IN THE HIGH COURT OF KWAZULU NATAL, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

CASE NO. AR 22/2011

In the matter between:

37 GILLESPIE STREET, DURBAN (PTY) LTD Appellant

and

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS First respondent

ERIC STEPHEN BURNETT Second respondent

J U D G M E N T

NDLOVU J

[1] This is an appeal against the judgment of Naidoo AJ handed down on 21 June 2010 in terms of which the court *a quo* dismissed the appellant's claim with costs. The appeal served before us with the leave of the court *a quo.*

[2] The appellant company (the plaintiff in the court *a quo*) known as 37 Gillespie Street Durban (Pty) Ltd is the registered owner of immovable property physically situated at 37 Gillespie Street, Durban[1] ("the property" or "the building"). The property was commercially used, in the main, to provide hotel or accommodation services and it traded under the name and style of Blenheim Hotel ("the hotel").

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1 Fully described as *"the remainder of sub 7 of lot 10234, situate in the City of Durban, administrative district of Natal, in extent 350m²"*

[3] It was common cause, however, that the appellant only owned the property and that the business operations conducted therein were the responsibility of the appellant's tenants. Besides the hotel, a portion of the building also accommodated a mobile phone business which was operated by another tenant of the appellant.

[4] On 5 February 2002 the first respondent, the National Director of Public prosecutions ("the NDPP") applied for and was granted a preservation order in terms of section 38(2) of the Prevention of Organised Crime Act[2] ("the Act") in terms of which the seizure and placement of the hotel under the curatorship of the second respondent was authorised. The appointment of the second respondent as *curator bonis* ("the curator") to take custody and control of the building was sanctioned in terms of the preservation order aforesaid.

[5] As a ground for the seizure of the building, the NDPP had alleged in its application papers that various criminal activities were allegedly taking place in the building and that, on that basis, the building constituted "*an instrumentality of an offence*"[3] within the meaning of that concept in the Act. The application for the preservation order was made and granted on an *ex parte* basis[4], with neither the appellant nor the curator having been served with notice thereof.

[6] The preservation order was executed on the same day of its issue, that is, on 5 February 2002, through the co-operation and assistance of the members of the South African Police Service ("SAPS") who were directed to render such co-operation and assistance under the preservation order. Pursuant thereto, the members of SAPS raided the building, evicted all the tenants and guests and thereafter handed the building together with all its contents to the curator who, amongst other things, employed a private security firm to provide a 24 hour on-site guarding service on the property, which was strictly kept under lock and key.

2 Act No. 121 of 1998
3 Section 1 of the Act
4 The procedure is expressly permitted by section 38(1) of the Act

[7] The appellant denied that the building was used as "an instrumentality of an offence", hence the appellant entered an appearance to defend the forfeiture proceedings[5] which had been foreshadowed by the preservation order.

[8] In the meantime the appellant launched an application for an order that the NDPP and the curator be ordered, jointly and severally, to pay the amount of R350 000 to the appellant's attorneys in order to enable the appellant to fund the anticipated forfeiture proceedings which, according to the appellant, were expected to be protracted due to alleged substantial disputes of fact arising in the matter[6]. The application was opposed and it came before Magid J who, after perusing the papers and with the consent of both parties, directed that the matter be heard on short notice only on the one question, namely, whether the property could, in the circumstances disclosed in the applicant's (that is, the NDPP's) papers, properly be described as "an instrumentality of an offence" within the meaning of the Act. Magid J, in his judgment handed down on 10 September 2002 ("the Magid judgment") pronounced in the negative and, as a result, set aside the preservation order granted on 5 February 2002. The NDPP sought and was granted leave to appeal the Magid judgment to the Supreme Court of Appeal.

[9] Soon after leave to appeal was granted the appellant demanded that the NDPP return the building to the possession of the appellant on the basis that the preservation order had been discharged by Magid J. However, the NDPP opined differently. The NDPP was advised that, by virtue of the pending appeal, the Magid judgment was not to be given effect to. For this proposition the NDPP was relying on the provisions of rule 49(11) of the Uniform Rules. Consequently, the building was not returned to the appellant at that stage.

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5 See section 39(3) of the Act
6 See section 44 of the Act

[10] The Supreme Court of Appeal judgment in the matter was handed down on 13 May 2004 ("the SCA judgment") in terms of which the NDPP's appeal was dismissed with costs, albeit on a different ground to that given by Magid J. Eventually, at or about the end of May 2004, the curator handed the building back to the appellant.

[11] The following facts were either common cause or not in dispute:

11.1 That when the building was raided by members of SAPS on 5 February 2002 some physical damage was caused to the building and that the conduct of the said members, in that respect, was the cause of the damage.

11.2 That there was vandalism and maintenance neglect of the building after its seizure in terms of the preservation order, which condition caused some further physical damage to the property.

11.3 That, during the time when the property was under the custody and control of the curator, the appellant was denied income from rent and other invoices payable to the appellant by its tenants in the building, which the appellant would otherwise have received, but for the seizure of the property.

