A the case and the hearing of further evidence. The Legislature has provided the only remedy now available to them. It follows that this application should have been addressed to the State President.

The application for the amendment of the notice of motion referred to earlier in this judgment is refused.

B In the result the application is dismissed.

[On the application for leave to appeal the Court ruled as follows:]

Human AJ: Mr *Unterhalter* has applied for leave to appeal to the Appellate Division on the ground that I erred in dismissing the application to reopen C the hearing or to grant leave to hear further evidence to found the special entry referred to in the notice of motion as amended and he has referred me to the case of *R v Nzimande* 1957 (3) SA 772 (A) at 774 and 775 and to s 363 of the Criminal Procedure Act.

Mr *Van der Merwe* opposes the application and he also bases his opposition on the decision in *Nzimande's* case.

D I wish to refer only to the case of *R v Maharaj* 1958 (4) SA 246 (A) at 248G–H where the acting Chief Justice, Schreiner ACJ, said the following:

'The application now made to this Court like that made to the Natal Provincial Division is twofold covering both the request for a special entry and a prayer for E leave to appeal. Counsel for the applicant, in refraining from arguing that a special entry should be made, exercised a wise discretion. Since the fact that a Crown witness has committed perjury or suppressed the truth does not constitute any irregularity or illegality of procedure and is therefore not a proper ground for such an entry.'

And he refers to the case of *R v Thielke* 1918 AD 373 and *R v Sibande* 1958 F (3) SA 1 (A) at 5.

Secondly, Mr *Kuny* has argued that I wrongly decided that this Court has no inherent jurisdiction to hear further evidence or set aside its own decision. This is also opposed by Mr *Van der Merwe*.

I am of the view, assuming that this order that I have made is appealable G in terms of s 21 of the Supreme Court Act 59 of 1959, that there is no prospect of success on appeal and the application is therefore dismissed.

[An order further staying the execution of the applicants was granted, pending their petition to the Chief Justice for leave to appeal against the decision.]

H Applicants' **Attorneys:** *Krish Naidoo and Co*, **Johannesburg**; *S S Omar & Associates*, **Pretoria.**

CLIFFORD v FARINHA

A

WITWATERSRAND LOCAL DIVISION

CILLIERS AJ

1987 October 29, 30; November 23 1988 June 14

B

Delict—Condictio furtiva—*Remedy of not restricted to owner of* res *stolen—Defendant held liable to lessee of vehicle for loss of the vehicle on the basis that she, having wrongfully and intentionally withdrawn possession of vehicle from lessee and appropriated the possession and use thereof to herself, incurred the risk of the* C *vehicle being lost through a cause not attributable to her fault—Temporary taking of possession and use of a thing still to be regarded as falling within the scope of the* condictio furtiva.

The *condictio furtiva* is, in our law, a remedy not restricted only to owners of the *res* stolen. The *dictum* in *Minister van Verdediging v Van Wyk en Andere* 1976 (1) SA 397 (T) at D 400G not approved and not followed.

The temporary taking of possession and use of a thing, even though it has become obsolete as a common law crime, is still regarded as falling within the scope of the *condictio furtiva*.

The Court, in an action based, *inter alia*, on the *condictio furtiva*, held the defendant liable on the *condictio* where she had taken possession, without the consent of the E plaintiff, of a motor vehicle leased by the plaintiff and had used the vehicle, which was, during the time when the defendant was using it, stolen by a third person. The Court held that the basis of the defendant's liability was that she, having wrongfully and intentionally withdrawn possession of the vehicle from the plaintiff and appropriated such possession and use to herself, had incurred the risk of the vehicle being lost through a cause not attributable to her fault (in the present case, through the theft of the vehicle). The defendant was held liable for the agreed value F of the vehicle.

Civil trial in an action for damages for the **loss of a leased motor vehicle.** Facts not material to this report **have been omitted from the reasons for** judgment. G

B K Pincus for the plaintiff.
T W Beckerling for the defendant.

Cur adv vult.

Postea (June 14).

