

SOUTH AFRICA / JUDGMENT

Rousseau v Lombard and Another (M241/2019) [2020] ZANWHC 5 (30 January 2020) [2020] ZANWHC 5

COURT

North West High Court, Mafikeng

BEFORE

Nobanda

CASE / FILE NUMBER

M241/2019

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Source record

IN THE HIGH COURT OF
SOUTH AFRICA
NORTH
WEST DIVISION, MAHIKENG
CASE
NO. M241/2019
In

the matter between:

ROUSSEAU
HERMAN
Applicant
and
LOMBARD NATASHA (nee
HENERY, nee
VAN
DER MERWE)
1ST
Respondent
FIRSTRAND
BANK LIMITED t/a WESBANK
2ND
Respondent
OPPOSED
MOTION
NOBANDA
AJ
DATE

OF HEARING: O6
DECEMBER 2019
DATE
OF JUDGMENT: 30
JANUARY 2020
FOR
THE APPLICANT : ADV
Q PELSER SC
FOR

THE RESPONDENT : ADV
D.D
SWART

JUDGMENT

NOBANDA AJ.

Introduction

- [1] The Applicant brought an application seeking the return of a motor vehicle currently in possession of the First Respondent. No order is sought against the Second Respondent.

Background

- [2] During October 2018, the Applicant and the First Respondent got engaged to be married after being romantically involved in July 2018.
- [3] In September 2018, the Applicant purchased a motor vehicle from the Second Respondent in terms of an instalment sale agreement which provided inter alia,

3.1 Clause 4.1

The Second Respondent would remain the owner of the motor vehicle until the Applicant has paid all the amounts due under the agreement;

3.2 Clause 2.5

Upon delivery of the motor vehicle, all risks in and to the motor vehicle would pass to the Applicant and remain with the Applicant;

3.3 Clause 6.3

The Applicant cannot sell, let, loan, pledge or transfer the motor vehicle to another person without the Second Respondent's prior written consent.

- [4] After obtaining the delivery of the motor vehicle, the Applicant gave possession of the motor vehicle to the First Respondent. During December 2018, the First Respondent and the Applicant terminated their relationship. The Applicant demanded the return of the motor vehicle but the First Respondent refused, claiming that the Applicant had donated the motor vehicle to her. The Applicant denies donating the motor vehicle to the First Respondent.

Applicable Legal Principles

- [5] Donation made during the lifetime of the donor (*donatio inter vivos*), is a donation made with the intention of granting a donee the benefit of the gift during the life of the donor and which, subject to a few exceptions, is irrevocable.[1] As a donation is a contract, like any other contract, it has to comply with all the requirements of the law of contract. Van Zyl J in *Commissioner, South African Revenue Services v Marx NO*[2] explains it thus:

“[24] The donor’s intention to make a donation (animus donandi) must arise from generosity (liberalitas) or liberality

(*munificentia*) and be expressed as a promise (offer) to donate, which promise (offer) must be accepted by the donee before a binding contract of donation comes into existence. Once this happens the donation is perfected and it may be revoked only under certain circumstances. The resultant contract is not sufficient, however, for purposes of transferring the donated asset into the ownership (*dominium*) of the donee. Performance of the obligation arising from the donation, in the form of delivery (*traditio*) of the asset donated, first has to take place, as appears from the following dictum of Jansen JA in *Mankowitz v Loewenthal*:

‘At the outset it must be remembered that a contract of donation and the performance thereof, viz the delivery of the article donated, are two separate juristic acts: the one directed at creating an obligation and the other at transferring possession (and *dominium*).’

(emphasis provided)

- [6] The onus is on the person who alleges a donation to prove it on a balance of probabilities.[3]
- [7] The First Respondent alleges that the Applicant donated the motor vehicle to her. She alleges that when the Applicant presented the motor vehicle to her, he stated; “Ek het vir jou a kar gekoop”. Thereafter, the Applicant handed her the car keys and she drove it to Lichtenburg whereinafter the Applicant boasted to her parents that he had bought her the motor vehicle. In essence, the First Respondent contends that the donation was completed in that there was delivery and therefore transfer of ownership of the motor vehicle to her.
- [8] Mr Pelser on behalf of the Applicant contended that , it is trite that the Applicant cannot transfer more rights to another than he has. The motor vehicle does not belong to the Applicant. The motor vehicle was purchased by the Applicant from the Second Respondent in terms of an instalment sale agreement. In terms of Clause 4.1 thereof, Second Respondent would remain the owner of the motor vehicle until Applicant has paid all amount due under the agreement. As such, the Applicant could not transfer ownership of

the motor vehicle to First Respondent, firstly because the motor vehicle did not belong to him to transfer ownership thereof to the First Respondent. Secondly, the agreement forbids the transfer of any of those rights to another person unless consented to by the bank and no such consent was sought nor given to the Applicant to transfer any of his rights to the First Respondent.

