Bib. 81/86

Case no: 81/85

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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

CARGO MOTORS .... Appellant

and

G L MOTORS .... Respondent

Coram: RABIE, CJ, JOUBERT, HOEXTER, HEFER et JACOBS, JJA.

Heard: 13 May 1986.

Delivered: 29 May 1986

J U D G M E N T

RABIE, CJ: /.........

RABIE, CJ:

This case began as an application in the Witwatersrand Local Division in which the present appellant, a distributor of Mercedes Benz motor vehicles, prayed for an order directing the respondent, a dealer in motor vehicles, to hand over to it a 1984 model Mercedes Benz 500 SEC motor car of which the appellant alleged that it was the owner. The appellant's case, of which fuller details will be given below, was that it had on 17 May 1984 in a cash transaction sold and delivered the aforesaid vehicle to one Lukas Malepe; that the cheque which was given to it in payment of the purchase price of the vehicle was a forgery, and that, by reason of the fact that the purchase price was not paid, the ownership in the vehicle remained vested in the appellant. The respondent company (Crown Service Station (Pty) Ltd, which trades as G.L. Motors) denied that the appellant was the owner of the vehicle and alleged that the respondent had on or about 23 May 1984 purchased the vehicle in a cash transaction from one Ferror, who had, in turn, bought the vehicle for cash from Lukas Malepe. The respondent alleged, furthermore, that even if the appellant were still the owner of the vehicle, it was estopped from vindicating it from the respondent. After the appellant had filed an affidavit in reply to the respondent's opposing affidavit, the application was referred for the hearing of oral evidence on certain issues as defined by the Court. At the conclusion of the hearing Kriegler, J, dismissed the application with costs, holding that the appellant had parted with its ownership in the vehicle when it sold and delivered it to Malepe on 17 May 1984. The learned Judge went on to say that, if it had been necessary to decide the matter on the basis that the appellant had retained its ownership in the vehicle, he would have held, for the reasons stated by him in his judgment, that the appellant was estopped from asserting its ownership as against the respondent. The appeal is against the whole of the judgment of the Court a quo.

The appellant called three witnesses. The first was Mr. R W Brien, who testified that he was the manager, and "the person in charge", of the appellant's branch in Rosebank, Johannesburg. (In a statement made by him to the police on 24 May 1984 he referred to himself as the "sales manager" at the appellant's Rosebank branch.) The second witness was Mr. A D Venables, the appellant's financial director, and the third was Mrs. D. Nielson, a credit control clerk at the appellant's head-office in Johannesburg. The respondent called only one witness, viz. Mr. J F E Tutt, its managing director. The facts of the case, as they emerge from the evidence, are, in so far as relevant, set out below.

According to Brien, he heard on 14 May 1984

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that there were "negotiations in progress" with regard to the sale of the above-mentioned Mercedes. (All the dates mentioned below were dates in May 1984.) One Müller, a salesman in the appellant's employ, conducted the negotiations on behalf of the appellant. The prospective purchaser, Brien was informed, was one Lukas Malepe. According to reports made to Brien, Malepe was a Black man from Maseru, Lesotho, who stayed, while in Johannesburg, at the Carlton Hotel. Staying with Malepe at the Carlton Hotel, Brien was told, was a Mr. Hanley, who was said to be Malepe's adviser. Brien assumed that Malepe visited the appellant's premises and that Müller spoke to him there. Brien himself never saw Malepe. Müller, according to Brien, also spoke to Malepe on the telephone, and also went to the Carlton Hotel, where (so Brien was told) he spoke "to several people". Brien told Müller that, because the would-be purchaser was from Lesotho, the appellant would "require a bank guaranteed cheque before he could deliver the vehicle to him." Subsequently, Brien testified, Müller told him that "they'd agreed they would get the bank guaranteed cheque", and that the cheque was "to be flown" to Johannesburg "on the daily service from Maseru." The purchase price of the car was to be R97 050. On 15 May Brien received a telephone call from someone who, according to Brien, spoke in "an accent from the Southern part of England". This man introduced himself as "Hanley" and said to Brien that the delays in the transaction concerning the vehicle "were causing him perhaps to reconsider the purchase". "In other words", Brien testified, "he was putting pressure on me to get the car delivered to him - or to Malepe." The next day (16 May) Brien dropped Müller off at the Carlton Hotel. Müller was there given a cheque, which he took to the appellant's premises in Rosebank, where Brien saw it. The date on the cheque was 16 May 1986. It was not a bank guaranteed cheque, but purported to be a bank cheque for R97 050, drawn by Barclays Bank International Limited, Maseru, Lesotho, on itself, in favour of "Cargo Motors." On 17 May Brien was handed a document which purported to contain an offer by Malepe to buy the vehicle

from/.........

