

SOUTH AFRICA / JUDGMENT

Mmore v Makhetha (A3080/17) [2018] ZAGPJHC 134 (26 April 2018)

[2018] ZAGPJHC 134

COURT

South Gauteng High Court, Johannesburg

BEFORE

R M Keightley, S July

CASE / FILE NUMBER

A3080/17

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: A3080/17

(1)

REPORTABLE: YES

/ NO

(2)

OF INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED.

.....

.....

DATE

SIGNATURE

In

the matter between:

MOTHUSI
CLOUDINE
MMORE
APPELLANT
And
LETELE
MAKHETHA
RESPONDENT

J
U D G M E N T
KEIGHTLEY,
J:
INTRODUCTION

[1]

The appellant was the plaintiff in the court a quo, being the Johannesburg Magistrate's Court. She instituted an action against the respondent for the return of a Renault Megane motor vehicle ("the motor vehicle" or "the Megane") in the possession of the respondent. Her cause of action was the rei vindicatio, based on her alleged ownership of the motor vehicle. Appellant averred in her particulars of claim that the parties had entered into a verbal agreement in terms of which she had loaned the motor vehicle to the respondent for a week. Contrary to this agreement, the appellant claimed that the respondent had failed to return the vehicle to her on expiry of this period.

[2]

It was common cause on the pleadings that the motor vehicle was registered in the appellant's name. It was further common cause that the respondent was in possession of the vehicle when the action was instituted. However, in his plea, the respondent denied that the appellant was the de facto owner of the vehicle. He averred, on the contrary, that he had bought and paid for the vehicle. The nub of the respondent's defence was that the appellant, not being the owner of the vehicle, was not entitled to exercise the rights of an owner under the rei vindicatio and to demand that he return the vehicle to her possession.

[3]

The critical issue for determination by the court a quo

was whether the appellant had established that she was the owner of the motor vehicle. The court found that she had failed to satisfy her onus in this regard, and found in favour of the respondent. Being dissatisfied with this outcome, the appellant instituted the appeal before us.

THE

EVIDENCE BEFORE THE COURT A QUO

[4]

It was common cause between the parties that they had been involved in a romantic relationship from 2005 to 2011. This was at a time when the respondent already had a life partner who did not know that he was involved in another relationship with the appellant. It was also common cause that the original source of the money used to purchase the motor vehicle was an amount of approximately R42 000 that the respondent transferred into the appellant's bank account. This money came from the respondent's inheritance from his parents. The nature of this payment was in dispute. The appellant's version was that it was a gift.

This was disputed by the respondent for the reasons I will set out shortly. It should be noted that in her evidence the appellant referred to the amount as being R40 000. In my view, nothing turns on whether it was R40 000 or R42 000.

[5]

The appellant's version was that she used this money to purchase a Jetta motor vehicle. Her nephew assisted her with this purchase. The Jetta was subsequently sold. The appellant conceded that the respondent had arranged for the sale of the Jetta. On the appellant's version, the respondent thereafter alerted her to the fact that the Megane was for sale at an auction. After that she gave him a cheque drawn on her bank account (being the same account into which the original R40 000 from the respondent had been deposited), the respondent proceeded to the auction and purchased the Megane, which was subsequently registered in the appellant's name. It was common cause that the proceeds from the sale of the Jetta (which had been funded by the original deposit of R40 000 or R42 000 into the appellant's account by the respondent) ultimately were used to purchase the Megane, which is the subject matter of this appeal.

[6]

The appellant's claim of ownership was based in her particulars of claim on the plain assertion that she was the registered owner of the motor vehicle. It is trite that in terms of our law, registration of a motor vehicle in a person's name is not sufficient to establish ownership. In terms of our abstract system of transfer of ownership, it is necessary to interrogate the real agreement between all the parties involved in the transaction to determine who acquired legal ownership of the object in question. The question is whether there was an agreement between them that there would be a legal acquisition of ownership. Registration in the name of a particular party may be a relevant factor in this inquiry, but, if challenged, it must be weighed against all other relevant evidence in order to determine who actually acquired ownership in the eyes of the law. It may be that, on the facts, despite registration in a person's name, there was no intention that he or she will de facto and de lege become owner of the vehicle in question.

