REPUBLIC OF SOUTH AFRICA

Case no: 381/96

In the appeal of

INFO PLUS — Appellant

and

J SCHEELKE — First Respondent

MCCARTHY RETAIL LIMITED — Second Respondent

Court: Van Heerden DCJ, Hefer, Eksteen, Nienaber and Howie JJA

Heard: 13 March 1998 Delivered: 25 March 1998

JUDGMENT

VAN HEERDEN DCJ

The appellant is a firm which at all material times hereto was represented by Mr FW Macaskill. During May 1988 the appellant entered into a written instalment sale agreement with First National Bank Limited which then ceded it rigths to First National Western Bank Limited ("Wesbank"). In terms of this agreement there was sold to the appellant a Mercedes Benz 230 TE motor vehicle ("the Mercedes"). The appellant was credited in respect of a trade-in and the balance of the purchase price was payable in 60 monthly instalments. The Mercedes was delivered to the appellant and registered in its name but the agreement provided that ownership of the vehicle would remain vested in the seller until receipt by it of all amounts payable by the appellant. As will appear, this condition was not fulfilled before 20 November 1990 at the earliest.

During July 1990 the appellant entered into an arrangement with Mr

Gavin Sharman ("Gavin") acting on behalf of Sharman Motors (Pty) Ltd ("Sharman Motors"). It was agreed that the Mercedes would be delivered to Sharman Motors; that Gavin would endeavour to find a purchaser for it at a net price of R120 000; that, if successful, Gavin would introduce the prospective purchaser to the appellant, and that if a sale resulted the purchaser would then pay the full purchase price to the appellant which, in turn, would pay Sharman Motors its commission.

Pursuant to the above arrangement the appellant caused the Mercedes to be delivered to Sharman Motors. At no stage thereafter did Gavin, or anybody else acting for Sharman Motors, introduce a purchaser to the appellant. On his return from a trip abroad towards the end of October 1990 Macaskill established that Gavin had left the employ of Sharman Motors and that the Mercedes was then registered in the name of the first respondent. Further enquiries brought

the following to light.

During September 1990 Gavin, professing to act on behalf of Sharman Motors, offered to sell the Mercedes to the second respondent. Eventually the latter bought the vehicle at a purchase price of R87 000. On the same day the Mercedes was delivered to the second respondent together with a registration certificate reflecting that Sharman Motors was the registered owner of the vehicle. A few days afterwards the second respondent paid the purchase price by means of a cheque drawn in favour of Sharman Motors. Some 14 days later it sold and delivered the Mercedes to the first respondent and the vehicle was then registered in the latter's name. (I shall later deal more fully with the circumstances in which the Mercedes was registered in the name of Sharman Motors and sold to the second respondent.)

After Macaskill had acquired knowledge of Gavin's breach of trust, he

informed the police, the second respondent and Wesbank that the Mercedes had been stolen. Wesbank then undertook to repossess the vehicle on behalf of the appellant but failed to do so. The reason was that Wesbank and the second respondent subsequently entered into an agreement pursuant to which the latter paid Wesbank an amount of R61 436,52 in settlement of the total amount outstanding under the instalment sale agreement. Payment was made to Wesbank on 20 November 1990 and the result was that the Mercedes remained in the first respondent's possession.

During March 1995 the appellant instituted action against the first respondent in the Witwatersrand Local Division. The appellant claimed delivery of the Mercedes on the strength of allegations that it was the owner of the vehicle and that the first respondent was in possession thereof. The second respondent obtained leave to intervene as a co-defendant and subsequently pleas

were filed by both respondents. Both admitted that the first respondent was in possession of the Mercedes but denied the appellant's alleged ownership. Thereafter the second respondent's plea was amended so as to introduce an alternative defence of estoppel.

The matter was heard by Streicher J who dismissed the appellant's claims on the ground that since it was not in possession of the Mercedes when the aforesaid payment was made to Wesbank by the second respondent, the appellant did not become the owner of the vehicle as a result of that payment. (The judgment has been reported: Info Plus v Scheelke 1996(4) SA 1058 (W).) Subsequently Streicher J granted the appellant leave to appeal to this court.

