174/88

Case Nr. 548/87

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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

B & B HARDWARE DISTRIBUTORS (PTY) LTD ..Appellant

THE ADMINISTRATOR OF THE PROVINCE OF

THE CAPE OF GOOD HOPE ..... First Respondent

R McCARTHY & CO (PTY) LTD .....Second Respondent

Coram: RABIE ACJ, HOEXTER, VAN HEERDEN, GROSSKOPF, et

EKSTEEN JJA.

Heard: Delivered:

3 November 1988 1 December 1988

J U D G M E N T

RABIE ACJ:

On the return day of a rule nisi which called upon the respondents to show cause why the appellant should not

be declared to be the owner of certain goods, and why the respondents should not be ordered to hand over the said goods to the appellant, the Eastern Cape Division (per Jennett J) held that the appellant was the owner of the goods, but that it was estopped from asserting its ownership therein. The rule nisi was accordingly discharged with costs. The appeal is against that order. The facts of the case, in so far as relevant to the appeal, are set out hereunder.

The appellant trades as a supplier of ironmongery. Its principal place of business is in Selby, Johannesburg. In March 1984 the Provincial Administration of the Cape of Good Hope (the first respondent) and a company called Thomas Construction (Pty) Ltd entered into a written agreement in terms of which the company (hereinafter referred to as "Thomas Construction") was to erect a hospital at King William's Town. According to Mr B.H. Escreet, who deposed to the appellant's founding affidavit and who is a director of the appellant, he was requested by Thomas Construction

early in March 1985 to quote for the supply of ironmongery to be used in the construction of the hospital. On 9 March 1985 - thus Escreet - he telephoned Mr David Gradwell, who was employed by Thomas Construction as the "construction buyer" in respect of the aforesaid hospital contract. They discussed the quotation required by Thomas Construction, and Escreet undertook to submit prices to Thomas Construction in due course. On 25 March 1988 Escreet again spoke to Gradwell on the telephone. Gradwell told him that Thomas Construction would in all likelihood place an order with the appellant. On 11 April 1985 the appellant sent a written quotation to Thomas Construction. On 19 May 1985 Gradwell telephoned Escreet and advised him that Thomas Construction would be placing an order with the appellant. On that occasion (i.e., 19 May 1985), Escreet says, it was agreed between himself and Gradwell that all goods to be supplied by the appellant would be supplied subject to the appellant's "standard terms and conditions", one of which terms was that ownership in any

goods supplied would remain vested in the appellant until the full purchase price of such goods had been paid to the appellant. On 20 May 1985 Thomas Construction sent a number of "buying orders" to the appellant, and during the period September to October 1985 goods to the value of R84 573.35 were sent to Thomas Construction and delivered at the building site in King William's Town.

Escreet's aforesaid statements relating to his dealings with Gradwell and the agreement concluded between them on 19 May 1985 are confirmed by Gradwell in an affidavit deposed to by him.

Thomas Construction was liquidated provisionally on 12 November 1985, and finally on 18 December 1985. At that stage it had not made any payment for the goods it had ordered from the appellant. The liquidators of Thomas Construction also made no payment to the appellant in respect of the purchase price of the goods. On 31 January 1986 the appellant caused a letter to be sent to the liquidators in

which it cancelled its agreement with Thomas Construction and demanded the return of the goods it had sold and delivered to Thomas Construction.

In February 1986 the first respondent entered into an agreement with the second respondent (R. McCarthy and Company (Pty) Ltd) in terms of which the second respondent was to complete the work left unfinished by Thomas Construction. Thereafter the first respondent also entered into an agreement with the liquidators of Thomas Construction in terms of which Thomas Construction sold its plant and equipment on the building site to the second respondent. The liquidators' attitude to the appellant's claim that it was entitled to the return of the goods it had sold to Thomas Construction was, according to Escreet, that they had no interest in the goods and that the first respondent had, by virtue of the provisions of clause 12 of its agreement with Thomas Construction, become the owner of the goods. (More will be said about clause 12 of the said agreement later in

the judgment.) The State Attorney at Port Elizabeth, acting on behalf of the first respondent, stated in a letter written - so it would seem - on 22 May 1986, that the first respondent had "paid for the said goods in terms of a payment certificate and considered (itself) to be the owner of the said goods", and that it was not prepared to give an undertaking that the goods would not be used in the construction of the hospital.