[7]

In amplification of her case, the appellant testified that she had intended to become owner when she registered the vehicle in her name. She confirmed that the respondent had initially given her an amount of R40 000, which she claimed was simply in the nature of a gift. In other words, she testified that the respondent had not expected the money to be repaid. She had used this money to buy the Jetta, and then used the proceeds of the sale of the Jetta to purchase the motor vehicle. Her nephew had physically bought the Jetta on her behalf, as he had experience in the business of buying and selling used cars. In answer to the question from her attorney: "Then to buy the Megane you instructed the defendant to act as your agent?" she responded affirmatively. She was also asked whether, "this, if I can call 'business' that you had, was the defendant a part of that business agreement, or business dealings?" she responded in the negative. I should add that this was the only reference by the appellant in her evidence in chief to the purchase of the vehicles being part of a business venture. As I indicate shortly, she only amplified her version in this regard under

re-examination.

[8]

Appellant's attorney put the respondent's version to the appellant during her evidence in chief, and the appellant denied that version. She denied that the reason that the vehicle had been registered in the appellant's name was so that the respondent's life partner would not know about their affair and their dealings involving the vehicles. She also denied that the vehicle had been purchased with the respondent's money. She was asked to comment on an SMS that she had sent to the respondent. In that SMS she had told the respondent to "come and get your car" (meaning the motor vehicle). She explained that this was at a time when they were not getting on together, and she had been trying to be sarcastic. It was in response to the respondent demanding the car from her. She gave the response while she was angry.

[9]

Under cross-examination the issue of the business of buying and selling cars was considered further. The appellant denied that she and the respondent had decided to go into the business of buying and selling cars together while they were involved in their affair. She claimed that the respondent's role was limited to assisting her by taking the Jetta to the Free State to be sold, and by going to buy the motor vehicle at the auction.

[10]

Under re-examination, the appellant explained that her nephew, who had bought the Jetta, was in the business of buying and selling cars. She had told the respondent about this, and he had offered to give her R40 000 to start a business. However, there was no agreement that she would pay this money back to the respondent. She also stated that the respondent had never sought to share in the profits of her business.

[11]

The respondent's version was that he and the appellant had decided to go into business together while they were still involved

in their affair. As capital for the business, he transferred an amount of some R42 000 into an account opened specifically for this purpose in the appellant's name. The arrangement between the parties was that they would share 50/50 in the profits of the business. At first, they thought of opening a second-hand clothing business, but this did not work out. It was then that the appellant told the respondent about her nephew who was in the business of buying and selling used cars. They decided to go into the same type of business. They would buy a vehicle and use the proceeds to buy a new vehicle for sale.

[12]

The Jetta was bought as part of the business relationship between the parties, with the R42 000 being used as the capital to purchase it. The respondent did not want his life partner to know about his business dealings with the vehicle, and so the arrangement between him and the appellant was that it would be registered in her name. In this way, no correspondence about the Jetta would reach the respondent and his life partner would be none the wiser. According to the respondent, the same held true with regard to the Megane that was purchased later. At no stage was there any agreement that the appellant would be the owner of the vehicles. The business relationship was a team effort, with the respondent being in a position to dictate the terms as he had provided the capital.

[13]

The respondent arranged with a friend of his in the Kroonstad to sell the Jetta. The transaction was successful, with the proceeds being deposited in the bank account held in the appellant's name. According to the respondent, shortly after the Jetta was sold he sourced the Megane motor vehicle at an auctioneer. They discussed it and decided to purchase the vehicle. The respondent attended at the auction and bid for the vehicle. The bid was successful and he then arranged with the respondent to secure a bank guaranteed cheque from the bank account to pay for it. The vehicle was released to him on payment. He drove it to the appellant's residence as

she had secure parking for it in a garage. The respondent phoned the same friend in Kroonstad who had sold the Jetta for them and arranged for him to try to sell the Megane. He and the appellant once again drove to Kroonstad to deliver the car to the friend.

[14]

However, after some time without a sale, they decided to bring the vehicle back to Johannesburg to try to sell it here. The respondent suggested that the appellant use the vehicle as this would be a form of advertising it for sale. Also, she had an old mother who needed transport. This arrangement lasted for about a year. There appears to have been no progress on the sale of the vehicle during this period.

