# *THE SUPREME COURT OF APPEAL OF SOUTH AFRICA*

Case number : 219/03

In the matter between :

CONCOR HOLDINGS (PTY) LTD
t/a CONCOR TECHNICRETE APPELLANT

and

HERMANUS PHILLIPUS POTGIETER RESPONDENT

CORAM : SCOTT, ZULMAN, FARLAM, CONRADIE, CLOETE JJA

HEARD : 21 MAY 2004

DELIVERED : 28 MAY 2004

ORDER: In paragraph [14]

**Summary: Estoppel by conduct as defence to *rei vindicatio* – requirements for representation clarified.**

## *JUDGMENT*

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**CLOETE JA/**

CLOETE JA:

[1] The sole issue in the present appeal is whether the appellant is estopped from vindicating paving stones of which it is the owner and which are in the respondent's possession. The magistrate held that it is not. The Pretoria High Court (Botha J, Patel J concurring) reversed the decision but granted leave to appeal to this court.

[2] The facts fall within a small compass. The appellant manufactures and supplies paving stones. One of its customers was a builder, Mr Van Dyk, who traded as Polokwane Homes. The builder purchased the paving stones from the appellant. The purchase was governed by the following clause in the appellant's standard credit application form which had previously been completed by the builder:

'The ownership in the goods supplied shall remain vested in the supplier until date of payment. The supplier shall be entitled to repossess all goods not paid for.'

The appellant knew, through its salesman Mr Uys who concluded the contract with the builder for the purchase of the paving stones, that they were going to be used by the builder to cover the parking area for a building and that they were required with some urgency for that purpose. The building site was owned by the respondent, with whom the builder had concluded a contract for the erection of the building and for paving

of the adjacent parking area. As Uys knew, the colour chosen for most of the paving stones from samples taken by him to the site and shown to the respondent, was ‘apricot’, to match the building. Some of the paving stones were collected by the builder from the appellant’s premises and some were delivered by the appellant directly to the site. They were laid on site, which involved a number being cut to fit the terrain and layout and a consequential high degree of wastage resulted. The respondent formally admitted at the trial that the paving stones remained movables. The respondent paid the builder for the works executed by him, which included the paving stones. He testified that had he been aware of the reservation of ownership clause, he would have ensured that the appellant was paid, and this evidence was not challenged. The builder did not pay the appellant and his estate was sequestrated.

[3] The appellant brought a *rei vindicatio* against the respondent for the return of the paving stones. The respondent countered with a plea of estoppel.

[4] The respondent was not represented before this court, but did not concede the merits of the appeal. The primary question raised by the appellant’s counsel was whether the appellant made a representation

which could found an estoppel. The court *a quo* reasoned as follows:

'Ek vind dit moeilik om in te sien watter ander indruk die eiser kon geskep het, deur plaveistene op 'n bouperseel aan 'n boukontrakteur af te lewer, stene wat getoets is om in kleur by ander stene aan te pas, as dat die kontrakteur ten minste by magte was om oor die stene te beskik. Die enigste logiese afleiding onder die omstandighede was dat die kontrakteur die stene op die perseel vir die bouheer sou installeer. Onvermydelik het dit die gevolg gehad dat hy in die proses die stene aan die bouheer verkoop het. Daar was tussen die verweerder en die kontrakteur geen sprake van 'n voorbehoud van eiendomsreg nie… Die eiser het geen kennis gedra van wat die reëlings tussen die verweerder en die kontrakteur was nie. Die eiser het geweet dat die bouheer nie vir hom nie, maar vir die kontrakteur sou betaal. Onder die omstandighede meen ek dat die waarskynlikhede daarop dui dat daar wel met die lewering van die stene op die perseel 'n voorstelling was dat die kontrakteur by magte was om oor die stene te beskik.'

[5] The appellant's counsel submitted that this reasoning was wrong and relied on a passage in *B & B Hardware Distributors (Pty) Limited v Administrator, Cape* 1989 (1) SA 957 (A), subsequently followed by Kannemeyer JP in *Saflec Security Systems (Pty) Limited v Group Five Building (East Cape) (Pty) Limited* 1990 (4) SA 626 (E). In *B & B*, which was a case concerning representation by conduct, Rabie ACJ said at 964I-965B:

'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 Limited v L C van Deventer Beyleveld NO*; delivered on 22 September 1988 [1989 (1) SA 496 (A)]). 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…'

[6] In *Saflec* the facts were similar to the facts in the present case and may be summarised as follows. The respondent contended that the applicant was estopped from vindicating electronic metal detectors which it had sold to a third party because the applicant knew that they would be delivered to a construction site for a prison, which was being built for a Government department, and that the equipment would therefore (in terms of a standard clause in Government contracts) become the property of that Government department on being brought onto the site. The respondent further contended that by permitting or authorising delivery of the detectors to the site, without advising the respondent of its reservation of ownership therein, the applicant had represented to the respondent that the purchaser of the equipment was the owner of the

goods and/or that the purchaser had the *jus disponendi* in respect thereof. Kannemeyer JP quoted the passage from *B & B* set out above and went on to say (at 634J-635A):

'As in that case, so too in the present case it seems to me that the alleged representation relied on by the respondent is not an unequivocal one.'

