ELECTROLUX (PTY) LTD v KHOTA AND ANOTHER
[1961] 4 All SA 132 (W)

Division:	Witwatersrand Local Division
Judgment Date:	4 July 1961
Case No:	not recorded
Before:	Trollip J
Parallel Citation:	1961 (4) SA 244 (W)

• Keywords • Cases referred to • Judgment •

Keywords

Estoppel - Conduct - Owner entrusting another with possession of articles - Necessity for proof that owner's conduct reasonably induced representation of ownership by another - Manufacturer placing trader in possession of several refrigerators

Estoppel - Dealer entrusted with article for sale - Bona fide purchaser believing article to be part of stock-in-trade - Whether true owner can vindicate article if special terms of sale not observed by dealer when selling to purchaser

Ownership - Vindication - Sale for cash - Dishonoured cheque

Cases referred to:

Bold v Cooper and Another 1949 (1) SA 1195 (W) - Referred to

Broekman v TCD Motors (Pty) Limited 1949 (4) SA 418 (T) - Referred to

Central Newbury Car Auctions Ltd v Unity Finance Ltd and Another (Mercury Motors Third Parties) [1956] 3 All ER 905 - Applied

Champions Ltd v Van Staden Bros and Another 1929 CPD 330 - Referred to

Grosvenor Motors (Potchefstroom) Ltd v Douglas 1956 (3) SA 420 (AD) - Applied

Morum Bros Ltd v Nepgen 1916 CPD 392 - Referred to

Ross v Barnard 1951 (1) SA 414 (T) - Distinguished

Sprinz v Rayton Diamonds Ltd 1926 WLD 23 - Applied

Truman v Attenborough 103 LT 118 - Applied

United Cape Fisheries (Pty) Ltd v Silverman 1951 (2) SA 612 (T) - Referred to

Weiner v Gill (1905) 2 KB 172 (KB) - Applied

West v De Villiers 1938 CPD 96 - Referred to

Page 133 of [1961] 4 All SA 132 (W)
View Parallel Citation

Judgment

TROLLIP, J.: This is an application to recover 15 Electrolux refrigerators which are at present in the custody of the second respondent but to which the first respondent also lays claim. The second respondent did not oppose the application; he has stated that he will abide by the decision of the Court. In the meantime it has been agreed by the parties that the second respondent should retain the custody of the articles until it has been decided who is entitled thereto.

The applicant carries on business in Johannesburg as the manufacturers

Page 134 of [1961] 4 All SA 132 (W)
View Parallel Citation

and suppliers of Electrolux products, including refrigerators. On the 28th September 1960, it sold the 15 refrigerators in question to one Stephen Grubb, who represented that he was trading as Electrical Distributors at 232, Louis Botha Avenue, Johannesburg, for £1,710 4s. to be paid in cash by cheque on delivery. On the afternoon of the 28th September, 1960, the refrigerators were delivered by the applicant at Grubb's request to 232, Louis Botha Avenue, against which a cheque was handed over for the above-mentioned amount. The cheque was dated the 28th September, 1960, and was signed by G. Bailey for Electrical Distributors. Grubb had said that Bailey would receive the refrigerators for him and would hand over the cheque therefor. In fact, Bailey, unknown to the applicant, was none other than Grubb himself. Fairly early the next morning Grubb commenced negotiations with the first respondent for the re-sale of the refrigerators for £1,658, which was their normal retail price less a discount of 33⅓ per cent. After making certain enquiries, the first respondent ultimately agreed to buy them at that bargain price. They reached agreement sometime during the morning. In the afternoon of the same day the refrigerators were delivered to the first respondent's place of business. He then gave Grubb a cheque (uncrossed at Grubb's request) in payment of the price. The cheque was dated the 30th September, 1960, as the banks had by then already closed. Grubb cashed that cheque and received the proceeds.

In the meantime, the applicant had deposited Grubb's cheque with its bank on the morning of the 29th September, 1960, which was the earliest opportunity which it had of doing so. On the 30th September, 1960, Grubb's cheque was dishonoured by non-payment and the applicant was notified thereof. The applicant thereupon through its branch manager, Greeff, who had handled the transaction with Grubb, took immediate steps to trace Grubb and the refrigerators but he was unable to do so until about 4 or 5 days later when he traced the refrigerators to the place of business of the first respondent.

That Grubb obtained the refrigerators from the applicant by fraud is beyond question. He was subsequently charged with that offence, pleaded guilty, and was presumably found guilty and was sentenced. The first respondent was entirely ignorant of that fraud and *bona fide* purchased the refrigerators from Grubb.

The refrigerators were exhibits in the criminal case; that accounts for their now being in the custody of the second respondent.