[15]

It seems that the romantic relationship between the parties soured during this time. The respondent testified about various disagreements between them regarding his taking the vehicle back from the appellant. According to him, the appellant refused on the basis that she would only do so if he repaid to her money she had spent on maintaining the vehicle and repairing it. The respondent's attitude was that as the appellant was the one using the vehicle it was only fair that she should pay for the maintenance required and for repairs relating to damage to the vehicle. Eventually, the respondent used the excuse of his cousin's funeral in Lesotho to obtain possession of the vehicle. On his own version, this provided him with an opportunity to take possession of the vehicle and to retain possession. After making some excuses to the appellant about why he had not returned the vehicle to her, he eventually told her that he was not going to give the vehicle back, but was going to give it to his son.

[16]

This prompted the appellant to go to the police. Both the appellant and the respondent testified about this. It is not necessary to go into the details, save to say that it is common cause that the respondent gave a statement to the police in March 2011 to the effect that the vehicle had been purchased as part of their business arrangement. The respondent

outlined the purchase of the Jetta with the money he had deposited into the appellant's bank account. He stated that he had done this as he did not want his wife to know about it. He also asserted in the statement that the vehicle was only registered in the appellant's name but that it was not her vehicle. He also referred to an SMS that she had sent to him saying: "You will get your car after 2h30 today ...". He indicated in his statement that this showed that the appellant knew that the vehicle was his. It is common cause that the police declined to take the matter further. Thereafter, the appellant instituted her civil action for the recovery of the vehicle.

JUDGMENT

OF THE COURT A QUO

- [17] The court a quo identified the key issue for determination as being whether the appellant or the respondent was the owner of the motor vehicle. It noted that it was faced with two irreconcilable versions. The court considered the credibility of the parties and the probabilities of their versions.
- [18] With regard to the question of the nature of the R42 000 payment by the respondent to the appellant, the court found that the appellant's version that it was a gift was improbable. The court noted that the appellant had testified that this was the only monetary gift she had ever received from the appellant and found it improbable that the respondent, who was a businessman, would suddenly, and out of the blue, give the appellant R42 000.
- [19] The court a quo also accepted as probable the respondent's version that both vehicles had been registered in appellant's name to avoid his life partner finding out about his affair with the appellant and their business dealings. The court was persuaded, too, that the appellant's SMS to the effect that she would bring back the respondent's vehicle was evidence that the appellant well knew that in terms of the arrangement between them, she was not the owner of the vehicle. The court found that the probability was that the appellant knew that the respondent was the owner as the vehicle had been bought with his money, and that she knew that the money she had received from him was not a gift, but was in fact capital intended to be used to buy and sell vehicles. The court noted that it was common cause that the respondent had been involved in buying and selling (or attempting to sell) the vehicles through the respondent's friend in Kroonstad.

[20] As to the credibility of the parties, the court a quo found the respondent to have been an honest witness who told things as they were and who was not moved under cross-examination. The court took it to be a point in his favour that the respondent had been open with the court in saying that he had used his cousin's

funeral in Lesotho as a pretext to get the vehicle back from the appellant.

[21] On the contrary, the court dismissed the appellant as a dishonest witness who wanted to be unjustly enriched from money provided by the respondent, and who took advantage of the fact that the respondent had wanted to keep his dealings with the appellant a secret from his life partner.

[22] The court also rejected the evidence of the appellant's nephew who had testified that he had approached his aunt with a proposal to buy the Jetta, and that she had bought the Jetta with her own money. The court found that the nephew had been biased in favour of his aunt.

ISSUES

ON APPEAL

[23] The appellant noted no less than 15 grounds of appeal. Many are interrelated, and are aimed at various findings made along the way in the judgment of the court a quo. In essence, the real issue on appeal is whether the court a quo was correct in finding that the appellant had not met the onus of establishing that she was the owner of the motor vehicle.

[24] The appellant takes issue with the court a quo's rejection as improbable the appellant's version that the R42 000 paid to her was a gift. This was a crucial finding by the court below as it went directly to the nub of the appellant's case, viz. that she had independently bought the motor vehicle for herself, and that she and the respondent were not involved together in the business of buying and selling cars.

[25] To sustain this version, the appellant was required to satisfy the court that for no reason other than from a fit of generosity the respondent had paid her a substantial sum of money. Further, that this "gift" had no connection with the respondent subsequently being involved in the transactions in terms of which first the Jetta was purchased and sold, and subsequently the Megane was purchased. This is because the appellant did not dispute that the respondent had been involved by, among other things, assisting to sell the Jetta through the respondent's friend in Kroonstad; identifying the Megane as being a possibility for the next vehicle to purchase; attending to purchase the Megane at the auction; taking delivery of it; once again arranging for the same friend in Kroonstad to attempt to sell the Megane; and going together with the appellant to retrieve the Megane from Kroonstad when a sale did not come through.