The basic reasoning of the court a quo appears from the following passage in the judgment (at p 1062 D-F):

"When the full purchase price was paid by the second defendant there

was an existing agreement between Wesbank and the plaintiff that the plaintiff would from then onwards hold the motor vehicle as owner. No further agreement was required. The plaintiff did, however, not at that stage have physical control over the motor vehicle and the motor vehicle was not held by anybody on its behalf No traditio brevi manu could therefore take place and no other form of delivery took place. There has consequently not been delivery of the motor vehicle to the plaintiff coupled with an agreement between Wesbank and the plaintiff to pass and to acquire ownership."

It is, of course, trite law that transfer of ownership of corporeal movable property requires delivery, i.e. transfer of possession, of the property by the owner to the transferee coupled with a real agreement between them. The constituent elements of this agreement are the intention of the owner to transfer ownership and the intention of the transferee to acquire it. Transfer of possession can be either actual or constructive and it is hardly necessary to say that an agent can act for either the owner or the transferee or both. Somewhat surprisingly, however, there are only two previous reported cases in which the

application of these principles has been considered with reference to a situation where (i) a seller as owner delivered a thing to a purchaser in terms of a contract providing that ownership would pass only on fulfilment of a suspensive condition, and (ii) the purchaser was no longer in possession of the merx when the condition was fulfilled. (For convenience I shall refer to such a contract as a hire-purchase contract.)

In Pennefather v Gokul 1960(4) SA 42 (N), Harcourt AJ held that a purchaser who found himself in the above situation became owner of the merx (a vehicle) on fulfilment of the condition (payment of the full purchase price). He appears to have been of the view that the conditional delivery of the vehicle to the purchaser became unconditional when the condition was fulfilled, with a resultant transfer of ownership, but added (at p 44B):

"Another view, arriving at the same conclusion, is that the delivery of the

vehicle to the 'hirer' is converted on payment of the full purchase price into a traditio brevi manu on payment of such purchase price into the requisite delivery to pass ownership."

Traditio brevi manu takes place when an owner and a detentor of a thing agree that the latter shall in the future hold the thing in his own right (i.e. as owner): Air-Kel (Edms)(Bpk)h/a Merkel Motors v Bodenstein 1980(1) SA 917 (A) 922H - 923A. I therefore agree with Streicher J (in his reported judgment at p 1061 E-F) that since the purchaser in Pennefather was not in possession of the vehicle when the condition was fulfilled, he could not have become owner thereof by virtue of a traditio brevi manu.

In Forsdick Motors Ltd v Lauritzen 1967 (3) SA 249 (N), James J also considered the position of a purchaser of a vehicle under a hire-purchase contract who was not in possession thereof at the time of the (alleged) fulfilment

the condition. James J held, albeit obiter, that even if the condition had been fulfilled the purchaser, who had previously parted with possession of the vehicle, could not have become the owner thereof. Having said that the mere physical handing over of the merx to a purchaser under a hire-purchase contract does not make him the owner, the learned judge continued (at p 253E-H):

> "He has its detentio but the mental element involved in every transfer of ownership is lacking because neither the seller nor the buyer intends that ownership shall pass. When the contract finally comes into operation a further act of delivery is necessary to effect transfer. As the purchaser already has the detentio of the property that further act relates to the intention of the parties towards it and requires that the parties should agree that the transferee who already has the physical detention of the property, although holding it on behalf of the transferor, would in future possess it as his own. Transfer is brought about by a traditio brevi manu. For traditio brevi manu to take effect the potential transferee must be in physical possession of the article and must have the animus to hold it for himself." (My emphasis)

It would appear that in the view of James J ownership of a thing sold in

terms of a hire-purchase contract cannot pass to the purchaser when the condition is fulfilled unless the parties then agree that the purchaser as detentor will henceforth possess the merx as his own. And because transfer of ownership is in such a case brought about by a traditio brevi manu the purchaser must be in possession of the merx when the condition is fulfilled.

The requirement that subsequent to delivery of the merx under a hire-purchase contract there should be a further agreement between the parties, in the sense of a mutual intention at the time of fulfilment of the condition that ownership shall be transferred to the purchaser, with due respect strikes me as somewhat artificial. I would indeed be surprised if a substantial number of sellers gives any consideration to the passing of ownership when the condition is fulfilled. And even if a seller should prior to fulfilment inform the purchaser that he no longer intends transferring ownership to the latter, that by itself

would surely not preclude a transfer from taking place.

