

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 10198/2013

(1)	<u>REPORTABLE: YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
.....
DATE	SIGNATURE

In the matter between:

ELATFIELD (PTY) LTD

Applicant

and

CELTIC FREIGHT LOGISTICS (PTY) LTD

Respondent

In re:

APPLICATION TO INTERVENE

HYGIENIC TISSUE MILLS CC

Intervening Party

J U D G M E N T

N F KGOMO, J:

INTRODUCTION

[1] In the main application launched by the applicant during March 2013, the applicant sought an order directing the respondent to release to the

applicant 30 tissue paper reels (*“the tissues”*) allegedly owned by the Intervening Party, and which were at the time in the respondent’s possession at its warehouse situated at 56 Rigger Road, Spartan, Kempton Park.

[2] The tissues were delivered to the respondent by the applicant during January or February 2013 for the former to transport them or have them transported to a client of the Intervening Party in Harare, Zimbabwe. According to the applicant specifically, the goods were taken to the premises of the respondent solely for the purpose of them being transferred onto another vehicle owned by a freight-forwarding company going by the names of Trafalgar Logistics for transportation by the latter logistics company to Zimbabwe.¹

[3] Trafalgar Logistics had been engaged by the applicant to collect the tissue reels from the respondent’s premises and transport them to Paper Company Holdings in Harare, Zimbabwe. Copies of the bill of lading or loading instruction provided to Trafalgar Logistics by the applicant as well as the Tax Invoice issued by the Intervening Party in respect of these tissue rolls are annexed to the founding affidavit in the main application.²

[4] Towards the end of June 2013, specifically on 24 June 2013, the intervening party launched the application to intervene and related orders in the following terms or seeking the following orders:

¹ Main application : Founding affidavit, paragraphs 30.2 to 30.4 at page 19 of the paginated record thereat.

² See Annexures “GH.8” and “GH.9” respectively as well as paragraphs 30.5 and 30.6 of the applicant’s founding affidavit at pp 19-20 of paginated papers.

- 4.1 That Hygienic Tissue Mills CC (hereinafter referred to as the "*Intervening Party*") be and is hereby granted leave to intervene as an interested party in this application;
- 4.2 That it be declared that the respondent is not entitled to exercise any lien over the Intervening Party's thirty (30) tissue paper reels weighing 21 840 kg then in the respondent's possession at its warehouse situate at 56 Rigger Road, Spartan, Kempton Park or wherever same may be found;
- 4.3 That the respondent be and is hereby directed to forthwith return to the Intervening Party the 30 tissue paper reels;
- 4.4 That in the event that the respondent failed, alternatively refused, alternatively neglected to comply with the prayer set out in 4.3 above, the sheriff of this Court be directed, mandated and authorised to give effect thereto;
- 4.5 That the respondent be ordered to pay the costs of this intervention application; and
- 4.6 Further and/or alternative relief.

[5] When the respondent filed its answering affidavit on 2 July 2013 it emerged that the respondent had exercised “*some sort of lien*” over the property for the applicant’s indebtedness to it and had even sold the tissue paper reels and vended the proceeds towards reducing such indebtedness to it by the applicant.³ The date of sale is given as June 2013.

[6] What is material is that when the Intervening Party launched its application, it was labouring under the impression that the tissue paper reels were still being kept or “*held in lien*” at the respondent’s warehouse, which fact was part of the papers in the main application.

THE PARTIES

[7] The Intervening Party, namely, Hygienic Tissue Mills CC, is a close corporation duly incorporated in terms of the Close Corporations Act, 1984 (Act 69 of 1984) (as amended) and it has its principal place of business given as or situate at 19 Cardiff Road, Willowtown, Pietermaritzburg, KwaZulu-Natal.

[8] The applicant, ELATIFIELD (PTY) LTD is a limited liability company, duly registered and incorporated in accordance with the company laws of the Republic of South Africa (“*RSA*”) with its registered office situate at 7 Daly Road, Marlands, Germiston, Ekurhuleni District, Gauteng Province. It also trades under the name and style of Sub-Sahara Freight.

