



'Reportable'

SUMMARY

CASE NO.: I 4499/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE DEPUTY SHERIFF OF SWAKOPMUND v MARINA TOYOTA CC and J L BOLTMAN

PARKER J

2011 November 4

Estoppel - Interpleader proceedings – Motor vehicle attached by Deputy Sheriff and taken under his control – Second claimant being judgment creditor laying claim to motor vehicle – Second claimant not disputing first claimant's ownership of motor vehicle but relying on estoppel to prevent first claimant vindicating motor vehicle – Court finding that second claimant has not proved any representation by conduct imputable to first claimant that judgment debtor was owner of the motor vehicle – Court finding further that second respondent has failed to discharge the *onus* of proving that *culpa* of the first claimant caused him to be misled into erroneous belief that judgment debtor was owner of the motor vehicle.

Held, where estoppel is pleaded, the owner of the goods is not precluded from asserting his right to vindicate his property unless there is clear proof of estoppel.

Held, further that in order to establish estoppel, the party who sets up a case of estoppel must prove that *culpa* attributable to the owner of the goods in question caused him to be misled into erroneous belief that a third party was the owner of the goods.

Held, further that since the first claimant has not made any representation, by conduct or otherwise, to the second claimant that the motor vehicle was the property of the judgment debtor, who was neither an agent for sale nor a factor, the first claimant was not estopped from asserting that it is still the owner of the motor vehicle.

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE DEPUTY SHERIFF OF SWAKOPMUND

Applicant

and

MARINA TOYOTA CC

First Claimant

J L BOLTMAN

Second Claimant

CORAM: PARKER J

Heard on: 2011 October 28

Delivered on: 2011 November 4

JUDGMENT

PARKER J: [1] In this matter the applicant has filed an interpleader notice in terms of rule 58 (1) of the Rules of Court. The applicant is the deputy sheriff of Swakopmund. On 3 February 2011 the applicant proceeded to attach and take under his control the movable goods of Mr Louis Haasbroek in terms of a Writ of Execution issued by the second claimant.

[2] The applicant gave oral evidence before the Court in which he explained that he attached and took under his control '1 x Colt Bakkie ("the motor vehicle") (no registration number as the registration number N38690T belongs to a Toyota Corolla)' because that was the only moveable goods of the said Haasbroek, the judgment debtor. It is this motor vehicle which is the subject of the present

interpleader notice, because the first claimant has claimed the said motor vehicle. I shall return to the significant fact that nowhere in the Writ of Execution is any specific movable goods mentioned. It is also important to note – and I shall revert to it in due course – that the goods were attached in Swakopmund and not in Otjiwarongo where the first claimant carries on business.

[3] At the commencement of the hearing Mr Van Zyl, counsel for the first respondent, moved the Court to grant the relief the first claimant has prayed for in the Notice of Motion, supported by an affidavit of Frederik Deon Swart, that is, to condone the late filing of the first claimant's particulars of claim in terms of rule 58 (3)(b) of the Rules of Court in respect of the Interpleader Notice. The second claimant did not oppose the application, and I am satisfied that a case has been made out for the grant of the relief; and so the late filing of the first claimant's particulars of claim is condoned; and there is no order as to costs as respects the condonation application.

[4] The first claimant's claim is based on ownership of the motor vehicle; and from what I can gather from the papers and submissions by Mrs Visser, counsel for the second claimant, the second claimant does not, as a matter of law, dispute the first claimant's ownership of the motor vehicle. The second claimant's claim is rather based solely on estoppel; and so it is to estoppel that I now direct the present enquiry in determining the interpleader.

[5] Put simply, estoppel is a rule of evidence which precludes X denying the truth of some statement previously made by him or from denying the existence of facts which X has by words or conduct led others to believe in. And before estoppel can lie against a party, it must be proved (1) that X had previously by

words or conduct held out the existence of a certain fact, and (2) that X has led Y alleging estoppel to believe in the existence of such fact, and (3) that Y has by reason of such belief acted to Y's prejudice. (See *Beck's Theory and Principles of Pleading in Civil Actions*, 5th edn: para 88 and the cases three cited.) In this regard, it is worth noting that in order to succeed, Y must prove together all the three items (i.e. (1), (2) and (3)) in the *Beck's* proposition.

[6] In her attempt to prove, on behalf of the second claimant, item (1) of the aforementioned *Beck's* proposition, Ms Visser says that the second defendant relies on the conduct of the first claimant; and, according to counsel, the said conduct consists of (a) Haasbroek's undisturbed possession of the motor vehicle and (b) the fact that the registration number of the motor vehicle was N38690T and not N5560V or N66635W which, according to the Certificate of Registration issued by NATIS, were the last two registration numbers. Thus, according to Ms Visser, Haasbroek was in 'undisturbed possession' of the motor vehicle for some two years and two months, the registration number on the motor vehicle has been changed, as aforementioned, and, according to counsel, it was probable that the applicant saw Haasbroek driving the motor vehicle with the new registration number on it. And all that, counsel says, amounted to representation by conduct that is attributable to the first claimant that the motor vehicle belonged to Haasbroek, and so the first claimant cannot vindicate the motor vehicle.

