

SOUTH AFRICA / JUDGMENT

Q.V Trading CC v KGK Diamonds SA (Pty) Ltd (34348/2018) [2019] ZAGPJHC 397 (30 September 2019) [2019] ZAGPJHC 397

COURT

South Gauteng High Court, Johannesburg

BEFORE

F Southwood

CASE / FILE NUMBER

34348/2018

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REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA,
GAUTENG
LOCAL DIVISION,
JOHANNESBURG
CASE
NO: 34348/2018
In

the matter between:

Q.V.
TRADING CC
(Reg.
No. 1996/002103/23)
Applicant
and
KGK
DIAMONDS SA (PTY) LTD
(Reg.
No.
2002/031614/07)
Respondent

JUDGMENT

SOUTHWOOD AJ:

A.

INTRODUCTION

- [1] The applicant seeks to vindicate five diamonds from the respondent.
- [2] The diamonds are identified as 1.10 E SI CERT #2276019683, 1.26 E VSI CERT #1279465516, 1.02 E VVS2 CERT #2274159100, 1.01 E SI1 CERT #2106663405 and 2.07 E SI1 CERT #223675202 ('the diamonds').
- [3] The applicant claims to be the owner of the diamonds which it alleges are unlawfully in the respondent's possession.
- [4] At the outset of the hearing, Mr Hollander, for the applicant, sought a referral of the matter to trial. That application was dismissed on the day of the hearing in an ex tempore ruling on the basis that I could discern no material disputes of fact on the papers. Thereafter, the merits were argued. Mr Hollander did not participate save to make submissions in relation to costs. Mr Hollander's heads of argument, similarly, did not deal with the merits. Only respondent's counsel, Mr Peter SC, addressed me on the merits.

B. RELEVANT FACTS

- [5] The following facts have not been properly placed in dispute.
- [6] The applicant purchased the diamonds from various entities in 2016 and 2017 and took delivery of the diamonds.
- [7] On 16 January 2018, the applicant delivered the diamonds to Nevada Diamonds Pty Ltd ('Nevada') in terms of the applicant's 7-day Appro Note No 2018/A1384.
- [8] In terms of the Appro Note, Nevada took possession of the diamonds for approval only and had to return the diamonds to the applicant; ownership of the diamonds remained with the applicant until the diamonds were invoiced; Nevada could not hand over possession of the diamonds to a third party without the applicant's written consent; and ownership of the diamonds would only pass to Nevada on payment in full.
- [9] Nevada is not a consumer or end-user of diamonds but a trader in diamonds. The purpose of Nevada taking possession of the diamonds was to on-sell them. As is customary in the diamond industry, owners of diamonds place them with a trader to on-sell. Approval in this context means confirmation of a purchase and sale as between the trader and the owner which occurs when the trader is able to on-sell the diamonds.

[10] The applicant did not invoice Nevada for the diamonds and Nevada did not make payment to the applicant for the diamonds.

Accordingly, ownership did not pass to Nevada.

[11] Nevada gave possession of the diamonds to the respondent.

[12] The respondent exported two of the diamonds with GIA certificate numbers 2276019683 and 1279465516 and is in possession of only three diamonds.

C. REQUIREMENTS FOR REI VINDICATIO

[13] An owner is entitled to reclaim possession of its property with the rei vindicatio. A claimant must establish that it is the owner of the property and that the other party is in possession of the property.[1]

D. BASIS FOR OPPOSITION

[14] The respondent opposes the relief sought on the basis that:

[14.1] the applicant has failed to establish that it ever became owner of the diamonds;

[14.2] the respondent is not in possession of two of the diamonds;

[14.3] the applicant is precluded from claiming the return of the diamonds in circumstances where the applicant placed Nevada in possession of the diamonds for the purpose of on-selling them;

[14.4] the applicant vested Nevada with a ius disponendi over the diamonds;

[14.5] the applicant is estopped from relying on its ownership of the diamonds and that Nevada could not lawfully sell and transfer ownership of the diamonds.

E. OWNERSHIP

[15] In relation to each diamond, the applicant has furnished particulars of each GIA certificate number, the date on which the applicant purchased each diamond, the identity of the seller; and the purchase price. In each case, the applicant alleges that it paid the purchase price and took delivery of the diamond.

[16] The respondent raises a bare denial of these facts. It implies that the allegations should be rejected because:

[16.1] the applicant has furnished insufficient particulars regarding the sale agreements such as who represented the parties; where the alleged agreements were entered into; if the agreements were written or oral; and the material terms of the agreements; and insufficient documentation such as copies of the agreements (if written), invoices, and proof of payment;

[16.2] three of the diamonds are described as rough diamonds whereas GIA certificates are only given in respect of cut and polished diamonds

[17] In establishing its ownership in the diamonds prior to placing the diamonds with Nevada, the applicant was entitled to rely on the

factual presumption of ownership arising from possession; and a party who wished to dispute ownership had to rebut that presumption with clear and satisfactory evidence.[2]

[18] The respondent does not dispute that the diamonds were in the applicant's possession prior to their delivery to Nevada.

