



IN THE HIGH COURT OF SOUTH AFRICA
(IN THE NORTHGAUTENG HIGH COURT)
(REPUBLIC OF SOUTH AFRICA)

CASE NO: 31630/2008

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED

10/12/2013.

DATE

Mg Pmtl

SIGNATURE

In the matter between:

ANRO PLANT HIRE (PTY) LTD

AND

WILLEM HENDRIK LE ROUX

ABSA BANK LTD

10/12/2013
PLAINTIFF

1ST DEFENDANT

2ND DEFENDANT

JUDGEMENT

PHATUDI AJ:

Introduction:

- [1] The genesis of this matter stems from the main application for rei vindicatio which was launched by the Plaintiff against the first defendant during or about 23 June 2008. It appears that the application could not be disposed of on the papers, and was accordingly referred to trial.

- [2] The Plaintiff delivered a Declaration in which it circumscribed its claim for the delivery to it of the 1995 Model Furukawa FL 230-1 Front-End Loader ("the machine") with engine number 6D22-155126, and serial number F073862, alternatively, that the first Defendant pay to it the amount of R430 400,00, being the value thereof.
- [3] During or about the 10th December 2009, Absa Bank limited, ("Absa") brought an application in this court, seeking leave to intervene as the Second Respondent in the application proceedings on grounds that it had a direct and substantial interest in the matter between the Plaintiff and First Defendant. The application was subsequently granted, thus paving way for Absa to be joined as the Second Defendant in the matter.
- [4] At the commencement of the hearing, and by way of a summary of the Plaintiffs' claim, Counsel for the plaintiff, Mr Barnard provided, the following synopsis of the matter:
- 4.1. The Plaintiff will show in evidence that the machine was stolen from him while in his possession, and that it was found in the First Defendant's possession.
- 4.2. That Absa, the Second Defendant, had financed the transaction. In fact, the stolen machine was sold to Absa which in turn sold it to the First Defendant and,
- 4.3. Further that, evidence would be presented that the machine found in Second Defendant's possession was that of the Plaintiff.
- [5] The Plaintiff called six of its witnesses to testify on its behalf.

B. SUMMARY OF EVIDENCE FOR THE PLAINTIFF:

[6] The first witness to testify was Michael O' Brian, whose evidence was briefly the following:

- He was employed with Hitachi Construction Equipment as a Product Manager, based in Boksburg.
- He gave a short profile of his career as a professional engineer, and work experience.
- He is currently a sales Manager attached to Hitachi construction, in charge of sales of various mining equipment
- He considered himself an expert in the field of earth moving equipment
- He was referred to a Tax Invoice from Mariner Investments dated 14.05.2002 to Baka Plant for sale the of the Furukawa FL 230 with serial number 2735 ("the machine") valued at R136 800 (vat included)

[7]

- While he worked for Hitachi, his Branch Service Manager in Nelspruit indicated that to him that Mariner Investments ("Mariner") wanted to sell the machine.
- He, and Brian Kelly who was linked to Baka Plant, decided to acquire the machine referred to.
- The parties drove to Nelspruit to Mariner where they made an offer to buy the machine, and also asked for proof of ownership therein.
- The owner of Mariner, one Chris Borman, sent a fax confirming the information sought.
- The fax was delivered to Baka Plant sales ("Baka") for the witness' attention.

- The letter faxed dated 14.05.2002, contained a tax invoice from Hyundai Plant Equipment ("Hyundai") to Mariner when they sold the machine to it.
- The document mentioned was sent out by Hyundai as one of the documents sent by Chris Borman dated 07.03.1997¹). The machine was transported from Jet Park to Pilgrims Rest in 2002, even before the witness went to inspect the machine with a view to make an offer.
- Mariner bought the machine from Hyundai around 1997, as backed by the delivery note releasing the same machine.

[8]

- The witness confirmed that the Bankfin cession dated 24.04.1997, which related to the same machine, was issued by Bankfin to Mariner unencumbered and was debt free.
- The letter from Bankfin entitled "Bevesting: Rekening ten volle bedrae betaal" dated 19.05.2002, was issued to Mariner²) confirming full payment by Mariner of the machine.
- Mariner also furnished the Tax Invoice to Baka Plant dated 14.05.2002 for the same machine³)
- The witness testified that Baka Plant was a company registered in his friend, Brian Kelly's wife. ("Brian-Adrian-Kim-Ashley") hence "Baka", a close corporation ("cc")

[9] He testified that the purchase from Mariner, was jointly done by Brian Kelly and himself.

- Baka Plant CC was in fact the purchaser from Mariner. The transaction was concluded on 14.05.2005, where payment was tendered by cheque 172.

¹Hyundai Tax Invoice, P7, Bundle A.

²Page 10, Bundle 'A'

³Marine Tax Invoice, P 13, Bundle A.

- The witness stated that he was a silent partner in Baka Plant having 50% member's interest in the machine.
- The machine was brought to Boksburg, where it was kept at B G Locomotive.
- On arrival, its batteries were bought for the machine from York Spares around 18.05.2002.

[10]

- The witness made sketches for repairs to the machine for its bushes and cylinders, to be made on front end of the "H" frame, being linkages from the main engine to the bucket, with hydraulic cylinders mounted below.
- The bucket (seat) had to be repaired by replacing bushes on the bottom end of the bucket.
- The B G Locomotive was asked to repair the rear frame that had a crack, bought new parts for the seat, windows and fixed the bucket.
- The machine was bought "voetsoots", but its condition was described as "not too bad", but had basic wear and tear issues e.g. the pins and bushes and the rear tail light, was repaired and the machine re-sprayed.

[11]

- Out of factory, the machine's rear light housing is small custom on the side of the machine. This is where the rear tail lights are mounted in.
- The Machine colour was darker yellowish, and so was the original housing. The boxes were sprayed black. The parts that appear on ps. 14,15 & 16 ('Bundle A') were used on the transmission during repair process. They were bought from DOSCO, a hydraulic supply company for earthmoving equipment. This purchase was done on or about 19.06.2002, and customer was Brian Kelly.

[12]

- The witness stated that the costs of repairs shot up to roughly R183 772.40. (P1, Bundle A)
- Kinetic Transmissions also effected repairs on the machine eg assembly and re-assembly of the transmission (gearbox), and break test performed on 30.01.2003 for R4 000.00. The gear box was “slipping”, could not pull off correctly, and had to be stripped off.

[13]

- The witness was referred to Kimba Plant, (“Kimba”) owned by Okkie (Le Roux).
- Kimba’s core business is to buy and resell second hand equipment after repairing. They then specialised in Furukawa machines.
- A friend, Wikus, referred the witness to Kimba, to sort out the gear box.
- Wikus informed the witness that the rear end was previously welded from the previous crack, and had a spare frame to exchange.
- The serial number is located on the rear frame of machine.
- It is stamped on the frame/metal impregnated into the metal.
- Page 18 Bundle “A”, was said to be Kimba Plant’s (“Kimba”) cost sheet dated 07.05.2003 for the machine’s rear frame dated with the amount of R5 000.00 as changed or fitted into machine.
- Where a rear frame had been changed, then it would adopt serial number of the frame replaced (F 072735)
- The witness explained the serial number, make and model and engine capacity and size thereof.
- After been repaired Kimba then referred the machine to their sales yard to sell on the witness’ behalf.

