60/56

60/56

G.P.-S.103675—1954-5—1,000. U.D.J. 219.

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(APPELLATE Provincial Division).
Provinsiale Afdeling).

Appeal in Civil Case.
Appèl in Siviele Saak.

(GROSVENOR MOTORS (POTCHEFSTROOM) LTD. *Appellant,*

versus

TERENCE GORDON DOUGLAS. *Respondent.*

Appellant's Attorney / *Prokureur vir Appellant* J. A. Hill — *Respondent's Attorney* / *Prokureur vir Respondent* Kirk, B. & F.

Appellant's Advocate / *Advokaat vir Appellant* C. Gagiano, QC — *Respondent's Advocate* / *Advokaat vir Respondent* J. Wessels

Set down for hearing on / *Op die rol geplaas vir verhoor op* Monday, 28th May, 1956

(TPD)

1, 3, 5, 8, 11

9.50 — 12.45 }
2.15 — 4.0 p.m. } CAV

— Appeal dismissed, with costs including costs ~~which~~ reserved in the event of no further written argument.

Centlivres, C.J., Hoexter, Steyn, Brink & O. Bloch (ad hoc) — J.A.

Registrar
14/6/56

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

GROSVENOR MOTORS (Potchefstroom)LTD. Appellant

and

TERENCE GORDON DOUGLAS Respondent

Coram: Centlivres, C.J., Hoexter Steyn, Brink JJ.A. et van Blerk, A.J.A.

Heard: 28th. May, 1956. Delivered: 14-6-1956

J U D G M E N T

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. v. Nepgen 1916 C.P.D. at page 394, and to de Wet,

"Estoppel/.....

"Estoppel by Representation" in die Suid-Afrikaanse Reg, page 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 emphasize the importance which, notwithstanding recognised exceptions, our law attaches to the owner's right to vindicate his property, and sugrests 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/.....

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/.....

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 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 ~~xxxxxxx~~ 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 ~~xx~~ 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 ~~xxxxxxxxxx~~ 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,/.....

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.

L. C. Steyn.

Hunter J.A.
Brink J.A.
van Blerk A.J.A. } Concur.

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between :

GROSVENOR MOTORS (Potchefstroom) LTD. Appellant

&

TERENCE GORDON DOUGLAS Respondent

CORAM : Centlivres C.J., Hoexter, Steyn, Brink JJ.A. et v. Blerk A.J.A.

Heard :- 28th May 1956. Delivered :- 14/6/56

J U D G M E N T

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. "

IN THE SUPREME COURT OF [illegible]

([illegible])

In the matter between :

[illegible] Respondent

&

[illegible] Appellant

BEFORE : Gratiaen J., [illegible] J.

ARGUED :- [illegible] May 1956. DECIDED :- 14/6/56

JUDGMENT

GRATIAEN J. :- The respondent, to whom I shall refer as the plaintiff, instituted an action in the [illegible] against the appellant (defendant) for the recovery of [illegible]. In his declaration the plaintiff alleged that he was the owner of the car [illegible] that the defendant [illegible] [illegible] the defendant denied that [illegible] and pleaded alternatively [illegible] 1954, the plaintiff sold and delivered the car to [illegible] as proof of that sale he wished to rely [illegible] a written document signed by the plaintiff in the following terms :-

"[illegible] 15.11.54

" I, the undersigned, sold my Consul car CO [illegible] [illegible] to [illegible]

[illegible]

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 plain-

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 Uriel but said that on November 17th, 1954, he entered into a cash sale with Uriel in terms whereof he agreed to sell the car to Uriel for the sum of £550 and that he thereafter delivered the car to Uriel but Uriel failed to pay him the sum of £550 or any sum whatever. It was averred that in these circumstances the ownership of the motor car did not pass to Uriel.

In its rejoinder the defendant alleged that by reason of his action in furnishing Uriel with the document referred to above the plaintiff was estopped from disputing Uriel'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 Uriel ownership passed to Uriel.