H

Cilliers AJ: On 6 February 1981 the plaintiff entered into a written agreement of lease with Barclays Western Bank Ltd in terms whereof the latter leased to the former a BMW motor vehicle, registration number FGW 502T ('the BMW'). In its terms the lease terminated on 5 February 1985. In terms of clause 4 of the lease, I

'(a)ll risk of loss, damage, destruction or otherwise in and to the goods or arising out of the hiring thereof shall pass to the lessee on delivery to the lessee or on signature hereof, whichever is the earlier . . .',

and the plaintiff undertook comprehensively to insure the vehicle and ensure that the lessor's interest is endorsed on the insurance policy. In J

terms of clause 11 of the lease, the plaintiff immediately upon loss of the vehicle by theft became liable to the lessor for the balance of rental payments in respect of the unexpired period of the lease.

The plaintiff and his family lived in Ferndale, Johannesburg. On Thursday 20 December 1984 the plaintiff and his family departed from Johannesburg for a vacation to San Lameer on the Natal coast.

The BMW remained at his Ferndale residence. The defendant, who was at the time the plaintiff's sister-in-law, had been visiting and staying with the plaintiff and his family for some four or five days prior to 20 December 1984. She remained in Johannesburg when the plaintiff and his family departed for their vacation. On Saturday 22 December 1984 at about 12h30 or 1 pm the defendant, accompanied by one Caretsos, drove the BMW and decided to park it in Tyrwhitt Avenue in Rosebank, Johannesburg. The physical act of parking was carried out by Caretsos because only a small parking space was available and he was apparently considered more skilful than the defendant to carry out the parking operation, but nothing turns on this fact. The BMW's windows were secured and the doors were locked. The defendant and Caretsos went into premises which were no further than some 10 or 15 metres from where the BMW had been parked. When they returned after a short while, the vehicle was no longer there: it had been stolen, and has not been found since.

Against this factual background, which will be amplified later, the plaintiff formulated his cause of action against the defendant in paras 3–7 of his particulars of claim as follows:

'3.1 The plaintiff is the lessee of a 528i BMW motor vehicle, registration number FGW 502T ("the vehicle") by virtue of a written contract of lease concluded between the plaintiff as lessee and Messrs Wesbank as lessor.

3.2 In terms of the said agreement the plaintiff bears the risk of loss and/or damage or destruction to the vehicle.

4. On or about 22 December 1984 and whilst the vehicle was parked at the plaintiff's premises the defendant unlawfully removed the vehicle and drove it away from the premises.

5. As at 22 December 1984 the value of the vehicle was the sum of R14 000.

6. The defendant has failed to return the vehicle to the plaintiff.

7. In the circumstances the defendant is obliged to return the vehicle to the plaintiff, alternatively, to pay to the plaintiff the value of the vehicle, namely the sum of R14 000.'

The plaintiff claimed an order that the defendant return the vehicle to him, alternatively, payment of R14 000 plus interest thereon at 20% per annum *a tempore morae*, and costs.

The defendant pleaded to para 4 of the particulars of claim as follows:

'The defendant admits that on 22 December 1984 she removed the vehicle from the plaintiff's possession and premises but denies that such removal was unlawful and puts the plaintiff to the proof thereof. The defendant further states that whilst the said vehicle was in her lawful possession it was stolen, a fact well known to the plaintiff.'

The denial that the removal of the vehicle from the plaintiff's possession and premises was unlawful was amplified in further particulars to the plea, by the further averment that:

'Authority was given to the defendant by plaintiff's wife. The keys were handed to defendant in front of the plaintiff.'

In his replication the plaintiff denied that such authority was given by the plaintiff's wife and, in the alternative, the authority of the plaintiff's wife to have given such authority was specifically denied.

During the trial the plaintiff amended his particulars of claim by adding to his original claim a first and a second alternative claim. Each alternative claim was founded on an alleged oral agreement in terms whereof the plaintiff agreed to and did hand over the BMW to the defendant for her use. The first alternative claim alleged that the oral agreement was consensually terminated on 22 December 1984. The second alternative claim alleged that it was a term of the oral agreement that the defendant would not be permitted to use a Mercedes Benz sports car of the plaintiff, that the defendant materially breached this agreement by using that vehicle, and that the plaintiff on 22 December 1984 cancelled the oral agreement. The relief sought in each alternative claim was the same as that sought in the original claim. In her plea to each alternative claim the defendant admitted the oral agreement, but denied the other allegations, and only in the alternative averred that the oral agreement was consensually cancelled on or about 22 December 1984. The defendant further averred that the BMW was stolen without fault on her part.

