

296/74

IN THE SUPREME COURT OF SOUTH AFRICA.

APPELLATE DIVISION.

In the matter between

JEAN CLAUDE AVIS DU BUISSON.....APPELLANT.

and

JUAN MUNOZRESPONDENT.

Coram:Holmes, Jansen et Rabie, JJ.A., et Galgut,
Kotze, A.JJ.A.

Heard: 9 September 1975.

Delivered: 25 September 1975.

J U D G M E N T.

GALGUT, A.J.A.

The appellant sued the respondent in the

magistrate's...../2

magistrate's court, Johannesburg, for R700 which he claimed was the balance of commission due to him. He succeeded in the magistrate's court. The respondent took the matter on appeal to the Transvaal Provincial Division. The appeal succeeded. The present appeal is against the latter judgment.

In his further particulars to his claim the appellant alleged that on the 6th December 1971 respondent appointed him, as his sole agent, to sell a Mercedes motor car; that respondent undertook to remunerate him "by an amount representing the difference between the sale price and the sum of R9 000"; that the car was sold for R10.000-00; that the appellant was the effective cause of the sale; that he had received R300 from the respondent; that the balance still due to him was R700. The relevant paragraphs in respondent's plea are paragraphs 1(b) to 1(f). These read:

"(b)...../3

- "(b) It was a term of the said agreement of mandate that the Plaintiff would be entitled to payment... of the difference between the sum of R9,000 (NINE THOUSAND RAND) and the sale price of the said motor car, as commission for his services if he was the effective cause of such sale.
- (c) The said commission was to be paid by the Defendant on the sale of the said motor car and payment of the said selling price to the Defendant.
- (d) The said motor car was duly sold to a certain P.Galasko of Pretoria for a selling price of R9150 (NINE THOUSAND ONE HUNDRED AND FIFTY RAND) which amount was duly paid by the said P.Galasko to the Defendant.
- (e) By reason thereof, the Plaintiff became entitled to payment of the sum of R150 (ONE HUNDRED AND FIFTY RAND).
- (f) On or about the 16th December 1971 the Defendant paid to the Plaintiff the sum of R150 (ONE HUNDRED AND FIFTY RAND) and a further amount of R150 (ONE HUNDRED AND FIFTY RAND) as a donation, which amounts were accepted by the Plaintiff in settlement of the amount due to him. "

The plea then ends with a denial of liability.

As...../4

As I read paragraphs 1(e) and (f) this is an admission that appellant was the effective cause of the sale albeit not at the figure of R10,000-00.

It is necessary to set out the evidence in some detail. Appellant testified that he had heard that respondent, who lived in Johannesburg, owned a Mercedes car (of a certain type) which he wished to sell; that he also heard, from one Rogers, that P.Galasko of Pretoria was interested in buying such a car; that he then telephoned P.Galasko who confirmed that he was interested; that thereafter he telephoned respondent who confirmed that he wished to sell his car; that it was arranged that appellant could take the car to Pretoria on the following day, viz., Tuesday; that it was agreed that "my commission would be whatever I sold the car above the R9 000"; that, on Tuesday, he met and showed the car to P.Galasko; that he told him the price was R10,00-00 and
that...../5

that the latter agreed to buy the car subject to it being tested and passed by the A.A.; that P. Galasko also gave him a post-dated cheque made in favour of appellant for R1 000 "to secure the car so that it wouldn't be sold to anyone else"; that he returned to Johannesburg with the car and told the respondent that he had sold the car; that he then saw from the registration papers that the car was registered in the name of respondent's mother; that, having obtained advice from a friend, he completed the "change of ownership" forms which he signed as agent on behalf of the mother; that he returned to Pretoria on Wednesday morning where he met P.Galasko and the car was taken to the A.A. where it was tested and passed; that on the morning they went to the offices of a firm, D.Myer and Co. Pty. Ltd., to see one H.Galsko, the father of P.Galasko; that H.Galasko looked at the car papers and asked him what authority he had to sell the car; that he replied (in terms

of a discussion he had previously had with respondent)
that the car belonged to his ^{step-}mother-in-law; that H.Galasko
was not pleased that his son had given a post-dated cheque
and asked for its return; that the cheque was then handed
to H.Galasko who destroyed it; that it was arranged that
he and respondent would meet P.Galasko at the office of
a certain Mr. Swart, at 2 p.m. on Thursday, to enable the
latter to check the car's papers; that before leaving for
Pretoria on that Thursday he asked the respondent to sign
a document recording that the car had been sold; that the
respondent signed the document (Exhibit A in the case).

