THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 668/2011

In the matter between:

DHAYALAN CHOCKANATHAN CHETTY **APPELLANT**

and

ITALTILE CERAMICS LTD **RESPONDENT**

Neutral citation:	*CHETTY v ITALTILE* (668/2011) [2012] ZASCA 170 (28 November 2012)
Coram:	Brand, Malan, Pillay JJA and Southwood and Erasmus AJJA
Heard:	**16 November 2012**
Delivered:	**28 November 2012**

Summary: **Delictual liability for *furtum usus* – whether defendant used missing stock when stock rolled over – whether defendant used stock when selling it in breach of contract – causation.**

ORDER

On appeal from: the North Gauteng High Court, Pretoria (T M Makgoka J sitting as court of first instance):

1 The appeal is upheld with costs.

2 The order of the court below is set aside and replaced by the following:
'The plaintiff's claim is dismissed with costs.'

JUDGMENT

Malan JA (Brand and Pillay JJA and Southwood and Erasmus AJJA concurring):

[1] This is an appeal against the judgment and order of Makgoka J in the North Gauteng High Court, Pretoria that the appellant (Mr D C Chetty) pay the amount of R1 168 340,26 as damages together with interest and costs to the respondent (Italtile Ceramics Ltd). The remedy relied upon was the *condictio furtiva*. The appeal is with leave of the court below.

[2] Italtile is a retailer in ceramics. It has numerous branches and franchises and conducts business under the names of both Italtile and CTM. During 2004 Mr Chetty was a trainee manager at Italtile's CTM branch in Gezina, Pretoria. On 8 June 2006 he personally and through his close corporation (the second defendant in the court below), entered into a joint venture and franchise agreement with Italtile which commenced on 11 February 2006. He became the manager of both the combined warehouse and the CTM retail store in Gezina. The CTM brand is directed at the middle range of the tile and sanitaryware market. It operates (with a minor exception) on a strictly cash and carry basis. Italtile remained owner of all the goods in the Gezina store. Its policy was that none of the goods in the store could be taken

without payment first having been made. Mr Chetty was aware of this policy, and that it was required of him to manage the store in accordance with Italtile's procedures and targets.

[3] Mr Chetty, as a joint venture partner, was entitled to share with the respondent in the profits made at the store. If, however, the profits declined his remuneration would have been correspondingly less. By 2008 the Gezina store was not meeting the performance targets set by Italtile. The executive chairman of Italtile, Mr G A M Ravazzotti, then instructed Ms T Govender, a head office official responsible for monitoring joint venture and franchise stores, to investigate the situation at the Gezina store. She performed a mini audit of the store on 18 and 19 September 2008. She had stock sheets printed, did some stock counting and checked whether certain stock was correctly stored in the areas demarcated. She also discussed the management of the store with Mr Chetty.

[4] Her mini audit indicated that management of the store was poor and a cause for concern. Moreover, she ascertained that there were large variances between stock which was recorded on Italtile's SAP computerised stock and accounting system as being present at the store and what was in fact there. Furthermore, during her mini audit, Mr Chetty admitted to her that he was running a manual delivery book system (which involved the granting of credit) which he had not disclosed to Italtile, the details of which were kept outside the SAP stock and accounting system. Mr Chetty knew that Mr Ravazzotti was unaware of the delivery book system and also that he would not be happy to hear that stock had left the store without payment pursuant to the delivery book system. He preferred to tell the latter about the system himself and not leave it to Ms Govender to do so.

[5] Mr Chetty's evidence was that the delivery book system was designed to allow his favoured customers to purchase merchandise on credit. This, he knew, contravened company policy. Mr Chetty had longstanding relationships with these customers and the arrangement was that they would buy large quatities of stock, obtain delivery and settle their accounts at month's end. He did this without the knowledge or consent of Italtile which remained owner of the stock held by the store.

[6] Ms Govender's mini audit led to a full stock count to be done to determine the extent of the stock losses. In 2008 the Gezina store would carry stock of about R5 million on the premises. Stock losses should have been in the region of no more than 0,5 per cent of the stock delivered to the store. A report by Mr Mark Prior which was given to Ms Govender showed stock variances of R1 million for a three month period. It was during this stock count that Ms Govender ascertained that Mr Chetty was rolling stock. He had started doing this late in 2007. He would take the missing stock off the system on the first day of a month (by posting it to eg breakages or customer claims) and reverse it back onto the system on the last day of that month. The management accounts which were automatically generated on the last day of the month would therefore reflect that the missing stock was still held in the store. On discovering Mr Chetty's stock rolling, Italtile, on 17 October 2008, terminated the joint venture and his management of the store.