In the course of the trial the plaintiff conceded that the loss of the vehicle was not caused by any negligence on the part of the defendant. Because, as later appears, it is found that there was no oral agreement in terms whereof the defendant was entitled to use the BMW, the claims founded on such agreement, and raised only in the alternative to the main claim founded on an unlawful removal of the BMW from the plaintiff's possession, fall away.

Before adverting to the evidence, it remains to refer to the minute of the pre-trial conference held in terms of Rule 37. Paragraph 1 thereof reads:

'The defendant will admit the plaintiff's *quantum* in the sum of R14 000 and that the plaintiff is entitled to sue.'

Paragraph 4 thereof reads:

'Plaintiff will admit that, on 22 December 1984, the defendant reported to the South African Police that the BMW motor vehicle registration number FGW 502T had been stolen whilst parked in Rosebank.'

At the commencement of the trial, Mr *Beckerling*, who appeared for the defendant, but had not acted for her at the time of the pre-trial conference, submitted that it would be convenient to hear evidence only on the issue whether the BMW had been stolen and was no longer in the defendant's possession, and then decide whether the allegations in the plaintiff's particulars of claim founded a cause of action for the alternative claim of payment of R14 000 plus interest thereon. Mr *Beckerling* intimated that the thrust of his contentions would be that once it is proved that the defendant is no longer in possession of the BMW, the *rei vindicatio* was not available to the plaintiff, and that the alternative claim for a judgment

sounding in money was ill-founded because the *actio ad exhibendum* was not available to the plaintiff on the facts as pleaded, that the *condictio furtiva* did not lie at the instance of a lessee, and the *actio legis Aquiliae* was also not available in the absence of an allegation that the damage suffered by the plaintiff was caused by the fault of the defendant.

Mr *Pincus*, appearing for the plaintiff, resisted the intimated application for decision of the aforesaid limited issues principally on the ground that he sought to hold the defendant to the concession made in para 1 of the pre-trial minute, namely 'that the plaintiff is entitled to sue'. This concession, while not too clear in its terms, did appear to concede the plaintiff's *locus standi* to sue also for payment of the R14 000 plus interest thereon, and it appeared that this concession would have to be withdrawn before Mr *Beckerling* could raise the issues which he wanted separately decided in terms of Rule 33(4). Because of this difficulty, and the fact that the plaintiff had brought a witness from Durban, and because I anticipated having to reserve judgment on the arguments foreshadowed by Mr *Beckerling*, I decided, after hearing the witness from Durban, that the trial should proceed. In the course of the trial it was agreed between the parties that the words 'and that the plaintiff is entitled to sue' be deleted from para 1 of the pre-trial minute, and it was, as already indicated, later agreed that the plaintiff may amend his pleadings by introduction of his alternative claims, to which the defendant filed a plea in the course of the trial. In the event, and in view of the findings set out hereafter in regard to the evidence, the legal issues which Mr *Beckerling* wished to argue at an early stage were not removed by the evidence on the main claim or the alternative claims, and remain for decision at the end of the trial.

The only other matter of significance agreed at the pre-trial conference was recorded in para 2 of the pre-trial minute as follows:

> 'Plaintiff will admit that the BMW motor vehicle registration number FGW 502T was reserved principally for his wife's use but also that he was entitled to use the motor vehicle.'

As appears from the pleadings referred to above, it is not disputed that the defendant removed the BMW from the plaintiff's possession and premises in December 1984. The defence to the allegation that this was unlawfully done was that the defendant removed the vehicle with the authority 'given to the defendant by plaintiff's wife'. Presumably this allegation in the further particulars to the plea was intended to convey that the plaintiff's wife was authorised by the plaintiff to give such authority to use the BMW. The further allegation that 'the keys were handed to defendant in front of the plaintiff' is also wide enough to cover authority to use the BMW given by the plaintiff himself. If either of these bases of authority to use the BMW were accepted, the main claim, founded on unlawful removal of the vehicle, would fail. If neither of these bases of authority to use the BMW was accepted, the legal issue whether the plaintiff was entitled to claim the value of the vehicle as at 22 December 1984 from the defendant would arise. I point out that the admission of the *quantum* of the claim in para 1 of the pre-trial minute must, read with para 5 of the particulars of claim, be read as an admission that the loss caused to the plaintiff by the alleged unlawful removal was the value of the vehicle as at 22 December 1984.

