

IN THE HIGH COURT OF SOUTH AFRICA

DELETE WHICHEVER IS NOT APPLICABLE (NORTH GAUTENG HIGH COURT, PRETORIA)

1. REPORTABLE: YES/NO. ☒ YES

2. OF INTEREST TO OTHER JUDGES: YES/NO. ☒ YES

3. REVISED: ☒ YES

DATE: 27/10/10 In the matter between: SIGNATURE: [Signature]

CASE No. 13606/09

27/10/2010

MANHAND (WP) CC

Applicant

and

PENLIN BUILDING SUPPLIES

First Respondent

FIRST RAND BANK T/A WESBANK

Second Respondent

JUDGMENT

Van der Byl, AJ:-

Introduction

[1] In this matter the Applicant seeks, in addition to the usual order of costs, an order in terms of which -

- (a) the First Respondent is ordered to return to the Applicant a Manhand Diesel Forklift;

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(b) the Sheriff is authorized to forthwith attach and remove the said forklift and to return it to the Applicant.

[2] In issue in this matter is whether the Applicant is estopped from vindicating the Forklift of which it is the owner and which is in the First Respondent's possession.

**Relevant facts of the matter**

[3] The facts fall within a fairly narrow compass.

[4] The Applicant, Manhand (WP) CC, on 18 October 2007 entered into an oral agreement with Truck and Tractor Specialists CC, being a dealer in products, amongst which forklifts of the Applicant, in terms of which the Applicant had undertaken to deliver to the said Truck and Tractor Specialists CC "*forklifts and spareparts for forklifts*" to "*sell to third parties*".

[5] it was an express term of the agreement that the Applicant would remain the owner of the forklifts and spareparts supplied to it until such time as the full outstanding amount for the forklifts and spareparts was paid by the said Truck and Tractor Specialists CC. By virtue of this agreement the Applicant on 18 June 2008 delivered to Truck and Tractor Specialists CC the Manhand Diesel Forklift in question. It appears that the said Truck and Tractor Specialists CC had, in terms of a sale agreement concluded on 9 June 2008, already sold the said Forklift to the First Respondent at a stage before it has paid the Applicant and, therefore, at a stage when the ownership in

the Forklift still vested in the Applicant.

[6] In its answering affidavit the First Respondent stated -

- (a) that it on 9 June 2008 concluded an instalment agreement with FirstRand Bank Limited trading as Wesbank ("*Wesbank*") in terms of which the First Respondent purchased the Forklift in question from Wesbank in order to secure financing for the purchase of the Forklift in question;
- (b) that in terms of the instalment sale agreement -
  - (i) the First Respondent would take delivery of the forklift on behalf of Wesbank;
  - (ii) the First Respondent purchased the Forklift from Wesbank;
  - (iii) Wesbank retained ownership of the Forklift until the First Respondent paid all the amounts due under that agreement;
- (c) that Wesbank on 6 June 2008 purchased the Forklift from Truck and Tractor Specialists CC and paid for it in full;
- (d) that it previously also purchased a forklift from Truck and Tractor Specialists CC and had no reason to dispute its right and title to validly transfer ownership of the

vehicle.

[7] Wesbank was on application joined in the application as Second Respondent on 14 October 2009 "*to vindicate its interest in the forklift*" and to prevent the Applicant from recovering the Forklift from the possession of the First Respondent.

[8] Apart from confirming the allegations made by the First Respondent in its answering affidavit, it is contended by Wesbank -

- (a) that Truck and Tractor Specialists CC is an accredited dealership and that it had financed many items purchased from it which had been purchased by it for on-selling to third parties, such as, the First Respondent;
- (b) that at no stage had it been it aware that Truck and Tractor Specialists CC did not have the title to transfer the ownership of the forklift to it for purposes of eventually transferring ownership to the First Respondent;
- (c) that, had it known that Truck and Tractor Specialists CC was not in a position to transfer ownership of the forklift, it would not have entertained the notion of acquiring the forklift and not have advance finance to the First Respondent.

