GROSVENOR MOTORS (POTCHEFSTROOM) LTD v DOUGLAS
[1956] 3 All SA 399 (A)

Division:	Appellate Division
Judgment Date:	14 June 1956
Case No:	not recorded
Before:	Centlivres CJ,Hoexter JA, Steyn JA, Brink JA and Van Blerk AJA
Parallel Citation:	1956 (3) SA 420 (A)

• Keywords • Cases referred to • Judgment •

Keywords

Estoppel - Representation - Culpa - Onus of proof of negligence - Seller of goods giving purchaser document indicating conclusion of sale

Maxims - Ignorantia juris neminem excusat

Maxims - Nemo contra suum factum venire debet

Ownership - Passing of - Cash sale - Acceptance of cheque by purchaser - Cheque drawn on distant bank

Ownership - Vindication - Negligence - Transfer of motor vehicle - Cash transaction

Cases referred to:

Laing v South African Milling Co Ltd 1921 AD 387 - Applied

Lickbarrow v Mason 100 ER 35 - Referred to

Morum Bros Ltd v Nepgen 1916 CPD 392 - Applied

Potgieter v Cape Dairy and General Livestock Auctioneers 2 1942 WLD 147 - Statement in not approved

R v Nader 1935 TPD 97 - Approved

R v Salaam 1933 AD 318 - Explained

Rimmer v Webster (1902) 2 Ch 172 (ChD) - Referred to

Union Government v National Bank of South Africa Ltd 1921 AD 121 - Considered

Judgment

CENTLIVRES, C.J.: The respondent, to whom I shall refer as the plaintiff, instituted an action in the Transvaal Provincial Division against the appellant (defendant) for the recovery of a motor car. In his declaration the plaintiff alleged that he was the owner of the car and that the defendant was in unlawful possession of it. In its plea the defendant denied those allegations and pleaded alternatively that on November 15th, 1954, the plaintiff sold and delivered the car to W. A. Kriel and as proof of that sale handed to Kriel at that time a written document signed by the plaintiff in the following terms:

"5a Beukes Street,
Kroonstad.
15.11.54.

I, the undersigned, sold my Consul car CC 6054 Eng. No. EOT7306 to Mr. W. A. Kriel.

(Sgd.) Terence G. Douglas."

Defendant admitted that it was in possession of the car and denied that it was obliged to deliver the car to the plaintiff.

In his replication the plaintiff admitted that he handed the above document to Kriel but said that on November 15th, 1954, he entered into a cash sale with Kriel in terms whereof he agreed to sell the car to Kriel for the sum of £500 and that he thereafter delivered the car to Kriel but Kriel failed to pay him the sum of £500 or any sum whatever. It was averred that in these circumstances the ownership of the motor car did not pass to Kriel.

In its rejoinder the defendant alleged that by reason of his action in furnishing Kriel with the document referred to above the plaintiff was estopped from disputing Kriel's right to dispose of the car and that in any event, in terms of

that document, the sale was not a cash sale and that upon delivery of the car to Kriel ownership passed to Kriel.

The Provincial Division granted an order ordering the defendant to restore the motor car to the plaintiff and it is against that order that the defendant now appeals.

It appears from the evidence that one Pretorius, a motor salesman, introduced Kriel on November 15th, 1954, to the plaintiff who was desirous of disposing of his motor car. The plaintiff agreed to sell the car to Kriel for £500. He said that "As far as I can remember, I indicated that it was cash. I had no thought of selling it for anything but cash." Kriel told the plaintiff that he did not have his cheque book with him at the time and that it was at his house in Welkom. It was then arranged that Pretorius should accompany Kriel to Welkom and hand the car over to him on receiving a cheque for the purchase price. Plaintiff had mislaid the car's licence papers and Kriel asked him to give him a document indicating "why he was in the car; it would protect him in case of any enquiries." The plaintiff thereupon gave Kriel the document dated November 15th, 1954. Kriel and Pretorius then left for Welkom. On the following day Pretorius handed the plaintiff a cheque dated November 16th, 1954, which was signed by Kriel and drawn at a bank in Welkom. On November 18th, 1954, this cheque was returned to the plaintiff marked "No account." The plaintiff immediately placed the matter in the hands of the Criminal Investigation Department.