During argument at the end of the trial, counsel for both sides intimated their agreement that, if the defendant were held to be liable to the plaintiff, judgment in the capital sum of R14 000 should be entered for the plaintiff.

I now turn to an analysis of the evidence in order to make a finding on the issue of whether the defendant was given consent to use the BMW.

The defendant alleges that, in the early afternoon of 20 December 1984 she was given consent to use the BMW immediately before the departure of the plaintiff and her sister to San Lameer. The plaintiff disputes this. It is therefore necessary to refer to events both before and after this occasion, since the whole sequence of events bears on the probabilities of what happened on the occasion when such consent was alleged to have been given.

[The learned Judge then analysed the evidence and continued.]

In the result, on the crucial issues of whether the defendant had, or believed that she had, the authority of the plaintiff to use the BMW at the time when she drove the vehicle to Rosebank where it was stolen, it is found that she neither had such authority nor believed that she had such authority.

It is now necessary to consider whether, on the facts as found, the plaintiff is entitled to recover damages in the agreed capital amount of R14 000 from the defendant. The salient factual features, which led to much debate on whether the plaintiff has any cause of action, may be summarised as follows. First, the plaintiff was at the material time not the owner but the lessee of the vehicle; secondly, the defendant removed the vehicle from the possession of the plaintiff without any authority to do so, but also without any intention to cause the plaintiff any damage (any claim for damage arising out of depreciation by use of the vehicle being disavowed by plaintiff's counsel); thirdly, the proximate cause of the loss of the vehicle was the theft thereof by a third party in circumstances were no fault is alleged or attributable to the defendant.

The *rei vindicatio* is not available to the plaintiff because the vehicle was not in the defendant's possession at any time after the theft thereof on 22 December 1984 (*Vulcan Rubber Works (Pty) Ltd v South African Railways and Harbours* 1958 (3) SA 285 (A)). The remedy known as the *actio ad exhibendum* is also not available to the plaintiff since the defendant was not alleged nor proven voluntarily to have parted with possession of the vehicle (see *Alderson & Flitton (Tzaneen) (Pty) Ltd v E G Duffeys Spares (Pty) Ltd* 1975 (3) SA 41 (T) at 47H), and the loss thereof was also not alleged nor proven to have been caused intentionally, or indeed negligently (*ibid* at 51E–F). Mr *Beckerling* further argued that, in the absence of any allegation or proof that the loss of the vehicle was caused by the fault of the defendant (on the contrary, the plaintiff conceded that the defendant had not been negligent in having the vehicle parked at the place and in the manner where it was parked in Rosebank or in regard to the theft thereof by a third party), no case for Aquilian liability has been made out. Of course, the allegation that the defendant had 'removed the vehicle and drove it away from the premises' of the plaintiff necessarily connotes that this conduct was intentional, and such intentional conduct constituted an

invasion of the plaintiff's rights of possession of the vehicle, but this intention of the defendant was not directed at causing the plaintiff the loss of the vehicle. In regard to the required *nexus* between the intention of the wrongdoer, the *actus reus* itself and the consequences of the act of the defendant, for the founding of a claim on Aquilian grounds, Boberg in *The Law of Delict* vol 1 (1984) at 272 states:

'Though it is common to speak of an intentional "act", this is a misnomer. Delictual liability is predicated not upon "acts", but upon consequences, and the fault must relate to producing the consequence for which the actor is sought to be held liable. Thus liability founded on intention can arise only where the actor's will was directed at producing the particular consequence of which the plaintiff now complains.'

Of course the reference to 'the particular consequence' must be understood in conjunction with various considerations relating to the kind of harm, the extent of the harm, and the manner in which the harm occurs, and the considerations of causality and remoteness which come into play in founding delictual liability—as dealt with by the same author in chaps 3 and 4 of the work referred to above. The difficulty experienced by the plaintiff in establishing Aquilian liability on the facts of the present case is that the defendant's intentional acts—the unauthorised removal of the vehicle from the possession of the defendant, and the unauthorised use thereof—were not intended to cause the loss of the vehicle, while the act which proximately caused the loss of the vehicle—namely the theft by a third party—was not attributable to any fault on the part of the defendant.

