



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 41/2013
Not Reportable

In the matter between:

MILES LOURENS VAN DER MOLEN

APPELLANT

and

ILONA FAGAN

RESPONDENT

Neutral citation: *Van der Molen v Fagan* (41/2013) [2013] ZASCA 203 (02 November 2013)

Coram: Lewis, Maya, Wallis, Pillay JJA and Swain AJA

Heard: 20 November 2013

Delivered: 2 December 2013

Summary: *Rei vindicatio* – whether ownership of a motor vehicle fraudulently acquired from seller and sold to an innocent third party passed to purchaser who did not make payment – *iusta causa* for transfer – whether seller estopped from asserting ownership of the vehicle against innocent third party.

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Maluleke, Victor and Tshabalala JJ sitting as court of appeal):

The appeal is dismissed with costs.

JUDGMENT

MAYA JA (LEWIS, WALLIS, PILLAY JJA and SWAIN AJA concurring):

[1] This is a dispute about who owns a 2008 Mercedes-Benz C63 AMG with engine number 15698560027534 and VIN number WDD2040772F146278 (the vehicle) presently registered in the appellant's name¹ which the respondent claims as hers. The respondent successfully brought a vindicatory claim for its return in the South Gauteng High Court, Johannesburg (Teffo AJ). The full court of that division (Tshabalala J, Maluleke J concurring and Victor J dissenting) affirmed this decision on appeal. The present appeal against the full court's judgment is with the leave of this court.

[2] The relevant background facts are largely undisputed. On 18 January 2010 the respondent sold the vehicle to Mr Shameer Amod for a purchase price of R650 000 which was payable by 18 February 2010. This was in terms of a written agreement of sale (the agreement) concluded in Brakpan in the

¹ In his heads of argument the appellant indicated that the Sheriff removed the vehicle from his possession after the dismissal of his appeal by the full court.

presence of two witnesses, the respondent's husband and Mr Shiraz Choonara, Amod's companion.

[3] The respondent handed over the vehicle's original registration and licensing documents to Amod upon its delivery at the latter's request, purportedly to enable him to source finance for payment of the purchase price. But Amod did not pay the purchase price by the due date. The respondent's attempts to locate him revealed that the address he had furnished was in fact a vacant stand. She subsequently opened a case of theft and fraud against him with the Brakpan police.²

[4] Unbeknown to the respondent the vehicle had, in the meantime, been registered in Choonara's name with effect from the very day she concluded the agreement with Amod, 18 January 2010. A few days later, on 27 January 2010, Choonara, armed with the vehicle's original documents procured by his registration and a roadworthy certificate which proclaimed him its owner, sold the vehicle to a car dealership, Victor Miller Cars CC t/a The Cartique (the Cartique), in Randburg. The vehicle's trade-in value was fixed at R605 000 and, as consideration therefor, the Cartique sold Choonara a BMW 335i coupe for R370 000 and paid him the balance of R235 000 in cash. Having established through the relevant body that no debt was due to any financial institution in respect of the vehicle and that it was not stolen, the Cartique duly registered the vehicle in its name. In September 2010, it sold the vehicle to the appellant for a sum of R630 000. The appellant is presently registered as its owner and BMW Financial Services, which financed the transaction under an instalment sale agreement, as titleholder.

² Under case number 90/6/2010. Amod was ultimately arrested in 2011 in another province in connection with various theft and fraud cases.

[5] The respondent finally traced the vehicle to the appellant in October 2010 and sued for its return in the high court. She claimed that the vehicle still belonged to her as the agreement contemplated that its ownership would pass to Amod only after he paid the full purchase price which he failed to do. She contended that she was a victim of fraud and that if the vehicle were returned to her the appellant would not be left without remedy as he has a claim for damages against the Cartique which, in turn, would have a claim against Choonara.

[6] The appellant strenuously opposed the application. He argued that (a) the respondent was not the owner of the vehicle at any time, and in particular at the time she concluded the agreement with Amod; (b) if the respondent was the owner of the vehicle at the time she concluded the agreement with Amod, then its ownership passed to Amod upon conclusion of the agreement and Amod taking delivery on 18 January 2010; and (c) if ownership did not pass to Amod, the respondent was estopped from asserting ownership of the vehicle. As indicated, neither the court of first instance (which erroneously ignored the estoppel question) nor the majority of the full court were persuaded by the appellant's contentions. And an application to strike out allegations made in the respondent's replying affidavit explaining her disputed ownership of the vehicle in response to (a) above (which, along with (a), is not pursued in this appeal) also failed.

[7] The crisp issues in this appeal are whether the respondent intended to pass ownership to Amod upon delivery and whether, if she did not, she is nonetheless estopped from asserting ownership of the vehicle. The appellant contended that if the respondent was the owner of the vehicle when she concluded the agreement with Amod then, and as expressly provided for in certain clauses thereof, ownership of the vehicle passed from her to Amod upon conclusion of the agreement and Amod taking delivery of the vehicle on 18 January 2010. And if ownership did not pass, the respondent is nevertheless estopped from asserting ownership of the vehicle because by handing the

vehicle's original documents over to Amod she represented that he was its owner, or entitled to dispose of it, and also negligently failed to report it as stolen timeously. This representation was the proximate cause of his acting to his prejudice, it was argued. The respondent, on the other hand, insisted that upon a proper interpretation of the agreement ownership did not pass because it was reserved until the full purchase price had been paid and that the appellant failed to prove the necessary requisites for the defence of estoppel.