from the appellant for R97 050. It was a printed document, headed "Offer to Purchase", on which Müller had written the name "Lukas Malepe", and the address "Maseru, Lesotho". Malepe did not sign the document. The space provided in the document for the signature of the "purchaser" was left vacant. Brien signed his name at the foot of the document, next to the printed words "Authority to Process". By giving this "authority", Brien testified, he "authorised the deal". After he had given this authority, Brien said, he sent the "deal", with the aforesaid cheque, to Mr. Niel Calder, the appellant's credit manager. The credit manager, he testified, is the person who determines the manner of payment and who decides "whether ownership passes or not or whether the deal goes through or anything else." Calder accepted the aforesaid "Offer to Purchase" by signing his name and writing the date 17.5.1984 below the printed words: "This Offer Accepted For And On Behalf Of Cargo Motors Corporation Limited." Above these printed words, in a space provided (so it seems) for the noting of "Other Instructions", Calder wrote: "COD PD". Brien conceded that these letters meant "Cash on Delivery Paid ". After this document had been signed by Calder, it was returned to Brien. On the same day (17 May) a "Vehicle Invoice" relating to the sale of the vehicle was issued by the appellant's Rosebank branch. The invoice contained the name Lukas Malepe; the address "Maseru, Lesotho"; particulars of the vehicle; the purchase price and, also, next to the printed word "Terms", the typwritten letters "C.O.D."

According to Brien the vehicle was delivered to the purchaser by Müller on 18 May. There were also handed over, one gathers from Brien's evidence, the aforesaid invoice; a temporary licence; a temporary third party disc; the necessary registration papers; a change of ownership form; "guarantee forms"; two sets of keys to the car, and an owner's manual.

On the morning of 23 May the aforesaid Tutt called on Brien at the latter's office. The reason for the visit, according to Tutt, was as follows.

On 21 May one Pienaar and a Black man, who was not known to Tutt, came to Tutt's place of business to inquire whether he (Tutt) would be interested in buying a virtually new 500 SEC Mercedes Benz motor car. A price of about R75 000 was mentioned. They did not have the car with them, and Tutt said that he would like to see it. They brought the car the next day (22 May). There was then a third man with them who was introduced to Tutt as Louis Ferror. Tutt was told that Ferror was the owner of the car, and that he had paid Malepe R80 000 for it. Tutt was interested in buying the car, but he was suspicious of the offer because the vehicle was virtually new (it had done only about 1 400 kilometres) and because the price asked for it was much less than the price of a new car of that kind. Tutt, who was shown the papers which the appellant had handed over when it delivered the vehicle, called for proof of Ferror's title and also asked for a clearance by the police to the effect that the vehicle was not listed as stolen. Ferror thereafter produced an affidavit, attested to before an attorney, wherein the deponent, who said that he was Lukas Malepe, declared that he had sold the vehicle to Ferror and that Ferror had paid him the purchase price of R80 000 in full. Ferror also produced a clearance by the police, as requested. Tutt, still uneasy about the offer made to him, then went to see Brien, whom he knew well. There is little reason to doubt that Tutt wished to establish whether it would be safe for him to buy the car from Ferror, and that he put questions to Brien with a view to discovering whether the appellant still had an interest in the car which could be affected if he (Tutt) were to buy the car. There is, however, a dispute on the evidence as to precisely what questions Tutt put to Brien and what answers he received in reply thereto. In view of the conclusion to which I have come regarding the appeal, I do not propose to set out the evidence relating to that dispute. Suffice it to say that the learned Judge found that neither Brien nor Tutt was a particularly satisfactory witness, but that there were "overwhelming probabilities" that "Brien did represent to Tutt that the applicant (appellant) had no further interest in the vehicle."