**Legal principles applicable**

[9] It had frequently been held by our courts that in circumstances as in this case

*J.*

an owner can in principle be estopped from asserting his rights to ownership.

[10] In *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd*

**1976 (1) SA 441 (A)** the principle is elucidated as follows at **452A-G**:

*"Our law jealously protects the right of ownership and the correlative right of the owner in regard to his property, unless, of course, the possessor has some enforceable right against the owner. Consistent with this, it has been authoritatively laid down by this Court that an owner is estopped from asserting his rights to his property only -*

- (a) *where the person who acquired his property did so because, by the culpa of the owner, he was misled into the belief that the person, from whom he acquired it, was the owner or was entitled to dispose of it; or*
- (b) *.....*

*As to (a) supra, it may be stated that the owner will be frustrated by estoppel upon proof of the following requirements -*

- (i) *There must be a representation by the owner, by conduct or otherwise, that the person who disposed of his property was the owner of it or was entitled to dispose of it. A helpful decision in this regard is **Electrolux (Pty) Ltd v Khota and Another 1961 (4) SA 244 (W)**, with its reference at 247 to the entrusting of possession of property with the indicia of dominium or jus disponendi.*
- (ii) *The representation must have been made negligently in the circumstances.*
- (iii) *The representation must have been relied upon by the person raising the estoppel.*
- (iv) *Such person's reliance upon the representation must be the cause of his acting to his detriment."*

See also: *Quenty's Motors (Pty) Ltd v Standard Credit Corp Ltd 1994 (3) SA*

**188 (A) at 198G**

*J...*

[11] In the **Electrolux (Pty)** case referred to by the learned Judge in the **Oakland case** it is stated at **247B-E** as follows:

*"To give rise to the representation of dominium or jus disponendi, the owner's conduct must be not only the entrusting of possession to the possessor but also the entrusting of it with the indicia of the dominium or jus disponendi. Such indicia may be the documents of title and/or of authority to dispose of the articles .....; or such indicia may be the actual manner or circumstances in which the owner allows the possessor to possess the articles, as for example, the owner/wholesaler allowing the retailer to exhibit the articles in question for sale with his other stock in trade ....."*

(See also: **Concor Holdings (Pty) Ltd T/a Concor Technicrete v Potgieter 2004 (6) SA 491 (SCA) at 495B; Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) (Edms) Bpk 1996 (3) SA 273 (A) at 284I-286H**)

#### **Evaluation of Applicant's case**

[12] In applying these principles to the facts of this matter it is clear that the Applicant, having delivered the Forklift to Truck and Tractor Specialists CC, being a dealer and distributor of, *inter alia*, forklifts, for purposes of sale to third parties, must have been aware that it may be sold by Truck and Tractor Specialists CC in the ordinary course of business. In having done that it, in the words of Holmes JA in the **Electrolux case**, "*clothed*" Truck and Tractor Specialists CC by conduct with the indications of ownership of the Forklift concerned or of authority to transfer by allowing Truck and Tractor Specialists CC to exhibit the Forklift or offer it for sale with its other stock in trade. In the circumstances the conduct of the Applicant could reasonably have been expected to mislead the Respondents into believing that Truck and Tractor Specialists

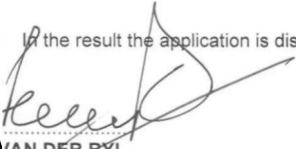
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CC had the right to transfer ownership in the Forklift. The Applicant should, therefore, reasonably have foreseen that a prospective purchaser might act thereon to his or her prejudice. It is apparent from the evidence that the Applicant took no steps to prevent it being sold before Truck and Tractor Specialists CC had paid for it or draw attention of any third party that Truck and Tractor Specialists CC had no right to transfer ownership before ownership has been transferred to it.

[13] In my opinion, therefore, the estoppel raised by the Respondents was clearly established.

**Order**

[14] In the result the application is dismissed with costs.

  
P C VAN DER BYL  
ACTING JUDGE OF THE HIGH COURT

ON BEHALF OF THE APPLICANT

ADV J N W BOTHA

On the instructions of:

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ADV C VAN DER SPUY

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