- They, later after some time, took the machine back to Hitachi's yard in Boksburg as there was a passing trade to see to it that it was up for sale.

[14]

- The witness and Brian Kelly decided to sell the machine to Baka Plant Cc.
- Baka sold machine to ANRO Plant ("ANRO") the Plaintiff herein.

[15]

- The Witness then referred to a delivery note (P.200 Bundle "A") dated 10.02.2005, issued by CTS East (Pty) Ltd, for customer Hitachi, for delivery of the machine to Anro in Garsfontein. (Reg no: F . 07-3 862)

[16]

- It is important to note that the number F 07 3862, was a new number that was on the replacement rear frame. The serial number is 3862.
- Hitachi issued delivery note on 10.02.2005 to Anro for the same machine the "used Furukawa FL 230, F 07-3862"
- The machine was received by the witness himself.
- CTS also issued a dispatch note for the machine on same day.

[17]

- These machines are not registered for use on public roads so they do not have plate numbers.
- The witness confirmed he had personal knowledge about all the transport and dispatch notes referred to.
- The witness did not have any idea what happened to the machine since transported to Anro in February 2005.

[18]

- The witness was notified by Craig Howie of Anro, that the machine had been stolen.⁴) He did not know by who was it stolen.
- The alleged theft was committed in 2005.

[19]

- In 2007, while on a visit to Western Platinum, Rustenburg area, doing his sales representative duties, he drove past a plant and noticed it was a Furukawa machine.
- He said that he could identify it with the modified rear tail lights usually used on shunting locomotives.
- He recognised the machine virtually by the modifications on the bucket, the seats, and rear light housing.
- He then notified Craig Howie about the discovery he made.

[20]

- He also got it from the operator there and then that the current “owner” was one Mr Willem Hendrik Le Roux, the First Defendant.
- On return to the site subsequently, the witness confirmed that it was the same machine which he recognised by the serial number 3862.
- The witness was referred to a tax invoice dated 30.03.2005, (P 34 Bundle A) issued by Kimba Plant to customer Absa bank branch, Klerksdorp, for him to identify .

[21]

- He stated that it was a tax invoice relating to the machine in question which he received from the secretary then working for Kimba. Kimba was the company that worked on the machine and for a while tried to sell it for Anro.

⁴ P. 35 Vol. I, Record

From the said tax invoice, it appears that Kimba sold the machine to Absa for R359 100.00 for delivery of W.H. Le Roux, the First Defendant.

- [22] The owner of Kimba Plant one "Okkie" (real name Ockert Petrus Jacobus Laubscher,) while on a business trip to Namibia, was apparently involved in a motor vehicle accident and died. The deceased died on 27.06.2005. For the sake of convenience I shall refer to the deceased as "Okkie".
- [23] In due course, Craig Howie of Anro Plant asked the witness to accompany him with Absa officials to the site where he discovered the machine and the First Defendant was also present thereat. Also present was an Absa bank 's legal representative. The visit took place in 2010. [The witness pointed out Absa bank's attorney in court]
- [24] In the presence of the aforementioned parties, the machine was recognised, apart from all other visual things, by the bucket, rear tail light housing, the seat, and importantly, the serial number thereof.
- [25] To confirm the identity features, the witness was referred to copies of the pictures depicting the machine⁵). These pictures were taken by Craig Howie on the day of inspection in loco at the site.
- [26] The photos in short, depicted the machine in dispute, the attorney for Absa in company of 1st Defendant, viewing the machine, FL 230, showing rear tail light (blackbox) which were fitted in by B.G. Locomotives.

⁵ Ps 128 to 132, Bundle A.

[27] During the inspection, the witness became satisfied that it was the same machine he “spent many hours working on personally”

From the manufacturer, there would only be one serial number and engine linked to documentation from the factory.

[28] On being asked whether it were possible to have two different machines with the same serial number, the witness answered in the negative. The engine numbers are linked to serial numbers.

The market value of the machine when he sold to Baka, was roughly R403 000,00 as per witness' expert opinion.

[29] This in a nut-shell, was the evidence –in –chief for the First witness. Counsel for the Second and Third Defendants cross-examined the witness at length, the purpose being to dispute firstly, that the machine the Plaintiff sought to vindicate did not belong to it, but to the First Defendant, and that Absa bank (“Absa”) has a direct and substantial interest therein as it financed the merx.

[30] The Plaintiff then called its Second witness, Mr Paul Kruger to give evidence. He testified that:

30.1. He is 68 years old, currently a director of the company called ELB Equipment Ltd, (“ELB”) Boksburg, whose core business is to sell earthmoving, construction and mining equipment.

30.2. He said the moment a new machine arrives at the yard, they create a “birth certificate” for each.

- 30.3. Upon arrival of a machine in the yard, a serial number, engine number and details of the shipping documentation thereof is recorded. Machines are usually imported from Japan via Durban harbour, then delivered to the yard at ELB.
- 30.4. The yellow "birth certificate" in this instance recorded that the machine was sold to one Chris Borman. It was delivered to the original buyer on 16.11.1988. Its serial number was 2735, model FL 230-" engine no: 155126, arrival date at yard was 14.11.1988. pre-fix 6D22- merely indicated the type of engine or engine capacity.
- 30.5. With regard to the Second card (P5 Bundle A), the machine arrived on 29.06.1994, same model FL230-1, with serial no: 3862, engine no: 6D 222 222D3
- 30.6. Like the previous witness, Mr O' Brian, Mr Kruger was also pertinently asked if it were possible to have two different Furukawa FL 230 machines sharing the same serial number or same engine number, and the witness answered in the negative saying it was "impossible". Each unit is allocated from the factory a separate serial number.
- 30.7 He said in his 40 years of experience in the industry he never encountered a situation where two different machines could have or share the same serial or engine numbers.
- 30.8 According to the witness, the serial number 2735 came out with that engine number, while the one with serial number: 3862, came out with the other engine number.

That, briefly was Mr. Kruger's testimony.

30.9 The witness under cross-examination explained that where the unit is divided in the rear part where the engine is located, and the front half being the loader section, what would happen is that it retains its identity by means of the serial number originally allocated to it. He described it like “the surname of the machine” or identity number of the unit regardless whether it was cut into halves. In other words, should the machine be split into two halves, it retains the original serial number and original engine number as stamped on rear frame.

30.10. Since 2004, these types of machines are liable to be registered with transport authority ie. Natis System. Prior to 2004, such registration was not required. On p.128 Bundle A, appeared an inscribed serial number in its original state.

[31] After the evidence of the witness was concluded, counsel for the defendants proceeded with cross-examination of Mr O’Brein, which was quite extensive. I do not intend to recapture the rest of it in this judgment, as the same was mechanically recorded.

[32] The third witness to testify on behalf of the Plaintiff was Christiaan Herodimus Borman, whose evidence was essentially the following:

32.1 He stated that he was the owner and sole director of Mariner Investments (Pty) Ltd.

32.2 He said that he sent a fax cover at Baka c/o of Michael, the first witness. The fax contained information relating to the tax invoice for the machine, Furukawa, wheel loader, cession letter to bankfin, letter from Bankfin and that the original tax invoice would be allocated in due course.

32.3 He said the reason why he sent the information to Michael was because he, Michael, needed some clarity on the machine.

