REPORTABLE
Case number: 286/98

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

P COETZEE (SHERIFF, PRETORIA EAST)
APPELLANT

and

F E MEEVIS
RESPONDENT

CORAM: **VAN HEERDEN DCJ, SMALBERGER, VIVIER, ZULMAN JJA and MELUNSKY AJA**

DATE OF HEARING: **18 SEPTEMBER 2000**

DELIVERY DATE: **29 SEPTEMBER 2000**

Unlawful attachment - sheriff's liability.

JUDGMENT

SMALBERGER JA

SMALBERGER JA:

[1] The appellant is the duly appointed sheriff for the district of Pretoria East.

He appeals, with leave of the Chief Justice, against a finding by De Villiers J in the

Transvaal Provincial Division that he is liable to compensate the respondent (the

plaintiff in the court *a quo*) for the damage she has suffered as a result of his

unlawful attachment of certain jewellery belonging to her. The judgment of the

court *a quo* is reported as *Meevis v Sheriff, Pretoria East* 1999(2) SA 389 (T).

[2] In June 1990 the respondent and one Smithers, a British national ("Smithers"), were living together in Pretoria. Action had been instituted against Smithers in the Transvaal Provincial Division by a certain Mrs

Hutchinson. He was arrested *tamquam suspectus de fuga*. In order to secure his release the respondent, on 5 June 1990, gave a written undertaking to one Vlok, the acting sheriff of Pretoria, in his official capacity, to furnish him with security in the sum of R12 500,00 for the due appearance of Smithers. This was done in terms of rule 9(8) of the Uniform Rules of Court. The security was in the form of jewellery comprising two bracelets and a diamond and emerald pendant ("the jewellery"). The jewellery was handed over voluntarily to Mr Vlok by the respondent at the common residence which she shared with Smithers and accepted by him for safekeeping.

[3] The undertaking, after providing that:

> "I . . . hereby undertake to furnish . . . security in the sum of R12 500,00 . . . in jewellery . . . on behalf of respondent [Smithers]" continues
> "Such security shall act as a guarantee for the due appearance by the said respondent until finalisation of the aforesaid action and shall ensure his appearance at any or all times of hearing of that action.
> I agree further that such security shall be given by me on behalf of and in the name of the respondent and shall be forfeited to the applicant should respondent fail to appear as aforesaid."

[4] On 27 June 1990 and 5 July 1990 warrants of execution were issued

against Smithers for judgments in the sums of R2644,26 and R87 000,00 respectively, plus costs. Service of the warrants on Smithers on 7 July 1990 resulted in a returns of *nulla bona*. On 6 August 1990 the jewellery was attached in execution pursuant to a warrant. The sale in execution of the jewellery was advertised in two local newspapers to take place on 9 October 1990. The sale, however, was cancelled before that date but the acting sheriff was instructed by the executing creditor's (Mrs Hutchinson's) attorneys to keep the jewellery under attachment.

[5] Following upon the delimitation of the areas of jurisdiction of the sheriffs in Pretoria on 1 December 1990 the appellant assumed responsibility for the further conduct of the matter and the relevant file, together with the jewellery, was handed over to him. He was instructed by Mrs Hutchinson's attorneys to keep the attached jewellery in safekeeping pending further instructions.

[6] On 21 November 1991 judgment was given against Smithers. (The judgment is reported as *Hutchinson v Hylton Holdings and Another* 1993(2) SA 405 (T).) On the same day the appellant was furnished with a further warrant of execution by Mrs Hutchinson's attorneys and was instructed by

them in their covering letter “to attach immediately the jewellery held by yourselves as security . . .” The appellant duly proceeded to do so, the attachment taking place at his office where the jewellery was being held. In his return of service the appellant refers to the jewellery “which [was] held by me as security.” It is apparent, having regard to the letter and subsequent returns of service by the appellant, that he must have been aware of the judgment on 21 November 1991 (or at the latest 27 November 1991).

