



REPUBLIC OF SOUTH AFRICA

109/98

***THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA***

Case No 66/97

In the matter between :

JOSE BONIFACIO CALDEIRA

Appellant

and

RUBEN RUTHENBERG

First Respondent

BLOOMSBURY (PTY) LIMITED

Second Respondent

RANDBURG MOTORLINK CC

Third Respondent

THE MINISTER OF SAFETY AND SECURITY

Fourth Respondent

SERGEANT M LANGFORD

Fifth Respondent

Coram: Van Heerden DCJ, Vivier, Hoexter, Nienaber JJA et
Ngoepe AJA

Heard: 17 November 1998

Delivered: 27 November 1998

JUDGMENT

VIVIER JA

VIVIER JA:

This case started as an urgent application on notice of motion in the Cape Provincial Division for an order setting aside a search warrant which authorised the seizure of a 1996 Mercedes Benz 600 SL convertible sports car ("the Mercedes") and for its recovery. The applicants were Ruben Ruthenberg ("Ruthenberg"), Bloomsbury (Pty) Ltd ("Bloomsbury") and Randburg Motorlink CC ("Motorlink"). They alleged that Ruthenberg bought the Mercedes from Bloomsbury which in turn had bought it from Motorlink which in turn had bought it from Exclusive Boys Toys CC ("Exclusive"). Bloomsbury and Motorlink were dealers in expensive, exotic second-hand motor cars. Exclusive carried on a similar business until its beneficial owner, one Pretorius, closed the business and fled the country on 15 August 1996. The respondents in the application were the Minister of Safety and Security ("the Minister") as first respondent,

sergeant Langford ("Langford") as second respondent and Jose Bonifacio Caldeira ("Caldeira") as third respondent. Before the matter was heard the applicants arrived at a settlement with the Minister and Langford as a result of which the relief claimed against these two respondents was withdrawn and an interim court order was made directing that the Mercedes remain in Ruthenberg's possession under seizure pending the outcome of the application. The Minister and Langford agreed to abide the Court's decision and have taken no further part in the proceedings. A settlement was also reached between the applicants to the effect that, as between them, Motorlink was the owner of the Mercedes. The notice of motion was thereafter amended and an order was then sought declaring that Motorlink was the common law owner of the Mercedes and entitled to the free and undisturbed possession thereof and that Caldeira was *estopped* from asserting any rights thereto. This meant that Ruthenberg and Bloomsbury

no longer had any interest in the orders sought and they have taken no further part in the proceedings. Caldeira in turn brought a counter-application for an order declaring that he was the lawful owner of the Mercedes and entitled to possession of it. The Court *a quo* (Traverso J) held in favour of Motorlink and granted the order sought by it. Caldeira's counter-application was dismissed and he was ordered to pay the costs of the application and counter-application. With the leave of the Court *a quo* Caldeira now appeals to this Court.

It was not disputed that Caldeira bought the Mercedes in England on 23 November 1995, that it was registered in his name on 28 November 1995 and that he subsequently, during January 1996, instructed one Gous, a salesman employed by Exclusive, to attend to the importation of the Mercedes to South Africa and to sell it in this country on his behalf. The Mercedes was imported via Namibia by C and M International ("CM") a

firm of importers operating out of Walvis Bay. According to the Namibian customs and excise documentation the Mercedes arrived in Namibia on 23 March 1996 and was released on 14 June 1996. It arrived at the premises of Exclusive later in June 1996 and was displayed for sale in Exclusive's showroom. Exclusive also extensively advertised the Mercedes for sale in the Auto Trader car magazine during the period 18 April to 11 July 1996.

It was common cause that on 13 June 1996, ie even before its arrival in South Africa, Exclusive, without the knowledge of Caldeira, fraudulently caused the Mercedes to be registered in its name.

Caldeira's mandate to Exclusive, in so far as may be relevant, was to sell the Mercedes at a minimum price of R560 000-00 to which had to be added a certain profit margin for Caldeira, a commission of six percent for Exclusive plus all the transport and import costs and duties. The mandate was to last for 60 days and Exclusive would not be entitled to

deliver the Mercedes to a buyer until Caldeira had been paid the full purchase price. The 60-day period of the mandate expired and was thereafter renewed from week to week.