In addition, there was the question whether a claim based on Aquilian liability had been sufficiently pleaded. For the reasons that follow, I do not find it necessary to decide whether the aforesaid requisites for founding a claim based on Aquilian liability have been established. There are many examples in our law where damages have been awarded for wrongful interference with possession, but cases where the damage flowing from wrongful interference with possession was directly causally connected with the act of the wrongdoer are not in point in the present case. Thus no assistance in the present case is derived from decisions such as *Erasmus v Mittel and Reichman* 1913 TPD 617 (a case based on damage negligently caused to property in the possession of the plaintiff) and *Matthee v Schietekat* 1959 (1) SA 344 (C) (a case based on intentional deprivation of possession of land).

All the requisites for holding the defendant liable under the main claim have been established. It should be expressly stated that the basis of the finding that the defendant is liable to the plaintiff, is a basis which does not involve causally relevant fault as usually required in the Aquilian context. By this is meant an acceptance that there was, in the present case, not a sufficiently close legal *nexus* between the fault of the defendant (which consisted of intentionally removing the vehicle from the possession of the plaintiff and using it) and the loss of the vehicle due to the theft by a third party to found Aquilian liability. Yet the fault of the defendant in intentionally and wrongfully withdrawing the vehicle from the plaintiff's possession remains relevant to the issue of her liability, as will be indicated hereinafter.

The basis of the defendant's liability is that she, having wrongfully and intentionally withdrawn possession of the vehicle from the plaintiff and appropriated such possession and use to herself, incurred *the risk* of the vehicle being lost through a cause not attributable to her fault. There is direct authority for this basis of liability. *Voet*, in 13.1.2, dealing with the *condictio furtiva*, states:

'Moreover the action for the recovery of stolen property is a personal action. Not merely was it brought to meet the personal case of wrongdoing; but rather was it granted and did it arise from and depend upon the actual infamous wrongdoing of theft. On the side of the plaintiff it is an action for the recovery of property. On the side of the defendant it is penal, insofar as judgment is given against the person sued in this action though nothing has reached his hands out of the property stolen, or it has perished by accident. It is open only to an owner.'

(*Gane's* translation.) The last sentence of this section is, as will be pointed out hereunder, later qualified by *Voet*.

And in s 6 of the same title, *Voet* states:

'It seems that he who originally handled the property against the will of the owner is always in default in regard to the restoration of a thing which he ought never to have removed.'

Since the thief is considered always to be in default in restoring the owner's property—*D* 13.1.8: *semper enim moram fur facere videtur*; and *D* 13.1.20: *qui primo invito domino rem contrectaverit, semper in restituenda ea*—the risk of accidental loss remains on him. Such accidental loss lacks the element of causally related *culpa* required for Aquilian liability, and has been referred to as 'skuldlose deliktuele aanspreeklikheid' (Beyleveld *Tydskrif vir die Suid-Afrikaanse Reg* 1977 at 187). But the imposition of such liability on the thief is not contrary to the principles of our law: the '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 the obligation 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 (see De Vos '*Mora Inculpata*' 1968 *Tydskrif vir Romeins-Hollandse Reg* 111 at 113 *et seq*), or as simply arising from the delict (Van Zyl Steyn *Mora Debitoris* at 72), the thief is in any event regarded as being in default (*Voet* 22.1.27, where the thief's default is classified under *mora ex re*), and the obligation to restore

'is perpetuated even after the accidental destruction of the thing, unless it would have perished in the same way in the hands of the creditor . . .'.

(*Voet* 22.1.28—*Gane's* translation.) The rule that the thief carried the risk of accidental loss was also applied in the Roman law—see *D* 13.1.20 and *D* 13.1.8.1—and it is also the position in modern German law. (See Andreas Wacke '*Casum sentit dominus*: Liability for Accidental Damages in Roman and Modern German Law of Property and Obligations' (1987) 3 *Tydskrif vir die Suid-Afrikaanse Reg* 318 at 325–6.) Thus, although the causal connection between the fault and the loss as required in Aquilian actions may not be present, the liability of the thief for accidental loss is not entirely causally unrelated to fault: the thief was guilty of *dolus* when he unlawfully dealt with the thing. Where there was no causal connection between the theft and the loss or damage, because the thing would in any

event have been lost or damaged, the law was apparently prepared to allow this circumstance as a defence (see D J Joubert '*Casum sentit dominus*: Liability for Accidental Damages in Roman-Dutch and Modern South African Law' (1987) 3 *TSAR* 332 at 334, quoting *Voet* 6.1.34 who in this book deals with vindication of things, and in s 34 of title 1 deals with claims in respect of things lost or damaged by accident). Since, in the present case, there is no suggestion that the vehicle would in any event have been lost if the defendant had not removed it from the plaintiff's possession and used it, it is unnecessary to consider whether this exception to the liability of the thief for accidental loss or damage applies in our law.