[7] On 18 December 1991 the respondent filed an affidavit with the appellant in which she confirmed that the jewellery belonged to her and was given as security to secure Smithers’s appearance in court. She went on to add that “at no time was my jewellery intended to guarantee payment of Supreme Court awarded damages or costs.” This occurred after Smithers had made a number of calls to the appellant’s office concerning the safekeeping of the respondent’s jewellery.

[8] On 6 January 1992 Smithers’s attorneys wrote to the appellant confirming that an affidavit had been filed by the respondent. The letter continues:

> "Ons versoek u vriendelik om intussen voort te gaan met 'n tussenpleitgeding ten einde hierdie aspek tot finaliteit te bring.
>
> Ons het egter geen beswaar indien hierdie tussenpleitgeding oorgehou word hangende die appèl hierin nie".

The appeal referred to was presumably that noted by Smithers against the judgment given against him.

[9] No letter of demand for the return of the jewellery was sent, nor were any further steps taken to secure their return, before 16 January 1992. On that day an armed robbery took place at the appellant's offices. Amongst the items taken was the jewellery, which has not since been recovered. No fault attached to the appellant or any member of his staff in relation to the robbery. On the day following the robbery formal demand for the return of the jewellery was made for the first time.

[10] The respondent's main claim was based on the appellant having been *in mora* in regard to the return of the jewellery and thus liable for the loss she sustained. De Villiers J held that he was not *in mora* (at 392 C-F). This finding was not raised or challenged on appeal. There is no need to express any view as to its correctness and I specifically refrain from doing

so. The learned judge, however, found for the respondent on her alternative claim based on the wrongful attachment of the jewellery on 21 November 1991. Central to this finding was the reliance he placed on the decision in *Weeks and Another v Amalgamated Agencies, Ltd* 1920 AD 218.

[11] *Weeks*'s case was decided by a court presided over by Innes CJ. Two concurring judgments were delivered, the one by De Villiers AJA and the other by Juta AJA. The remaining members of the court concurred in the latter judgment. Both judgments had comprehensive regard to Roman-Dutch authority. In the course of his judgment Juta AJA said the following (at 238):

> "Applying the principles of the Roman-Dutch law, and the Statute Law (Act 32 of 1917), the position of a Messenger in attaching the goods of a third person seems clear. [1] If he attaches them while in the possession of the judgment debtor they are presumed to belong to the latter, and the Messenger is not liable to the owner for such attachment. [2] If on attachment or thereafter before they are sold, they are claimed by a third person, his duty is to take out an interpleader summons. If he neglects to do so he is answerable to the owner of the goods. [3] If he attaches goods not in the possession of the judgment debtor which belong to a third person, he does so at his own risk, and is answerable to the true owner. No hardship is imposed on the Messenger because by Order 25, section 6 of

> Act 32 of 1917, if he is in doubt as to the validity of any attachment or contemplated attachment, he may require that the party suing out the process shall give security to indemnify him."
>
> (Numbered square brackets inserted by me.)

[12] De Villiers AJA, referring to the position of the messenger had, *inter alia*, the following to say (at 226):

> "He is therefore not entitled to attach the property of third parties. If he does so he acts outside the limits of his functions and is liable. . . . [T]he authorities are unanimous that the Messenger is liable if he attaches the goods of third parties, whether there be negligence in the ordinary sense on his part or not.
>
> Only in one case is a Messenger entitled to attach the property of a third party, and that is when the property is found in the possession of the debtor."

[13] *Weeks*'s case has since been followed in a number of decisions (see, eg, *Smit v Van Wyk* 1966(3) SA 210 (T) (per Marais J) and *Trust Bank van Afrika, Bpk v Geregsbode, Middelburg* 1966(3) 391 (T) (per Trollip and Colman JJ). It has also received the approval of academic writers (see, eg, *Neethling's Law of Personality* at 202/3). Its correctness was not challenged on appeal before us.