About six days after he received delivery of the car Kriel offered to sell it to the defendant. The sales manager of the defendant asked Kriel where he bought the car and if he had any proof thereof. Kriel produced the document of November 15th, 1954, and told him that he had paid the purchase price. The sales manager asked him for the licence papers of the car. Kriel told him that the plaintiff had sent the papers to Kimberley where he used to live in order that the car could be registered in his (Kriel's) name. The defendant thereupon bought the car for £460.

At the trial defendant's counsel accepted the position that the sale to Kriel was for cash and the trial Court held that "there was no intention whatsoever of giving credit to Kriel and consequently ownership could not pass to him as a result of the sale and delivery." On appeal, however, where a different counsel appeared for the defendant, it was faintly contended that the sale to Kriel was on credit and that

ownership consequently passed to Kriel when the car was delivered to him. This contention is, in my view, devoid of any substance. In *Laing* v. *South African Milling Company Limited*, 1921 A.D. 387 at pp. 394 and 395, INNES, C.J., referred to *Vinnius* (Inst. 2, 1, 41) and said that that commentator held the view

> "that the giving of credit cannot be inferred from mere delivery. In this he is supported by a great weight of Roman-Dutch authority. (*Voet* 19,1,11; *Cens. For.* 4.19,20; *van der Keessel*, Th. 203)."

It will be sufficient to quote what *Voet* says in 19, 1, 11. I quote from Berwick's translation at p. 174:

> "But if the vendor has simply delivered the thing, and suffered it to be taken away by the purchaser, and nothing has been said as to payment of the price, nor any of the things already mentioned taken place, it can scarcely be said that credit has been given for the price; for the vendor has neither been secured nor has satisfaction been made to him (i.e., he has neither got payment or security), nor was there anything to indicate that credit had been given; and, moreover, if the contrary opinion were admitted there would scarcely be a case in which credit for the price would not be considered as given to the purchaser, unless it had been specially expressed that the vendor would not trust him; and so that admonition of the Emperor would be vain: 'Things sold and delivered are only acquired by the purchaser when he has paid the price to the vendor or in some other way satisfied him.'"

It is, in my opinion, abundantly clear from the evidence that there was never any intention on the part of the plaintiff to sell his car to Kriel on credit. It was, however, contended on behalf of the defendant, that the acceptance by the plaintiff of a cheque drawn on a bank at a place other than his own residence indicates that the plaintiff intended to give Kriel credit for at least a day or two. But I think that it is clear from what *Voet* says that such an intention cannot be implied, for even if the plaintiff had delivered his car to Kriel without receiving a cheque it does not follow that he intended to give Kriel credit. I agree with what TINDALL, J., said in *R.* v. *Nader*, 1935 T.P.D. 97 at p. 100:

> "The fact that the cheque given was payable to a bank in a town some distance away does not justify the inference that credit was given, it was dated the same date as the sale and was immediately negotiable."

I do not agree with the doubt apparently cast upon that decision in *Potgieter* v. *Cape Dairy and General Livestock Auctioneers* (2), 1942 W.L.D. 147 at p. 154, where it was said that "the question of distance and the time that would elapse before presentation (of the cheque) was not however considered" in *R.* v. *Nader, supra.* In the present case the cheque was not post-dated. A clear inference from the evidence is that when Pretorius on behalf of the plaintiff received the cheque at Welkom he delivered the car to Kriel.

Counsel for the appellant relied on *R.* v. *Salaam*, 1933 A.D. 318 at p. 320, where WESSELS, C.J., said that

> "the presumption of our law is that a sale is a sale for cash but that presumption falls away when the cash is not demanded on delivery."