Tutt bought the vehicle from Ferror shortly after midday on the day of his conversation with Brien. He paid Ferror R30 000 in cash and delivered to him a motor car valued at R40 000.

Following on his conversation with Tutt, Brien telephoned Mrs. Nielson and Mr. Venables. He told them about the transaction with Malepe and asked them whether the cheque had been paid. They caused inquiries to be made, and during the afternoon of the next day (24 May) Brien was informed that the cheque was a forgery.

Tutt succeeded in recovering the motor car

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which he had delivered to Ferror, but not the R30 000 he had paid to him in cash.

The learned Judge found that the cheque that had been given to the appellant in payment of the vehicle was accepted by Calder "as being as good as cash", and that in the absence of any evidence to the contrary by Calder it should be concluded that he "intended to transfer ownership in the vehicle, fondly believing that the bank cheque was infallible and that he would never see or have to concern himself with Malepe or the vehicle again."

Mr Goldblatt, for the appellant, submitted that the trial Court erred in holding that the onus was on the appellant to prove that it was the owner of the vehicle, and, also, in finding on the evidence that the appellant had parted with its ownership in the vehicle.

As to the question of onus, counsel submitted that the trial Court should have held that the onus was on the respondent to show that the appellant was not the owner of the vehicle. His contention was, as I understood it, that since the appellant was the owner of the vehicle before the conclusion of its aforesaid transaction with Malepe, the onus was on the respondent to prove, if it wished to retain possession of the vehicle as against the appellant, that the appellant had parted with its ownership when it sold and delivered the vehicle to Malepe. I do not agree with this contention. The application constituted a *rei vindicatio*.

The appellant alleged that it was the owner of the vehicle and it sought to recover it on the basis of its ownership. The respondent denied that the appellant was the owner, and in the circumstances the onus was on the appellant to prove its ownership. There is ample authority to the effect that in vindicatory proceedings the onus is on the claimant to prove his ownership. See e.g. Voet 6.1.20; Marcus v. Stamper and Zoutendyk 1910 AD 58 at 72, and Ruskin NO v. Thiergen 1962(3) SA 737 (A) at 744 A-F.

In contending that the trial Court erred in finding that Calder must be held to have accepted the cheque "as being as good as cash" and to have intended to part with the appellant's ownership in the vehicle, Mr Goldblatt commenced his argument by referring to a number of decided cases in support of the following legal submissions, viz.:

(i) that every sale is, in the absence of proof to the contrary, presumed to be a sale for cash;

(ii) that in a sale for cash ownership in the thing sold does not pass until the purchase price has been paid, even if delivery has meanwhile been made; and

(iii) that payment by cheque does not constitute payment until the cheque is met, and that the fact that a seller has taken a cheque in payment does not lead to an inference that he has given credit to the buyer.

With regard to (i), counsel referred to Laing v. South African Milling Co. Ltd 1921 AD 387 at 399; Lendalease Finance (Pty) Ltd v. Corporacion Mercadeo Agricola and Others 1976(4) SA 464(A) at 490 E-F; and, with regard to (ii) and (iii), he relied on Grosvenor Motors (Potchefstroom) Ltd v. Douglas 1956(3) SA 420 (A) at 423 H-425 A; Nowell v. Franzen 1956(4) SA 35(C) at 38 G-39 C; Bold v. Cooper and Another 1949(1) SA 1195(W) at 1199 i.f. - 1200; Eriksen Motors (Welkom) Ltd v. Protea Motors, Warrenton and Another 1973(3) SA 685(A) at 693 F-694 A, and the Lendalease case, supra, at 490 A-F). The transaction in the present case, counsel argued, was a cash sale; ownership in the vehicle would, therefore, have passed to Malepe only upon payment of the purchase price; the price was not paid, the cheque having been a forgery, and consequently ownership in the vehicle remained vested in the appellant. Thus the argument.

