THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE

Case number: 250/04

In the matter between :

ANDRIES FREDERICK DREYER NO **FIRST APPELLANT**
LOUISE DREYER NO **SECOND APPELLANT**

and

AXZS INDUSTRIES (PTY) LTD **RESPONDENT**

CORAM : **HARMS, MTHIYANE, BRAND, JAFTA JJA *et* NKABINDE AJA**

HEARD : **16 SEPTEMBER 2005**

DELIVERED : **26 SEPTEMBER 2005**

Summary: *Actio rei vindicatio* – ownership of movable assets alleged to have passed to the respondent through delivery coupled with real agreement – requirements of real agreement – not established – proper approach to resolving irreconcilable disputes of fact.

JUDGMENT

BRAND JA/

BRAND JA:

[1] Proceedings in this matter started when the respondent instituted a vindicatory action against the appellants in the Johannesburg High Court for the delivery of movables, consisting of two compressors, compressed air pipes and other equipment used in the furniture manufacturing industry ('the equipment'). The appellants were cited in their capacities as joint trustees of two trusts, the Anfred Trust and the Mareli Trust. The trusts were said to be in possession of the equipment. That much was common cause. The dispute between the parties turned on the limited issue whether the respondent had discharged the onus of proving its ownership of the equipment. The court *a quo* (Willis J) held that it did. Consequently, judgment was granted in favour of the respondent with costs. The appeal against that judgment, which has since been reported under the incorrect citation of *AXZS Industries v A F Dreyer (Pty) Ltd* 2004 (4) SA 186 (W), is with the leave of the court *a quo.*

[2] The equipment previously belonged to a company, A F Dreyer (Pty) Ltd ('the company'), that went into liquidation in about February 2002. Though the liquidator of the company was joined

as third defendant in the court *a quo,* he never entered an appearance to defend.

[3] Prior to liquidation the company, then controlled by the first appellant, Mr A F Dreyer, conducted its business as a manufacturer of furniture from premises registered in the names of the two trusts. Initially the appellants' main defence on the pleadings was that the trusts had become the owners of the equipment through a process of *accessio* when it was attached to their building by Dreyer, acting on behalf of the company. In the alternative, and in any event, the appellant denied that the respondent was the owner of the equipment. Shortly before the commencement of the trial, the appellants abandoned their main defence based on *accessio*. The only defence that remained was therefore that the respondent was not the owner of the equipment.

[4] The first argument raised by the respondent, *in limine*, as it were, both in this court and in the court *a quo,* was that, in the absence of any plea that the appellants had a right or entitlement to hold the equipment, no proper defence had been raised to respondent's claim under the *rei vindicatio*. There is no merit in this argument. A party who institutes the *rei vindicatio* is required to allege and prove ownership of the thing. Since one of the incidents

of ownership is the right to possession of the thing, a plaintiff who establishes ownership is not required to prove that the defendant's possession is unlawful. In that event, the onus to establish any right to retain possession will rest on the defendant, as long as the plaintiff does not go beyond alleging ownership. But, if the plaintiff fails to establish ownership, the possessor is to be absolved. This principle was recognised in Voet 6.1.24 and has been consistently applied by our courts, at least since *Kemp v Roper NO* 2 BAC 141 (at 143) which was decided in 1886. (See also *Ruskin NO v Thiergen* 1962 (3) SA 737 (A) at 744; *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20A-C; Van der Merwe *Sakereg* 2ed p 347 *et seq*; Silberberg & Schoeman *The Law of Property* 4ed (by Badenhorst, Pienaar and Mostert) p 255 *et seq.*)

[5] I revert to the facts. The respondent's case is that it acquired ownership of the equipment pursuant to a post-liquidation auction sale of the movable assets of the company which was held on 19 March 2002. The venue of the auction was the trusts' property which constituted the former business premises of the company. It was not a public auction but a so-called 'bid-out' between two bidders, the respondent and another interested party, who had

submitted competing offers for moveable assets of the company to its provisional liquidators at an earlier stage.

[6] The respondent was represented at the auction by its managing director Mr Gordon Brews. It is common cause that Brews's bid of R3,4m exceeded the highest offer of the other interested party and that the respondent thus became the purchaser and eventually the owner of whatever movables of the company were sold at the auction. The issue between the parties turns on whether the equipment formed part of the subject matter of the auction sale. The respondent alleged that it did. The appellants' denial of this allegation was essentially based on the terms of a document titled 'conditions of sale' which was read out by the auctioneer prior to the auction and signed by Brews on behalf of the respondent immediately after the hammer had fallen.