32.4 The witness said that Michael, the first witness, had bought the machine from him while trading as Mariner. The machine was stolen and he wanted to ascertain the serial number thereof and other details.

32.5 The faxed information was sent on 14.05.2002. The witness was also referred to another fax dispatched by him to Baka sales dated 23.08.2006. From the fax, the information sent was a delivery note dated 07.03.1997, from Hyundai, the company that first traded using the machine and the data reflecting the date, model and serial number from Hyundai transported to Pilgrim's Rest, and as well as the invoices for repairs on fuel pumps at Bryayshow Diesel.

[33] He testified further that he also sent to Michael, a copy of the bankfin Cession document as he had bought the machine which was financed through Bankfin. The reason he sent the information was to assist the previous witness that the machine previously belonged to Mariner, of which he was the sole owner and shareholder.

33.1 As to page 13 of Bundle A, the witness stated that it was a copy of the tax invoice he issued to Baka dated 14.05.2002, when he sold the machine which is now in dispute. It had serial no: 2735 on it, and was sold "voetstoosts" for the amount of R120 000,00 plus vat; (total price R136 800,00)

33.2 The witness was also referred to a copy of a note from Bankfin dated 13.05.2002, directed at Mariner, showing confirmation that the machine was fully paid by Mariner since 1998. It also indicated that Bankfin's lien on the machine had fallen away, and thus it was owned by Mariner. This was then proof required by owner of Baka.

- 33.3 The witness denied that the qualification made by Bankfin on its note dated 13.05.2002, could have suggested that Mariner still had an outstanding debt on the machine.
- 33.4 Regarding pages 6 and 58 of Bundle A, the witnesses indicated that the delivery note from Hyundai dated 01 March 1997, was proof that he bought the machine from them, and had serial no: 2735. The machine was delivered to him by Hyundai at Gold Mining Estates, where he had a contract.
- 33.5 The same machine he bought from Hyundai, was also the same machine the witness sold to Baka Plant Sales Cc, with the same serial no: 2735, and was fully paid for.
- 33.6 The witness also stated that the tyres of the machine on photo 131 (Bundle A) were the same as when he sold the machine to Baka, they were not changed. He also recognised the machine by its overall yellow colour, and had different "black stuff" and lights at the top and tail lights at the rear part.

That, in brief was the evidence in-chief. He, like the previous witness, was subjected to lengthy cross-examination by counsel for the defendants.

[34] The fourth witness called by the Plaintiff was Johannes Gerhardus Botha, whose evidence was the following:

- 34.1 That, he was employed at ELB Equipment Ltd as its National Manager based in Boksburg. He then narrated his work experience and his career as an expert.
- 34.2 During or about 2001, he joined ELB Equipment doing inventory controller for them, and in 2004 he got promoted to position of workshop manager where he did duties including diagnostic and repair procedure of equipment.

- 34.3 He was referred to the identity card (p4, Bundle A) kept in workshop for service history of a particular machine.
- 34.4 From the identity card and photo on p.128 thereof, he identified a serial number stamped on the rear frame of the machine. He also saw from photos on pages 131 and 132 that there was a "black box" which was not a standard fitment item on this type of machines. It was fitted later as an "aftermarket" or mine requirement of a certain place. These "black boxes" are not factory manufactured.
- 34.5 The number 2735 on the identity card was according to him, the original machine serial number. The number 155 126 was the engine serial number. He then explained the make, model and capacity of the machine with reference to its numbers.

Briefly, that was the evidence for this witness, and both the defence counsel had no cross-examination to raise.

[35] Next to testify on behalf of the Plaintiff, was Henry James John Chapman. His evidence was the following:

- 35.1 That, he serves as a director in a few companies, and has been involved in earthmoving all his life.
- 35.2 He was approached by some SAPS members at some stage after he had made a statement in an affidavit to the police⁶) It was deposed to on 30.11.2005. In it, he stated that he had been asked by Okkie Laubscher, the owner of Kimba Plant to assist him in loading a machine, and he went to the site where he was directed. The assistance was with loading the Furukawa

⁶ Annexure R18, P 140, Bundle B.

front-end loader found in Garsfontein, behind a cement factory now called Grafters.

35.3 Upon arrival he said he found them basically winching the machine onto the low-bed as it was not moving. Okkie used his truck to try to load the machine. There was another loader, a caterpillar loader which was also used to load, and thereafter the parties parted ways.

35.4 Okkie loaded the machine from the site as he said it was his own machine, and it was never paid for in full and, therefore, was taking re-possession thereof.

35.5 The loading took place in full view of the security officers manning the entrance to the premises.

35.6 The witness said photos on pages 131 and 132, depicted exactly the type of machine they loaded, except that its back was sprayed. The lights in front are usually square, but of this machine were round.

35.7 He said he was 99% certain, the more so that such type of machine was now discontinued.

That, in a nut-shell, was his evidence in-chief, and thereafter cross-examination ensued.

35.8 The witness re-emphasised his role at the site were Laubscher directed him, that was to assist in loading the machine. He denied any allegations of being a thief or being charged or convicted of theft.

35.9 It was suggested to the witness during cross-examination that the reason why the Second and Third defendants opposed the main application was because he, the witness, allegedly stole the machine, and sold it to Okkie Laubscher of Kimba Plant, who in turn invoiced the defendant for the sale transaction thereof.

[36] The sixth witness to give evidence was Craig Alexander Hilton Howie. His evidence can be summarised as follows:

- 36.1 That, he is the general manager of Anro Plant Hire, ("Anro") the plaintiff company herein, and that he is the sole shareholder thereof.
- 36.2 The witness was referred to an invoice from Baka Plant which sold the machine to Anro dated 31.03.2005. The serial number is F 07-3862, and machine was Furukawa FL 230, with engine number 22/ 155126.
- 36.3 He stated that the owner of the machine is Anro Plant Hire (Pty) Ltd.
- 36.4 The Court, on seeking clarity from the witness in relation to proof of ownership, he testified that proof will follow from the sale transaction between Baka Plant, the seller, and Anro, the Buyer, on credit agreement. The witness further clarified that the current system of proof of ownership did not obtain prior to the time pre-dating the sale of the machine. It is now recently that the machines have a Vin number. In that sense, ownership would pass validity only after full payment has been effected to the seller, and ownership exchanged.
- 36.5 The witness acquired Baka Plant Cc's member's interest in the entity approximately a year before the sale transaction.
- 36.6 A business decision has been made that the witness and one Gert Fourie both acquired a Member's interest in Baka Plant sales Cc, which would deal in plant sales with a view to create an asset base for Gert, who happened to be then in the employ of Anro.
- 36.7 He said the machine before Anro acquired it belonged to Baka Plant sales Cc since 2002. Prior to that it was owned by Mariner.

