THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not reportable

Case no: 916/12

In the matter between:

NICK CHRISTELIS NO	**First Appellant**
ANNA CHARALAMBO CHRISTELIS NO	**Second Appellant**
OLGA LEONARD NO	**Third Appellant**
and	
VICTORIA LENA MEYER NO	**First Respondent**
ELENA JOAQUIM NO	**Second Respondent**
EMMANUEL CHRISTELIS NO	**Third Respondent**

Neutral citation: *Christelis NO v Meyer NO* (916/12) [2014] ZASCA 53 (16 April 2014)

Coram: MTHIYANE DP, MHLANTLA and WALLIS JJA, LEGODI and MATHOPO AJJA.

Heard: **7 March 2014**

Delivered: **16 April 2014**

Summary: Claim in terms of lex furtiva – requirements – proof of existence of assets the subject of the claim and that they had been disposed of with knowledge of the plaintiff's claim – evidence unsatisfactory.

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Monama J sitting as court of first instance):

1 The appeal is dismissed with costs, such costs to include those consequent upon the employment of two counsel, but subject to the further orders set out below.

2 The respondents shall not be entitled to recover their costs of complying with rule 8(9) of the Rules of this Court and 40% of the costs of perusal of the record.

3 None of the legal practitioners, whether representing the appellants or the respondents, shall be entitled to recover from their clients any costs in relation to the preparation and lodging of revised records or the revised heads of argument.

JUDGMENT

Wallis JA (Mthiyane DP, Mhlantla JA and Mathopo AJA concurring)

[1] Peter and Alfred (known as Lef, Left or Lefty) Christelis were identical twins born on 2[…]. They left school early to work in their father's shop and proved to be adept businessmen. The principal source of their success was a sweet factory in Germiston, but they branched out into other activities, including property development and money lending. In the result they became wealthy. That wealth was shared between them

equally, the relationship being so close that, as Lef said after his brother's death, they did everything together and shared everything so that the relationship was one of universal partnership. The complete lack of separation between their business interests and assets is the source of the present litigation, which is between their respective executors and heirs. The first and third appellants are Peter's children and the second appellant is his widow. The respondents are Lef's children. The allegation by the appellants is that after Peter's death on 9 February 2003 and prior to his death on 7 October 2007, Lef removed, concealed and disposed of jointly owned assets. Their claim to recover the value of the allegedly missing assets was dismissed by Monama J, but he gave leave to appeal to this court.

[2] The brothers owned the sweet factory and a number of property owning companies. The sweet factory has been disposed of and the property companies divided between the two families. Apart from these assets it is said that the twins held their wealth in hard assets such as diamonds, Kruger Rands and jewellery, and in negotiable certificates of deposit (NCDs) issued by banks. These were said to have existed when Peter died and they have not been accounted for. Some items of jewellery and a number of Kruger Rands were discovered shortly prior to Lef's death when a search was made at his house. These have been divided between the two families, but they are said to be but a fraction of all the assets of these types that were owned by the twins. The claim relates to the allegedly missing hard assets.

[3] The twins were secretive by nature and shared matters only between themselves. They were frugal people, apart from a shared passion for gambling at casinos, and did not display their wealth. They

did not share the details of their businesses with their immediate families or any advisers. Nor did they share the details with the income tax authorities. In fact they took active steps to disguise the source of their income from them. Thus, for example, they would purchase winning tickets on the totalisator at more than their face value and then cash them with the totalisator board. This enabled them to claim that gambling winnings were the source of some of their assets, even though the evidence is that they had no interest in betting on horses. It is no surprise therefore that there are few documents of any significance that assist in identifying assets of the type that give rise to the appellants' claims. The appellants allege that the value of the allegedly missing assets is of the order of R40 to R50 million.

[4] The respondents disavow any knowledge of the existence of such assets, although it was originally alleged that they knew of their existence and were concealing them. However, in response to a question from the bench in this Court, counsel disavowed any reliance on such a case. We are therefore only concerned with a contention that the assets existed at the time of Peter's death; were in Lef's possession; and their present whereabouts are unknown. We are asked to draw the inference that Lef disposed of them, knowing that they were jointly owned and that he was obliged to account to his late brother's estate for them.

[5] Some detail of the assets forming the subject of the claim is necessary. They are described in para 8 of the particulars of claim in the following terms:

'(a) one box full of diamonds separated by and/or packaged in white paper sheets consisting of 1,500 carats with a value (calculated at $5,000.00 per carat) of $7,5 million equating to approximately R57, 375,000;

(b) Negotiable Certificates of Deposit issued by Nedbank Limited and First National Bank Limited and/or Mercantile Bank Limited together with interest at 13% having a value of R19 million;

(c) at least one thousand Kruger Rands, having a value of R6,5 million;

(d) three gold Rolex watches, having a total value of R600, 000;

(e) the balance of items of jewellery referred to by the late Peter Nicholas Christelis and the late Alfred Nicholas Christelis as "Eleni's jewellery" which the late Alfred Nicholas Christelis valued (and the which value the Claimants for the purpose of this claim accept) at between R3-5 million;

(f) jewellery, having a value of not less than R3 Million consisting *inter alia* of the following [and here followed a list of 21 items].'

[6] The conduct of the trial was complicated by an order, ultimately taken by consent, in terms of which the quantities of the assets described in paras (a) to (e) and the value or valuations of all these assets were to be excluded from consideration by the trial court. That was an inappropriate order to have made, bearing in mind that the relief being sought, after this order was granted, was in the form of declaratory orders that at the date of Peter's death he and Lef were co-owners of the described assets and that, after Peter's death, Lef stole or disposed of the assets with knowledge of the claim by Peter's estate thereto.

[7] A declaratory order in regard to the ownership of property not identified in that order is nonsensical. Take the claim in relation to NCDs. The court was asked to make an order in relation to them with absolutely no means of identification whatsoever. The order formulated in the course of the appeal was a declaration of co-ownership in relation to:

'The negotiable certificates of deposit issued by Nedbank, First National Bank and Mercantile Bank to which the estate of the late Peter is entitled to the share of the proceeds thereof.'

The order is circular because there is no entitlement to it without proof that NCDs existed to which the estate of Peter had a claim. I am unable to see on what conceivable basis it could be implemented or made the subject of further proceedings. That is because one does not know to what it relates. The similar orders sought in respect of a box of diamonds or an indeterminate number of Kruger Rands would also be meaningless. The claim in respect of the three Rolex watches was abandoned in the course of argument in this court, but either there were three Rolex watches or there were not, and if they existed they needed to be clearly identified so that, when the court came to deal with the next stage of the case, it would know what the subject matter of the dispute was.

[8] This court has repeatedly pointed out that there should only be a separation of issues when the issues that are separated are both clearly defined and capable of being determined without reference to the remaining issues in the case.[1] If that is not done the trial proceeds on an unrealistic basis. The unreality of it in the present case is illustrated by counsel's opening address in which he told the judge that they were concerned with 'what was there and was it co-owned'. But the whole point of the separation order, as he repeatedly pointed out in argument in this court, was that the trial court was not concerned with what was there, because the issue of quantities was excluded from consideration. The end result is that we are asked to make an order in this appeal that will resolve no issue between the parties and result in further lengthy and, no doubt, expensive litigation over the quantities of the assets to which the declaratory order applies. An enquiry from the bench as to the evidence available to prove the quantities of these assets received the cryptic

---

[1] *Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA) para 3; *Adlem and Another v Arlow* 2013 (3) SA 1 (SCA) para 5.

response that reliance would be placed on statistical evidence. Without further clarification, I can only say that it is wholly unclear to me on what basis it is thought that statistical evidence can establish how many diamonds or Kruger Rands (if any) the secretive Christelis twins jointly owned at the date of Peter's death. And if one cannot prove the quantities there is no point in a declaratory order that means no more than that at that date they owned some diamonds or gold coins jointly. However, in view of the conclusion I have reached about the fate of the appeal it is unnecessary to give further consideration to this.

[9] Returning to the pleadings it was alleged that Lef 'unlawfully and intentionally committed theft of the assets alternatively disposed of them with knowledge of the Plaintiff's claim'. In advancing this claim in argument before us reliance was placed solely on the *actio furtiva* as expounded in *Clifford v Farinha*[2] and *Chetty v Italtile Ceramics Ltd*.[3] For that reason, unlike my colleague, I find it unnecessary to deal with the *actio ad exhibendum*, which was briefly referred to in the heads of argument as an alternative basis for the claim. It is as well to examine the legal footing for the claim before turning to consider whether the trial judge was correct in holding that the appellants did not discharge the onus of proving that claim.

[10] In para 10 of his judgment in *Chetty*, Malan JA summarised the law relating to claims based on an alleged theft (the *condictio furtiva)* in the following terms:

'The condictio furtiva is a remedy the owner of, or someone with an interest in, a thing has against a thief and his heirs for damages. It is generally characterised as a

---

[2] *Clifford v Farinha* 1988 (4) SA 315 (W).
[3] *Chetty v Italtile Ceramics Ltd* 2013 (3) SA 374 (SCA).

delictual action. It is, of course, required that the object involved be stolen before the condictio can find application. The law requires for the crime of theft —

"not only that the thing should have been taken without belief that the owner … had consented or would have consented to the taking, but also that the taker should have intended to terminate the owner's enjoyment of his rights or, in other words, to deprive him of the whole benefit of his ownership".

