SONDAY v SURREY ESTATE MODERN MEAT MARKET (PTY) LTD
[1983] 1 All SA 476 (C)

Division:	Cape Provincial Division
Judgment Date:	18 February 1983
Case No:	A 132/82
Before:	Tebbutt J and Berman AJ
Parallel Citation:	1983 (2) SA 521 (C)

• Keywords • Cases referred to • Judgment •

Keywords

Estoppel - Exceptio doli - Relevance and development

Estoppel - Negligence - Proof - Not required except in vindicatory claims

Estoppel - Representation - Exceptio doli - Fault - Fault - Necessity for proof of dolus or culpa

Cases referred to:

Aris Enterprises (Finance) (Pty) Limited v Waterberg Koelkamers (Pty) Limited 1977 (2) SA 425 (AD) - Referred to

Aris Enterprises (Finance) (Pty) Ltd v Waterberg Koelkamers (Pty) Ltd 1977 (2) SA 436 (T) - Referred to

Baumann v Thomas 1920 AD 428 - Referred to

Blackwood Hodge South Africa (Pty) Ltd v Elco Steel Dealers 1978 (3) SA 852 (T) - Referred to

Bodemer NO v American Insurance Company 1960 (4) SA 428 (T) - Referred to

Burkinshaw v Nicholls (1878) 3 AC 1004 (HL) - Applied

Coetzee v Van der Westhuizen and Another 1958 (3) SA 847 (T) - Considered

Connock's (SA) Motor Co Ltd v Sentraal Westelike Ko-operatiewe Maatskappy Bpk 1964 (2) SA 47 (T) - Considered and discussed

Credit Corporation of SA Ltd v Botha 1968 (4) SA 837 (N) - Considered

Die Trust Bank van Afrika Bpk v Du Toit 1961 (3) SA 36 (T) - Referred to

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

Hauptfleisch v Caledon Divisional Council 1963 (4) SA 53 (C) - Considered and discussed

Hopgood v Brown [1955] 1 All ER 550 (CA) - Referred to

In re Reynolds Vehicle and Harness Factory Ltd (1906) 23 SC 703 - Applied

Johaadien v Stanley Porter (Paarl) (Pty) Ltd 1970 (1) SA 394 (AD) - Considered and discussed

Merriman v Williams 1880 Foord 135 - Applied

Morum Bros Ltd v Nepgen 1916 CPD 392 - Referred to

North Vaal Mineral Co Ltd v Lovasz 1961 (3) SA 604 (T) - Referred to

Novick and Another v Comair Holdings Ltd and Others 1979 (2) SA 116 (W) - Considered

Oakland Nominees (Pty) Ltd v Gelria Mining and Investment Co (Pty) Ltd 1976 (1) SA 441 (AD) - Considered and discussed

Otto en 'n Ander v Heymans 1971 (4) SA 148 (T) - Referred to

Paddock Motors (Pty) Ltd v Igesund 1976 (3) SA 16 (AD) - Referred to

Pickard v Sears 112 ER 179 - Referred to

Rand Bank Ltd v Rubenstein 1981 (2) SA 207 (W) - Referred to

Rashid v Durban City Council 1975 (3) SA 920 (D) - Referred to

Smit v Smit's Executrix (1897) 14 SC 142 - Applied

Trust Bank of Africa Ltd v Appletime Engineering (Pty) Ltd and Others 1981 (1) SA 374 (D) - Referred to

Trust Bank of Africa Ltd v Van der Walt and Another 1962 (1) SA 174 (T) - Referred to

Trust Bank of SA Ltd v Maharaj 1961 (2) SA 770 (N) - Referred to

Trust Bank van Afrika Bpk v Eksteen 1964 (3) SA 402 (AD) - Applied

United South African Association Ltd v Cohn 1904 TS 733 - Referred to

Warre-Smith and Rance v Philips; B Lazarus v Levy and the Glencairn GM Co 1893 Hertzog 50 - Applied

Waterval Estate and Gold Mining Co Ltd v New Bullion Gold Mining Co Ltd 1905 TS 717 - Referred to

Weinerlein v Goch Buildings Ltd 1925 AD 282 - Referred to

Zuurbekom Ltd v Union Corporation Ltd 1947 (1) SA 514 (AD) - Considered and discussed

View Parallel Citation

Judgment

TEBBUTT J: The question for decision in this appeal is whether fault, in the sense of either *dolus* or *culpa*, is a requisite in a defence of estoppel in an action other than a vindicatory one.

The parties in the magistrate's court signed a statement of admitted facts in terms of Rule 29(6) of the Magistrates' Court Rules and asked the magistrate to determine as a question of law an issue of estoppel raised by one of the parties. Those facts,

together with the relevant facts arising from the pleadings and the supporting documents, are the following. Plaintiff and first defendant in the magistrate's court action, to whom I shall refer as Samsodien, entered into an agreement of lease for a period of three years in respect of certain premises, which tenancy commenced on 1 April 1980, at a monthly rental of R190 per month. A written agreement of lease was duly signed by Samsodien on 28 April 1980 and by plaintiff on 7 October 1980. It was a condition of the lease that second defendant, to whom I shall refer as Sonday, should bind himself as surety and co-principal debtor for the obligations of Samsodien under the lease, which suretyship was duly signed

View Parallel Citation

by Sonday. Occupation was taken by Samsodien of the leased premises, which are situated in a Coloured Group Area. Samsodien is, however, a member of the Indian Group who is accordingly not entitled to occupy the leased premises. Samsodien failed to pay the rental for September and October 1980, amounting to R380 and plaintiff, as it was entitled to do under the lease, cancelled the lease and claimed Samsodien's ejectment from the premises. It also claimed payment of the arrear R380 from Sonday who had renounced the benefit of excussion. Sonday's defence was that he was relieved from any liability under the lease because it was invalid *ab initio* in that Samsodien, as an Indian, was by law precluded from occupying premises in a Coloured Group Area and that therefore his suretyship also was of no force and effect. It is an agreed fact, however, that, and I quote:

> "On or about 16 April 1980 and at Athlone, Cape, Sonday orally represented to one Bray acting for and on behalf of plaintiff that Samsodien was a member of the Coloured Group and thus entitled to conclude the agreement of lease and occupy the premises in question. By so representing, Sonday induced plaintiff reasonably and *bona fide* to believe, and to act upon such belief to its prejudice, that Samsodien was in fact a member of the Coloured Group".

Plaintiff accordingly averred in a replication that Sonday was estopped from denying that Samsodien is a member of the Coloured group and from contending that the agreement is invalid.