This document reads:

"9.12.71.

This is to confirm that I am aware that
Mr. J.C.A. DU BUISSON has concluded a sale for
the Mercedes 280 S.L. Automatic. Registration
No. 332181 to Messrs D.Meyer & Co. (Mr. P.E.
Galasko) for the sum of R10,000-00 of which
money it is agreed I will receive R9,000-00
nett and Mr. Du Buisson will be entitled to
one thousand rand as his commission.

I the undersigned,

(Sgd)

JUAN MUNOZ "

Appellant.... /7

Appellant then went on to say that he and respondent then went to Mr. Swart's office to have the papers checked but P.Galasko had been held up and was not there; that they had to get a letter from the Director of Imports advising that the car could be sold; that having completed all the formalities they went to the office of H.Galasko; that H.Galasko was told by appellant that the registered owner of the car was not appellant's step-mother but the mother of respondent and that the car was in fact respondent's car; that respondent had his mother's power of attorney; that H.Galasko asked about respondent's financial position and said he wished to make inquiries about respondent from the latter's bank; that H.Galasko knew that the car had been purchased for R10,00-00 and that appellant's commission was to be paid therefrom; that P.Galasko had not yet arrived and H.Galasko said respondent would have the cheque the next day, i.e.Friday; that, on their way back to Johannesburg, respondent told appellant he did not want

H.Galasko...../8

H. Galasko to speak to his, respondent's, bank; that accordingly, appellant telephoned P. Galasko that night to discuss the matter; that P. Galasko, to appellant's surprise and consternation, said to him "I am taking the car, but I will see that you don't get a penny out of it"; that the respondent thereafter told him that he "did not want to fight for his money and if there was somebody else who was interested in the car to let him know"; that respondent was hoping to find a quick buyer for the car; that this did not cause him concern because he knew he had already sold the car and was entitled to his commission; that on Sunday the 12th December he went with Rogers to respondent's home as the former apparently had a potential buyer; that by Monday the 13th December it was clear that Rogers' buyer could not find the immediate finance to buy the car; that he, Rogers and respondent were together in a restaurant on Monday the 13th December; that respondent decided to telephone the Galaskos about the car; that they all three proceeded to nearby offices and from there respondent

that :

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

telephoned the Galaskos; that the respondent, after the telephone call, advised them that H. Galasko had said they were taking the car; that he assumed that it was for R10 000-00. It was suggested to appellant in cross-examination that he had acquiesced in the cancellation of his sale to P. Galasko and that was why he had accompanied Rogers to respondent's home. This appellant denied, repeating that he knew that he had concluded the sale to P. Galasko and was entitled to his commission. Appellant went on to say that shortly thereafter respondent telephoned him and advised him that he had concluded the sale of the car to P. Galasko for R9 150, and as he was proceeding overseas he had left money, being appellant's commission, with a relative; that he, appellant, went to collect this money but it was only R300; that he took this money but stipulated in the receipt which he gave that it was "part payment".

The above is a summary of his evidence. It is necessary to add that he agreed that it was a term of his mandate that respondent "was to receive an immediate payment of R9 000 out of the purchase price". He further agreed that

he knew that respondent "wanted his money in a hurry because he was leaving for overseas and he wanted to take some money out of the country".