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

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

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

[11] *Clifford v Farinha* dealt with theft in the form of *furtum usus* and held that, although it is no longer a crime, it is still a basis for a claim based on the *condictio furtiva.* It was held that once a thief has withdrawn possession of property from the owner or party entitled to the possession thereof, and is in default of restoring the property to that person, the risk

of accidental loss rests on the thief. The appellants' case was therefore that Lef, knowing that he and Peter jointly owned the items specified in the particulars of claim, withdrew them or withheld them from the possession of Peter's estate and its executors and was therefore guilty of at least *furtum usus*. What he did with them thereafter is so they say irrelevant. If he disposed of them then that is simply theft in relation to the half interest of Peter's estate in such assets. If he has lost them or they have been stolen whilst in his possession then he bore the risk of their loss and his estate is liable to compensate Peter's estate for the loss occasioned thereby. These legal principles were not challenged before us and for present purposes I accept them.

[12] That left two main factual issues at the trial. They were whether the alleged assets existed at the time of Peter's death and whether Lef removed them in circumstances amounting at least to *furtum usus*. It is therefore of critical importance to ascertain what the factual position was at the time of Peter's death. In order to do this it is necessary to trace some of the events after he died.

[13] Peter died on 9 February 2003. His son, Nick Christelis (Nick), the first appellant, an attorney and businessman, is one of his executors. The others are his widow, the second appellant, who one infers is elderly, and his daughter, the third appellant, who lives in Greece. In the result Nick has played the principal role on behalf of the appellants in the events since that date. He is clearly the moving spirit behind the present litigation. Immediately after his father's death he sought to take control of his affairs. Under the latter's will a trust was constituted, of which Lef was to be the trustee and principal beneficiary, in respect of Peter's interest in a close corporation, Christelis Promotions CC. As to the

balance of the estate it was bequeathed in equal shares to Nick, his mother and his sister. However that was subject to restrictions. Insofar as it consisted of shares in private companies or members' interests in close corporations and claims on loan account against such companies and corporations, the executors were not entitled without Lef's consent to sell, alienate, pledge or otherwise to dispose of them to any one other than a beneficiary of Peter's. Nor could they demand repayment of the loan accounts, subject to an exception in relation to an amount of R100 000. Lef's will was executed at the same time and contained mirror provisions in favour of Peter.

[14] Christelis Promotions CC owned what was probably the most valuable property in the property portfolio owned by the Christelis twins. It was also the one that generated the most income. Accordingly, under Peter's will, Lef would have the entire benefit from this property until his death. In addition the provisions in regard to the other companies and close corporations meant that until Lef's death it would be difficult for Peter's estate to unlock any value from them. Nick was unhappy with this and said he was concerned that it did not provide adequately for his mother and would not enable her to purchase a flat in Cape Town and move there where she could be close to her sister and brother.

[15] These concerns led to Nick discussing matters with Lef, who it is common cause was in a state of great distress at the time, and with a Mr Wasserman, who had been the auditor of the various companies for many years. On 25 February 2003, a mere 16 days after Peter died and, apparently before his funeral had taken place, Nick and Mr Wasserman met with Lef at the latter's office. They discussed the continued conduct of the sweet factory; the administration of the properties and the

provisions of Peter’s will. At the end of that meeting Lef signed a document that Nick had prepared in advance of the meeting. It recorded that Lef declined to adiate in terms of Peter’s will.

[16] The signature of this document precipitated a series of bitter disputes between Lef and his nephew that lasted for the rest of Lef’s life. Within a couple of days Lef contacted Mr Wasserman and expressed outrage at the document and complained that he had been taken advantage of and tricked into signing it. He said that he had been in a state of shock at the time having so recently lost the person to whom he had been closest in all the world. His eyesight had degenerated and he was virtually blind. He said he was in no state to make such an important decision, that undermined the intentions of Peter and himself that, once one of them died, the other would continue to control their businesses without interference from members of their families. Whatever the merits of these contentions it is unfortunate that Nick did not accept that Lef no longer wished to adhere to the refusal to adiate and seek to resolve his concerns in some other way. His rigid insistence that the refusal to adiate was binding led to acrimonious disputes and litigation between uncle and nephew.

[17] It is unnecessary to trawl through the history of all this. By June 2003 both sides had engaged the services of attorneys. On 9 June 2003 the attorneys representing Lef wrote to Nick’s attorneys saying that an action would be instituted by Lef to invalidate the refusal to adiate. The letter proposed that Lef continue to administer all the companies while paying a regular amount to his sister-in-law and niece for their maintenance. The amount proffered infuriated Nick and on 10 July 2003, Mr Brasg, an attorney acting for Peter’s estate on Nick’s instructions,

advised that in view of its contents the appellants had decided to 'terminate their association with your client with immediate effect'. They demanded a full accounting of the business of the partnership both prior to and subsequent to Peter's death. The letter added:

'Such accounting will have to include full details of all movable assets and in particular, cash, jewellery and bearer instruments in the nature of cash deposit receipts, fixed deposit receipts and share certificates in negotiable form. As many of these movable assets are kept in a safe-deposit box and also under the direct personal control of your client, we require your client's undertaking that he will not access this deposit box without a representative of our clients being present, nor will he disgorge or conceal those assets under his personal control.'

[18] Receipt of this letter led to the crucial events in this case. They are dealt with in the evidence of Mr Costa Livanos, a long-standing acquaintance of the Christelis twins. I recite his version of events, subject to the caveat that the trial judge held him to be an unreliable witness and on the basis that I will need in due course to address the question of his credibility. Mr Livanos said that he was approached by Lef, in some desperation, and told that he was having enormous problems with his nephew, Nick, who he thought was trying to steal his money and his share of the wealth he had built up over the years with Peter. He was furnished with balance sheets from which he prepared a schedule of the different companies and close corporations and their assets and liabilities. The accuracy of this schedule was not disputed and it apparently formed the basis upon which the property interests were divided between the two estates.

[19] In regard to the demand in respect of movable assets Mr Livanos said that he took Lef to see his own attorney, a Mr Melamed. Although he insisted that there was only one meeting on 29 August 2003, there must

have been at least two meetings with Mr Melamed, because on 7 August 2003 the latter had written to Mr Brasg, an attorney, representing Nick and the executors in Peter's estate, in response to the letter referred to in para 19 above. That meeting must have occurred some time after 21 July 2003, because until that date another attorney was representing Lef. Be that as it may, on 29 August 2003 a meeting took place at the chambers of Mr Slomowitz SC, who had been retained by Mr Melamed on behalf of Lef. Others at the meeting were Mr Melamed, Mr Livanos as his representative, Mr Limberis, an advocate, and Mr Brasg. According to Mr Livanos, Lef was too distressed to make a contribution, so he conducted the negotiations on his behalf. Discussion revolved around the contents of a security box or boxes. He said that it was accepted that the contents belonged to the universal partnership and it was agreed that they should go and do an inventory of these items.

[20] It does not appear that Mr Livanos' recollection in regard to this agreement is accurate because it flies in the face of the probabilities. In a letter written on 16 October 2003, Mr Brasg said they were told at the meeting of 29 August that an inventory had been prepared in respect of the movable assets. This is inconsistent with him agreeing at the meeting that Mr Livanos would prepare an inventory. It is also unlikely that Mr Brasg would have agreed to an inventory being prepared without him, or someone else representing Nick, being present. He had written in July demanding that Lef not access the safe deposit box without a representative of Peter's estate being present and there was no reason for him to alter that stance. It would have been contrary to his instructions to do so. Mr Livanos was not a neutral party, but Lef's representative. Finally, if there had been such an agreement, Mr Brasg would soon after the meeting have demanded that the inventory be produced. It is more

probable that Messrs Slomowitz and Melamed decided that an inventory should be prepared and told Mr Livanos to attend to it. In what follows I proceed on that basis.

[21] According to Mr Livanos, on 6 September 2003 he and Captain Fourie from the SAPS, accompanied Lef to the premises of Mercantile Bank in Germiston in order to prepare an inventory. He explained the presence of Captain Fourie on the basis that 'when people see you going to banks and things like that then maybe there was going to be a robbery or somebody will attack us thinking that I have got money'. That was an absurd explanation. They were not going to withdraw money or valuables but to undertake an inventory of the contents of a safe deposit box. Furthermore they went to the bank by car, so the risk of a robbery was small. He added later that it was necessary to have someone to verify and 'in that letter they had stipulated that we must not go on our own'. Presumably that was a reference to Mr Brasg's letter of 10 July 2003, but the letter demanded that the safe deposit box not be opened unless a representative of both Nick and Peter's estate was present. Captain Fourie's presence cannot be explained on that basis.