[7] Italtile originally claimed an amount of R1 477 081 from Mr Chetty. This amount was to a large extent based on the stock count performed by Mr Prior during October 2008. Mr Prior did not give evidence but Ms Govender prepared a summary of all stock movements showing the amount of missing stock. During her cross-examination Italtile applied for an amendment reducing the claim to R568 374,30 which was made up as follows: R542 318,70 in respect of stock rolling and R26 055,62 lost as a result of the book delivery system. These figures were not in dispute. Italtile later applied for a further amendment to increase the amount claimed to R1 168 340,26, being the retail value of the stock and not its cost. This was the amount awarded by the court below.

[8] Italtile relied on the *condictio furtiva*. It alleged in its particulars of claim that subsequent to the conclusion of the agreement it saw to it that the store was stocked and that Mr Chetty, as the sole member of the second defendant, controlled the warehousing and the stock in the store. It alleged that between February and October 2008, Mr Chetty, with the intention to steal, directed or procured or caused the unlawful removal of certain items of stock from the premises. The stock so removed was not removed in the course of the management and operation of the business nor in the ordinary course of the business. The plaintiff was at all times the

owner of the missing stock. Mr Chetty, the particulars of claim concluded, failed to return the missing stock and was unable to do so.

[9] Makgoka J found for Italtile on all aspects. He held that Italtile had established that it was the owner of the stock in the store; that large quantities of the stock went missing during the time Mr Chetty was in charge; that he, contrary to company policy, extended credit to selected customers; that he rolled stock by making false entries on the SAP system and that the stock that was rolled could not be found. Makgoba J found that Mr Chetty did not furnish a coherent, plausible reason why he had rolled stock and that he misrepresented the true state of affairs to Italtile. The inference he drew from these facts was that Mr Chetty's conduct amounted to theft as defined in the common law. He said that Mr Chetty's delivery book system, false write-off's and reversals of missing stock resulted in Italtile's suffering patrimonial loss. But, with respect to the learned judge, this was not the issue. The question was whether Mr Chetty could be held liable on account of *furtum usus* both in respect of the manual delivery system and his stock rolling. This required an investigation into whether the requirements of theft of this kind had been met.

[10] The *condictio furtiva* is a remedy the owner of, or someone with an interest in,[1] a thing has against a thief and his heirs for damages.[2] It is generally characterised as a delictual action.[3] It is, of course, required that the object involved be stolen before the *condictio* can find application. The law requires for the crime of theft –

'not only that the thing should have been taken without belief that the owner ... had consented or would have consented to the taking, but also that the taker should have

[1] *Clifford v Farinha* 1988 (4) SA 315 (W).
[2] *Kruger v Navratil* 1952 (4) SA 405 (SWA) at 408; *John Bell & Co Ltd v Esselen* 1954 (1) SA 147 (A) at 151E-152B: *Minister van Verdediging v Van Wyk & Andere* 1976 (1) SA 397 (T) at 400C; *Crots v Pretorius* 2010 (6) SA 512 (SCA) para 3.
[3] Cf J Voet *Commentarius ad Pandectas* translated by P Gane *The Selective Voet* (1955) 13.1.2; *Minister van Verdediging v Van Wyk & Andere* at 400C-D; *Clifford v Farinha* at 320H-322D; *Crots v Pretorius* para 3. On the nature of and need for the *condictio furtiva*, see John Blackie and Ian Farlam 'Enrichment by act of the party enriched' in Reinhard Zimmermann, Daniel Visser and Kenneth Reid (eds) *Mixed legal systems* (2004) 469 at 488-9; P C Pauw 'Historical notes on the nature of the *condictio furtiva*' (1976) 93 *SALJ* 395 at 399-400; J C Sonnekus *Ongegronde verryking in die Suid-Afrikaanse reg* (2007) at 149 ff; Daniel Visser *Unjustified enrichment* (2008) at 661 ff and Jacques du Plessis *The South African law of unjustified enrichment* (2012) at 338-9.

intended to terminate the owner's enjoyment of his rights or, in other words, to deprive him of the whole benefit of his ownership.'[4]