[14] The extract from the judgment of Juta AJA in para **[11]** postulates three situations which I numbered for convenience. In the present matter

we are dealing with the third situation - the attachment of goods not in the possession of the judgment debtor (in *casu* Smithers) which belongs to a third person (in *casu* the respondent). Where a messenger (or sheriff) so acts, he does so at his own risk and must answer to the true owner for any loss suffered. It is no defence that he believed the attachment to be lawful as consciousness on his part of the wrongful character of his act is not a requirement for liability (*Minister of Justice v Hofmeyr* 1993(3) SA 131 (A) at 154 H-J; *Ramsay v Minister van Polisie en Andere* 1981(4) SA 802 (A) at 818 E- 819C).

[15] It was common cause on appeal that the jewellery belonged to the respondent. The circumstances in which the appellant's predecessor was placed in possession of the jewellery were such that he must have known that it belonged to the respondent, a fact which would also have become known to the appellant when the relevant file and jewellery were later handed over to him. The jewellery was never attached while in the possession of Smithers. Nor was it attached at the common residence of Smithers and the respondent. As previously mentioned, it was handed over at their residence to the appellant's predecessor as security on behalf

of Smithers for his due appearance in the proceedings instituted against him. That the jewellery was the respondent's was apparent both from her conduct and the terms of the undertaking she gave ("I . . . hereby undertake; security . . . given by me.") The nature of the jewellery *per se* strongly suggested that it was hers. (That it was her property was a position she maintained steadfastly throughout.) No one else ever laid claim to the jewellery. Nor did later events detract from the fact that the jewellery was the respondent's property which was being held as security.

[16] There was no lawful basis for the attachment of the jewellery on 6 August 1990 which preceded the aborted attempt to sell the jewellery in execution. When judgment was given against Smithers on 21 November 1991, the jewellery was still being held by the appellant as security. As provided for in rule 9(8), the giving of adequate security is intended to ensure "that the defendant will appear according to the exigency of the said writ, and will abide the judgment of the court thereon." The Afrikaans word used for "abide" in the sub-rule is "afwag". On a proper construction of rule 9(8) security is only required until the time that judgment is given. When that occurs the purpose it was designed to achieve ceases. While the rule

is silent on this score, as a matter of law and logic a third party who has provided security would immediately thereafter be entitled to the return thereof. Security provided by a third party under rule 9 is not intended to satisfy the judgment debt (*cf* Herbstein and Van Winsen: *The Civil Practice of the Supreme Court of South Africa*: 4th ed at 109). This approach would seem to be in accordance with rule 9(15) which deals with the situation where a defendant has been arrested and not yet released. It provides that "[i]f in any such proceedings judgement is given against the defendant, he shall be entitled to his release." (See also rule 9(13).) If judgment operates to release the defendant, it should likewise operate to release any security put up by a third party to ensure the defendant's attendance (*cf Alliance Corporation Ltd v Blogg* [1999] 3 All SA 262 (W) at 265 h - 266 c). It is noteworthy that the appellant admitted the allegation made by the respondent in para 6 of her particulars of claim that when judgment was given on 21 November 1991 "the undertaking given by [the respondent] . . . was duly complied with."

[17] When the appellant purported to attach the jewellery again on 21 November 1991 the respondent was entitled to its return. It was attached

in part satisfaction of Smithers's judgment debt. As I have found, the appellant (who chose not to give evidence) must have been aware of the fact that the jewellery belonged to the respondent. It was not attached while in Smithers's possession nor had it previously come from his possession. It matters not that when the attachment took place the jewellery was in the appellant's safekeeping. The lawfulness of the appellant's conduct must be judged in relation to whom the jewellery belonged and where it originally came from. The position which pertained falls squarely within the third situation postulated in *Weeks*'s case. In the circumstances the attachment was unlawful.