[22] At a later stage in his evidence Mr Livanos proffered another explanation for Captain Fourie's presence. He said that he had told him (inaccurately) that 'there was a big court case going on'. It was to protect him (Livanos) against any allegations that he had stolen something and to verify that everything Mr Livanos did was 'correct' so that 'nobody could point any fingers at me'. Why that should have been a concern was not explained.

[23] Mr Livanos testified that Lef had with him a black pilot's bag, similar to those used by lawyers to carry files. The purpose of the bag became apparent after a bank official had admitted him and Lef and Captain Fourie to the strong room containing the safe deposit boxes. The bank official and Lef each had keys to two boxes and, once these had been unlocked, they were left alone in the strong room. The first box, identified as A8, was taken out and placed on a counter. According to him the pilot bag was placed next to it and Lef started to take things from the safe deposit box and put them into the pilot bag. He said that he started to write down the items. His first note read:

'NCD
Gold Coin
Cash
Rings Diamond.'

He then drew a cross through this list because, so he said, Lef told him not to write yet and to wait.

[24] At this stage in Mr Livanos' recitation of the events in the strong room, he was asked to tell the judge 'in particular' what Lef removed from the box. There followed a blatantly leading question: 'Did he take any container out of there?' It is no surprise that the answer was: 'He took a lot of stuff out. He took, he took, he took … there was a box of diamonds he took out, he …' Counsel intervened, confirmed that Lef had taken a box of diamonds out, and asked some questions about the size of the box. He was told that it was about the size of half a shoe box. Having produced an example of what was said to be a similarly sized box, counsel again asked a leading question: 'Now you are taking the lid off, did he do that?' Mr Livanos confirmed that he had and explained that the box contained white packets and cellophane packets and that Lef opened

about three packets and there were 'about ten diamonds in the packets'. He said that Lef felt the diamonds in the palm of his hand and estimated the size of most of them as being larger than his wife's diamond ring, which was 1.6 carats. After this Lef folded up the packages, closed the box and placed it in the pilot bag.

[25] Continuing Mr Livanos' narrative, he said that the next item removed from the safe deposit box was a similarly sized box about half to a third full of gold coins. After some prompting from counsel by way of another leading question, he identified these as Kruger Rands. He said Lef removed these from the box in handfuls and put them in the pilot bag. His estimate was that he did this about 20 times removing 20 to 25 coins on each occasion. As before, according to Mr Livanos, Lef did this while he and Captain Fourie watched and said nothing.

[26] I interpose at this point to say that whilst not impossible it is difficult to imagine a man suffering from the physical disabilities of Lef doing this. He was old, nearly blind and severely arthritic. Scooping coins out of a box in handfuls as described seems improbable bearing in mind the size and weight of the coins in question. A Kruger Rand is slightly larger than the R5 coin currently in circulation in South Africa and weighs nearly 33 grams. Each handful would have weighed nearly half a kilogram, even if one allows for some of the coins being half Kruger Rands. The pilot's bag would, at the end of this, have weighed something of the order of 12 to 15 kgs. That would be a heavy load for Lef to carry even if, as Mr Livanos said, he was strong.

[27] After the Kruger Rands, so the tale continued, Lef removed 'a whole lot of diamond rings' and three Rolex watches from the box and

put them in the bag. After some questions about the watches he was asked:

'[W]hat else did he remove? Was there anything else in that box, any papers?'

This further blatantly leading question prompted the answer that there was a bundle of documents that 'turned out to be NCDs'. Mr Livanos did not say how he knew this other than to say that Lef spoke to Captain Fourie and asked him for some information about what these were and values, before putting them in the pilot's bag.

[28] At this stage, so Mr Livanos said, he was permitted by Lef to make an inventory of what remained in the safe deposit box. His evidence on the point started with counsel referring to the item of cash. That had not at that stage been mentioned and the judge pointed this out. Once the exchange between the judge and counsel concluded it is no great surprise that Mr Livanos then added that Lef had removed a number of bundles of notes of various denominations from the safe deposit box and put them in the bag, leaving behind only 5 or 10% of the total cash in the box.

[29] Mr Livanos then made a handwritten list of the items remaining in safe deposit box A8. The list as written included 6 gold rings and diamonds; 3 gold hand bracelets; 1 gold antique watch; 2 gold pendants, 2 gold chains; R18 850 in notes; 18 large and 13 small Kruger Rands; 55 gld rings and diamond inserts; gold bracelets of different sizes; 1 gold chain; 5 gold bangles; 9 gold bracelets; 5 pendants; 1 silver bracelet and a diamond insert. The items after the Kruger Rands appeared under a heading 'Family inheritance'. While Mr Livanos was making this list he said Lef turned his attentions, together with Captain Fourie, to the second safe deposit box, A10. He was unable to see what they did with its contents as he was busy writing his list of the remaining contents of A8.

When he had finished that task he then wrote a separate list of the contents of A10. That list included 4 pearl necklaces; 3 gold rings; 3 gold watches; 6 gold chains/Kruger Rand; 1 necklace/Kruger Rand; 3 pairs gold earrings; 2 gold necklaces; 6 assorted brooches and 18 assorted gold/silver/diamond bracelets.

[30] At this stage the three men left the bank and went to Lef's home, with Lef carrying the pilot's bag. According to Mr Livanos, when they got to the house Lef placed the bag on the table, reached in and removed R10 000 and gave it to Captain Fourie.[4] He then said to Mr Livanos that he must not tell anyone of what they had done as he would deal with it. Mr Livanos responded that this placed him in a terrible situation. Not only did half of everything belong to Peter, but he had to report back to the advocates and attorneys on the contents of the inventory. He claimed that he was very unhappy and that Lef treated him like a little boy. He described in some detail how Lef insisted that he would keep some of the items at the house and some at the factory. He then left the house angry and concerned at what had occurred.

[31] To sum up at this point, the three men had gone to the bank for the purpose of preparing an inventory of the contents of the two safe deposit boxes. Instead Lef had removed diamonds, Kruger Rands, diamond rings, Rolex watches, cash and NCDs from the one box and possibly some items from the other. The inventory prepared by Mr Livanos was severely attenuated and after they had returned to the house Lef was adamant, over Mr Livanos' protests, that he would keep what he had removed, even though this placed Mr Livanos in an impossible situation in the light of the mandate he understood he had received from the lawyers.

[4] Mr Livanos said that he learned the amount subsequently from Captain Fourie.

[32] One might have expected Mr Livanos to seek advice from at least Mr Melamed as to the course he should now follow. But that is not what he did. Instead he went home and had his wife type up two inventories, one for each box, from his written notes. He then corrected her typing in manuscript and wrote in a heading and conclusion. The document then read as follows:

‘INVENTORY

PROPERTY OF A N CHRISTELIS

INVENTORY in the presence of: DATE:- 2003 09 06

1. Mr A N Christelis
2. Mr C Livanos
3. Captain L Fourie

This document serves to confirm that an inspection was conducted at the premises of Mercantile Bank Germiston in the presence of the above mentioned parties.

The Schedule hereby reflects a true and accurate Inventory of the goods contained in the aforementioned Box.

[The document then set out in tabular form the items reflected in Mr Livanos’ note.]

I LOUIS FREDERICK FOURIE (Detective Captain S. A. P. Services Germiston) declare that the above is a correct and true recording.’

Provision was made below this last statement for Captain Fourie to sign the inventories.

[33] A few days later according to Mr Livanos, Lef approached him asking for the inventories. When he demurred he said that Lef offered to give him a large diamond ring for his wife if he would only sign the inventories, but he responded that this was an insult. Lef then wept and asked him to sign the documents and get Captain Fourie to sign them, but Mr Livanos refused and became, in his own words, ‘cold to him’ and told him to leave.

[34] The last act in this drama according to Mr Livanos was that he arranged for Lef's elder daughter, Vicky, the first respondent, and his son, Mano, the third respondent, to come and visit him. He claimed that he told them word for word what had happened and that he was no longer prepared to act for their father. They begged him to change his mind, but he was adamant. According to him Vicky then said that Nick should take control of everything because he would make sure that everything would be shared. Mr Livanos said that was up to them but he would have nothing more to do with the matter. He then left. As a coda to the whole affair a while later (in fact a little less than a year later), Lef approached him and said that there had been a robbery at the Mercantile Bank and again asked him for the inventory in order to enable him to make a claim against his insurance. He promised to let Mr Livanos have 20% of the insurance proceeds in return for his assistance, but this was turned down as an insult. Mr Livanos then had nothing more to do with the matter until after Lef's death, when he was approached by Nick seeking information about assets in his late father's estate.