³ Respondent’s answering affidavit in main application, para 5.3 at p 29 of the paginated papers therein.

[9] The respondent, CELTIC FREIGHT LOGISTICS (PTY) LTD is a limited liability company duly registered and incorporated in accordance with the company laws of the RSA, having its principal place of business situate at 56 Rigger Road, Spartan, Kempton Park, Ekurhuleni District, Gauteng Province.

ISSUES TO BE DECIDED

[10] What is in issue here and to be decided by this Court is whether or not the tissue paper reels in question here are the property of or owned by the Intervening Party. If so, then whether or not a declarator sought by the Intervening Party that it so does should be issued. Furthermore, now that it is common cause that the respondent sold the tissue paper reels during June 2013, whether the respondent may be ordered to compensate the Intervening Party to the tune of the value thereof, as a naturalia of the above.

BRIEF HISTORY OF THE MATTER AND RELEVANT FACTUAL MATRIX

[11] According to the Intervening Party, on or during January and/or February 2013 the Intervening Party engaged the services of the applicant to facilitate the transportation of 30 reels of tissue paper for delivery to the latter's clients in Harare, Zimbabwe. To facilitate the above the Intervening Party engaged the services of SSR Transport to transport the tissue paper reels from Pietermaritzburg to the applicant's business premises in Spartan, Kempton Park. The instructions from the Intervening Party as agreed with the

applicant was that the tissue paper reels be loaded or transferred onto a truck arranged by the applicant for their transportation to Zimbabwe.

[12] At all times the applicant remained the owner of the tissue paper reels.

[13] As it transpired later, instead of the tissue paper reels being transported to Zimbabwe, they were detained and impounded by the respondent at its premises who claimed a *lien* over them for a debt owed to them by the applicant.

[14] The applicant, through its Sub-Sahara Freight company, notified the Intervening Party about this aspect in an undated letter.⁴ For completeness sake, this letter is quoted in its entirety. It reads as follows:

“Dear Ashraf

Referring [to] your Tax Invoice 108333

We hereby wish to confirm that we cannot execute delivery of your tissue jumbo rolls to your customer Paper Co Holdings (Pvt) Ltd, No. 20 Austin Road, Workington, Harare, Zimbabwe as it is being detained unlawfully at the premises of Celtic Freight and Logistics (Pty) Ltd, 56 Rigger Road, Spartan, Kempton Park. We used the premises of Celtic Freight and Logistics as a handling/storage facility before we trans-ship it to Zimbabwe destined vehicles. We have written to Celtic Freight informing them that these goods belong to Hygienic Tissue Mills and Paper Co Holdings and were in transit to Zimbabwe but they refuse to release these to us for onward transport to Zimbabwe. Attached you will find the Celtic Freight – Goods Received Voucher # GRVJ 150213/25428. [my underlining].

We keep in copy our attorney C Le Roux.”

⁴ Annexure “E.2” at p 19 of the Intervention Application (Annexure to founding affidavit).

[15] An exchange of letters between the applicant's and respondent's attorneys during February 2013 which also relate to the ownership of the tissue paper reels followed. A goods received voucher issued by the respondent on 15 February 2013 acknowledges receipt at its premises of the 30 tissue paper reels as delivered to it by Sub-Sahara Freight (Pty) Ltd, the applicant's company.

[16] In a letter dated 21 February 2013 written by the applicant's attorneys to the respondent's attorneys in response to the latter's letter dated 19 February 2013⁵ the respondents, who ostensibly were refusing to release the 30 toilet paper reels, are notified of the Intervening Party's ownership of the tissue paper reels. At paragraph 2.2(b) thereof the following is recorded:

"2.2(b)

Our client reiterates the terms of the freight and logistics agreement as set out in 1 above and furthermore denies that your client's standard terms and conditions of trade are applicable thereto. Even if these standard terms and conditions of trade are applicable then it is denied that the alleged 'lien' can be exercised against cargo belonging to a third party. Your client is currently alleging a lien in respect of the (good of) Hygienic Tissue Mills Cargo which, to the knowledge of your client, does not belong to our client but to Paper Company Holdings (Pvt) Ltd in Zimbabwe ..." (my underlining)

[17] Representatives of the Intervening Party engaged with the applicant and even the respondent's people to prove ownership of the tissue paper rolls. They attended at the applicant's premises on 6 March 2013 and proceeded to the respondent's premises which are incidentally within the

⁵ See Annexures "GH.5" at p 42 and "GH.6" at p 46 of Main Application.

same erf or precinct. The respondent refused to release the tissue paper reels to the Intervening Party. A criminal case opened with the police was discontinued after the police were of the view that this was a civil matter.

