

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA



APPEAL CASE NO.: A35/2022
COURT A QUO CASE NUMBER: 44911/2015

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED: NO

[Redacted signature]

26 July 2023

In the matter between:

BLUE SKY CARRIERS (PTY) LTD

Appellant

And

SYLCO PLANT HIRE (PTY) LTD

Respondent

JUDGMENT

Manamela AJ

Introduction

- [1] The appellant sought leave to appeal to the full bench against the whole judgment of Lukhaimane AJ under case number 44911/2015 granted on 27 November 2020. This matter was on trial on 21-23 October 2020.

- [2] The court *a quo* had to decide on the vindication action for the recovery of CAT Loader machine which was in the appellant's possession. The determination of the value of the CAT Loader machine was separated, as agreed between the parties, at a pre-trial conference. The main defence of the appellant is based on the doctrine of estoppel.

- [3] The court *a quo* ordered that the Applicant [being the respondent herein] and not the Respondent [being the Appellant herein] is the owner of and is entitled to the CAT Loader machine and further that the Appellant must pay the costs.

Condonation and Reinstatement of appeal

- [4] The notice to appeal was filed on 1 April 2021. With this appeal, the appellant filed a condonation application as well as an application for the reinstatement of the appeal, for the late filing of the records, which was opposed by the Respondent. These applications were heard simultaneously with the merits of the appeal on 15 March 2023.

- [5] The respondent argues against the lateness of appellant application for date of hearing of the appeal, as it does not comply with Rule 49(6)(a); and against the appellant's failure to file records of appeal in terms of Rule 49(7)(a), and to fully and timeously comply with the practice directives dated 17 April 2018.
- [6] The appellant's attorneys indicate that the delays were caused by the impact of Covid-19, as the requests for obtaining records between the court and the transcribers could not be processed timeously.
- [7] It is well settled in our law that in considering applications for condonation, the court's discretion must be exercised judicially upon a consideration of all the facts and that in essence, it is a question of fairness to both sides. In this enquiry, relevant considerations may include the degree of non-compliance, the explanation therefore, the prospects of success on appeal, the importance of the case, the respondent's interest in the finality of his judgment, the convenience of the court, and the avoidance of unnecessary delay in the administration of justice.
- [8] These factors are not individually decisive but are interrelated and must be weighed one against the other, thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong.¹

[1]

United Plant Hire (Pty) Ltd v Hills 1976 (1) SA 717 (A)

- [9] There is a clear legal basis for the respondent's decision to oppose the application for condonation and reinstatement, as the appellant could have partially complied with Rule 49, as far as it was practically possible within the prescribed time, by simply filing all records that were at hand.
- [10] With regard to the prospects of success of the appeal as an important factor to be considered by the court, I find that, it is outweighed by the importance of the case to the parties, the respondent's interest in the finality of this judgment, as well as the convenience of the court and the avoidance of unnecessary delay in the administration of justice.
- [11] The respondent argues that there is absence of urgency on the part of the appellant. However, I do not see why the respondent refused to agree to a late filing of the appeal record, when asked for indulgence, as the appeal could have benefited both parties in bringing certainty to the relief sought.
- [12] There was no explanation as to why the records that were already in the attorney's possession such as pleadings were not delivered, in accordance with Rule 49. The appellant's lateness of the appeal condoned and is therefore reinstated.
- [13] An order as to cost against the respondent is simply unjustified.

Factual Background

- [14] The facts leading to this claim are not disputed, and it is not disputed that the appellant is in possession of the CAT Loader. The CAT Loader was imported from the Netherlands around 2012, by a Cape Town based close corporation, Calmar Trading CC. Calmar Trading CC sold the CAT Loader to the respondent in 2012. The respondent then delivered the CAT Loader to Tamarron Plant & Equipment (Pty) Ltd and or Tamarron Asset Management (Pty) Ltd, on the basis of a verbal or agreement to find a buyer of the CAT Loader. The respondent's case is that it remained the owner of the CAT Loader until the full purchased price is paid.
- [15] Following non-payment, the respondent instituted a vindication action against the appellant for the delivery of CAT Loader. Simultaneously, with this action the Respondent launched an application for the attachment and safekeeping of the CAT Loader pending finalization of the action.
- [16] The appellant was interdicted from alienating the CAT Loader and the costs relating to the application were reserved for determination in the main action.
- [17] The respondent was informed by Tamarron that there was an offer of R1, 200 000.00 excluding VAT from the appellant, from which Tamarron wanted to make a profit of R50 000.00. On the basis of this offer, the respondent invoiced Tamarron and awaited payment which never came forth.