However, at common law 'theft' has a wider meaning and includes *furtum usus*, or the appropriation of the use of another's thing.[5] Theft of the use of another person's thing is no longer a crime.[6] The *condictio furtiva* lies in all cases of theft: 'whether the theft wreaked was one of proprietorship or of use or possession ... makes no difference to the possibility of the action being available.'[7] In *Clifford v Farinha* it was stated with regard to the *condictio furtiva*:[8]

'[T]he "benemer" – to use the term of De Groot 3.37.3 – does something which he is not permitted by law to do, namely, to arrogate to himself the power to deal with another's property. Thereby he incurs an obligation of the thief immediately to undo what he has done. Whether the obligation of the thief immediately to restore what he has stolen is classified as part of the *mora* doctrine ... or as simply arising from the delict ... the thief is ... regarded as being in default ... and the obligation to restore – "is perpetuated ...".'

The intention to appropriate the thing permanently, as in the case of criminal theft, is not a requirement of the *condictio* where *furtum usus* is concerned. The *condictio furtiva* will be available where, for example, the defendant withdraws the thing from the possession of another, or 'takes' it, and uses it while intending to restore possession after use.[9] The *condictio* entitles the owner to the highest value of the thing between the time it was stolen and *litis contestatio*.[10] The *rei vindicatio* and the *condictio furtiva* are alternative remedies.[11] Where the thing stolen was lost or destroyed the *condictio* is the owner's only remedy.[12]

---

[4] *R v Sibiya* 1955 (4) SA 247 (A) at 257B-D and see *S v Van Coller* 1970 (1) SA 417 (A) at 424G-F.
[5] Visser at 661 ff; Du Plessis at 336-9; *Minister van Verdediging v Van Wyk & Andere* at 402G-403C; *Clifford v Farinha* at 322E-323E.
[6] *R v Sibiya* 1955 (4) SA 247 (A).
[7] Voet 13.1.7.
[8] *Clifford v Farinha* at 321F-H. Hugo de Groot *The jurisprudence of Holland* (1953) (translated by R W Lee) at 3.37.3: 'Door goed-beneming werden verbonden alle dieven, geweldigers, grondroovers, oock die door valsche oorkonde ofte andere quade middelen iemand van 't sijne helpen, die eens anders beest quetsen, ende diergelijcken.' As was remarked in *Smit v Saipem* 1974 (4) SA 918 (A) at 929H-930C, at the time De Groot wrote his *Introduction* there was no significant difference between the *actio furti* and the *actio legis Aquiliae*. See also Pauw at 400.
[9] *Clifford v Farinha* at 322C-D.
[10] Pauw at 400; Visser at 661-5; Du Plessis at 338 but see M D Blecher 'The owner's actions against persons who fraudulently ceased to possess his *res* (*qui dolo desierunt possidere*)' (1978) 95 *SALJ* 341 at 358.
[11] *Conradie v Jones* 1917 OPD 112 at 119; 8(1) *Lawsa* 2 ed para 34.
[12] See 8(1) *Lawsa* 2 ed para 34 and 27 *Lawsa* para 387 for further particulars.

[11] I will first consider the claim of *furtum usus* based on stock rolling. Mr Rome, who appeared for Italtile, submitted that the 'inexorable' inference to be drawn from the facts was that Mr Chetty used the stock in an unauthorised manner and to camouflage his misuse he concealed the missing stock by posting fraudulent entries to accounts such as the breakages account. He then concealed the disappearance of the stock at month end to mislead Italtile further. This, Mr Rome submitted, constituted the use of another's property without his consent. In support of his contention, counsel referred to Mr Chetty's reversal of the write-off's at month end to ensure that his take home pay would not be affected; his misuse of the breakages account and, generally, his failure to provide a proper explanation for his conduct.

[12] I do not agree that the conduct complained of constituted the *use* of another's property. What Mr Chetty did was to post false entries to the accounts to mislead Italtile. This could well have amounted to fraud in as much as it would have caused an increase in Mr Chetty's profits, but it is not *use* of the stock. Most of the stock, in any event, went missing prior to the false entries so that no use of it was possible. The question is rather whether Mr Chetty's conduct was calculated to conceal any unlawful taking of the stock. There is no direct evidence of theft nor of Mr Chetty's participation in theft. Nor is such an inference the most plausible or the most likely one to be drawn from the proven facts.