The magistrate found that plaintiff's plea of estoppel succeeded and granted judgment in favour of plaintiff against Sonday in the amount of R380 with interest and costs. Sonday now comes on appeal to this Court against that judgment.

I shall, for the sake of convenience, continue herein to refer to the appellant as Sonday and the respondent as plaintiff.

Before the magistrate a number of issues were raised by Sonday in respect of all of which the magistrate found in plaintiff's favour. Two of these were that no prejudice or potential prejudice had on the facts been established by plaintiff and that there was no indication that Bray was a director of plaintiff's company or had by resolution been authorised to act

on plaintiff's behalf so that no representation had been made to plaintiff personally. Neither of these were raised or persisted in on appeal. Nor was the third and major issue raised before the magistrate persisted in on appeal viz that because the lease between plaintiff and Samsodien was invalid, Sonday's suretyship was invalid and plaintiff could not, regard being had to the mischief sought to be remedied by the Group Areas Act, in the public interest be allowed to plead an estoppel.

It is quite clear that having regard to the provisions of the Group Areas Act the lease between plaintiff and Samsodien was invalid *ab initio.* It is also clear, generally speaking, that where in a suretyship agreement the principal obligation is void or unenforceable, the accessory suretyship is also void (see *Caney*: *Suretyship* 3rd Ed p 37). In this instance the suretyship agreement is accessory to the main agreement of lease. Plaintiff was not therefore able to rely on the suretyship agreement *per se* to succeed in its claim against Sonday. It

View Parallel Citation

had to rely on Sonday's being estopped from asserting that the lease did not legally permit Samsodien's occupation of the leased premises as the latter is an Indian and not a Coloured person and that his suretyship is therefore invalid, in the light of Sonday's representation to the plaintiff that Samsodien was a member of the Coloured group, which representation, according to the agreed facts, induced plaintiff reasonably and *bona fide* to believe and to act upon such belief to its prejudice. In other words, plaintiff was not seeking to rely on an invalid agreement, but on the equitable remedy of estopping Sonday from relying on such invalidity. It has, I think, now been clearly held that a plaintiff can in such circumstances plead and rely upon an estoppel - provided all the necessary elements of such an estoppel are present - even where the suretyship concerned is accessory to an invalid principal obligation (see *Trust Bank van Afrika Bpk* v *Eksteen* 1964(3) SA 402(A) at 412, 416; *Trust Bank of Africa Ltd* v *Appletime Engineering* (*Pty*) *Ltd and Others* 1981(1) SA 374 (N)). It was on this basis that the magistrate found, quite correctly in my view, for the plaintiff.

As I have said, Sonday on appeal to this Court did not seek to attack the magistrate's finding in this regard. He, however, raised before us an entirely new point and one not taken in the magistrate's court, viz that, for a defence of estoppel to succeed, fault on the part of Sonday had to be established on the facts. This, it was contended on his behalf, was a necessary element in the defence of estoppel. It was, however, neither pleaded nor established. The only elements of estoppel established by the admitted facts, so the contention went, were (*a*) a material misrepresentation by Sonday to the plaintiff; (*b*) which induced plaintiff reasonably and *bona fide* to believe in its truth and to act thereon; (*c*) to

plaintiff's prejudice, and it was not pleaded or proved that Sonday had in making the misrepresentation acted either with the intention to deceive the plaintiff (*dolus*) or negligently (*culpa*). Unless either *dolus* or *culpa* were present, it was argued, estoppel did not arise.

It is now clear law both in English law and in our law that *dolus* is not an essential element of estoppel (see *De Wet*: "*Estoppel by Representation*" *in die Suid-Afrikaanse Reg pp* 38-39; *per Rabie* CJ in *Joubert*: *The Law of South Africa* vol 9 para 381 p 202; *Hoffmann and Zeffertt*: *South African Law of Evidence* 3rd Ed p 270; *Connock's* (*SA*) *Motor Co Ltd* v *Sentraal Westelike Ko-operatiewe Mpy Bpk* 1964(2) SA 47(T) at 49F-H). It would, therefore, not be necessary to plead or establish that the representation upon which a defence of estoppel is based was made with the intention to deceive.

As to the question whether fault in the form of *culpa*, or negligence, is a prerequisite to the operation of estoppel, our law would not appear to be in a settled state and there has as yet been no clear definition of the areas in which *culpa* is or is not a requisite. As *Rabie* in *Joubert loc. cit* says, there has as yet been no clear and simple answer to the question that would hold good in all situations and in all types of cases. It has for example been decided by the Appellate Division *per Steyn* CJ, with Van Blerk, Wessels and Jansen JJA concurring, Rumpff JA (as he then was) dissenting, that save in certain exceptional circumstances it is necessary to prove negligence on the part of

View Parallel Citation

the person whom it is sought to estop from vindicating his property (see *Johaadien* v *Stanley Porter* (*Paarl*) (*Pty*) *Ltd* 1970(1) SA 394(A); *Grosvenor Motors* (*Potchefstroom*) *Ltd* v *Douglas* 1956(3) SA 420(A) at 427 B-E.) *Steyn* CJ, however, stated that it did not follow that the law will require proof of negligence in all cases of estoppel. *Rumpff* J A, again, felt that negligence was not a requisite for a defence of estoppel even in the case of a vindicatory action which was the subject of the dispute in *Johaadien's* case. I shall return to a fuller discussion of the judgments in that case later herein.

Two writers have expressed the view that proof of *culpa* is required in cases of estoppel. They are Dr J C *de Wet* in his treatise on "*Estoppel by Representation*" *in* Schmidt in his work "*Bewysreg*". I shall deal with the approach of both these writers in due course.

In order to reach some definition of the question with which I am faced, viz whether *culpa* is a requisite of our law of estoppel, it is necessary I feel, to review the origins and basis of estoppel as it operates in our law. In this, I am concerned only with estoppel by representation and not other forms of estoppel such as estoppel by judgment (*exceptio rei judicatae*).

I have been greatly assisted in my task by the clear and comprehensive historical account of the reception of the doctrine into our law by the present Chief Justice, Mr Justice *Rabie* in *Joubert's Law of South Africa* Vol 9 at paras 369-370.

Estoppel is a term of English law used to describe a group of rules of which the common feature is that they preclude a party from asserting or denying a particular fact (see *Hoffmann & Zeffertt op cit p* 254). As *Rabie* says, the doctrine, briefly stated, is that a person is precluded i.e. estopped, from denying the truth of a representation previously made by him to another person in the latter, believing in the truth of the representation, acted thereon to his prejudice (see *Joubert op cit* para 367 and cases there cited). It was taken over into our law from the English law but in recent years there has been a reluctance on the part of our courts, and particularly by *Steyn* CJ, to accept that the application of its principles in the South African law would always create the same legal consequences as those accepted in English law.