[7] The subject matter of the sale is referred to in clause 1 of the conditions of sale. It provides that:

'the auctioneer's sole obligation and responsibility shall be to solicit higher offers or bids in respect of the purchase of *all of the assets as per annexure A hereto* subject to his sole and unfettered discretion.' (My emphasis.)

Clauses 20 and 21 relate to the same topic. Clause 20 stipulates that –

'the following items reflected in annexure A hereto shall be omitted and not form part of the sale.'

Clause 21 provides that –

'the following items *not* reflected in annexure A hereto shall be included and form part of the sale.'

Below the provisions of both clauses a number of items were inserted in handwritten form.

[8] Annexure A is again referred to as follows in the last clause of the document:

'The above conditions of sale, having been publicly read out to the parties present, the assets of [the company] as per Annexure A hereto were offered to the interested parties in order to elicit the highest possible offer and the highest offer was received from:
Puchaser – '

Then follows, in manuscript, the name of the respondent and, immediately thereafter, the signature of Brews on its behalf.

[9] Other 'conditions of sale' relevant for present purposes are contained in clauses 7, 8 and 17. These clauses provide:

'7. A contract of purchase and sale shall arise between the buyer [defined as the highest bidder] and the seller [defined as the provisional liquidators of the company] on the fall of the hammer on the terms set out herein, the purchase price being the amount of the highest bid accepted by the auctioneer …

8. Ownership in and to the assets shall pass to the buyer on confirmation of the sale by the liquidators when the purchase price and all other amounts shall be paid in full and all other conditions (if any) of the purchase shall be met. Thereafter the assets may be removed and not before.

…

17. These conditions of sale form the sole basis on which the seller and auctioneer transact with prospective buyers and on which a contract of sale will be concluded (on the acceptance of a bid or otherwise) between the seller and the buyer. No variation, alteration, novation, or cancellation of any of the terms hereof shall be of any force or effect unless reduced to writing and signed by all of the parties concerned.'

[10] On 9 April 2002 the three provisional liquidators of the company indicated their confirmation of the transaction, as envisaged in clause 8, by appending their signatures to the 'conditions of sale'. Although Brews had already signed a document in similar terms on behalf of the respondent on 19

March 2002, he again did so after the provisional liquidators' written confirmation had been obtained. Shortly thereafter, Brews also complied with the respondent's obligation in terms of clause 8 by paying the agreed purchase price of R3,4m in full. Both parties to the present litigation accepted that the respondent thereupon became the owner of whatever assets formed the subject matter of the auction sale, which brings us back to the recurring question: did the equipment form part of what was sold at the auction?

[11] It is common cause that the equipment was neither incorporated in annexure A, nor included amongst the additional items enumerated in clause 21. On the face of it, the conditions of sale therefore lend support to the appellants' argument that the equipment did not form part of the subject matter of the auction sale. The respondent's answer to this argument is founded on the evidence of Brews, which was corroborated in all material respects by its other witness, Mr Timothy Baynes. According to these two witnesses, they arrived at the erstwhile business premises of the company, which was the proposed venue of the auction, on 19 March 2002 prior to the commencement of the sale. Upon arrival they were met by a number of individuals, including Dreyer, Mr Muller, (who represented the other interested party), the

auctioneer and Mr Leon Vermeulen. The last mentioned was instructed by the provisional liquidators to administer the liquidation of the company's estate on their behalf. What then happened, according to Brews and Baynes, was that it was orally agreed amongst all those present that the subject matter of the sale would not be limited to the items referred to in annexure A – as extended by clause 21 – but that it would include all items contained in an enclosed section of the premises, excluding only those items that were specifically mentioned in clause 20 of the conditions of sale. Based on this evidence, the respondent's case is that, since the equipment was within the enclosed section of the premises referred to and was not listed under clause 20, it formed part of the subject matter of the auction sale by virtue of the prior oral agreement.

[12] Vermeulen, who was the only witness called to testify on behalf of the appellants, denied the oral agreement alleged by Brews and Baynes. His version, simply stated, was that the terms of the agreement between the respondent and the provisional liquidators were those reflected in the written conditions of sale. He never intended, nor did he have the authority, he said, to sell any

assets at the auction that were not embodied in annexure A to the written agreement.

[13] In support of the respondent's contention that the subject matter of the auction sale was not confined to the items referred to in annexure A, Brews also testified that, subsequent to the auction, he took possession of numerous other assets of the company that were likewise not referred to in annexure A. The value of the items so removed by him, he said, was in the region of R1m. Vermeulen was not in a position to say that this did not happen. His response was, however, that if Brews had in fact taken company assets which did not appear in annexure A, it happened without his knowledge and consent as administrator of the estate on behalf of the provisional liquidators.

