THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 34/10

In the matter between:

PIETRICH FREDERICH GERHARDT CROTS Appellant

and

JACQUES PRETORIUS Respondent

Neutral citation:	*Crots v Pretorius* (34/10) [2010] ZASCA 107 (17 SEPTEMBER 2010)
Coram:	HARMS DP, NAVSA, SNYDERS, MHLANTLA JJA AND K PILLAY AJA
Heard:	**1 SEPTEMBER 2010**
Delivered:	**17 SEPTEMBER 2010**
Summary:	*Condictio furtiva – dolus eventualis* sufficient to establish - Defamation – insufficient proof.

ORDER

On appeal from: Free State High Court (Bloemfontein) (Van der Merwe J and Ploos van Amstel AJ sitting as court of appeal):

1. The appeal is upheld with costs.
2. The order of the court below is replaced with the following:
    a. 'The appeal is upheld with costs;
    b. The order of the court a quo is replaced with the following:
        i. The defendant is ordered to pay the plaintiff the amount of R45 000;
        ii. The defendant is ordered to pay interest on the amount of R45 000 at the rate of 15,5% per annum from 30 October 2006 until date of final payment;
        iii. The defendant is ordered to pay the costs of suit, including the costs of 7 April 2006 and 8 September 2006;
        iv. The defendant's counterclaim is dismissed with costs.'

JUDGMENT

Snyders JA (Harms DP, Navsa, Mhlantla JJA and Pillay AJA concurring)

[1] On 5 August 2005 the appellant discovered that he had become a victim of stock theft when he found that nine of his gravid heifers had been stolen. His

subsequent investigations led him to institute action in the Kroonstad Magistrate's Court against the respondent for payment of R45 000, the alleged value of the heifers. He alleged that the respondent had stolen and slaughtered his heifers. In response the respondent instituted a counterclaim in the amount of R50 000, alleging that the appellant defamed him by telling third parties that he had stolen the heifers.

[2] The magistrate dismissed the appellant's claim and upheld the counterclaim in the amount of R20 000. An appeal to the Free State High Court (Bloemfontein), (Ploos van Amstel AJ, Van der Merwe J concurring) was dismissed. Leave to appeal was refused by the high court, but granted on petition to this court.

[3] The *condictio furtiva* is a delictual action for the recovery of patrimonial loss as a result of theft. It is available to an owner or anyone who has an interest in the stolen thing, against a thief or his heirs.[1]

[4] The respondent's version offers all the facts on which this case is to be decided. He is a stock speculator of seven years' standing. He knows about the provisions of the Stock Theft Act 57 of 1959 (the Act). A man who only

[1] C G van der Merwe 'Things' Joubert (ed) *The Law of South Africa* (2 ed) vol 27 para 387; *Minister van Verdediging v Van Wyk en andere* 1976 (1) SA 397 (T) at 400C and 402G-403B; *Clifford v Farinha* 1988 (4) SA 315 (W) at 322G-323F.

introduced himself as Petrus, telephoned him. Petrus offered to sell nine head of cattle to him. He agreed on the basis that he would pay Petrus the price the cattle would fetch upon slaughter at the abattoir, less his commission. Petrus was satisfied with this arrangement. As Petrus had no transport available for the cattle, the respondent arranged for the collection of the cattle by a private transporter. Petrus did not disclose and the respondent did not ascertain the collection point for the cattle. They arranged that Petrus would send somebody to meet the truck driver at a rendezvous point and accompany him to where the cattle had to be loaded. Pursuant to the respondent's arrangements nine of the appellant's gravid heifers were collected from his farm on 5 August 2005, taken to Country Meat abattoir in Kroonstad and slaughtered.

[5] Despite the respondent's usual practise to make payment to his customers seven days after the sale, Petrus telephonically asked him the very next day for an advance on the money and he agreed. On 5 August 2005 he paid a R2000 cash advance to Petrus, without obtaining any form of acknowledgement of the payment. Needless to say, that was the last that was seen or heard of Petrus.

[6] The respondent did not involve himself in the transaction beyond making the arrangements for the collection of the cattle and delivery to the abattoir. He made no attempt to comply with the Act. He did not ask for any of Petrus'

details or credentials, nor of the cattle, their breed, age, whether or how they were branded or ear marked, or the place for collection of the cattle.[2] In fact, he left the Kroonstad area to attend to business in Johannesburg.

