

SOUTH AFRICA / JUDGMENT

Air Products SA (Pty) Ltd v African Oxygen Ltd (14762/01) [2003]

ZAGPHC 15 (26 November 2003)

[2003] ZAGPHC 15

COURT

High Courts - Gauteng

BEFORE

Willis

CASE / FILE NUMBER

14762/01

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IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG

CASE NO: 14762/01

DATE:2003-11-26

In the matter between

AIR PRODUCTS SA (PTY) LTD.....Applicant

and

AFRICAN OXYGEN LTD.....Respondent

JUDGMENT

WILLIS, J: This is an application in terms of which the applicant claims the return of certain liquid petroleum gas cylinders relying on the *actio rei vindicatio*. The respondent does not dispute that it is in possession of these particular cylinders and save for the issue of a salvage lien which is raised in the alternative, does not set out any justification for its possession of the cylinders.

The approach of the respondent has been essentially to contend that the applicant has not proven its ownership. The attitude of the

respondent, essentially as I understood it from respondent's counsel, Mr Pienaar, this morning is that it accepts that the applicant may indeed be the owner but contends that the applicant has failed to prove this ownership.

In my view the applicant has indeed proven the ownership of the goods in question. It is set out in considerable detail from paragraphs 9 to 15 how it acquired ownership and, more particularly, how these gas cylinders had distinctive markings on them which can only mean that they are owned by the applicant. There is no real dispute concerning this and indeed, in my view, the photographic exhibits of the gas cylinders in question very clearly have distinctive markings on them that show the ownership of the applicant.

The alternative defence of the respondent that it has a salvage lien in my view has no merit whatsoever. The salvage lien could only operate if the respondent in fact recognised the ownership of the applicant and in fact took steps to salvage the items in question in order to preserve the applicant's ownership. In my view one cannot approbate and reprobate, one cannot adiate and repudiate, one cannot blow hot and cold at the same time and accordingly this alternative defence must fail. In my view the applicant has succeeded in establishing its rights under the *actio rei vindicatio* which after all are simple and straightforward enough.

An order is accordingly granted in terms of prayer 1, as amended, of the notice of motion dated 3 July 2001 as well as prayers 3 and 4. The costs of this application include all costs reserved to date.

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