



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case Number: A166/2015

In the matter between:

LEON BOSMAN N.O.
IZAK DANIEL BOSMAN N.O.

and

MORTIMER TOYOTA (PTY) LTD

CORAM: LEKALE, J *et* MOTIMELE, AJ *et* ZIETSMAN, AJ

JUDGMENT BY: ZIETSMAN, AJ

HEARD ON: 30 MAY 2016

DELIVERED ON: 9 JUNE 2016

- [1] This is a full bench appeal emanating from a judgment by a single judge of this division after leave to appeal had been granted.

- [2] In summary the background and facts of this matter as appears from the pleadings and the evidence before the court *a quo*, are that the plaintiff trust as represented by one of its trustees, Mr Bosman, issued summons against the defendant, Mortimer Toyota (Pty) Ltd (Reitz) claiming damages in the amount of R250 000,00 based upon an alleged oral agreement entered into between the trust and Mortimer Toyota during the beginning of February 2013. The alleged terms whereof are that plaintiff delivered a Hilux vehicle to the defendant to be placed on the defendant's display floor for second hand vehicles and to be marketed on behalf of the plaintiff at a selling price of R250 000,00. It is further alleged that the defendant breached the contract by selling the vehicle without the knowledge and consent of the plaintiff at a selling price of R180 000,00 and that defendant delivered the vehicle to the purchaser without obtaining payment of the purchase price. Consequently defendant sold plaintiff's Hilux vehicle and failed to pay the agreed selling price of R250 000,00, to the plaintiff as agreed.
- [3] The defence raised, by Mortimer Toyota, was that a certain Mr Wium, the branch manager of Mortimer Toyota at Reitz, did not have the necessary authority to conclude any agreement with the plaintiff as alleged and consequently the agreement is denied. Although other defences were raised, the main issue between the parties was whether the aforesaid Mr Wium had the necessary authority to act on behalf of the defendant in conclusion of such an oral agreement with the plaintiff.

- [4] In replication, the plaintiff relied on estoppel, in that the defendant's representative was indeed duly authorised to enter into the agreement, and in the alternative that should it be found otherwise, the defendant should be estopped from denying Wium's authority. In this regard the plaintiff pleaded that the defendant was bound based on ostensible authority, relying on a number of factors, amongst others that the defendant represented to the plaintiff that Mr Wium as the branch manager of Mortimer Toyota, Reitz had the necessary authority to enter into any agreements with the public at large pertaining to the buying and/or selling of vehicles at Mortimer Toyota, Reitz.
- [5] It was also reiterated by the plaintiff that as far as his claim of R250 000,00 is concerned, the amount represents the agreed selling price of R255 000,00, less defendant's commission of R5 000,00 in the event of the sale occurring, in which event and upon delivery of the vehicle to the purchaser, the amount of R250 000,00 would be payable to plaintiff forthwith.
- [6] The court *a quo* found that the plea of estoppel had not been proved by the plaintiff and the defendant is in those circumstances not liable. The court *a quo* found that Wium did not have ostensible authority to act on behalf of the defendant, amongst others because of the fact that the plaintiff knew, or ought to have known that although Wium is the branch manager at the Reitz branch of Mortimer Toyota, he being an attorney (although not practicing any more) and an astute businessman, that Mortimer Toyota is in the business of buying and selling vehicles to and from the public, and that Mortimer Toyota is

bound by the Second Hand Goods Act, 6 of 2009 which came into effect on 30 April 2012, and also the Consumer Protection Act, 68 of 2008. In that instance the defendant would have introduced internal measures and regulations to which its employees are bound. Such internal measures being a prohibition amongst others, to enter into any agreements called private agreements.

- [7] It is also common cause between the parties that the Reitz Toyota dealership, previously belonged to an entity called Greyling Broers, and it was sold to the present defendant during 2012. It is also common cause between the parties that the plaintiff previously had similar agreements with Greyling Broers as represented by amongst others the same Mr Wium and it was never brought to plaintiff's attention that defendant's sales representatives were not entitled to sell motor vehicles on behalf of clients to third parties for commission.
- [8] The court *a quo* found that it must be accepted that Greyling Broers sold second hand vehicles on behalf of plaintiff in the past, and that he as a businessman and attorney should have made enquiries from the defendant – a company of outsiders unknown to him, with many branches and a head office in KwaZulu Natal – whether it would be prepared to act as agent in the selling of plaintiff's vehicles, similar to that with Greyling Broers. The court *a quo* found that the plaintiff failed to do so and that it cannot rely with success on the version that the defendant's internal measures were unknown to him. The court *a quo* also found that the plaintiff must be held to have actual knowledge of defendant's

automark business and the manner in which it operated. The automark brand had certain promises which were advertised to the public at large through amongst others a newspaper circulated in the Bethlehem and Reitz districts, called the Die Vrystaat.

- [9] As will be clear from the aforesaid, the central question which this court has to decide is whether the defendant was estopped from denying the lack authority on the part of Mr Wium to have concluded on behalf of the defendant the contract the plaintiff contended for. The main issue, therefore, is whether there was a representation by the defendant (not its agent) that it can and may conclude agreements with the public at large through its branch manager Mr Wium in the circumstances.

- [10] Although the court *a quo*'s reasons as to why the plaintiff ought to have known about the internal measures and regulations of the defendant's Reitz branch, might be questionable, in that the court might have placed a higher burden upon the plaintiff because of the fact that he is an attorney and astute businessman, than it normally should have done, it is clear that the plaintiff entered into an agreement with Mr Wium in a private deal and therefore with him personally, and not with Mortimer Toyota.

