***ESKOM v ROLLOMATIC ENGINEERING (EDMS) BPK* 1992 (2) SA 725 (A)**

Court: Appellate Division

Judges: Botha AJ, HEFER AJ, VIVIER AJ, VAN DEN HEEVER AJ, HOWIE AJA

Heard: March 16, 1992

Judgment: March 26, 1992

Flynote : Key words

Ownership - Movable property - Transfer of - *Traditio longa manu* - Requirement that transferee should, after property pointed out, be able to exercise physical control over it - Plaintiff had purchased certain steel towers from owner of a farm in 1981 - Plaintiff responsible for removal of steel towers and their concrete foundations from farm - Delivery of steel towers would take place after plaintiff had made arrangements therefore with owner of farm - No such arrangements made - Steel towers left on farm - Portion of farm where steel towers stood sold to defendant (Eskom) - Defendant using steel towers in erection of electrical substation - Plaintiff having exercised no control over portion of farm upon which steel towers stood or the steel towers themselves - Delivery by way of *traditio longa manu* not established - Transfer of ownership of steel towers to plaintiff not proven.

Headnote:

In 1981 the plaintiff (respondent in the present appeal) purchased certain steel towers, which had previously been part of an electrical substation, from the owner of the farm on which they stood. In terms of the contract of sale the plaintiff was responsible for the removal of the steel towers and their concrete foundations and for restoring the land to its original state. Delivery of the steel towers to the plaintiff would take place after the plaintiff had made arrangements therefor with an official of the company which owned the farm. No such arrangements were ever made, and the plaintiff left the steel towers on the farm. The plaintiff's managing director, J, had, in his personal capacity, hired the farm for grazing purposes but the fenced-off area upon which the substation and steel towers stood was expressly excluded from the lease. The defendant (appellant in the present appeal) later decided to put the substation into operation again and purchased a small portion of the farm upon which the substation stood, taking transfer thereof in January 1986. The defendant again used the steel towers, which were still standing there, as an integral part of the new substation. When the plaintiff sent its employees to remove the steel towers in May 1987, they could not do so because of the erection of the new substation. In an action (a *rei vindicatio*) instituted in a Provincial Division by the plaintiff against the defendant for the delivery of the steel towers, the Court found that the steel towers did not form part of the land and were therefore movable and further that fictional delivery thereof in the form of *traditio longa manu* had taken place. In an appeal,

Held, on the evidence, that neither J in his personal capacity nor the plaintiff had any control over the steel towers or the fenced-off area where they stood: it was clear from the evidence that before May 1987 the plaintiff had not been interested in acquiring control over the steel towers.

Held, further, that at least one of the requirements for *traditio longa manu* had accordingly not been met, namely that the transferee, after the pointing out of the property, should be able to exercise physical control over the property.

Held, accordingly, that the plaintiff had not proved that it had become owner of the steel towers and that it was therefore not entitled to an order for the delivery thereof. Appeal allowed.

The decision in the Transvaal Provincial Division in *Rollomatic Engineering (Edms) Bpk v Eskom* was reversed.

Case Information:

Appeal against a decision in the Transvaal Provincial Division (Spoelstra J). The facts are apparent from the decision by Vivier AJ.

SF Burger SC (assisted by *JI du Toit*) on behalf of the appellant referred to the following authority: Regarding the application for condonation of the late service of the notice of appeal, see *Federated Employers Fire & General Insurance Co Ltd v McKenzie* 1969 (3) SA 360 (A) J at 362G-H; *Ferreira v Ntshingila* 1990 (4) SA 271 (A) at 281D-282A.

