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G.P.-S.59968—1970-71—2 500

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

PHILIP ROBÉINSON MOTORS *Appellant,*

*versus*

N. M. DADA (PTY) LTD. *Respondent*

*Appellant's Attorney* Rosendorff, B. & B. *Respondent's Attorney*
*Prokureur vir Appellant* *Prokureur vir Respondent* V d Merwe + Sorour

*Appellant's Advocate* M.W. Friedman *Respondent's Advocate*
*Advokaat vir Appelland* *Advokaat vir Respondent* B. Ancer

*Set down for hearing on*
*Op die rol geplaas vir verhoor op* 18-2-1975

24680

(T.P.D.) Coram: van Blerk, Holmes, Trollip, Corbett, Hofmeyr JJA

Friedman:- 9.45 - 11.00. 11.15 - 11.38;
3.35 - 4.05

Ancer:- 11.38 - 12.45; 2.15 - 3.35;

The Court allows the said appeal with costs. C.A.V.

P.T.O.

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

Bills taxed—Kosterekenings getakseer

| Date Datum | Amount Bedrag | Initials Paraaf |
|---|---|---|
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IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

PHILIP ROBINSON MOTORS (PTY) LTD.....Appellant

and

N.M. DADA (PTY) LTD.....Respondent

Coram: Van Blerk, Holmes, Trollip, Corbett et Hofmeyr, JJ.A.

Heard: 18 February 1975

Delivered: 27 February 1975

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J U D G M E N T

HOLMES, J.A.:

This is an appeal against a decision of the Transvaal Provincial Division ordering absolution from the instance in respect of a claim by the plaintiff (now the appellant) against the defendant (now the respondent) for the return of the appellant's Ford Fairlane motor car which, it was averred, was in the possession of the respondent. The alternative claim which, as it transpired, was the substantial

issue.....2/

issue between the parties at the trial, was one for delictual damages in the sum of R3 000 on the ground that the respondent, with full knowledge of the appellant's rights in the said car, "wrongfully and unlawfully disposed of or alienated" it, the appellant being unable to locate it.

It will be seen that the first claim was a vindicatory action - it is my car, you are in possession, I ask for restoration. No more need be said about this claim because, as it transpired, the car was not in the respondent's possession, and the appellant could not ascertain its whereabouts; and to all intents and purposes the claim at the trial was one for delictual damages on the grounds of the respondent's unlawful alienation of the car.

The plea, in essence -

(1) denied the appellant's ownership of the car, and denied that the respondent was in possession of it;

(2) admitted.....3/

(2) admitted the respondent's disposal of the car during 1971, but denied unlawfulness;

(3) averred that, if the appellant was the owner, it was estopped from asserting its ownership because -

(a) The appellant approved of, acquiesced in or ratified, the respondent's disposal of the car;

(b) alternatively, the appellant, by deliberate or negligent words or conduct, misled the respondent, to its prejudice, into the belief that the appellant was not the owner of the car, or that the appellant was approving or acquiescing in or ratifying the disposal of the car.

The factual background may be tabulated as follows:

(i) The appellant carries on the business of a motor dealer in Klerksdorp in the Western Transvaal.

(ii) The respondent also carries on the business of a motor dealer in Lichtenburg, also in the Western Transvaal.

(iii) On.....4/

(iii) On 23 January, 1970 the appellant sold one of its new cars - a Ford Fairlane - to G.J. Pretorius of Klerksdorp, a transport contractor, under a hire purchase agreement reserving ownership. The price was R4 375, as distinct from the finance charges. There was a cash deposit of R1 500 via a trade-in. The monthly instalments were R144. According to clause 7, failure to pay any instalment entitled the seller inter alia forthwith to terminate the agreement and recover possession of the car, retaining, as forfeited, all paid instalments.

(iv) On 24 June 1970 Pretorius, while there was still an unpaid balance, and there were also arrears of instalments, sold the car to the respondent, without the knowledge of the appellant.