[18] There remains to be considered whether the appellant's wrongful conduct was the cause of whatever damage the respondent has suffered as a result of the loss of the jewellery (the quantum of her claim having been ordered to stand over for later determination). Causation involves two distinct inquiries. They were formulated by Corbett CJ in *International Shipping Co (Pty) Ltd v Bentley* 1990(1) SA 680 (A) at 700 E-I as follows:

> "The first is a factual one and relates to the question as to whether the defendant's wrongful act was a cause of the plaintiff's loss. This has been referred to as 'factual causation'.

> The enquiry as to factual causation is generally conducted by applying the so-called 'but-for' test, which is designed to determine whether a postulated cause can be identified as a *causa sine qua non* of the loss in question. . . . [D]emonstration that the wrongful act was a *causa sine qua non* of the loss does not necessarily result in legal liability. The second enquiry then arises, viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part. This is sometimes called 'legal causation'."

(See too *Groenewald v Groenewald* 1998(2) SA 1106 (SCA) at 1113 C-I).

We are only concerned with the first inquiry because it is common cause that if factual causation has been established (the *onus* in this regard being on the respondent) the requirements for legal causation have been satisfied.

[19] According to what was said by Corbett CJ in *International Shipping Co (Pty) Ltd v Bentley* when elaborating on the test for factual causation (at 700 F-G), one must ask oneself what would probably have happened but for the wrongful attachment of the jewellery. This involves "the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's [respondent's] loss would have ensued or

not". The answer to my mind is that the jewellery would most probably have been returned to the respondent before the robbery took place. The appellant was under an obligation to return the jewellery once judgment had been given. The respondent in turn was anxious to have the jewellery restored to her possession - hence Smithers's frequent enquiries culminating in the affidavit filed by her on 18 December 1991. Given the fact that the jewellery belonged to her and that she would naturally have wanted it to be returned as soon as possible after it had served its purpose (she had after all been deprived of its possession and use for well over a year) one would normally have expected its early return - indeed that is what she sought to achieve. But for the attachment the appellant would have had no reason to keep the jewellery. It was the unlawful attachment alone that precluded its early return - in fact the whole purpose of the attachment was presumably to prevent it being handed back. Had it been returned when it should, and probably would, have been but for the attachment, the jewellery would no longer have been in the appellant's possession, and would not have been stolen, on 16 January 1992.

[20] The letter written by Smithers's attorneys on 6 January 1992 (see

para **[8]** above) does not in any way affect this conclusion. I shall assume that it was written with the respondent's knowledge and approval. The respondent was faced with a *fait accompli*. There had been an attachment of her jewellery and that was the reason why the appellant refused to return it. The letter was a further step in the process of trying eventually to recover the jewellery. The fact of the matter is that the attachment was unlawful and should not have taken place, in which case the jewellery would have been returned and the letter would have been unnecessary. The letter is therefore not relevant to the factual causation inquiry.

[21] In my view the court *a quo* correctly held that the appellant's wrongful attachment of the jewellery caused or materially contributed to the respondent's loss, and that he is accordingly liable to her for such loss.

[22] The appeal is dismissed with costs.

J W SMALBERGER
JUDGE OF APPEAL

VIVIER JA)

ZULMAN JA)Concur
MELUNSKY AJA)

HJO VAN HEERDEN WndHR

[1] Om redes wat volg, kan ek nie akkoord gaan met die meerderheidsuitpsraak nie.

[2] In alle gevalle wat in die tersaaklike bronne vermeld word, het die beslaglegging gepaard gegaan met besitstoeëiening deur die betrokke amptenaar; in ons hedendaagse reg die balju. Geen vermelding word gemaak van ‘n geval waarin die goed reeds in besit van die balju is nie, en dus slegs ‘n kennisgewing van beslaglegging beteken word.

