

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 6017/2010

In the matter between:-

UNITRANS AUTOMOTIVE (PTY) LIMITED

Applicant

and

THE TRUSTEES OF THE RALLY MOTORS TRUST Respondent

HEARD ON: 3 MARCH 2011

JUDGMENT BY: FISCHER, AJ

DELIVERED ON: 10 MARCH 2011

[1] Unitrans Automotive (Pty) Ltd (applicant) brought an application in which it sought and was granted *ex parte* an interim interdict preventing the trustees of the Rally Motors Trust (respondent) from dealing with a properly identified 4 x 4 Hilux motor vehicle pending the subsequent obtaining of a declaratory order to the effect that the applicant was as such the owner of the motor vehicle together with further ancillary relief relating to the return thereof. Respondent opposed the granting of such final relief, which was then argued before me.

[2] The salient facts which as such are not in dispute may be summarised as follows:

2.1 On 2 November 2002 a certain Kok visited the premises of applicant where he was introduced to one of the sales persons employed by applicant, a certain Mr. Amaro (Amaro).

2.2 Kok intimated that he was visiting from New Zealand and that he intended touring Botswana with the motor vehicle before selling same as he regarded this as a more expedient and cost effective manner in which to tour as opposed to hiring a vehicle.

2.3 The purchase price was set at R359 000,00 and Kok advised that he intended doing a "cash deal".

2.4 Amaro was more than keen and willing to assist Kok, who advised that he intended leaving on his trip the very next day. As a result hereof Amaro and on 2 November 2002 prepared not only the relevant tax invoice addressed to Kok, but in addition thereto the official certificate of registration in respect of the motor vehicle evidencing the registration of same in the name of Kok, together with the official motor vehicle licence and licence disk, such documents having been issued

in terms of the National Road Traffic Act of 1996.

2.5 On 3 November 2010 Kok returned and advised that he would effect payment by means of an electronic transfer of funds, but that he needed to make the necessary arrangements with Absa Bank. A certain Disney (Disney), an accounting officer in the employ of applicant, assisted Kok in gaining access to the Absa website on her own computer shortly whereafter Kok produced what on the face thereof appeared to be a copy of the confirmation of a successful beneficiary payment via the internet banking system. Amaro was apparently satisfied with such “proof of payment” whereafter an offer to purchase was prepared and signed by all relevant parties, including applicant’s sales manager, a certain Mr. Schoombee. The vehicle together with the aforementioned documentation was thereafter handed over to Kok, who left the premises in his “newly acquired vehicle”.

2.6 What thereafter transpired can only be described as a woeful tale of naivety, incompetence and misplaced trust. Applicant according to its own *ipse dixit* very well knew that as the payment was effected by means of an

electronic transfer from a different bank to that used by applicant, the funds would only become available in applicant's account "n paar dae later". Applicant furthermore stated that

"normaalweg sal applikant in omstandighede soos die, die voertuig hou totdat die betaling op die applikant se rekening reflekteer. In die geval was die omstandighede egter sodanig dat Mnr. Amaro en ander werknemers van applikant, Kok vertrou het."

On 8 November 2010 the accounting officer finally decided to advise Amaro that payment had as yet not been "made" as applicant's bank statements failed to reflect such a transaction. Amaro thereafter phoned Kok on several occasions enquiring about the non-payment problem only to be met by explanations from Kok ranging from a claim that he was already in Botswana, that his wife would attend to the payment from her own funds, that his mother-in-law was now objecting to payment from her daughter's funds and finally an undertaking that he (Kok) would be back in

the country by 11 November 2010. On 11 November 2010 Kok arrived at the premises of applicant and advised that he would immediately attend to the payment via a bank in New Zealand whereupon he and Amaro went to Standard Bank (being applicant's bank) to effect the transaction through their foreign exchange facility. Amaro was advised that any such transaction would take between two and ten working days to be finalised whereupon the two gentlemen returned to the premises of the applicant where the accounting officer, Mrs. Disney, was advised that payment would be effected in the very near future. The woeful tale was compounded by the fact that Amaro noticed that Kok was in fact no longer driving the relevant vehicle, and had arrived in another allegedly belonging to his father. It was only after Kok had left the premises that Disney contacted Standard Bank and was advised that the transaction would in fact take several days whereupon applicant finally decided to request Kok to return the vehicle pending payment from New Zealand. Kok once again misled the applicant as to when he intended "returning" the vehicle and it was only on 15 November

2010 that applicant confirmed that no such transaction involving transfers from a bank in New Zealand had been arranged by Kok. Then for the first time the applicant realised that it had been misled at all material times by Kok.