(v) On 4 July 1970 the respondent sold the car to F.C. van der Merwe, of Warmbaths, without the knowledge of the appellant.

(vi) On 23 October 1970 a director of the appellant visited the widow of Pretorius (who had died a fortnight earlier) to make enquiries about the car, and other vehicles, and received a report from her.

(vii) In.....5/

(vii) In consequence, the director went to see the licensing authorities about the car.

(viii) As the result, on 26 October 1970, the appellant's director telephoned to the respondent at Lichtenburg and informed it that the car which the respondent had acquired from Pretorius was under hire purchase agreement; and he further said that he was now aware that the respondent had disposed of the car to Van der Merwe; and he asked for the car to be returned, or for the balance owing to be paid to the appellant.

(ix) On 30 October 1970 there was a meeting at Klerksdorp between, on the one hand, the appellant's director and his attorney and, on the other hand, two representatives of the respondent. The latter were then informed that the appellant claimed ownership of the car, and that the appellant intended attaching it unless the outstanding balance was paid. The hire purchase agreement was exhibited to the respondent's representatives. The appellant's director said that he would let the respondent know by telephone on 2 November 1970 what the outstanding balance was.

(x) On.....6/

(x) On 2 November 1970, according to evidence on behalf of the appellant, a representative of the respondent telephoned to the appellant. The subject matter of the conversation is in dispute, but it must have precipitated the events referred to in the next paragraph hereof.

(xi) On the following day, 3 November 1970, the appellant obtained an ex parte order in the Magistrates' Court at Klerksdorp for the return of the car. The respondent and the Estate of Pretorius were cited. The order was served on Van der Merwe, and the car was attached in his possession.

(xii) On 5 November 1970 the respondent anticipated the return day, and the rule nisi was discharged, and the car was returned to the possession of Van der Merwe. The appellant's attorney stated in evidence in the present case that the reason was that the deceased estate of G.J. Pretorius had been incorrectly cited, inasmuch as no executor had at that time been appointed. The learned trial Judge was skeptical about this reason. However, it was not challenged in cross-examination and, indeed, it appears to have been

common.....7/

common cause, for it was put to this witness in cross-examination that there was a conversation at the Magistrates' Court, after the discharge of the rule on 5 November 1970, in which the respondent's attorney suggested to the witness that he get an executor appointed to the Estate ~~of~~ Pretorius and then cite the estate correctly. The witness agreed that it was quite possible that this conversation took place.

(xiii) On the same day, 5 November 1970, a director of respondent went, with his attorney, to see Mrs Pretorius. She handed him a paid cheque voucher for R3 000 on which was written the words "vir M boot en Ford". Apparently Pretorius had bought a motor boat from the appellant, as well as the car. She told him that the car was fully paid for. This is not evidence as to the truth of that fact, but it is relevant to the state of mind of the appellant's director. He said that he felt satisfied that the price had indeed been fully paid; but this was on frail grounds, for he did not discuss the matter of the cheque with the appellant, or ask to see the books.

(xiv) In.....8/

(xiv) In point of fact, the price of the car had not been fully paid. There is a dispute whether the balance was R1 500 or R3 000; but nothing turns on this. The fact remains that there was a substantial balance outstanding, and on 11 January 1971 the appellant cancelled the hire purchase agreement on that ground, and became entitled to possession of the car, at any rate as against Estate Pretorius. It already had ownership.

(xv) On or about 10 November 1970 a director of the appellant went with his attorney to the premises of the respondent in Lichtenburg and asked about the whereabouts of the Ford and the motor boat. He said in evidence that he was quite sure that the respondent knew that they were still claiming the car. They were ordered off the premises. The director then instructed his attorney to locate the car and issue summons to obtain possession of the car. On 10 November 1970 the appellant's attorney wrote to Van der Merwe claiming the return of the car. The director also sent one of his men to make enquiries from the licensing authorities at Warmbaths. The car was eventually traced to a registration number in Botswana but in this pea and thimble game, it was later found in the Transvaal. The appellant issued summons against Van der Merwe, in March 1971, believing the car to be in his possession; but the pea was found not to be under that thimble.