Rogers was called as a witness by appellant. He testified that he had tried to sell a lefthand-drive Mercedes to P. Galasko; that P. Galasko did not want it and had said, "If this car was a righthand-drive car, I would drop you at home immediately and give you a cheque for R10 000-00"; that he, Rogers, told appellant that P. Galasko wanted a Mercedes car; that he later saw appellant and respondent together and they told him that the car was sold and that they led him to believe that all that remained was the completion of some formalities and the vehicle would then be delivered and the respondent would receive his cheque; that thereafter on Sunday (i.e. the 12th) the respondent telephoned him and asked if he had a buyer for his car as he was leaving South Africa on holiday and wanted the money urgently; that this was the first time he had heard of a "snag" in the Galasko deal; that he felt it was his duty to advise the

appellant.../11

appellant that respondent had telephoned him; that he in fact did so; that the appellant's attitude was "one of surprise, in that the deal with Galasko had not gone cold, or that, you know, that the deal was not out,....but he was - if I could put it, upset, a bit worried now that, that I was coming into the deal"; that he and appellant went to ~~defendant's~~^{respondent's} home that evening at 5 p.m.; that he then took the car to his prospective buyer, one Cilliers; that by arrangement he and appellant and respondent met at a restaurant the next morning (Monday the 13th); that he then told respondent that Cilliers was unable to arrange immediate finance; that respondent then said he wanted to telephone Galasko and they went to some offices nearby; that the respondent, after the telephone call, told him and appellant that Galasko had taken the car; that neither he nor respondent were told at that stage what the price was; that, that evening, the respondent told him that the deal had been concluded; that at no stage in his presence was the appellant told the price was R9 150; that he could not remember that a figure of R300 as and for commission being mentioned.

P.Galasko...../12

P.Galasko was called as a witness for the defence. He holds a B.Comm. degree and is a business manager in his father's firm. His evidence is that he met appellant on the Tuesday; that he liked the car and wanted to buy it; that he gave appellant a post-dated cheque for R1 000 to secure the car; that no price was discussed; that he would not have bought it for R10,000-00; that he said he was prepared to buy it provided the A.A. passed it, and if his father, H.Galasko, approved; the appellant brought the car for the A.A. test on the Wednesday; that he was unable to keep the appointment at Mr. Swart's office on the Thursday; that, because the appellant had told them a lie, i.e. the stepmother story, he and his father were not prepared to have any further dealings with him; that no contract had been concluded with appellant on Tuesday the 7th December; that he spoke to respondent on the night of Friday (i.e. the 10th December) and on Saturday; that he offered him R8 500; that the only

contract...../13

contract was with the respondent, viz., on Monday (i.e. the 13th) for R9 150.

H.Galasko also gave evidence. He once practised as an attorney but now managed the firm which he described as a "big concern". He testified that his son had told him that he had negotiated the purchase of a car and had given him a post-dated cheque for R1 000 for the car. His evidence leaves one in no doubt that his son gave him to understand that the car had been purchased for R10,000-00. He went on to say that, because it was an imported car, he wished to be certain that all the documents were in proper order; that he wanted to ensure that the seller had the right to sell the car; that he was upset by the fact that his son had given a post-dated cheque and he wanted it back; that he was "very much put out" because of the false (stepmother) story which appellant had told him; that he did not want to deal...../14

deal with the appellant; that he was also cautious because respondent was a foreigner and had shown him a Spanish power of attorney which he could not read; that "----once we tore the cheque up, and once we got to the bottom that he wasn't who he represented himself to be, the deal was off and we weren't really - we weren't talking, the seller wasn't talking to purchaser."

H.Galasko then went on to say that on Monday the 13th December, the car was purchased for R9 150. He stated that he did know what commission appellant was to receive and had not on the Thursday known of the fact that appellant was to receive R1 000. He further testified that his son was a major and financially able to buy the car.

The magistrate in his verbal reasons for judgment stated that the appellant impressed him favourably. P. Galasko did not and he rejected his evidence. It is

also...../15

also implicit from the magistrate's reasons that he did not accept respondent's testimony to the effect that the latter believed that the car had not been sold to P.Galasko for R10,000-00. The magistrate found as a fact that appellant had told respondent there had been a sale at R10,000-00, and further, that respondent confirmed this in his own evidence and also by signing exhibit A. The magistrate did not comment on the evidence of Rogers or H.Galasko. The magistrate was not asked to give written reasons for judgment. He did, however, react to the grounds of appeal as set out in the notice of appeal.