It was not disputed that the sale of the refrigerators by the applicant to Grubb was for cash, and that as Grubb's cheque was dishonoured, the *dominium* remained with the applicant who would be entitled to vindicate them from the first respondent unless he is estopped from doing so. That position could indeed not have been disputed in view of *Grosvenor Motors* (*Potchefstroom*) *Ltd.* v. *Douglas*, 1956 (3) S.A. 420 (A.D.) at pp. 423-4.

The first respondent's defence to this application is therefore limited to one of estoppel and the only question is whether the applicant is estopped from denying (as it does) that Grubb was the owner of the refrigerators or had the applicant's authority to dispose of them on the 29th September, 1960.

Page 135 of [1961] 4 All SA 132 (W)
View Parallel Citation

In cases like the present where both the owner and the respondent have been defrauded, the essence of the defence of estoppel is that the owner by his conduct, which might include or consist of his negligence, has represented or caused to be represented to the respondent, thereby misleading him to believe, that the swindler was the owner of, or was entitled to dispose of the articles.

Consequently, I think that generally and logically the first enquiry should be into what was the specific conduct of the owner that the respondent relies upon for the estoppel. If that conduct is not such as would in the eyes of a reasonable person, in the same position as the respondent, constitute a representation that the swindler was the owner of, or entitled to dispose of, the articles, then *cadit quaestio*—no estoppel could then arise. But if such conduct does beget that representation, then the next enquiry would logically be whether the respondent relied upon, or was misled by, that representation in buying the articles.

Now the only conduct of, or imputable to, the applicant that the first respondent could rely upon as being

relevant in the present case is that the applicant put and left Grubb, a dealer in refrigerators, in possession of the 15 refrigerators from the afternoon of the 28th September, 1960, until the following afternoon of the 29th September, 1960, in such a way that Grubb was able to sell and deliver them to the first respondent during the 29th September, 1960. That is the only conduct for which the first respondent can fasten any responsibility on the applicant. Other conduct that took place during the negotiations between Grubb and the first respondent that might have misled the latter to believe that Grubb had the authority to sell these refrigerators was conduct by Grubb himself for which the applicant was not responsible. I refer here in particular to Grubb's conduct when, after he had delivered the refrigerators to the first respondent and the first respondent had asked him for the invoices relating to his purchase of them from the applicant, he informed the first respondent that as he had only just bought them the invoices had not yet been delivered, and that he then purported to telephone the applicant to ascertain when they would be arriving and conveyed to the first respondent that the invoices would be posted. The applicant was in no way responsible for those histrionics by Grubb.

Did the above-mentioned conduct for which the applicant was responsible, reasonably beget any representation to the first respondent that Grubb was the owner of, or entitled to dispose of, the refrigerators? 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 the possession of its articles is not sufficient to produce the representation that the *dominium* or *jus disponendi* was vested in the possessor (*Grosvenor Motors*' case, *supra* at 425E; *Morum Bros.* v. *Nepgen*, 1916 C.P.D. 392; *Champions Ltd.* v. *Van Staden Bros.*, 1929 C.P.D. 330 at p. 334; *Halsbury*, 3rd ed. vol. 15 para. 426 p. 226; *Central Newbury Car Auctions Ltd.* v. *Unity Finance Ltd.*, 1957 (1) Q.B. 371 at pp. 381, 388). 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. I think that that principle underlies all the motor car cases, like *Grosvenor Motors, supra*, in which it has been held that the owner is not estopped from vindicating his motor car which had been fraudulently acquired from him and sold to an innocent third party (for example, *Broekman* v. *T.C.D. Motors* (*Pty*.) *Ltd.*, 1949 (4) S.A. 418 (T); *Bold* v. *Cooper*, 1949 (1) S.A. 1195 (W); and the *Central Newbury* case, *supra*).

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 C.P.D. 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 (see *Morum Bros.*' case *supra*, at pp. 402/3, 404; *United Cape Fisheries* (*Pty*.) *Ltd.* v. *Silverman*, 1951 (2) S.A. 612 (T); *Ross* v. *Barnard*, 1951 (1) S.A. 414 (T) at p. 420C-E). 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, as agent, debtor, or otherwise."

(Spencer Bower on *Estoppel by Representation*, p. 208).

In the present case the applicant did not put Grubb in possession of any documents evidencing his *dominium* or *jus disponendi*, but Mr. *Schneider* for the first respondent relied heavily upon the facts that to the applicant's knowledge Grubb was or professed to be a trader in refrigerators; that the applicant entrusted him with a large number of its refrigerators; and that he had intended selling them. It was contended that those facts distinguished the motor car cases, in which the defence of estoppel failed, because in those cases the possessor was only entrusted with one motor car and he was not a dealer but a private individual. I proceed to deal with that contention.