In.....9/

In fact, the appellant's attorneys were told by Van der Merwe's attorney on 16 April 1971 that their client had traded the car back to the respondent in Lichtenburg on 27 February 1971 "prior to the date of the issue of summons", and had bought another vehicle from the respondent.

(xvi) A curious feature about the foregoing is that the respondent's director, under cross-examination, was shown an invoice dated 16 March 1971 (Exhibit "A") reflecting the trading in of the car in question by Van der Merwe in favour of a Triumph car. The witness then stated definitely more than once that this transaction took place after the date of the summons against Van der Merwe, although he said that the latter did not mention the summons to him, and he said that the car was in Van der Merwe's possession until 16 March 1971. Later he changed his evidence and said that the transaction actually took place on 27 February 1971 "but we made out an invoice on 16th March because the Triumph was not ready for delivery at that time". This evidence led to a submission by counsel for the appellant that, on the probabilities, Van der Merwe, on receiving the summons claiming possession of the car,

went.....10/

went hotfoot to the appellant as the seller and got rid of it; and that the two of them were shuttling the car to and fro to frustrate the appellant's claim. One is not able to come to a definite conclusion about this; but it is an odd feature in the case.

(xvii) On 8 June 1971 the appellant's attorney wrote to the respondent's attorney asking for confirmation that the car was still in the possession of the respondent.

(xviii) On 23 June 1971, having received no reply, the appellant's attorney sent a reminder.

(xix) On 24 June 1971 the respondent's attorney replied saying that to the best of his knowledge the car was still in the respondent's possession.

(xx) Meantime, on 17 June 1971, the bird had again flown : the respondent sold the car to one Vorster in the Mafeking district, although the appellant did not know about this.

(xxi) On 17 June 1971 the appellant issued the summons in the present case. We were informed that it was served on or about 28 June 1971. Nothing happened for more than two years (alas, for the law's delays!) when the respondent's attorney requested further particulars to the appellant's claim. In the meantime the appellant had changed his own attorneys with a view to celerity.

The.....11/

The learned trial Judge's assessment of the facts led him to conclude that, at the end of May or the beginning of June, 1971, the respondent, having waited as long as it did, was quite satisfied that the appellant was not pursuing its claim in regard to the car; and that on 17 June 1971 it accordingly sold the car. In the circumstances the learned Judge held that the appellant had failed to discharge the onus of proving that the respondent had the requisite knowledge. Accordingly, absolution was ordered.

In this Court the matter was thoroughly argued by both sides for a full day. I have considered the arguments with care. I mean no disrespect to counsels' conscientious submissions if I here deal only with the salient points.

The major point of counsel for the respondent was based on the sequence of events. He referred to the discharge of the rule nisi on 5 November 1970; the failure of the appellant to do anything vis-a-vis the respondent for eight months;

and.....12/

and the assurances from Pretorius and his widow that the car was paid for, and Van der Merwe's statement that he had heard nothing from the appellant. All these, so the argument went, led the respondent to believe that the appellant was not pursuing any claim to the car.

In my view the foregoing does not do sufficient justice to the appellant's efforts and the respondent's knowledge thereof. On 30 October 1970 the appellant claimed the car and exhibited the hire purchase agreement and stated that there was a balance outstanding. This was a firm and positive caveat. As to that, Smith and Another v. Sharenovitz, 20 SC 591 was a case in which the defendant's knowledge of the owner's claim was challenged. At page 595 De Villiers, C.J., said:

> "It is said that the defendant in the present case possessed no such knowledge, but he had full means of knowledge, for Aston, although unwillingly, showed him the document in which the

plaintiff's.....13/

> plaintiff's rights of ownership are reserved. Having deliberately closed his eyes to such means of knowledge, he must bear the consequences."

That passage was applied by this Court in The Standard Bank of S.A. Ltd. v. Stama (Pty) Ltd., decided on 29 November 1974.