One of these grounds reads:

"That at best for the Plaintiff the Magistrate should have held that he could not decide which side the truth lay and as the onus was on the Plaintiff he should have granted absolution from the instance with costs."

His written reply to the above grounds reads:

The/16

"The Court was able to decide where the truth lay and has given its reasons for such decision."

Having regard to what was said in the verbal reasons and in the above reply, it follows that he accepted appellant's evidence, not only as to the sale, but also as to the subsequent events. It further follows that he accepted Rogers's evidence as to the events on Sunday the 12th and Monday the 13th.

As stated, when the matter came before the Provincial Division, it set aside the magistrate's judgment. Its reasons for doing so were twofold. Firstly, it held that the fact, that Rogers was asked on Sunday the 12th if he could find a buyer, showed that both the appellant and respondent had accepted that no final contract had been concluded with P. Galasko and hence the appellant could not rely on the "original" contract as performance of his mandate. The second ground for upsetting the
magistrate's.../17

magistrate's finding appears from the following extract
from the reasons of the Court a quo:

"-----it seems to me that in view of the fairly loose arrangement which existed between the plaintiff and the defendant, it cannot be said that the defendant was obliged to rigidly keep the Galasko's to their contract. He might, for motives of his own, have been prepared, if the Galasko's showed signs of resiling from the contract, to reduce the price: That is a risk, in my view, which plaintiff took that some such thing might happen. It is a fair inference that the defendant required R9,000-00 fairly urgently.

'There is no indication that he was obliged vis a vis the plaintiff, to insist on payment of R10,000-00 if the purchasers proved to be unyielding in their attitude that they were only prepared to take the car at a lower price.' "

The learned Judge then went on to discuss the principles in Gowan v. Bown 1924 A.D. at p. 565 and applied them to the facts of the present case. Counsel for the appellant submitted that the Court a quo had erred in respect of both the above grounds whereas counsel for

respondent..../18

respondent supported both findings and also supported the judgment on other grounds. The various submissions made can conveniently be dealt with under the following headings:

- A. Did the magistrate err in accepting the appellant's evidence and rejecting that of the respondent and P.Galasko.
- B. Did appellant prove that he had concluded a binding contract, for R10,000-00, with P.Galasko.
- C. Assuming that a binding contract had been concluded by appellant with P.Galasko, did appellant, by his conduct, forfeit his rights to his remuneration.
- D. Assuming that a binding contract had been concluded by appellant with P.Galasko, did appellant waive his right to receive the R1 000 as

commission...../19

commission.

E. What was the nature of the contract between appellant and respondent.

F. Can the doctrine of fictional fulfilment be applied in the present case.

I turn now to deal with each of the above issues in turn.

Ad A above: Did the magistrate err in accepting the appellant's evidence and rejecting that of the respondent and P.Galasko.

We have had regard to the submissions made by Counsel for respondent but are unable to agree that the magistrate erred in accepting the evidence of the appellant and rejecting that of P.Galasko and respondent. Certainly the evidence of P.Galasko must be rejected entirely. It not only conflicts with that of appellant, but the evidence of his father, H.Galasko, shows that he

is...../20

is untruthful on the main issue, viz., whether or not he had purchased the car for R10,000-00. Then too, the probabilities are against him. Had the deal not been concluded, it is most unlikely that appellant would have completed "change of ownership" forms and handed them to H.Galasko. It would also not have been necessary to go to the trouble of completing all the necessary papers and formalities and taking them to an expert like Mr. Swart. Furthermore, it is improbable that P.Galasko would have handed over a post-dated cheque to "secure" the car if he had not concluded the deal. The respondent's evidence reads far from well. Moreover, his evidence to the effect that he did not believe that appellant had concluded the sale of the car to P.Galasko, is unacceptable. It flies in the face of Exhibit A in which he acknowledges that the sale had been concluded. There is also the fact that he gave the registration papers...../21

papers to appellant to enable the latter to complete the "change of ownership" forms. Respondent's evidence also conflicts with that of Rogers. Rogers' evidence reads well and it must be remembered that he had no interest in the matter. Even though appellant's evidence can be criticised in some respects, it nevertheless reads better than that of the respondent. Then too, Rogers' evidence supports the appellant. The probabilities also favour the appellant's version, especially when one has regard to the various steps taken by the appellant after his meeting with P.Galasko on the Tuesday morning. Finally, the evidence of H.Galasko to the effect that his son had told him that he had bought the car, supports the appellant.