[7] The test postulated in *B & B* that 'in order to found an estoppel, a representation must be precise and unambiguous'[1] has been held to be a correct reflection of our law in a case involving a representation in words.[2] The present is not such a case and the correctness of the decisions which lay down that test in such cases was not debated before us. It is therefore unnecessary and undesirable to express a view in this regard. But the test in regard to a representation made by conduct has been formulated differently. Our law is that a person may be bound by a representation constituted by conduct if the representor should reasonably have expected that the representee might be misled by his conduct[3] and if in

[1]This is the position in England, at least in regard to a representation in words: *Woodhouse A.C. Israel Cocoa Ltd SA and Another v Nigerian Produce Marketing Co Ltd* [1972] AC 741 (HL, E) which establishes that the words have to bear only one reasonable meaning (Lord Hailsham at 756D-F).
[2]*Hartogh v National Bank* 1907 TS 1092 at 1104; *Southern Life Association Ltd v Beyleveld* 1989 (1) SA 496 (A) 503I-504C, but such an approach has been criticised by Rabie *LAWSA* reissue vol 9 para 456 and Rabie and Sonnekus *The Law of Estoppel in South Africa* (2 ed) p 75 para 5.3.3.3. The counter-argument is put forcefully by Lord Denning MR in the *Woodhouse* case referred to in n 1 above in the Court of Appeal [1971] 2 QB 23 (CA) 59H-60H.
[3]*Strachan v Blackbeard and Son* 1910 AD 282 at 288-9; *Monzali v Smith* 1929 AD 382 at 386; *Poort Sugar Planters (Pty) Ltd v Minister of Lands* 1963 (3) SA 352 (A) at 364F-G; *Union National South British Insurance Co Ltd v Padayachee* 1985 (1) SA 551 (A) at 562I-562B.

addition the representee acted reasonably in construing the representation in the sense in which the representee did so. It is true that in *Service Motor Supplies (1956) (Pty) Limited v Hyper Investments (Pty) Limited* 1961 (4) SA 842 (A) at 848G-H Hoexter ACJ referred to 'the only inference' which the representee 'could possibly have drawn from the conduct of' the representor. But that this *dictum* reflects the facts in the particular case and is not to be taken as the requirement in all cases, appears from the subsequent decision of this court in *Poort Sugar Planters (Pty) Limited v Minister of Lands*[4] at 365A-C where Ogilvie Thompson JA, dealing with conduct on which it was sought to found an estoppel, said:

'Moreover, in my judgment, a representation, to found an estoppel, must (to borrow a phrase from *Halsbury*, 3rd ed. vol. 15 para. 426) be such as will reasonably be understood by the person to whom it is made in the sense contended for … [I]t does not appear to me that respondent's conduct … could reasonably have been understood by appellant in the sense now contended for by it.'

Furthermore, Trollip J said in *Electrolux (Pty) Limited v Khota* 1961 (4) SA 244 (W) at 246A-C:

'Consequently, I think that generally and logically the first enquiry should be into what was the specific conduct of the owner that the respondent relies upon for the estoppel. If that conduct is not such as would in the eyes of a reasonable person, in

[4]Above n 3

the same position as the respondent, constitute a representation that the swindler was the owner of, or entitled to dispose of, the articles, then *cadit quaestio* — no estoppel could then arise. But if such conduct does beget that representation, then the next enquiry would logically be whether the respondent relied upon, or was misled by, that representation in buying the articles.'

[8] Both the passage in *Poort Sugar Planters* and in *Electrolux* just quoted were referred to by Rabie JA as authorities in support of the following finding in his judgment in *Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou* 1978 (2) SA 835 (A) at 849D-F:

'Appellant se getuienis hou nie steek nie. Vanweë sy bekendheid met die inhoud van die ooreenkoms, het hy geweet wat die bevoegdhede van die ingenieur was en het hy geweet dat slegs die Sekretaris van die Departement, of sy gedelegeerde, onder klousule 18 kon optree. Hieruit volg dat daar nie optrede aan die kant van die Department was wat appellant redelikerwys onder die indruk kon gebring het dat die streekverteenwoordiger bevoegd was om die ooreenkoms te repudieer nie.'

