IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

CASE NO: AR101/13

In the matter between:

GREEN AFRICA CONTAINER DEPOT (PTY) LTD — Appellant
(Defendant in the court *a quo*)

And

PERFECT INNOVATIONS 146 CC — Respondent
(Plaintiff in the court *a quo*)

ORDER

On appeal from: The KwaZulu-Natal High Court, Durban (Mokgohloa J) sitting as court of first instance. It is ordered that:

(a) Paragraph 2 of the order of the court *a quo* is amended to read as follows:

"Interest thereon at the rate of 15.5% per annum from 8 May 2008 to date of payment."

(b) The appeal is otherwise dismissed with costs, such costs to include the costs of Senior Counsel.

JUDGMENT

SEEGOBIN J:

INTRODUCTION

[1] With leave of the trial court, the appellant appeals against the whole of the judgment of Mokgohloa J handed down in the High Court, Durban, on 4 April 2012. The learned Judge had granted judgment against the appellant (defendant in the court *a quo*) in an amount of R4 053 973.00 together with interest and costs.[1] Mr Troskie SC appeared on behalf of the appellant and Mr Pammenter SC on behalf of the respondent (plaintiff in the court *a quo*). We are indebted to both counsel for their assistance in this matter. For the sake of convenience the parties will hereafter be referred to as they were in the court *a quo*.

[2] The plaintiff is a close corporation which trades as an importer and distributor of OTR (off the road) tyres. The defendant on the other hand carries on business as a container depot operator in Durban. On 8 May 2008 the plaintiff instituted an action for damages against the defendant when two consignments of the plaintiff's OTR 4000-57 tyres were damaged. The tyres in question were purchased by the plaintiff from a company known as North West Tyres which is based in England. North West Tyres sourced the tyres from a company known as Sinotyre which is based in China. North West Tyres paid Sinotyre for the tyres and had them shipped from China directly to Durban.

[1] Record, Vol. 1, page 12.

[3] The plaintiff thereafter appointed a close corporation known as Havannah Transport and Freight CC trading as South African Freight Services (SAFS) as a clearing and forwarding agent to clear the tyres through customs, store them in Durban and thereafter have them delivered to their final destination which in this case was to a company known as Quality Tyres in Middelburg. SAFS in turn contracted with the defendant to have the tyres unpacked, and stored at its depot and to thereafter have them delivered to Middelburg.

COMMON CAUSE FACTS

[4] It is common cause that the two consignments (consisting of six tyres each) were indeed delivered to and stored by the defendant. The first consignment of tyres was removed from the container at the premises of a concern known as Elcon Crane Hire in Durban and from there they were transported on a flatbed trailer pulled by an articulated vehicle to the defendant's premises where they were off-loaded and stored. The second consignment (again consisting of six tyres) was removed by the defendant from a container and stored at its premises. The defendant thereafter received an instruction from SAFS to load the first consignment of tyres onto a flatbed trailer and to convey these tyres to Quality Tyres in Middelburg. The defendant complied with the instruction and delivered the first consignment to Quality Tyres. However, when the tyres were delivered, Quality Tyres refused to accept delivery because it was found that the tyres were damaged. These tyres were brought back to Durban but the defendant refused to accept them for further storage. The tyres were finally stored at the plaintiff's warehouse in Johannesburg. When the defendant delivered the second consignment of tyres to Quality Tyres, the latter once again refused to accept the tyres because they were damaged. These tyres were also returned and stored in Johannesburg. The court *a quo* found, correctly in my view, that the tyres were damaged by the defendant. The defendant does not challenge this finding.

ISSUES ON APPEAL

[5] The issues that require determination in this appeal are the following:

(a) whether ownership in the tyres had passed to the plaintiff;
(b) whether the transaction between the plaintiff and North West Tyres was one in terms of a credit agreement;
(c) whether the defendants 'STANDARD TRADING TERMS AND CONDITIONS' find application;
(d) whether the *quantum* of damages awarded is in accordance with the evidence.

[6] A further issue which arose in the course of argument was whether the court *a quo* was correct in awarding interest on the damages claimed from date of demand.

ISSUES OF OWNERSHIP AND THE EXISTENCE OF A CREDIT AGREEMENT

[7] In view of the fact that the issues relating to ownership and the existence of the credit agreement are inter-related, it is convenient to deal with them simultaneously herein.