- [26] The appellant flatly denied in her evidence that she and the respondent had been involved together in the business of buying and selling the Jetta, and then buying the Megane. In other words, her version was that none of this conduct on the part of the respondent was indicative of a business relationship between them, nor was the respondent's initial payment of R42 000 into her account indicative of such a relationship.
- [27] Was the court a quo wrong in concluding that the appellant's version as to the nature of the R42 000 payment was improbable? In my view, the court cannot be faulted in this regard. On a balance of probabilities, the evidence established a link between the initial payment of R42 000 into an account held in the appellant's name, and the commencement of a business to buy and sell vehicles. The evidence also clearly established a link between that business (involving the purchase of the Jetta, and subsequently, the Megane) and the respondent. The capital was put up by the respondent, and he was intimately involved in the relevant transactions. It is significant that the initial payment to the appellant's bank account occurred shortly before the Jetta was purchased and then sold. This is all consistent with a joint business venture between the parties involving, as the respondent contended, him as the dominant business partner. He was a businessman at the time. It is common cause that he had not previously given the appellant gifts of money. Accordingly, it is highly improbable, as the court a quo said, that out of the blue he would have decided to gift the appellant a considerable sum of money and then, thereafter, simply to act as her agent in her independent purchase and sale of cars. The registration of the vehicles in the appellant's name is also completely consistent with the respondent wishing to keep his relationship with the appellant a secret from his life partner. In this regard, the appellant's denial that she knew about the respondent's life partner is also improbable in view of the fact that she and the respondent had been involved in a relationship for a number of years.
- [28] In support of these probabilities is the fact that it was common cause that the dispute around the ownership of the vehicle arose after the romantic relationship between the parties had broken down. The respondent correctly points out that the appellant confirmed that she had sent an SMS to the respondent telling him to "come and get your car". She also confirmed that the respondent had told her via SMS that she should deliver the vehicle registration papers to him. This is consistent with the respondent's version that although the vehicle was registered in the appellant's name, he was in fact the owner. Although the appellant said that she had been "sarcastic" and angry when she had told the respondent to come and collect his car, this explanation simply does not hold water when viewed in the context of the evidence as a whole.
- [29] In my view, on the probabilities the evidence points to a business relationship between the parties along the lines described by the respondent. Despite the vehicle being registered in the appellant's name, it was not the real intention of the parties that she would acquire legal ownership. Her interest in the vehicle was limited to a share in the ultimate profits that may have flowed from its sale. She possessed the vehicle with the consent of the respondent, and not as owner. A dispute arose between them after the romantic relationship broke down and

he wished to recover the vehicle from her. She held out, wishing to be reimbursed for expenses she had incurred while using the vehicle. Ultimately, the respondent resorted to self-help by using the guise of his cousin's funeral to secure a return of the vehicle to him. That the respondent did so is of no assistance to the appellant. Her claim was based on the *rei vindicatio*. She did not rely on the *mandament van spolie*. She bore the onus of establishing ownership, not possession. As the court *a quo* correctly found, she failed to do so and was thus not entitled to judgment in her favour.

- [30] The appellant also takes issue with the court below approach to, and finding on the issues of credibility. In the first instance, the appellant submits that the court *a quo* erred in that it did not make a finding on the probabilities, but rather on credibility. In other words, the submission is that the court was persuaded primarily that the respondent was a credible witness, and that the appellant was not and that it based its decision on the probabilities on this credibility finding. The appellant made this submission on the ground that in paragraph 22 of the judgment, under the heading "Evaluation of Evidence", the magistrate stated that: "The court is confronted with two irreconcilable versions. The court has to make findings on the credibility of factual witnesses." The appellant's argument is that this shows that it was the issue of credibility, and not the probabilities that formed the core of the ultimate finding by the court. While it is so that in this paragraph, the court did not say that it was also necessary to consider the probabilities of the two versions, it is quite clear from the paragraphs that follow, that this is precisely what the court went on to do. It is evident from the judgment read as a whole that the court below considered the probabilities thoroughly and that this consideration was not based on the credibility of the competing parties' testimony, but on the

facts

considered as a whole. Thus, there is no merit in the appellant's contention in this regard.