Regarding the question whether the steel towers were movable or immovable things, see *Standard-Vacuum Refining Co of SA (Pty) Ltd v Durban City Council* 1961 (2) SA 669 (A) at 677H-678C, 679B-D; *Trust Bank van Afrika Bpk v Western Bank Bpk en Andere NNO* 1978 (4) SA 281 (A) at 295E; *Theatre Investments (Pty) Ltd and Another v Butcher Brothers Ltd* 1978 (3) SA 682 (A) at 688E-G; *Sumatie (Edms) Bpk v Venter en 'n Ander NNO* 1990 (1) SA 173 (T) at 186C, 189E-G; *Melcorp SA (Pty) Ltd v Joint Municipal Pension Fund (Transvaal)* 1980 (2) SA 214 (W) at 222F-G and 224A-B; *Newcastle Collieries Co Ltd v Borough of Newcastle* 1916 AD 561 at 564-5, 565-6; *Western Bank Bpk v Trust Bank van Afrika Bpk en Andere NNO* 1977 (2) SA 1008 (O) at 1022B; *Pettersen and Others v Sorvaag* 1955 (3) SA 624 (A) at 628A; *Van Wezel v Van Wezel's Trustee* 1924 AD 409 at 412; *Champions Ltd v Van Staden Bros and Another* 1929 CPD 330; *Land and Agricultural Bank of SWA v Howaldt and Vollmer* 1925 SWA 34; *Cape Town & District Gas, Light & Coke Co Ltd v Director of Valuations* 1949 (4) SA 197 (K); *Edwards v Barberton Mines Ltd and Another* 1961 (1) SA 187 (T); *Caltex (Africa) Ltd and Others v Director of Valuations* 1961 (1) SA 525 (C) ; Van der Merwe *Sakereg* 2 ed at 250; *R v Mabula* 1927 D AD 159; *MacDonald Ltd v Radin NO and the Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454 at 477-8. Regarding the question whether delivery to the plaintiff by *traditio longa manu* had taken place, see Van der Merwe (*op cit* at 318-19); *Groenewald v Van der Merwe* 1917 AD 233 at 239; *Botha v Mazeka* 1981 (3) SA 191 (A) at 195F; *Erasmus v ME Rosenberg Ltd* 1910 TPD 1188; *Page NO v Blieden & Kaplan* 1916 TPD 606; *Kaal Valley Supply Stores v Louw* 1923 OPD 60.

NB Tuchten on behalf of the respondent referred to the following authority: Regarding the intention of the parties when transferring ownership, see Van der Merwe *Sakereg* 2 ed at 305-14; Joubert (ed) *Law of South Africa* vol 27 at 151-5. Regarding the question whether the steel towers were movable or immovable, see *Newcastle Collieries Co Ltd v Borough of Newcastle* 1916 AD 561 at 564, 565; *Melcorp SA (Pty) Ltd v Joint Municipal Pension Fund (Transvaal)* 1980 (2) SA 214 (W) at 224A-D; *MacDonald Ltd v Radin NO and the Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454 at 467-8, 477-8. Regarding the question whether delivery of the steel towers did in fact take place, see *S v R* 1971 (3) SA 798 (T) at 800A-G; Joubert (*op cit* vol 27 at 57 par 61 and at 59-61); *Hearn & Co v Bleiman* 1950 (3) SA 617 (K) at 625B-626G; *Trust Bank van Afrika v Ebrahim (1) and (2); Trust Bank van Afrika v Omar* 1961 (4) SA 336 (T) at 338E; *Caledon en Suid-Westelike Distrikte Eksekuteurskamer Bpk v Wentzel* 1972 (1) SA 270 (A) at 272H-273H, 274H; *Air-kel (Edms) Bpk h/a Merkel Motors v Bodenstein* 1980 (3) SA 917 (A)

at 923H; *Barclays Western Bank Ltd v Ernst* 1988 (1) SA 243 (A) at 253C-D; Van der Merwe (*op cit* at 315, 317-19, 321-30); Joubert (*op cit* at 156-9, 160-4).

Cur adv vult.

Postea (March 26).

Judgment

Vivier AJ: The respondent, to whom I shall refer as the plaintiff, has a *rei vindicatio* against the appellant, to whom I shall refer as the defendant, instituted in the Transvaal Provincial Division. The plaintiff's case was that he was the owner, and that the defendant was in possession, of a structure, consisting of "substation steelwork and foundations" on a piece of land currently known as portion 21 of the farm Zwartkloof no 707 in the district of Warmbaths. The plaintiff was consequently claiming delivery of the structure, or alternatively payment of the market value. An alternative claim for payment of the amount of R51 778 based on an alleged verbal agreement to pay that amount was not proceeded with at the hearing. The plaintiff's claim for delivery of the structure was upheld with costs by Spoelstra J, who then gave the defendant leave to appeal to this Court. Since then the plaintiff has, in terms of Rule 41(2) of the Uniform Rules of Court, abandoned that part of the order that commands the defendant to deliver the "foundations" of the structure.