That the doctrine of estoppel has come into our law from the English law is, of course, undoubted. *Rumpff* JA in *Johaadien's* case *supra p* 409 H said

> "Dit moet aanvaar word, as 'n voldonge feit, dat die regsfiguur 'estoppel' vanuit die Engelse reg in ons reg geresipieer is. Daarmee het in ons reg gekom wat in die Privy Council beskryf is as
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> "a simple and wholly untechnical conception, perhaps the most powerful and flexible instrument to be found in any system of court juris prudence', *Spencer Bower* 2de Ed bl 20"

And in *Baumann* v *Thomas* 1920 AD 428 at 434, *Solomon* JA said:

> "The word estoppel is one which has been taken over by us from the English law, and which is now freely used in our daily practice".

The original reception of the English doctrine of estoppel into our law appears to have come about because the principle upon which it was based accorded with a similar principle recognised in our own

View Parallel Citation

legal structure. The English doctrine is an equitable one (*per Hoexter* JA in *Trust Bank van Afrika Bpk* v *Eksteen supra p* 412; *per* Lord *Blackburn* in *Burkinshaw* v *Nicholls* (1878) 3 AC 1004 HL at p 1016). This appeared from the judgments of some of the courts in the earlier cases in South Africa, to be analogous to what was known in Roman law as the *exceptio doli mali.* Indeed *Trollip* J, as he then was, in *Connock's* (*SA*) *Motor Co Ltd* v *Sentraal Westelike Ko-operatiewe Mpy Bpk supra* at p 49 A put it thus:

> "The English doctrine of estoppel by representation migrated to this country on the authority of a passport that it approximated the *exceptio doli mali* of Roman Law. However doubtful the validity of that passport might originally have been (cf *De Wet Estoppel by Representation* chap II and secs 1 and 2 of Chap V) the doctrine has

> now become naturalised and domiciled here as part of our law . . ."

The immigration authority who first stamped the doctrine's passport for entry into the Cape, to continue *Trollip* J's metaphor, appears to have been Lord *De Villiers* CJ who in four early Cape cases referred to the doctrine (see *Merriman* v *Williams Foord's* Rep 172; *Smit* v *Smit's Executrix* (1897) 14 SC 142 at 147; *Van Blommenstein* v *Holiday* (1904) 21 SC 11 at 17; *In re Reynolds Vehicle and Harness Factory Ltd* (1906) 23 SC 703 at 712-713).

In the last named of these four cases he stated that the equivalent of the civil law in England of estoppel was "*obstrictio re quis contra suum factum veniat*", instances of the use of which expression were continually found in *Voet's Commentaries*, e.g. *Voet* 6.1.17,19; and 14.3.6 (*Voet* actually uses the expression "*nemo contra suum factum venire debet*") (see also *Smit* v *Smit's Executrix supra* at 147). In the Transvaal the doctrine's travel document appears to have been officially stamped by *Kotze* CJ, who in *Smith and Dance* v *Phillips Lazarus* v *Levy and The Glencairn C M Co* 1893 Hertzog 50 at p 60, said:

> "Now the doctrine of estoppel is likewise recognised by our law, as sufficiently appears from the exception *doli mali*, the rule *nemo ex suo delicto meliorem conditionem suam facere potent* and others"

The passport was again examined by *Innes* CJ in the full bench decision in *United South African Association Ltd* v *Cohn* 1904 TS 733. At p 740 he said that

> "the principle which underlies the doctrine of estoppel is, in its main incidents, recognised by the Roman-Dutch law".

That recognition was endorsed by another full bench of the Transvaal supreme Court in 1905 when *Curlewis* J in *Waterval Estate and G M Co Ltd* v *New Bullion G M Co* 1905 TS 717 at p 722 said

> "The doctrine of estoppel *in pais*, as expounded by the later decisions in England and America, though not known to our law under that name, is analogous to what was known in Roman law as the *exceptio doli mali.* This special form of defence allowed by the Roman law was introduced by the praetor, so that a person should not, by reason of the subtlety of the civil law and contrary to the dictates of natural justice, derive advantage from his own bad faith - *ne cui dolus suus per occasionem juris civilis contra naturalem aequitatem prosit* (*Dig.* 44, 4,1).
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> A consideration of the many instances given in *Dig.* 44,4, in which this defence can be maintained, shows that the doctrine of estoppel *in pais* is merely an extended interpretation of the principles underlying the *exceptio doli mali.* The application of the maxim of Roman Law, *nemo contra suum factum venire*

View Parallel Citation

> *debet*, would create the same legal consequences as estoppel in English Law; it is practically the estoppel by conduct of the English Law. The term "estoppel" has indeed been generally adopted in practice in South Africa as a more convenient expression for that form of defence which was known under the Roman law as the *exceptio*

> *doli mali*: and the principles of the English doctrine of estoppel by conduct, as evolved by the decisions of English courts, may, I think, be equally applied in our courts in the consideration of a defence such as is raised in the present case".

Estoppel *in pais* I understand to be equivalent to estoppel by conduct or representation.

Referring to these statements of the early Transvaal courts which I have just quoted, *Galgut* J in 1960 said that it seemed clear that our law of estoppel is based on the *exceptio doli mali* and that the decisions of the English courts should be used only as guides (see *Bodemer NO* v *American Insurance Company* 1960 (4) SA 428 (T) at 432 H - 433 A).

That the *exceptio doli* is the basis of our law of estoppel has not been universally accepted. *De Wet op cit pp* 83-89, for example, deals with the *exceptio doli.* He refers to the *exceptio doli specialis* which applies to fraud committed in the past (i.e. a plea alleging that the defendant was induced by the fraud of the plaintiff to conclude the juristic act on which the plaintiff sues, as opposed to the fraud or *dolus* of a person instituting legal proceedings knowing full well that his suit is inconsistent with good faith e.g. in conflict with a *pactum de non petendo*, see *Zuurbekom Ltd* v *Union Corporation Ltd* 1947 (1) SA 514 (A) at 535) and concludes that it may contain the basis for an estoppel but that the *exceptio doli generalis* to which I shall refer in greater detail later did not form the basis of estoppel in our law. *De Wet's* reason for this is, at p 89, that:

> "Die gevolgtrekking waartoe ek kom is dat die *exceptio doli generalis* geen aanspreeklikheidsbeginsel bevat nie en dus nie die grondslag van aanspreeklikheid by estoppel vorm nie".