[18] On 22 March 2013 the applicant launched motion proceedings against the respondent and the ownership of the tissue paper rolls was specifically spelled out.

[19] Prayer 1 thereof reads as follows:

- “1. *Directing the respondent to release to the applicant 30 tissue paper reels weighing 21 840 kilograms which are owned by Hygienic Tissue Mills CC and which are in the respondent's possession at its warehouse situate at 56 Rigger Road, Spartan, Kempton Park; ...*”

[20] It should also be mentioned at this stage that this consignment of tissue paper was accompanied by an invoice or bill of lading addressed to Paper Co Holdings (Pty) Ltd, P O Box GD 253, Greendale, Harare, Zimbabwe issued by the Intervening Party.

RESPONDENT'S REPOSTÉ TO INTERVENING PARTY'S CLAIM TO OWNERSHIP

[21] In addition to the respondent denying that the Intervening Party was the owner of the tissue paper reels, it also relies on Clause 37 or 38 of some

standard terms and conditions relating to the business relationship between the applicant and the respondent.

[22] It is trite that the Intervening Party is not a party to the alleged business relationship between the applicant and the respondent. As such, this ground cannot and should not avail the respondent in this interlocutory application by the Intervening Party. On all reasonable constructions, this clause does not and cannot apply to goods belonging to a third party who is not a party to such terms and conditions. Consequently, there are no grounds or justification, based on this ground, to exercise a *lien* over goods belonging to the Intervening Party based on a debt owed to the respondent by the applicant.

WHETHER REI VINDICATIO ESTABLISHED

[23] The owner of a thing has the right to possess it; to use it; to destroy it⁶ and to alienate it.⁷ Possession can even be through the doctrine of *constitutio possessorium*. If any of these rights are in any way infringed, the owner has appropriate legal remedies, like the *rei vindicatio*.

[24] If and when an owner of property is deprived of his possession thereof, he may, by the *rei vindicatio*, reclaim, or recover the possession from any person or institution in whose possession the thing is found.⁸

⁶ *Neebe v Registrar of Mining Rights* 1902 TS 65 at 81; 85 and 86; *Lazarus v Wessels* 1903 TS 499 at 504; *Dadoo Ltd v Krugersdorp Municipality* 1920 AD 530 at 537.

⁷ *Van der Linden* 1.7.1; *Grotius* 2.3.9; *Voet* 6.1.1.

⁸ *Vorster v Hodgson* (1902) 19 SC 493 at 495.

[25] To succeed with a *rei vindicatio* or vindicatory action the claimant need merely prove two facts, namely:

- (a) that he is the owner of the thing; and
- (b) that the thing is in the possession of the defendant, or any other person.⁹

[26] It does not make any difference whether the possession is *bona fide* or *mala fide*: The owner of a movable property found in the possession of a third party may recover it from such possession without having to compensate him, even in cases where the possessor is in good faith and who has given value for it, depending on the circumstances.¹⁰ In the case of land, the absolute owner may eject any person in possession thereof and/or interdict him/her and others from further trespassing on it or even claim damages for loss or destruction caused by trespassers.¹¹

[27] From the totality of the evidence in this application, this Court is satisfied that the Intervening Party is the owner of the 30 tissue paper reels in issue here. It is also the finding of this Court that the respondent's denial of such ownership is not supported by the facts and circumstances inherent herein. Neither is it (denial) borne out by the evidence. As already alluded to,

⁹ *Shimuadi v Shinungu* 1990 (3) SA 344 (SWA) at 347; *Akbar v Patel* 1974 (4) SA 104 (T) at 109; *Ontwikkelingsraad, Oos-Transvaal v Radebe and Others* 1987 (1) SA 878 (T); *Jeena v Minister of Lands* 1955 (2) SA (380) (A); *Chetty v Naido* 1974 (3) SA 13 (A).