Motorlink's case as to the circumstances under which it acquired the Mercedes was deposed to by its sole member, Rafiek Mohamed. In his founding affidavit he stated that during the middle of July 1996 he received a telephone call from one Landman of Bloomsbury who enquired whether he had a Mercedes Benz 600 SL convertible for sale. He told Landman that he was able to obtain such a vehicle as he knew that Exclusive had one in stock and that he would sell it to Landman for the sum of R750 000-00. He thereafter commenced negotiations with Exclusive, with whom he had had numerous dealings in the past, and it was agreed that he would buy the Mercedes from Exclusive for the sum of R725 000-00. Exclusive had earlier bought another Mercedes from Motorlink for the amount of

R652 000-00 which was then still unpaid, and it was agreed that payment for the Mercedes would be effected by set-off or *compensatio* and that the difference of R73 000-00 would be applied towards the reduction of the purchase price of a Range Rover which Exclusive had bought from Motorlink for the sum of R390 000-00. The Mercedes was delivered to Motorlink on 16 July 1996 and registered in its name on 18 July 1996. The next day Motorlink sold the Mercedes to Bloomsbury for the amount of R750 000-00 and Bloomsbury in turn sold it to Ruthenberg for the sum of R807 000-00.

Mohamed stated that upon delivery to Motorlink he was satisfied that Exclusive was entitled to dispose of the Mercedes, for the following reasons. Pretorius had told him as early as February or March 1996 that Exclusive was importing the Mercedes from England. The registration certificate reflected Exclusive as the owner and it also showed the vehicle

status as code 1 which meant that it had not been registered in this country before so that there was no previous owner here. He further made enquiries from one Hare of CM who told him that Exclusive had imported the Mercedes and he obtained a letter from the shippers, Viking Shipping Co (Pty) Ltd ("Viking"), confirming that all customs duties in respect of the Mercedes had been paid. Finally he obtained a letter from Exclusive which stated that there was no money outstanding and no encumbrances on the Mercedes.

According to Mohamed, therefore, Motorlink purchased the Mercedes and took delivery thereof only after receiving the enquiry from Bloomsbury in mid-July 1996. In his replying affidavit he stated that he received the enquiry on 15 July 1996. His case was that he was at that stage unaware of Caldeira or anyone else who was entitled to the Mercedes.

In answering affidavits both Caldeira and Gous state that on or

about 1 July 1966 Caldeira called on Exclusive, terminated the mandate and removed the Mercedes. According to Gous, Mohamed arrived at Exclusive's showroom later the same day and spoke to Pretorius in his presence. During the course of the discussion Pretorius told Gous to get the Mercedes back from Caldeira at all costs as Mohamed had obtained a buyer for it. The next day Gous approached Caldeira and told him that a buyer had been found at the agreed price. Caldeira thereupon reinstated the mandate and handed the Mercedes back to Gous, emphasising that Gous was not to relinquish possession unless the full purchase price had been paid. The following day, 3 July 1966, Gous noticed that the Mercedes was gone from Exclusive's showroom and Pretorius then told him that Mohamed had taken it as payment of money owed by Exclusive. Pretorius added that the arrangement with Mohamed was that he would give Exclusive another Mercedes which it could sell for cash. (As I will show

later it was not disputed that at the beginning of July 1996 Exclusive owed Motorlink the purchase price of two vehicles.) Pretorius told Gous to placate Caldeira and to keep him at bay in the meantime. This he managed to do until 13 August 1996 when Caldeira arrived at Exclusive's showroom and saw that the Mercedes was missing. Two days later, after Pretorius had fled the country, Gous disclosed to Caldeira what had happened to the Mercedes. Caldeira was able to trace the Mercedes and he reported the matter to the police who obtained the search warrant.

Gous's version is clearly destructive of Motorlink's case that it bought in good faith. Gous's version, if accepted, means at the very least that Mohamed was at Exclusive's showroom before Motorlink purchased the Mercedes and that he saw that it had been removed, which must have alerted him to the possibility that Exclusive was no longer entitled to dispose of it. Of course, Gous's version goes much further and, if

accepted, shows that Mohamed knew about Caldeira and that Exclusive could only regain possession by the use of a stratagem.