[7] The provisions of ss 6 and 8, and potentially s 7, of the Act applied to the transaction and obliged the respondent to obtain a removal certificate from the owner of the cattle and to supply a document of identification, signed by him, to the abattoir. The removal certificate and document of identification are designed to contain the details of, at least, the owner, the identifying features of the cattle and their destination.[3] The Act aims at preventing the removal and transport of livestock by persons with no legal entitlement to do so. By his own admission the respondent knew his obligations in terms of the Act. No less is to be expected of a livestock speculator. Mr de Waal, the transporter who testified for the appellant, said that he specifically mentioned to the respondent that there were no pre-printed removal certificates with the driver

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[2] GN R1685 published in GG 15990 on 30 September 1994 in terms of s 16 of the Act, prescribes the details aimed at identification of individual animals with reference to features like colour, breed, brandmark, earmark, tattoo and sex, which are to be contained in the documentation required by ss 6, 7 and 8 of the Act.

[3] S 6(1) obliges any person, including any agent, who sells any stock to any other person on his own behalf or on behalf of any other person, to, at the time of delivery of the stock, furnish such other person with a document of identification which includes details of his full name and address or the full name and address of the person on whose behalf he was selling, particulars of the stock, the full name and address of the person to whom the stock was sold, the date on which the stock was sold and certifying that such stock is his property or that he is duly authorized by the owner thereof to deal with or dispose of it.

S 7(1) obliges any person who acquires or receives into his possession for the purpose of sale, from a person who has no known place of residence, any stock, to receive with it a certificate of no older than 30 days from a person of authority, like a headman, as listed in the section, which certificate describes the stock and declares that the relevant person is entitled to dispose of or deal with such stock.

S 8(1) obliges a person who conveys or transports stock of which he is not the owner along any public road to carry a removal certificate issued to him by the owner of the stock which certificate is to include the name and address of the owner of the stock, the particulars of the stock, the place from and to which the stock is being conveyed, the name of the conveyer and the date of issue.

of his vehicle as they had run out. The respondent undertook to arrange for De Waal's driver to be furnished with the appropriate removal certificate, but he failed to do so.

[8] The respondent claimed that he had no direct knowledge about the theft or direct intent to steal the appellant's heifers. This stance served him well in both the magistrate's and the high court. The magistrate's court and the high court only investigated whether the respondent's version established direct intent to steal and concluded that it did not. Therein lies the misdirection that entitles this court to interfere. The presence of *dolus eventualis* satisfies the requirements of theft. The court below did not assess the probabilities in order to test whether the requirements of *dolus eventualis* were satisfied.

[9] The respondent will be liable if, on a balance of probabilities, he recognised the real possibility that Petrus did not have the right to deliver the cattle to him or that it was somebody else's cattle and he deliberately shut his eyes and entered into the transaction, thereby taking the risk of the consequences if the cattle were being stolen. Knowledge in the form of *dolus eventualis* is present if all the objective, factual circumstances justify the inference on a balance of probabilities that the respondent actually and subjectively foresaw that someone else had title to the cattle.[4]

[4] See *Frankel Pollak Vinderine Inc v Stanton NO* 2000 (1) SA 425 (W) at 438E-439J for a useful discussion of *dolus eventualis* in a similar context, the *actio ad exhibendum*.

[10] The transaction between the respondent and Petrus arouses grave suspicion. The question why Petrus involved the respondent at all when he could have earned all of the money paid by the abattoir for the cattle, remains unanswered. If Petrus was a legitimate seller of the cattle who had no transport, a mere phone call to a transporter was required to arrange the necessary transport. The respondent offered no explanation. He also did not explain why the lack of information about Petrus and the cattle did not arouse his suspicion, or why he made no attempt to ensure compliance with the Act. The irrational payment of a R2000 cash advance to Petrus without any acknowledgement of the payment also remains unexplained.

[11] By ensuring that he knew as little as possible about Petrus and the nine cattle sold to him and by not complying with the Act, the respondent facilitated the theft of the appellant's cattle. His failure to make any of the necessary enquiries overwhelmingly suggests that he was deliberately avoiding information that would have revealed that Petrus had no rights to the cattle or that the cattle were owned by someone else. It is inconceivable that the respondent, a livestock speculator in the area, would not have been able to ascertain the ownership of the cattle from the earmarks and tattoos that they carried or the location from which they were collected. The evidence was that all the cattle were earmarked and tattooed with the registered marks of the appellant and were collected from the appellant's farm.

[12] The respondent proceeded with the transaction recklessly and deliberately failed to comply with the provisions of the Act. His professed ignorance of the theft in these circumstances is so unreasonable that it cannot be accepted. The respondent deliberately shut his eyes to the real and glaring possibility that he was facilitating the theft of cattle, reconciled himself to the risk and took it. By so doing he participated in the theft.