- [31] The next submission in regard to credibility is that because the appellant engaged in a subterfuge with his life partner, and because

he lied to the appellant as to why he had not returned the vehicle to her after the funeral, the court ought to have rejected his evidence as being incredible. The point is not well made. Contrary to what the appellant submits, the fact that he engaged in a subterfuge with his life partner as regards to his relationship with the appellant does not make the respondent *per se* a dishonest person and litigant. His credibility was to be judged on whether or not he was honest in his testimony on the

relevant issues before the court, not credibility in other contexts. It is well established that even a witness who is found to have been dishonest on collateral aspects of his or her testimony may still be found to have been credible in respect of the relevant issues.[1] It is also trite that an appeal court will not lightly interfere with a credibility finding by a trial court.[2] Having regard to the transcript of proceedings, there is nothing to suggest that there is any scope for this court

to interfere with the court a quo's credibility finding as regards to the respondent. The transcript of proceedings shows that he gave detailed evidence and was not shaken under quite extensive cross-examination. His version remained consistent throughout.

Moreover, it was consistent with the version he gave in his statement to the police in 2011.

[32] There is also no merit in the submission by the appellant that the court a quo erred in making findings on evidence that was not admissible. The submission was based on the fact that the respondent's

attorney at trial did not formally put to the appellant the respondent's version when cross-examining the appellant.

In the first place, it is not clear from the appellant's submissions what was the alleged inadmissible evidence alleged to

have been relied on by the trial court. In the second place, the appellant's attorney did not raise an objection to the admissibility of aspects of the respondent's testimony and ask for a ruling from the trial court. All the record reflects is that the appellant's attorney raised the issue that the respondent's attorney had not put various details of the respondent's version to the appellant under cross-examination. The appellant's attorney stated that as a consequence she would argue that the respondent's version was to be rejected on the basis that he was manufacturing a version on the spot, having heard the appellant's version. This is cannot be equated, as counsel for the appellant argued before the court on appeal, to an implied objection having been raised. In so far as the argument that the respondent's version was manufactured after having heard the appellant's testimony, this simply cannot be so. By the extensive details given in his oral testimony, his version was consistent with the version given by his attorney in his opening address, which took place before the appellant testified. It was also consistent with the version he gave in his police statement many years previously. Furthermore, the respondent's attorney explained to the court why he had not put the full details of the respondent's version to the appellant.

[33] It is also significant that the appellant's own attorney put the respondent's version to the appellant when she gave her evidence in chief, albeit not with the level of detail later given by the respondent. In short, there is no question that the respondent's version on the main issue before the court was laid down and known long before he stepped into the witness

box. There was no unfairness perpetrated against the appellant in this regard: she was called to answer on the respondent's

version on the main issue before the court and she did so; further, the magistrate did not rely on any of the details provided by the respondent in his testimony in reaching its decision on the probabilities. Thus, I am of the view that there was no

misdirection on the part of the court a quo in relying on the details provided by the respondent in amplification of his well-known version in finding in his favour on the probabilities.

[34] Finally, the appellant submits that the court below erred in law in finding that the respondent, and not the appellant, was the owner of the motor vehicle. The submission proceeds on the basis that when the appellant loaned the vehicle to him to attend the funeral in Lesotho she had no intention, in the legal sense, of transferring ownership to him. Thus, so the submission goes, there was no real agreement between them that he would acquire ownership. This submission may be disposed of briefly. It is based on a misconception. It was never the respondent's contention that the appellant had transferred ownership to him by loaning the vehicle to him. The nub of the case was whether the appellant was able to satisfy the onus she bore of establishing that she had acquired ownership in the first place. For the reasons already stated, in my view, the court a quo did not err in finding against her on this critical point. This leg of the appeal accordingly also must fail.

CONCLUSION

[35] It follows, for the reasons stated above that the appeal must fail. I propose the following order:

1. The appeal is dismissed with costs, excluding the costs of counsel for the respondent, who appeared pro bono.

R M KEIGHTLEY

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

I agree

S JULY

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Date Heard

: 29 January 2018

Date of Judgment

: 26 April 2018

Counsel for the appellant : R Blumenthal

Instructed by

: Muller Voigt Attorneys

Counsel for respondent : MA Wesley

Instructed by

: Law Clinic, University of Johannesburg

[1] Orville Investments (Pty) Ltd v Sandfontein Motors 2000 (2) SA 886 (T) at 914C-D

[2] R v Dhlumayo and Another 1948 (2) SA 677 (A)

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