The dispute between the parties arose as follows: Around 1970 Goldfields South Africa Ltd ('Goldfields') started constructing a mine to mine fluorite on the farm Zwartkloof no 707 ('Swartkloof'). An agreement was concluded with the defendant beforehand that the latter would supply electricity to the mine by means of an overhead supply line from the defendant's distribution station at Warmbaths to a substation to be erected at the mine. The written agreement in terms of which the defendant undertook to supply electricity to the mine was not available at the hearing, but it appears from other documentation that the consumer was to be Zwartkloof Fluorspar Ltd ('Zwartkloof Fluorspar'), one of the companies in the Goldfields group. Zwartkloof Fluorspar would be responsible for constructing certain parts of the substation at its own expense according to specifications to be supplied by the defendant.

Zwartkloof Fluorspar carried out certain construction work according to specifications; this included certain steel towers that formed part of the substation. After the steel towers had been erected, the defendant attached his own equipment for the conductance of electricity to the towers and on 15 October 1971 electricity began to be supplied to Zwartkloof Fluorspar, which was the only consumer of electricity from the substation.

The steel towers each stand on a concrete base which measures two cubic metres and is sunk into the ground. Each steel tower is attached to its base by means of a steel tip and bolts. The various units of which the towers are made up were pre-manufactured, placed in position on site and then bolted together.

It appears from the evidence that the original intention was that production would continue indefinitely, so it must be accepted that the substation was built to last for an indefinite period. However, it was soon found that the ore body did not meet expectations and consequently mining operations were abandoned and the supply of electricity was discontinued early in 1976. The agreement in terms of which electricity was supplied was terminated with effect from 31 March 1976. The defendant left his overhead supply line from the Warmbaths distribution station in

place but removed his equipment from the substation and recovered his construction and dismantling costs from Zwartkloof Fluorspar. The latter company left the remainder of the substation just as it was. This means that the building, the steel towers, the gravel cover over the whole site and the security fence, *inter alia*, remained there.

According to Mr Joubert, the plaintiff's managing director, this was the position when a few years later, on 13 June 1979, he signed a written deed of lease with Zwartkloof Fluorspar in his personal capacity, in terms of which he leased Zwartkloof for grazing purposes. Zwartkloof Fluorspar is described as the owner of Zwartkloof in the lease. The lease was extended from time to time and is still in force. The lease agreement expressly excluded 'all buildings and structures'. It is clear that all the parties intended this to mean the whole fenced site of the substation. As Joubert put it in his evidence, "the livestock don't eat gravel".

In 1981 Goldfields sold the steel portion of the towers to the plaintiff as scrap steel. The plaintiff wanted to use this steel to erect observation towers on a game farm in the vicinity. The purchase price for the 20 tons of scrap steel from the towers was R700, calculated at R35 per ton. In terms of the agreement the plaintiff was responsible for removing the steel towers and their concrete foundations and restoring the land to its original condition. According to a letter from Goldfields to the plaintiff dated 24 August 1981, in which the preceding verbal purchase agreement was put in writing, delivery would take place after the plaintiff had made arrangements therefore with an official of Goldfields. No such arrangements were ever made.

By 1984 the defendant had decided to put the substation into operation again in order to supply electricity to a number of other consumers in the area. For this purpose the defendant purchased a portion of Swartkloof, which was approximately 0,3 ha in extent and on which the original substation stood, from another company in the Goldfields group, Zwartkloof Mining Ltd, for the sum of R600. On 29 January 1986 the subdivided portion, now known as portion 21 of the farm Zwartkloof no 707, was registered in the defendant's name. The defendant recommissioned the steel towers, which were standing there in an unaltered condition, as an integral part of a new, enlarged substation for the supply of electricity. When the plaintiff sent his workmen in May 1987 to dismantle the towers and remove the scrap steel, they found the substation in full swing and had to return without performing their task.