The fact that Calder wrote "COD PD" on the "Offer to Purchase", counsel submitted, was no indication that he believed that the cheque was as good as cash, but merely meant that Malepe had complied with the request (as testified to by Brien) that he should furnish the appellant with a bank guaranteed cheque. Counsel conceded that the appellant clearly believed that the cheque would be met, but be submitted that that did not mean that it was prepared to let its ownership in the vehicle pass to the purchaser before the cheque was paid.

I am not persuaded that the trial Court erred in its aforesaid view of the matter. While it is no doubt a rule of our law, as was submitted by Mr Goldblatt, that a sale is usually, in the absence of evidence pointing to a different conclusion , presumed to be a cash sale, and that in a cash sale ownership in the thing sold does not, despite delivery, pass to the purchaser until the purchase price has been paid, one cannot, on the evidence given in the present case, safely conclude that the transaction in issue was a cash sale in which the seller intended that its ownership in the thing sold would not pass before the purchase price was paid. The question as to when, in any particular transaction, ownership is to pass, has to be determined with reference to the intention of the contracting parties as it emerges from the terms of their agreement, and, where relevant, the surrounding circumstances and the

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conduct of the parties. (See Weeks and Another v. Amalgamated Agencies, Ltd 1920 AD 218 at 230; Eriksen Motors (Welkom) Ltd v. Protea Motors, Warrenton and Another, *supra*, at 694 A, and the Lendalease case, *supra*, at 489 *i.f.* - 490 A.) In the present case there is no direct evidence as to all the terms on which the parties contracted. Müller, who conducted the negotiations leading up to the conclusion of the sale on behalf of the appellant, did not give evidence. Brien was called to testify, but he had no first-hand knowledge of what passed between Müller and the purchaser of the vehicle, and he could not testify as to Calder's state of mind when he accepted the cheque and authorised the delivery of the vehicle to Malepe. With regard to Brien's evidence, reference should perhaps be made to the contents of a booklet, issued by the appellant for use by its salesmen and staff, on which he was examined by counsel for the respondent. In this booklet employees of the appellant are told that in a cash on delivery transaction the vehicle may only be handed over after receipt of "cash for the full amount of the invoice", or "a cheque, but not a post-dated cheque". With regard to payments by cheque, the instruction reads that "there are instances where a cheque will not be acceptable until cleared by the bank or guaranteed by the bank". The last-mentioned note would seem to indicate - I put it no higher than that - that a bank guaranteed cheque was considered by the appellant to be as good a guarantee of payment as a cheque "cleared by the bank". It may be added in this connection that Brien stated that it was his belief that a bank guaranteed cheque could not be countermanded, and that a banker could not refuse to pay such a cheque. With regard to the cheque in issue in this case, he stated that "it wasn't cash", but that he regarded it as "suitable", i.e. that it "would be met", and that he "felt that the interests of the company ..... were protected by this particular cheque."

As pointed out above, it was Calder, the appellant's credit manager, who accepted the cheque, who signed the "Offer to Purchase" form on behalf of the appellant and wrote thereon the letters "COD PD", and who authorised delivery of the vehicle to Malepe. This being so, it is clear that it is the intention with which Calder did these things which is decisive of the question whether the appellant intended to transfer its ownership in the vehicle to the purchaser. (It may be added at this point that it was not disputed that Malepe wished to make himself owner of the vehicle.) Calder, as said before, was not called to testify and the trial Court held that, in the absence of evidence by him which could lead one to a different conclusion, the inference to be drawn from all the evidence in the case was that he considered the cheque to be tantamount to cash and that he was prepared to let the ownership in the vehicle pass to Malepe.

I have already indicated that I am not persuaded that the trial Court's decision was wrong. I think the inference is justified that Calder would not have written the letters "COD PD" on the "Offer to Purchase" form if he had not regarded the cheque as tantamount to cash. One may add in this connection that Calder would have had good reason to believe that the cheque was as good as cash. It was, on the face of it, a cheque drawn by Barclays Bank International Limited on itself, in favour of the appellant, and, there being nothing which suggested that it was not a genuine document, Calder would have good reason to believe that it was as good as cash. If he held such a belief (as it would seem that he did), it would explain why he wrote "COD PD" on the "Offer to Purchase" form and why he authorised delivery of the vehicle to Malepe. Calder's conduct, one may add, would not seem to have been in conflict with the appellant's aforementioned policy regarding delivery of a vehicle when payment is made by cheque. Counsel for the appellant submitted, as stated above, that by writing "COD PD" on the "Offer to Purchase" form, Calder intended to indicate no more than that Malepe had complied with Brien's request that a bank guaranteed cheque should be furnished. This submission does not, in my view, afford a satisfactory explanation for Calder's use of the word "paid" ("PD"), and I find myself unable to agree with it.