¹⁰ *Mngadi v Ntuli* 1981 (3) SA 478 (D); *Wainwright & Co v Trustee Assigned Estate's Hassan Mahomed* (1908) 29 WLR 619 at 626-627.

¹¹ *Möller v SAR&H* 1969 (3) SA 374 (N) at 381; *Botha v Minister of Lands* 1965 (1) SA 728 (A) at 741; *Priel Diamond Mining Co v Berlin Mission Society* (1909) BAC 391.

the respondent's reliance on Clause 38 of the terms and conditions in the business agreement between it and the applicant does not affect the Intervening Party's right of ownership in the tissue paper reels.

[28] Which brings us to the next question: What next then?

[29] As also already alluded to above, when the Intervening Party launched this application, it was under the impression that the respondent was still in possession of the goods. It is my finding that the Intervening Party has satisfactorily explained this. I find thus further, that the Intervening Party's impression or belief was genuine at the time.

[30] The issue now to be determined is what should happen now that the *rei vindicatio* cannot be relied upon or used.

[31] When and where movable property, in this case, the tissue paper reels, have been despoiled from its owner unlawfully – in any manner -, and it has been alienated or sold – as in this case – in such circumstances that the owner cannot vindicate the property, he may claim the value thereof from the culprit or from any other person who parted with the possession thereof with the knowledge of the owner's claim thereof¹² (my emphasis). However, this would also apply where the possessor purchased the goods in good faith but then proceeded to dispose of it when he/she had been made aware that the

¹² *Atkinson Oats Motors Ltd v Trust Bank of Africa Ltd* 1977 (3) SA 188 (W); *Alderson and Flitton (Tzaneen) (Pty) Ltd v E.G. Duffy Spares (Pty) Ltd* 1975 (3) SA 41 (T) at 51; *Hall & Sons Ltd v Kleinsmith* 1963 (4) SA 320 (T) at 321; *Vulcan Rubber Works (Pty) Ltd v SAR&H* 1958 (3) SA 285 (A) at 289; *John Bell & Co Ltd v Esselen* 1954 (1) SA 147 (A) at 153; *Aspeling NO v Joubert* 1917 AD 167 at 171.

real owner was demanding their return, or worse still, when legal proceedings are already under way to reclaim such property. Such disposition would not be *bona fide*.

[32] As early as February 2013 the respondent was notified that the tissue paper reels belonged to the Intervening Party. The applicant also launched the main application herein on 22 March 2013, clearly and unambiguously stating that these tissue paper reels belonged to the Intervening Party. The invoices and bills of lading alluded to above also proved or ought to have awakened the respondent to the fact that it was having some third party's goods in its possession. By proceeding to sell the tissue paper reels during June 2013 while armed with this knowledge cannot be said to have been a sale by a *bona fide* possessor who did not know that the goods belonged to a third party.

[33] The facts in this application point to the respondent having proceeded to sell the tissue paper reels in clear disregard of the Intervening Party's ownership thereof. One would not be far from the truth if one ventures to state that the respondent regarded the Intervening Party's ownership with contempt.

[34] With the above scenario in mind the next question to be answered is whether or not the respondent can ask that the Intervening Party be estopped from exercising its right to claim the value of the tissue paper reels.

[35] The legal position relative to any claim based on estoppel can be summarised as follows: Where the owner of movable (or immovable) property¹³ entrusts the possession thereof to another person in such circumstances that his/her conduct amounts to a representation that the custodian possessor is the owner of the thing or that he has the power to alienate it; and the custodian sells or delivers the thing to a *bona fide* purchaser who relies on the representation, the true owner, if his conduct was negligent, is estopped by his conduct from disputing the title of the innocent holder, and he consequently cannot vindicate the thing.¹⁴ The jurisdiction for such estoppel will be that the original owner was negligent.¹⁵ The *onus* of proof of such negligence is on the innocent holder and it is usually a difficult task to achieve.