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 Uriel on November 15th, 1954, to the plain-

tiff 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

tiff who was desirous of disposing of his motor car. The

plaintiff agreed to sell the car to Uriel for [illegible]. 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." Uriel

told the plaintiff that he did not have his cheque book with

him at the time and that it was at his home in [illegible]. It

was then arranged that Frederick should accompany Uriel to [illegible]

[illegible] and hand the car over to him on receiving a cheque for the

purchase price. Plaintiff had obtained the car's licence papers

and Uriel asked him to give him a document indicating that he

was in the car; it would protect him in case of any enquiries.

The plaintiff thereupon gave him the document dated November

15th, 1954. Uriel and Frederick then left for [illegible]. On

the following day Frederick handed the plaintiff a cheque dated

November [illegible], 1954, which was signed by Uriel and drawn on a

bank in [illegible]. On November 17th, 1954, this cheque was re-

turned 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

Uriel offered to sell it to the defendant. The sales manager

of the defendant asked Uriel 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

ned any proof produced. Erial produced the licence of Novem-
ber 15th, 1956, and told him that he had paid the purchase
price. The second witness asked him for the licence papers
of the car. Erial told him that the plaintiff had sent the
papers to Eliasdorp where he used to live in order that the car
could be registered in his (Erial's) name. The defendant there-
upon bought the car for R460.

At the trial defendant's counsel accepted the posit-
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that "there is no indication whatsoever of giving credit to
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at pp. 396 and 397) _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 great weight of Roman-Dutch authority. (_Voet_
18,1,11 ; Inst. Inst. 4,15,20 ; _Van der Keessel_ Th. 207)." It
will be sufficient to quote what _Voet_ says in 18,1,11. 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

from Berwick's translation at p. 171 :-

" 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 is correctly held 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 expressly agreed 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 Aitken 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 [illegible] credit for at least a day or two. And 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 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 imm- "ediately negotiable." I do not agree with the doubt apparently cast upon that decision in Potgieter v Cape Dairy and General Livestock Auctioneers (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 (1931 A.D. 318 at p. 320) where Wessels C.J. said that "the presumpt- "ion of our law is that a sale is a sale for cash but that pre- "sumption 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

be inferred [illegible] trial credit. I agree also [illegible] Eyre-

J., said in Re [illegible] (1959 [illegible]) : "The

that [illegible] the [illegible] said in [illegible]

[illegible] justify [illegible] inference [illegible] cru-

[illegible] make [illegible] date [illegible]

[illegible] repetition." I do not agree with the [illegible]

[illegible]

[illegible]

[illegible] that "the question of [illegible]

[illegible] the [illegible] is not ne-

ver considered" in Re [illegible]. In the present case

[illegible] has not post-dated. [illegible] from the

[illegible] is that when [illegible] to [illegible] of the [illegible]

[illegible] not

to [illegible].

Counsel for the [illegible] relied on [illegible] ([illegible])

[illegible] where [illegible] said that "the [illegible]

[illegible]

[illegible] condonation."

[illegible] dictum [illegible] inconsistent

with the view expressed in [illegible] case ([illegible]) [illegible]

by [illegible] that the giving of credit [illegible]

inferred from a 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

The document, it must be conceded, contained no misstatements of [illegible] this condition.

[illegible] of [illegible] and was an [illegible] -

[illegible] in effect, calculated to

[illegible] of the [illegible] that the

[illegible] the trial.

[illegible] in this case. I proceed to a consideration of the

I hold, therefore, that the plaintiff [illegible] his

[illegible]

[illegible] which [illegible]

[illegible] of the [illegible] -

It appears there was no intention [illegible] any

[illegible] which it appears [illegible] not

in [illegible] which was quoted by [illegible]: it [illegible] to

be construed as an intention to depart from the view expressed

inferred from [illegible] more explicitly. That [illegible] case, however,

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 stand point 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