And in the first edition of his book *The Law of Estoppel in South Africa* published in 1992, Mr Justice Rabie himself said[5] that the court in *B & B* 'referred to *Hartogh v National Bank* and to *Southern Life Association Ltd v Beyleveld NO* and failed to note that in those cases the rule that the presentation must be precise and unambiguous was mentioned in connection with representations made by words'. The same comment by

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the same learned author is to be found in the revised edition of *LAWSA,* published in 1996[6].

[9] In view of the body of authority to which I have referred, including the judgment of Rabie JA in *Van Rooyen* and his subsequent remarks expressed extra-curially, I am driven to the respectful conclusion that the statement in *B & B* incorrectly formulates the test for a representation by conduct. The same criticism may be levelled at the decision in *Saflec* where the test postulated was that the representation had to be 'unequivocal'. Nevertheless if a representation by conduct is plainly ambiguous, the representee would not be acting reasonably if he chose to rely on one of the possible meanings without making further enquiries to clarify the position.

[10] The appellant's counsel placed much store by an alleged concession wrung out of the respondent during cross-examination, which he submitted was to the effect that any logical person, including Uys of the appellant, could have accepted that the respondent knew of a 'general practice' whereby ownership is reserved by the seller in building materials sold on credit to a builder. The respondent's evidence on this point is not clear from the record inasmuch as a crucial answer given by

[6]Vol 9 para 456

him was not transcribed in full. There was no evidence on record that the respondent

knew, or that Uys could reasonably have accepted that he knew, that where building materials are sold on credit, the seller frequently or even usually, much less invariably, reserves ownership in them until paid. At best for the appellant the concession, if made, can only amount to this: That Uys of the appellant was entitled to assume that the respondent knew that sometimes building suppliers reserve ownership in goods sold on credit. But that would not suffice to defeat the plea of estoppel. An owner's *rei vindicatio* can be defeated not only when the representation made by the owner is that a third party is the owner, but also where the representation is that the third person is entitled to transfer ownership to the representee.[7] In this latter regard there are the following important facts, all known to Uys. The paving stones were going to form part of the works being constructed by the builder for the respondent. They were purchased for that specific purpose. Without them, the building works

[7]*Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk* 1996 (3) SA 273 (A) 284I-J, the cases quoted at 286H-288E and the conclusion reached at 288C.

could not be completed. The colour of the majority was chosen to match the building. A number had to be cut and fitted. Although, on the evidence of Uys, they could without difficulty be picked up, it is clear that some effort would have been required to perform this task bearing in mind the area (some 570 m²) and the fact that they had been embedded in a sand base. All of these facts suggest that the paving stones, once laid, were going to remain permanently in place and the admission by the respondent that they remained movables does not detract from this – it merely has the effect that the respondent is precluded from arguing that he became the owner of the paving stones by *accessio*.

[11] In the circumstances the conduct of the appellant could, despite the alleged concession, reasonably have been expected to mislead the respondent into believing that the builder (even if not the owner) had the right to transfer ownership in the paving stones; and furthermore, the respondent acted reasonably in forming the belief which he did: cf the reasoning in *Konstanz Properties (Pty) Limited v Wm Spilhaus & Kie (WP) Beperk* (above, n 7) at 286E-288D, and the autorities there quoted, none of which it is necessary to repeat.

[12] The appellant also put in issue whether it was negligent. It clearly was. The alienation of the paving stones in question by the builder to the

respondent took place with the approval and in accordance with the expectations of the appellant ─ that was the very purpose for which they were supplied. The builder was entitled to dispose of them in the ordinary course of the building operations undertaken for the respondent, even before he made payment to the appellant ─ indeed, they were required urgently, and it could therefore have been expected that they would be laid quickly. The appellant must have been aware of the possibility that the builder might not pay the amount owing to it ─ it was for that very reason that the appellant reserved ownership in the paving stones. But the reservation of ownership created the further foreseeable possibility which the appellant did not guard against, namely, that the respondent would pay for the paving stones once they had been laid, in the belief that he would thereby become the owner. The reasoning in *Konstanz Properties* at 288D-I which I have largely paraphrased in this paragraph is directly applicable and it is decisively against the appellant on this point.

[13] The other requirements of estoppel were not put in issue by the appellant, and rightly so. They accordingly do not require consideration.

[14] The appeal is dismissed, with costs.

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T D CLOETE
JUDGE OF APPEAL

Concur: Scott JA
Zulman JA
Farlam JA
Conradie JA