It seems clear, however, from the earlier judgments to which I have referred as well as to the later statements in cases such as *Trust bank* v *Eksteen supra* by *Trollip* J and *Bodemer NO* v *American Insurance Company supra* by *Galgut* J that the *exceptio doli* (and the reference in all the cases is to the *exceptio doli generalis*) is regarded by our Courts as the basis of estoppel in our law and that the English doctrine of estoppel was received into South Africa because it was felt that it was analogous to the *exceptio doli.* If not a blood brother, it was a near cousin and therefore to be welcomed as part of the familty.

The fact that the *exceptio doli* played a part in the development of our law of estoppel has also received recognition by the Appellate Division. In *Oakland Nominees Ltd* v *Gelria Mining Investment Co Ltd* 1976 (1) SA 441 (A) at 452 A-C, *Holmes* JA said:

> ". . . it has been authoritatively laid down by this Court that an owner is estopped from asserting his rights to his property only-
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> (*a*) where a person who acquired his property did so because, by the *culpa*

> of the owner, he was misled into the belief that the person, from whom he acquired it, was the owner or was entitled to dispose of it; or
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> (*b*) (possibly) where, despite the absence of *culpa*, the owner is precluded from asserting his rights by compelling considerations of fairness within the broad concept of the *exceptio doli.*

View Parallel Citation

> See *Grosvenor Motors* (*Potchefstroom) Ltd* v *Douglas*, 1956 (3) SA 420 (AD); *Johaadien* v *Stanley Porter* (*Paarl)* (*Pty) Ltd*, 1970 (1) SA 394 (AD) at p 409".

Having once received the English doctrine of estoppel into our law, our courts have not allowed it to retain its English form undisturbed and unaltered but have sought to fashion it to the mould of South African principles. Like any other immigrant that has been here for some time, the original "Englishness" has to a certain extent faded in favour of a more South African appearance. But the immigrant's background remains and our courts have not overlooked it in adopting it into the South African legal milieu.

In *Baumann* v *Thomas supra* at 434 - 435, *Solomon* JA said:

> "The word estoppel is one which has been taken over by us from the English law, and which is now freely used in our daily practice. The doctrine, however, is as much a part of our law as it is of that of England. In the case of *Waterval GM Co* v *New Bullion GM Co* (1905, TS p 722) it was pointed out by Curlewis J that the estoppel *in pais* of English law is analogous to what was known in Roman law as the *exceptio doli mali.* In his judgment the learned judge says "the application of the maxim of Roman Law *nemo contra suum factum venire debet*, would create the same legal consequences as estoppel in English law: it is practically the estoppel by conduct of the English law". The subject, however, has been much more fully developed by the decisions of the English Courts than it has been in our own authorities, so that in practice we usually look for guidance to the former rather than to the latter".

In *Hauptfleisch* v *Caledon Divisional Council* 1963 (4) SA 53 (C), a full bench decision of this Court, *Corbett* AJ, as he then was, who gave the decision of the Court, said at p 56:

> "Though the term "estoppel" is essentially a product of English law it has been recognised by our Courts that the doctrine of estoppel by representation is as much part of our law as it is of English law. Moreover, because the subject has been more fully developed by the decisions of the English Courts than by our own authorities, the English decisions are often looked to for guidance in the application of the doctrine in our Courts (see *Rossouw & Steenkamp* v *Dawson*, 1920 AD 173; *Baumann* v *Thomas*, 1920 AD 428; *Union Government* v *National Bank of South Africa Ltd* 1921 AD 121; *Union Government* v *Vianini Ferro-Concrete Pipes* (*Pty*) *Ltd* 1941 AD 43). It is true that the English decisions are only to be regarded as guides in the matter

(cf *Bodemer NO* v *American Insurance Co* 1960 (4) SA 428 (T)) but, in my view, where such decisions are of high authority and expound the basic principles of the doctrine, our courts will generally follow them, unless they are in conflict with some principle of our law".

Referring to this statement by *Corbett* AJ, *Trollip* J in the *Connock's Motor Co* case *supra* at p 49 D-E said, after quoting the definition of estoppel by *Spencer Bower* which has been accepted by both the English courts and our own, that:

"In the application of those requisites to particular situations, it is only natural that in practice our courts should and do look to English decisions for guidance (see all the authorities collected in a recent judgment by *Corbett* AJ, as he then was, in *Hauptfleisch* v *Caledon Divisional Council* 1963 (4) SA 53 (C) at p 56). But, as often happens with foreign principles and doctrines, once they have permanently settled here, they tend to develop along lines that are peculiar to South Africa in conformity with the fundamental concepts of our own law".

And in *Trust Bank van Afrika* v *Eksteen supra, Hoexter* AJA, in a concurring judgment but one in which he added reasons other than those of the majority of the Court said at p 415 E:

View Parallel Citation

"I bear in mind that our Courts have pointed out over and over again that, in matters of estoppel, it is proper and safe to look for guidance to the decisions of the English Courts."

I have already referred to the passage in *Johaadien's* case *supra* at 409 - 410 where *Rumpff* JA said that-

"Dit moet aanvaar word, as voldonge feit, dat die regsfiguur 'estoppel' vanuit die Engelse reg in ons reg geresipieer is . . . .".

The learned judge, however, added at 410 A that-

"Terstond moet egter bygevoeg word dat hierdie regsfiguur . . . nie teenstrydig met, of los van, die grondslae van ons eie reg kan of behoort te funksioneer nie, kyk *Trust Bank van Afrika Bpk* v *Eksteen* 1964 (3) SA 402 (AA)".

He was, of course, referring to the wellknown judgment of *Steyn* CJ in that case, concurred in by *Botha*, *Van Wyk* and *Wessels* JJA, in which he sought to repudiate the approach of the trial Judge in the court *a quo* who had stated, as had so many courts before him, that-

". . . it must, in my view, be taken as fairly settled that the doctrine of estoppel and the rules thereof . . . are to be sought principally in the decisions of the English Courts, which have for long been the main guide to our Courts".