[14] The dispute between the appellant and the respondent came to a head when Brews tried to sell the equipment to Dreyer during May 2002. The latter's reaction was that the equipment was a fixture and belonged to the trusts. Vermeulen was called in as unofficial arbiter to resolve the dispute. His response, which he subsequently confirmed in evidence, was succinctly set out in his letter to Brews of 22 May 2002. The relevant part of this letter reads as follows:

'We refer to the meeting that took place between Mr Dreyer and the writer yesterday morning and would like to reiterate the view of the liquidators regarding certain assets on the premises.

The liquidators are of the opinion that the following property [including the equipment] were not sold to you, that the same were not disclosed in the list attached to the agreement of sale, neither were the property valued as it was not regarded by the liquidators as movables …

Regarding [the equipment] the liquidators have been of the opinion at the outset that these be regarded as fixtures and that the liquidators would settle their claim with the landlord direct on the basis of enrichment. For this reason the items were not valued and did not form part of the list attached to the agreement of sale.'

[15] In the court *a quo*, the appellants' answer to the respondent's reliance on the oral agreement contended for by Brews and Baynes, was twofold. First, that in the light of Vermeulen's evidence, the oral agreement had, as a matter of fact, not been established. Second, that as a matter of law, reliance on such oral agreement would in any event be in conflict with the parol evidence rule. As to the first of these answers Willis J preferred the version of Brews and Baynes to that of Vermeulen. I shall return to his reasons for doing so.

[16] The general import of the parol evidence rule, which formed the basis of the appellants' second answer, is well known. It is to the effect that where an agreement is embodied in writing, the written document is conclusive as to its terms. No evidence, save the document itself, is admissible to prove them. Nor may the contents of the document be contradicted, altered, added to or varied by oral evidence (see eg *Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd* 1941 AD 43 at 47; *National Board (Pretoria) (Pty) Ltd v Estate Swanepoel* 1975 (3) SA 16 (A) at 26A-D). The court *a quo* found, however, (in paras 15-20 at 192C-195G) that the parol evidence rule did not preclude the respondent from relying on the terms of the preceding oral agreement, essentially, on the basis that the written document stood to be rectified to accord with the terms of the oral agreement between Vermeulen and Brews.

[17] Moreover, so the court held, (in para 21 at 195G-196G), even if the respondent was precluded from relying on the terms of the oral agreement, that would not be fatal to its case. The court's reasons for the latter finding were based on the so-called abstract theory of transfer, which is generally accepted as part of our law. In accordance with this theory, a valid underlying legal transaction

or *iusta causa traditionis* is not a requirement for the valid transfer of ownership. Otherwise stated, the validity of transfer of ownership is not dependent on the validity of the underlying transaction, such as in this case the contract of sale (see eg C*ommissioner of Customs & Excise v Randles, Brothers & Hudson Ltd* 1941 AD 369 at 398-399 (Watermeyer JA) and at 411 (Centlivres JA); *Trust Bank van Afrika Bpk v Western Bank Bpk en Andere NNO* 1978 (4) SA 281 (A) at 301H-302A. Generally speaking, the requirements for the valid passing of ownership of a movable thing are: delivery – actual or constructive – of the thing by the owner – or someone duly authorised to act on his or her behalf – coupled with a so-called real agreement or 'saaklike ooreenkoms', consisting of the intention on the part of the transferor to transfer ownership and the intention on the part of the transferee of accepting ownership of that thing (see eg *Air-Kel (Edms) Bpk h/a Merkel Motors v Bodenstein* 1980 (3) SA 917 (A) at 922E-F; *Concor Construction (Cape) (Pty) Ltd v Santam Bank Ltd* 1993 (3) SA 930 (A) at 933A-C).

[18] In applying these principles, the court *a quo* concluded that, since delivery of the equipment was not in issue, the only remaining inquiry related to whether the respondent succeeded in

establishing the requisite real agreement. With regard to this inquiry the court held, on the respondent's version of the disputed facts, which was the favoured one, that both Vermeulen and Brews intended that the respondent should receive transfer of ownership, not only of the items reflected in annexure A, but of all the items referred to in their earlier oral agreement, including the equipment. Moreover, so the court held, both Vermeulen and Brews were duly authorised by their respective principals to give effect to their oral agreement. Consequently, the court concluded, transfer of ownership of the equipment to the respondent was established.