[35] The appellants' case rested entirely on the truthfulness and reliability of Mr Livanos. The trial court held him to be an unreliable witness. That finding is not one that is easily disturbed on appeal, particularly where it is based in whole or part upon the impression the witness made in giving evidence. It is easier to do so where the finding is based on the proper inferences to be drawn from undisputed facts and the overall probabilities.[5] The analysis involves a careful weighing of the credibility and reliability of the witness in the light of the overall

[5] *Union Spinning Mills (Pty) Ltd v Paltex Dye House (Pty) Ltd and Another* 2002 (4) SA 408 (SCA) para 24.

probabilities.[6] It must also be borne in mind that Lef is dead and unable to contradict Mr Livanos. It is necessary to heed the warning sounded by Fagan JA in *Borcherds v Estate Naidoo* [7] that:

'If the facts in issue are particularly within the knowledge of only one of the parties to a suit, that is a circumstance which the Court must take into consideration in weighing the probative effect of the evidence adduced. Here the one party to the alleged transaction of repayment is dead. The Court must therefore scrutinise with caution the evidence given by, and led on behalf of, the surviving party.'

[36] There are a number of extremely curious features in Mr Livanos' evidence. Chief amongst these are the following. First, there is his lack of enquiry about the purpose of Lef bringing the pilot bag to the bank. One would have expected him to ask because they were going to make an inventory, not to remove items. Second is the failure by both him and Captain Fourie to protest at Lef's conduct in the strong room in removing items and packing them in the pilot's bag. That self-evidently was directed at defeating the aim of taking an inventory. It seems inconceivable that they would not have demanded an explanation. Third, is the feebleness of his explanation that he thought Lef intended to count them at his home and prepare the inventory there. The obvious safe place for them to do that was in the strong room. That it might have taken some time is neither here nor there.

[37] Fourth, is the curious sequence in which he wrote the note that was crossed out. It started with NCD and this was followed by gold coin, cash and 'rings diamond'. But this was not the order in which he described the items being removed from the box and it didn't mention the box of

---

[6] *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Other* 2003 (1) SA 11 (SCA) para 5.

[7] *Borcherds v Estate Naidoo* 1955 (3) SA 78 (A) at 79A–B. See also *Moyce v Estate Taylor* 1948 (3) SA 822 (A) at 827.

diamonds. Yet, according to him, that was the first thing removed from the safe deposit box. If that were true, why was it not the first thing that he wrote down? Even stranger is the fact that he did not make a note of it at all. Fifth is the oddity of his differing explanations for Captain Fourie's presence. Neither made any sense and the obvious explanation of his being an impartial witness was not what he said. There is the further oddity that he testified that, when the NCDs were removed from the safety deposit box, Lef asked Captain Fourie what these were and their values. That seems improbable bearing in mind that Lef was a successful businessman, accustomed to invest in NCDs, and Captain Fourie had no apparent expertise in this area.

[38] Sixth, it must have been apparent from the events at Lef's home that he had no intention of permitting a proper inventory to be prepared. He claimed to have challenged him over this and left angry. Yet, notwithstanding this, he prepared typed inventories that he knew were inaccurate and made provision for them to be signed by Captain Fourie as an accurate reflection of the contents of the boxes. Seventh, these inventories stated that they covered the property of A N Christelis, not 'A N Christelis and Late P N Christelis', which is how he had headed the inventory of companies and close corporations. Eighth, he did not report the outcome of this expedition to Mr Melamed and counsel, who had mandated him to undertake it. Lastly, he remained silent and thereby concealed Lef's conduct until after the latter's death, when he suddenly became willing to reveal what had occurred. His suggestion that he did this out of respect for Lef does not hold water. It is inconsistent with his story that he told Lef's children exactly what had happened. They would be the ones most disappointed by dishonourable conduct on the part of

their father in trying to cheat his late brother and their cousins out of what was rightfully theirs.

[39] Mr Livanos did not fare well under cross-examination on these issues. He tried to picture himself as subordinate to Lef, but that was inconsistent with his earlier portrait of Lef as an old, tired and distressed man who had invoked his assistance in resisting the attempts by his nephew, Nick, to deprive him of his assets. There were other problems with his evidence. Lef's briefcase was produced and it did not match the description of the pilot bag. The evidence was that after Lef's death a search was undertaken and it did not reveal the existence of such a bag. In addition, if his evidence concerning the meeting with Vicky and Mano were correct, it is strange that Vicky did not approach Nick for assistance at that stage, as she trusted him. The extent of Lef's fortune was not known to his children and one would have expected them to be delighted to know that their father had all these additional assets and concerned to ensure that he did not hide or lose them.

[40] Furthermore, as the assets have not been discovered since Lef's death, one is constrained to ask what happened to them, if he in fact removed them? There is no evidence to suggest that he was in a position to dispose of them, nor any evidence that after a lifetime of frugal living he squandered them. Had they been stolen there is no reason to believe that he would not have claimed against his insurers to recover any loss. The safety deposit box at Nedbank, was opened and it contained 185 Kruger Rands, which were shared between the families. There was a curious incident when Lef took Vicky to Mercantile Bank in July 2003 and opened a safe deposit box in her name for which he retained the key. But that was before any suggestion that an inventory should be prepared

and in any event there is no evidence that anything was ever placed in the box. Certainly Lef made no claim in that regard when there was a break-in at the bank and enquiries at the bank revealed that they had no such box. None of these features assist the appellants' case.

[41] There seems to be little doubt that Mr Livanos accompanied Lef to the bank, together with Captain Fourie (who was available but not called by either side as a witness), to undertake an inventory. He also prepared the inventories. At some stage he clearly had a falling out with Lef. He also had a meeting with Vicky and Mano. At that meeting he gave them the property inventory, but not the inventory of what remained in the safe deposit box, although he accepted that he might have had that with him. He was unable to explain why, if he had given them a complete explanation of what occurred in the strong room and at Lef's home, he did not show them the inventories.

[42] The strongest factor in support of Mr Livanos' evidence is an affidavit signed by Lef on 27 July 2004 after a break-in at the Mercantile Bank, in the course of which the contents of the two safety deposit boxes were stolen. As counsel relied strongly on this affidavit it is best to set out its terms in full. It reads:

'At the time of forced entry the inventory in my lockers were to the best of my knowledge as stated below

1 16 or 19 Diamond rings half carat each
2 Numerous small items of jewellery which I cannot verify.
3 Cash amount of forty to sixty thousand rand.

Bulk of which was in the two lockers were withdrawn prior to the forced entry on the 2nd June 2004.

Due to the fact that I have had no response from Captain Fourie and Costa Livanos in connection with the inventory I am therefore obliged to submit

> to the best of my ability the contents of the safety boxes during the time of the burglary.'

[43] Counsel seized on the sentence 'Bulk of which was in the two lockers were withdrawn' and the reference to the inability to obtain the inventory from Captain Fourie and Mr Livanos. But that is to read the word 'which' as 'what' and to correct the tense of 'were' to read 'was'. However, that statement appears immediately after the reference to an estimate of the cash amount remaining in the safety deposit boxes and would more naturally relate to money than the overall contents of the boxes. Certainly if the word 'which' is replaced by 'the cash' it makes perfect sense. The reference to the inventory is a two-edged sword. If Lef had removed the bulk of the contents of the boxes then the two people he identified knew that and, if approached by assessors acting for the bank or its insurers, might feel obliged to explain what had happened on 6 September to the potential embarrassment of Lef. It was particularly dangerous for him to do so when he had already approached Mr Livanos asking for the inventories and had been turned away. He was at that stage engaged in litigation with Nick and the inventory had been prepared in the light of his having been advised that he was obliged to account to Peter's estate for jointly owned assets.

[44] Counsel urged upon us that there was no apparent motive for Mr Livanos to fabricate his story. But he had undoubtedly fallen out with Lef and his family in 2003. When Vicky and Mano told their father that they had been to see Mr Livanos his response was: 'What right have you got to go and see that crook?' Clearly the breach between them was deep.

In those circumstances to speculate about his possible motives after Lef's death to fabricate a story is dangerous.[8]

[45] But the evidence of Mr Livanos cannot be dealt with in isolation. Lef is not here to give his side of the story. But one must nonetheless try and weigh the likelihood of this story being true against what one knows about Lef. If Mr Livanos is telling the truth then, very shortly after his brother's death and knowing that his nephew was trying to find and lay his hands on Peter's assets, he deliberately removed and secreted a large number of those assets. What could have been his purpose in doing this? It could not have been because he needed money or resources. Those he had aplenty. Nor was it to benefit his own children and prejudice those of his late brother. This was a man who had throughout a long life shared everything with his brother. Their income and assets were but 'one pocket'. They had made mirror wills that provided for the survivor to control the assets until his death and then for them to be divided equally between the families. There is no evidence of animosity between the families. Indeed the evidence points to their constituting a close-knit clan. The suggestion that Lef should suddenly try to cheat his brother's heirs is implausible.