Taken in isolation this *dictum* would appear to be inconsistent with the view expressed in *Laing's* case, *supra*, and supported by *Voet, loc. cit.*, viz. that the giving of credit cannot be inferred from mere delivery. That *dictum* cannot, however, be construed as an intention to depart from the view expressed in *Laing's* case which was quoted by WESSELS, C.J.: it must be read in the context in which it appears and from that context it appears that there was no intention to demand cash on delivery as under the contract in issue payment for the goods was

deferred until the presentation of a sight draft through a bank. Such being the position there was, in that case, a sale of goods on credit.

I hold, therefore, that the plaintiff never lost his ownership in the car. I proceed to consider which of the two innocent parties must suffer through the fraud of Kriel.

It was contended on behalf of the defendant that the document of November 15th, 1954, was, in effect, addressed to the world at large and was an intimation that Kriel was entitled to dispose of the car. I do not agree with this contention. The document, it must be observed, contained no misstatement of fact. It simply recited what was a fact, viz. that the car had been sold to Kriel. We were urged, however, not to look at the matter through the eyes of lawyers but to regard the matter from the standpoint of the man in the street who is unacquainted with the niceties of the law. It was contended that when a man in the street reads the document he will at once come to the conclusion that Kriel was free to deal with the car in any manner that he pleased. I shall assume, for the purposes of this argument, that the defendant's salesman was inexperienced in the law of purchase and sale and the passing of ownership and that he may be regarded as "a man in the street"—an assumption which can scarcely be justified on the evidence given by the salesman who bought the car on behalf of the defendant not only on the strength of the document signed by the plaintiff but also after being told by Kriel that the purchase price had been paid and that the car's licence papers had been sent to Kimberley for the purpose of registering the car in Kriel's name. But, be that as it may, the rule *ignorantia juris neminem excusat* applies to everyone, including the man in the street. If I seek to recover my property from a man in the street, he cannot be heard to say that he is under no obligation to restore it to me because he bought it from a third person and paid for it under the belief that that person was the owner of it because I allowed him to be in possession of it.

It was further contended by defendant's counsel that, as the document of November 15th, 1954, enabled Kriel to perpetrate a fraud on the defendant, the plaintiff who issued that document should suffer the loss. That contention reminds one of the *dictum* of ASHHURST, J., in the case of *Lickbarrow* v. *Mason*, *2* Term. Rep. 63 at p. 70; 100 E.R. 35 at p. 39:

> "We may lay down as a broad general principle 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."

In *Union Government v. National Bank of South Africa Limited*, 1921 A.D 121, INNES, C.J., stated that the rule enunciated by ASHHURST, J., "has on several occasions been held to have been too broadly stated" and SOLOMON, J.A., at p. 138 pointed out that

> "the rule is too widely stated and needs to be qualified. . . . So qualified it becomes necessary, amongst other things, that the neglect must be the proximate cause of the loss; and that, in my opinion, is where the defence of estoppel breaks down in the present case."

Even if the plaintiff was negligent and even if the document was calculated to mislead others, I am satisfied on the evidence that the defendant's sales manager would not have bought the car from Kriel if the latter had not told him that he had paid the purchase price to the plaintiff and further that the licence papers had been sent to Kimberley to effect registration in favour of himself (Kriel). I can see no reason for

differing from the finding of the trial Court that the real and direct cause which led the defendant's sales manager to believe that Kriel was the owner was not the document which Kriel used to facilitate his deception but Kriel's own fraudulent conduct, as revealed in the evidence; it was that which caused the sales manager to conclude the contract. This being the position, it cannot be said that the document which the plaintiff gave to Kriel was the proximate cause of the defendant buying the car.