- 36.8 Before Anro or the witness acquired a Member's interest in Baka Plant, the machine was put up for sale for quite some time at Kimba's yard, but by the time he acquired an interest in Baka, it had stood also at Hitachi's yard, along the road at, Dunswart Boksburg.
- 36.9 While awaiting it to be sold, which took more than a year, Gert and one of the members got work for it at Corpio Ready Mix. He said Gert got to meet the owner of Corpio Ready Mix. The understanding was that the project would be that of Anro, although the machine was Baka's.
- 36.10 The history of the transaction was that Gert Fourie, a member of Baka, was approached by Corpio Ready Mix ("Ready mix") to hire the machine. That was probably the causa for the purchase of the machine by Anro from Baka, the seller.
- 36.11 Gert Fourie, representing the seller, Baka, and the witness representing Anro, came to an agreement to purchase the machine on credit sale agreement. This was an oral agreement. I would characterize it as a "gentleman's agreement". The purchase price was R430 500,00 with VAT and the purchase price to Baka was paid in full settlement by Anro.
- 36.12 The witness then referred to a summary of payments Anro made to Baka. This summary reflected payments amounting to R377 631.58. The witness was also referred to copies of Nedbank's bank statements to confirm the contents to which counsel for Absa, Adv Meyer, strenuously objected. His objection was that such evidence would offend the provisions of sections 28 to 32 of the Civil Proceedings Evidence Act⁷. This court sustained his objection.

⁷ Act no 25 of 1965, as amended

- 36.13 The witness was referred to a delivery note issued by CTS East (Pty) Ltd ("CTS") dated 10.02.2005. CTS is a transporter delivering the machine in question from Hitachi's yard to Anro's yard. Its serial no: 3862, which compared the same with the tax invoice issued by Baka Plant sales Cc on 31.03.2005.
- 36.14 At the request of Anro, the machine was delivered to its yard in Garsfontein, where it was checked into stock, and sent directly to the site at Ready mix. Delivery was effected by Hitachi per note dated 10.02.2005, and it was for the same machine.
- The machine was then let out to Ready mix who operated in Mooikloof area, around 5km from the Garsfontein Road.
- 36.15 The witness was called upon to explain the apparent discrepancy between the invoice from Baka plant dated 31.03.2005, and date of delivery being 10.02.2005. He testified that due to the cordial relationship Anro had with Baka, the understanding was that when the machine is sent to site, provided it performed to the hirer's satisfaction, the sale would proceed, hence the delay in the issuing of the tax invoice. The actual transaction was sealed on 10.02.2005.
- 36.16 On yet another apparent discrepancy arising from the witness' Founding Affidavit in support of the *rei vindicatio* application, mention was made about the date of purchase being 31.05.2005. He offered an explanation that he could not discern the difference in legal parlance between delivery and the concept of ownership. He thought that when an invoice is issued, an agreement was reached on the 10th February 2005, when possession was taken over. However, he confirmed in evidence that the date was the date of the invoice.

36.17 He also testified on Anro 's financial asset register for the year ending February 2006. This asset register reveals that the same machine was stolen in June 2006. The encryption was supposed to read March 2005 and June 2005 instead. This he said was a typing error made by their accounting department which was then busy with the 2006 financials.

36.18 He testified further that the machine was presently in the First Defendant's possession in Wolmaranstad. The last time he has had sight into it was at a mine site in the Mooinooi area, and the photographs on pages 128 to 132, were taken by the witness himself, in the presence of the attorney for Second Defendant.

36.19 The letting and hiring agreement between Baka and Ready Mix was oral. While used by Ready mix, the machine broke down, and coincidentally, it was on the day it was removed by Chapman, and probably transported to Kimba Plant's yard.

He knew that the machine was removed by Henry Chapman as he recorded his details with the security officers. The witness found Okkie Laubscher's (Kimba) involvement in the removal of the machine from the statement Chapman made to the police which was in the police docket.

He later discovered that the machine was in possession of First Defendant at a mine site in Mooinooi, and that it was sold by Kimba Plant to Absa bank.

36.20 On being asked about yet another discrepancy in his affidavit when reference was made to Concordia as an entity that hired out the machine instead of Ready mix, the witness characterised the discrepancy as a "misnomer" on his part.

36.21. He said he came to learn about the missing front end loader on or about May/June 2005. It was Gert Fourie who reported the machine as missing or

stolen and later he left Baka and/or Anro, then living in Zambia. That was when he received the information from him.

36.22 The witness confirmed that he knew Michael'O Brein even before he owned Baka plant.

36.23 Having heard about the missing machine, the witness phoned Brian Kelly, but could not ascertain that he also informed Michael'O Brein as well.

36.24 Around 2007, Michael 'O Brein informed him that he had seen the machine on the site of the defendant at the mine in Mooinooi, at Western Platinum mine, the same site where it has been taken pictures.

36.25 The witness then referred to a letter from his attorneys Daan Beukes to the tracing agents dated 03.09.2007, to locate details of the First Defendant for the purposes of the main application.

36.26 The witness then referred to the tax invoice issued to Absa Klerksdorp by Kimba Plant dated 30.03.2005 for the same machine, with the same engine and serial number, for delivery to W.H. Le Roux, the First Defendant. This tax invoice was obtained from Kimba offices, the other from Absa.

36.27 The witness stated that after launching the main application against First Defendant, Mr Le Roux, in opposing the application, contended that the machine was not the same as the one under consideration.

36.28 Through his attorney to defendant's attorneys in a letter dated 11.09.2009, the witness asked for permission to inspect the machine, and to take its pictures, which access was, however denied, contending that defendant was still in the process of finalising E-Natis registration documents, which, at any rate, were never sent to the witness.

36.29 The witness once again, referred to a copy of the letter to defendant's attorneys dated 19.10.2010, which read as follows:

“Ons plaas ook op rekort dat u ons meegedeel dat u sal prober om u klient te oorreel teneinde fotos te neem van die masjien waarvoor geding handel”

In further correspondence, the witness also through its attorneys to defendant's attorneys requested for copies of the registration document and the E-Natis documentation of the particular machine.

In reply thereto, defendant's attorneys, Rossouw Nel Lombaard, wrote:

“Geliewe kennis te neem dat ons klient ons nou meegedeel da hy nie lams in besit van die registrasie hier of, E-Natis dokumente van die voertuig nie, maar hy gaan dit probeer in die hande kry”.

36.30 It was after this long struggle to have access to the machine that a notice in terms of Rule 36 (6) of the Uniform Rules was issued seeking to compel defendant to allow the Plaintiff (applicant in main application) to inspect the machine, which access was subsequently granted before the application to compel could be moved.

36.31 The witness again confirmed the identity details of the machine, by reference to its serial number, and the machine in respect of which the Plaintiff seeks restoration.

36.32 The witness turned to a copy of an Absa instalment sale agreement with defendant dated 30.03.2005. It was a pre-typed document, whose details were amended by handwriting of the parties thereto. It seems that the document was signed in Florida on 11.05.2005, roughly 2 months after defendant signed on 30.05.2005.

36.33 The witness was cautioned about the submission defendants had made that seeing that the tax invoice between Baka and Anro was dated 31.03.2005,

and whereas the Absa sale agreement with Me Le Roux was signed on 30.03.2005, it was therefore, not possible that it could have been Anro's machine in respect of which it claims restoration. In reply thereto, the witness said he would not lay any comment on the sale transaction between the First Defendant and Second Defendant, but what he knew was that Anro took delivery of the machine on 10.02.2005, sometime long before Le Roux signed the sale agreement in March 2005.

36.34 He further testified that when he and Gert Fourie bought Baka Plant, the machine was already an asset of that close corporation for more than a year.

[37] The witness was also cross-examined by counsel for Second Defendant, Adv. Erasmus.

37.1 The witness was referred to annexure 'R16', a copy of the letter from Jacobs & Jooste Tracers dated 03.09.2007. He said that was when he was informed by the tracers that the machine was in possession of First Defendant. However, he came to know about it a month before.