fact. It simply recited what was a fact viz: that the car had been sold to Drisko. We cannot, however, [illegible] the matter through the eyes of lawyer but to regard the matter from the standpoint of the man in the street who is unacquaint-ed with the niceties of the law. It was contended that when a man in the street reads the document he will [illegible] to the conclusion that Drisko was free to deal with the car in any manner that he pleases. I think, however, [illegible] of this argument, that the defendant [illegible] in the way of purchase and sale and the [illegible] and that he may be regarded as [illegible] in the street — [illegible] assumption which can scarcely be justified on the evidence given by the salesman who bought the car on behalf of the de-fendant not only on the strength of the document signed by the plaintiff but also after being told by Drisko that [illegible] notes had been held and that the plaintiff's [illegible] had been sent to [illegible] for the purpose of registering the car in Drisko's name. But be that as it may the rule [illegible] [illegible] applies to everyone, including a man in the street. If I seek to [illegible] the street, he cannot [illegible] that he is under no co-[illegible] to [illegible] it [illegible]

[illegible]

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 me 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

attributed to mislaid carbon, I am satisfied on the evidence [illegible]

[illegible] the plaintiff [illegible] I have [illegible] as

"defence of estoppel [illegible] in the present case." [illegible]

"[illegible] of the loss [illegible] in my opinion, it would be

"[illegible] other things, that the [illegible] reliefs

"[illegible] .... to [illegible]

[illegible] that [illegible] stated [illegible]

[illegible]

[illegible] and [illegible] J. [illegible]

[illegible] the dictum of Ashburner, J. in the case of [illegible]

[illegible] the document of December [illegible], 1954, [illegible]

a friend of the defendants, the plaintiff who [illegible]

[illegible]

of it.

[illegible] paid for it under the belief that [illegible]

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, that 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 plain-

that the [illegible]

[illegible] has not told him that he had paid

the purchase price to the plaintiff and further that the

[illegible]

[illegible] I can see [illegible] for

differing from the [illegible] of the trial [illegible]

[illegible] which [illegible] defendant's [illegible]

[illegible]

[illegible] difficult [illegible] exception [illegible]

[illegible]

[illegible]

[illegible] it cannot be said [illegible]

[illegible] cause of the defendant [illegible]

[illegible]

In the present case [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible] purchase price. [illegible]

circumstances [illegible]

tiff 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 & 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 JA.
Brink JA
V Blaikie AJA } concur

IN THE SUPREME COURT OF SOUTH AFRICA

(Transvaal Provincial Division)

Delivered: 5. 4. 56.

TERENCE GORDON DOUGLAS Plaintiff

versus

GROSVENOR MOTORS (POTCHEFSTROOM) LIMITED Defendant

HILL, J.: The plaintiff, a clergyman residing at Kroonstad, instituted action against the defendant for the restoration of possession to him of a certain Ford Consul sedan motorcar, of which he claimed to be the owner; alternatively, payment of the sum of £500, the value of the car.

On the 15th November, 1954, the plaintiff, who was the owner of the car in question, endeavoured to sell it to a firm of motor traders in Kroonstad. The firm was, however, not prepared to pay plaintiff's price of £500. At about 6 p.m. the same day a certain Pretorius, a salesman of the firm to whom the car was offered for sale, arrived at plaintiff's house accompanied by a certain Kriel and two other men. Pretorius introduced Kriel as a possible buyer of plaintiff's car. Kriel was satisfied with the car and the price but told plaintiff that he had left his cheque book at his home in Welkom. It was then arranged that Pretorius, as plaintiff's agent, would accompany Kriel to Welkom in order to get the latter's cheque. Plaintiff was unable to find the registration papers of the car and at Kriel's request that some document be given to him for the purpose of "protecting him against any inquiries" plaintiff wrote out and handed him a document

in the following terms:

"5(a) Bukes Street,
Kroonstad,
15.11.54.

I, the undersigned, sold my Consul car C.C. 6054, Eng. No. EOT.7306 to Mr. W. A. Kriel.

Terence G. Douglas."

Pretorius returned the following morning with Kriel's cheque for £500 payable at Barclays Bank, Welkom, and as commission for his services received a cheque for £50 from the plaintiff. Plaintiff deposited Kriel's cheque the same day but two days afterwards it was returned to him marked "no account". Plaintiff immediately placed the matter in the hands of the police but a few days afterwards ascertained that this car had been sold by Kriel to the defendant.