[46] The dispute between Lef and Nick was not over the principle that the twins had owned everything jointly. It was occasioned by the signature of the refusal to adiate and Lef's feelings that this was a device being used by Nick to cheat him. One can understand him trying to protect his own interests in that situation, but it is far less easy to find a motive for him appropriating assets that he knew his brother's estate had

[8] In the same way as it is dangerous to speculate on why a witness in a criminal trial might be lying. *Maseti v S* [2014] 1 All SA 420 (SCA) para 25.

an interest in and none was suggested. Then there is the question of what happened to these assets. For different reasons both sides in this dispute have searched for them. Lef's children searched in an endeavour to discover assets the existence of which could only benefit them. Nick obtained a court order against Lef before his death and the sheriff and an attorney, whose report is part of the record, searched his house, the factory and attended at both Nedbank and Mercantile Bank. At the commencement of the search Lef handed over what he said was Eleni's jewellery. It is not suggested that this was not her jewellery, only that it was not all of her jewellery. Some further jewellery was discovered in a safe. The inventory prepared by the sheriff shows that this consisted of rings, gold chains, pendants, earrings, brooches, bracelets and watches. All of this jewellery has been divided between the two families, whether it came from Eleni or from other sources. During this search some old valuation certificates for diamonds were found as well as some stale NCDs and cheques. Some amounts in cash were found and presumably this has also been divided.

[47] In regard to the NCDs the evidence showed that Lef continued for the remainder of his life to deal with them as he had before, namely, to roll them over as they matured, sometimes withdrawing the interest. He did this from 2003 until 2007. That is inconsistent with him having been trying to steal these assets. It is also inconsistent with there being other NCDs beyond those identified by Mercantile Bank.

[48] If Mr Livanos is not telling the truth then all this is explicable. The diamonds and Kruger Rands and vast quantities of jewellery are a figment of his imagination. Lef may have taken a few items from the safety deposit boxes at Mercantile Bank, but they were either stored

elsewhere at Nedbank or in his safe at home. One can understand that he might have wished to keep his mother's jewellery close to hand in view of his closeness to her. It must also be remembered that his brother had entrusted these items to his care and he may have seen it as his obligation to continue to care for them. The documents discovered in the course of the search appear to have been out of date – the type of old document stored at one stage and never thrown away that is frequently found when clearing out the home of an elderly person. All this is more plausible than the suggestion that he set out to cheat his late brother and his closest relatives including his own children.

[49] In those circumstances I am unable to fault the trial judge in his assessment of Mr Livanos as a witness. He was a poor witness and his version of events is shot through with improbabilities. Accordingly his evidence fails to establish on the requisite balance of probabilities that on 6 September 2003 Lef removed diamonds, Kruger Rands, jewellery, Rolex watches and NCDs from two safe deposit boxes at Mercantile Bank.

[50] It remains necessary to deal with three further aspects relating to the items left in the safe deposit box that were stolen when Mercantile Bank was broken into; the claim in respect of NCDs and that in respect of Eleni's jewellery, which may in some respects not depend on Mr Livanos' evidence. In the latter regard the contention was that Eleni, the twins' mother had been a flamboyant character who loved to wear a great deal of valuable jewellery provided to her by Peter and Lef, to whom she was particularly close. However, photographs of Eleni taken on various occasions, including formal dinners where one would expect her to wear her best jewellery, do not support this suggestion. They show a modestly

dressed lady of mature years at various functions and in a domestic situation. She is usually wearing a watch and two or three bracelets and on occasions a string of pearls or necklace or a brooch. On this evidence there is no basis for thinking that any significant items of jewellery owned by the late Eleni Christelis was in Lef's possession and has not been produced.

[51] The claim was not based on physical evidence but on a settlement agreement concluded between Nick and Lef to resolve all the litigation between them. That agreement had a clause in which both parties acknowledged that Eleni's jewellery belonged to Peter's estate and Lef in equal shares and added in manuscript:

'It is recorded that Eleni's jewellery is that as referred to in clauses 18 to 20 inclusive of the founding affidavit in case no 2005/5536.'

However, reference to these paragraphs of that affidavit, which was deposed to by Nick, shows that they contain no description of the jewellery in question. The nearest it comes to a description is a sentence that reads:

'To the best of our recollection, Eleni's jewellery consisted of at least twenty diamond rings and at least six gold and diamond brooches with a reputed value (at that time) of between R3 and R5 million.'

That unclear recollection must be read in the light of the further paragraph saying that only Lef had details of what constituted the jewellery. When he produced it, after Nick had obtained a court order and Lef's house was searched by the sheriff and an attorney, it proved far less fabulous than that description suggested. What was sued for was the balance, which was entirely indefinite and nothing in the evidence identified it with any greater clarity. On that ground alone the claim had to fail.

[52] As regards NCDs Mr Livanos made a note that these existed when he was at the bank. However, there is no evidence that they were current NCDs. When Lef's house was searched a number of stale NCDs were discovered. They were part of a series that had been rolled over every three months. When the matter came to trial a sub-poena was served on Mercantile Bank and this resulted in the production of what was virtually the full series of NCDs. As a schedule prepared by the respondents showed, three series of NCDs had run from 2001 to 2007. When they matured in January 2007 they were reinvested in two NCDs and in April 2007 one of those was given to Nick on behalf of Peter's estate and the other was held, reinvested and the proceeds divided among Lef's children. It was suggested in argument that the schedule revealed an obligation for Lef's estate to account to Peter's estate for an amount of some R600 000 but that is a matter of accounting in the two estates. It is not the claim that was pursued in the action and can be resolved by way of a claim against the estate of Lef. The pleaded claim was one in respect of NCDs that fell within the *actio furitva*. However, that could only relate to NCDs removed by Lef from the strong room of the bank. Not only does that claim depend on the evidence of Mr Livanos but his evidence, even if accepted, did not suffice to show the existence of NCDs that were current at the time and have not subsequently been accounted for.

[53] Lastly there are the items stolen from the safety deposit boxes at Mercantile Bank and reflected in the two inventories prepared by Mr Livanos. In regard to them Lef had during Peter's lifetime been entrusted with the task of storing and securing them. He did so by placing them in the bank's care in safety deposit boxes. They were not appropriated by him, but were in the care and custody of the bank when they were stolen.

In those circumstances the requirements for the *actio furtiva* are not satisfied in respect of these items.

[54] For those reasons the appeal must be dismissed. Ordinarily that would carry with it an order that the appellants pay the costs of the appeal including the costs of two counsel. However, that order must be qualified in two respects. First the record consisted of 14 volumes and 2659 pages. A large part of this was due to the respondents' attorneys insisting on the inclusion of documents that were unnecessary for the conduct of the appeal. Their costs in regard to compliance with rule 8(9) of the Rules of this Court and in regard to the perusal of the unnecessary portion of the record, which I estimate at 1000 pages out of 2500 or 40% of the record, should be disallowed.

[55] The fault in this regard extended from the attorneys to the advocates in relation to the preparation of the heads of argument and in complying with the requirements of the practice directive. We were told by both sets of counsel that we needed to read the entire record. That was manifestly wrong because most of the record was not referred to in the heads of argument and there were portions that related to claims abandoned in the course of the trial and the issue of quantum that had been separated. In addition we were told that it was impossible to prepare a core bundle. Again that was incorrect. This was pointed out to the parties in a letter from the registrar of this court in which the following was said:

'[A] superficial examination of the record reveals [that] neither party has made any reference to Volumes 11 and 12 and there are but a handful of references to Volumes 2, 8, 9 and 10. In Volume 14 it appears only to be necessary to consider the judgment of the trial court. A large part of the pleadings and the interlocutory applications in Volume 1 are also irrelevant.

In addition both sets of counsel say that it is not possible to extract a core bundle from the documents forming part of the record, albeit that they both only refer to a handful of documents. This is likewise incorrect and constitutes non-compliance with the requirements of the rule.'

There followed a directive to the parties to file a proper practice note and a core bundle.

[56] This directive was ignored and instead two revised records were delivered, the one of some 1100 pages and the other of some 1450 pages. There was also a flurry of correspondence of an acrimonious nature about the reasons for the parties not being able to agree on what was relevant. The parties had been warned that there would be consequences flowing from their failure to comply with the rules of this court. In the result there was a tender in the course of argument, made jointly by counsel on behalf of all the legal practitioners involved that they would not raise fees or charge their clients any costs in relation to the preparation and lodging of revised records or the revised heads of argument. An order will be made to this effect.

[57] The following order is made:

1 The appeal is dismissed with costs, such costs to include those consequent upon the employment of two counsel, but subject to the further orders set out below.
2 The respondents shall not be entitled to recover their costs of complying with rule 8(9) of the Rules of this Court and 40% of the costs of perusal of the record.
3 None of the legal practitioners, whether representing the appellants or the respondents, shall be entitled to recover from their clients

any costs in relation to the preparation and lodging of revised records or the revised heads of argument.

M J D WALLIS
JUDGE OF APPEAL

Legodi AJA (dissenting)

[58] I have had the opportunity to read the judgment of Wallis JA. Unfortunately for the reasons that will follow, I am unable to agree therewith. I do not find it necessary to repeat the facts of the case except insofar as it might be necessary. I prefer to refer to the twin brothers as Peter and Alfred.

[59] The separation of issues referred to in the majority judgment was intended to deal first with co-ownership, existence or possession and disposal or theft by Alfred of the assets set out in para 8 of the particulars of claim. Quantum, that is, the quantities and values of such assets, was to be dealt with at a later stage, except for the quantities of the assets set in sub-para 8(f) of the particulars of claim.

