondent's argument that a claim for a

statement and debatement lies against Apex and not the respondent, has no merit at all.

[31] To sum up. On the conspectus of the entire credible evidence, and save as indicated in this judgment, the applicant has made out a case on a balance of probabilities for the relief claimed in the Notice of Motion.

[32] In the result the following order is made:

1. An order is granted in terms of prayer 1, in particular prayers 1.1, 1.1.1, 1.1.2 and 1.2 under Part A of the Notice of Motion dated 13 September 2010.

2. The respondent is ordered to pay the costs of Part A of this application.

3. An order is granted in terms of prayers 5, 6, 7 and 8 of the Notice of Motion dated 13 September 2010.

4. The costs orders shall include the costs consequent upon the employment of two counsel.

_____

D S S MOSHIDI
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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DATE OF HEARING	25 NOVEMBER 2010
DATE OF JUDGMENT	7 APRIL 2010