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REPUBLIC OF SOUTH AFRICA



**SOUTH GAUTENG LOCAL DIVISION,
JOHANNESBURG**

**CASE NO: 14488/13
DATE: 15 APRIL 2014**

**NOT REPORTABLE
NOT OF INTEREST TO OTHER JUDGES**

In the matter between:

LIFESTYLE TRANSPORT CC

Applicant

and

THE MINISTER OF POLICE

First Respondent

TANZER TRANSPORT FOOD HALL

WAREHOUSING CC t/a TANZER TRANSPORT

Second Respondent

ASTROTAIL 125 CC

Third Respondent

PLATINUM TRUCK CENTRE (PTY) LTD

Fourth Respondent

JUDGMENT

OPPERMAN AJ

INTRODUCTION

- [1] The applicant seeks an order declaring that the applicant is the owner of a Mercedes-Benz truck 2435, with registration no. KNM [...], chassis no. 6[...] and engine no. V[...] ("**the vehicle**"), which is in the possession of the first respondent.
- [2] In the alternative, the applicant seeks an order that the first and second respondents be interdicted and restrained from disposing of or alienating the vehicle, pending the outcome of an action to be instituted by the applicant for the return of the vehicle, within thirty days of the granting of such order.
- [3] The first, third and fourth respondents did not oppose the application.
- [4] The second respondent only opposed the application.

SUMMARY OF THE FACTS

- [5] Much of the facts were, at the end of the day, common cause, alternatively

the second respondent's version was to be preferred, having regard to the principles enunciated in the *Plascon-Evans* matter.¹

[6] Admittedly, the applicant's alternative relief is for interim relief and the *Plascon-Evans* rule will thus not be applicable. In my assessment of the evidence, I will distinguish, insofar as it is necessary.

[7] The business of the applicant is that of a transport company. In order to fulfil its duties, it purchases trucks from time to time.

[8] The second respondent carries on business as a transport company. It owns and operates a fleet of delivery vehicles for that purpose. When a vehicle is no longer suitable for use by the second respondent in the course of its transport business, the second respondent sells the vehicle on a second-hand basis.

[9] The manner in which the vehicles are so sold by the second respondent is that the vehicles are handed, on consignment, to a second-hand motor dealer such as the third respondent. The arrangement between the second respondent and the dealer includes the dealer ascertaining from the second respondent the price that it is prepared to accept for the vehicle from a purchaser thereof. For purposes of administrative and logistical convenience, the vehicle is then physically removed from the second respondent's premises onto the premises of the second-hand dealer. The physical possession (*detentio*) of the vehicle is handed over to the dealer on the basis that the dealer will not become the owner of the vehicle, but

¹ Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)

will return the vehicle to the second respondent in the event of the dealer not being able to find a purchaser for that price. If, on the other hand, the dealer is able to achieve the price, then, the dealer would hand the vehicle over to the purchaser against payment.

[10] At the time when the vehicle is physically handed over to the dealer, the second respondent signs the relevant change of ownership form in favour of the dealer and hands the completed form to the dealer. If the vehicle is not sold by the dealer to a third party, then the completed change of ownership form is handed back by the dealer to the second respondent together with the vehicle itself. The second respondent and the dealer embark on this process subject to the condition that ownership of the vehicle will remain vested in the second respondent until such time as the dealer is able to sell the vehicle at the price required by the second respondent.

[11] The transaction between the second and the third respondent in relation to the vehicle in issue in the present proceedings, was at all times governed by the arrangement set out hereinbefore relating to the second respondent's general modus operandi in respect of the sale of its vehicles.

[12] In relation to the vehicle in issue in this application, the second respondent required an amount of R250 000.

[13] The third respondent was given the vehicle to sell, but never achieved that price.

[14] The background to the relationship between second and third respondents

is that during March 2011, the managing director of the second respondent, Mr Tanzer, was approached by Mr Pickl and Mr Paton who claimed to represent the third respondent. From April 2011 onwards, the second respondent began to do business with the third respondent in relation to the sale of second-hand vehicles that the second respondent wished to dispose of.