[8] The first issue may be given short shrift. An agreement that defers payment of the purchase price for a non-negligible period after the agreed delivery date, resulting in a contractually deferred payment, is one for credit and the parties may validly agree that ownership shall not pass until the purchase price has been paid.³ Jumbled as the agreement was, it made clear as evidence of the parties' intention in one crucial respect that the parties contracted for credit and did not contemplate transfer of ownership until the full purchase price was paid. It is inconceivable that the respondent would have released an expensive vehicle to a virtual stranger before she was paid without reservation of ownership. And her subsequent approach to the police to report the vehicle as stolen when Amod failed to pay by due date is entirely consistent with a view that she did not intend ownership to pass to Amod. And Amod, given his and Choonara's fraudulent conduct, could hardly have intended to acquire ownership of the vehicle. Amod therefore had no rights to ownership and could not have transferred ownership to Choonara. And as Choonara did not become owner, ownership passed neither to the Cartique nor the last purchaser in the doomed chain, the appellant.

³ *Laing v SA Milling Co. Ltd* 1921 AD 387 at 395-6; *Grosvenor Motors (Potchefstroom) Ltd v Douglas* 1956 (3) SA 420 (A) at 424G; *Lendlease Finance Ltd v Corp De Mercadeo Agricola* 1976 (4) SA 464 (A) 489-90.

[9] It remains to consider whether the respondent is estopped from asserting ownership of the vehicle. The requirements of estoppel with regard to ownership are well-established: (a) there must be a representation by the owner, by conduct or otherwise, that the person who disposed of his or her property was its owner or was entitled to dispose of it; (b) the representation must be made negligently in the circumstances; (c) the representation must have been relied upon by the person raising the estoppel; and (d) such person's reliance upon the representation must be the cause of his or her acting to his detriment.⁴

[10] The appellant argued that the respondent's negligent representation, the 'trigger at the outset' as counsel termed it, lay in her handing over the vehicle's 'trappings of ownership' to Amod. And despite Choonara's later fraud it remained the cause which induced him to act to his detriment, he argued. Reliance for this submission was placed on a number of milestone decisions of this and other courts (for example, *Broekman v TCD Motors (Pty) Ltd* 1949 (4) SA 418 (T); *Grosvenor Motors (Potchefstroom) Ltd v Douglas* 1956 (3) SA 420 (A); *Johaadien v Stanley Porter (Paarl) (Pty) Ltd* 1970 (1) SA 394 AD and *Electrolux (Pty) Ltd v Khota & another* 1961 (4) SA 244 (W)) which precluded an owner from vindicating on the basis of estoppel because they had negligently entrusted to others possession of their property with the *indicia* of *dominium* or the *jus disponendi*.

[11] In my view, these authorities do not assist the appellant's case. They are distinguished by the fact that the owners had handed their respective goods to dealers or traders in the particular items who then dealt with the goods with the owners' consent in such a manner as to proclaim that the *dominium* or *jus*

⁴ *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd* 1976 (1) SA 441 (A) at 452A-G; *Quenty's Motors (Pty) Ltd v Standard Credit Corporation Ltd* 1994 (3) SA 188 at 198G-199A.

disponendi was vested in them. Here, the respondent had no connection whatsoever with the Cartique. The basis for holding someone liable for holding out something is the image he conjured up which prompted the other party to react to his prejudice,⁵ and if due to some new circumstance (in this case Amod's fraud) a new image is superimposed on the old one (in this case Choonara's image of ownership which may have been created by the respondent's handing over the vehicle's 'trappings of ownership'), it is the new image to which the other party responds and on which he relies; the original party can no longer be held to it even if he would otherwise have remained liable.⁶

[12] It is patently Choonara's fraud upon the Cartique's owner, Mr Victor Miller, which induced the latter to purchase the vehicle. Significantly, Miller did nothing much to interrogate the young Choonara's suspiciously short period of ownership of the expensive vehicle other than to run a check on whether it was not stolen, and that only after he had concluded the sale. It cannot be said by any stretch of the imagination that the appellant took transfer of the vehicle by reason of any representation made by the respondent and nothing she did could have caused him or the Cartique prejudice. The so-called 'facilitation theory', which is essentially what the appellant's counsel was urging us to apply, has no place in our jurisprudence; we must adjudge the matter by the ordinary general principles relating to estoppel by negligence taking into account, of course, the fraudulent intervention of a third party.⁷ The appellant therefore failed the first hurdle in the discharge of his duty to establish a representation by the respondent and his reliance thereon which was the cause of his acting to his prejudice. The appeal must, accordingly, fail.

⁵ *Southern Life Association Ltd v Byleveld* NO 1989 (1) SA 496 at 505F-G.

⁶ *Stellenbosch Farmers' Winery Ltd v Vlachos t/a The Liquor Den* 2001 (3) SA 597 (SCA) para 18.

⁷ *Stellenbosch Farmers' Winery Ltd v Vlachos t/a The Liquor Den* para 17; *OK Bazaars* (1929) *Ltd v Universal Stores Ltd* 1973 (2) SA 281 at 287H-288B.

[13] In the result, the following order is made:

The appeal is dismissed with costs.

MML MAYA
JUDGE OF APPEAL

APPEARANCES:**FOR APPELLANT:**

L HOLLANDER

DARRYL FURMAN & ASSOCIATES,
ROSEBANK

MATSEPES INC, BLOEMFONTEIN

FOR RESPONDENT:

HD BAER

TROLLIP COWLING & JANEKE,
JOHANNESBURGSYMINGTON & DE KOK,
BLOEMFONTEIN