2.7 Unknown to the applicant Kok had already and on 3 November 2010 sold the motor vehicle to respondent.

- [3] In its Answering Affidavit the respondent advised that Kok had conveyed the same story to it, namely that he was visiting from New Zealand; that he found it more appropriate to purchase the vehicle whilst visiting South Africa and to thereafter sell it before departing; that he had earlier in the year bought the vehicle from applicant; that he wanted R295 000,00 for the sale of the vehicle to respondent and that not only the registration papers, but proof of identity together with an international driver's licence were presented. On the strength of the foregoing respondent purchased the motor vehicle from Kok, issued him with the necessary tax invoice and thereafter registered the vehicle in its own name as part of its stock. Respondent raised as a defence to applicant's claim in terms of the *rei vindicatio* that applicant was, in the

circumstances, estopped from claiming return of the vehicle in question.

- [4] Mr. Steyn, on behalf of the applicant, submitted that the defence of estoppel could not be upheld as Kok was at no material time the owner of such vehicle and that the only reason why applicant had parted with the vehicle was as a result of the fraudulent conduct on the part of Kok which amounted to nothing less than theft. In support of his argument Mr. Steyn referred the Court to the case of **BROEKMAN v TCD MOTORS (PTY), LTD** 1949 (4) SA 418 (TPD). The legal position has been dealt with over a number of years in cases such as **GROSVENOR MOTORS (POTCHEFSTROOM) LTD v DOUGLAS** 1956 (3) SA 420 (A); **ELECTROLUX (PTY) LTD v KHOTA AND ANOTHER** 1961 (4) SA 244 (W); **JOHAADIEN v STANLEY PORTER (PAARL) (PTY) LTD** 1970 (1) SA 394 (A); **KAJEE v H M GOUGH (EDMS) BPK** 1971 (3) SA 99 (N); **OAKLAND NOMINEES (PTY) LTD v GELRIA MINING & INVESTMENT CO (PTY) LTD** 1976 (1) SA 441 (A); **QUENTY'S MOTORS (PTY) LTD v STANDARD CREDIT CORPORATION LTD** 1994 (3) SA 188 (A) and **ABSA BANK BEPERK v**

RAMAKATANE AND ANOTHER [2001] 1 ALL SA 559 (O).

- [5] All the above cases including the **BROEKMAN**-case, *supra*, deal, amongst other things, with the causal connection between the representation and the extent to or manner in which the representee acted on such representation to his or her own prejudice which has commonly become known as the so-called proximate cause test. *In casu* it was incumbent upon the respondent to show that *culpa* on the part of the applicant caused the respondent to be misled into the erroneous belief that Kok had the right to dispose of the vehicle. Put differently, the respondent must discharge the onus of proving that the negligence on the part of applicant (and not any other person's negligence) was the cause of respondent's erroneous belief.

See: **GROSVENOR MOTORS (POTCHEFSTROOM) LTD v DOUGLAS** 1956 (3) SA 420 (AD) at p. 427 E.

The Appeal Court appears to have gone even further in the **JOHAADIEN**-case, *supra*, by qualifying the view expressed in the **GROSVENOR MOTORS**-case, *supra*, by saying that it

was conceivable that the owner of a motor vehicle could “by reason of compelling considerations of fairness” be estopped from asserting his or her rights even if there was no *culpa* on his or her part.

See: **JOHAADIEN**-case, *supra* at p. 409 E – G.

- [6] Mr. Steyn, on behalf of the applicant, submitted that the applicant had not acted negligently *vis-a-vis* the respondent in handing the vehicle, together with all necessary registration papers, to Kok but had in fact only acted negligently *vis-a-vis* itself in believing Kok’s story. He further submitted that respondent had been misled by the unlawful and criminal representations made to it by Kok and that such was the proximate cause of respondent’s prejudice. To this extent Mr. Steyn relied on the **BROEKMAN**-case, *supra*, in which it was found that the proximate cause of the deception on the respondent was the “act of wickedness” and “fraudulent misrepresentation” of the third party (*in casu* Kok) relating to the possession and completion of a formal “notice of change of ownership” document as envisaged in terms of section 9(1) of the then prevailing Motor Vehicle Ordinance.

The **BROEKMAN**-case, *supra*, was decided in favour of the owner/applicant on facts which differ materially from those in the present application. The applicant in that case did not hand over registration papers to the third party evidencing a change of ownership as was the case *in casu*. More apposite is the case of **KAJEE**, *supra*, in which the full bench found in favour of the party in the same position as that of the party in the present application on very similar and comparable facts.