[13] The appellant, after due expert notice testified as a farmer and someone who used to be in the business of marketing and selling livestock. He stated the value of his nine gravid heifers to have been R5 000 each. He also testified that at an auction in the area shortly after the theft heifers of a similar age, but not with calf, fetched prices of over R5000 each. The evidence was not disputed and no alternative value was suggested. The only dispute raised was a denial that the heifers were recently with calf. As the respondent did not attempt to show how this denial would affect the value of R5000, the dispute is irrelevant.

[14] The respondent's counterclaim for defamation was granted in the amount of R20 000. There are three problems with this conclusion. First the respondent did not plead to whom the defamation was published, second it was never put to the appellant who the third parties were that publication was allegedly made to and third the evidence tendered does not establish the cause of action.

[15] Publication is an essential requirement of defamation that must be pleaded and proved. The names of the persons to whom the defamatory remarks were made and who were to be called as witnesses have to be pleaded and disclosed during cross-examination.[5] The reasons are apparent. Apart from avoiding surprise the identity of the persons involved is also relevant to enable the defendant to raise appropriate defences. For instance, depending on who the person is, the defendant may rely on privilege. The respondent attempted to meet this obligation by pleading that the appellant made defamatory remarks to third parties to the effect that the respondent stole his heifers. Who the third parties were, was not alleged. During his evidence the respondent also did not disclose the identity of the third parties. During cross-examination the appellant denied that he made defamatory statements to third parties. The following broad allegation was then put to him: *'. . . indien nodig gaan daar getuies geroep word wat gaan kom sê u het ook teenoor hulle hierdie bewering [dat die verweerder u verse gesteel het] gemaak, ek wil hê u moet mooi dink, Karoo Ochse byvoorbeeld?'* [6]

The appellant not only denied the allegation, he challenged the respondent to call the witnesses. The appellant was never given the opportunity to respond to the identity of those to whom he allegedly published the alleged defamatory remarks. If a witness is not given the opportunity to respond to an aspect, it

[5] *International Tobacco Co (SA) Ltd v United Tobacco Co (South) Ltd (4)* 1955 (2) SA 40 (W); *Mograbi v Miller* 1956 (4) SA 239 (T).

[6] My translation: *'. . . if necessary, witnesses are going to be called that would say you made the allegation [that the defendant stole your heifers] to them as well, I want you to think carefully, for example, persons from Karoo Ochse?'*

would be unfair to reject his evidence on that aspect.[7] The respondent failed to adequately plead publication to the persons to whom it was allegedly made, to testify to that or to confront the appellant with the identity of that person or persons to allow the appellant a fair opportunity to respond.

[16] Mr Hanekom testified to the alleged publication for the respondent. He was in the employ of a business previously known as Karoo Ochse. His vague evidence was that a 'long time ago' he had a conversation with the appellant which he 'could not really remember' or could not contextualise, but that it 'became apparent' during the conversation that the respondent stole nine of the appellant's heifers, that was 'more or less' what the appellant 'alluded to'.[8] The evidence of Hanekom is simply too vague to support the defamation pleaded.

[17] For these reasons the respondent's counterclaim should not have been upheld.

[18] In the result I make the following order:

18.1 The appeal is upheld with costs;

18.2 The order of the court below is replaced with the following:

a. 'The appeal is upheld with costs;

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[7] *President of the Republic of South Africa and others v South African Rugby Football Union and others* 2000 (1) SA 1 (CC) paras 61 to 63.

[8] The phrases quoted are my translations for the following: 'lank terug', 'kan nie rêrig onthou' , 'aan die lig gekom', 'min of meer' and 'gesinspeel'.

b. The order of the court a quo is replaced with the following:

i. The defendant is ordered to pay the plaintiff the amount of R45 000;

ii. The defendant is ordered to pay interest on the amount of R45 000 at the rate of 15,5% per annum from 30 October 2006 until date of final payment;

iii. The defendant is ordered to pay the costs of suit, including the costs of 7 April 2006 and 8 September 2006;

iv. The defendant's counterclaim is dismissed with costs.'

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S SNYDERS
JUDGE OF APPEAL

APPEARANCES:

For appellant: N Snellenburg

Instructed by Du Randt & Louw, Kroonstad,
Rosendorff Reitz Barry, Bloemfontein.

For respondent: J G Gilliland

Instructed by Grimbeek van Rooyen & vennotte,
Kroonstad,
Quinton Grimbeek Prokureurs, Bloemfontein.