The rule *fur semper in mora*, and the liability of the thief for accidental loss or damage, applied not only to the thief who appropriated the *res* itself, but also to the person who—such as the present defendant—merely wrongfully withdraws a thing from the possession of another and uses it while intending to restore possession after the use thereof. When regard is had to the ratio for the rule *fur semper in mora* as indicated above, there is also no reason to exclude a person in the position of the defendant from the operation of the rule. *Voet* 13.1.7 expressly states that the *condictio furtiva* applies in such circumstances:

> 'Whether the theft wreaked was one of proprietorship or one of use or possession . . . makes no difference to the possibility of this action being available.'

(*Gane's* translation.) A question that arises is whether the temporary taking of possession and use of a thing should in our modern law—when it has become obsolete as a common law crime (*R v Sibiya* 1955 (4) SA 247 (A))—still be regarded as falling within the scope of the *condictio furtiva*. Nothing in *R v Sibiya* (*supra*) militates against an affirmative answer to this question; indeed at 256C–D Schreiner ACJ says:

> 'I do not think that one is entitled to assume that it was a crime merely because it is and was at all material times a delict and because no authority says specifically that it was not a crime.'

Moreover, there is nothing to indicate that the Roman-Dutch writers to whom I have been able to refer, in dealing with civil actions based on theft in its various manifestations, considered a civil claim to be dependent on the particular manifestation of theft also being a crime. In *Smit v Saipem* 1974 (4) SA 918 (A) at 929 Jansen JA, in tracing the history of the *actio furti* and the *actio legis Aquiliae*, states:

> 'Daar kan dus aanvaar word dat toe De Groot sy *Inleiding* geskryf het, daar weinig verskil was tussen die *actio furti* en die *actio legis Aquiliae*—beide was bloot skadevergoedingsaksies. . . . Dit kan dus geen groot sprong gewees het toe *De Groot*, met sy gawe vir sintese, die Romeinsregtelike onregmatige dade soos diefstal en saakbeskadiging saamvoeg tot "misdaed tegens goed" en 'n verhaalsreg aan "die 't goed aengaet" toeken nie.'

The reference to the *actio furti* is to an action based on theft, which in substance was the reipersecutory *condictio furtiva* (if one wishes to use labels for actions, which *Groenewegen* considered as out of date in his time), because the Roman *actio furti* was already obsolete in *De Groot's* time. The point is that *De Groot* 3.37.1–6 deals with an 'algemene skadevergoedingsaksie', which includes actions based on theft and

Aquilian actions, and the question of civil liability is treated independently of whether the delictual conduct also constituted a crime. This is also apparent from Van der Keessel *Praelectiones* 3.2.37.1:

> 'Misdaad tegens goed. Onregmatige dade teen goed is alle handelinge waardeur die goed, teen die sin van die belanghebbende party, verlore gaan, verwyder word of beskadig word, of hulle nou in die Romeinse reg onder die klas private delikte of onder die groep publieke delikte tuisgebring word, en of hulle nou met opset of as gevolg van nalatigheid gepleeg word. Hulle word almal hier deur *De Groot* slegs in soverre oorweeg as daar aan die party wat skade gely het, uit hoofde daarvan 'n aksie vir die vordering van skadevergoeding verleen word, sonder enige beskouing van daardie kenmerkende karaktertrek waardeur hulle elkeen afsonderlik in die strafhof onderskei word, of van die openbare boete waarmee hulle besoek word.'