[19] I find myself in disagreement with the judgment of the court *a quo* in essentially all its constituent parts. First, I do not agree with the credibility findings against Vermeulen in favour of the respondent's two witnesses. Second, I believe that even on the respondent's own version, the alleged oral agreement, which formed the corner stone of its case, never became enforceable. Third, I hold the view that several of the essential elements of the real agreement, upon which the court's judgment was ultimately founded, were not established.

[20] Since I propose to deal with issues of credibility in conclusion, I start with the enforceability of the alleged oral

agreement on the respondent's version. With regard to this issue, the court *a quo* devoted a considerable part of its judgment to the rather intricate questions arising from the appellants' reliance on the parol evidence rule. In argument before this court, counsel for both parties repeated the same exercise. For reasons that will become apparent, I find it unnecessary to deal with them.

[21] Brews did not contend that, as a result of the oral agreement the written agreement became of no consequence. Apart from extending the subject matter of the sale beyond annexure A, the oral agreement did not, even on Brews's version, affect the terms of the written conditions of sale. The relationship between the respondent, as buyer, and the provisional liquidators, as sellers, was still governed, inter alia, by clause 8. In terms of that clause, the sale was conditional in that it was subject to the approval of the provisional liquidators. The sale was indeed approved by the provisional liquidators. In fact, on Brews's version, they did so in writing by all three appending their signatures to the conditions of sale on 9 April 2002. But, what they approved was obviously the written document, with the subject matter of the sale set out in annexure A. The three of them were not present at the auction and Brews did not even suggest that they knew about the alleged oral

agreement. On the contrary, the very fact that they signed the written agreement without any qualifications, is a clear indication that they intended to confirm no more and no less than what was contained in that document.

[22] On the respondent's version of the facts, the same difficulty arises with reference to the real agreement. The sale of the company's assets was always subject to confirmation by the provisional liquidators and Vermeulen had no authority to transfer company assets otherwise than in terms of the deed of sale. In consequence, the real agreement relied upon by the respondent lacks one of its essential requirements because the alleged agent had no authority to transfer ownership of the movable things on behalf of their owners. This is the death knell of the real agreement.

[23] But, there is another key element of the real agreement that was not established: the intention on the part of Vermeulen to transfer ownership in the equipment to the respondent. Vermeulen denied that he ever intended to do so. That was not a bald denial. His motivation was that such intention would be in conflict with an earlier agreement between him and Dreyer that the liquidators would regard the equipment as fixtures to the building of the trusts

for which they would seek compensation from the latter on an enrichment basis. Since this part of Vermeulen's evidence stood uncontroverted it has to be accepted, whatever one's views of Vermeulen as a witness, in general, may be. In argument, the respondent's answer to all this was that the *accessio* defence was abandoned. That, however, misses the point. Logic dictates that because Vermeulen already had an agreement with Dreyer that the equipment would not be removed, he could not subsequently have intended to transfer the very same equipment to the respondent. It matters not whether or not the equipment could strictly be regarded as fixtures to the building.

[24] The court *a quo* found support for its conclusion of a real agreement (at 196C-E) in what it obviously regarded as having been established as a matter of fact, namely, 'that [the respondent] took possession of all movables at the premises of the company in liquidation … with the full knowledge and approval of the third defendant and his predecessors'. It is common cause, however, that the third defendant, who was not one of the provisional liquidators, was appointed as the (final) liquidator of the company long after the event. He could therefore not possibly have given the approval attributed to him. As to his 'predecessors in title',

which could only refer to the provisional liquidators, the court's finding is in direct conflict with the evidence of Vermeulen, who administered the company's affairs on their behalf. His evidence was that he had no knowledge of the fact that the respondent took possession of any assets that were not reflected in annexure A and that, if he had known about it, he would have put a stop to it. In cross-examination it was not even suggested to Vermeulen that this part of his evidence was not the truth.

[25] From what I have said, it is clear that my expressed disagreement with the court *a quo*'s credibility findings can make no difference to what, in my view, should be the outcome of the appeal. Nevertheless, particularly since the court's judgment has been reported, I believe that I have some obligation towards Vermeulen, who is a practicing attorney of some 21 years standing, to state why I do not agree with the finding that he should be disbelieved.

[26] The court *a quo*'s reasons for rejecting Vermeulen's version appears from para 13 of the judgment (at 191C-G), the relevant part of which reads as follows:

'Despite denying an oral agreement prior to the sale, Vermeulen says that it had been orally agreed prior to the auction that the goods forming the subject-

matter of this dispute would be regarded as having acceded to the immovable property to which I have already referred. Quite how they could have been agreed to have acceded without there being an oral agreement as to the terms of the auction itself, is beyond my understanding. Besides, it seems inherent in the nature of an auction that, prior to its taking place, there must be an oral agreement relating thereto. No one knows in advance what the price will be at an auction and therefore it is incapable of being reflected in a written agreement beforehand. On the other hand, there must be an agreement to conduct the auction. Inevitably, therefore, it must be oral. I therefore disbelieve Vermeulen when he says that there had been no antecedent oral agreement prior to the signing of the written agreement to which annexure A is attached.'