- [11] It was furthermore clear that this specific agreement, as were the previous agreements which the plaintiff entered into with amongst others Wium, was an "out of hand" selling of his vehicle. Meaning a deal in which plaintiff required from the salesman of the defendant to sell the vehicle on its behalf to a third party without

the defendant buying the vehicle and on-selling it to a third party. This is regarded as a private deal or private sale, because the deal in its entirety does not go through the books of the defendant. No documentation, invoices, etc. are issued by the defendant, and according to Mr Neethling on behalf of the defendant:

“Meneer Bosman het ook gesê dat die voertuig uit die, hy wil R250 000,00 vir die voertuig hê en die verkoopsman wat die voertuig verkoop sal hy R5 000,00 kommissie betaal en op daardie stadium het ek omgedraai en weg geloop.” See Volume 1, page 271, line 20 to 25.

[12] So also Mr A J Stone on behalf of the defendant testified that the agreement was “uit die hand uit” agreement. He explained that that meant “Uit die hand uit, wat beteken die uitdrukking? --- Wel, “uit die hand uit” beteken as u sou na my toe kom met ‘n voertuig van u eie en ek maak u prys vir die voertuig en u is nie tevrede daarmee nie dan sal, met ander woorde ek ruil dan nie die voertuig in nie, dan sal u die voertuig uit die hand uit verkoop, wat beteken dit is ‘n privaat verkoop aan iemand anderster, maar nie aan my, of die handelaar nie.” See volume 2, page 360, line 9 -15.

[13] In my view it should have been clear to Mr Bosman, that the defendant is not in the trade and business of facilitating private deals or as they called it “uit die hand verkoping”. It is also clear from the aforesaid that it is not Mortimer Toyota who will earn the commission as referred hereto and above, but the specific salesman (in a private deal). This fact should and could have been determined by the plaintiff well-knowing that he is no longer

dealing with Greyling Broers from Reitz, but with Mortimer Toyota, a company with several outlets and a head office in KwaZulu Natal. Defendant's usual trade and business is the buying and selling of vehicles from the public and to the public.

- [14] Further confirmation for the fact that this was a private deal, was the advertisement placed in the Landbou Weekblad, which clearly shows that the vehicle was advertised by "Thabo", being the representative of the plaintiff, with his cell number in Petrus Steyn. It does not seem as if the defendant ever advertised the vehicle, as being for sale, under its own name. According to the evidence the advertisements were indeed paid for by the plaintiff and/or plaintiff's representative, and not by the defendant. See volume 2, page 485.
- [15] From the aforesaid it is clear that both Mr Bosman and Mr Wium (the branch manager of the defendant) knew that the private transaction would not go through the books of the defendant and that the transaction was dealt with on the side. Wium therefore did not mind the defendant's business, but his own.
- [16] From the aforesaid facts it seems that Mr Wium was on a frolic of his own. In the decision of **Glofinco v Absa Bank Limited t/a United Bank** 2002 (6) SA 470 (SCA) at para [12] the SCA stated the requirements for holding a principal liable on the basis of ostensible authority of his agent. In paragraph [14] of the same judgment of the SCA, however, Nienaber JA stated the following:

“Of course that does not mean that a bank is liable to a third party ex contractu for all the actions and transactions of the branch manager when the latter is in truth minding not the bank's business but his own.”

[17] It must be determined who Mr Wium in these circumstances represented when he concluded an agreement with Mr Bosman on behalf of the plaintiff. In my view this was a private deal, and the evidence shows that Mr Wium facilitated the plaintiff in selling the plaintiff's vehicle “out of hand” or private, without intervention of the defendant. For that purpose Mr Wium utilised, amongst others, the display floor of the defendant, without the defendant's knowledge and in fact contrary to the defendant's clear instructions to him that he was not to entertain private deals in the circumstances.

[18] The court *a quo* also found the following:

“[14] It is also important to remember that in order for ostensible authority to be relied upon, the representation must have been created by the principal and not the agent. A person holding himself out as the principal's agent cannot, of itself, impose liability on the principal. See **LAWSA**, 3rd edition, volume 1, para [162], with reference to **NBS Bank Limited v Cape Produce Co (Pty) Ltd** *loc cit* at para [25] where it was also stated that it is not enough that an impression was in fact created as a result of the representation as it is also necessary that the representee should have acted reasonably in forming that impression.”

A view that I align myself with.

[19] The court *a quo* also correctly found that the burden of proof rests on the person who relies on estoppel. In paragraph [16] of the judgment the court *a quo* stated the following:

“The representee has to show that he was misled, i.e. that a certain state of facts exist which actually does not exist. He should have been misled by the person who he seeks to hold liable as principal or by someone for whose conduct such person is responsible.”

See volume 3, paragraph [16].

[20] In my view the facts in *casu* are comparable to the facts in the **Glofinco** matter, furthermore, besides any other reasons advanced by the court *a quo*, some of which might be criticised, this in itself, namely that Mr Wium acted on a frolic of his own in dealing with the plaintiff, is in fact a clear indication that there was not a representation by the defendant that Wium contracted with plaintiff on its behalf. The plaintiff knew this or at least ought to have known this.

[21] Therefore in those circumstances, it could not be found that there was any representation by the defendant to enter into an agreement with Mr Bosman. He did a private deal.

[22] In my view therefore, the appeal cannot succeed and I would recommend the following order:

1. The appeal is dismissed with costs.

P. ZIETSMAN, AJ

I concur.

I therefore make the following order:

The appeal is dismissed with costs.

L. J. LEKALE, J

I concur.

A. M. M. MOTIMELE, AJ

On behalf of the appellant: Adv. J. Y. Claasen SC
Instructed by:
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On behalf the respondent: Adv. J. J. Meiring
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