[12] Hence, the appellant instituted an action in the court *a quo* under case number 12091/2005 against both the NDPP and the curator, albeit it sought no relief against the curator. It is the judgment in this action against which the appellant now appeals to this court.

[13] Despite the fact that the NDPP was cited in the summons as the first defendant and the curator as the second defendant, it was common cause that wherever reference was made to "the defendant" in the particulars of claim, this was a reference only to the NDPP, and not to the curator, against whom no relief was sought in the first place. This general reference to "the defendant" is evident in the succeeding paragraph.

[14] In claiming patrimonial damages against the NDPP in the total sum of R1 492 134 the appellant pleaded, amongst other things, in its particulars of claim, as follows:

> "20. The defendant had throughout its possession of the hotel the duty to preserve the hotel properly and maintain same. This duty arose from inter alia the following facts and circumstances:
> a) The defendant sought and obtained an order to which it was objectively established it was not entitled to;
> b) Such order was to preserve the hotel so that it could be sold to achieve the best price possible or to return the hotel to its owner in the same condition it had been in when it was seized.
> c) The defendant deprived the plaintiff of the possession and all benefit of the property and prevented access to the property by either itself or through the curator it had appointed and contracted with, changing the locks and employing security guards to do so.
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> 21. The defendant breached its duty of preserving the hotel in that it allowed it to:
> (a) Fall into disrepair;
> (b) Allowed it to be vandalised and abused.
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> 22. The defendant acted intentionally recklessly alternatively negligently in respect of the failure to preserve the hotel by failing inter alia to maintain the hotel and prevent any damage to it.
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> 23. By reason of:
> (a) The defendant's seizure of the hotel which had been held to be unlawful;
> (b) The defendant's refusal to return the hotel to the plaintiff after 10 September 2002;
> (c) The defendant's failure to preserve the hotel by maintaining it in good condition and preventing any damage to it;
> (d) The defendant's failure to return the movables seized;
> (e) The plaintiff being deprived of all benefit and income of the hotel especially income from tenants;
> (f) The plaintiff having to incur wasteful expenditure."

[15] During the trial in the court *a quo* the appellant called seven witnesses and the NDPP called only one. It was obviously the number of the appellant's witnesses which was responsible for the appeal record extending to some 1200 pages. However, as the court *a quo* correctly determined, only the evidence of one witness from the appellant's side, namely Harold Talbott, was pertinent to the crisp issue before the court, which is dealt with in due course.

[16] At the commencement of the trial, counsel for the NDPP, Mr

Govindasamy, handed up a substantive application for separation of the issues of liability and quantum in terms of rule 33(4), seeking that the issue of liability be determined first and that of quantum be held over. This application was vehemently opposed by the appellant (then plaintiff) and Mr *Quinlan*, who appeared for the appellant both on appeal and in the court *a quo*, referred to the application as an "ambush" in that it was effectively a disingenuous way of bringing in a late exception defence against the appellant's summons. In any event, after listening to both arguments the learned Acting Judge ruled in favour of granting separation. Hence, the trial proceeded on the issue of liability only, in relation to the NDPP.

[17] The appellant's particulars of claim appeared somewhat ambiguous as to whether the alleged cause of action was based on the *actio injuria* or the *actio legis Aquiliae.* The court *a quo* dealt with the matter from the premise that it was an action based on *injuria* in the form of a claim for damages arising from wrongful and/or malicious prosecution. However, in *Minister of Finance v EBN Trading*[7] the court (*per* Magid J) observed:

> "In Roman-Dutch law, unlike English law, there are no hard and fast categories of delicts, nor is it necessary to label a cause of action. In our law all delicts give rise to claims based on either the *actio injuriarum* or on the *lex Aquilia*. Provided facts are alleged in a pleading which justify the relief sought in accordance with the principles of our law, the pleading will disclose a cause of action without the delict being named. Similarly, if the evidence led in an action justifies a judgment consistent with our legal principles no label need be attached to the claim on which it is based."[8]

In any event, this issue is of no consequence in the light of the ground on which I propose to rely for the disposal of this appeal. To that extent, suffice it to say I am satisfied that, in the present instance, the appellant's claim was based on an *Aquilian* action.

[18] There were other issues raised both in pleadings and during argument which included the following:

18.1 Whether, notwithstanding section 38(1) of the Act permitting it, it

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7 *Minister of Finance & others v EBN Trading (Pty) Ltd* 1998 (2) SA 319 (N)
8 *EBN Trading*, above, at 324B-C

was improper, in the circumstances of this case, for the NDPP to have brought the application for the preservation order on an *ex parte* basis, in the light of the decision in *National Director of Public Prosecutions v Rautenbach & others*[9] ;

18.2 Whether the provisions of rule 49(11) were applicable, as to have automatically suspended the effect of the Magid judgment and, if so, whether the effect thereof was to have revived the preservation order in favour of the NDPP; and

18.3 Whether the appellant's particulars of claim disclosed any cause of action against the NDPP, in particular.

[19] As in every civil suit it is most crucial to determine whether, on the pleadings, a cause of action for which relief is sought, is made out against the party being sued. This preliminary determination is particularly crucial in the present instance because, it seems to me, the outcome thereof is potentially dispositive of the matter. Hence, I propose to deal first with that issue, which is listed third above.