It follows that I agree with Streicher J (at p1062A) that no further real agreement, concluded subsequent to delivery of the merx under a hire purchase contract, is required (cf Trust Bank van Afrika Bpk v Van Jaarsveldt; Trust Bank van Afrika Bpk v Bitzer 1978 (4) SA 115(0) 121 F). The real agreement reached when delivery takes place, suffices. Because of the conditional term in the hire-purchase contract that agreement is also conditional. Notwithstanding delivery ownership of the thing sold therefore does not pass prior to fulfilment of the condition (hereinafter mostly referred to as the material time). But when that happens ownership passes without more, at any rate if the purchaser is then in possession of the merx.

It remains to consider the question whether a different position obtains if the purchaser is no longer in possession at the relevant time. A positive reply

gives rise to some rather curious consequences. Assume that a purchaser brings

about fulfilment of the condition by paying the balance owing under a hire-purchase contract at noon on a particular day. Also assume that the purchased vehicle, which he parked in front of the seller's premises, is stolen a minute after twelve. Since ownership has passed to him he can, as owner, recover the vehicle from whomsoever may be in possession thereof. But if the theft took place a minute before twelve he cannot do so.

Consider a further example. A purchaser buys a vehicle for cash and takes possession of it. The cheque given by him to the seller is, however, only cleared a day later. Before actual payment takes place the vehicle is stolen. If the above question calls for a positive answer, the purchaser does not become owner at the time of payment — unless, of course, he timeously regained possession of the vehicle.

Consider yet another example. For some or other reason A sells and delivers his horse to B subject to the stipulation that ownership will only pass a month later. B pays the purchase price but before the end of the stipulated period the horse is stolen from him and remains stolen. I cannot perceive any reason why, in the context under consideration, a distinction should be drawn between delivery subject to, on the one hand, a time stipulation and, on the other, a condition. If, therefore, a purchaser under a hire-purchase contract does not become owner if he is not in possession of the merx when the condition is fulfilled, then neither does B at the expiry of the agreed period. In my view, however, this is not the law.

I fail to see why a second form of delivery should be required at the material time. It is true that pendente condicione ownership of the thing sold, say, a vehicle, remains vested in the seller, but nevertheless a transfer of

possession, which is one of the requirements of transfer of ownership, does take

place. Such transfer of possession is effected in terms of a real agreement embodying the intention of both parties that at the material time the purchaser shall without more ado become owner of the vehicle. At the risk of repetition I stress that at that time both requirements for a transfer of ownership are satisfied inasmuch as the conditional delivery ipso jure becomes an unconditional one (cf Cronje, Die Verkryging van Eiendomsreg deur 'n Huurkoopkoper, 1979 TSAR 16, 50). It is therefore not necessary that the purchaser must be in possession of the vehicle at the material time. Such a requirement can only be justified on the premise, which I have already rejected, that conditio existente a second real agreement must be concluded. That being so, there is no warrant for insisting that one of the requirements of a traditio brevi manu must nevertheless be satisfied.

would add that if a purchaser under a hire-purchase contract does not acquire ownership if at the material time he is not in possession of the merx, it is not at all clear to me by virtue of which legal principle he will become owner should he later regain possession.

It should further be borne in mind that, in theory at any rate, transfer of ownership may also be important from the seller's point of view; so, for instance, if he is contractually obliged to insure the merx as long as he remains the owner thereof, albeit that he may be entitled to recover premiums paid by him from the purchaser. On the view of the court a quo, however, the seller will perforce retain ownership, with its concomitant obligation, if fortuitously the purchaser is not in possession of the merx when the condition is fulfilled.

In the present case it was, of course, not the appellant but the second respondent who paid the aforesaid sum of R61 436,52 to Wesbank. However,

if that sum was paid in settlement of the balance outstanding under the

instalment sale agreement, the condition in question would have been fulfilled. For it is hardly necessary to say that a debt owing by A to B may be extinguished by a payment made by a stranger to B in discharge of that debt even if A is unaware of such payment.