[15] During August 2012, Mr Paton agreed with the second respondent that the third respondent, in accordance with the standard arrangements outlined hereinbefore, would sell the vehicle in issue in the present proceedings. Further, the sale of the vehicle was not supposed to take place until the second respondent had invoiced the third respondent in the amount of R250 000.

[16] On 12 September 2012, Mr Tanzer discovered that the vehicle had been sold to the fourth respondent for R180 000 by Mr Paton. No monies had been paid to the second respondent.

[17] Mr Tanzer also discovered that the fourth respondent had on-sold the vehicle to the applicant for the sum of R235 000. The tax invoice dated 3 July 2012 purporting to emanate from the second respondent in terms of which the second respondent had sold the vehicle to the third respondent, is not authentic and the second respondent contends that it is a forgery. For present purposes this must be accepted.

[18] On 15 September 2012, the second respondent discovered that Mr Paton was not a representative of the third respondent but that he had merely

acted as a “broker” for the third respondent. It was subsequently established that Mr Paton, had sold the vehicle purportedly on behalf of the third respondent, and Mr Paton had appropriated the proceeds of the sale of the vehicle for himself.

[19] The third respondent has never paid the second respondent anything for the vehicle.

[20] During the early part of February 2013, the applicant's driver, driving the vehicle, attempted to cross the border into Swaziland. The border officials would not allow the vehicle into Swaziland and the vehicle was returned to the applicant's premises. On 13 February 2013, at the business premises of the fourth respondent, the first respondent seized the vehicle. This was done as Mr Tanzer, acting as a representative of the second respondent, had laid a complaint in respect of the vehicle.

[21] The first respondent advised that neither the applicant nor the fourth respondent would obtain return of the vehicle and clarity should be sought from the Court.

[22] On or about 7 December 2012, Mr Paton was arrested for fraud and theft in respect of the vehicle.

OWNERSHIP OF THE VEHICLE

[23] The Applicant's claim is vindicatory in nature. For the purposes of a vindicatory claim, the applicant is required to establish that it is the owner of the *res* in question See *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty)*

Ltd 1993 (1) SA 77 (A) at 82A; *Concor Construction (Cape) (Pty) Ltd v Santambank Ltd* 1993 (3) SA 930 (A).

[24] The second respondent contends that it is the owner of the vehicle.

[25] It is clear that the second respondent is the victim of a fraud perpetrated on it by Mr Paton. The third respondent did not comply with the contractual arrangement which provided that ownership might only pass once payment in full of the purchase price had been made. Ownership, of course, only passes if two requisites are met: there must be an intention to pass ownership and an intention to receive ownership (the so-called 'saaklike ooreeenkoms', see *Concor*, supra at 933 C- J) and there must be delivery of the object (*res*). Applying the foregoing principles, ownership could not have passed to the third respondent, who could thus not have transferred it to the fourth respondent who in turn, had no right to transfer it to the applicant. See too *Lendlease Finance (Pty) Ltd v Corporacion de Merçadeo Agrícola & others* 1976 (4) SA 464 (A) at 489G-H; *De Wet v Santam Bpk* 1996 (2) SA 629 (A) at 638E-F in respect of delivery of the vehicle.

[26] I find that the second respondent remained, and is still on these facts, the owner of the vehicle.

ESTOPPEL

[27] The applicant argued that the second respondent should be estopped from asserting its ownership in and to the vehicle. It contended that the

requirements for estoppel, in particular in the context of conduct amounting to a representation in regard to ownership, are as follows:

- 27.1. there must be a representation by the owner, by conduct or otherwise, that the person who disposed of his/her property was the owner of it or was entitled to dispose of it;
- 27.2. the representation must have been made negligently in the circumstances;
- 27.3. the representation must have been relied upon by the person raising the estoppel;
- 27.4. such person's reliance upon the representation must be the direct or proximate cause of his/her acting to his/her detriment.

[28] The argument went further that, a person may be bound by a representation constituted by conduct if:

- 28.1. the representor ought reasonably to have expected that the representee might be misled by his conduct;
- 28.2. the representee had acted reasonably in construing the representation in the way he/she did.

