C of A (CIV) No. 21/2005

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:

MOTAUNG COLD STORAGE **APPELLANT**

and

LESOTHO REVENUE AUTHORITY **RESPONDENT**

Held at Maseru

CORAM:
Steyn, P
Smalberger, JA
Melunsky, JA

JUDGMENT

SUMMARY

Appeal directed against the refusal to grant a spoliation order. High Court dismissing application on the ground that it had no jurisdiction. – Merits of matter fully argued before Court of Appeal. – Court accepting without deciding that High Court had jurisdiction – Appellant a partnership with two partners – same partners own the debtor firm operating in the same product market. – Seizure effected by Respondent in terms of Section 42 of the VAT Act 2001. – Respondent's seizure in circumstances lawful as vehicle owned by the partners and not by the firm. – Appeal dismissed.

STEYN, P

This matter was enrolled as a matter of urgency – due cause for such a set down having been shown.

On the 19th of August 2005 the High Court dismissed an

application brought by way of Notice of Motion by the appellant. It did so on the sole ground that the spoliation order sought by the appellant in respect of a refrigerated truck allegedly owned by the appellant, fell within the jurisdiction of the Magistrate's Court. The High Court held that the proceedings should, in terms of the Subordinate Courts Order 1988 read with Section 6 of the High Court Act 1978, have been instituted in the Magistrate's Court, no leave having been granted in terms of Section 6 (b) of that Act. It was the correctness of this finding and the consequent dismissal of the application that appellant challenged before us.

The appellant, however, was not content for us to limit the appeal to the jurisdictional question. What it sought on appeal was the relief claimed in the notice of motion, namely for the respondent to restore the refrigerated truck into its possession. Although the merits of the spoliation application were not dealt with in the appellant's heads of argument, counsel for the appellant urged us to decide whether the respondent's seizure of the truck was lawful. As counsel for the respondent had no objection to this course, we acceded to the appellant's request and heard argument on the merits.

In the event, and as appears hereunder, there is no need for this Court to deal with the question of jurisdiction.

The principal deponent in these proceedings one Rego runs a business in partnership with one Anthony Robert Stevenson, trading as Motaung Cold Storage located at No 6 Loop Street, Ladybrand in the Republic of South Africa. The appellant was engaged in the business of selling processed meats delivered to Maseru every day of the week using *inter alia* an Izusu 31/2 ton refrigerated truck. On the 24th of December 2004 officers of the respondent seized the truck whilst it was in Maseru. It did so in respect of a claim of M123,201.60 allegedly due in respect of VAT for the period commencing 2001 by Motaung Meat Wholesalers – a partnership which carried on a butchery business in Maseru and imported its meat into Lesotho from South Africa. Although Rego stated in his replying affidavit that Motaung Meat Wholesalers was an "enterprise which he ran jointly" with Stevenson, he nowhere denied the respondent's averment that the so-called enterprise was in fact a partnership and that the parties at all relevant times were Rego and Stevenson. Appellant contended that this disturbance of its

possession of a vehicle owned by it was unlawful and it sought the protection of an order or writ of mandament van spolie. It is common cause that Motaung Meat Wholesalers was the debtor, not the appellant partnership. In fact and in law, however, the debt was owed by the parties of this business.

The respondent raised several defences to the granting of a spoliation order. Apart from challenging the jurisdiction of the High Court with reliance on the statutory provisions referred to above, it also contested the right of the appellant's claim to ownership or lawful possession of the vehicle seized. Finally it averred that even if ownership had been transferred to the appellant, in law the truck was owned and in the possession of the individual partners who were also partners in the business of the debtor (while it) was trading as Motaung Meat Wholesalers. It is not disputed for present purposes that the debtor firm is indebted to the respondent in respect of unpaid VAT tax in the amount claimed. In these circumstances, - so the respondent submitted – it was entitled in terms of Section 42 of the Value Added Tax Act 2001 ("the Act") to recover VAT owed, via distress proceedings, and to seize the vehicle in issue.

I am prepared for present purposes to assume – without so deciding – that the High Court had jurisdiction to adjudicate the application. The issue to be decided was whether the respondent seized the vehicle lawfully in terms of Section 42 of the Act.

The facts relevant for the determination of this issue are the following. As outlined above, the two partners in the partnership trading as Motaung Cold Storage (the appellant), are also the two partners in the firm Motaung Meat Wholesalers (the debtor). One of the two partners - the said Stevenson – alleges that he "personally purchased" the vehicle and paid for it by means of 3 post-dated cheques drawn by "a company" – T. Stevenson Marketing and Warehousing. It is clear however that the vehicle in question is still registered in the name of the seller, one Dr. Musoke. She avers that she sold the vehicle to Motaung Meat Wholesalers (the debtor) and she confirmed that no formal change of ownership occurred and that she was still the registered owner.

Stevenson says that when Dr. Musoke alleges that she sold the vehicle to Motaung Wholesalers for M27,000 (and not for M58,000 as averred by him), she is not correct and he attached cheques totaling R58,000 to prove this fact. He does not however state on whose behalf he bought the vehicle or how it is alleged to have been "acquired" or possessed by the appellant firm or transferred to it. The only evidence tendered by the appellant is Stevenson's allegation that "I personally (my emphasis) purchased this vehicle

from Dr. Musoke …". (It must be borne in mind that Rego admitted in his replying affidavit that Motaung Meat Wholesalers (the debtor company) "was ….. an enterprise run jointly by the said Stevenson and I and I consequently accept liability for its act."