37.2 The witness could hardly remember if he ever telephoned Le Roux in respect of the machine.

37.3 It was put to the witness that Le Roux will say that there is a person who called and asked him about the machine's serial and engine numbers, and in reply he said, it made sense as it could be that it was his attorney Daan Beukes, who made several attempts to gain access thereto.

37.4 Counsel then disclosed Le Roux's version to the witness inter alia, as follows:

(a) That, in March 2005 he was awarded a contract at Lesokeng, Lonmin mine for which he needed front-end loader.

- (b) That, he approached Alex Coal which had a caterpillar a version the witness disputed.
- (c) As the contract at Lesokeng mine started end March 2005, or early April he had to take delivery of the machine end of March 2005.
- (d) By then CAT had a problem with the diesel pump, Alex Coal referred First Defendant to one Okkie, who was selling a Furukawa machine. In reply to this version, he confirmed that Kimba Plant owned by Okkie, had supplied their machine.
- (e) That, he saw an advertisement in Truck and Trailer, whereafter, he approached the Absa bank on 30.03.2005 saying that the CAT is no longer up for sale.
- (f) That, he took delivery of the machine on 30.03.2005, and actual physical delivery was in April 2005.
- (g) After taking possession, he then used the machine at the site. To this version, the witness said when he visited the mine site, in 2007, the machine was still at the site and was in possession of Le Roux.
- (h) That, he signed the purchase agreement on 30.03.2005 and paid the purchase price in instalments and the contract between Le Roux and Absa was fulfilled.
- (i) Further that when Kimba gave him the machine, the intention was to confer ownership on him. To his version, witness denied that Kimba was not the owner, and thus could not have validity conferred ownership to Le Roux.

That, was the conclusion of the lengthy cross-examination, and no re-examination ensued.

[38] Counsel for Plaintiff applied to submit an affidavit from Nedbank relating to the bank statements in respect of which an objection was raised against their admissibility. Such bank statements were provisionally admitted in evidence.

It was on those basis that the Plaintiff closed its case.

[39] Counsel for the Second Defendant was asked if defendant had invoked Rule 35(6) of the Rules of Court to inspect the copies of Nedbank statements, and the answer was in the negative.

[40] Having closed its case for the Plaintiff, Adv Erasmus sought to put the defendant's version on record, followed by Mr Le Roux's testimony in defence.

C: SUMMARY OF FIRST DEFENDANT'S EVIDENCE:

[WILLEM HENDRIK LE ROUX]

[41] He testified that:

41.1 He was a diamond miner. He knew about the Furukawa machine which was in his possession. He said his brother heard of a contract at Mogale Alloys and they were looking for a machine in Rustenburg. He started looking for the machine around March 2005, and it had to be in good condition. He found a CAT machine on 23.03.2005.

41.2. He looked for the machine from Alex Coal, who it appears referred him to Barlow

41.3 He then went to Absa Klerkdrorp to apply for finance to buy the machine. He spoke to one "aunt susan" and filled in an application form. The loan amount approved was R315 000,00. By then Barlow World could not fix the diesel pump of the CAT machine.

41.4 Alex Coal then referred witness to Kimba Plant, in particular, to Okkie who had a re-built machine of Furukawa

- He then phoned Okkie about the unit which he said was still available.
He phoned him on 29.03.2005.

41.5 The contract at the mine was to start on 01.04.2005. he then asked for the engine and serial number thereof.

- On 30.03.2005 he went back to Absa in Klerksdorp to obtain a loan.
Susan then suggested to put a new serial number on contract and accordingly was changed by auntie Susan.

41.6 The details of the machine were the same as that claimed by Plaintiff e.g. engine number 6D22 155 1266, and serial number 3862-1995.

- After he signed the Absa documents, the witness was given an inspection document report to hand over to Okkie if he was satisfied therewith.

41.7 He went to a place which he did not know. He found the machine with no transmission cover.

- He said Absa approved the finance of the machine without having inspected it.

41.8 He signed the inspection report on 30.03.2005, and gave it to Okkie.

- The invoice was issued by Kimba to Absa.
- He did not ask Kimba where it got the machine from nor did Okkie give him its papers. He did not have the papers either.
- He did not ask Kimba about the papers for the machine as he believed Kimba was "Absa's dealer".
- The delivery note was dated 30.03.2005.

41.9 When the machine was delivered, Okkie did not hand over to him proof of ownership of the machine, as he assumed that Okkie was Absa's agent or dealer and

- As on 30.03.2005, the witness could not with certainty say if Absa did in fact pay Kimba for the machine.
- The witness said he paid Okkie the difference in money between the CAT and the machine by cheque, but at a later stage.
- The machine was driven or delivered to Lonmin by Kimba on 09.04.2005.
- Two to Three weeks after delivery, the steering began to leak oil, and had to call one Henry Harbour, the mechanic to fix the steering wheel.

41.10 He then got a telephone call that his machine was a stolen property and the caller sought to inspect the same, but he refused.

- Later on the witness was served with an application in the Mmabatho/Mafikeng High Court for the restoration of the machine.
- The witness confirmed that the machine pictured on p131 (Bundle A) was the same machine which worked at Lonmin.
- He said he kept the machine at Wolmaranstad, Kameelboom plot. It is not his plot, but that of one Johan Botha. He, however, possesses the machine as his.

41.11 On that score, that was where the evidence in-chief ended.

Mr Meyer on behalf of Second Defendant did not have any questions for the witness, Mr Le Roux.

[42] Counsel for Plaintiff then proceeded with cross-examination. The witness stated that:

- The machine was delivered on 09.04.2005 to him, and used it immediately.

- It was immediately put to him that he took delivery on 30.03.2005 in terms of his Answering Affidavit, and the witness conceded that the date in the affidavit was wrong.
- In the affidavit, the witness did not say he received the machine on 29.04.2005.
- The date of April 2006 in the affidavit was also incorrect as it should have been 2005.
- He got the machine during second week of April 2005, i.e. 09.04.2005.
- It was put to him that again the date was incorrect, and the witness conceded.
- The witness conceded that although Absa was the financier, he actually bought from Kimba.
- The machine was not inspected at Kimba floor, but somewhere in Pretoria East where they work on concrete.
- He also conceded that the machine was found at the same place in Pretoria East as described by the Plaintiff.
- The version was put that the same machine was loaded on low bed by Okkie Laubscher and Chapman and by then the machine had problems.
- The witness admitted that Okkie sold the same machine with same details.
- Both Plaintiff and Le Roux referred to the broken transmission of the machine.
- Okkie then fixed the machine and then brought it to him in North West, Lonmin area.
- It was put to the witness that the machine was hired out at Copier Ready mix on 10.02.2005.

- The witness again conceded that it was the same machine he bought (p455, vol 5, Record).

The witness said he could not dispute the evidence on the history of the machine as given by the Plaintiff's witness. (p458, vol 5, Record)

[43] During re-examination Adv Meyer asked the witness about the arrival in our country of the Furukawa machine, and the details on its "birth certificate". The witness confirmed that the machine he received from Okkie was Furukawa machine, 1995 model, engine no 6D222-155-126, and serial number: 3862.

The machine, however, on the first identity card was a 1994 machine, with arrival date being 14.11.1988, with a serial number: 2735. The engine number was however, the same being 155-126.