If the respondent had doubted the existence of an outstanding balance under the hire purchase agreement, it could easily have cleared the matter up there and then by inspecting the appellant's books. The meeting on 30 October 1970 took place at the appellant's place of business in Klerksdorp. Instead, the respondent chose to rely on the ex parte statement by the debtor's widow that the car was paid for. Her son's paid cheque, which she handed over, was inconclusive. The writing on it did not say that the payment was in full settlement, nor did it indicate any allocation as between the motor boat and the car. Nor indeed did it specifically identify the car there referred to with the Fairlane

Ford.....14/

Ford car in question in this case : other Ford cars appear to have been sold by the appellant to Pretorius during the relevant time. The respondent chose not to check on this information with the appellant. Again, on 10 November 1970 (after the rule nisi had been discharged on technical grounds) the appellant's representatives took the trouble to go to Lichtenburg to claim the car and to enquire as to its whereabouts. The respondent's director admitted under cross-examination that "they were demanding the car". Asked why he did not give the car back to the appellant when this was demanded on that occasion, he replied, "because I was under the impression that the car was paid for". He admitted that he had not checked this with the appellant. He said that he had received the cheque and receipt from Mrs Pretorius who had told him that the car was paid for. "So I didn't even bother". It seems to me that the respondent was sedulously putting Nelson's telescope to the situation.

Thereafter.....15/

Thereafter the appellant made constant efforts to locate the car. It may be that the respondent was unaware of this. However, as late as 8 June 1971 the appellant's attorneys wrote to the attorney who acted for the respondent, and asked whether the car was still in the respondent's possession and also asked, very significantly, whether the respondent's name was N.M. Dada (Pty) Ltd. trading as Dada Motors. The attorney replied on 24 June confirming the name and stating that the car was to the best of his knowledge still in the possession of respondent. It is asking too much to suppose that there was no communication between the attorney and his client, the respondent, about this.

To sum up on the question of the respondent's knowledge, I hold that, when the respondent sold the car to Vorster on 17 June 1971, it knew that the car had previously been sold by the appellant to Pretorius under hire purchase agreement with reservation of ownership. It knew, too,

that.....16/

that in October and November 1970 the appellant had stoutly maintained that there was still an unpaid balance owing under the hire purchase agreement, and that the appellant claimed the car. And the respondent probably knew, too, that on 8 June 1971 the appellant was enquiring from the respondent's attorney the correct citation of its name and whether it still had the car in its possession. Finally, before the respondent disposed of the car in June 1971, if he were bona fide it would have been a simple and reasonably prudent precaution, in view of all that had gone before, to telephone to the appellant and ask whether the coast was now clear. No doubt there should be honour amongst motor dealers.

On these facts, culminating in the appellant's attorney's letter of 8 June 1971, there is no validity in the respondent's pleas of estoppel. In particular, there was no disavowal of ownership, tacit or otherwise, by the appellant and no representation of any sort entitling the respondent to assume that it was free to dispose of the car on 17 June 1971. On the

contrary.....17/

contrary, the respondent had seen the hire purchase agreement, and was aware of the appellant's resolute and persistent claim that there was a balance outstanding thereunder.

In these circumstances, the respondent was acting mala fide in disposing of the car on 17 June 1971. See Smith's case, supra, in which De Villiers, C.J., said:

> "But the sale and delivery of goods belonging to another with knowledge of plaintiff's claim is a wrongful act which the person committing it cannot avail himself of as a defence to an action for the delivery of the goods or payment of their value."

That passage was approved of by this Court in Aspeling, N.O. v. Joubert, 1919 AD. 167, at page 171.

Similarly, the respondent's mala fide disposal of the car on 17 June 1971 was a delict depriving the appellant of its vindicatory right; see Voet, 6.1.10., Morobane v. Bateman, 1918 A.D. 460 at 465 in fin., and John Bell & Co. Ltd. v. Esselen, 1954(1) S.A. 14 (AD) at page 152.