[7.1] In advancing the appeal on behalf of the defendant on these issues Mr Troskie submitted that the alleged ownership of the plaintiff was based on the contention that the sale was a credit sale, that there was no reservation of ownership by North West Tyres and that delivery of the tyres occurred which had the effect of passing ownership from North West Tyres to the plaintiff. He further submitted that inasmuch as the credit arrangement in existence between North West Tyres and the plaintiff was allegedly a sixty (60) day credit limit, it was common cause that by the time of hearing of this matter in the court *a quo* in March 2011, nearly four years later, North West Tyres had

not been paid for these tyres.[2] There also appears to have been some other arrangement in place in terms of which North West Tyres was to share in the profit which the sale of these tyres by the plaintiff was to generate.[3] It seems that only one invoice evidencing the sale of tyres by North West Tyres to the plaintiff was produced at the hearing and no documentary evidence was produced in respect of the other tyres.[4] It was further submitted that the evidence, in any event, did not support a finding that delivery to the plaintiff had taken place. In light of all this it was contended on behalf of the defendant that the real arrangement in existence between the plaintiff and North West Tyres was not placed before the court and as such the evidence did not support a finding that the plaintiff had established a credit agreement in order to satisfy the requirement for the passing of ownership and delivery.

[7.2] In order to decide this issue it is necessary to examine the relationship that existed between the plaintiff and North West Tyres and the manner in which they conducted business with each other. There is no dispute that North West Tyres and the plaintiff conducted business with each other since 2005. Two witnesses namely **Mr Wess** for North West Tyres and **Mr Keach** for the plaintiff both gave factual evidence on the issue of ownership of the tyres and both of them confirmed that the sale was a credit sale and that there was no reservation of ownership.[5]

[7.3] It is trite that in terms of our common law, if goods are sold on credit then ownership would pass on delivery.[6] This general rule has been succinctly set out by Holmes J in *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and Another*[7] as follows:

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[2] Record, Vol. 2 page 100 lines 1 & 2.
[3] Record, Vol. 2 page 116 to page 118 line 19.
[4] Record, Vol. 5 page 343.
[5] Record, Vol. 2, page 100 lines 10-24 and Vol. 3, page 210 lines 1-7.
[6] *Norman's Law of Purchase and Sale in South Africa*, 5ed (2005), paras 12.7.2 and 12.10.
[7] 1973 (3) SA 685 (A) at the headnote. (added in the position of the quoted text) See also: *Lendalease Finance (Pty) Ltd v Corporacion De Mercadeo Agricola and others* 1976 (4) SA 464 (A) at 490D-E.

> "In general, payment by cheque is *prima facie* regarded as immediate payment subject to a condition. The condition is that the cheque be honoured on presentation. When the cheque is so honoured, the date of payment of the debt is the date of the giving of the cheque. Conversely, if the cheque is dishonoured there has been no payment …. The general rule is that (a) in a sale for cash, ownership does not pass until the price is paid, even if delivery has meantime [been] given; (b) in a sale on credit, ownership passes on delivery. This, however, is not an irrefrangible principle of law. It is basically a question of fact in each case. It depends whether the totality of the circumstances shows, by inference or otherwise, that the parties intended ownership to pass or not to pass, as the case might be." [my emphasis]

[7.4] It would seem to me that the defendant's contention regarding the issue of ownership in this matter appears to be premised on a disbelief on its part that North West Tyres was prepared to contract with the plaintiff in this manner. This stems from the nature of the transaction, which on the facts, was as follows: (a) North West Tyres sold the tyres to the plaintiff at the same price it paid to the manufacturer, namely Sinotyre of China; (b) the tyres were sold by North West Tyres to the plaintiff on "open account" with payment to be made sixty (60) days after delivery, even though it had paid Sinotyre prior to the tyres reaching Durban; (c) the two consignments form part of a greater number of consignments resulting in a total liability by the plaintiff to North West Tyres in an amount of approximately USD 600 000.00 for which North West Tyres held no security whatsoever, and (d) North West Tyres was to receive 50% of any profit which the plaintiff made on the resale of the tyres. Both **Wess** and **Keach** testified to this effect[8] and their evidence was accepted by the trial judge. There is no reason for this court to interfere with that finding.

[8] Record, **Wess**: Vol. 2 page 98 lines 4-12; **Keach**: Vol. 3 page 210 lines 2-7. Further in Vol. 2 page 103 lines 1-11 and page 115 line 8 to page 118 line 6. Keach explained the nature of the transaction in his evidence-in-chief in Vol. 3 page 207 line 12 to page 208 line 6.