In my view the payment in question did extinguish the appellant's indebtedness to Wesbank. In the correspondence between Wesbank and the second respondent there certainly is no allusion to any other purpose that the payment was intended to achieve. In Wesbank's fax to the second respondent, dated 20 November 1990, no more of note is said than that, as orally agreed between the latter's Mr van der Westhuizen and Wesbank's regional manager, Mr Wilson, the settlement figure for "the above account" (being the appellant's account in the books of Wesbank) is R61 436,52. The second respondent's

reply, in so far as material, reads as follows:

> "As per our discussions and your fax of today I herewith attach a cheque to the amount of R61 436,52 ... in full and final settlement of the above account (being again the appellant's account)."

The correspondence therefore unmistakably evinces a mutual intention to bring about a discharge of the appellant's indebtedness. And when Van der Westhuizen was asked at the trial whether he and Wilson had discussed anything not mentioned in the above fax, he replied in the negative. True, he subsequently added a rider but this did not really qualify his initial reply. He said:

> "Basics is mnr. John Wilson heeltemal ingelig van die hele totale toedrag van sake en hy was bewus van die feit dat ons die voertuig verkoop het en dat ons die koper in die situasie moet ondersteun en daardeur betaal ons die aflosbedrag."

It is also true that Van der Westhuizen repeatedly said that the second

respondent intended acquiring ownership of the Mercedes by making the above payment, but his motive by itself had, of course, no bearing on the effect of the payment. And it is clear that Van der Westhuizen thought that ownership of the Mercedes would vest in the second respondent as a result of the discharge of the amount owing by the appellant to Wesbank. In any event, whatever Van der Westhuizen's subjective intention may have been, there is nothing to show that it was shared by Wilson. Asked whether the latter at any stage agreed, or even mentioned, that on payment of the amount of R61 436,52 ownership of the Mercedes would pass to the respondent, Van der Westhuizen replied that he could not remember.

I should say that although during the course of his argument counsel for the respondents endeavoured to draw a distinction between the factual and legal effect of that payment, he later rightly conceded that in law it served to

extinguish the appellant's debt.

It follows that, subject to a consideration of the second respondent's alternative plea, I hold the view that on payment of the above amount to Wesbank the condition under consideration was fulfilled and that hence the appellant became the owner of the Mercedes.

I turn to the estoppel defence. The material allegations in the amended plea reads as follows:

"3.2.1 The Plaintiff had entrusted the vehicle to Sharman Motors (Pty) Ltd which was a well-known dealer in motor vehicles;

3.2.2 The Plaintiff requested or instructed Sharman Motors (Pty) Ltd to find a buyer for the vehicle;

3.2.3 The Plaintiff well knew, alternatively must have contemplated that Sharman Motors (Pty) would exhibit the vehicle for sale at its business premises with its other stock in-trade, that Sharman Motors (Pty) Ltd was a well-known dealer in motor vehicles and would deal with the vehicle in

such a manner as to proclaim that either the dominium therein vested in Sharman Motors (Pty)Ltd or that it had the ius disponendi thereof:

3.2.4 By his aforesaid conduct the Plaintiff negligently represented to the Second Defendant that Sharman Motors (Pty) Ltd was the owner of the vehicle or has the ius disponendi thereof;

3.2.5 The Second Defendant accepted as correct the aforesaid representation and had acted in reliance thereof to its prejudice in purchasing the vehicle from Sharman Motors (Pty) Ltd on 7 September 1990 for the sum of R87 000,00."

It will be observed that there is no express averment that Sharman Motors in fact exhibited the Mercedes for sale at its business premises together with its other stock-in-trade, but I shall assume, in favour of the respondents, that such an averment is to be implied. It is, however, not borne out by the evidence. Although Macaskill admitted that he assumed that the Mercedes "would for