The principles which guide an appeal court when dealing with findings of credibility by the trial court, need not be repeated in this judgment. They have been...../22

been fully set out in cases like Cheek v. Cheek 1935 A.D. at pp. 337 - 338 and R.v. Dhlumayo 1948 (2) S.A. at pp. 705/706 (A.D.)

It is for all the above reasons that we can find no reason to differ from the magistrate's findings on credibility.

Ad B above :Did appellant prove that he had concluded a binding contract for R10,000-00 with P.Galasko.

It follows from what has been said in A above that the evidence of appellant must be accepted. As pointed out, the probabilities favour the appellant's version; the conduct of the parties after the meeting of P. Galasko and appellant on Tuesday morning support the view that appellant was sure he had concluded the sale. Respondent did sign Exhibit A. He is not an ignorant man, nor is he an illiterate person. He, in fact, carries on

a business in Johannesburg. Then there is the evidence of H.Galasko as to what his son told him and the evidence of Rogers as to what respondent and appellant told him before he first learned of the "snags".

In the light of all the above it cannot be said that the magistrate erred in finding that appellant had proved that he had effected the sale to P.Galasko for R10,000-00.

It was submitted that, by giving the cheque for R1 000, P.Galasko was securing an option and did not purchase the car. This argument must fail. Not only did P.Galasko not suggest, in his evidence, that he had asked for or obtained an option, but, as we have seen, he told his father he had bought the car.

Ad C above :Assuming that a binding contract had been concluded by appellant with P.Galasko, did appellant, by his conduct, forfeit his rights to his remuneration...../24

tion.

It was urged that the Galaskos had become disenchanted with the deal in general, and appellant in particular, because of the lie he had told them, viz., the stepmother story. This story was, in fact, told to them only after the sale to P.Galasko had been concluded. It was in any event told with the concurrence of the respondent. Furthermore, the evidence of H.Galasko was that he was extremely cautious in his approach, not only because of the stepmother story, but also because he regarded the respondent as a foreigner who exhibited a power of attorney, in Spanish, which he could not read. Finally, the fact remains that P.Galasko on the Thursday night said he was buying the car, but would see to it that appellant got nothing out of it, and thereafter he continued to make offers for the car on the Friday and the Saturday, and the car was bought on the Monday. It is difficult,

in...../25

in the light of these facts, to see how the stepmother story can be used as an argument to suggest that the appellant's conduct was such as to warrant a finding that his claim to his remuneration should be forfeited.

Ad D above : Assuming that a binding contract had been concluded by appellant with P.Galasko, did appellant waive his right to receive the R1 000 as commission.

The fact that appellant had been told by respondent that he did not want to "fight" for his money and had thereafter accompanied Rogers to respondent's home on Sunday the 12th and had not remonstrated with respondent when the latter asked Rogers if he had a buyer for the car, was advanced in support of an argument that appellant had waived his right to claim commission. It showed, so it was said, that he had accepted that his sale to P.Galasko had fallen through. This argument cannot be sustained. Waiver was not pleaded. Further-

more...../26

more, there is the evidence of Rogers to the effect that appellant was surprised and upset when Rogers telephoned him. Rogers and appellant both deny that respondent told them, after the telephone call on Monday the 13th, that the sale had been concluded at R9 150. When appellant signed the receipt as early as Wednesday the 15th, he made it clear that he was accepting the R300 as part payment. Finally, there is the evidence of appellant that he knew that he had concluded a sale and was entitled to his commission. There is no evidence to warrant a finding that appellant, by his conduct or otherwise, agreed to waive his rights.