[7.5] As far as the defendant's contention that 'delivery' did not take place and as such ownership did not pass is concerned, the evidence established that the agreement with Sinotyre was that North West Tyres would pay Sinotyre before the tyres arrived in Durban. This ensured that once Sinotyre was paid the tyres would be released. There was no transfer to the plaintiff of a bill of lading and as such ownership of the tyres could not have passed as per the traditional method employed in international sales.[9] What happened in the present case was that the tyres in question were released on the basis of an 'express' or 'telex'. The evidence of both Wess[10] and Naicker[11] (on behalf of SAFS) disclosed that this is an arrangement whereby, in the absence of a bill of lading, the shipping company, on being instructed by the consignor to do so by means of a telex or other written instruction, releases the goods in question to the consignee thereof or its agent.

[7.6] The authors of *Silberberg and Schoeman's: The Law of Property*, 5ed (2006), Bardenhorst *et al*, point out that delivery mostly involves an actual physical handing over of a thing, in which case, what is referred to is actual delivery (*traditio vera*) (see page 180). However, delivery may also involve changes in possession without any physical handing over taking place, based on changes in the intentions of the parties involved. The so-called constructive forms of delivery (*traditio ficta*) are especially important where actual physical handing over of a thing is not possible (see page 180 – 181).

[7.7] The author Carey Miller: *The Acquisition and Protection of Ownership* (1986) (pages 142-144) points out that:

> "the bases of recognition of the constructive modes vary; in some the result is justified because the transferee has physical control, although *detention* remains with the transferor. In other instances the element of physical control

[9] This entails that unless the parties expressly agree otherwise, ownership of goods in international sales passes on delivery of the bill of lading.
[10] Record, Vol. 2 page 97 lines 7-24.
[11] Record, Vol. 3 page 130 line 17 to page 131 line 4.

obtained by the transferee is minimal – or even non-existent – but the parties' intention that ownership should pass is so manifest as to justify the result. In the typical case of the actual handing over of the thing the parties' intention is extrapolated from the act of delivery itself, but if this intention emerges from other facts the need for a manifest act of delivery is reduced".

[7.8] In the present case, it follows in my view, that once the telex release had been arranged the tyres were now at the disposal and effective control of the plaintiff which in turn instructed SAFS to make arrangements for their physical upliftment and delivery to the defendants depot for storage until their final destination was determined. In the circumstances, the court *a quo* was correct in its finding that delivery to the plaintiff had taken place.

DID THE DEFENDANT'S 'STANDARD TERMS AND CONDITIONS' APPLY TO THE PLAINTIFF?

[8] It was the defendant's case both in the court *a quo* and before this court that its standard terms and conditions applied to the transaction in question.[12] The significance of this is that if the standard terms and conditions did in fact apply, the plaintiff's claim would be limited to R6.50 per kg of the weight of the tyres.[13] It stands to reason that the standard terms and conditions can only apply if plaintiff and defendant agreed, either expressly or tacitly, that they would apply.

[9] The defendant's case was that SAFS acted as the plaintiff's agent when contracting with the defendant and that Naicker, on behalf of SAFS, knew that the plaintiff carried on business with its customers on the basis that the standard terms and conditions applied to any transaction. Even if one were to accept on the evidence that in their past dealings with each other, Naicker had received documents

[12] Paragraph 11 of the defendant's plea, Record, Vol. 2 pages 45-46. The actual standard terms and condition are to be found in Vol. 6, commencing at page 437.
[13] Paragraph 11 of the 'Standard Terms and Conditions' at Vol. 6 page 440 of the Record.

from the defendant which indicated that the defendant had contracted on the basis that its standard terms would apply, then tacity, at least, it must be accepted that the standard terms and conditions applied to any contract which Naicker concluded with the defendant. The real issue however, is whether *in casu* Naicker contracted with the defendant as the duly authorized agent of the plaintiff or as an independent agent.

[10] The learned author AJ Kerr in his book *The Law of Agency* 4ed (2006) states the following in the very first paragraph (see page 1):

> "The aim of the appointment of an agent is the performance of a service for the principal: what the principal finds impractical, inconvenient or difficult to do for himself, he proposes to do through another. However, many besides agents perform services for another. One needs to consider other characteristics when one identifies the nature of agency."

