Case no 300/88

/MC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

Between:

ADENDORFF AUCTIONEERS (PTY) LIMITED Appellant

- and-

J. C. PRETORIUS Respondent

CORAM: JOUBERT, VIVIER et KUMLEBEN JJA.

HEARD: 21 NOVEMBER 1989.

DELIVERED: 5 DECEMBER 1989.

J U D G M E N T

VIVIER JA.

VIVIER JA:

The appellant instituted a vindicatory action against the respondent in the Orange Free State Provincial Division for the recovery of two vehicles viz a Mercedes Benz mechanical horse and a Hendred tip trailer. In the alternative the appellant claimed the value of the vehicles. I shall refer to the parties as the plaintiff and the defendant respectively. The plaintiff alleged that it was the owner of the vehicles and that the defendant was in possession thereof. The defendant in his plea admitted that he was in possession of the vehicles but denied that the plaintiff was the owner thereof. In the alternative the defendant pleaded that the plaintiff was estopped from asserting its ownership of the vehicles. At the pre-trial conference the parties agreed on a

valuation of R18 000 for the vehicles, which were by then no longer in the defendant's possession. Two issues accordingly remained to be decided at the trial: firstly whether the plaintiff could establish its ownership in the vehicles and if so, whether it was estopped from asserting its ownership. The trial came before HATTINGH J who found that the plaintiff had failed to prove that it was the owner of the vehicles. Absolution from the instance with costs was accordingly granted against the plaintiff. With the leave of the Court a quo the plaintiff now appeals to this Court.

The plaintiff carries on business as auctioneers. It received instructions from the owner of the vehicles, one Wobbe, to sell the vehicles on his behalf at a public auction which was to be conducted by plaintiff's managing director, Mr Montagu Martin Beytell, at the plaintiff's

Johannesburg premises on 30 August 1984. Beytell, who was the sole witness for the plaintiff, told the trial Court that a few days before the sale he received a telephone call from one Barend Frederick Mostert, whom he did not know, to the effect that he wanted to purchase some vehicles at the auction in order to start a transport business. Mostert said that he was unable to pay for the vehicles immediately but that he would be in a position to do so within a few weeks, and that he therefore required credit. According to Beytell his reply to Mostert was that he would "consider his proposal provided that he could furnish me with sufficient guarantees ensuring that I received payment within the three week or one month period after the sale". Immediately before the sale Mostert presented Beytell with a letter from his attorneys, a firm called Leslie J Marx and Co., addressed

to the plaintiff, to the effect that Mostert had on 6 August 1984 sold his fixed property at Roodepoort to one Fourie for the sum of R180 000 of which a deposit of R40 000 had already been paid. The letter stated that Fourie had obtained a loan for the balance of the purchase price of which an amount of R90 000 would be made available to pay for any vehicles purchased by Mostert at the auction. Beytell testified that he regarded the letter "more-or-less as a guarantee that there were funds that Mr Mostert would receive during the next three to four weeks, so that he could pay me for any purchases he would make at the sale". He accordingly informed Mostert that he would allow him to bid at the auction but that "should he buy any vehicles, we would have to enter into a formal agreement whereby I could protect my rights". No details of the "formal agreement" were

mentioned. Beytell's evidence was that the reason why he had acceded to Mostert's request to purchase on credit was because he needed the commission since his company was in the middle of a recession and was battling for customers. Prior to the commencement of the sale a so-called buyer's card, containing the conditions of sale, was handed to Mostert. The conditions of sale were also read out at the commencement of the sale. They provided, inter alia, that the sale was for cash, unless otherwise stated by the auctioneer; that the highest accepted bidder would be the purchaser; that each item sold would, at the fall of the hammer, be considered as delivered; that no item sold could be removed until paid for without the sanction of the auctioneer and that the auctioneers acted merely as agents for the sellers.

It is common cause that Mostert bid at the

auction and that eight vehicles, including the two in question, were knocked down to him. Their owner Wobbe, was present at the auction and Beytell said that although Mostert's bids for the two vehicles, which were the highest received, were slightly below Wobbe's reserve prices the latter indicated to him during the course of the bidding that he could accept Mostert's bid. Beytell said that immediately after the auction he informed Wobbe and the sellers of the other vehicles which had been knocked down to Mostert that "Mostert had purchased these vehicles subject to a formal agreement being concluded" between the plaintiff and Mostert. Beytell said that he also told the sellers that he would, in the meantime, assume responsibility for the vehicles, acquire ownership thereof and pay for them. He did not say from whom he proposed acquiring ownership. He paid Wobbe

the following day.

Beytell further told the trial Court that he informed Mostert after the sale that his attorney would prepare an agreement for Mostert to sign the next day, after which he could take delivery of the vehicles. Mostert came to his office the following day, 31 August 1984, and they then both signed a written agreement which was entitled, "Agreement of Sale". This document recorded that the eight vehicles which had been knocked down to Mostert at the sale, had been sold by the plaintiff to Mostert at the purchase prices reflected therein, which were the prices they fetched at the sale. It provided, inter alia, for the purchase price to be paid upon delivery of the vehicles and for ownership in the vehicles to remain with the plaintiff until such time as the full purchase price had been paid.