[20] It is trite that an *Aquilian* action is a remedy whereby a plaintiff is enabled to recover patrimonial loss (including purely economic loss) suffered through a wrongful and negligent act on the part of the defendant.[10] It is also well known that for a claim under the *actio legis Aquiliae* to be sustained it is incumbent upon a plaintiff to allege and prove, against or on the part of the defendant, the following: (1) Wrongful act or omission; (2) Duty of care and the breach thereof; (3) Damages or patrimonial loss; (4) Causation; and (5) Negligence.

[21] It was clear from the appellant's pleadings in the court *a quo* that the appellant sought to make out its case against the NDPP on the basis of the averments contained in paragraphs 20 to 23 of the particulars of claim, referred to above, whereby the appellant, in summary, alleged the following:

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9 2005 (4) SA 603 (SCA) at 610H-I

10 *Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd* 1978 (4) SA 901 (N)

21.1 That the NDPP was in possession of the property.

21.2 That the NDPP had a duty to preserve and maintain the property properly.

21.3 That the NDPP failed in its duty to preserve and maintain the property as required of it.

21.4 That the NDPP failed to restore the appellant to its possession of the property immediately after the Magid judgment.

21.5 That the conduct of the NDPP aforesaid was negligent.

[22] Mr *Quinlan* was unable, in my view, to convince us really on what basis, in the circumstances of this case, it could seriously be said that the NDPP was ever in possession or control of the property, in respect of which the NDPP would have had a duty of care to preserve and properly maintain. Counsel argued from the premise that the appointment of the curator was at the behest of the NDPP under the *ex parte* application launched by the NDPP on 5 February 2002. He further submitted that, in any event, even if the NDPP was not in physical possession and control of the property, the NDPP had the power to direct, or at the least to use its good office to persuade, the curator to restore possession of the property to the appellant, which the NDPP had failed to do despite several demands by the appellant's attorneys in that regard. In my view, this line of argument is not convincing.

[23] It was a hard fact that the NDPP was never in possession or control of the property in terms of the preservation order, but that the curator was. Granted, the appointment of the curator was at the behest of the NDPP. However, this involvement of the NDPP in the appointment of the curator did not in any way render the curator subject and subservient to the NDPP. What is to be borne in mind is that upon his appointment the curator did not become an agent of, or appendage to, the NDPP but performed his duties independently of the NDPP. The *curator bonis* is a statutory institution the incumbent of which is appointed[11]by a court to exercise powers[12] and execute functions[13], in terms of the Act. Once so appointed the *curator bonis* acts

11 Section 42 of the Act
12 Section 33 of the Act
13 Section 32 of the Act

independently of the NDPP and for his own account. Therefore, if anything, the curator was only responsible to the court which appointed him and, indeed, to which the curator submitted his reports accounting for what he had done in terms of his mandate[14]. Therefore, the appellant's averment that the curator was appointed by the NDPP was factually incorrect.[15] I also observe that when a legal controversy ensued as to the curator's position during the period pending appeal against the Magid Judgment, the curator sought legal advice not from the NDPP's attorneys of record (the state attorney), but from his own private attorneys[16]. This conduct was, in my view, a further demonstration of the curator's independence from the NDPP.

[24] In the present instance it followed that since the NDPP never took possession and control of the property, no duty of care in relation to its preservation or maintenance on the part of the NDPP could have possibly arisen. Therefore, the appellant's pleadings did not make out any cause of action in respect of the relief that the appellant sought against the NDPP. On this basis alone the appeal falls to be dismissed. In this event, it becomes unnecessary to deal with the other issues raised in the pleadings and argument, which I referred to above.

[25] Concerning the question of costs, I take regard of the fact that the success of the NDPP in this matter is premised essentially on an exception which the NDPP ought to have pleaded at the outset as a legal challenge to the appellant's claim in the summons. This was the appropriate step which the NDPP ought to have taken. Instead, the NDPP filed its plea and thus allowed the matter to be dealt with as a trial in the ordinary course. In the circumstances, the NDPP should only be entitled to costs on the level of an opposed exception.

[26] In the result, the appeal is dismissed with costs, but such costs shall be taxed on the level of an opposed exception.

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14 See 1st and 2nd Reports (both undated) at pp. 36 and 1015 of the indexed record
15 See paragraph 20(c) of the plaintiff's particulars of claim, above
16 See the curator's letter dated 19 December 2002 addressed to attorneys Garlicke & Bousfield, at p.448 of the indexed record

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NDLOVU J

_____ I agree

GORVEN J

_____ I agree

LOPES J

Date of hearing : 10 August 2011

Date of judgment : 22 September 2011

Appearances:

For the appellant : Mr PD Quinlan

Instructed by : Lyle & Lambert Inc., Durban

For 1st respondent : Mr M Govindasamy SC

Instructed by : The State Attorney (KZN), Durban