The fact that the possessor is a dealer or trader in the particular article is by itself of no significance. That is illustrated by *Weiner* v. *Gill*, 1905 (2) K.B. 172, and *Truman* v. *Attenborough*, 103 L.T. 118, referred to in *Morum Bros.*' case, *supra*, on pp. 401/2. In both those cases the owner was a manufacturing jeweller

who entrusted jewellery to a retailer or merchant jeweller on sale for cash or return, the former retaining the ownership until the price was paid; the latter disposed of it without paying the price and it was held that the former was not estopped from recovering his property. It follows that to create the effective representation the dealer or trader must, in addition, deal with the goods with the owner's consent or connivance in such a manner as to proclaim that the *dominium* or *jus disponendi* is vested in him; as for example, by displaying, with the owner's consent

Page 137 of [1961] 4 All SA 132 (W)
View Parallel Citation

or connivance, the articles for sale with his own goods. It is that additional circumstance that provides the necessary "scenic apparatus" for begetting the effective representation.

In the present case the refrigerators were merely delivered in crates by the applicant to Grubb at a vacant stand near 232, Louis Botha Avenue. The premises at 232, Louis Botha Avenue, which had been hired by Grubb, were not occupied or set up as a shop or other business premises at the time. The refrigerators were consequently never displayed or exhibited by Grubb on those premises or elsewhere, as if they were his stock; and indeed, the first respondent never saw the refrigerators until after he had agreed to buy them when they were delivered to his premises, presumably still crated, on the afternoon of the 29th September, 1960.

Consequently, there was no particular manner in which Grubb dealt with the refrigerators that could have begotten any representation that he had the ownership of or right to sell them.

In my view too, the number of refrigerators which the applicant entrusted to Grubb added nothing to "the scenic apparatus". If anything it detracted from a representation of ownership or authority to sell vesting in Grubb. The 15 refrigerators constituted a valuable parcel of goods; such goods are not infrequently sold for cash or otherwise on a condition suspending passing of ownership until the price has been paid (cf. *Morum Bros.*' case, *supra* at p. 405; *Champions Ltd.* case, *supra* at pp. 334-5); and consequently it would have appeared to a reasonable prospective purchaser in the position of the first respondent, that a dealer like Grubb who was short of money and obviously hawking the articles about for sale, might have purchased them for cash or on a suspensive condition and that he had not yet paid for them and therefore did not have the right to sell them. That probably did occur to the first respondent because when the refrigerators were delivered to him he did ask for the invoices relating to Grubb's purchase of the articles from the applicant but he was fobbed off by Grubb's play-acting that has already been related.

Nor do I think that in the circumstances the applicant's knowledge that Grubb intended selling the refrigerators advances the first respondent's case. That is only relevant to the question whether the applicant was culpably inactive in leaving the refrigerators in Grubb's possession. I do not think that the applicant was in any way culpable in that respect. The applicant did not know and could not have known that Grubb's cheque would not be met and that before it could be presented for payment, Grubb would re-sell the refrigerators. The applicant only became aware of the dishonour of the cheque after the first respondent had already purchased and received the refrigerators. Consequently, this is not a case where the owner, knowing that the possessor/dealer intends selling the articles, remains inactive and thereby represents to the purchaser that the possessor has the authority to sell them, as was the position in *Ross* v. *Barnard*, 1951 (1) S.A. 414 (T).

The first respondent also says in his replying affidavit that he assumed that a firm of the size and standing of the applicant, dealing in an internationally known commodity like Electrolux refrigerators, would

Page 138 of [1961] 4 All SA 132 (W)
View Parallel Citation

have supplied them only to authorised or appointed dealers; and he therefore believed that as Grubb was a dealer in possession of 15 refrigerators of the applicant's, he was an authorised or appointed dealer who was entitled to sell them. But I do not think that there was anything in the conduct of the applicant in putting and leaving Grubb in possession of the refrigerators that could have evoked the impression that Grubb was one of its authorised or appointed dealers. That is indeed borne out by the fact that at no stage did the first respondent even enquire of Grubb whether he was such an authorised or appointed dealer.

Mr. *Schneider* also contended that the applicant was negligent in various ways in putting and leaving

Grubb in possession of the refrigerators against a mere handing over of his cheque. I do not think that that contention takes the case of the first respondent any further; it merely serves to draw a red herring across the legal track. As *Spencer Bower* says (p. 85):

> "It is not the negligence, *per se*, which estops, but only the representation implied from it."