In the present case there is no room for the application of the maxim *nemo contra suum factum venire debet.* Plaintiff is not seeking to dispute the statement made in the document of November 15th, 1954, viz. that he sold the car to Kriel. The wording of that document cannot be stretched to mean either that the car had been sold on credit or that it had been sold for cash and that Kriel had paid the purchase price. In these circumstances it cannot, in my opinion, be said that the plaintiff is estopped from vindicating the car. In *Morum Brothers Limited* v. *Nepgen*, 1916 C.P.D. 392, JUTA, J.P., referred at length to Roman-Dutch writers and came to the conclusion on pp. 395 and 396 that

> "the great balance of the authority followed in our Courts is in favour of the law that the owner can recover his goods except in the case of sale and pledge by agents for sale and factors."

In that case it was held that, where the plaintiff sold two horses on the suspensive condition to a speculator in horses and where the speculator sold the horses to defendant who was a *bona fide* purchaser for value, the plaintiff was not estopped from recovering the horses from the defendant. Similarly in the present case, as the plaintiff made no representation to the defendant that the car was the property of Kriel, who was neither an agent for sale nor a factor, he is not estopped from asserting that he is still the owner of the car.

Another case relied on by counsel for the defendant was *Rimmer* v. *Webster*, 1902, 2 Ch. 172. That case is of no assistance to the defendant, for as JUTA, J.P., pointed out in *Nepgen's* case, *supra* at pp. 401-402, it deals with the principle that where an owner of property gives all the *indicia* of title to another person with the intention that he should deal with the property, the principles of agency apply and any limit which he has imposed on his agent's dealings cannot be enforced against an innocent purchaser from the agent who had no notice of the limit. The present case is entirely different from *Rimmer's* case.

The plaintiff's counsel was taken by surprise when the defendant's counsel contended that the plaintiff had lost his

ownership in the car, it having been conceded both in the trial Court and in the heads of argument filed on behalf of the defendant in this Court that the sale to Kriel was for cash. In these circumstances this Court gave the parties leave to file further written arguments. Any costs which may have been incurred through these written arguments must be paid by the defendant.

The appeal is dismissed with costs, including such costs as may have been incurred as a result of the further written arguments.

HOEXTER, J.A., concurred in the above judgment and in the following judgment.

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STEYN, J.A.: This appeal concerns a vindicatory action in which the defendant, the buyer of a motor car from a third party, pleaded that the vindicator, who claims to be the owner of the car, is estopped from disputing the right of the third party to dispose of it. The facts relied upon by the defendant appear from the judgment of the CHIEF JUSTICE and need not be repeated here, except to point out that, in relation to the owner of the car, Kriel was not a factor or an agent for sale. For the principle of our common law which, on the facts of this case, governs the issue raised by the plea of estoppel, it is sufficient for present purposes to refer to the judgment of JUTA, J.P., in *Morum Bros. Ltd.* v. *Nepgen*, 1916 C.P.D. 392 at p. 394, and to DE WET, "*Estoppel by Representation" in die Suid-Afrikaanse Reg*, p. 56 *et seq.* That principle appears to be that an owner forfeits his right to vindicate where the person who acquires his property does so because, by the *culpa* of the owner, he has been misled into the belief that the person from whom he acquires it, is entitled to dispose of it. It is only necessary to add that according to *Matthaeus Paroemia*, 7, 7, *i.f.,* enactments derogating from an owner's vindicatory rights are to be very strictly (*strictissime*) construed, a view with which Voet, *Commentarius*, 6, 1, 12, agrees. 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 order to establish the defence of estoppel, the appellant, apart from facts which are not in dispute, had to prove that *culpa* on the part of the respondent caused him to be misled into the erroneous belief that Kriel had the right to dispose of the car. The question is whether the appellant has discharged the *onus* of proving any relevant negligence on the part of the respondent, and, if so, whether he has shown that that negligence was the cause of his erroneous belief.