Although defendant pleaded that plaintiff had sold and delivered the car to Kriel and, therefore, parted with the ownership thereof, counsel for defendant did not rely on this plea and for the purposes of his argument accepted the position that the sale to Kriel was one for cash. It is clear from the evidence that the car was merely delivered to Kriel on his promise to give the cheque for the purchase price to Pretorius at Welkom where he had left his cheque book. 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.

Defendant, however, pleaded that if the sale was in fact for cash, the plaintiff is estopped from disputing Kriel's right of disposing of the car by reason

of the statement in the document that he had sold this car to him.

Mr. Theron, who appeared for the defendant, contended that to anyone not conversant with the true facts the document can bear only one meaning, namely, that ownership in the car was transferred by plaintiff to Kriel, and relying on this document, which, as was argued, contained an unequivocal statement of fact that Kriel was owner of the car, defendant was induced to conclude the sale with Kriel.

On this argument two questions arise: Firstly, has the defendant on whom the onus lies, proved that the car had been entrusted to Kriel in such circumstances that it could reasonably be believed that Kriel was the owner thereof? Secondly, was the defendant in fact misled by the document into believing that Kriel was the owner and thereby induced to enter into the contract? "If the owner of property clothes a third person with apparent authority and right of disposition thereof, not merely by transferring it to him, but also by acknowledging that the transferee has paid the consideration for it, he is estopped from asserting his title as against a person to whom such third party has disposed of the property, and who took it in good faith and for value." Rimmer v. Webster, (1902) 2 Ch. 163 cited in Spencer Bower on Estoppel in note m. to paragraph 235.

In the present case the document in question was given to Kriel as proof that he had lawful possession of the car as a result of a sale but beyond saying that the car was sold to Kriel there is nothing to show that the purchase price had been paid or that credit had been given or that the sale was unconditional.

In Bold v. Cooper and Another, 1949 (1) S.A. 1195, at p. 1199, MURRAY, J. says:

> "Assuming that a sale induced by fraud is merely voidable, not void, the question still arises as to the nature of the right acquired by the purchaser. It cannot be disputed, I think, that the principle of our law is that ownership of a movable does not pass on the mere conclusion of the contract of sale. Not only must delivery, actual or constructive, be effected, but either credit must be given if the sale is not for cash, or, if the sale is for cash, the cash must be paid (Crockett v. Lezard, 1903 T.S. 590, at p. 592; Laing v. S.A. Milling Co., 1921 A.D. 398)."

In Bold's case the applicant entrusted his car to his son for the purpose of selling it for cash and the latter advertised it in a newspaper for such sale. One Harvey answered the advertisement and after some negotiations a cash sale for £550 was concluded between Harvey and Bold junior. Bold accepted a cheque payable on demand and handed over the car, its registration and licence papers, and a completed form of a notice of change of ownership as required by Section 9 of Ordinance No. 17 of 1931 recording the sale from applicant to Harvey. The cheque was returned by the bank marked R/D. Harvey fraudulently sold the car to the respondents, holding out to them that he was Bold junior and handing over the registration and licence papers together with a notice of change of ownership from applicant to respondents.

It was held that the delivery of the registration

and licence papers to Harvey by Bold junior was insufficient to clothe Harvey with the apparent right of an owner and did not constitute any implied representation of power to dispose.

Morum Bros. Ltd. v. Nepgen, 1916 C.P.D. 392, is also in point. There plaintiff sold his horses to one Slabbert on the suspensive condition that they were not to become the latter's property until payment of the purchase price. Slabbert sold the horses to defendant and the only fact relied upon by him in contending that plaintiff was estopped is that Slabbert was, to the knowledge of plaintiff, a speculator in horses. At page 405 DE VILLIERS, A.J. says:

"Now how under these circumstances can it be said that a person seeing a horse in Slabbert's stable or in Slabbert's cart, could fairly and reasonably believe that Slabbert must either be the owner or must have the right of selling and passing the ownership? This is not the case of groceries or new shop goods being publicly displayed for sale in a shop; such shop goods can only be in the shopkeeper's possession for one purpose, i.e., for the purpose of being sold, and if the goods are in the shopkeeper's possession with the consent of the true owner, the latter may become estopped from asserting his ownership. A horse, on the other hand, may be possessed, even by a 'speculator', for many other purposes than that of being re-sold. It may be possessed for use or for pleasure; Slabbert, for instance, might have purchased the two horses for his post-cart, or for his private use. What reason was there, to take as an illustration the facts of this very case, why a person seeing a horse in Slabbert's possession should ignore the

possibility of its having been sold to Slabbert under a suspensive condition, and should jump to the conclusion that Slabbert was the owner or had authority to pass the ownership? So long as such suspensive conditions are recognised by law, how can anyone dealing with others shut his eyes to the possibility of a suspensive condition existing, save perhaps in cases similar to the case which has already been instanced of shop-goods exposed for sale in a shop"?

In the absence of any acknowledgment by the seller that the purchase consideration had been paid, it seems to me that in the present case the possibility that the sale was for cash where the price had not been paid, or even a sale subject to a suspensive condition, cannot be excluded, particularly if regard is had to the common practice in South Africa of selling cars under hire-purchase agreements.

For these reasons I have come to the conclusion that the document does not contain an unequivocal assertion that Kriel as purchaser of the car had full ownership so that estoppel could be founded on the document.

But even if it could be said that it could reasonably be inferred from the document that plaintiff had passed ownership to Kriel there remains the question whether the representation contained in the document was the real and effective cause of the belief in the mind of defendant's sales manager that Kriel was in fact the owner of the vehicle.

Kriel called at the defendant's place of business at Potchefstroom on the 22nd November, 1954, when he offered the car for sale to Beukes and the only documentary proof of title he could produce was the handwritten

statement dated at Kroonstad about seven days previously saying that the car was sold to Kriel by one Terence G. Douglas. Kriel was a total stranger to Beukes and the plaintiff was completely unknown to him. Can it be said in these circumstances that any ordinary reasonable dealer in cars would purchase a car relying on a document such as was exhibited to Beukes as sufficient proof of title? I do not think so.

Although Beukes does say that he accepted plaintiff's note as sufficient proof that Kriel had the right of disposition and that he would not have bought the car it appears on closer examination of the evidence that Beukes was induced to alter his position for the worse as a direct result of the fraud by Kriel himself and not the representation in the document exhibited to him. The material portion of the evidence runs as follows:

"Voor Mnr. Kriel die kar aan u verkoop het het u belanggestel om uit te vind van hom wie die eienaar was van die kar?---Ja, ek het hom gevra waar hy die kar gekoop het en hy het my gesê - ek het hom gevra of hy enige bewys het daarvan en daarop het hy toe gesê 'ja'. Hy het die brief uitgehaal en aan my getoon.

Ek wil hê u moet weer kyk na die brief, bewysstuk 'F'. Kyk na die dokument en sien of u dit kan herken?---Ja, dis die dokument.

Op die tydstip toe Kriel die kar aan jou aangebied het en jy dit gekoop het het jy Kriel geken toe?---Nee, ek het nie.

En indien Kriel nie die brief aan jou getoon het nie sou jy die kar gekoop het?---Nee, dan sou ek dit gladnie gekoop het nie.

Die maatskappy waarvoor u werk, dryf hulle ook

handel in die koop en verkoop van tweedehandse karre? ---Ja.

En wanneer u 'n tweedehandse kar koop koop u dit sonder enige verdere ondersoek?---Nee, ons stel onsself tevrede dat die voertuig ... dat hy die eienaar van die voertuig is.

Wat was jou gevolgtrekking omtrent sy regte ten aansien van die kar?---Toe die brief aan my getoon is het ek aangeneem die voertuig was gekoop en die vorige eienaar het die brief aan Kriel gegee om te wys dit is sy eiendom en dat hy kan maak daarmee wat hy wil.

KRUISVRAGING DEUR MNR VILJOEN: Het Kriel vir u gesê hoeveel hy betaal het vir die kar?---Hy het gesê hy het die kar net gekoop; ek dink hy het gesê hy betaal £500 vir hom.