Steyn CJ referred to that statement and then went on to say at p 410 F - 411 E-

"As ek hierdie opmerking reg verstaan dan is die geleerde Regter van oordeel dat ons reg van estoppel in die eerste plek in die beslissings van Engelse Howe gesoek moet word. Indien dit sy mening reg weergee, sou ek verplig voel om van hom te verskil. Dit is waar dat 'n reeks sake in hierdie Hof, soos *Rossouw and*

Steenkamp v *Dawson* 1920 AD 173 op bl 181, *Baumann* v *Thomas* 1920 AD 428 op bl 434, en *Union Government* v *National Bank of SA Ltd* 1921 AD 121 op bl 127, die standpunt ingeneem is dat ons reg van estoppel dieselfde is as die Engelse reg en dat in die praktyk meer na Engelse beslissings omgesien word vir leiding ("guidance") dan na ons eie outoriteite. Ek is egter geensins oortuig daarvan dat die toepassing van die beginsels wat in ons reg te vind is, in alle opsigte tot dieselfde resultate lei as wat in die Engelse reg aanvaar word nie, en die ondersoek wat uit genoemde sake blyk, kan onmoontlik so 'n algemene gevolgtrekking regverdig. Die beskouing dat ons eie outoriteite deur hierdie en dergelike uitsprake regtens of vir alle praktiese doeleindes vervang is deur Engelse gewysdes, met die meegaande implikasie dat ons Howe, en ook hierdie Hof, aan Engelse gewysdes gebonde is, sou ek as klaarblyklik en geheel en al ongegrond moet verwerp. Geen Hof, ook nie hierdie Hof nie, besit die bevoegdheid om ons gemene reg met die reg van enige ander land te vervang nie. Dit kan alleen die Wetgewer doen. Ek kan ook nie aanneem dat dit die bedoeling was om so iets te bewerkstellig nie. Indien dit wel die bedoeling was, dan sou ek my nie daaraan gebonde ag nie, want dit sou reëlreg in stryd wees met die elementêre plig van elke Hof om geen ander reg dan eie geldende reg toe te pas nie. Dit is dan ook opmerklik dat in talle sake wat oor estoppel handel nie nagelaat is om na die grondslae waarop dit in ons reg sou rus, te verwys nie. Dit is onder meer gedoen in *Smit* v *Smit's Executrix* (1897) 14 SC 142; *Van Blommenstein* v *Holliday* (1904) 21 SC 11; *In re Reynolds Vehicle and Harness Factory Ltd* (1906) 23 SC 703; *United South African Association Ltd* v *Cohn* 1904 TS 733; *Waterval Estate and Gold Mining Co Ltd* v *New Bullion Gold Mining Co Ltd* 1905 TS 717; *Morum Bros Ltd* v *Nepgen*, 1916 CPD 392; *Pretorius* v *Pretorius*, 1948 (4) SA 144 (O), en ook in bogenoemde gewysdes van hierdie Hof. Dit kan daarom nie staande gehou word dat ons eie reg prysgegee is nie; en om dit in 'n ander regstelsel te gaan soek, kan ek, ook waar inderdaad eenselwigheid van regsbeginsel te vind is, nie anders as 'n aweregse prosedure beskou nie. Daarmee wil ek allermins te kenne gee dat alle verwysing na of oorweging van die beginsels van 'n ander regstelsel uit die bose is. Vergelykende oorweging kan, soos ten oorvloede uit talle van ons gewysdes en regsverhandelinge blyk, 'n besonder

View Parallel Citation

dienstige middel wees om tot helderheid te geraak omtrent die beste toepassing, aanpassing of uitbouing van eie beginsels. Om die bevrugtende inwerking van verwante regstelsels te wil uitsluit, sou nie slegs 'n onbegonne taak wees nie, maar ook 'n verarmende kortsigtigheid waaraan ek geen deel sou wil hê nie. Maar dit is een ding om 'n ander reg te ondersoek ten einde ons eie meer doeltreffend te kan hanteer, en 'n gans ander

saak om 'n ander reg te benader asof dit 'n ingelyfde deel van ons erkende regsbronne is".

Those remarks by the former Chief Justice have been severely criticised (see Article "Legal Chauvinism, Executive-mindedness and Justice - L C *Steyn's* Impact on South African Law by Edwin Cameron (1982) 99 *SALJ* 38 at pp 46-48) as misstating, and over-reacting to, the views of other judges that English law is a recognised and integral source in the area of estoppel. *Cameron* says at p 47 that-

> ". . . . it is yet to be shown that in an important sense English law is not - or was not before the *Eksteen* judgment - a relevant and accepted source of South African law".

Be that as it may, as I read *Steyn* CJ's judgment, he found no fault with those cases in which the foundation of our law of estoppel had been described as the *exceptio doli*, referring to those such as *Smit* v *Smit's Executrix supra*, and to the *Waterval Estate and GM* case which I have set out above as

> "die sake . . . (waar) nie nagelaat is om na die grondslae waarop dit (estoppel) in ons reg sou wees, te verwys nie".

And he did not say that English sources should not be looked to. They could be "for comparative purposes" or to enable our own law to be handled more effectively.

I feel therefore, that I am entitled to approach the question with which I am now faced either on the basis of examining it in the light of what I believe to have been established as the foundation of our law of estoppel viz the *exceptio doli* or by seeking guidance from, or comparing our law's approach to, estoppel, if you will, with the English law in regard to the doctrine.

Before doing so I feel I should briefly refer to two further matters, viz the approach of our courts to the *exceptio doli* and its application in recent cases and to the changes or developments in our law in regard to both the *exceptio doli* and to estoppel, which latter has also undergone changes in England.

In regard to the latter, i.e. the development of the law of estoppel, *Trollip* J had the following trenchant remarks to make in the *Connock Motor Co* case *supra* at p 49 F-H:

> ". . . . even in its country of origin, since before and after its first formulation in modern form in 1837 in *Pickard* v *Sears* 112 ER 179, estoppel by representation has had an interesting history of constant development in England. In Lord *Coke's* time estoppel could only be founded on particular acts and declarations of the most formal kind (see *Spencer Bower* paras 5-9); but by 1837 Lord *Denman* CJ, could state with confidence in *Pickard* v *Sears* that any words or any conduct could give rise to it provided the representation thereby conveyed was made "wilfully", i.e. fraudulently; and in 1848 the extension of the rule was confirmed in *Freeman* v *Cooke*, 154 ER 652, to include not only a representation

> by words or conduct made intentionally, even if not fraudulently, but also a representation by words or conduct made unintentionally or resulting from negligence or omission which a reasonable man would have

View Parallel Citation

> assumed was intended to be and would have acted upon. That objectivism in estoppel by representation therefore dates from *Freeman* v *Cooke*, and is still in the process of being developed and defined by English and our Courts".