However that may be, and on the assumption that Stevenson bought the truck for the purposes of the business conducted by the appellant, it is clear that it was never registered in its name and inasmuch as it was a partnership asset it was at the time of its seizure the property of the partners. The respondent contended that the fact that the vehicle may not have been used in pursuance of the business needs of the debtor at the time of its seizure was irrelevant if indeed it was owned in law by the individual partners of both partnerships – one of whom was the debtor in the amount claimed.

Support for this contention is to be found in Gibson SA Mercantile and Company Law 7th ed, pp248-249 and Wille's Principles of South African Law 8th ed, p.612. In Strydom v Protea Eiendomsagente 1979 (2) SA 206 (T) at p.209 C-D Nestadt J (as he then was) summarizes the law concerning the legal personality of a

partnership as follows: "There is now no doubt, if there ever was, that the basic common law principle is that a partnership is not a legal entity or persona separate from its members. This means that the rights of a partnership are vested in, and the liabilities are binding on, the individual partners." See also Ex Parte Cohen and Another 1974 (4) SA 674 (W) at 675 and Muller and Another v Pienaar 1968 (3) SA (A) 195 at 202 F-H where the Court states "The assets of a partnership is the property of the partners in joint undivided shares". (Own translation)

The respondent contended that the use of different names for the business conducted by the respondent was merely a facade to facilitate the evasion of VAT. There is certainly a well-founded suspicion that what the two partners did by conducting business under a variety of aliases was a charade intended to confuse and obfuscate the true identity of those involved for whatever purpose – tax evasion or otherwise. In this regard there is the unexplained peculiarity that a vehicle, allegedly purchased for use by the appellant, was bought by Stevenson and paid for by cheques issued by a company under the name T. Stevenson Marketing and

Warehousing. Then there is the fact that the deponent of the founding affidavit failed to disclose therein that he was himself a partner of the debtor business. Indeed he was at pains at that point to distance himself from any association with this enterprise. His allegation in the founding affidavit was that Motaung Wholesalers – the debtor company - "is the butchery business which the said Stevenson attempted to run in Maseru but could not obtain a licence to operate in Maseru …". As pointed out above it was only in reply that he admitted that he was indeed a partner in the debtor business.

It is also to be noted that the allegation made by the respondent that the partners kept on changing their trade name and had also operated a butchery in the trade name Lefikeng Butchery is not explicitly denied by the appellant. Indeed the response is the following:

> "As will be apparent to this Honourable Court I have attempted not to answer the gratuitous insults and accusations of dishonesty hurled at me by the deponent simply because they are irrelevant to the question of the ownership of the vehicle in issue and also because they do not show the required decorum to this Honourable

Court."

This is an evasive and unconvincing response to specific and detailed allegations that required a reasoned rebuttal.

Even if it were to be assumed for present purposes that Stevenson bought the vehicle exclusively for the purposes of the appellant's business, (which he does not allege) this does not in any way affect the principle that its ownership vested in the partners in the business – Rego and Stevenson. This principle is defined as follows in Wille's Principles of South African Law (8th ed.) *op.cit:*

> "Although the assets or property mentioned above are invariably referred to as 'partnership property', they do not actually belong to the firm, since the firm is not a persona and cannot therefore own property. The property is owned jointly by the partners in undivided shares, i.e. they are co-owners, in such proportions as have been stipulated."

See also the authorities cited by the authors and cf. the Strydom decision cited above.

It follows therefore that the respondent was entitled to attach the asset (the truck) as it was owned and in the possession of the partners who represented both the appellant and the debtor [company].

It is my view that the truck was owned by the partners in related enterprises operating formally under different names. The failure of both Rego and Stevenson to deal appropriately with the respondent's allegations of the use of different names for tax evasion purposes and that they also at one point changed their trade name to Lefikeng Butchery strengthens the suspicion that these various businesses were essentially one business operating under different names. If these were two distinct businesses, one would have expected the partners to have responded and to have demonstrated their *bona fides* by setting out why these businesses had different names; that they operated from different premises; had separate books of account and were genuinely distinct enterprises. It is also puzzling why the appellant never registered the vehicle in its name. No explanation was tendered for its failure to do so.

Whilst it is clear that a male fide exercise of statutory powers of seizure is spoliation – see Van Eck N.O. v Etna Stores 1947 (2) SA 984 (A) – the respondent in my view acted both bona fide and intra vires when it seized the vehicle – the property of the partners, Rego and Stevenson.

I summarize our findings thus.

1. It is common cause:

   1.1 The debtor company owes the Respondent M123,201-60 due for VAT purposes.

   1.2 The partners in the Appellant and in the debtor businesses are the same persons.

2. It is our view that the respondent acted lawfully when it seized the vehicle in question in terms of Section 42 of the Act because -

   2.1 The vehicle was in law the property of its two partners.

   2.2 The two partners being partners in both businesses, ran them not as distinct and separate businesses but they were essentially the same business but with different names.

   2.3 It follows that the basic common law rule applies that the assets of both businesses belonged to the two partners who were common to both these enterprises.

2.4 In these circumstances the respondent acted lawfully when it availed itself of the powers conferred on it by Section 42 of the Act when it seized the vehicle in question.

For these reasons the appeal is dismissed with costs

_____
J.H. STEYN
PRESIDENT OF THE COURT OF APEAL

I agree: _____
J.W. SMALBERGER
JUDGE OF APPEAL

I agree: _____
L. MELUNSKY
JUDGE OF APPEAL

Delivered on this 20th day of October 2005.

For Appellant : Mr. K. Sello, KC
For Respondent : Mr. R. Mathaba