- [18] It transpired that the appellant took delivery of the CAT Loader without making full payment. It is evident from the appellant's heads of argument that the appellant accepts that ownership of the CAT Loader was reserved between the respondent and Tamarron, and could never have passed to Tamarron, as the respondent never received payment.
- [19] The appellant alleged that there were mechanical problems on the CAT Loader, which led to an agreement to reduce the purchase price with Tamarron to R800 000.00.
- [20] The appellant's case is that the respondent allowed Tamarron to make representation *vis-à-vis* the appellant, which misled the appellant into believing that Tamarron was entitled to transfer ownership of the property to the appellant, and that such representation was made negligently and on that basis the appellant acted to its detriment by making payment and taking delivery of the CAT loader.
- [21] Tamarron did not pay the respondent the agreed amount of R1,200,000.00. The appellant claims to have taken ownership of the CAT loader on 9 February 2015 after paying an amount of R800 000.00 for the CAT Loader. The appellant relies on an oral agreement with Tamarron's representative that the price of the CAT Loader can be reduced due to some repairs done by the appellant. The respondent is therefore estopped from claiming its ownership right over the CAT loader.

Grounds of appeal

[22] The following grounds of appeal are set-out in the notice of appeal: -

- "1. The Court a quo erred in not dismissing the action with costs;*
- 2. The Court a quo erred in dismissing the Defendant's Plea of estoppel;*
- 3. The Court a quo erred in not finding that the Plaintiff through its conduct in concluding the agreement with Tamarron constituted a representation and that such representation was negligent;*
- 4. The Court a quo erred in not finding that the Plaintiff provided the intermediary, namely Tamarron, the scenic apparatus that enabled it to represent to the Defendant that it was entitled to dispose of the vehicle and that the Defendant was entitled to purchase same from it;*
- 5. The Court a quo erred in not finding that the plaintiff is estopped from relying on its ownership;*
- 6. The Court a quo erred in finding that the Defendant did not conclude an agreement with Tamaron to reduce the purchase price by the expenses incurred.*
- 7. The Court a quo erred in taking into account the fact that the Plaintiff did not give Tamaron any documents indicating that it was the owner of the CAT Loader;*
- 8. The Court a quo erred in finding that it was odd that the Defendant did not ask for any information/documents indicating that Tamarron had the authority to dispose of the CAT loader;*

9. The Court a quo erred in finding that nothing in the manner that the Plaintiff dealt with the CAT Loader could have led the Defendant to believe that Tamarron had the authority to dispose of the CAT Loader;
10. The Court a quo erred in finding that it was the Defendant's own gullibility that led him to conclude that such authority to dispose of the CAT Loader was present;
11. The Court a quo erred in not finding that the Plaintiff was aware that Tamarron would present to any buyer that it could sell the CAT Loader;
12. The Court a quo erred in not finding that the Plaintiff knew that Tamarron would invoice any potential purchaser;
13. The Court a quo erred in not finding that the purchaser would pay Tamarron in terms of such invoice provided;
14. The Court a quo erred in not finding that payment by a potential purchaser must take place prior to Tamarron paying the Plaintiff;
15. The Court a quo erred in not finding that Tamarron would take payment from the purchaser knowing that the Plaintiff was still the owner and that it would remain so until Tamarron paid the Plaintiff;
16. The Court a quo erred in finding that the Defendant still owes R568 000.00 in respect of the CAT Loader;
17. The Court a quo erred in not finding that the structure of the deal between the Plaintiff and Tamarron gave rise to a negligent misrepresentation to any potential purchaser of the CAT Loader;
18. The Court a quo erred in not taking into account that Mr. Scharrighuisen on behalf of the Plaintiff conceded that a

reasonable buyer would assume that Tamarron was the owner;

19. *The Court a quo erred in not finding that the Defendant acted on the correctness of the facts represented and acted to its detriment;*

20. *The Court a quo erred in not finding that the Plaintiff took no steps to ensure that any potential buyer would know the true state of affairs and as a result such conduct was negligent."*

Legal Principles

[23] Estoppel is a rule of evidence that prevents the representor from denying the truth of the representation that was previously made by the owner to the representee, such that the latter relied in the representation to his or her detriment. If this defence was to succeed the owner of the property is indefinitely precluded from denying that the person who sold its property had no authority to dispose of the property (*rei disponenti*) or that the seller had the right of ownership (*dominium*).

[24] In *ABSA Bank Limited v Knysna Auto Services cc*², the court recited the legal principles on estoppel as applied by Holmes JA in *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd* 1976 (1) SA 441 (A) at 452A-G where he held:

'Our law jealousy 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

² [2016] JOL 36038 (SCA)

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 of was entitled to dispose of it; or

...

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.'

[25] Under this doctrine of estoppel, the representation must, firstly, be made by one person who is the owner of the goods to another, secondly the representation made must be as to facts and not as to the law, thirdly, it must be made as to an existing

fact, and it must be made in a manner that the other person believes it to be true.