In England, as pointed out by *Trollip* J, it now seems clear that the element of wilfulness referred to in *Pickard* v *Sears supra* has been extended from a representation by words or conduct made intentionally to such a representation made unintentionally *or* resulting from negligence or omission which a reasonable man would have assumed was intended to be, and would have been, acted upon. I have underlined the word *or* advisedly for it would now appear in English law that even an unintentional representation can give rise to estoppel and that there is no requirement of intent (*dolus* as we know it) nor negligence (*culpa* in our law) to establish an estoppel.

Spencer Bower's definition of estoppel (*Estoppel by Representation*, 3rd Ed p 4) has no suggestion that negligence is a prerequisite of estoppel. That definition has not only been approved by the English courts (see *Hopgood* v *Brown* (1955) 1 All ER 550 (CA) at p 559), but by our courts as well (see eg *Union Government* v *Vianini FerroConcrete Pipes* (*Pty*) *Ltd* 1941 AD 43 at p 49; *Hauptfleisch* v *Caledon Divisional Council supra* at p 56; *Connock's Motor Co Ltd* v *Sentraal Westelike Ko-operatiewe Mpy Bpk supra* at 49 B-D). It reads as follows:

> "Where one person ('the representor') has made a representation to another person ('the representee') in words, or by acts and conduct, or (being under a duty to the representee to speak or act) by silence or inaction, with the intention (actual or presumptive), and with the result, of inducing the representee on the faith of such representation to alter his position to his detriment, the representor, in any litigation which may afterwards take place between him and the representee, is estopped, from making, or attempting to establish by evidence, any averment substantially at variance with his former representation, if the representee at the proper time, and in the proper manner, objects thereto".

With regard to the *exceptio doli generalis* doubt has recently been expressed by *Coetzee* J as to whether it was part of the Roman-Dutch law and therefore still available in our law today (see *Aris Enterprises* (*Finance*) (*Pty*) *Ltd* v *Waterberg Koelkamers* (*Pty*) *Ltd* 1977 (2) SA 436 (T), a matter upon which the Appellate Division chose not to express any view in the appeal in the *Aris* case (see *Aris Enterprises* (*Finance*) (*Pty*) *Ltd* v *Waterberg Koelkamers* (*Pty*) *Ltd* 1977 (2) SA 425 (AD) at 431 -432).

It is clear, however, that it has been accepted as part of our law and applied as such for a considerable period of time, both by provincial divisions as well as the Appellate Division. As

Coetzee J says, its basis originated in the Roman Law where it contributed to the amelioration of the inflexibility of

the *jus civile.* The *jus strictum* of the Roman Law recognised no legal liability ("aanspreeklikheid") for fraud. To remedy this, the praetor introduced the *actio doli* and the *exceptio doli*, the cornerstone of the *exceptio doli* as recognised in our courts. It soon was extended, however, to temper the harshness of the *jus strictum* in other spheres (see *de Wet op cit pp* 84 - 85).

View Parallel Citation

In *Zuurbekom Ltd* v *Union Corporation Ltd supra, Tindall* JA said that he did not "profess to be clear as to the exact limits of the defence known as the *exceptio doli*". Saying that in the *Digest* (44.4.1) it was stated that this form of defence was introduced by the praetor so that a person should not by reason of the subtlety of the civil law, and contrary to the dictates of natural justice, derive advantage from his own bad faith, *Tindall* J quoted with approval a passage from *Sohm*: *Institutes* Sec 53 in which *Sohm* referred to the development of the *exceptio* from its inception by the praetor and said

> "As a result of this development the *exceptio doli* came to be available in place of all other special *exceptiones*, operating as a kind of general reserve clause which, without specifying the defence, enabled the defendant to set up *in judicio* any fact which, for any reason whatever, might seem calculated to secure his acquittal. It was this breadth of scope that fitted the *exceptio doli* for becoming, above all things, the instrument which was used, both in the theory and the practice of Roman Law, for effecting such modifications of the material law as equity seemed to require".

In the *Zuurbekom* case the court had to deal with an application for an interdict and where there had been a delay in bringing the claim, *Tindall* JA stated at p 537 that-

> "I am prepared to assume, for the purpose of the argument, that something falling short of conduct constituting an estoppel against the plaintiff may be embraced by the defence known as the *exceptio doli.* But even on that assumption it seems to me that, before the plaintiff's delay can be a valid obstacle to his claim for an interdict, it must be shown (as the very name *exceptio doli* indicates) that in the circumstances of the particular case the enforcement of that remedy by the plaintiff would cause some great inequity and would amount to unconscionable conduct on his part."

The limits of the field of operation of the *exceptio* have never been defined by our courts but it seems clear that they have been extended from the comparatively limited area embraced by *Tindall* JA's "great inequity" or "unconscionable conduct".

Also expressing doubt, as *Coetzee* J did, as to whether the *exceptio doli* exists in our law, but considering that it was not open to him as a single judge to hold that it was

not so in the light of the full bench decision of the Transvaal Court in *Otto en* 'n *Ander* v *Heymans* 1971 (4) SA 148 (T) where the *exceptio doli* was recognised as an independent remedy (which was also *Coetzee* J's approach in the *Aris Enterprises* case *supra), Colman* J in *Novick and Another* v *Comair Holdings Ltd and Others* 1979 (2) SA 116 (W) felt that the stringent ambit of the *exceptio* suggested by *Tindall* JA was correct. At p 156H - 157B, after referring to the judgment in the *Otto* case *supra* where it was stated that-

> "Die *exceptio doli* is nie 'n skerp omlynde regsfiguur nie maar 'n regsmiddel wat na gelang van al die feite in 'n gegewe geval aan 'n party toegeken word as die Hof meen dat daar anders ontoelaatbare onreg sou geskied".

Colman J at p 156 H - 157 B said-

> "The judgment does not specify any limits within which the Courts have jurisdiction to regard conduct as so intolerable or impermissible that the litigant guilty of it should be denied the rights which the law would otherwise afford him.
>
> But there must be limits, and they must be narrow ones. It is not consonant with public policy, or with modern jurisprudence, to accord the power to a Judge to refuse relief otherwise available at law, or to grant relief not otherwise available at law, merely because, in the exercise of an unfettered equitable

View Parallel Citation

> discretion, he thinks it would be just, in the circumstances of the case before him, to act in that way. I would respectfully adopt, in that regard, the observations of *Jansen* J (as he then was) in *North Vaal Mineral Co. Ltd* v *Lovasz* 1961 (3) SA 604 (T) at 607-8. I must assume, as he did, that the remedy exists. But I shall follow him in his assumption that a minimum prerequisite for its application is the presence of the circumstances mentioned by *Tindall* JA in the *Zuurbekom* case *supra*, namely that the enforcement of his rights by one of the litigants would be unconscionable conduct on his part, and would cause some great inequity. What other limits there may be upon the field of operation of the *exceptio* I do not know, although I assume that they must exist."