[44] For the record, the witness stressed that the machine he had in his possession is a 1995 model, with engine number: 155 126. He then pointed out that the difference between his and that claimed by the Plaintiff, was that his was a 1995 model, and the engine number was 155-126, the serial number: 3862. He emphasised the difference in the 1995 year model, as his point of departure.

[45] At the end of the defence's case, the second Defendant, closed its case, and did not call any witness to testify on its behalf, and so did the First Defendant close its case.

D.THE QUESTION FOR DETERMINATION:

I am called upon to determine whether, given the facts in this matter, the Plaintiff succeeded in showing firstly, that he was the true owner of the machine in dispute,

which secondly, was in the first defendant's possession at the time of the action, and thirdly, that the machine sought to be vindicated, is still in existence (in esse) and clearly identifiable, for the purposes of a successful call on rei vindicatio.

[46] In order to determine the legal issue herein, I consider it worthy of salt to marry the facts found to be proven by the evidence to be applicable legal framework as sourced from both our old and contemporary authorities.

[47] The evidence, which has not been refuted, was essentially the following:

47.1 That, the Plaintiff, Anro Plant Hire (Pty) Ltd ("Anro") purchased from a company known as Baka Plant Cc ("Baka") a front-end loader with engine number: 6D22-155126, serial number F07-3862. The transaction took place on or about 31 March 2005. The amount of the purchase price as reflected on the tax invoice (p9 Bundle A) was R430 500,00 (VAT INC). The front-end loader, Furukawa FL 230-1, was throughout in this judgment captioned ("the machine") unless the context denotes the contrary.

47.2 That, the said machine was collected from the premises of Hitachi Construction Machinery, where Baka Plant had it for sale.

47.3 The machine was delivered into the yard of Anro on 10 February 2005, and upon arrival was received into stock on the same day as indicated on the Hitachi's delivery note, and also on the dispatch form of even date.

47.4 The delivery of the machine to the Plaintiff's premises was effected by CTS East (Pty) Ltd ("CTS") on the same day being 10 February 2005.

- 47.5 During or about February /May 2005, Anro decided to let the machine out to Corpio Ready mix ("Ready mix") as indicated on annexure "CH 6", Bundle "B", which formed part of the record of the proceedings. Ready mix hired the machine for the purposes of loading aggregate material into their concrete batching plant at their site just behind B house in Mooikloof, Pretoria.
- 47.6 This, machine, according to Craig Howie, was by that time owned by Anro, the Plaintiff. However, prior to the introduction in the country of the E-Natis system, it appears that registration certificates or the licencing of these peculiar industrial machines, was not a prerequisite to evidence ownership therein by way of a VIN number.
- 47.7 Prior to acquisition of the machine by Anro, it was owned by Baka, and before that, it was owned by Marine Investments.
- 47.8 Before Baka's business interests were acquired by Anro, the machine was advertised for sale for sometime while in Kimba's yard, and when the acquisition of Baka's business was concluded, the machine was at Hitachi's yard, Atlas Road, Boksburg area.
- 47.9 The third witness for the Plaintiff, was Mr C.H. Borman, the former owner of Mariner Investments (Pty) Ltd ("Mariner"). His evidence, by and large, was to give an exposition on the short history of the machine under consideration. His evidence, corroborated that of Michael O'Brien in so far as the acquisition by Baka of the machine from Mariner on 14 May 2002, was

concerned. By then its serial number was 2735, an equipment that was clearly bought “voetstoots”. The selling price was R138 800.00 (VAT INC).

47.10 The witness, Mr Borman, was asked by Michael O'Brien to furnish proof of his ownership in the machine that Michael and Brian Kelly of Baka were desirous to purchase. The evidence thereof, apart from the tax invoice ie Mariner issued to Baka on 14 May 2002, in respect of the machine, is self-speaking. Mr Borman forwarded to Baka a copy of the tax invoice, cession letter from Bankifin (as it then was) a letter from Bankfin, and the original invoice of the sale was to be collected in due course.

47.11 It appears that prior to Mariner's ownership of the machine, Hyundai were the first to have traded in the front-end loader. The fax Mr Borman sent to Baka sales on 23.08.2006, attached thereto an invoice reflecting the date, model and serial number from Hyundai for its transportation to Pilgrims' Rest where he had a contract at the gold mine.

47.12 From the certification made by Bankfin to Mariner dated 19.05.2002, in connection with the 1988 Furukawa FL2301, it seems plain that the Bankfin's account had been settled as early as May 1996 by Mariner, who then acquired ownership in the machine.

47.13 The machine was delivered by Hyundai to Mariner on 07.03.1997, a date on which he took up delivery thereof. (P58, Bundle A)

47.14 The machine was also identified by Mr Borman from the photos in pages 128-132, Bundle A of the record.

47.15 This machine was subsequently sold by Mariner to Baka Plant sales Cc, which in turn sold it by credit sale transaction to the present Plaintiff. I must remark, though orbiter that this evidence was, to this stage, uncontradicted nor was it in anyway shaken under cross-examination.

47.16 I now turn to deal with a vexed question namely, at what stage or under what circumstances did the serial number of the machine in dispute originally bought by Mariner as 2735, changed to that of F07-3862, and why?

47.17 Michael O'Brien was called as an expert in the field of earthmoving equipment and matters incidental thereto. He also had a 50% interest in the machine which Baka bought in order to sell. Its brief history after being brought by Baka unfolds as follows:

- (a) The same machine was brought to Dunswart at B G Locomotives for repairs on 18.05.2002.
- (b) The repairs were captured as sketches of the new bushes and cylinders to be fitted. (Pp1-3 Bundle A) These costs amounted to roughly R183 772.40. SA Tube and Honing was to effect the repairs needed.
- (C) While at BG Locomotives, the custom- made rear trail lights housing were fabricated and fitted by a supplier of BG Locomotives, assumingly, SA Tube and Honing. During the course of repairs, it was found out that its transmission was faulty.

- (d) One Vickus Menezes, a Furukawa dealer, was contacted, who in turn referred Michael O'Brien to Okkie Laubscher then owner of Kimba Plant.
- (e) The machine was then delivered to Kimba Plant for repairs during which time, it was found that the rear frame of the machine was cracked beyond economical repairs. It appears that Kimba had a spare rear frame with serial number: F07-3862 which it then fitted to the machine. The machine, however, retained its original engine number: 6D22-155126.

This, in short, throws light as to how did it happen that the machine inherited a new serial number. It follows from the evidence that, it was changed as Kimba Plant effected a replacement of the spare rear frame to the machine bought by Baka. For the sake of completeness, a rear frame, is that part in which the engine and rear transmission are mounted, similar to a "big box section of steel heavy metal" this is where one locates a serial number, which is stamped onto the frame metal, that is, empregnated into the metal.

- (f) The costs which Kimba Plant incurred in repairing the machine were as set out at Page18, Bundle A, which as a matter of fact, formed part of the record. The date of the cost sheet reflecting the rear frame was 07.05.2003 and amounted to R5000.00.
- (g) As a matter of fact, Michael O'Brien evidence on the identity of the machine, and how it inherited a new frame work is irreproachable. It was confirmed to the witness by his friend, Vickus Menezes of Kimba, that the rear frame was liable to be replaced.