The rule nisi, referred to in the first paragraph of this judgment, was issued on 5 June 1986.

The first respondent's answering affidavit was deposed to by its deputy director of works, Mr R.F. Delport. In this affidavit he resisted the appellant's claim for the return of the aforesaid goods on several grounds. The first of these grounds was that Gradwell had no authority from Thomas Construction to enter into an agreement whereby the ownership in the goods would remain vested in the appellant after the goods had been delivered to Thomas Construction.

The other grounds are set out in a paragraph - paragraph 6(d) of his affidavit - which I propose to quote in full. It reads as follows (I have inserted the letters (A) and (B) therein to facilitate reference to the main and alternative parts of the paragraph):

> "(A) I state further that the Applicant, through its employees, including the said ESCREET, who had and who have knowledge of the building industry and the usual provisions to be found in building contracts, was aware of the fact that once goods are delivered to a building site the value of such goods will be included in payment certificates issued by the architect and that this would result in the Employer making payment, in accordance with such payment certificate, of the value of such goods to the Contractor. This is what invariably occurs in contracts of this nature and I have no doubt that the Applicant was aware of this. Upon payment of the value of such goods by the Employer to the Contractor the Employer

becomes the owner of such goods. This is also what occurred in the present instance. The value of the ironmongery in question was included in payment certificates issued by the architect and an amount of R84 000,00 was paid by First Respondent to Thomas Construction (Pty) Limited in respect of these goods. By making such payment First Respondent became the owner thereof. I respectfully contend that if the Applicant had in fact entered into an agreement whereby it reserved or intended to reserve ownership of the goods in question it would have informed First Respondent thereof.

(B) Alternatively, the Applicant either deliberately or negligently failed to inform First Respondent thereof and as a result First Respondent, in good faith, made payment of the value of the goods to Thomas Construction (Pty) Limited. By reason of the aforegoing it is now not open to the Applicant to deny that ownership in the goods in question has passed to First Respondent as this will

> result in considerable prejudice to First Respondent. If the Applicant is entitled to take possession of the ironmongery in question it will either have to be repurchased from the Applicant or purchased from another source, which means that First Respondent will have to pay twice for the goods in question or for goods of a similar nature. If the Applicant had in fact intended to retain ownership of the goods in question it would, in my submission, have informed First Respondent of this fact; or First Respondent could reasonably have expected that it would have been informed thereof."

The second respondent, in an affidavit made by one of its directors, Mr M.R. McCarthy, supported the first respondent's claim to the ownership of the goods.

Jennett J held, as stated before, that the appellant had proved that it had retained its ownership in the goods, but that it was estopped from relying thereon in

claiming the return of the goods it had sold to Thomas Construction. This finding will be discussed later in the judgment.

In this Court the first respondent did not attack the Court a quo's finding that the appellant reserved its ownership in the goods, as alleged by Escreet. The argument advanced on its behalf was devoted solely to the issue of estoppel. It will be convenient to consider the question of estoppel after I have dealt with the argument which the second respondent advanced in this Court.

The argument presented on behalf of the second respondent was not advanced in the Court a quo. It is to the following effect. The appellant's quotation of 11 April 1985, it is said, was a written offer made by Thomas Construction, and the buying orders sent to the appellant by Thomas Construction constituted a written acceptance of the offer; the said offer and acceptance constituted a written agreement of sale between the parties; and this agreement

of sale was intended to be one on credit, the offer containing no reference to a reservation of ownership and stating that payment was to be made within 30 days. The parties, it is said, intended the written offer and each of the buying orders to contain the whole of their agreement. Consequently, counsel contends, citing Union Government v. Vianini Ferro-Concrete Pipes (Pty) Ltd 1941 AD 43, evidence of the oral agreement alleged by Escreet in terms of which ownership was reserved to the appellant until it received payment for the goods sold by it, is rendered inadmissible by the parol evidence rule. In the alternative, counsel contends, even it is found that what the appellant and Thomas Construction intended was that their agreement should be partly in writing and partly oral, the "integration rule", to referred to in Johnston v. Leal 1980(3) SA 927(A) at 944, would be applicable, and it would render inadmissible any extrinsic evidence which contradicts or varies the written portion of the agreement. In the result, it is submitted,

the appellant is not entitled to prove its alleged reservation of its ownership in the goods it sold to Thomas Construction.