- [7] The legal position has however been succinctly stated by the Supreme Court of Appeal in, amongst others, the case of **STELLENBOSCH FARMERS' WINERY LTD v VLACHOS t/a THE LIQUOR DEN** 2001 (3) SA 597 (SCA) at 609 where Nienaber JA referred to the case of **OK BAZAARS (1929) LTD v UNIVERSAL STORES LTD** 1973 (2) SA 281 (C) at 287 H – 288 B:

“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 p. 425; see also *Connock's (S.A .) Motor Co. Ltd. v Sentraal Westelike Ko-operatiewe Maatskappy Bpk.*, [1964 \(2\) SA 47 \(T\)](#) A at p. 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."

- [8] Nienaber JA went on to state that our courts have, in attempting to determine whether it was the fraud of the intervening party (*in casu* Kok), or the negligence of the owner (*in casu* the applicant) which caused the representee (*in casu* respondent) to act to his prejudice "chiefly but not exclusively" employed the so-called proximate cause test. The learned Judge went on to state that whatever the approach was, it should not be viewed in isolation but rather in the context of a broad overall picture which would as such

as of necessity include matters of policy and fairness.

See: **STELLENBOSCH FARMERS' WINERY LTD**-case, *supra*, p. 610 D.

- [9] In **ABSA BANK BEPERK v RAMAKATANE**-case, *supra*, at p. 563 E – G Hancke J dealt with the requirements for successfully relying on estoppel as stated in the case of **OAKLAND NOMINEES (PTY) LTD v GELRIA MINING & INVESTMENT CO (PTY) LTD** 1976 (1) SA 441 (A) at p. 452 F – G. A useful approach to the whole problem is to be found in the case of **ELECTROLUX (PTY) LTD v KHOTA AND ANOTHER** 1961 (4) SA 244 (W) at p. 247 B – E.

“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, as for example, the share certificate with a blank transfer form annexed, as in *West v De Villiers*, 1938 CPD 96, and the other cases referred to therein; 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. In all such cases the owner

'provides all the scenic apparatus by which his agent or debtor may pose as entirely unaccountable to himself, and in concealment pulls the strings by which the puppet is made to assume the appearance of independent activity. This amounts to a representation, by silence and inaction . . . as well as by conduct, that the person so armed with the external indications of independence is in fact unrelated and unaccountable to the representor (*in casu* applicant) ... or otherwise.'

[10] Mr. Snellenburg, for the respondent, argued that if regard be had to the facts of the case as read in the context of the correct approach in applying the “proximate cause” test, the respondent had shown that on a balance of probabilities the applicant should be estopped from asserting ownership.

[11] I am of the opinion that if regard be had to not only the manner in which applicant dealt with Kok, but in addition thereto the extent to which Kok was entrusted with the *indicia of dominium or jus disponendi*, being the vehicle, its ignition keys, the certificate of registration and the motor

vehicle licence and licence disk evidencing that the vehicle had been transferred into the name of Kok, it must be accepted that applicant had as such provided Kok with all the “scenic apparatus” with which Kok was able to represent to the respondent that he was entitled to dispose of the vehicle and that respondent was as such entitled to purchase same from him. In the **OAKLAND NOMINEES (PTY) LTD**-case, *supra*, at p. 458 H – 459 A Holmes JA encapsulates what in my opinion is the correct approach:

“It would be wrong to say that the requirement is that the representation which is relied upon must be the cause of the defendant's *loss*. Such a formulation would emasculate the defence of estoppel, for the cause of the defendant's loss is nearly always the villainy of the intermediary. (my emphasis) In estoppel by negligent representation we are concerned with the effect of the representation on the state of mind of the defendant, i.e., that his reliance on it was the cause of his *having entered into the transaction...* This state of mind precedes his loss. Hence the requirement is that the representation and his reliance on it must be the cause of his *having acted as he did* - to his detriment.” (emphasis of Holmes JA)

[12] I find on the facts before me that without the *indicia of dominium* or the “scenic apparatus” provided by applicant to Kok, Kok would have been unable to persuade respondent to act to its own detriment and purchase the motor vehicle in question. The respondent purchased the motor vehicle and was able to register same in its own name by virtue of the *indicia* or “scenic apparatus” provided to it by Kok. Kok had in turn been provided with such *indicia* by applicant in circumstances where it acted negligently and on its own *ipse dixit* contrary to normal practise and procedure in parting with the *indicia* and/or “scenic apparatus” before receiving payment. The applicant was furthermore negligent in not foreseeing that Kok could and in fact did deal with the vehicle as his own property given the facts. In the circumstances and having regard to the facts and considerations of fairness I am of the opinion that the applicant is not entitled to the relief it seeks and that the application should be dismissed with costs.

I accordingly make the following order:

The application is dismissed with costs.

P.U. FISCHER, AJ

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On behalf of the respondent:

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