If ever there was an affidavit which called for a comprehensive answer, Gous's affidavit was one. Mohamed's replying affidavit, however, involves in my view a sedulous avoidance of Gous's version.

In his replying affidavit Mohamed reiterated the sequence of events set out in his founding affidavit, stating that he received the request from Landman on 15 July 1996 and that he purchased the Mercedes from Exclusive the next day. Referring to the paragraph in Gous's affidavit containing the latter's version set out above, Mohamed said no more than that he denied the correctness of the "chronological sequence related by Gous" insofar as it differed from the events stated by himself. He did not deal with Gous's allegations that he was present at Exclusive's showroom on or about 1 July 1996 when the Mercedes was no longer in the showroom.

In my view Mohamed's replying affidavit does not amount to a denial of Gous's version, and even if it does, it is certainly not such as to raise a real or genuine dispute of fact. His denial of the correctness of the chronological sequence does not assist him, as there can be no doubt that the events deposed to by Gous took place before Motorlink purchased the Mercedes.

In the circumstances there is no reason for not accepting Gous's version. It follows from what I have said in regard thereto that Motorlink cannot be regarded as having bought the Mercedes in good faith and that it was not misled into the belief that Exclusive was entitled to dispose of the Mercedes.

That really disposes of the appeal. There are, in addition, other aspects of this case which, in my view, raise a serious doubt as to whether Motorlink acquired the Mercedes in good faith. One of the reasons given

had personally dealt with Exclusive since its inception two years earlier and that eighty percent of their dealings had been on a consignment basis.

It is clear from the affidavits filed in this matter that by the end of June 1996 Exclusive was in serious financial difficulties. According to Gous, Motorlink's attorney had on a few occasions earlier that month threatened to liquidate Exclusive unless it paid the amounts owing to Motorlink for two vehicles. In his replying affidavit Mohamed did not deny that Exclusive had failed to pay for two vehicles but stated that it was not unusual for him to wait 10-14 days for payment. He admitted that he had threatened to liquidate Exclusive but explained unconvincingly that he did not really intend doing so.

It seems that the Court *a quo* accepted, without a critical analysis of the evidence, that Motorlink acquired the Mercedes in good faith. It proceeded to base its decision that Motorlink became the owner of the

Mercedes solely on the common law rule stated in *Morum Bros Ltd v Nepgen* 1916 CPD 392 at 394-397. According to this rule the owner of a movable, if he entrusts it to an agent for sale or a factor who delivers it to a *bona fide* purchaser, cannot recover it, in any event not unless he compensates the buyer for the amount of the price paid. As I have shown, Motorlink was not a *bona fide* purchaser, so that the rule, even if it still forms part of our law, as to which it is not necessary for me to express any view (cf *Pretorius v Loudon* 1985 (3) SA 845 (A) at 860 B - 862 I), has no application to the facts of the present case. The Court therefore erred in granting the declarator sought by Motorlink. As regards *estoppel*, I have already found that Motorlink was not misled into the belief that Exclusive had an unqualified right to dispose of the Mercedes.

It remains to deal with the counter-application. As between Motorlink and Caldeira the latter is clearly entitled to the free and

undisturbed possession of the Mercedes. The question whether he is also the common law owner of the Mercedes was, in view of the nature of the proceedings, not fully canvassed and there is insufficient information on the papers before me to justify an order to that effect.

In the result, therefore, the following order is made :

1. The appeal succeeds with costs, including the costs of two counsel.
2. The order of the Court *a quo* is set aside and there is substituted therefor the following:

- “1. The application is dismissed.
2. The counter-application succeeds to the extent that it is declared that third respondent (Caldeira) is entitled to the free and undisturbed possession of a 1996 Mercedes Benz 600 SL convertible sports car, the subject matter of this dispute.
3. Third Applicant (Randburg Motorlink CC) is

ordered to pay the costs of both the application
and counter-application, including the costs of
two counsel.”

W VIVIER JA

VAN HEERDEN DCJ)
HOEXTER JA)
NIENABER JA)
NGOEPE AJA) Concur.