[36] In *Johaardien v Stanley Porter (Paarl) (Pty) Ltd*¹⁶ the court held among others that the owner may “possibly” be estopped where his conduct has not been proved negligent but where “... *compelling considerations of fairness within the broad concept of the exceptio doli ...*” exists.

[37] There is nowhere in the circumstances of this case and the facts where it can be said the Intervening Party was negligent or has created an

¹³ *Michelsen v Aaronson and Baikie* 1914 TPD 158; *Apostoliese Geloofsending van SA (Maitland Gemeente) v Capes* 1978 (4) SA 48 (C).

¹⁴ *Barclays Western Bank Ltd v Fourie* 1979 (4) SA 157 (C) at 161; *Oakland Nominees (Pty) Ltd v Gelvia Mining & Investment Co (Pty) Ltd* 1976 (1) SA 441 (A).

¹⁵ *Sunday v Surrey Estate Modern Meta Market (Pty) Ltd* 1983 (2) SA 521 (C); *Trust Bank of Africa Ltd v Eksteen* 1964 (3) SA 402 (A); *Pennefather v Gokul* 1960 (4) SA 42 (N); *Grosvenor Motors (Potchefstroom) Ltd v Douglas* 1956 (3) SA 420 (A) at 427.

¹⁶ 1970 (1) SA 394 (A) at 409.

impression by his conduct (his representation) that could have moved the respondent to act to its detriment.

[38] In *Alderson v Flitton (Tzaneen) (Pty) Ltd v E.G. Duffy Spares (Pty) Ltd*¹⁷ it was held among others that when a plaintiff owner sues a defendant in an *actio ad exhibendum* for payment of the value of the owner's property which was formerly in the defendant's possession but which he/she is unable to restore because of him/her having ceased to possess it, the general principle to be applied is that the *onus* is on the plaintiff to allege and prove at least that at the time of the defendant's loss of possession, he had knowledge of the plaintiff's ownership or of his/her claim to ownership of the property.

[39] It is my finding that the Intervening Party has managed to prove that at the time the respondent sold the tissue paper rolls or reels, it knew or had knowledge that they were owned by the Intervening Party.

[40] In the light of the above, can it be said that the respondent was accentuated by some degree of negligence or lack of sufficient knowledge of relevant facts and/or factors at the time it disposed of the toilet paper reels.

[41] The totality of evidence herein does not lend itself to such interpretation.

¹⁷ *Supra*.

[42] In *Sadie v Standard Bank*,¹⁸ De Villiers CJ held among others that –

“... the deliberate sale and delivery of goods, with full knowledge of the owner’s claim to his rights of ownership, cannot be regarded as an ordinary loss by negligence. It is a wrongful act, which the person committing it cannot avail himself of a defence to an action for the re-delivery of the goods, or, failing such delivery, for the value (Digest 6.1.68; Voet 6.1.32) ...”

[43] The facts, circumstances and evidence in this application points to the respondent falling under the category of persons mentioned by De Villiers CJ above. It sold the tissue paper reels in issue here well knowing that court proceedings (in which they are respondents) for their return were well and truly under way.

WHETHER RESPONDENT WAS ENTITLED TO EXERCISE *LIEN*

[44] If the respondent is entitled to exercise a *lien* over property for moneys owed to it, it can do so over the property belonging to those who owed it. Correspondingly therefore, the respondent can hardly be heard to exercise a *lien* over the Intervening Party’s tissue paper rolls or reels. They are owned by the Intervening Party and the latter is not indebted to the respondent.

¹⁸ 7 SC 87 at 92-3.

[45] The respondent sought to pounce, opportunistically in my view, on a sentence in the letter from the applicant's attorneys to its (respondent's) attorneys dated 21 February 2013¹⁹ which reads as follows:

*"... Your client is currently alleging a lien in respect of the Hygienic Tissue Mills cargo which, to the knowledge of your client, does not belong to our client but to Paper Company Holdings (Pvt) Ltd in Zimbabwe ..."*²⁰

[46] It is my finding that the above statement was an unfortunate utterance from the applicant's attorneys which is at odds with the totality of averments by the attorneys in these regards. The statement is even contradictory of itself where it starts with "*... alleging a lien in respect of the Hygienic Tissue Mill's cargo ...*".