Ad E above : What was the nature of the contract between appellant and respondent.

It was urged on behalf of respondent that the evidence showed that the appellant did not look to the respondent for his commission, but looked, as it were,

to...../27

to the purchase price, in the sense that he was to receive such amount, over R9 000, as was actually received by respondent and that respondent was only a "conduit pipe" for the excess to pass from the purchaser to the appellant. Passages from Gowan v. Bownern 1924 A.D. p. 550 were relied on to support the submission. I do not find it necessary to contrast the facts in the present case with those in Gowan v. Bownern. The issue is, quite apart from the evidence, settled by the plea. It will be seen from paragraphs 1(b) and 1(c) thereof (quoted earlier), that respondent pleaded that "The said commission was to be paid by the Defendant on the sale of the said motor car and payment of the said selling price to the Defendant". This leaves no room for doubt. As we have seen, appellant effected the sale at a price of R10 000-00. This was not paid because respondent decided

to...../28

to accept a lesser sum. It will be remembered that respondent in his evidence, maintained that no such sale had been effected at R10,000-00. This also is alleged in paragraph 1(c) of the plea. Therefore, once it has been shown that there was in fact a sale at R10,000-00 to P.Galasko, respondent cannot escape liability because he allowed the said buyer to pay only R9 150.

Ad F above : Can the doctrine of fictional fulfilment be applied in the present case.

Both counsel referred to the principles in cases like MacDuff & Co. Ltd.(in Liquidation) v. Johannesburg Consolidated Investment Co. Ltd. 1924 A.D. 573 at pp. 590 and 591, and Koenig v. Johnston & Co. 1935 A.D. 262 at pp. 271 - 273. It was urged that the appellant could not invoke the doctrine of fictional fulfilment against the respondent because it had not been pleaded. It was further said that, in any event, it had not been

shown...../29

shown that respondent had frustrated the contract, in the sense discussed in the above cases, in that he had agreed to accept R9 150 because of the resistance raised by the Galaskos and his own need to have money urgently. In this latter respect it should be mentioned that it transpired when the respondent gave evidence that he did not use this money for his trip overseas and he further said that he did not need the money urgently.

The view I take is that the issue of fictional fulfilment does not arise. Respondent's evidence was that there was no sale at R10 000-00; that the only sale was the sale which he, respondent, had concluded at R9 150; that appellant was accordingly only entitled to R150 as his commission. He is bound by his pleadings. Had he pleaded that it was a term of the mandate that the buyer would pay the purchase price immediately, that despite the fact that a sale had been concluded at R10 000-00 the buyer refused or was unwilling to make payment immediately; that he was accordingly driven to accepting a lower figure or facing a possible lawsuit, the case before...../30

before the magistrate might have been a different one.

As we have seen, a sale with P.Galasko at a price of R10,000-00 had been concluded; respondent accepted that position; that sale was never cancelled, either by P.Galasko or by respondent; the respondent then accepted a lower figure; he did so on his own initiative and without consulting the appellant and, in my view, at his own risk.

It follows from what has been said in C,D and E above that we are of the view that the Court a quo erred in finding that appellant had accepted "that no final contract had been concluded" with P.Galasko and in finding that "in view of the loose arrangement" which existed between appellant and respondent that respondent was entitled to accept a lower price and refused to pay appellant his commission of R1 000. It further follows from what has been said in A, B, C, D,

E/31

E above that we are of the view that the magistrate's finding was correct.

In the result the decision of the Court a quo must be set aside and the judgment of the magistrate restored.

The order made herein is:

- A. The appeal is allowed with costs.
- B. The judgment in the Court a quo is set aside and the appellant in that Court (who is the respondent in this Court) is to pay the costs of that appeal.
- C. The judgment of the magistrate is restored.



O.GALGUT, M.J.A.

HOLMES, J.A.)
JANSEN, J.A.) Concur.
RABIE, J.A.)
KOTZE, A.J.A.)