[11] At pages 3 and 4 of the same work the learned author deals with empowered and unempowered agents. He points out that an empowered agent is one who has the permission to do certain acts which will alter his principal's legal position. At page 14 the learned author distinguishes between independent contractors, mandatories and independent agents. He points out that an independent contractor usually means a *conductor operis*, namely one who is obliged to produce a certain finished work as opposed to an empowered agent who does something on behalf of his principal.

[12] There are several cases involving *locatio conductio operis* that deal with the distinction between an independent contractor on the one hand and an employee on the other. They are useful in determining who is and who is not an independent contractor. Joubert J in *Smit v Workman's Compensation Commissioner*,[14] after

[14] 1979 (1) SA 51 (A). See also: *Marais v Bezuidenhout* 1999 (3) SA 988 (W) which dealt with the provisions of Section 21(d) of the Copyright Act 98 of 1978. The court found that an architect who was instructed to design a

giving examples of the different types of contracts *locatio conductio operis*, stated the following at 58A-C:

> "… In all these instances the *conductor operis* undertook to produce a certain result on a person or physical thing which was handed to him by the *locator operis*. The *conductor operis* was bound to complete the work properly according to the specifications and terms of the contract. Inasmuch as he undertook to produce the promised result or product he was not bound to obey the orders or instructions of the *locator operis* in regard to the manner of carrying out the work himself unless otherwise agreed upon … There was in principle nothing to prevent him from subcontracting (subject to contrary agreement) since he remained contractually responsible for the finished product."

[13] Turning to the evidence, there was no dispute that SAFS was a 'clearing and forwarding agent'. The evidence showed that SAFS had contracted with the plaintiff to bring about a desired result: it had to clear the tyres through customs, uplift them from the harbor, have them stored at Durban and thereafter arrange to have them delivered to their end destination being Quality Tyres in Middelburg. How SAFS sought to achieve all this was left entirely up to it. It was entitled to employ sub-contractors to enable it to do so. The defendant was one of its sub-contractors. The witness **Arumugam**[15] on behalf of the defendant confirmed that he never asked Naicker who he was acting for. Since he wanted to hold Naicker responsible for payment, he preferred having a contractual relationship with Naicker (SAFS) rather than with his client. However, it seems that **Arumugam** himself was not sure whether Naicker was acting as an agent or not. This is apparent from the following extract of his evidence under cross-examination:[16]

> "Right. Now, you then sent an email to Mr Renu where you said, and I'm quoting from the second paragraph of this email at page 117:

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home within certain parameters enters into a contract *locatio conductio operis* and not a contract of service. Therefore the copyright in the drawings remain vested in the architect.
Also: *Niselow v Liberty Life Association of Africa Ltd* 1998(4) SA 163 (AD) in which Streicher JA found that an insurance agent was an independent contractor and not an employee.

[15] Record, Vol. 4, pages 321-322.

[16] Record, Vol. 4, page 320 lines 5-21.

> 'Could you kindly advise if South African Freight Services contracted the unpacking and handling of the industrial tyres to Green Africa Container Depot for the abovementioned client as an agent for Perfect Innovations CC or as the principal.'
>
> --- Absolutely correct.
>
> So, your attorney asked you whether South African Freight Services was acting as agent or not. --- Correct.
>
> So, the conclusion we have to draw from that surely is that when your attorney asked you whether South African Freight Services was acting as an agent, you weren't sure. --- Well, I responded to our attorney originally that South African Freight Services were the agent, but he wanted me to get clarity from Mr Naicker himself.'"

[14] As I pointed out above there was nothing in the arrangement between Naicker on the one hand and Arumugam on the other that brought about a contractual nexus between the plaintiff and any of SAFS's sub-contractors. It follows, in my view, that there is simply no evidence to support the contention advanced by the defendant that such agency existed. In the circumstances the court *a quo* was correct in finding that the defendant's standard terms and conditions applied to SAFS and not to the plaintiff.

ARE THE DAMAGES AWARDED IN ACCORDANCE WITH THE EVIDENCE?

[15] The defendants contentions in this regard were based *first* on the ground that the court *a quo* did not make any allowance for the salvage value of the tyres and *second* on the ground that the court did not take into account the fact that the plaintiff was obliged to pay 50% of the profit on the transaction to North West Tyres.