[19] Furthermore, the respondent has failed to furnish evidence to rebut the presumption.

[20] Simply on this basis, the applicant is presumed to be the owner of the diamonds prior to its furnishing the diamonds to Nevada.

[21] Also, the deponent to the founding affidavit is the sole member of the applicant. A reasonable inference may be drawn that he has personal knowledge of the facts relating to the applicant's purchase of the diamonds. The detail furnished is credible. In addition, a reasonable inference may be drawn from the allegations of payment by the applicant for the diamonds and delivery of the diamonds to the applicant that the intention of the respective sellers and the applicant was to transfer ownership of the respective diamonds to the applicant.

[22] Finally, the respondent alleges that the applicant placed Nevada in possession of the original GIA certificates for the diamonds.

Accordingly, the applicant must have been in possession of these certificates. A GIA certificate, contends the respondent, is delivered with a diamond in a bona fide sale. This supports the allegation that the applicant acquired the diamonds in a bona fide sale.

[23] For all these reasons, prior to placing the diamonds with Nevada, the applicant has established its ownership in the diamonds.

[24] Insofar as placing the diamonds with Nevada is concerned, the respondent does not dispute that the applicant did not invoice Nevada for the diamonds nor receive payment for the diamonds nor that ownership in the diamonds was not transferred to Nevada.

[25] Accordingly, I am satisfied that the applicant has established that it is the owner of the diamonds.

F. POSSESSION OF THE DIAMONDS

[26]The applicant alleges that Nevada gave possession of the diamonds to the respondent in terms of a Nevada appro note dated 18 January 2018. The applicant's version is based on inadmissible hearsay supported by a document which has not been authenticated. The respondent alleges that the appro note is a fraud. The document has not been admitted and is, thus, inadmissible.

[27] The answering affidavit is disposed to by Mr Nitesh Lunawat, a director of the respondent and also a director and shareholder of Kothari Trading (Pty) Ltd ('Kothari'). Mr Lunawat alleges that he acted for Kothari when it purchased the diamonds from Nevada on 18 January 2018, which is evidenced by an invoice, dated 18 January 2018, in the name of Nevada, made out to Kothari, and a confirmation of payment of the invoiced amount to Nevada. Mr Lunawat states, further, that Kothari on-sold the diamonds to the respondent which exported two diamonds, as described in prayers 1.1 and 1.2 of the Notice of Motion. These allegations have not been refuted. He concedes that the respondent is in possession of only three diamonds.

[28] Accordingly, absent a successful defence, the applicant would be entitled to the return of the diamonds referred to in prayers 1.3 to 1.5 of the Notice of Motion.

G. THE RESPONDENT'S DEFENCE

[29] Given my findings in relation to estoppel, I do not deal with the other defences raised by the respondent.

[30] In order to succeed with a defence based on estoppel, the respondent is required to prove:

[30.1] a representation by the owner, by conduct or otherwise, that the person who disposed of the property was the owner of it or entitled to dispose of it;

[30.2] the representation must have been made negligently in the circumstances;

[30.3] the representation must have been relied upon by the person raising the estoppel;

[30.4] the reliance upon the representation must have caused that person to act to his detriment.

[3]

[31] Entrusting possession of the goods with the indicia of dominium or ius disponendi to another is conduct which gives rise to the requisite representation. Such indicia may be documents of title and/or authority to dispose of the goods; or the manner in which the owner allows another to possess the goods e.g. allowing a retailer to exhibit the goods with other stock in trade[4], such as in the case of consignment.

[32] The applicant's Appro Note to Nevada refers to Nevada as a consignee and to the applicant as a consignor which indicates that the diamonds were furnished to Nevada on consignment.

[33] Consignment has been held to mean shipped to a dealer who acts as agent (as for a manufacturer) to sell, auction, or exhibit with the agreement that he may take title to and pay for what he sells, that he must remit the proceeds of sales less commission to the shipper, and that he may return anything left unsold (goods shipped on consignment).[5]

[34] The applicant placed the diamonds with Nevada on consignment. (In this regard, it is not in dispute that Kothari purchased the diamonds as part of a larger parcel of diamonds). The applicant does not dispute that it was aware that Nevada was a dealer in diamonds and would not purchase the diamonds for itself. The applicant furnished the original GIA

certificates to Nevada. The applicant does not dispute that the original GIA certificate for a diamond is delivered with the diamond in a legitimate bona fide sale and that the absence of such a certificate would require an explanation from the seller.

[35] In the premises, the respondent has established the requisite representation by the applicant that Nevada was the owner or had the right to dispose of the diamonds.