Spoelstra J found that the structure did not form part of the land and that it would therefore have to be regarded as movable. He also found that fictitious delivery in the form of *traditio longa manu* had taken place in that the seller had left the structure in the possession of the plaintiff, as lessee. In this way the plaintiff had become the owner of the structure, or at least the steel section of it.

I see no need to take a decision in the present case on whether the structure should be regarded as movable or immovable. Even assuming that it is movable, I cannot agree with the trial judge that delivery did take place. At the time when the plaintiff purchased the steel Zwartkloof Fluorspar was the owner of Zwartkloof and had full possession of all buildings and structures thereon. As I have already mentioned, the entire fenced site of the substation, with all the buildings and structures thereon, was excluded from the deed of lease that Zwartkloof Fluorspar concluded with Joubert in his personal capacity. Joubert therefore had no control over the substation and the plaintiff had even less. At all events the plaintiff had no control over the leased land. Clause 18 of the lease contained a prohibition against

subdivision or any cession of the lessee's rights without the written consent of the lessor and there was no question of any such consent in favour of the plaintiff. The trial judge was therefore in error in describing the plaintiff as the lessee of the land.

According to Joubert he took delivery of the steel on behalf of the plaintiff. His own evidence does not support this claim, however. There is no evidence that delivery took place as expressly determined in the contract of sale. The question arises whether there may have been fictitious delivery in the form of *traditio longa manu*, as argued before us on behalf of the plaintiff.

Neither Joubert in his personal capacity nor the plaintiff had any control over the structure. There is no doubt that nobody had any right to enter the premises on which the structure stood without making advance arrangements with the seller (and no such arrangements were made). It is clear from Joubert's own evidence that the plaintiff had no interest in obtaining control prior to May 1987. He testified that when the plaintiff purchased the steel in 1981 he was not ready to erect the observation towers. This only happened in May 1987. In the mean while it suited the plaintiff that the structure was left on the site under the control of Goldfields or one of its subsidiaries. According to Joubert he seldom visited Zwartkloof, about once in three years, and up to May 1987 he was unaware that the substation had been enlarged and recommissioned or that the defendant had purchased the site of the substation from Zwartkloof Mining Ltd. It is clear from this that there was no question of the plaintiff's having been in control of the site or the structure. At least one of the requirements for delivery with the long hand was therefore not met, namely that the transferee must be in a position to exercise physical control over the thing, once it has been pointed out. In *Groenewald v Van der Merwe* 1917 AD 233, Innes CJ described this requirement for delivery with the long hand as follows at 239:

"But physical prehension is not essential if the subject-matter is placed in presence of the would-be possessor in such circumstances that he and he alone can deal with it at pleasure. In that way the physical element is sufficiently supplied; and if the mind of the transferee contemplates and desires so to deal with it, the transfer of possession - that is the delivery - is in law complete. (See *Digest* 41.2.1.21; *Voet* 41.1.34; *Savigny* Book 2 ss 15-17; *Pothier* vol 2 par 314.) When this deposit of the subject-matter in the presence and at the disposition of the new possessor takes the place of physical prehension, the delivery is said to be made *longa manu*, and it constitutes one of the forms of fictitious, as distinguished from actual, delivery."

See also *Botha v Mazeka* 1981 (3) SA 191 (A) at 195F-H.

"The plaintiff therefore failed to prove that he had become the owner of the steel and he was not entitled to an order for delivery of the steel."

There were two applications before us from the defendant: for condonation of noncompliance with certain Rules of this Court, which were opposed by the plaintiff on the single ground that there was no reasonable prospect of success on the merits of the appeal. It follows that the application for condonation must succeed.

The following order is consequently made:

1. The applications for condonation are granted and the defendant is ordered to pay the costs on an unopposed basis.

2. The appeal succeeds with costs, which include the costs of two advocates, excluding the cost of the application for condonation.

3. The order of the Court *a quo* is amended to read: “Plaintiff’s claim is denied with costs.”

Botha AJ, Hefer AJ, Van den Heever AJ and Howie Actg AJ concurred.

Appellant’s Attorneys: *Hofmeyer, Van der Merwe Inc*, Johannesburg; *Naudes*, Bloemfontein. Respondent’s Attorneys: *Arthur Schoeman Inc*, Johannesburg; *Symington & De Kok*, Bloemfontein.