- [26] In principle estoppel can only succeed if one can prove following elements, namely, misrepresentation, negligence, prejudice, causation, and maintainability.
- [27] In *Konstanz Properties (Edms) BPK v Wm Spilhaus & Kie (WP) Bpk*³ the court had to decide on whether the equipment had become part of the Appellant's property through attachment, and (ii) if not, whether the Respondent was estopped from relying on its reserved right of ownership. The court held that the decision as to whether or not property had become immovable through attachment depends on the particular circumstances... the nature of the movable... The court noted that there was a *traditional* approach in terms of which intention only mattered if an objective consideration of the nature of the object or the manner of attachment was ambiguous, and a *new* approach in terms of the subjective intention (the ipse dixit) was decisive of the matter, and the nature of the object and the object and the manner of attachment were only indicative of the degree of the intention.
- [28] In the context of a vindication action, the appellant, as the possessor has to prove that the owner created a negligent representation on which the possessor reasonably relied on. In *Concor Holdings (Pty) Ltd t/a Concor Technicrete v Potgieter*⁴, the court held that the appellant had clearly been negligent,

³ [1996] All SA 215 (A)

⁴ [2004] 4 All SA 589 (SCA)

since it must have been aware of the possibility that the builder might not pay the amount owing to it, and yet permitted the alienation of the paving stones, by the builder.

- [29] It is clear from the authorities in our law, as well as in English law, that the owner's mere entrusting a person (not being a factor, broker, or agent for selling) with possession of his articles is not sufficient to produce the representation that the *dominium* or *jus disponendi* was vested in the possessor. The respondent would not be entitled to assume from such mere possession that the possessor was authorised to dispose of the articles. If he made such an assumption he would only have himself to blame for his gullibility"⁵

Discussion

- [30] The appellant and Tamarron dealt with the sale of this CAT loader machine in an unusual manner. Both parties conceded that such machine does not have any means to proof ownership such as Natis registration system. It is not sufficient to rely on possession to establish or claim ownership. The Court in *Grosvenor Motors (Potchefstroom) Ltd*⁶ set out the following:

"If I seek to recover my property from a man in the street, he cannot be heard to say that he is under no obligation to restore it to me because he bought it from a third person and paid for it

⁵ *Electrolux (Pty) Ltd v Khota* 1961 (4) SA 244 (W) at page 246

⁶ *Grosvenor Motors (Potchefstroom) Ltd v Douglas* 1956 (3) (SA) 420 (A)

*under the belief that person was the owner of it because I allowed him to be in possession of it."*⁷

- [31] From the evidence led, it is apparent that the appellant relied upon a representation made by Tamarron and not by the respondent. In *B v B Hardware Distributors (Pty) Ltd v Administrator, Cape Town*⁸ Rabie ACJ said at 964I-965B: "*In order to found an estoppel, a representation must be precise and unambiguous.*"
- [32] The question of whether Tamarron was acting as an agent was debatable in that, on the one hand, the respondent claims to have only requested Tamarron to find a purchaser and once that is done, Tamarron had to purchase the machine for it to sell it to the intended buyer and on the other hand, the appellant argues that Tamarron acted as owner or agent and as such it was entitled to transfer ownership.
- [33] There was no basis for the court to find that the respondent, through its conduct in concluding the agreement with Tamarron, constituted a representation and or that such representation was negligent. The respondent was not negligent in its conduct, and it is found to be irrelevant that the representatives of Tamarron held themselves out to be owners or agents, and in any event such act cannot be blamed on the respondent.

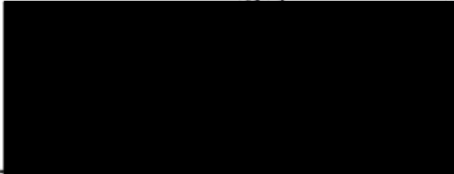
⁷ *Grosvenor Motors (Potchefstroom) Ltd v Douglas* at page 425E

⁸ 1990 (4) SA 626 (E)

- [34] The appellant's own conduct pertaining to short payment of the purchase price affected its own claim to ownership of the CAT Loader.
- [35] It would not be necessary for this court to interfere with the findings of the court *a quo* and I find that estoppel as a defence cannot succeed under the circumstances.

The following order is made:

1. The Appellant is granted condonation for late filing of the appeal.
2. The appeal is dismissed with costs.


MANAMELA PN
ACTING JUDGE OF THE HIGH COURT

This judgment was delivered electronically by circulation to the parties' legal representatives by e-mail and uploading onto CaseLines. The date and time of hand down is deemed to be 26 July 2023.

I concur

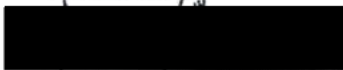


N DAVIS J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION: PRETORIA

I concur



N KWINANA AJ

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION: PRETORIA

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