[3] Die reël dat ‘n balju skuldloos aanspreeklik is vir ‘n skadestigtende, onregmatige beslaglegging is klaarblyklik ‘n uitsondering op die algemene vereiste vir aanspreeklikheid. Bowendien lê dit nie voor die hand nie dat in die gepostuleerde geval - in teenstelling tot, byvoorbeeld, ‘n verkoping as gevolg van ‘n beslaglegging - die blote beslaglegging ongepaard met ‘n fisiese handeling in sigself onregmatig is. Ek sou dus huiwer om die skuldlose aanspreeklikheid van ‘n balju uit te brei om ook ‘n geval soos die onderhawige in te sluit. Dit is egter nie nodig om daaroor uitsluitsel te gee nie.

[4] Aangenome dat daar *in casu* ‘n onregmatige beslaglegging was, kon die appellant teenoor die respondent aanspreeklik wees slegs indien, onder andere, daar ‘n feitlike kousale verband

tussen die beslaglegging en die respondent se verlies bestaan het. Die respondent se advokaat het geredelik toegegee dat die bewyslas betreffende hierdie vereiste op haar gerus het. Die vraag is dus of die respondent bewys het dat sy nie ‘n verlies sou gely het indien daar geen beslaglegging was nie.

[5] Die appellant het instruksies van die vonnisskuldeiser gekry om op die juwele beslag te lê. Indien hy sonder goeie rede versuim het om die instruksies uit te voer, sou hy aanspreeklikheid teenoor die skuldeiser opgeloop het indien sy late laasgenoemde geskaad het: Bort, Rechtsgeleerden Wercken, Arresten 6.4. Hoogstens sou die appellant dus die beslaglegging agterweë gehou het met kennis aan die respondent van die instruksies wat hy ontvang het.

[6] Dit is glad nie ‘n uitgemaakte saak dat die respondent wel op so ‘n kennisgewing sou reageer het nie. Ons weet immers dat nadat vonnis op 21 November 1991 teen Smithers verleen is tot nadat die roof gepleeg is, die respondent geen poging aangewend het om herbesit van die juwele te verkry nie - selfs nie eens by wyse van informele aanmaning nie. Indien sy egter wel aanspraak op die juwele sou gemaak het, was dit die appellant se plig - en ook redding - om ‘n tussenpleitgeding aanhangig te maak, selfs al was daar nie ‘n beslaglegging nie: Weeks v Amalgamated Agencies, Ltd 1920 AD 218,238. Het dit gebeur, sou die appellant ten tye van die roof waarskynlik nog in besit van die juwele gewees het, sy dit dan nie onder beslaglegging nie.

[7] Om die benarde posisie van ‘n balju in die gepostuleerde geval te illustreer kan op die volgende voorbeeld gelet word. In opdrag van ‘n vonnisskuldeiser lê ‘n balju beslag op goedere wat

volgens sy instruksies aan die skuldenaar behoort, maar nie by die adres van die skuldenaar nie. Daarna maak ‘n derde aanspraak op die goedere. Die enigste manier waarop die balju hom dan kan beveilig, is om met behoud van die goedere ‘n tussenpleitgeding aanhangig te maak. As die respondent dit reg het, kan die balju egter skuldloos aanspreeklik wees indien sy besit van die goedere vir die derde ‘n verlies meebring.

[8] In bostaande verband kan ook op die bepalings van Hofreël 45 gelet word. Subreël (3) bepaal dat indien die balju goedere in beslag geneem het of in beslag wil neem, en ‘n derde daarop aanspraak maak, die eiser die balju moet vrywaar teen verlies of skade weens die beslaglegging, waarna die balju dit moet behou of beslag daarop moet lê en in bewaring neem. Aangenome dat die vonnisskuldeiser in ons geval die vrywaring verstrek het - soos wel gebeur het - was die appellant dus verplig om die juwele in sy besit te hou. Dit mag dus wees dat Reël 45 die gemeenregtelike posisie soos uiteengesit in Weeks gewysig het.

[9] Samevattend is ek dus van mening dat nie bewys is dat indien daar geen beslaglegging van die juwele was die verlies nie in elk geval sou ingetree het nie. Ek sou dus die appèl met koste handhaaf.

VAN HEERDEN WndHR