some time possibly be on display", there is no evidence that Sharman Motors

at any stage displayed the vehicle at its business premises. But even if Sharman Motors did so, the second respondent was unaware thereof. What happened is that Gavin telephonically enquired from one Bostwick, a sales representative of the second respondent, whether the latter would consider purchasing the Mercedes. Gavin then drove the vehicle to the second respondent's premises in Randburg where it transpired that the former, professing to act on behalf of Sharman Motors, wanted more for the Mercedes than the second respondent's representatives were prepared to pay. Subsequently, and pursuant to a second telephone call to Bostwick, Gavin again took the Mercedes to the second respondent's premises. The outcome was that Gavin and Van der Westhuizen there and then reached an agreement in terms of which the second respondent bought the vehicle from Sharman Motors for R87 000. It is, however, a fair

inference from Van der Westhuizen's evidence that the sale was subject to the stipulation that the purchase price would be payable only after the second respondent had received from Sharman Motors certain documents, including a certificate reflecting that the latter was the registered owner of the Mercedes.

After conclusion of the sale Bostwick accompanied Gavin to the premises of Sharman Motors. There Gavin furnished Bostwick with inter alia a registration certificate pertaining to the Mercedes. It proclaimed that the vehicle was registered in the name of Sharman Motors. Gavin, on behalf of Sharman Motors, also signed a document emanating from the second respondent. Its heading was "Used Vehicle Clearance form" and, in so far as material, paragraph 2 thereof read:

"I/We declare that the abovementioned vehicle [the Mercedes] is my/our property, fully paid for....:"

It was only after he had seen the registration certificate and the completed form that Van der Westhuizen authorised payment of the purchase price to Sharman Motors.

A registration certificate manifesting that the Mercedes was registered in the name of the appellant was still in Macaskill's possession at the time of the trial and no transfer form relating to the vehicle was at any stage signed by him. It does not appear how the Mercedes came to be registered in the name of Sharman Motors, but the only reasonable inference is that a transfer form must have been signed on behalf of the appellant, as transferor, by somebody (probably Gavin) who knew that the had no authority to do so.

The requirements for a successful reliance on estoppel in the context under consideration have been set out in a number of decisions of this court.

See e.g. Ouenty's Motors (Pty) Ltd v Standard Credit Corporation Ltd 1994 (3) SA 188 (A) 198-9. The first requisite is that there must be a representation by the owner (or possessor) that the person who disposed of his property ("the defrauder") was the owner, or entitled to dispose, of it. In most cases, of course, the ultimate representation is made by the defrauder. The real question then is whether conduct of the owner effectively contributed to the making of that representation.

In casu the second respondent did not rely upon a representation that, apart from ownership, the jus disponendi of the Mercedes vested in Sharman Motors. As has appeared, Gavin represented to the second respondent that Sharman Motors was the owner of the vehicle. No doubt the prior delivery of the vehicle to Sharman Motors causally assisted Gavin in making that representation, but the mere delivery of property by one person to another does

not by itself constitute a representation that the latter is the owner (or is entitled to dispose) thereof: Electrolux (Pty) Ltd v Khota 1961 (4) SA 244 (W) 246H, cited with apparent approval in Oakland Nominees (Pty) Ltd v Gelria Mining and Investment Co (Pty) Ltd 1976 (1) SA 441 (A) 452E, and Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP)Bpk 1996(3) SA 273 (A) 286 E. Nor does the fact that the transferee is a dealer or trader in the particular commodity transform the transfer of possession into such a representation. As was said by Trollip J in Electrolux at pp 247-8:

> ". . . . to create the effective representation the dealer or trader must, in addition, deal with the goods with the owner's consent or connivance in such a manner as to proclaim that the dominium or jus disponendi is vested in him; as for example, by displaying, with the owner's consent or connivance, the articles for sale with his own goods. It is that additional circumstance that provides the necessary 'scenic apparatus' for begetting the effective representation."

Apart from placing Sharman Motors in possession of the Mercedes the

appellant did nothing that could have created the impression, vis-a-vis the second respondent, that the dominium of the vehicle vested in Sharman Motors. Hence I do not think that the first requirement set out above has been satisfied. The appeal is allowed with costs and the following is substituted for the order of the court a quo

"(1) The first defendant is ordered to deliver to the plaintiff a Mercedes

Benz 230 TE vehicle, registration number MPB 105T. (2) The costs of the suit are to be paid by the defendants

jointly and severally".

HJO VAN HEERDEN
Deputy Chief Justice

Concur

Hefer JA
Eksteen JA
Nienaber JA Howie
JA