Neither of the aforesaid submissions can be sustained. It is clear from Escreet's affidavit, referred to above, that it was not the intention of the parties that the written quotation of 11 April 1985 and the buying orders which followed thereon should embody the whole of their agreement. It is incorrect to say, too, that oral evidence relating to the reservation of ownership is inadmissible for being in conflict with the written portion of the agreement. The offer which Thomas Construction accepted when it forwarded its buying orders to the appellant consisted not solely of the quotation as set out in the document dated 11 April 1985, but of that quotation as amended by the subsequent reservation of ownership by Escreet on 19 May 1985. This appears, as I have said, from the affidavit of Escreet to which I referred above. It also appears from

certain passages in his answer to affidavits filed by the respondents, viz. "The question of reservation of ownership in and to the goods by the Applicant had already been resolved when the order was placed on it by Thomas Construction", and: "I state the goods were supplied pursuant to the conditions contained in Quotation IMQ 113/85 - dated 11 April, but that the Applicant's standard terms and condition, including the reservation of ownership were incorporated in addition to the conditions contained in the said quotation, at the time that the order was placed by Thomas Construction on the Applicant". It appears, therefore, that the agreement between the appellant and Thomas Construction was that contained in the offer of 11 April 1984, as subsequently amended, and the buying orders which followed on, and constituted an acceptance of, the offer as so amended. In the circumstances there can be no objection, based on the parol evidence rule, to the admission of evidence relating to the question of the

reservation of ownership.

I turn now to the question of estoppel, on which, as I said above, **Jennett J** held against the appellant. In dealing with this issue, the learned Judge, after referring to the cases of Oakland Nominees (Pty) Ltd v. Gelria Mining & Investment Co (Pty) Ltd 1976(1) SA 441(A) at 452 A-G and Akojee v. Sibanyoni and Another 1976(3) SA 440 (W) at 442 F-H, said:

> "In the present case applicant delivered goods to Thomas Construction for the purpose that they be installed in the building that Thomas Construction was engaged upon and in which event the goods would accede to the building. Applicant must have contemplated the goods would be at the building site in circumstances no different from other building materials and thus with the applicant's consent in such a manner as to proclaim that the dominium or jus disponendi thereof vested in Thomas Construction. Applicant clothed Thomas Construction with the apparent authority vis-à-vis first respondent to dispose of the goods as if they were part of Thomas Construction's materials and

applicant cannot set up his private agreement with Gradwell that ownership in the goods was not to pass to Thomas Construction until the purchase price therefor had been paid.

On behalf of applicant it was argued that it was in fact negligence on the part of first respondent's architect that caused first respondent to purchase the goods from Thomas Construction and there was indeed provision in the main agreement between first respondent and Thomas Construction that the architect should satisfy himself as to the ownership of goods in Thomas Construction before certifying that first respondent should or could make payment to Thomas Construction therefor. The position in the present case is however that the architect could only have learned of the arrangement between applicant and Thomas Construction by making enquiries of either applicant or Gradwell, and in my view there was no call for the architect to do so. I am of the view that applicant's representation by conduct was negligently made and at the very least in order to protect itself applicant should have informed first respondent and/or first respondent's architect of the terms of agreement between applicant and Thomas

Construction.

Accordingly I am of the view that applicant is estopped from asserting its rights to the goods concerned which means in turn that the rule nisi must be discharged."