In regard to *culpa*, it must be borne in mind that at the time the respondent gave Kriel the note upon which the appellant relies, he had in fact, as stated in the note, sold the car to Kriel, and had the transaction taken the ordinary course, Kriel would have become the owner of the car, with the result that no person could possibly have been misled by the note coupled with Kriel's possession of the car. At that stage the possibility that any person could be so misled could only arise if Kriel failed to pay the purchase price and sold the respondent's car. Before *culpa* can be imputed to the respondent, it must be shown that, as a reasonably prudent person, he should have foreseen such eventualities and have guarded against them, in order to avoid possible abuse, in the circumstances which would then arise, of the note he had handed to Kriel. It is here, I think, that the appellant's case breaks down. Kriel, who was accompanied by two other men, had been introduced to the respondent, at his home in Kroonstad, by Pretorius, a salesman in the firm of Currie Motors, as a prospective purchaser of the respondent's car. He was informed that Kriel wanted to buy a car but could find nothing to his satisfaction at Currie Motors. Pretorius further told him that Kriel was in the employ of James

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Thompson and "was reliable". Kriel and one of the men accompanying him took the car for a trial run and on their return Kriel told the respondent that he was satisfied both with the car and with the price. He had left his cheque book at his home in Welkom, and it was arranged that Pretorius would accompany him as the respondent's agent and would there hand over the car to him on receipt of the cheque. As the respondent had mislaid the licence papers, Kriel asked for something in writing to protect him in case of enquiries, and the respondent handed him the note in question. The licence papers were to be produced at a later stage. Pretorius afterwards returned with Kriel's cheque and was promptly paid £50 by way of commission. When the cheque was dishonoured the respondent immediately reported the matter to the police, but before any effective action could be taken Kriel had sold the car to the appellant.

There can be no doubt that the respondent in fact harboured no suspicions in regard to Kriel. He parted with his car and paid Pretorius his commission before the cheque could be met. Neither can I find anything to show that he should have had misgivings as to Kriel's *bona fides.* He did not know him but he had been assured by the salesman of a presumably reputable firm that he was in employment and a reliable purchaser. It was, apparently, only because the respondent was unable to produce the licence papers that Kriel asked for something in writing. He did not have his cheque book with him, but agreed not to be given possession of the car until delivery of his cheque at Welkom. It is true that the respondent allowed himself to be misled, but so did Beukes, who bought the car on behalf of the appellant. It would seem that Kriel was well versed in the procedures of effective deception. It may be that the respondent conducted this transaction in a manner not altogether in accordance with the standards of more cautious commercial practice, but in all the circumstances it is difficult to hold that he was negligent, in relation to the use which could be made of the note, in assuming that the cheque would be met, and that Kriel had no dishonest designs. Dishonoured cheques and cars dishonestly resold are, of course, not things unknown, but that does not mean that *culpa*, in relation to possible prejudice to third parties, must necessarily or even as a general

rule be imputed to a seller who fails to foresee that a purchaser's cheque may not be met and that he may resell the article of which he has not become the owner. Misplaced confidence in one person is not synonymous with negligence towards another. The existence of such negligence must depend on the facts of each case and in the present case they do not, in my opinion, suffice to prove such negligence.

In regard to the question whether or not the car was sold for cash, I concur in the conclusion arrived at by the CHIEF JUSTICE and in his reasons for that conclusion.

I agree, therefore, with the order proposed by the CHIEF JUSTICE.

BRINK, J.A., and VAN BLERK, A.J.A., concurred in both the above judgments.

Appearances

O Galgut, QC and CF Eloff - Advocate/s for the Appellant/s

G Viljoen - Advocate/s for the Respondent/s

MacRobert, de Villiers and Hitge, Pretoria; Williams, Gaisford and Steyn, Potchefstroom; GA Hill, Bloemfontein - Attorney/s for the Appellant/s

Roger Dyason, Douglas and Muller, Pretoria; Lourens R Botha, Kroonstad; Reitz, Barry and Berning, Bloemfontein - Attorney/s for the Respondent/s