That narrow application of the *exceptio* has not always been followed and in other recent cases broader considerations of fairness and justice have persuaded the Courts to apply the *exceptio* (see e.g. *Rand Bank Ltd* v *Rubenstein* 1981 (2) SA 207 (W) at 214 - 215). The courts have, however, been at pains to emphasise that even where the *exceptio doli* may be said to apply and where they have refused "to allow a person to make an unconscionable claim even though his claim might be supported by a strict reading of the law" (see *Weinerlein* v *Goch Buildings Ltd* 1925 AD 282 at 292), it was not a general principle that equity should override the substantive law (see e.g. *Paddock Motors* (*Pty*) *Ltd* v *Igesund* 1976 (3) SA 16 (A) at 27 G - 28 H; *Rashid* v *Durban City Council*

1975 (3) SA 920 (D) at 927 B - D). It has accordingly been stated that the *exceptio doli* falls short of estoppel (see *North Vaal Mineral Co Ltd* v *Lovasz* 1961 (3) SA 604 (T) at p 607 H; *Zuurbekom Ltd* v *Union Corporation Ltd supra* p

537; *Rashid's* case *supra p* 926 H). However, as the basis of estoppel, it is clear that the fundamental principle of considerations of fairness and justice and the avoidance of inequity and unconscionable conduct upon which it is based also permeates our law of estoppel. Nowhere is it suggested that those principles include negligence as an essential element. This accords, too, with the equitable relief which the English doctrine of estoppel affords.

In the English doctrine, as we have seen, fault is no requirement (see *Spencer Bower op cit* at 47, 69-70; Article: *Die Beskerming van die Bona Fide-besitsverkryger* by Prof J C Van der Walt in "J C *Noster* - 'n *Feesbundel*" at p 81). All that is required under the English doctrine is a representation by the representor of such a nature that it induced the representee to alter his position to his prejudice made with the intention, actual or presumed that the representee would be induced so to alter his position (see the definition by *Spencer-Bower* - cited above). An analysis of the definition suggests the following essentials: (i) a representation; (ii) which induced the representee to alter his position to his prejudice; (iii) which is material in the sense that it would have misled a reasonable man (in other words, a misrepresentation), and (iv) prejudice. The intention to induce is obviously a purely objective requirement, viz a representation which would have induced a reasonable man in the representee's position (see *Spencer Bower* at pp 89-92; *Van der Walt's* article *supra* p 81 note 45). Note, again, that fault either in the sense of *dolus* or *culpa*, is not a requisite. That *culpa* is not a requirement appears therefore to be *prima facie* the position in both English law and in our law. It has, however, as I have said

View Parallel Citation

above, been stated to be an essential requirement by *De Wet* and *Schmidt* and held to be so in the case of a vindicatory action by several of our courts (see *Grosvenor Motors* case *supra, Johaadien's* case *supra*). *De Wet* rejects the *exceptio doli* as the basis of our law of estoppel and concludes that *culpa* is the only possible theoretical basis of estoppel, a conclusion which has not found universal acceptance by our courts. *Steyn* CJ who found *culpa* to be a requirement in the *rei vindicatio* himself said it was not necessarily and in all circumstances a requirement even under the *rei vindicatio* and he refrained from expressing it to be so in other cases where estoppel may operate (see *Johaadien's* case *supra* at p 409). In the same case *Rumpff* JA considered that it was not a requirement in our law, even in a vindicatory action (see at p 412 H - 413 B, 416 A). *Culpa* as a requirement for estoppel in a

Page 491 of [1983] 1 All SA 476 (C)

vindicatory action has been adverted to in e.g. *Van Blommenstein* v *Holiday supra* (where, *De Villiers* CJ said:

> "But I am satisfied that neither under the Roman nor under the Dutch law would a person, who by his words or conduct has wilfully or *negligently* . . . . induced another to alter his own position in the belief that a certain state of fact exists, have been allowed to assert a right against such other person inconsistent with such state of affairs",

- my underlining), *Morum Bros Ltd* v *Nepgen* 1916 CPD 392; *Grosvenor Motors* (*Potchefstroom*) *Ltd* v *Douglas supra, Johaadien's* case *supra* and *Oakland Nominees Ltd* v *Gelria Mining and Investment Co Ltd supra* at p 452 A - C, and it has also been suggested as a requirement in *Blackwood Hodge South Africa & Elco Steel Dealers* 1978 (3) SA 852 (T) p 855 D. I am therefore not persuaded that *De Wet* is correct in his view. Schmidt *Bewysreg p* 448 argues that because the requirement of fault (skuld) is so deeply rooted in Roman-Dutch law and because Steyn CJ said in the *Trust Bank* v *Eksteen* case *supra* that the principles of estoppel are to be sought in the Roman-Dutch law, either *dolus or culpa* should be required to found a defence of estoppel. But as *Rabie* in *Joubert op cit* para 381 p 202 points out, the learned author makes no mention of the view stated in *Johaadien's* case that it does not follow that the law will require proof of negligence in all cases of estoppel. He also does not deal with the fact that part of the source of estoppel in our law is the *exceptio doli* which did not require *culpa* as a requirement. Nor does he deal with the dissenting view of *Rumpff* JA in *Johaadien's* case.

Per contra, Van der Walt loc cit tends to suggest that *culpa* is not a requirement in estoppel, a view also expressed by *Galgut* AJ, as he then was, in *Coetzee* v *Van der Westhuizen* 1958 (3) SA 847 (T), who appears, however, to have relied for this view on the English law, and this was, of course, also the view of *Rumpff* CJ in *Johaadien's* case *supra.* A similar view was mooted by *Shearer* J in *Credit Corporation of SA Ltd* v *Botha* 1968 (4) SA 837 (N) where at p 847 G - H he said:

> "In the absence of any special duty resulting from a special relationship between the parties, a person is under a duty so to conduct himself in commercial relationship that a reasonable man would not be misled to his prejudice by what that person has done. That duty is not necessarily co-extensive with the duty of care, the breach of which will give rise to an action in negligence. While much of the terminology appropriate to the consideration of questions of negligence coincides with that used in cases of estoppel by conduct – "duty", "reasonable man", "foreseeability", "proximate cause" - it is clear from the

View Parallel Citation

> authorities that conduct which would not found an action in negligence may found an estoppel".