The first part ("A") of paragraph 6(d) of Delport's affidavit, quoted above, deals with the contention that the first respondent became the owner of the goods by paying to Thomas Construction the amount reflected in "payment certificates issued by the architect", i.e. R84 000,00. "By making such payment", Delport says, "First Respondent became the owner" of the goods. Paragraph "A" of paragraph 6(d) being, therefore, concerned solely with establishing the first respondent's claim to the ownership of the goods, it is necessary to consider whether part "B" thereof establishes a defence of estoppel, as found by the Court a quo. "B"

commences with the statement by Delport that the appellant failed to inform the first respondent that it had reserved its ownership in the goods and that "as a result First Respondent, in good faith, made payment of the value of the goods" to Thomas Construction. "By reason of the aforegoing, "he goes on to say, "it is now not open to the Applicant to deny that ownership in the goods in question has passed to First Respondent as this will result in considerable prejudice to First Respondent." The impression one gets is that Delport intended to advance an alternative ground on which the first respondent acquired ownership in the goods, viz. its payment of the said amount "in good faith." It seems to me that when he says that it is not open to the appellant "to deny that ownership in the goods has passed to First Respondent", he is, in effect, saying that the first respondent <u>is</u> the owner. If this is so, it follows that what is said in "B" was not intended to be, and is not, a plea of estoppel.

I shall, however, assume that Delport intended to raise a defence of estoppel and that what he meant to say in "B" was that, because the first respondent paid the aforesaid amount "in good faith" - i.e., as I understand it, in the belief that Thomas Construction was the owner of the goods - it is not open to the appellant, although it had reserved its ownership in the goods, to rely thereon in demanding the return of the goods.

The question which then arises is whether, on the aforesaid assumption, "B" can be said to constitute a plea of estoppel. The person who raises an estoppel must inter alia show, the onus being on him, that a representation was made to him and that, relying on the truth thereof, he acted to his detriment. (See, e.g., Union Government v. Vianini Ferro-Concrete Pipes (Pty) Ltd, supra, at 49, and the Oakland Nominees case, supra, at 452 E-G. It is immediately apparent that it is not expressly stated in "B" what representation the appellant made to the first respondent. It is contended

on behalf of the first respondent, however, that Delport must be taken to say that the appellant, by delivering the goods at the building site without informing the first respondent of its reservation of ownership therein, represented to the first respondent that Thomas Construction was the owner of the goods, or had the right to dispose thereof. We were referred in this regard to the statement by McCarthy, mentioned above, that in his 33 years' experience in the building industry "it has always been the generally accepted practice that ownership in materials supplied to a site by a merchant, passes to the main contractor on delivery of the materials on the site." Escreet, however, disputes this and says that in his experience it is "not normal practice" for a building owner to make payment in respect of goods before the contractor has paid the supplier, and he submits that the first respondent, "prior to making any payment in respect of any goods delivered to site, should have ascertained that it was capable of acquiring ownership of the goods and that the

contractor, Thomas Construction, had paid its supplier in respect of the goods". In order to found an estoppel, a representation must be precise and unambiguous. (See Hartogh v. National Bank 1907 TS 1092 at 1104, and the judgment of this Court in the case of The Southern Life Association Ltd v. L.C. van Deventer Beyleveld N.O; delivered on 22 September 1988). In the present case, judging by what is said in the papers, I am not sure that it can be said that the appellant, by delivering the goods at the building site without informing the first respondent of its reservation of ownership in the goods, clearly and unambiguously represented to the first respondent that Thomas Construction was the owner of the goods, or that it had the jus disponendi in respect thereof. I do not, however, find it necessary to give a final decision on this question, since I am satisfied that, even if there was a representation as contended for by the first respondent, there are other grounds for holding that the first respondent failed to allege and establish the

necessary elements of a defence of estoppel.

The person who raises such a defence must, as stated above, allege and prove that he relied on the representation that was made to him by the person against whom the defence is raised, and that, in doing so, he acted to his detriment. The first respondent, being a juristic person, must necessarily act through its officials, or other persons representing it. It cannot, by itself, hold a belief, or make a decision. One would, therefore, have expected the first respondent, if it intended to raise a plea of estoppel, to have put before the Court evidence by an official, or officials, to the effect that he, or they, representing the first respondent, believed the representation contended for by the first respondent to be true and acted in reliance thereon. There is, however, no such evidence. It is not said who, representing the first respondent, relied on the alleged representation made by the appellant; and there is no affidavit by anyone saying that he acted on the faith of

such representation. It is not stated who, acting on behalf of the first respondent, decided that the amount of R84 000 should be paid to Thomas Construction, or what induced him to make that decision. There is, also, no evidence by anyone to the effect that such payment would not have been made if it had been known that Thomas Construction had not yet paid for the goods. In the papers there are references to payment certificates issued by the architect, but no such certificates, and no affidavit deposed to by the architect, were put before the Court. One does not therefore know what information, if any, the architect had regarding the ownership of the goods; and one does not know what induced him to decide (if he in fact did so) that payment should be made to Thomas Construction.