[60] The description of the assets in para 8 of the particulars of claim is set out in para 5 of the main judgment and is based on the evidence of Livanos and settlement agreement relating to Eleni's jewellery. The declaratory order sought is in respect of the assets identified and described in para 8 of the particulars of claim. Therefore co-ownership and the existence of these assets as at the death of Peter on the 9 February

2003, as well as the possession and disposal thereof by Alfred are capable of being separated from the quantum issue, that is, from the issue of what the quantities and values of the assets listed in para 8 of the particulars of claim were. Once the issue relating to co-ownership, possession and disposal of the assets in question is disposed of in favour of the appellants, there will be no need to go into any issue other than that relating to the quantities and values of such assets. I am therefore unable to agree that the trial court proceeded on an unrealistic basis.

[61] At the start of the trial, the parties elected not to lead evidence on the quantities and values of the assets except for quantities of assets set out in sub-para 8(f) of the particulars of claim. It would therefore be premature to come to the conclusion that the appellants would not be able to establish the quantities and values of the assets set out in para 8 of the particulars of claim during the second stage of the trial.

[62] The court below having heard evidence dismissed the appellants' action on the limited issues placed before it. It rejected Livanos' evidence and stated that it lacked credibility and corroboration. The appellants appeal against these findings.

[63] The appellants' cause of action is based on the principle of *actio ad exhibendum* and *actio furtiva*. The appellants are relying on *actio ad exhibendum* as an alternative to *actio furtiva* principle. The action *ad exhibendum* is a delictual action which is instituted as an alternative to *rei vindicatio*. It enables a plaintiff to claim damages from an erstwhile possessor of the plaintiff's property.[9]

---

[9] *Frankel Pollak Vinderine Inc v Stanton NO* 2000 (1) SA 425 (W).

[64] In an *ad exhibendum* action, the plaintiff must allege and prove that:

(a) the plaintiff is or was the owner of the property concernedwhen such property was alienated by the defendant;[10]

(b) the defendant had been in possession of the property;[11]

(c) the defendant's loss of possession was *mala fide*. This will be the case if, at the time of the loss of possession or destruction, the defendant had knowledge of the plaintiff's ownership or claim to ownership of the property.[12] A defendant who disposes of a plaintiff's property after the institution of an action in which the plaintiff relies on alleged ownership is *mala fide*;[13]

(d) the defendant intentionally disposed of the property or caused its destruction intentionally or negligently.[14]

[65] The appellants sufficiently pleaded *actio ad exhibendum* but also pleaded theft to bring in *actio furtiva* as a further cause of action. In paragraph 13.1.1 read with paragraph 13.1 of their prayers they asked for an order declaring that they have a valid claim against the estate of the late Alfred in the amount of R44 737 500 together with interest thereon at the prescribed rate. The relief sought in the court *a quo* is not for the return of the assets, but rather the value thereof. The very basis of liability

---

[10] *RMS Tranport v Psicon Holdings (Pty) Ltd* 1996 (2) SA 176 (T) at181.
[11] *Frankel Pollak Vinderine Inc. v Stanton NO, supra.*
[12] *Vulcan Rubber Works (Pty) Ltd v south African Railways & Harbours* 1958 (3) 285 (A).
[13] *Philip Robison Motors (Pty) Ltd v NM Dada (Pty) Ltd* 1975 (2) SA 420 (A).
[14] *Ibid.*

in the *actio ad exhibendum* is bad faith or knowledge of tainted title.[15] It runs counter to common sense and the *actio ad exhibendum* principle to hold that it is a sufficient cause of action for the plaintiff to allege that he or she is the owner of an article and that the defendant was at one time in possession of it, although he is no longer in possession of it because he has disposed of it or it has been destroyed.[16] It would seem to follow that bad faith on the part of the defendant in such cases is a necessary ingredient of the owner's cause of action for recovery of the value of the property and must be alleged and proved by him.[17] The general principle to be applied when an owner sues a defendant in an *actio ad exhibendum* for the payment of the value of the owner's property which was formerly in the defendant's possession, but which he is unable to restore because of his having ceased to possess the property, is that the onus is on the plaintiff to allege and prove that, at least at the time of the defendant's loss of possession, he had knowledge of the plaintiff's ownership or of his claim to ownership of the property.[18]

[66] In the case of *Alderson* cited above, Botha J as he then was, extensively referred to the work of *Voet* using Gane's translation. Fraudulent possession and loss thereof was considered. In section 6.1.32

---

[15] See *Morobane v Bateman* 1918 AD 460 at 466.
[16] See *Alderson & Flitton (Tzaneen) (Pty) Ltd v E G Duffeys Spares (Pty) Ltd* 1975 (3) SA 41 (T).
[17] *Ibid* at 46 C-D.
[18] *Ibid* at 48 G-H.

Voet stated that a defendant who has ceased to possess by fraud is liable to make good the value of the thing to the owner.[19] Similarly, *Voet* indicated in section 6.1.33 of his work that 'the value of the property must be restored by a possessor in bad faith who has ceased to possess through negligence before joinder of issue, but that a possessor in good faith is only liable in the event of a negligent loss of possession after joinder of issue since, *by such joinder, he has been placed in a position of bad faith.*' In 6.1.34 he goes on: '[*H*]*e who indeed possesses in bad faith*, but is not a robber, ought only to make good the loss of the thing *in the case where it would not have perished in the same way in the hands of the plaintiff, as when perchance he shows that he would have sold it off'*.[20] (Emphasis added.) It was argued on behalf of the plaintiff in that case that by virtue of the reference therein, to *litis contestatio,* the *actio ad exhibendum* was intended to apply only to cases *where there had been a formal demand*, or a summons for delivery of possession before the property was destroyed.

[67] Coming back to the rejection of Livanos' evidence by the trial court, it found that: he waited for a period in excess of four years before he related the incident of 6 September 2003 to the first plaintiff, that he failed to offer an explanation for the delay and that the effect of his

[19] *Ibid* at 50 H.
[20] *Ibid* at 51 B-C.

silence was to deny the late Alfred an opportunity to defend himself in respect of his alleged conduct at Mercantile Bank. It also found that Livanos contradicted himself with regard to the Rolex watches taken by the late Alfred and that he did not explain how it was possible to observe the conduct of the late Alfred at the bank. The trial court concluded that Livanos was not a credible witness and that it would be dangerous to rely on his testimony without any corroboration.

[68] Perhaps some comment is appropriate regarding the required approach to evidence. The correct approach to evaluating evidence is to weigh up all relevant facts which point towards probabilities and improbabilities on both sides and, having done so, determine on whose side the balance of probabilities weigh heavily. This requires consideration of inherent strengths and weaknesses in the evidence of each witness. The trial court, in rejecting Livanos's evidence, found that his evidence was beset with some unexplained difficulties.

[69] Generally, the trial court has advantages which the court of appeal does not have in observing and hearing the witnesses and in being steeped in the atmosphere of the trial. Not only does it have the opportunity of observing their demeanour, but also their appearance and their

personalities. Consequently the appeal court is very reluctant to upset factual findings of the trial court.[21]

[70] It should be borne in mind that it is the duty of the court of appeal to overrule a conclusion of a court of first instance on a question of fact when, notwithstanding the disadvantages from which it suffers as compared with the court of first instance, it is convinced that the conclusion to which the latter court has come is wrong.[22] The truthfulness or untruthfulness of a witness can rarely be determined by demeanour alone, without regard to other factors including, especially, the probabilities. A finding based on demeanour involves interpreting the behaviour or conduct of the witness while testifying. A further and closely related danger is the implicit assumption, in referring to the trier of facts findings on demeanour, that all triers of fact have the ability to interpret correctly the behaviour of a witness, notwithstanding that the witness may be of a different culture, class, race or gender and someone whose life experience differs fundamentally from that of trier of fact.[23]

---

[21] *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 705-706.
[22] *Mine Workers' Union v Brodrick* 1948 (4) SA 959 (A) at 970.
[23] See *President of the Republic of South Africa and Others v South African Rugby Football Union & others* 2000 (1) SA 1 (CC) at 43; see also *Allie v Foodworld Stores Distribution (Pty) Ltd and Others* 2004 (2) SA 433 (SCA).

[71] It is apposite at this stage to consider Livanos' evidence in order to determine whether it was corroborated or not. I propose to commence with the conduct of the late Alfred at the bank. In this regard the evidence of Livanos does not stand alone.

[72] Subsequent to the burglary at Mercantile Bank on 2 June 2004, Alfred was requested by the Bank to provide the contents of the safety deposit boxes A8 and A10 as at 2 June 2004. He deposed to an affidavit which is quoted in para 42 of the main judgment and I do not find it necessary to repeat the quotation. I comment later in para 90 on what is stated in para 42 of the main judgment. It suffices for now to state that an affidavit deposed to by Alfred corroborates Livanos' evidence in two respects. First, the existence of an inventory or expectation of an inventory from Livanos. Second, the removal of the bulk of the assets from the two safety deposit boxes. This is a very material corroboration. Alfred, in the affidavit, can only be referring to the events of 6 September 2003. The conduct of the late Alfred on that day was further confirmed by the first respondent. Under cross-examination she indicated that Captain Fourie had confirmed to her that 'stuff' was removed from the safety deposit boxes on 6 September 2003.