Hy het gesê hy het betaal vir die kar?---Ja, hy het gesê hy het betaal vir hom.

En u het aangeneem die betaling is in orde?---Toe hy die brief aan my getoon het het ek aangeneem die kar is aan hom verkoop en dat hy betaal het daarvoor. Hy het gesê hy het die kar gekoop en dat hy daarvoor betaal het.

Die brief en die melding daarby dat hy wel betaal het - u het afgelei dat hy betaal het van wat hy u gesê het?---Ja.

U het aangeneem hy het betaal?---Ja.

Het u hom nie enige papiere gevra nie?---Ja, ek het.

En toe?---Hy het toe daardie aan my getoon.

Het u hom nie die lisensie of die registrasie papiere gevra nie?---Ja, en hy het my gesê, wat vir my aanneemlik is - hy het gesê hy is goed bevriend met die Ds Douglas en hy is afkomstig van Kimberley waar die Dominee

vandaan kom. Ek ken Ds. Douglas gladnie. En hy het gesê dat die Dominee reeds die lisensie papiere aan Kimberley gestuur het en gevra het vir 'n oordrag na Kroonstad, en ek het hom gevra 'watter reëling het julle nou gemaak' en toe sê hy die dominee het 'n brief geskryf om te sê hulle moet dit oordra aan hom oor hy op Kimberley woon en hy is nou die eienaar en hulle moet dit aan hom oordra.

Waar het Kriel gesê waar woon hy?---Hy het my 'n adres gegee op Kimberley.

En was daar 'n reëling dat hy die papiere aan u sou oorhandig?---Hy wou daarvandaan bel van my kantoor vir die dametjie wat by sy plek werksaam is op Kimberley maar hy kon nie deurkom nie en toe ek die nommer bel was dit iemand anders.

Hy het voorgegee hy werk in Kimberley en die papiere is op Kimberley en hy sou dit stuur?---Ja.

U het gewag vir die papiere?---Ja.

En toe die papiere nie aankom nie het jy suspisie gekry?---Ja, ongeveer vyf of ses dae daarna.

En nadat u die nommer gebel het op Kimberley?--- Dit is vyf of ses dae daarna - toe was dit heeltemal 'n ander plek.

Hy het vir u die nommer gegee en gesê u kan bel na Kimberley?---Nee, in die geselskap het hy gevra of ek vir hom 'n nommer sal aanvra en ek het die nommer klein geskryf in potlood."

The question put by Beukes to Kriel in regard to ownership of the car and the information furnished by Kriel indicate that Beukes did not act upon the plaintiff's letter as proof of Kriel's title.

Beukes admits that invariably before he buys a second-hand car he satisfies himself that the seller is

the owner of the vehicle. He asked Kriel about the purchase price and how payment was made. He was informed by Kriel that he had bought the car for £500 and that the purchase price was paid in cash. He accepted Kriel's story that he was on very friendly terms with plaintiff, that he and plaintiff hail from Kimberley, and that plaintiff had written to the licensing authorities of Kimberley to transfer the registration of the car to him. In order to give his statements the stamp of genuineness he pretended that he had an office in Kimberley and that he would telephone an employee in his office to urge the officials to issue the necessary transfer papers without delay. He was apparently unable to establish contact with the telephone number mentioned by him. About five days subsequently Beukes discovered that the number given by Kriel belonged to some other telephone subscriber.

The plaintiff's letter no doubt influenced Beukes to some extent in deciding to buy the car, but the real and direct cause which led Beukes to believe that Kriel was the owner was not the letter which Kriel used to facilitate his deception but Kriel's own fraudulent conduct, as revealed in the evidence, that caused Beukes to conclude the contract. Vide: Broekman v. T.C.D. Motors (Pty) Ltd., 1949(4) S.A. 418.

For these reasons I come to the conclusion that the defendant cannot succeed on its plea of estoppel. Consequently the defendant is ordered to return the Ford Consul car, No. CC.6054, to the plaintiff and to pay the costs of this action.

(Sgd) ROLAND HILL
JUDGE OF THE SUPREME COURT.