[29] The applicant contended that the conduct of an owner entrusting another with the *indicia* of ownership, such as documents of title, and in particular registration certificates in the case of motor vehicles, may amount to a representation if relied upon by a person raising estoppel. It relied on *Electrolux (Pty) Ltd v Khota and Another* 1961 (4) SA 224 (W) at 247B-E; *Broekman v T.C.D. Motors (Pty) Ltd* 1949 (4) SA 419 (T) at 423 and

Unitrans Automotive (Pty) Ltd v The Trustees of the Rally Motors Trust 2011 (4) SA 35 (FSB), para [11] and [12] at 41.

[30] It contended that *in casu*, the second respondent had handed over the completed change of ownership forms with only the details of the purchaser having been omitted. This enabled the third respondent to register the vehicle into its name and to transfer the vehicle to the fourth respondent, albeit on paper only. It argued that when the second respondent delivered the vehicle to the third respondent, it furnished it with the following:

- 30.1. relevant change of ownership forms;
- 30.2. an exit disc so that the vehicle could be exited from the second respondent's premises;
- 30.3. the vehicle;
- 30.4. keys to the vehicle.

[31] Under these circumstances, so it argued, the second respondent was estopped from alleging or relying upon its ownership in respect of the vehicle.

[32] Prior to considering the merits of the estoppel argument, consideration should be given to whether it is at all competent to found a cause of action on estoppel. It has been said that estoppel is not a shield but a sword. This shield can thus not assist the applicant in these proceedings. See *Union Government v National Bank of South Africa Ltd* 1921 AD 121 at 128; *Rosen v Barclays National Bank Ltd* 1984 (3) SA 974 (W) at 983H–I; *Sodo*

& another v Chairman, African National Congress, Umtata Region & others
[1998] 1 All SA 45 (Tk).

[33] The applicant conceded that estoppel cannot be used to found a cause of action and I am accordingly not called upon to decide whether or not estoppel might have been successfully raised in different circumstances. I must express my gratitude to the Second Respondent's legal representatives for the very comprehensive and helpful heads of argument.

[34] I attempt hereinunder to record the gist of the arguments advanced in respect of the estoppel issue as formulated by the Second Respondent. The Second Respondent argued that:

34.1. It did not make a representation to the applicant. The applicant did not contend that it had received the vehicle from the second respondent. The applicant had purchased the truck from the fourth respondent. The essence of the doctrine of estoppel by representation is, so the argument went, that a person is precluded or estopped from denying the truth of a representation made by him or her to another person if the latter, believing the truth of the representation, acted on it, to his or her detriment. See *Aris Enterprises (Finance) (Pty) Ltd v Protea Assurance Co Ltd* 1981 (3) SA 274 (A) at 291E.

34.2. The mere fact that an owner left his property in the possession of a third party does not constitute in and of itself a legally relevant representation that the possessor or holder of the property is

authorized to dispose of it. The estoppel asserter can consequently not base an estoppel on the mere fact that the owner left his property in the possession of a third party. See *Oceana Leasing Services (Pty) Ltd v BG Motors (Pty) Ltd* 1980 (3) SA 267 (W); *Rabie and Sonnekus The Law of Estoppel in South Africa* at 130.

- 34.3. It is undisputed that it is standard practice for a superseded vehicle to be placed by the second respondent in the physical possession of a dealer and for the relevant change of ownership form to be completed in favour of the dealer so as to facilitate transfer of ownership of the vehicle by the dealer to a purchaser who is prepared to pay the price required by the second respondent. There is no evidence to the effect that any of the second respondent's vehicles dealt with in this way have ever been fraudulently sold by a dealer to a third party at a price less than that required by the second respondent.
- 34.4. That being so, there is nothing to indicate that the second respondent ought reasonably to have foreseen the possibility that the truck in question would be fraudulently sold by the third respondent to the fourth respondent. The second respondent did business with the representatives of the third respondent from April 2011 onwards without any such incident taking place. It was only during August 2012 that the agreement was made with Mr. Paton that the vehicle would be sold by the third respondent on behalf of

the second respondent. It was contended that there is no basis in the affidavits for the conclusion that the second respondent ought reasonably to have foreseen that the truck in question would or might (as a reasonable possibility) have been fraudulently sold by the third respondent to a third party (the fourth respondent) for less than the amount that the second respondent was asking for the vehicle.