[74] In so far as Livanos' ability to observe the late Alfred's conduct at the bank is concerned, in my view, this should be seen in the context of the corroboration already outlined in the preceding paragraphs. But even more importantly the evidence suggests that when the items were removed from the safety deposit box A8 and put in a bag, Livanos was there. He was able to observe everything that happened. His evidence with regards to what the late Alfred did is not contradicted. His contemporaneous written notes also corroborate his evidence. He was stopped when he started writing down the list of the assets in the safety deposit box A8. At that stage, he had already written as follows:

'NCD

gold coins

cash

rings diamond.'

He then put a line across the inscription and waited until the late Alfred had finished removing items from the safety deposit box A8. The next inscription on the same page is a list of items that Livanos said remained in the safety deposit box A8. In this regard he stated during his oral evidence that he had already started writing 'NCD, gold coins, cash, rings, diamond' when he was stopped. By gold coins he was referring to the Kruger Rands, some of which were removed from the safety deposit box A8 and were contained in a half size shoe box.

[75] Livanos' testimony was further corroborated by the discovery of the Kruger Rands and jewellery at the home of the late Alfred. The negotiable certificates of deposit were also cashed after the events of 6 September 2003 and thus confirm the existence and removal thereof from the safety deposit box A8. Therefore, the contention by counsel for the respondents in surpport of the trial court's ruling that there was no corroboration of Livanos' evidence cannot be sustained. The trial court erred in its conclusion.

[76] It is also not correct that Livanos offered no explanation for waiting until after the death of the late Alfred before he could tell the first appellant about the events of 6 September 2003. Livanos was approached by the first appellant for information. Livanos explained the reasons for the delay as follows:

'Immediately after we left his house I started to think about this and the penny started to drop what was going on here. Because I know that that was not my mandate and my attorney and Mr Slomowitz were waiting, Mr Limberis, they were all waiting for me, they trusted me to go and give an inventory and how do I do it? How do I go and, there was no ways I was going to be part and parcel of this whole thing, and that is why when I finally withdrew from the matter it was the easiest way out for me just to rather say I am not acting in this matter, cut me out, I am not involved, he must now discuss work with Mr Christelis, I was not prepared, I never gave the inventory to Mr

Melamed, I never said anything, I just withdrew because it was not my because in the first place it was out of confidence that Mr Christelis, whatever he did rightly or wrongly, I did, and I was not going to disclose that to anybody else. The only person I told about it, I never gave anybody these documents, is that I, finally when I met with the two children I told them everything what had happened and that is when I said to them, I am telling you please, I am saying please you better do something, you better, you better go in and try and do something about this because this, and I told them what had happened with their father.'

[77] I find nothing wrong with this explanation. But even more importantly, further during his evidence when he was asked why he did not report the incident of 6 September 2003 whilst Alfred was still alive he stated:

'… I did not feel at that stage I had to keep, because I mean, I had a, obviously I could not do it to anybody else while Lefty was alive because he trusted me and that, but when Lefty had passed away then I (indistinct) told him what happened. All the documents I had I gave to Nicky.'

The explanation that he did not want to expose the late Alfred whilst he was still alive brings to an end the speculation why Livanos decided to hand over the inventory to the first appellant after the death of Alfred. What would he gain from falsely implicating the late Alfred? I cannot think of any. Therefore the imputation that he wanted to hit back at the late Alfred is not based on any facts. If indeed he wanted to, he would

surely have disclosed these events to the first appellant whilst Alfred was still alive.

[78] The court below also took the view that the delay in disclosing the events of 6 September 2003 was suspicious. I do not think that the criticism is justified. A week after the events of 6 September 2003, Livanos told the children of the late Alfred about the existence of the jewellery in the safety deposit boxes, as well as the existence of an inventory regarding the jewellery, but refused to show them. He told them about the removal of the assets from the safety deposit box. Although the latter fact is denied by the respondents, it must be seen in context. The respondents are not neutral to the dispute. Finding against the appellants will benefit the respondents because there will be no claim against their father's estate. Livanos told the respondents of the events of 6 September 2003 because they are Alfred's children. The chances of exposing Alfred through his children were minimal if not zero. Livanos confided in them on this basis. It makes sense why Alfred was angry when told that the children had spoken to Livanos. He was a very secretive person who shared nothing with his family about his business activities. In my view, no adverse inference should have been drawn against Livanos as a witness in this regard.

[79] The evidence of Livanos is very material to the existence of the assets listed in para 8 of the plaintiffs' particulars of claim. The list of jewellery in para8(f) is based on Livanos' evidence as to the assets which remained in the safety deposit boxes A8 and A10 on 6 September 2003. The assets listed in sub-paras 8(a) to (d) are the assets Livanos says were removed from safety deposit box A8 on 6 September 2003. Eleni's jewellery in sub-para 8(e) of the particulars of claim refers to the assets that the late Alfred confirmed to have had in his possession and undertook to hand over for sharing with the appellants.

[80] The critical question before us is the co-ownership and existence or possession of the late Alfred's assets listed in para 8 of the particulars of claim as at 9 February 2003. The trial court correctly found that a partnership existed between the twins. The evidence in my view is also overwhelming that the twins during their lifetime co-owned diamonds, Kruger Rands and negotiable certificates of deposit (NCDs), all or part of which were sometimes referred to as 'hard assets'. This is also supported by the evidence of Mr Van Vuuren and Mr Tzouras. It is clear from the undisputed evidence of Mr Tzouras that he introduced the twins to the trade of diamonds in 1976. He sold 'top quality diamonds' to the twins. Mr van Vuuren on the other hand was employed by the twins for many years until 1984. He also confirmed that the twins bought Kruger Rands.

The cash that was accumulated from the sweet and confectionary factory was kept either in the safe or strong room. The diamonds and Kruger Rands were purchased out of the cash kept in the strong room.

[81] The next question that has to be answered is: could the late Alfred have acquired 'the hard assets' which were in the two safety deposit boxes on 6 September 2003 after the death of his twin brother? The probabilities negate this. The first appellant was not happy with the will. On 23 February 2003 the late Alfred signed the refusal to adiate. The following morning he reneged from it. He branded the first plaintiff a crook who was trying to rob him of his share in the partnership assets. From there the relationship was terribly strained. There is no evidence that he purchased any of 'the hard assets' between 9 February 2003 and 6 September 2003. Therefore the assets that are listed in para 8 of the particulars of claim should have been in existence and co-owned as at 9 February 2003. This should include the negotiable certificates of deposit which Livanos had seen on 6 September 2003. Mr van Vuuren also confirmed the existence of the negotiable certificates of deposit. He became aware of their existence when he was still working for the twins. From time to time, on maturity dates, renewals were activated. The late Alfred had cashed some of the instruments after the death of the late Peter. He is the only one who had keys to the safety deposit boxes.

Therefore the contention that there was no evidence that he possessed the assets listed in para 8 of the particulars of claim after the 9 February 2003 ought to be rejected.

[82] I am therefore satisfied that the assets referred to in sub-paras 8(a), (b) and (c) of the particulars of claim were co-owned and the late Alfred was in possession of or in control of such assets as at 9 February 2003. The quantities and values of the assets listed in sub-paras 8(a), (b) and (c) of para 8, is not an issue before us and ought to be the subject of further hearing in the court a quo.

[83] The assets in sub-para 8(d) are three Rolex watches. During argument it was conceded that the appellants have not proved that they were co-owned. The concession should dispose of the issue relating to the Rolex watches. The contradictions, if any, regarding the Rolex watches, is in my view, not so material as to reject the whole of Livanos' evidence which is materialy corroborated by other independent evidence.

[84] As regards Eleni's jewellery listed in sub-para 8(e) of the particulars of claim, on 14 April 2005, the late Alfred and the first appellant entered into a settlement agreement which was made an order of the court. Of relevance, the parties acknowledged and recorded that

Eleni’s jewellery belonged to the estate of the late Peter N Christelis and Alfred Christelis in equal share. It was further recorded that the parties shall take all such steps and do all things necessary in order to procure the equitable separation and division of the jewellery as to 50% to the estate of the late Peter and 50% to the late Alfred. The existence of these assets as at 9 February 2003 was never an issue. Eleni’s jewellery as agreed consisted of 20 diamond rings and at least six gold and diamond brooches with a reputed value at the time of between three and five million rands. These were acquired and co-owned long before the death of Peter. After the death of Peter, the late Alfred before his death confirmed on a number of occasions the existence of Eleni’s jewellery to be in his possession. He, however, failed to hand them over for distribution or disclose their whereabouts. Despite court orders obtained against him, the late Alfred still failed to produce Eleni’s jewellery for distribution. It was only after the execution of the court order that very few items of jewellery forming part of Eleni’s jewellery were found. The suggestion made by the respondents’ counsel that there was no sufficient evidence that such assets were co-owned cannot be correct. I therefore see no basis to decline to make an order as proposed regarding Eleni’s jewellery.