[13] Mr Chetty was not a good manager. This was found by Ms Govender as soon as she commenced her mini audit. The 2006 financial year's results were in line with the targets set. The following year things deteriorated. The store underwent extensive renovations and became, as Mr Chetty testified, a virtual construction site with hundreds of people including contractors and builders walking in and out all the time. All of this impacted negatively on the stock control systems. Mr Chetty was concerned about stock going missing. He had suspicions about his staff members and arranged for polygraph tests to be done during February 2008. He had informed Mr Ravazzotti about these tests. He wanted to ascertain the reasons for the stock losses. The write-off's and subsequent reversals, so he said, would give him time to investigate the reasons for the stock losses. Some losses resulted from the changed packaging of the supplier, Pegasus. At best it can be said that Mr Chetty implemented inappropriate mechanisms to protect his equity in the business pending

his investigations as to the stock losses, not that he intended to and did steal the missing stock.

[14] Italtile's claim relating to the book delivery system is also based on *furtum usus*. The introduction and operation of the book delivery system was a contravention of company policy and could well have exposed Mr Chetty or his close corporation to claims for breach of contract. Whether it amounts to *furtum usus* is a different matter. There was no 'taking' or withdrawal from Italtile of the goods sold on credit: the stock was lawfully under Mr Chetty's control. Its sale by Mr Chetty could well have founded a complaint of another form of theft[13] (which is not relied upon by Italtile) but is difficult to fit it into the rubric of *furtum usus*. Mr Chetty never intended to return the stock sold on credit to Italtile. He did not intend using it temporarily, as in most cases of *furtum usus*, but sold it intending to benefit both his own corporation and Italtile. However, it seems that his making the stock available for sale pursuant to the book delivery system could be regarded as the *use* of the goods. The act of selling the goods, necessarily, includes their use.

[15] The monthly turnover on the delivery book system was between R300 000 and R400 000. Sales were made to major customers with whom Mr Chetty had formed commercial relationships. No bad debts were incurred by him except the amount of R26 055 referred to below. All amounts received was credited to the store. Despite this, it cannot be said that Mr Chetty's use of the goods in this manner was in good faith in the expectation that consent would be provided:[14] he knew that he was not entitled to sell on credit; he knew that if he had sought permission it would have been refused; and he conceded that he would not have stopped the book delivery system had he not been caught by Ms Govender.

[16] When Mr Chetty's employment was terminated he left the premises with only his diary and no information as to outstanding debts. All the reconciliations he had done he gave to Ms Govender. He had little or no opportunity to collect the debts outstanding after leaving his employment. Ms Govender collected all of them with

[13] Cf *R v Kinsella* 1961 (1) SA 230 (C).
[14] *First National Bank of Southern Africa Ltd v East Coast Design CC & others* 2000 (4) SA 137 (D&CLD) at 145E ff and see *LAWSA* 27 para 387 n 3 and C R Snyman *Criminal law* (2008) 5 ed at 493.

only a relatively small amount of R26 055 outstanding. For no specific reason she decided not to pursue collecting the latter amount. Mr Chetty's undisputed evidence is that he would have been able to collect whatever was outstanding had he been granted the opportunity to do so. Payment, he said, would have been forthcoming immediately. He himself never had a bad debt on the manual delivery system. It is difficult to conclude that he could have foreseen this specific loss. The loss arose, not directly from the use of the goods, but from the failure of Italtile to collect the outstanding debt. As between the parties Italtile was clearly better placed to recover the outstanding amount. It was the only party able to do so. The debt was that of Italtile, not that of the dismissed Mr Chetty. It could but did not request Mr Chetty's assistance. It is clear that Mr Chetty's conduct is a factual cause of the loss suffered by Italtile. However, in these circumstances it cannot be said that his conduct is sufficiently closely or directly linked to the loss for legal liability to ensue.[15] Italtile caused its own loss.

[17] In the result the following order is made:

1 The appeal is upheld with costs.

2 The order of the court below is set aside and replaced by the following:
'The plaintiff's claim is dismissed with costs.'

_____

F R Malan
Judge of Appeal

[15] *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700E-I and see *Fourway Haulage (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA) paras 34 and 35.

APPEARANCES:

For Appellant:	F du Toit SC
	Instructed by:
	Ron Lippi Attorneys Pretoria
	Lovius Block Bloemfontein
For Appellant:	G B Rome
	Instructed by:
	Edward Nathan Sonnenbergs C/o Edelstein Bosman Inc Pretoria
	McIntyre & Van der Post Bloemfontein