[15.1] The first ground seems to be based largely on the evidence of the plaintiff's expert Mr Ross Campbell who believed that the tyres could be sold without warranty to somebody who was prepared to accept the risk.[17] Keach on the other hand made it clear that he would not be prepared to sell the tyres, even if repaired, because there would be no warranty and in addition there were safety concerns.[18] However, when one examines Campbell's evidence carefully he makes it clear that "it's not advisable to repair a bead in the first place".[19] It was common cause that the 'beading' of the tyres had been damaged. Campbell goes on to state that "the tyre could fail on the bead resulting in serious injury or death or damage to the machine the tyre was fitted to."[20] Bearing in mind the resultant risk attached to these tyres if they were to be repaired and sold, it would seem to me that the court *a quo* was correct in not taking into account the salvage value of the tyres. In any event nowhere in the evidence was Keach asked whether he would accept these tyres in a repaired state, nor did Campbell say who he would be able to sell the tyres to.

[15.2] The defendant's second ground, namely, that the court *a quo* failed to take into account, when assessing the quantum of damages, the fact that the plaintiff had to pay North West Tyres 50% of the profits made on the resale of the tyres, is in my view, without merit. In this case the appropriate measure of damages would be the market value of the tyres at the time of the delict. The plaintiff established what the market value of the tyres were at the time. These were the damages it was entitled to.

INTEREST

[16] I now turn to consider the question of the interest payable. Mr Troskie submitted that it would have been fair to give interest from date of issue of summons

[17] Record, Vol. 4, page 248 line 4 to page 249 line 2.
[18] Record, Vol .3, page 216 lines 15-23.
[19] Record, Vol. 4, page 251 line 15.
[20] Record, Vol. 4, page 248 lines 19-23.

rather than from the date of demand as the court *a quo* had done. Bearing in mind that we are dealing with an unliquidated debt the provisions of section 2A(2)(a)(5) of the Prescribed Rate of Interest Act 55 of 1975 (the Act) would apply.

[17] Section 2A(2)(a) lays down the general position that interest runs from the date of demand or summons. Section 2A(5) of the Act provides as follows:

> "Notwithstanding the provisions of this Act but subject to any other law or an agreement between the parties, a court of law, or an arbitrator or an arbitration tribunal may make such order as appears just in respect of the payment of interest on an unliquidated debt, the rate at which interest shall accrue and the date from which interest shall run."

[18] In *Adel Builders (Pty) Ltd v Thompson*,[21] Howie JA set out the following approach to be followed by a court in the exercise of its discretion:

> "Acting in terms of ss (5), it was open to the Court, in fixing the date from which interest was to run, to give effect to its own view of what was just in all the circumstances . . . . The discretion afforded by s 2A(5) was of the nature referred to in a long line of cases in this Court from *Ex parte Neethling and Others* 1951 (4) SA 331 (A) onwards. Plainly, if parties wish certain facts and circumstances to be weighed in the exercise of such a discretion they must establish them. But there are no *facta probanda.* No enquiry arises as to whether a necessary fact has been successfully proved. Similarly, absence of proof does not result in failure on any issue. Indeed, there are no evidential issues to attract any *onus.*"

[19] In *MV Gladiator: Samsun Corporation t/a Samsun Line Corporation v Silver Cape Shipping Ltd, Malta,*[22] Southwood AJ was of the view that "in exercising its discretion the section expressly states that the court must make an order which is 'just', that is, it must exercise its powers in a way that is fair to the parties".

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[21] 2000 (4) SA 1027 (SCA) ([2000] 4 All SA 341) at para 15.
[22] 2007 (2) SA 401 (D) ([2005] 1 All SA 67) at 412I. See also: *Springgold Investments v Guardian National Insurance Co. Ltd* 2009 (3) SA 235 (D).

[20] The letter of demand in this matter is dated 25 October 2007. Summons was issued on 8 May 2008. It is not clear from the record when it was served on the defendant. In the exercise of my discretion I would have considered it just to order that interest run from the date of issue of summons. I would propose that paragraph 2 of the order of the court *a quo* be amended accordingly.

ORDER

[21] The order I propose is the following:

(a) Paragraph 2 of the order of the court *a quo* is amended to read as follows:

> "Interest thereon at the rate of 15.5% per annum from 8 May 2008 to date of payment."

(b) The appeal is otherwise dismissed with costs, such costs to include the costs of Senior Counsel.

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Ploos van Amstel J I agree

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Nzimande AJ I agree

Date of Hearing	:	3 February 2014
Date of Judgment	:	21 February 2014
Counsel for Appellant	:	Adv. A.J Troskie SC
Instructed by	:	Shepstone & Wylie
Counsel for Respondent	:	Adv. C.J Pammenter SC
Instructed by	:	Cox Yeats c/o Stowell & Company