(Translation by Professor *Gonin* of D G van der Keessel *Voorlesinge oor die Hedendaagse Reg na aanleiding van De Groot se 'Inleiding tot de Hollandse Rechtgeleerdheyd'*, published by Van Warmelo, Coertze and Gonin.) Hence it is concluded that the modern decriminalising of certain acts earlier constituting theft (*R v Sibiya* (*supra*)) did not affect the scope of the *condictio furtiva* in our law. This conclusion is in keeping with the development of the *condictio furtiva* set out in a scholarly article 'Historical Notes on the Nature of the *Condictio Furtiva*' by Pieter Pauw in 93 (1976) *South African Law Journal* at 395–400. It should be noted that, in declining to approach the scope of the modern *condictio furtiva* on the basis of the concept of theft in modern criminal law, Melamet J, in his *obiter* remarks in *Minister van Verdediging v Van Wyk en Andere* 1976 (1) SA 397 (T) at 402G–403B, did not, on the facts of that case, find it necessary to decide the precise scope of the *condictio furtiva* in modern civil law.

Lastly, as far as the requisites for liability are concerned, it must be considered whether the *condictio furtiva* can be brought at the instance of anyone other than the owner of the stolen thing. In *Minister van Verdediging v Van Wyk en Andere* (*supra*) the Court was concerned with the position of an owner who had recovered the wreck of the burnt-out vehicle, and had sold it. If one leaves aside the question whether the wreck could be equated with the undamaged thing, the Court in that case really considered whether a *condictio furtiva* was competent to recover damages where the *res* had already been vindicated, and decided this question in the negative—pointing out that an action for damages could still be brought under the *actio legis Aquiliae* (at 401C–E). This question does not arise in the present case. In the course of this aspect of the judgment, Melamet J, referring to *D* 13.1.1 and 47.2.14.16 stated that 'Die *condictio furtiva* was alleenlik ter beskikking van die eienaar of pandhouer van die gesteelde voorwerp' (at 400G).

This statement is correct as far as the Roman law was concerned. Dealing with the position in the Roman-Dutch law, the learned Judge, in the context of the question whether the owner was required still to be owner of the *res* when action under the *condictio furtiva* was instituted, continued:

> 'Dit is gemene saak dat die eiser die eienaar van die voertuig was ten tye van die beweerde diefstal. Uit para 23 van die gestelde saak blyk dit egter dat die eiser voor die uitreiking van dagvaarding in die huidige saak die voertuigwrak verkoop het en dat sedertdien eiser nie meer die eienaar is nie. Voet *Comm ad Pand* 13.1.2

konstateer egter aangaande die *condictio furtiva* in die Romeins-Hollandse reg dat dit 'n vereiste is dat die eiser nog eienaar van die gesteelde goedere moet wees wanneer die aksie kragtens die *condictio furtiva* ingestel word.

As hierdie die korrekte stelling is wat die Romeins-Hollandse reg betref, en daar was geen ander gesag in hierdie verband aan my voorgelê nie, dan behoort die eis om hierdie rede alleen van die hand gewys te word.

Dit is betoog dat geen gesag deur *Voet* vir sy stelling aangehaal is nie. Dit mag wel so wees maar, myns insiens, volg dit logies uit die beginsel dat dit 'n reg is wat net aan die eienaar van die gesteelde goed toekom.'

It is apparent that Melamet J was dealing with the question whether a plaintiff, whose *locus standi* depended solely on ownership, retained that *locus standi* if he had disposed of his ownership before the institution of action. In the present case the question is a different one, namely whether a non-owner, *in casu* a lessee, has *locus standi* to institute the *condictio furtiva*. Since it was not necessary for Melamet J to consider this latter question, his statements that the *condictio furtiva* was 'alleenlik ter beskikking van die eienaar' and that 'dit 'n reg is wat net aan die eienaar van gesteelde goed toekom', must, in the context of the present enquiry, be taken as *obiter*. It is also clear that, perhaps understandably on the facts of that case, the learned Judge's attention was not drawn to the later passage in *Voet* 13.1.3, where the following appears:

'*Modern law gives action to all who have an interest.* However *Groenewegen* notices, following others, that by our customs and those of other nations such niceties of Roman law are disregarded, and owners and all who have an interest are allowed to reclaim what they declare to have been taken from them by theft.'