The two vehicles in issue were subsequently removed by Mostert. Their registration documents had been made out in blank and signed by Wobbe and had been delivered by Wobbe to Beytell at the auction sale. Beytell, in turn, had handed them to Mostert on the occasion when the written agreement was signed. Beytell testified that he had given the registration documents to Mostert to enable the latter to register the vehicles in his name so that he could start his proposed transport business. Mostert never paid for the two vehicles but caused them to be re-registered in the name of a firm called Eldorado Motors at Krugersdorp. He later sold them on 5 October 1984 to the defendant for the sum of R18 000. The defendant was ignorant of any claim the plaintiff had in the vehicles.

By letter dated 3 October 1984 Mostert's said

attorneys notified the plaintiff that the sale of Mostert's fixed property at Roodepoort had been cancelled. Mostert's estate was subsequently sequestrated and he was sentenced to lengthy periods of imprisonment on a number of fraud charges unrelated to the present facts.

Mostert testified on behalf of the defendant and denied that he had told Beytell that he intended establishing a transport business. He said that he had informed Beytell that he was trading in second-hand vehicles and that he was interested in acquiring the vehicles in question for that purpose. He admitted that he received a buyer's card at the sale and that, although he did not read the conditions of sale which were printed on the back thereof, they were in any event read out by Beytell at the commencement of the sale. When Beytell informed him that he could bid at the auction

he accepted that the letter from his attorneys had satisfied Beytell's demand for a guarantee in respect of the purchase price. When the vehicles were knocked down to him his understanding of the matter was that he had bought the vehicles on credit.

Mostert further testified that he had nobody to help him drive the vehicles away after the sale. He consequently asked Beytell's permission to leave the vehicles at the premises where the sale had been held until the next day when he would remove them. Beytell replied that this was in order and asked him to collect the registration papers at his office the next day before removing the vehicles. When he arrived at Beytell's office the following day Beytell told him that his attorney had prepared a document which he wanted Mostert to sign to the effect that he was buying the vehicles on credit.

Beytell assured him that it was a standard type of document and he thereupon signed it without reading it, on the assumption that it provided for the manner of payment of the purchase price.

On appeal Mr Camp, who appeared on behalf of the plaintiff, submitted that no contract of sale resulted from the acceptance of Mostert's bid at the auction. He submitted that Beytell's sole intention in allowing Mostert to bid at the auction was to determine the price at which he could, after the sale, sell the vehicles to Mostert in terms of an agreement still to be negotiated. This submission flies in the face of Beytell's clear and explicit evidence and was raised for the first time on appeal. I have already referred to Beytell's evidence that he told Mostert that he could buy at the sale and that he told the sellers after the sale that Mostert had purchased the vehicles at the sale. It

is inconceivable that Beytell would have used such language had his intention been merely to fix the purchase price at the auction for a sale still to be concluded. I have also referred to Beytell's evidence that when Mostert's bids did not meet Wobbe's reserve prices he first looked across at Wobbe to obtain his consent before accepting Mostert's bids for the vehicles. Had Beytell's intention been merely to determine the price he would certainly not have referred to Wobbe for instructions during the bidding but would have waited until after the auction. There is nothing in Beytell's evidence to indicate that his intention was not to sell the vehicles to Mostert at the auction sale. It was furthermore never put to Mostert in cross-examination that he was not allowed to buy at the auction and that the sole purpose of his bidding was to determine the prices at which the vehicles

would later be sold to him.

In my view it is clear from the evidence of both Beytell and Mostert that the moment the vehicles were knocked down to Mostert a binding and enforceable oral contract of sale was concluded between Wobbe as seller, and Mostert as purchaser. In Beytell's own words the subsequent written contract was intended to protect the auctioneer without involving Wobbe, the seller, in any way. It was thus never intended that the written contract would be substituted for the oral contract which had been concluded at the auction. Beytell's evidence that he wanted the plaintiff's rights to be protected in a subsequent written contract and that he informed Mostert accordingly, is not inconsistent with the conclusion of a binding contract of sale at the auction. It would seem that it was Beytell's responsibility to

pay the purchase price of the vehicles sold at the auction to the sellers, less his commission, so that if Beytell sold on credit, as he did in this case, it was his responsibility to recover the purchase price from the buyer. I shall return to this aspect.

The oral contract of sale which was concluded between Wobbe and Mostert at the fall of the hammer was subject to all the terms and conditions set out in the conditions of sale which appeared on the buyer's card and which had been read out at the commencement of the sale (Pledge Investments (Pty) Ltd v Kramer, NO: In re Estate Selesnik 1975(3) SA 696(A) at 703A; Clark v C P Perks and Son 1965(3) SA 397 (EDC) at 400 C-D).