(see too *Sprinz* v. *Rayton Diamonds Ltd.*, 1926 W.L.D. 23). Assuming that the applicant or its servants were negligent in some way (which is by no means clear) in putting and leaving Grubb in possession of the refrigerators, the only representation that would stem from such negligence would be precisely the same as the representation (if any) arising from Grubb's actual possession of the refrigerators, which therefore takes the matter no further than that canvassed above.

For the reasons given above I conclude that the first respondent, on whom the *onus* of proof rests, has not proved that the applicant represented in any way that Grubb was the owner of or had the right to sell the refrigerators.

If, however, the applicant's conduct in putting and leaving a dealer like Grubb in possession of a large number of refrigerators had created the above-mentioned representation, and my view to the contrary is incorrect, I do not think that such conduct was "the real and direct cause" or "the proximate cause" (see *Grosvenor Motors*' case, *supra* at p. 426 A) which led the first respondent to believe that Grubb was entitled to sell the refrigerators; it was Grubb's own fraudulent conduct. It can be inferred from the first respondent's account of his negotiations with Grubb on the 29th September, 1960, that it was Grubb's causing one Latib, whom the first respondent had known for many years as a director of a substantial business, to introduce him to the first respondent, and his representing that he was the proprietor of a business known as Electrical Distributors at 232, Louis Botha Avenue, and that he had the 15 refrigerators for sale, and his offering to sell them at bargain prices, that induced the first respondent to enter into the contract to purchase them. At no stage prior to the conclusion of that contract did the first respondent see the refrigerators in Grubb's possession or displayed or exhibited at any premises of Grubb's; nor did he enquire of Grubb about his authority to sell them or ask him to produce any evidence thereof. He apparently believed that the refrigerators were Grubb's merely because Grubb said that he had them. After they were delivered, the first respondent for the first time asked

for the invoices from the applicant. Presumably that was to satisfy himself that Grubb was entitled to deal in them. It was Grubb's conduct when asked for the invoices that finally persuaded the first respondent that Grubb was entitled to sell them. As I have stated above, the applicant was in no way responsible for such conduct or statements. It follows that there was no conduct on the part of the applicant, assuming that it did give rise to any representation, that induced the first respondent to treat Grubb as having the *dominium* or *jus disponendi.* In this respect I do not think that the present case is distinguishable from the *Grosvenor Motors*' case. In my view, therefore, the defence of estoppel fails. That conclusion is fortified by his further consideration. The present CHIEF JUSTICE, referring to *Matthaeus* and *Voet*, stated in the *Grosvenor Motors*' case, *supra* at p. 427 B-D, that

> "enactments (i.e. rules) derogating from an owner's vindicatory rights are to be very strictly construed. . . . This serves to emphasise the importance which, notwithstanding recognised exceptions, our law attaches to the owner's right to vindicate his property, and suggests that, where estoppel is pleaded, he is not debarred from asserting that right, unless there is clear proof of estoppel."

In its practical application I think that that statement means that the Court should not be quick or over anxious to infer from an owner's conduct, including his negligence, a representation that the possessor is vested with the *dominium* or *jus disponendi;* the conduct should be such as to proclaim clearly and definitely to all who are concerned that the possessor is vested with the *dominium* or *jus disponendi;* secondly, if the owner's conduct does measure up to that high standard, the Court should then scrutinise the evidence of the respondent carefully and closely to ascertain whether the representation was indeed the real and direct or proximate cause of the respondent believing that the possessor did have the *dominium* or *jus disponendi.* I think that it is discernible in all the decisions of our Courts that have been referred to in this judgment in which the estoppel failed that that was the approach adopted by the Court. Adopting that approach, I do not think that the first respondent has proved his case of estoppel in either of the above respects.

Mr. *Schreiner*, for the applicant, informed me that in view of the provisions of sec. 360 of the Criminal

Procedure and Evidence Code, it would probably be preferable merely for the Court to make a declaratory order, declaring who was entitled to the refrigerators, instead of ordering the second respondent to return them to the party entitled thereto. Mr. *Schneider* agreed with that.

I therefore make the following orders:

(*a*) declaring that the applicant and not the first respondent is the owner of and is entitled to the 15 refrigerators mentioned in the petition, which are at present in the custody of the second respondent.

(*b*) that the first respondent must pay the costs of these proceedings.

Appearances

WHR Schreiner - Advocate/s for the Applicant/s

M Schneider - Advocate/s for the First Respondent

No Appearance - Advocate/s for the Second Respondent/s

Bell, Buissinne and OB Duckles - Attorney/s for the Applicant/s

Cramer and Cramer - Attorney/s for the First Respondent