[36] The establishment of negligence contemplates that a reasonable person in the position of the applicant would foresee the reasonable

possibility that its conduct could mislead a potential purchaser to act to its detriment; and that it failed to take steps to prevent it. [6]

[37] In my view, the applicant should have foreseen that a potential purchaser in the position of Kothari would have viewed Nevada's possession of the diamonds, as part of its stock of diamonds, as a trader in diamonds, combined with Nevada's possession of the original GIA certificates, as an indication that Nevada was the owner of the diamonds or was authorised to dispose of the diamonds; that it had placed Nevada in a position where it could sell and give possession of the diamonds without the applicant's consent; and that a potential purchaser would thus be misled to purchase and take possession of the diamonds from Nevada in a context where ownership in the diamonds might not be transferred and the diamonds might be vindicated by the applicant. A reasonable person would have taken steps to prevent such harm from arising by simply retaining the original GIA certificates. The applicant should have foreseen that a purchaser in the position of the respondent which was aware that Kothari had purchased the diamonds from Nevada in these circumstances would, similarly, be misled into purchasing the diamonds from Kothari in circumstances where the diamonds could be claimed by the applicant. Given that Mr Lunawat, who represented Kothari in purchasing the diamonds from Nevada, is also a director of the respondent, a reasonable inference may be drawn that the respondent was aware of the circumstances in which Kothari purchased the diamonds from Nevada.

[38] Accordingly, the applicant was negligent.

[39] Insofar as reliance is concerned, the first enquiry is whether a reasonable person in the position of firstly, Kothari, and secondly, the respondent, would regard the relevant conduct or representation as indicating that Nevada was the owner or had the right to dispose of the property. The second enquiry is to determine whether Kothari and, subsequently, the respondent relied upon, or was misled by, that representation in buying the diamonds. [7]

[40] Given the finding regarding the applicant's negligence, the first enquiry must be answered in favour of the respondent.

- [41] Insofar as the second enquiry is concerned, Mr Lunawat states that he had no reason to believe that Nevada was not the owner of the diamonds or that Nevada could not lawfully sell the diamonds. He states, further, that he would not have purchased the diamonds without the original GIA certificates being produced. These allegations have not been placed in dispute.
- [42] Accordingly, Kothari, in purchasing the diamonds from Nevada, relied upon the applicant's misrepresentation that Nevada was the owner or had the right to dispose of the diamonds. Given that Mr Lunawat is also a director of the respondent, his misapprehension regarding the ownership of the diamonds can also be attributed to the respondent, such misapprehension being that Nevada had the right to dispose of the diamonds to Kothari with the consequence that Kothari could dispose of the diamonds to the respondent.
- [43] The misrepresentation must cause the party relying thereon to act to its detriment. [8]
- [44] Purchasing and paying for goods where the ownership in the goods is not transferred and, consequently, where the owner can vindicate the goods from the purchaser constitutes prejudice or detriment. [9] That is what happened in this instance.
- [45] Accordingly, the respondent has established estoppel.

H. COSTS

- [46] Mr Peter sought the costs of two counsel on the basis that this dispute is one of a number of similar disputes and that the applicant is not the only party which may seek to institute proceedings against the respondent; that the judgment in this matter may potentially be precedent-setting given the potential of other litigation; that the issues are complex; and that the matter is extremely important to the respondent.
- [47] Mr Hollander objected to such an order being made indicating that the principles regarding estoppel are well-established and uncomplicated. This is not a precedent-setting matter which does not warrant the costs of two counsel. I agree with Mr Hollander.

ORDER

For the reasons set out above, the following order is made:

- [1] The application is dismissed with costs.

F SOUTHWOOD

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA,

Date of hearing:

8 August 2019

Date of judgment:

30 September 2019

For the Applicant:

L Hollander

Instructed by:

Edelstein Farber Grobler Inc

For the respondent:

J Peter SC assisted by D Hodge

Instructed by:

Shapiro-Aarons Inc.

[1] Chetty v Naidoo 1974

(3) SA 13 (A) at 20B-C

[2] Zandberg v Van Zyl 1910 AD 302 at 308

[3] Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd 1976

(1) SA 441 (A) at 452D-G

[4] Electrolux (Pty) Ltd v Khota and Another 1961

(4) SA 244 (W) at 247B-E

[5] Quenty's Motors (Pty) Ltd v Standard Credit Corporation Ltd [1994] ZASCA 41; 1994

(3) SA 188 (A) at 199H

[6] Grosvenor Motors (Potchefstroom) Ltd v Douglas 1956

(3) SA 420 (A) at 427G; Quenty's Motors (Pty) Ltd v Standard Credit Corporation Ltd [1994] ZASCA 41; 1994

(3) SA 188 (A) at 200B-C

[7] Electrolux (Pty) Ltd v Khota and Another 1961

(4) SA 244 (W) at 246A-C

[8] Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd 1976

(1) SA 441 (A) at 459A-B

[9] Quenty's Motors (Pty) Ltd v Standard Credit Corporation Ltd [1994] ZASCA 41; 1994

(3) SA 188 (A) at 200D

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