There are, as pointed out in the judgment of the Court *a quo*, various considerations which support the view that Calder regarded the cheque as tantamount to cash, and that, when he authorised the delivery of the vehicle, his intention was that ownership in the vehicle should pass to Malepe. According to information available to Brien at the time of the transaction, Malepe was going to take the vehicle to Lesotho. It was for this reason, Brien said, that no sales tax was payable in respect of the sale of the vehicle. Calder, too, would have seen on the "Offer to Purchase" form that Malepe was said to be a resident of Maseru, and, also, that no sales tax was payable in respect of the sale. It seems to me that if Calder had not regarded the cheque as being as good as cash and had not intended that ownership in the vehicle should pass to Malepe, the appellant would, at the very least, have taken steps to establish precisely where in Maseru Malepe resided, and what his business or occupation was. No attempt was made to do so. This is not all. It does not even appear from the evidence that there ever was a person called Lukas Malepe. Brien never saw anyone by that name, and it does not appear from his evidence whether Müller saw such a man or whether he merely negotiated with Hanley, who was said to be Malepe's adviser, or someone else. (It is not strange, in the circumstances, that the learned trial Judge said that, for all the appellant knew, Malepe was "merely the

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figment of some criminal's ingenuity".) One should add, also, that various documents which served to suggest that Malepe was the owner of the vehicle, were handed over by the appellant when the vehicle was delivered to the purchaser. A final point to note is that the appellant received the cheque on 17 May, but that it never made any inquiries as to whether it was a good cheque or whether it had been met until after Tutt had spoken to Brien on 23 May. Evidence given by Venables shows, it seems to me, that the necessary information could have been obtained in less than an hour.

Mr Goldblatt submitted that motor dealers do not always exercise the necessary caution about receiving payment when they make delivery of vehicles sold by them, and that the appellant's failure to take precautions of the kind mentioned above should not be taken to indicate in any way that Calder believed that the cheque was as good as cash and that the appellant could, therefore, safely part with its ownership in the vehicle. The submission as to the lack of caution sometimes displayed by motor dealers is not based on any evidence on record. Furthermore, as far as the present case is concerned, it should be noted that Brien agreed with cross-examining counsel's suggestion that steps by the appellant to establish Malepe's identity and his residential address, etc., were thought to be "unnecessary once you had a Barclays cheque."

In conclusion I should say that Mr Goldblatt contended that the trial Court was not entitled to draw

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the inference it did from the fact that Calder was not called to give evidence. Counsel contended, if I understood him correctly, that the rule that an adverse inference may be drawn against a party for not calling an available witness applies only to the case where there are two likely versions concerning an issue before the Court, and that the present case is not one where the Court was called upon to decide between two such versions. I do not agree with the argument. The fact that Calder wrote "COD PD" on the "Offer to Purchase" form, coupled with the fact that the appellant did not take precautions (as referred to above) which it would probably have taken if it had

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believed that it remained vested with the ownership of the vehicle, strongly suggests that Calder considered the cheque to be as good as cash and that he was accordingly prepared to let ownership in the vehicle pass to Malepe, and in the absence of evidence by Calder showing that the drawing of such an inference would not be warranted, I am of the opinion that one cannot say that the trial Court erred in coming to the conclusion that it did.

In view of what I have said above, I do not find it necessary to discuss the defence of estoppel that was raised by the respondent.

The appeal is dismissed with costs, including the costs of two counsel.

P J RABIE

CHIEF JUSTICE.

JOUBERT, JA.

HOEXTER, JA.

HEFER, JA.

JACOBS, JA.

Concur.