- (h) Logic dictates that when the machine was taken in for repairs or replacement at Kimba of its rear frame on or about May 2003, the machine was already bought and owed by Baka.
- (i) On or about 31 March 2005, Baka sold to Anro the Plaintiff, the machine with all its in inscription, and by that time, it clearly adopted a new serial number i.e 3862, but nevertheless retained its original engine number.

47.18 Taking into account these considerations, I am of the firm view that the only reasonable inference to be drawn from the history of how the machine exchanged hands, and the facts presented in evidence, is that as at 31 March 2005, Baka Plant Cc had then sold the same machine to the Plaintiff.

47.19 This then brings us to another level of the enquiry, namely, what then happened to the machine after Kimba Plant had fitted in a replacement rear frame to the machine.

47.20 The evidence revealed that, Kimba who had their own sales yard, attempted to sell the machine on behalf of Baka, but all in vain. Later the machine was restored to Hitachi's yard in Boksburg.

47.21 The machine was subsequently sold to Anro by Baka. It was delivered to Anro in Garsfontein on 10.02.2005.

47.22 It seems that during or about February to June 2005, the machine was let out to Corpia Ready mix. This deal was in fact between February/June 2005.

- [48] While the machine was let out to Ready mix, it was alleged by Mr Howie that the machine had been stolen, allegedly by one Mr Chapman. This was around June 2005.
- [49] For the purpose of this judgment, it is neither here nor there whether Mr Chapman, had in fact stolen the machine referred to from the premises of Ready mix, or simply whether he removed/ loaded the machine from there at the instance of Okkie Laubscher of Kimba Plant. His evidence, however, as to why the machine was removed from the said premises is of cardinal importance.
- [50] He testified in relation to his affidavit dated 30.11.2005 (Annexure "R", P 140, Bundle A) that he was asked by Okkie Laubscher early in 2005 to "assist him as he was busy loading a machine" and he went to the site where he was directed. Okkie was the owner of Kimba Plant. The Machine was in Garsfontein, passing Woodhill, near Grafters. The machine was loaded on Okkie's machine and off he drove. According to Chapman, the reason for loading the machine was that, he was re-possessing the machine as the owners have not paid for it in full. In his evidence, Chapman confirmed that the photos in the court's bundle, were that of the machine he helped Okkie to remove or load. He also described the lights of the machine as round.
- [51] From the evidence of Mr Chapman, there is little doubt that, the same machine which has been taken to Ready mix's yard, was the machine which both Okkie and the witness Chapman removed, and of course, without the knowledge of or the consent of either Ready mix or Anro, the Plaintiff.

[52] This then leads us to the next inquiry, being how then did the same machine ultimately be in the First Defendant's possession in the first place.

[53] The first witness, Mr O'Brien testified that he was at some point notified by Craig Howie of Anro that the unit had been stolen around 2005.

That, someday around 2007, he happened to be in the Rustenburg area visiting at Western Platinum mine while on duty, and he noticed this particular Furukawa, which he immediately recognised with its modified rear taillights normally used on shunting locomotives.

That was when he contacted Craig Howie about the discovery. He also verified from its operator that the "owner" was Willem Hendrik Le Roux, the first Defendant in this matter.

[54] There is also evidence that Mr O'Brien returned to the site to verify the machine's serial number which was confirmed as 3862, the same machine which was bought from Baka.

[55] The witness also referred to the Kimba Plant's tax invoice dated 30.03.2005, issued to the Second Defendant for delivery of the same Furukawa FL230-, model 1995 with the same engine and serial numbers, for delivery of W.H. Le Roux. This document was obtained from Kimba Plant, the company that previously replaced the rear end frame which had the existing serial number: 3862 inserted on. I find, therefore, that there is a clear nexus between the circumstances in which the machine was loaded by Okkie, with the assistance of Mr Chapman, from Ready mix premises, and the acquisition by First Defendant of the same machine from Kimba Plant.

[56] The conclusion therefore is inescapable that Okkie Laubscher had orchestrated with the assistance of Mr Chapman, the unlawful removal or vindication of the disputed machine through self-help, whatever the reason or motive for the vindication was. The evidence suggests that Okkie Laubscher, undoubtedly, removed the machine from the premises of Ready mix where it was let out, solely with a settled intention to sell to third parties, and the First and Second Defendants happened to be the culprits. The First Defendant bought the machine through Absa as the financial services provider.

[57] Mr Howie's evidence, which was undisputed, was that he had occasion to view the machine at the premises of a mine out in Mooi-nooi area, and further that the photos of the machine in Bundle A, were taken by him personally at the mining area during their visit. Furthermore, there is clear evidence that the machine was viewed by all the parties involved, to ascertain its details, and that was also the day on which its photos were taken. These photos were not placed in dispute by the defence.

[58] I now turn to evaluate the nature of the First Defendant's evidence . It is not in dispute that Mr Le Roux was referred to Okkie Laubscher of Kimba Plant to secure a front-end loader, Furukawa, which he had re-built.

[59] The First Defendant obtained finance to buy the machine from Second Defendant. This is evidenced by the tax invoice issued by Kimba to the Second Defendant, for delivery to the First Defendant.

[60] Mr. Le Roux signed an instalment sale agreement with Absa bank on or about 30.03.2005, a copy whereof appears on page 35, Bundle A, of the record. This

document was a pro-forma typed contract, but the details of the property sold were hand written, amended, and signed by the parties. The contract was for the sale and acquisition of a Furukawa FL201-1, a 1995 model, with engine no: 6D22-155126, with serial no: 3862, against payment of the amount of R359 100.00.

[61] I pause to remark that, these details did not in anyway differ from the descriptions given by all the Plaintiff's witnesses, except that the initial serial number on the rear frame of the machine before it was replaced by Kimba was F07-2735. It has not been disputed that the rear frame which had a different serial number inscribed and adopted after Kimba had replaced it, became serial no:3862. This was exactly the same machine which Kimba in turn sold to Absa, and later acquired by First Defendant only around 30.03.2005. One can, of course, not ignore the fact that the machine, with its original rear frame with serial no:2735, was bought by Baka Plant as early as 14.05.2002. The same machine was then sold to Anro Plant by Baka as early as 10.02.2005, approximately some 20 days before First Defendant could "purchase" it from Absa through an instalment sale agreement.

[62] Mr Le Roux confirmed in his evidence (P422,Par:10, record) that the details of engine and serial number of the machine were supplied to him by Okkie of Kimba. This, needless to say, is the same machine Okkie Laubscher who was assisted by Chapman to load, removed from Ready mix. The affidavit Chapman deposed to on 30.11.2005 is self-explanatory. It is also clear that the machine in question was at some stage or another, attended to by Kimba Plant for replacement of its rear frame. This as we have already seen, was on or about 07.05.2003, the date that preceded by far the date on which the First Defendant allegedly bought the machine from Absa on or about 30.03.2005. In the premises, I entertain no doubt in my mind

that it is impossible, if not a well-known impossibility that Mr Le Roux would have “bought” and taken possession of the machine sold to him by Absa a day before Baka sold the same machine to the Plaintiff on 31.03.2005. It follows logically that Baka, alternatively, Anro was still in possession of the machine as at 31.03.2005 when the sale contract was entered into.

[63] It is not surprising as to why the instalment sale agreement allegedly signed between Absa reflected a different place of signature, the one being Florida on or about 11.05.2005, for Absa, and the other place being Klerksdorp for Mr Le Roux. This alone renders the document sceptical to say the least, the more so that, there was no signature of any of the employees of Absa in the contract document.