In view of the aforegoing I consider that the first respondent failed to establish that it relied on the representation allegedly made to it by the appellant, and that such reliance caused it to act to its prejudice.

The following may be added to what has just been said. The prejudice of which the first respondent complains is, it would seem, the fact that it made payment in respect of the goods in the belief that it would thereby become the owner thereof. It is not clearly stated, however, what caused the firat respondent to entertain such belief. There is no suggestion on the papers that it purchased the goods from Thomas Construction and that it acquired ownership in that way. The only ground, it seems, on which it could have thought that it would become the owner of the goods, was if it believed that clause 12 of the contract between itself and Thomas Construction was of application. That clause reads:

> "Where in any certificate, of which the Contractor has received payment, the Architect has included the value of any unfixed materials and/or goods intended for and placed on or adjucent to the Works, such materials and/or goods shall become the property of the Department, for any loss or damage to which the Contractor shall be responsible, and

> they shall not be removed, except for use upon the Works, without the authority of the Architect in writing."

The clause is, however, not mentioned by Delport or in any other affidavit filed by the first respondent, and it is not stated anywhere that the first respondent relied thereon. (The contract between the first respondent and Thomas Construction, it may be added, was not put before the Court by the first respondent, but by the appellant, when Escreet replied to allegations contained in Delport's affidavit.) In any event, if the first respondent intended to say that it thought that it would become the owner of the goods by virtue of the operation of the said clause 12, the papers do not show that there was compliance with the provisions of the clause. Delport says that payment was made to Thomas Construction after the issue of certificates by the architect, but no such certificates were put before the Court. All that was put before it in this regard, was a letter which a quantity surveyor, Mr Neville Roy Lloyd, who

practises in East London, wrote to "the Director of Works" of the first respondent on 30 May 1986. In this letter Lloyd stated that he "recommended" payments of R70 000 and R14 000 in respect of "ironmongery supplied and stored on site" during September and October 1985. It will be observed that Lloyd wrote this letter some seven months after he had made his recommendations, and it is difficult to understand why he should have found it necessary to inform the first respondent of the facts therein stated when it should have been in possession of the relevant architect's certificates, if such certificates had indeed been issued. In his answer to Delport's affidavit Escreet pointed out that the first respondent did not put any architect's certificates before the Court, and said : "The First Respondent does not state where or if it in fact made payment to Thomas Construction in respect of the goods and whether same were in fact certified by the architect for payment." There was no reply to this by Delport.

In view of all this, it seems to me, one cannot say that the first respondent has clearly shown what induced it to believe that it would become the owner of the goods. It has not shown, in my opinion, that it was the representation by the appellant for which it contends that caused it to act as it did.

I find, therefore, that the plea of estoppel should not have been upheld by the Court a quo, and that the appeal must accordingly succeed. The order of the Court a quo, which must be set aside, cannot simply be replaced by an order confirming the rule nisi. This is so because at the time when the application was launched some of the goods delivered at the building site had already been installed in structures erected by Thomas Construction. Counsel were agreed that, if this Court should make an order for the return of goods, the order should relate to such goods as had not already been incorporated in buildings at the date of the application.

It is ordered as follows:

(1) The appeal is upheld with costs. The costs are payable by the respondents jointly and severally, the one paying the other to be absolved.

(2) The order made by the Court a quo is set aside, and the following order is substituted therefor:

"(a) The respondents are ordered to return to the applicant all those goods referred to in Annexure 'B' to the applicant's founding affidavit which had at the date of the application not been incorporated in buildings erected by Thomas Construction (Pty) Ltd in terms of its agreement with the first respondent, dated 1 March 1984.

(b) The respondents are to pay the applicant's costs. The costs are payable jointly and severally, the one paying the other to be absolved."

P J RABIE

Acting Chief Justice.

HOEXTER JA

VAN HEERDEN JA

GROSSKOPF JA

EKSTEEN JA

Concur