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The time at which to measure the delictual damages is ordinarily the date of the delict, because that is when the owner's patrimony is reduced. In the present case the date is 17 June 1971 when the respondent unlawfully disposed of the appellant's car to Vorster.

The measure of damages is the value of the article to the owner; see the judgment of Trollip, J., as he then was, in Mlombo v. Fourie, 1964(3) S.A. 350 (T) at page 358, and authorities there cited.

As to that, the respondent's unlawful alienation of the car placed the appellant in a difficulty about leading evidence of its value as at that date, for the appellant had not seen the car since November 1970. However, the appellant led or elicited the best evidence which it could. The appellant's director testified that on 3 November 1970, when the car was attached in the proceedings in the Magistrates' Court, it was stored at the appellant's premises. He examined it.

It.....19/

It had done a fairly low mileage. It was in excellent all-round condition, mechanically and as to the body. From his impressive experience as a motor dealer, and aided in part by the Auto Dealers Digest for the period July/August 1970, he valued the car as at November 1970 at R3 000, as being a "very fair estimate".

However, on 17 June 1971 when the respondent sold the car to Vorster, the state of the market was such that a price of R3 550 was obtained. This is not necessarily decisive of the value of the car to the appellant at that time, but it does tend strongly to support the respondent's claim of R3 000 in the summons. The respondent's director said in evidence that some money had to be spent on the car before it was sold for R3 550. This is understandable. He thought that its value before that was not in excess of R2 500. This statement, however, must be discounted by his vagueness and reluctance when counsel for the appellant pressed him for some indication of what had to be done to

the.....20/

the car and how much was spent on it. The following passage in the cross-examination illustrates this point -

> "What money was spent on the car? --- Well there were tires to be fitted, there was duco to be done on the car, there was ..... we normally take in these cars, and send them to our workshop and they go through the cars, and they set the car into condition.
>
> Show me on your books the amount that you spent on effecting improvements, or repairs to the car? --- I haven't got it with me.
>
> Where are they? Where are these documents? --- We sent the car to the Workshops, and they keep the documents.
>
> I would like to see.....are no amounts shown in your books as to the amounts spent on the cars? --- No My Lord."

To sum up on this issue of the value of the car as at 17 June 1971, the appellant, producing the best evidence it could in a situation created by the respondent, valued the car as at 3 November 1970 at R3 000, giving reasons. The respondent's figure was R2 500. In these circumstances the vital factor is that the car was sold on 17 June 1971 for R3 550. There is no reason to suppose that the appellant,

who.....21/

who was also a motor dealer, would not have disposed of it for that price too. Some allowance should be made for what the respondent spent on the car. The respondent is vague and unhelpful on the latter aspect. On a conspectus of all the evidence I consider that it would be fair to both sides to assess its value on that date at R3 000.

I would add that the present case is distinguishable from a vindicatory action claiming restoration or value where the defendant is in possession or can acquire possession. In such actions the value is determined as at the date of trial or judgment; see Mlombo's case, supra, and The Standard Bank of South Africa, Ltd., v. Stama (Pty) Ltd., supra. Mackeurtan, in his thoughtful book on Sale (4th ed., page 217) deals with claims for specific performance or alternatively damages; puts the time for assessing the value at the date of trial; and relates this to the defendant's right of election to tender the alternative money payment

in.....22/

in terms of the court's order. But if he chooses to tender before judgment, "he must tender an amount based upon the then value of the article". However all this may be, the present case is distinguishable because, as already indicated, the appellant's real claim is one for delictual damages on the ground of the respondent's unlawful alienation. Such damages are assessed as at the date of the delict.

In the result,

1. The appeal is allowed with costs.

2. The order of the Court a quo is altered to one awarding R3 000 to the plaintiff, with costs.

Judge of Appeal

Van Blerk, J.A.)
Trollip, J.A. )
Corbett, J.A. ) concur
Hofmeyr, J.A. )