- 34.5. The second respondent also submitted that in order for an estoppel to operate, the representation must have been the direct or proximate cause of the applicant acting to his or her detriment. In the present application, this requirement, so the submission ran, was not met for the following reasons: (i) there was no representation by the second respondent to anyone that the third respondent could sell the relevant truck for only R180 000; (ii) there was no representation of any kind by the second respondent to the applicant; and (iii) the direct or proximate cause of any detriment which the applicant might have suffered was clearly the fraud committed by the third respondent in purporting to sell the truck to the fourth respondent for only R180 000.
- 34.6. This fraud led the fourth respondent to believe that the transaction had the effect of transferring ownership in the truck to the fourth respondent which in turn enabled the fourth respondent to transfer ownership to the applicant. The fraud by the third respondent

clearly severed the chain of causation between the second respondent's conduct in handing the physical possession of the truck and its associated documentation to the third respondent and the detriment alleged to have been suffered by the applicant. Similarly, in *Union Government v National Bank*, 1921 AD at 138 Solomon JA held that the conduct of the postmaster in leaving a post-office date stamp unguarded was not the cause of the loss: the direct cause of the loss was '*the intervention of an act of wickedness*' on the part of the third party who fraudulently used the date stamp to stamp stolen postal orders, which the postmaster could not have been expected to anticipate.

- 34.7. Importantly, so the second respondent pointed out, Solomon JA in the *National Bank* case (supra) rejected the so-called '*facilitation theory*', under which whenever one of two innocent parties suffers by the act of a third person, he who enabled such person to occasion the loss must sustain it. The '*facilitation theory*' was ultimately rejected as not forming part of South African law in *Stellenbosch Farmers' Winery Ltd v Vlachos t/a The Liquor Den* 2001 (3) SA 597 (SCA) para 17 at 608J–609E, where Nienaber JA held:

'[T]he so-called "facilitation theory" . . . has long been discredited in this country (cf, for instance, Union Government v National Bank of South Africa Ltd 1921 AD 121 at 131, 138; and Grosvenor Motors (Potchefstroom) Ltd v Douglas 1956 (3) SA 420 (A) at 425F–H).

Thus it was declared by Corbett J in *OK Bazaars (1929) Ltd v Universal Stores Ltd* 1973 (2) SA 281 (C) at 287H–288B:

“As in the present instance, cases of estoppel by negligence often involve the fraudulent conduct of a third party and the complaint against the person sought to be estopped is that his negligence permitted or facilitated the fraud. In this situation our Courts have rejected, as being too broadly stated, the so-called ‘facilitation theory’, viz that wherever one of two innocent parties must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it (see Grosvenor Motors’ case supra at 425; see also Connock’s (SA) Motor Co Ltd v Sentraal Westelike Ko-operatiewe Maatskappy Bpk 1964 (2) SA 47 (T) at 48). It has, on the contrary, been held that such cases must be adjudged by the ordinary general principles relating to estoppel by negligence; and, of course, the fraudulent intervention of a third party is an important factor in determining whether the conduct of the person sought to be estopped proximately caused the other’s mistaken belief and resultant loss; and whether this result was reasonably foreseeable (see, for example, National Bank case supra).’

- 34.8. In *Grosvenor Motors (Potchefstroom) Ltd v Douglas* 1956 (3) SA 420 (A), reliance by the appellant (the estoppelasserter) on estoppel, failed where a fraudster had induced the respondent (the estoppel denier) to provide him with a note stating that the respondent had sold a particular car to the fraudster. The fraudster had then used the note to deceive the appellant into believing that the fraudster had authority to on-sell the car to the appellant. Centlivres CJ held that even if the respondent had been negligent in providing the fraudster with the note, the trial court had correctly

found that '*the real and direct cause*' of the deception was not the note which the fraudster had used to accomplish his fraud, but the fraudster's own fraudulent conduct. In the circumstances, it could not be said that the note which the respondent had given to the fraudster was the proximate cause of the appellant's purchase of the car. The second respondent argued that the same applies in the present application: the real and direct cause of the fraud of which the applicant was a victim was the conduct of Mr Paton on behalf of the third respondent, not the conduct of the second respondent in providing the vehicle, its keys and its ownership papers to the third respondent in accordance with normal sales procedures.