[64] The First Defendant, Mr Le Roux, contradicted himself in many respects on the date on which after buying the machine, took delivery. The contradictions were clearly glaring as seen when he was subjected to cross-examination, particularly on the date in which the machine was involved at the Western Platinum mine. The dates were even confused in his Answering Affidavit, opposing the main application.

[65] Mr Le Roux also conceded under cross-examination that the machine he bought from Absa bank had serial no:3862 with engine no:6D22-155126, which Absa acquired from Okkie Laubscher of Kimba.

[66] He also conceded that the Plaintiff's version that the machine was let out to a certain company dealing with concrete, coincided with the fact that it was the very same machine from which Okkie of Kimba had removed. Furthermore, the

Plaintiff stated that the machine had problems with the transmission, and so said the First Defendant.

[67] The First Defendant, again conceded after it has been put to him that the machine the plaintiff claims was possibly the same machine that is currently in his possession, and he answered in the positive. (P. 455, record, vol.5).

[68] The Second Defendant, which was joined in the intervening application, did not call any witness to substantiate its claim or interest in the action. The only reasonable explanation as to why it sought to be joined in the matter, according to the papers before court, was that it had a "direct and substantial interest" in the case in that it had financed the machine the First Defendant allegedly bought from Kimba Plant. This transaction took place on or about 30 May 2005. Consequently, the Second Defendant had a legal duty to assist the First Defendant's possession against eviction by any other party with a better title to the machine sold.

To that extent, this court finds that the ownership of the machine vests in the Plaintiff.

The First Defendant in its plea, filed in the same document, its counterclaim. The counterclaim was however not entertained during trial, and no evidence in that regard was adduced. In the premises, I consider it unnecessary to deal with and pronounce upon it in this judgment and, therefore, falls away naturally.

[69] Finally, when counsel for Plaintiff made the submission to Mr. Le Roux about the history of the machine and the various transactions, the Plaintiff and its witnesses went through, the First Defendant again conceded that he could not refute those allegations, the more so that he did not know its past history. (P458, Record, Vol,5)

- [70] Mr Meyer, asked Mr Le Roux during re-examination to distinguish the machine in his possession in relation to the machine the plaintiff claims. In his answer thereto, Mr Le Roux reiterated the same details, In respect of the engine and the serial number and that his was 1995 model, which is precisely the same machine the Plaintiff and its witnesses alluded to throughout the trial

E. THE LEGAL FRAMEWORK:

- [71] It is the general principle of our law that the owner of property who lost possession of a thing is entitled to reclaim it by means of rei vindicatio. The action is an action in rem.

In order to succeed with the action, the Plaintiff must allege and prove the following essential ingredients:

- (a) That, he or she is owner of the thing (whether movable or immovable)
- (b) That, the defendant was in possession of the property claimed when the action commenced and
- (c) Further that, the thing which is vindicated is still in existence and clearly identifiable.

- [72] Turning to that facts in the present action, there is abundant evidence that the Plaintiff is, on a balance of probabilities, the owner of the Furukawa FL230-1 engine number: 6D22-155126, serial number F07-3862. This machine was bought from Baka Plant sales Cc on or about 31.05.2005.

- [73] The machine was removed unlawfully by Okkie Laubscher, who had since died. He was assisted by Henry Chapman to load the machine on Okkie's truck, the owner of Kimba Plant.
- [74] It is common cause that the same Kimba Plant had sold to the First Defendant the same machine through Absa bank on or about 30.05.2005.
- [75] The Plaintiff paid to Baka Plant Sales Cc a total amount of R430 500.00 in instalments, the first being on 03.03.2005, and the last was effected on 01.08.2005. The inference to be drawn clearly, is that the Plaintiff bought the machine from Baka on 31.03.2005, when the agreement of purchase and sale was concluded.
- [76] The First Defendant confirmed that having acquired the machine from Kimba through Absa, he took possession thereof, and used the machine at Western Platinum mine where he had a contract with the mine.
- [77] There is also evidence that the same machine was later spotted at the site by Michael O'Brein, who in turn informed Craig Howie of Anro.
- [78] In the present instance, the Plaintiff's evidence that it is the owner of the machine found in possession of the First Defendant has been established on a balance of probabilities, and I am of the opinion, therefore, that it had discharged the onus of proof accordingly. See, *Goudini Chrome (Pty) Ltd V MCC contract (Pty) Ltd*.⁸)

⁸ 1993 1 ALL S.A 259 (A), 1993 (1) SA 77 (A).

- [79] When the action commenced, the Defendant was still in and remained in possession of the machine in dispute. See, in this regard *Chetty v Naidoo*⁹, wherein this requirement was laid down by the Appellant division.
- [80] The circumstances in which the machine was vindicated were clearly wrongful. In view of the wrongfulness of the conduct of both the late Okkie Laubscher and Henry Chapman, it follows that it is unnecessary for the Plaintiff to allege or prove that the First Defendant's possession was correspondingly wrongful. This was the principle established in *Krugersdorp Town Council v Fortuin*¹⁰).
- [81] The First Defendant, through out the trial proceedings was not heard setting out a bona fide defence to the claim, except to aver the machine he possessed, had a different serial number and was, therefore, not the same as the one claimed by the Plaintiff. This contention has no merit. There is uncontradicted evidence before the court that the rear frame which initially had 2735 stamped, was actually replaced at Kimba Plant, and another rear frame with serial number 3862, was fitted to the same machine with engine number: 6D22-155126
- [82] Furthermore, the Second Defendant, did not anywhere in his evidence deny possession of the machine, nor evidence of ownership the Plaintiff alleged. All it did was to dispute the fact that the machine he had was different from the machine claimed, which defence is unsatisfactory and untenable in the circumstances.
- [83] In the light of the foregoing considerations, and having considered the facts in this matter, I am satisfied that the Plaintiff has established all the elements necessary to

⁹1974 (3) SA 13 (A) at 20C.

¹⁰ 1965 (2) SA 335 (T)

found a claim based on a rei vindicatio , and in consequence, the claim ought to succeed. I accordingly make the following order:

COURT ORDER:

1. The First Defendant is ordered to restore to the Plaintiff possession of the 1995 model Furukawa FL230-1 frontend loader with engine number: 6D22-155126, and serial number: F07-3862, with immediate effect, after the granting of this order.
2. Should the First Defendant fail to deliver the machine referred to in 1 above to the Plaintiff within Ten (10) court days from the date of the granting of this Order, then alternatively .
3. The First Defendant is directed and Ordered to forthwith pay to the Plaintiff the sum of R430 000.00 being compensation for the value of the said Furukawa machine, and
4. Interest on the amount of R430 000.00 per annum a tempore morae to date of last payment.
5. Further that, the First and Second Defendants are directed and Ordered to pay the costs of suit herein, jointly and severally, the one paying the other absolved, which costs are including the costs reserved on 19.09.2010, 13.10.2010 and 24.10.2013

M.G. Phatudi
M.G PHATUDI, AJ
ACTING JUDGE OF THE NORTH AND
SOUTH GAUTENG HIGH COURT

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DATE OF HEARING: 28 OCTOBER 2013 TO 01 NOVEMBER 2013
DATE OF JUDGEMENT: 10 DECEMBER 2013