[7] Ms Visser buttressed her contention with the submission that the first claimant had also given the dealer stock certificate of the motor vehicle to Haasbroek, entitling him to do as he wished with the motor vehicle. And according to Ms Visser the first claimant's conduct in that behalf amounted to

negligence that is imputed to the first claimant and upon which the case of estoppel can be hanged by the second claimant.

[8] I now proceed to consider Ms Visser's submission. There is not one grain of evidence on the papers that Haasbroek was in 'undisturbed' possession of the motor vehicle. I do not also find a wraith of evidence on the papers that tends to establish that the first claimant made any representation by conduct, that can be imputed to the first claimant, to the applicant or to the second claimant that the motor vehicle belonged to Haasbroek. All that is proven is that, as far as the applicant is concerned, Haasbroek was in possession of the motor vehicle and the first claimant did not make any representation to him that Haasbroek was the owner of the said motor vehicle. The motor vehicle was the only movable goods in Haasbroek's possession – as the applicant testified – and so the applicant attached that motor vehicle.

[9] As respects the second claimant; the evidence that I accept is that the applicant attached the motor vehicle in Swakopmund, and not in Otjiwarongo where the first claimant carries on business, as Mr Van Zyl reminded the Court; and so Ms Visser's submission that Haasbroek was driving the motor vehicle with the new registration number on it and the first claimant 'probably' saw it has, with respect, no merit. Besides, and more important, it has been said that –

'the great balance of the authority followed in our Courts is in favour of the law that the owner can recover his goods except in the case of sale and pledge by agents for sale and factors (*Grosvenor Motors (Potchefstroom) Ltd v Douglas* 1956 (3) SA 420 (A) at 426C, *per Centlivres CJ*).'

[10] In this regard, Ms Visser's reliance on negligence of the first claimant is misplaced. An estoppel may be created by negligence but the doctrine is very strictly limited in application. An owner of a movable ('A') may by his negligence forfeit his right to vindicate such movable in the hands of a third party ('B') if B has acquired the movable from another person ('C') bona fide believing that C had the right to dispose of it, being misled by the negligence of A; and what is more, there must be clear proof of *culpa* on the part of another before estoppel can apply against him (*Beck's Theory and Principles of Pleading in Civil Action*, *ibid.* Para 88); *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd* 1976 (1) SA 441 (A)).

[11] The evidence establishes that Haasbroek and the first claimant agreed the purchase price of the motor vehicle because Haasbroek was desirous of purchasing the motor vehicle; and to assist him in obtaining finance the first claimant made out an invoice for the vehicle to Haasbroek in an amount of N\$95,000.00; and a dealer stock certificate was also delivered to him by the first claimant to enable him to register the vehicle in his name but only after he has paid the purchase price. On top of that, there was an oral agreement between the parties that Haasbroek would not register the vehicle nor acquire ownership thereof until he had made full payment of the purchase price.

[12] In order to establish estoppel, the second claimant has to prove that *culpa* on the part of the first claimant caused the second claimant to be misled into the erroneous belief that the motor vehicle belonged to Haasbroek. (See *Grosvenor Motors (Potchefstroom) Pty Ltd v Douglas* *supra* at 426E *per* Steyn JA.)

[13] I find that the second claimant has not discharged the onus of providing any relevant negligence on the part of the first claimant. Indeed, as Mr Van Zyl submitted – correctly, in my view – the second claimant has not proved any representation by conduct to the first claimant that can be imputed to the first claimant, let alone a negligent representation, that the motor vehicle belonged to Haasbroek. What the second claimant stands on as showing the elements of the conduct by the first claimant (and which I have set out previously) cannot by any stretch of legal imagination amount to representation that can be imputed to the first claimant and which can prove an estoppel. Thus, as the first claimant made no representation – by conduct or otherwise – to the second claimant or to the applicant that the motor vehicle was the property of Haasbroek who was neither an agent for sale nor a factor, the first claimant is not estopped from asserting that it is still the owner of the motor vehicle: Mitsubishi Colt 3000 V6 Club Cab 4 x 2, Engine No. 6G72PY2114, Vehicle Identification Number (VIN), ABJK66HNR2E075665, as appears in the ‘Certificate of Registration in Respect of Motor Vehicle’, annexed to the Interpleader Notice.

[14] As to costs; it is Mr Van Zyl’s submission that costs should be awarded to the first claimant because as at May 2011 the second claimant was aware of the first claimant’s entitlement to the motor vehicle and the second claimant ought not to have claimed the motor vehicle based on estoppel. That may be so; but as Ms Visser submitted, the second claimant was entitled to test its claim in the Court. Misplaced confidence in one party that it has a good case and so pursues the case without malice but vigorously against the other party is not synonymous with vexatiousness or frivolousness. Be that as it may, this, in my opinion is a proper case where costs should follow the event.

[15] In the result I make the following order:

1. The first claimant's claim in, and entitlement to, the said motor vehicle as the owner thereof is upheld, and the second claimant's claim is dismissed with costs; such costs to include costs of one instructed and one instructing counsel.
2. The applicant must release his possession of the said motor vehicle and deliver same to the first claimant.

PARKER J

COUNSEL ON BEHALF OF THE FIRST CLAIMANT:

Adv. C Van Zyl

Instructed by:

Engling, Stritter & Partners

COUNSEL ON BEHALF OF THE SECOND CLAIMANT:

Adv. I Visser

Instructed by:

Francois Erasmus & Partners