[85] The quantity of the assets listed in sub-para 8(f) is an issue before us. The inventory of what was kept in the safety boxes A8 and A10 also

contained the quantities of items so listed. Livanos prepared the list contemporaneously. His evidence with regards to the quantities was not materially challenged, neither was there any evidence to refute the list and the quantity. I therefore have no difficulty in finding that the quantities of the assets are as set out in the inventory. The value of the assets is not an issue before us.

[86] Regarding the disposal of the assets with the knowledge of the appellants' claims, the conduct of the late Alfred falls squarely within the principles of the *actio ad exhibendum*. On receipt of a letter of demand dated 10 July 2003, he caused his daughter under very strange circumstances to rent in her name a safety deposit at Mercantile Bank. He introduced her to the bank officials as the person who would assist him. He however did not give the key to his daughter and thus placed himself in control of the safety deposit box. On 6 September 2003 he removed the diamonds and Kruger Rands. He also stopped Livanos from making a full list of items in the safety deposit box A8. He paid Captain Fourie R10 000, apparently for his silence. He instructed Livanos and Fourie not to tell anyone about what they had witnessed. Two weeks thereafter, he offered Livanos a diamond, apparently in exchange for the incomplete inventory. Efforts to retrieve the jewellery, including Eleni's jewellery, was a challenge. Despite court orders he failed to account for these assets.

When the sheriff executed, very few items were found. For example, Livanos spoke about more than 500 Kruger Rands and only 185 were recovered. Mr van Vuuren, who worked for the twins for many years, spoke about 1 000 Kruger Rands. Livanos spoke about diamonds in a box half the size of a shoe box, which was full to the brim, but far less was recovered.

[87] There can be no doubt that he removed the diamonds, other jewellery and Kruger Rands from the safety deposit boxes so that they cannot be shared as part of the partnership's assets. He was fully aware of the appellants' claims thereto.

[88] He cashed the negotiable certificates of deposit. He was fully aware of the plaintiff's claims thereto yet he did not offer to share the proceeds thereof with the appellants. He should therefore be found to have disposed of the negotiable certificates of deposit, the balance of the Kruger Rands, Elini's jewellery and the diamonds, with the knowledge of the claims thereto by the appellants.

[89] As regards the assets listed in para 8(f) of the particulars of claim, they were left in the two safety deposit boxes on 6 September 2003. On 2 June 2003 a burglary occurred at the bank. The items were stolen. Theft

and or disposal thereof cannot be attributed to the late Alfred nor can it be said he took the risk by keeping the said assets in the safety deposit boxes. Therefore the declarator sought based on theft or disposal with the knowledge of the appellants' claims with regards to assets listed in sub-para 8(f) of the particulars of claim cannot succeed. Alfred was a very unreliable person. His daughter said so. The fact that he removed the assets from the safety box or boxes is proof that he was capable of disposing the assets in question like he did with the negotiable certificates of deposit which he cashed. I find it unnecessary to deal with the appellants' cause of action based on the *actio furtiva* principle. It suffices to mention that the conduct of Alfred with regards to the other assets removed from the safety deposit boxes satisfies the requirements for a claim based on the *actio furtiva* principle.

[90] I cannot agree that the statement quoted in para 42 of the majority judgment refers only to the 'cash amount' being item 3 in the statement. At the end of item 3, there is a full stop. The 'bulk of which was in the two lockers were withdrawn prior to the forced entry on the 2nd June 2004' is a sentence on its own starting on a separate paragraph below item 3. The subject concord 'was' in the statement should be understood to be referring to the 'bulk' of assets in the two lockers which were

withdrawn or removed prior to the forced entry. There is no evidence that there was cash in the other locker or the safety deposit box A10. Livanos spoke of cash in the safety deposit box A8, some of which was removed. Therefore, '… were withdrawn…' in the statement can only be referring to other assets of kinds of assets listed in items 1, 2 and 3 of the statement. The statement should be read and understood in the light of the other evidence. For example, Fourie confirmed to the first respondent that 'stuff' was removed from the safety deposit boxes on the 6 September 2003. This corroborative evidence regarding the removal of assets from the safety deposit boxes on 6 September 2003 cannot be ignored.

[91] Livanos testified for the appellants. They came to court on the basis that there was a meeting on 9 August 2003. Therefore the discussion regarding the meeting of 9 August 2003 referred to in para 20 of the main judgment should be accepted as alluded to by Livanos. In all probability the parties trusted Livanos. In fact Livanos says so, as stated in the quotation in para 76. It was therefore not necessary for the appellants to insist on another person to accompany Livanos and Alfred to the Bank. The presence of Fourie at the Bank on 6 September 2003 was confirmed by Fourie himself to the first respondent. Why he was there, one can only rely on the evidence of Livanos.

[92] There was no evidence that the physical disability of Alfred was such that he could not have taken scoops of Kruger Rands and carried the pilot bag as explained by Livanos. The exact or approximate weight of the bag, in my view, is not based on any reliable evidence and will amount to drawing conclusions without evidence to find Livanos unreliable in this regard.

[93] Livanos did not intervene or question Alfred at the Bank. He did not, because, whilst puzzled, he also thought the full inventory would be done at home. When that did not happen, he decided to distance himself from Alfred's conduct. Alfred was a co-owner of the assets. To suggest that Livanos and Fourie should have stopped him, would be to place an enormous and difficult task on them. Alfred was not an easy person to deal with. His daughter said so. Secondly, failure to question Alfred about the need to carry the pilot bag is not relevant or material to justify the rejection of Livanos's evidence. What is however relevant is that items were removed from the safety deposit box and put inside the pilot bag. There is no evidence to refute this assertion. The fact that the pilot bag could not be found should infact be seen as corroboration of the disposal or concealment of the assets in question.

[94] Concerning his declaration that the list of assets or inventory 'reflects a true and accurate inventory of the goods contained in the … box', he explained that that was with reference to what actually remained in the safety deposit boxes after Alfred had removed some of the assets. He refused to hand over the inventory to Alfred, because he knew that it was not complete. Livanos is not a legally trained person. To draw conclusions against evidence that is not reliably contradicted will amount to a wrong approach to evaluating evidence. I do not think that any adverse inference drawn against Livanos on the basis of his declaration is justified.

[95] As regards Livanos'failure to report to the legal representatives, it was Alfred who was obliged to account for the assets in the safety deposit boxes and not Livanos. So, if Alfred was unable to get an inventory from Livanos or Fourie, it was incumbent on him to report to the lawyers and not Livanos. Remember, Livanos got himself involved because he wanted to help Alfred. If Alfred by his conduct made it impossible or diffcult for Livanos to assist, he was entitled to distance himself as he did. Alfred in any event had access to the safety deposit boxes and he could have compiled another inventory if he wanted to.

[96] In the result, on a conspectus of evidence, the court a quo erred in dismissing the appellants' claim. It should have considered the corroborating evidence and concluded that the appellants had proved some of their claims. The appellants in my view have achieved substantial success on appeal. Accordingly, costs should follow the result.

[97] I turn now to consider the issue relating to the reserved costs of 10 May 2006. This relates to an application to separate the issues, postponement of the trial and an application to obtain the evidence of Tzouras on commission. Subsequent to the order to obtain evidence on commission, the evidence of Mr Tzouras was taken before Commissioner George Mavrikis in Athens, Greece on 17 May 2010. Both parties attended and participated in the proceedings.

[98] The evidence of Tzouras, in my view, was indeed relevant as it dealt with the possible existence of the diamonds. Secondly, it sought to dispel the suggestion that what Livanos said were diamonds could have been fake diamonds contained in some lucky packets. The appellants are therefore entitled to the reserved costs of the application in terms of rule 38(3) of the Uniform Rules of Court and the costs occasioned by the postponement of the trial in the court a *quo*.

[99] I have considered order 2 and 3 of the majority judgment. I agree with the displeasure expressed by Wallis JA and the order made. Rule 8 is not meant only for the convenience of the Court, but most importantly, to ensure the proper running of the proceedings and expeditious finalisation of appeals especially where the record is voluminous like in this case. A properly prepared bundle saves time. One does not have to read everything. The content of the core bundle is to be focused, dealing mostly with evidence and documents which are relevant to the issues only.

[100] I would have made an order upholding the appeal.

____

M F LEGODI
ACTING JUDGE OF APPEAL

Appearances

For appellant: C M Eloff SC (with him S Stein)

Instructed by:

Fluxmans Inc, Johannesburg;

Lovius Block, Bloemfontein.

For respondent: P L Carstensen (with him G Davids and A Schluep)

Instructed by:

Geo Isserow & T L Friedman, Johannesburg;

McIntyre & Van der Post, Bloemfontein.