[27] I find these reasons indicative of several misdirections. First, the oral agreement referred to by Vermeulen with regard to *accessio* was between him and Dreyer and not between him and Brews, as the court seemed to think. Second, the statement that an auction must always be preceded by an oral agreement is simply unfounded. Of course, no one knows before the auction what the purchase price will be. That is precisely why clause 7 of the conditions of sale (referred to in para [9] above) defined the 'purchase price' as 'the amount of the highest bid accepted by the auctioneer'. Third, the question, in any event, was not whether there was some vague oral agreement of a general kind, but whether Brews and Baynes should be believed when they said there was an oral agreement to deviate from the terms of the

written conditions of sale which both parties then subsequently signed without any qualification. In the end, I can find no valid consideration in the judgment of the court *a quo* for the rejection of Vermeulen's evidence.

[28] The court's reasons for its acceptance of the version presented by Brews and Baynes appear from para 14 (at 191G-192B) of the judgment. It first deals with a statement by Brews in an affidavit filed earlier in related litigation between the parties. According to this statement, Brews referred to the same oral agreement that found the basis of the respondent's case as having been entered into 'subsequent to the written agreement of sale'. In cross-examination, Brews was unable to explain the conflict between this statement and the whole tenor of his testimony that the oral agreement preceded the written agreement, save to say that the statement was a mistake. How this mistake could possibly have happened, he could not say.

[29] With regard to this conflict, the court *a quo* expressed itself as follows (at 191I-J):

'Even if this paragraph is to be read as a denial of the antecedent oral agreement before the written agreement (which I doubt), no significance attaches, in my view, to this so-called contradiction. There must, as I have

already indicated, have been an oral agreement prior to the holding of the auction.'

I find this reasoning unpersuasive. First, the contradiction is not 'so-called'. It is obvious. Second, as I have already said, the notion that an auction must always be preceded by an oral agreement, is simply unfounded. Third, I can think of a good reason why Brews would decide to abandon the 'subsequent oral agreement'-thesis. It would be in conflict with the standard non-variation provision contained in clause 17 of the conditions of sale (referred to in para [9] above). If this is so, it means that Brews deliberately changed his version to suit the respondent's case, which, of course, does serious harm to his general credibility. The same criticism can be levelled at Baynes who also deposed to an affidavit in the earlier litigation in which he confirmed Brews's version of a subsequent oral agreement.

[30] A further consideration why Brews's version was accepted appears from the following statement by the court *a quo* (at 192A-B):

'Was the evidence of Brews so unreliable because of this contradiction that one cannot believe his evidence as to the terms of the oral agreement? I do not believe so.'

The approach reflected in this statement, so it seems, is reminiscent of the method of evaluation employed with regard to the evidence of an accused person in a criminal case: is the version of the accused so unreliable, despite its shortcomings, that it cannot possibly be true? That is self-evidently not the proper approach to the resolution of factual disputes in a civil case, particularly when it comes to the evaluation of the witnesses for the party who bears the onus. The proper approach in resolving factual disputes where there are two irreconcilable versions is to be found, eg in *National Employers' General Insurance v Jagers* 1984 (4) SA 437 (E) at 440D-H; and *Stellenbosch Farmers' Winery Group Ltd v Martell et Cie* 2003 (1) SA 11 (SCA) paras 5-7 at 14 - 15. Had the correct approach been adopted, the court would have taken into account, inter alia, that Vermeulen had no interest whatsoever in the outcome of the dispute; that he had no prior relationship with either Dreyer or Brews; that he consulted with both parties prior to giving evidence and that in the circumstances it is inherently unlikely that an attorney of 21 years standing would be prepared to perjure himself for no suggested reasons. On a proper approach, a court should also have regard to the probabilities inherent in the respective conflicting versions. Had it

done so, it would, in my view, have found Vermeulen's version more probable.

[31] For these reasons, it is ordered that:

(a) The appeal is upheld with costs, including the costs of two counsel.

(b) The following order is substituted for the order granted by the court *a quo*:

'The defendant is absolved from the instance with costs.'

……
F D J BRAND
JUDGE OF APPEAL

Concur:

HARMS JA
MTHIYANE JA
JAFTA JA
NKABINDE AJA