Page 491(1) of [1983] 1 All SA 476 (C)

This case dealt with the estoppel of a "purchaser" at the instance of a "seller" under a hire-purchase agreement. In that case, as well as in other cases dealing with hire-purchase agreements, it was held that negligence was not required to found an estoppel (see also *Trust Bank of SA Ltd* v *Maharaj* (1961 (2) SA 770 (N). *Die Trust Bank van Afrika Bpk* v *du Toit* 1961 (3) SA 36 (T); *sed contra Trust Bank van Afrika Bpk* v *Van der Walt* 1962 (1) SA 174 (T)). *Rabie* at para 385 points out that as for the *ratio* in those decisions, it was said in the *Credit Corporation* case at 838 C - D that it was the intentional act of the party who enables the hire-purchase document to be put forth to an innocent

third party which operates to debar him, not because of negligence but "as a matter of justice", from asserting that the statements contained in the document are untrue when they have been acted upon by the third party to his prejudice.

It would seem therefore that it is really only in the sphere of vindicatory actions that negligence is regarded as a requisite for estoppel. The reason for this is probably that suggested by *Holmes* JA in the *Oakland Nominees* case *supra* where at p 452 he said:

> "Our law jealously protects the right of ownership and the correlative right of the owner in regard to his property, unless, of course, the possessor has some enforceable right against the owner. Consistent with this, it has been authoratively laid down by this Court that an owner is estopped from asserting his rights to his property only-
>
> (*a*) where the person who acquired his property did so because, by the *culpa* of the owner, he was misled into the belief that the person, from whom he acquired it, was the owner or was entitled to dispose of it."

But even then, echoing the views of *Steyn* CJ in *Johaadien's* case *supra* he added

> "or possibly where, despite the absence of *culpa* the owner is precluded from asserting his rights by compelling considerations of fairness within the broad concept of the *exceptio doli".*

As stated by *Steyn* CJ in *Johaadien's* case at p 403 A:

> "Daar sou dus niks ongerymds in wees nie om by 'n eiendomsvordering 'n skuldvereiste te stel, al sou dit nie as algemene vereiste by estoppel kan geld nie".

While, therefore, because of the high premium our law places upon rights of ownership and the fact that their denial should not be lightly granted, a requirement in any operation of estoppel in regard thereto should be fault, at least in the sense of *culpa*, it would seem that no warrant exists either in the English law of estoppel, to which our law owes much of its development, or in our own law, the basis of which appears to be the *exceptio doli*, for regarding it as a requirement for the defence of estoppel in other instances.

It is also significant that in *Connock's Motor Co* case *supra Trollip* J distinguished between the position where negligence may be present and estoppel. At p 48 H - 49 A, he said

> "Moreover I do not think that the defendant was proved to have been negligent in any respect. It has not been proved that it was unreasonable in trusting de Jager or that with due diligence it could earlier have ascertained his frauds. The only basis, therefore, upon which the plaintiff can and did base its case is estoppel; that is, that defendant was estopped by its conduct from denying De Jager's authority to bind it by his acts or from denying its liability for the purchases in question".

View Parallel Citation

And at p 51 he deals with what he calls "estoppel based on unintentional conduct". *Trollip* J therefore appears to have felt that negligence was not a prerequisite of estoppel in our law.

Noting that under the English law of estoppel founded on representation made unintentionally i.e. without intent to deceive or without negligence, regard is had chiefly to the position of the representee in deciding objectively whether the representor should be estopped, *Trollip* J at p 50 E opined that because the foundation of estoppel is still equity, our courts have evolved a different approach in estoppel based on unintentional conduct in applying an objective test viz that regard must also be had to the representor and to whether he should reasonably have expected that his words or conduct would have misled the representee. I shall return to this test later but suffice at this stage to say that *Trollip* J held that it was applicable in cases of "unintentional conduct" forming the basis of an estoppel, i.e. conduct in which there was no element of fault in the sense of *dolus* or negligence.

Finally it should be observed that negligence is not regarded as a requisite for estoppel in American law (see *American "Restatement of the Law", Torts* para 894 p 502). Williston on *Contracts* Vol 3 para 692 p 1996 (1937) says

> "At the present time while in many jurisdictions there are expressions still used which seem to mean that either fraud or culpable negligence is an essential element of estoppel, it is certain that the great weight of recent authority supports the view that positive statements of fact as to matters upon which the speaker may fairly be supposed to be informed may give rise to an estoppel, though there is neither of these elements"

and in Vol 5, para 1508 p 4205 he states:

> "This doctrine, as now understood, precludes one who has made positive statements of fact to another, in reliance upon which the latter has acted, from denying their truth in any controversy between these two parties. While some authorities consider *scienter* or negligence necessary where this doctrine is invoked, the better view recognises that it is immaterial whether the misstatement was either wilful or negligent".

For the above reasons I have reached the conclusion that in a case such as that which

is the subject of this appeal, not being a vindicatory action, it was not necessary for the plaintiff to plead or establish negligence on the part of Sonday.

It was, however, necessary to establish the requirements of estoppel set out by *Spencer-Bower* and quoted above. This, in my view, the plaintiff has done. Looking at it from the position of the representor too, he i.e. Sonday made a

statement which was material in that it was to the effect that Samsodien was a member of the Coloured group and "thus entitled to conclude the Agreement of lease and to occupy the said premises". Moreover it is an agreed fact as set out above that Sonday thereby "induced" the plaintiff to alter its position to its prejudice. It was not as if that by the misrepresentation the plaintiff "was induced" to act to its prejudice; the agreed fact is that Sonday, by his misrepresentation, positively "induced" the plaintiff so to act.

In summary, therefore, I am of the view that plaintiff, who did not have to establish *dolus* or *culpa* on the part of Sonday, established those elements necessary to estop Sonday from relying upon the invalidity of his suretyship and that, as Samsodien had failed to pay

View Parallel Citation

plaintiff the R380 owing for arrear rental, the latter was entitled to claim payment thereof from Sonday. In my view the magistrate was correct in granting judgment in plaintiff's favour and it follows that the appeal against that judgment must fail, with costs.

BERMAN AJ concurred.

Appearances

JJ Gauntlett - Advocate/s for the Appellant/s

E Sakinofsky - Advocate/s for the Respondent/s

Wilkinson, Joshua and Gihwala - Attorney/s for the Appellant/s

Saacks and Jaffe - Attorney/s for the Respondent/s