The reference to Groenewegen is to his *De Legibus Abrogatis* 13.1.1, where he states:

'In the case of a stolen thing the *condictio furtiva* was available to the owner alone; to others who had an interest in the thing the *condictio incerti* was available, or the *condictio triticara*. And sometimes even the *rei vindicatio* was available. This was pure *punctilio* on the part of the civil law. But, seeing that, as I have stated *ad rubric* of *Inst* 4.6, the names of actions are nowadays not usually inserted in the pleadings, therefore this scrupulous exactness of the Romans has been abandoned and under our customs and those of others the owner as well as those who have an interest in the thing are all permitted without distinction to reclaim whatever they allege to have been taken from them by theft.'

(*Beinart's* translation.)

This view is also in keeping with the *cuius interest* principle which Jansen JA in *Smit v Saipem* (*supra*) with reference to *De Groot* and other Roman-Dutch writers, held to be equally applicable to theft and Aquilian actions.

It must therefore, on the authority of *De Groot, Groenewegen* (whose views *Voet* recognises) and *Van der Keessel*, be concluded that the *condictio furtiva* is, in our law, a remedy not restricted to owners only and, insofar as the *obiter dicta* of Melamet J in *Minister van Verdediging v Van Wyk en Andere* (*supra*) may indicate the contrary, I must respectfully differ therefrom.

It was however contended by Mr *Beckerling*, who very correctly drew my attention to the aforementioned passage in *Voet* and *Groenewegen*, that, since the contract whereby the plaintiff leased the vehicle had in its own terms expired on 5 February 1985, and action had only been instituted in

October 1985, the plaintiff did not, at the time of institution of the action, have sufficient interest in the vehicle to found his *locus standi* to bring the claim. In this case it is not necessary to consider whether the plaintiff had the required positive interest (see *Smit v Saipem* (*supra* at 932C–E)) to found his *locus standi* or whether *locus standi* could have been founded on the mere fact of possession, of which the defendant wrongfully deprived the plaintiff; in terms of the lease the plaintiff became liable to the lessor for the outstanding balance of the rental if the vehicle was stolen and not recovered within 21 days and incurred liability towards the lessor for loss of the uninsured vehicle. These provisions gave the plaintiff a sufficient negative interest, still subsisting at the time of institution of action, in the vehicle to found *locus standi* to institute the *condictio furtiva* for damages. (See *Smit v Saipem* (*supra* at 931H–932B).) This negative interest was specifically pleaded, and proved by the lease being handed in as an exhibit during the trial. It is not necessary to quantify the amount which would be recoverable as the plaintiff's positive or negative interest, since it was agreed by both counsel that if the defendant was held liable to the plaintiff for any damages as result of his loss of possession of the vehicle, judgment should be entered for the plaintiff for the capital amount of R14 000.

The plaintiff also claimed interest at 20% per annum *a tempore morae*. The claim for payment of a sum of money was in its nature a claim for damages equivalent to the alleged value of the vehicle, and only in the course of the trial a figure of R14 000 was agreed. The question whether a creditor can be awarded interest on unliquidated damages from a date prior to judgment on the ground that the debtor could from such prior date have reasonably ascertained the amount payable was left open in *Russell NO and Loveday NO v Collins Submarine Pipelines Africa (Pty) Ltd* 1975 (1) SA 110 (A) at 155D. This issue was not specifically argued, nor was this question argued on the basis that the amount of the claim had been determined in the course of the trial. In the circumstances interest will in this judgment be awarded only from the date of judgment. Since, on this basis, the date on which interest begins to run (see s 1(1) of the Prescribed Rate of Interest Act 55 of 1975) is the date of judgment, interest will be awarded at the rate currently prescribed in terms of s 1(2) of Act 55 of 1975, which is 15% per annum. Should the plaintiff wish to argue the question of his entitlement to interest from an earlier date, and then possibly at a different rate because of a different date at which interest begins to run (see *Davehill (Pty) Ltd and Others v Community Development Board* 1988 (1) SA 290 (A)), the plaintiff may, on 14 calendar days' notice to the defendant, commencing from the date of delivery of this judgment, apply for a variation of the order relating to interest. Failing such application within the stated time, the whole of the order set out below will become final.

In the result, judgment is given for the plaintiff in the amount of R14 000 and for interest at the rate of 15% per annum from date of judgment to date of payment, and for costs of the action.

Plaintiff's Attorney: *Mervin Messias*. Defendant's Attorney: *David C Feldman*.