[47] Be that as it may, this Court is satisfied that the tissue paper reels were the property of the Intervening Party, namely, Hygienic Tissue Mills CC.

[48] The respondent has also latched on the above assertion to claim that there is a dispute of facts that cannot be resolved on the papers. I agree with the Intervening Party's submission that there are no factual disputes on the papers that the Intervening Party's property was being detained and had been subsequently sold by the respondent for moneys allegedly owed to it by the applicant. It is also common cause that (on the papers and in fact) the Intervening Party is not indebted to the respondent in any way whatsoever.

¹⁹ As alluded to and quoted in paragraph [14] of this judgment.

²⁰ Annexure "GH.6" at folio/page 45 of paginated Intervention Application papers.

[49] I consequently find that the issue as to whether or not the respondent is entitled in law or otherwise to exercise any *lien* over the Intervening Party's property can be determined on the papers as they stand. There is no serious or irresolvable dispute in the papers that can possibly prevent this Court from determining whether or not such *lien* can be exercised or who the real owner of the tissue paper reels is or was.

RIGHT TO INTERVENE

[50] Right at the on-set of argument in this matter the respondent abandoned its objection to the Intervening Party's deponent of its founding affidavit's mandate or authority to so depose to it. It also abandoned its objection based on the use of the word "*defend*" in the expression "... *to defend the proceedings in the South Gauteng High Court, Johannesburg* Both parties also asked the court to condone their respective late filing of their replying affidavit (in respect of the Intervening Party) and answering affidavit (in respect of the respondent). Such condonation was accordingly granted.

[51] The respondent has submitted that the Intervening Party does not have any direct and substantial interest in the subject matter of this application warranting it being granted leave to intervene. My understanding of this denial is that it was informed by the respondent's view as to who the owner was of the tissue paper reels.

[52] As indicated above, the Intervening Party was clearly the owner. As such, the basis for the respondent's submission fell away.

[53] I find that the Intervening Party has direct and substantial interest in the subject matters relevant herein.²¹ As such it should be granted leave to intervene.

CONCLUSION

[53] The respondent consistently submitted that the respondent –

“... has bona fide disposed of the tissue paper reels under the circumstances.”

[54] I have adequately demonstrated that the above view of the respondent is not only misguided and untenable when the facts and circumstances are anything to go by, but also incorrect and/or not borne out by the facts and/or evidence.

[55] The respondent did not have any right to exercise any *lien* over the Intervening Party's property, worse so, that it actually knew of the latter's claim to ownership long before it decided to sell them.

²¹ *Investec Bank Ltd v Mutemeri* 2010 (1) SA 265 (GSJ) at 278-9; *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) (2009) (1) SACR 361.

[56] In the circumstances it is the finding of this Court that the Intervening Party has made out a case for the grant of the relief it seeks.

COSTS

[57] The parties are agreed that costs should follow the suit in this application.

[58] I have independently assessed issues herein and am satisfied that costs should indeed follow the suit herein.

ORDER

[59] The following order is made:

1. The Intervening Party, i.e. Hygienic Tissue Mills CC, is hereby granted leave to intervene as an interested party in the application;
2. A declarator is hereby issued that the respondent was and is not entitled to exercise any *lien* over the Intervening Party's thirty (30) tissue paper reels weighing 21 840 (twenty one thousand eight hundred and forty) kilograms which were in the respondent's possession at its warehouse situate at 56 Rigger

Road, Spartan, Kempton Park, Ekurhuleni District Municipality,
Gauteng Province;

3. The Intervening Party has a right to claim the value of the tissue paper reels as on the date same were sold from the respondent;
4. The respondent is ordered to pay the costs of this application.

N F KGOMO
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

FOR THE INTERVENING PARTY

ADV D D NAIDO

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DATE OF HEARING

29 APRIL 2014

DATE OF JUDGMENT

6 MAY 2014