[35] The second respondent argued further that were this court to transform the shield into a sword, it would be a sword with a double edge:

35.1. This, so the argument went, is so as the effect of the court upholding the applicant's argument based on estoppel, would be to allow the consequences of a fraud perpetrated by the third respondent against the second respondent to stand. In as much as ownership cannot pass pursuant to a fraudulent transaction, so too estoppel cannot be relied upon by the applicant as a basis upon which ownership could be held to have passed to the applicant by virtue of a fraud perpetrated on second respondent.

35.2. The rule that public policy does not permit estoppel to operate in

circumstances where its application would produce a result which is not permitted by law, necessarily involves that a plea of estoppel will not be upheld if its effect would be to render enforceable what the law, be it at common law or by legislation, had in the public interest declared to be illegal or invalid: *Rabie and Sonnekus The Law of Estoppel in South Africa 3 ed (2012) by J C Sonnekus at 291*. If the applicant's argument based on estoppel were to be upheld, then the consequences of a fraud perpetrated by the third respondent against the second respondent would be given legal efficacy, and the fraud would be treated as having the legal consequence of passing ownership from the second respondent to the third respondent, and thereafter from the third respondent to the fourth respondent, and from the fourth respondent to the applicant.

- [36] Although the arguments in relation to estoppel advanced by the second respondent are persuasive, I do not, by virtue of the concession made by the applicant in relation to whether or not it could found a cause of action, have to make a finding in respect of the substance of the 'defence' of estoppel in order to reach my conclusion in this application. I am for another reason reluctant to do so, being that the applicant did not argue the merits of the estoppel point, having made the concession referred to hereinbefore. I would not want to bind another court with my findings, particularly not under circumstances where the point was not fully argued.

INTERIM RELIEF

- [37] The applicant seeks in the alternative an interim interdict against the second respondent restraining it from disposing of or alienating the vehicle, pending the outcome of an action to be instituted by the applicant for the return of the vehicle.
- [38] The requirements which the applicant must satisfy in order to obtain an interim interdict are: (i) a prima facie right; (ii) a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted; (iii) a balance of convenience in favour of the granting of the interim relief; and (iv) the absence of any other satisfactory remedy.
- [39] The applicant has not demonstrated either a prima facie right of ownership nor a clear right.
- [40] Even if the applicant were able to demonstrate a prima facie right of ownership vesting in it, the second respondent has never, since learning of the applicant's assertion that it owns the vehicle, threatened to violate any such right by alienating or disposing of the vehicle.
- [41] A well-grounded apprehension of irreparable harm to the applicant, if the interim relief is not granted and the applicant ultimately succeeds in establishing the right contended for by it, is absent. The second respondent stated that it has no intention, in the event of the vehicle being returned to it by members of the South African Police Service, of disposing

of or alienating the vehicle while legal proceedings pertaining to the vehicle were pending or in prospect. The second respondent, in fact, was anxious to retain the vehicle under its supervision and control, since the vehicle is currently being kept in an open yard under the control of the South African Police Service, where the vehicle is unprotected against the elements.

[42] In the present instance, the applicant clearly has a satisfactory alternative remedy, namely an action for the recovery of the purchase price paid by it to the fourth respondent (plus interest thereon), alternatively an action for damages in the amount of the purchase price, together with an action for damages for any consequential loss which might be claimable by the applicant against either the fourth respondent or the third respondent arising from the failure to afford the applicant the use of the vehicle at the time when the fourth respondent undertook that the vehicle would be handed over.

ORDER

[43] I accordingly make the following order : The application is dismissed with costs.

I Opperman
Acting Judge of the High Court

Heard: 4 March 2014

Judgment delivered: 17 April 2014

Appearances:

For Applicant: Adv JW Kloek

Attorneys: Beukes & Sonja Nel

For First Respondent: Adv D Joubert

For Second Respondent: Adv RG Cohen

Attorneys: Mervyn Dendy Attorney