The conditions of sale provided for the sale to be for cash unless otherwise stated by the auctioneer. According to Beytell he agreed with Mostert before the

sale to grant the latter credit for at least three weeks so that the sale of the vehicles to Mostert must be taken to have been a credit sale (Lendalease Finance (Pty) Ltd v Corporacion De Mercadeo Agricola and Others 1976(4) SA 464(A) at 490 D). Beytell's authority to grant such credit was not in issue either in the Court a quo or on appeal.

The question whether delivery of the vehicles was given to Mostert after the sale must next be considered. The Court a quo held that delivery to Mostert was effected in terms of the provision of the oral contract of sale that each item sold would, at the fall of the hammer, be considered as delivered. It seems to me that the parties acted in accordance with that provision when Mostert asked Beytell whether he could leave the vehicles on the premises where the sale had been held, as he had

nobody to assist him in driving the vehicles away, and Beytell agreed to this request. Mostert's evidence to this effect was not challenged in cross-examination, and Beytell's evidence that he told Mostert that he could take delivery the next day after he had signed the formal agreement is, for the reasons I have given, not inconsistent therewith. In my view delivery was thus effected, if not at some earlier stage, at the latest when Mostert, with Beytell's consent, left the vehicles at the premises where the auction had taken place.

The general rule is that ownership passes to the purchaser on delivery in the case of an unconditional sale on credit (Crockett v Lezard 1903 TS 590 at 592 in fine; Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and Another 1973(3) SA 685 (A)at 694 and the Lendalease case at 490 A-C). In the circumstances of

the present case there is no ground for departing from the general rule, so that it must be held that ownership passed to Mostert after the auction sale on delivery of the vehicles.

This brings me to Beytell's evidence that immediately after the sale he informed Wobbe and the other sellers that Mostert had purchased the vehicles subject to a formal agreement being concluded but that he (Beytell) would in the meantime assume responsibility for the vehicles, pay for them and acquire ownership thereof. I have already dealt with the effect of Beytell's stipulation to Mostert before the sale relating to the completion of a formal document after the sale and nothing which Beytell said to the sellers after the sale could alter the fact that a binding and enforceable oral contract of sale had been concluded at the fall of the hammer.

Beytell's statement to the sellers that he would accept responsibility for the vehicles, pay for them and acquire ownership thereof could not, in any way, effect the passing of ownership to Mostert and simply accords with what seems to be the custom or usage viz that it was the auctioneer's responsibility to pay the purchase price to the sellers, less his charges, whether he had received the purchase price from the buyers or not (Meikle and Co Ltd v Van Eyssen 1950(2) SA 403 at 410-412 and cf Estate Duminy v Hofmeyr and Son Ltd 1925 CPD 115 at 117-118).

Ownership of the vehicles accordingly never vested in the plaintiff so that the written agreement, which was signed on 31 August 1984, in terms of which the plaintiff purported to sell the vehicles to Mostert reserving ownership to itself until the purchase price had been paid in full, did not affect the dominium which

Mostert had previously acquired in the vehicles.

An alternative argument advanced on behalf of the plaintiff in both the Court a quo and in this Court was that, even if Mostert had acquired ownership in the vehicles from Wobbe, he, in turn, transferred ownership to the plaintiff in terms of the written agreement of 31 August 1984. The learned Judge a quo held that ownership did not pass to the plaintiff pursuant to the written agreement since no delivery was effected from Mostert to the plaintiff. Regarding the circumstances under which the agreement was signed the learned Judge said the following:

> "(A)lhoewel ek nie Mostert se getuienis in geheel as geloofwaardig kan aanvaar nie, aanvaar ek nietemin sy getuienis van hoe dit gebeur het dat hy Bewysstuk D geteken het, daar is niks onwaarskynlik in sy weergawe daaromtrent

nie en vind dit bowendien aansluiting met die getuienis van Beytell. Na my mening was daar geen werklike bedoeling by Mostert aanwesig om deur Bewysstuk D te onderteken eiendomsreg aan eiser oor te dra nie."

The simple answer to the alternative submission is that it runs counter to the express terms of the written agreement, which purported to be a sale, not by Mostert to the plaintiff, but by the latter to Mostert. And there is simply no evidence to support the rather far-fetched proposition that Mostert transferred ownership in the vehicle, it being at that stage his property, in order that it could be "sold" back to him. The plaintiff could accordingly not have acquired ownership in the vehicles pursuant to the written agreement.

For these reasons the learned Judge a quo was correct in holding that the plaintiff had failed to

establish its ownership in the vehicles.

With regard to costs Mr Camp submitted that the trial Court should have made a special order disallowing that portion of the trial costs occasioned by the evidence given by the defendant relating to the defence of estoppel which, Mr Camp submitted, was a defence without substance. The learned Judge a quo did not deal with this aspect in his judgment but, in my view, there are no grounds for interfering with the exercise of his discretion in not depriving the successful party of portion of his costs. The defendant's evidence-in-chief comprises a total of only six pages of the record whereas Mr Camp's cross-examination of this witness runs to 43 pages. In the circumstances the trial Judge had good reason, in my view, for not making the special order sought by Mr Camp.

In the result the appeal is dismissed with costs.

W. VIVIER JA.

JOUBERT JA)
Concurred.
KUMLEBEN JA)