- [9] Furthermore, Mr Pelser contended that the donation, if any, is an executory donation in that something still needed to be done before the donation could be perfected, like full payment of the instalment agreement by the Applicant before the Applicant could transfer ownership to First

Respondent. As such, since the donation is an executory donation, it had to comply with the provisions of section 5 of the General Law Amendment Act[4] (the Act) in that it had to be in writing and the terms thereof set out in writing. Since no such agreement exist, the donation is null and void.

- [10] Although the First Respondent does not dispute that the Applicant entered into an instalment sale agreement with the Second Respondent, she denies that the Second Respondent is the owner of the motor vehicle. The First Respondent contends that the Applicant is the owner of the motor vehicle. Hence, contending that the Applicant transferred ownership to her upon delivery of the motor vehicle.
- [11] With regard to the donation being null and void for non compliance with the provisions of section 5 of the Act, Mr Swart on behalf of the First Respondent contended that the donation is not an executory donation but a cession of the Applicant's personal rights of ownership to the First Respondent which do not require execution contemplated in section 5. Mr Swart contends that the Applicant and First Respondent concluded an oral agreement of transfer in anticipando that when the time of transfer of the ownership of the motor vehicle comes, the Applicant would transfer ownership to First Respondent. Mr Swart drew an analogy between this agreement and the cession of future rights (spes) of expectant crops by farmers to financial institutions.
- [12] It is trite that when the allegations in the pleadings are not denied, they are admitted. Other than stating that the instalment sale agreement is not signed, the First Respondent does not deny it. The Applicant explains that the agreement was concluded electronically, hence no signature. Ineluctably, an instalment sale agreement exists between the Applicant and the Second Respondent. In terms of Clause 4.1 thereof, the Second Respondent is the owner of the motor vehicle.
- [13] As such, I agree with Mr Pelser that the Applicant could not have passed ownership of the motor vehicle to the First Respondent until the Applicant had paid all amount due under the instalment sale agreement. There was no allegation that the Applicant had paid the full amounts due under the agreement. On the contrary, on the First Respondent's own version, the Applicant advised her at some stage that he was struggling to meet the monthly payments for the motor vehicle. Accordingly, the Applicant could not have transferred

ownership of the motor vehicle to the First Respondent as the Applicant could not transfer more rights than he had on the motor vehicle.

- [14] I further agree with Mr Pelser that if this was indeed a donation as contended by the First Applicant, it was an executory donation in that the transfer of ownership would have taken place at some future date, that is, after the Applicant had fulfilled the terms of the instalment sale agreement. As explained by Van Zyl J in Marx NO (supra), “An executory donation is so called because it still requires to be effected or perfected, in the sense that something is required to be done before it can be regarded as completely performed”. [5]

Section 5 of the Act provides:

“5. Formalities in respect of donations.-No donation concluded after the commencement of this Act shall be invalid merely by reason of the fact that it is not registered or notarially executed: Provided that no executory contract of donation entered into after the commencement of this Act shall be valid unless the terms thereof are embodied in a written document signed by the donor or by a person acting on his written authority granted by him in the presence of two witnesses.

(emphasis provided)

As such, the donation had to comply with the provisions of section 5 of the Act.[6] First Respondent implied the donation was oral. Accordingly, the donation is null and void for want of compliance with the provisions of section 5.

- [15] The contention and analogy drawn by Mr Swart of the transfer of personal rights is without substance. Firstly, that was never the First Respondent’s case that the Applicant transferred his personal rights to ownership to the First Respondent. From the outset, First Respondent contended that the Applicant donated the motor vehicle to her and transferred ownership to her by delivering it to her. These allegations are further confirmed by the First Respondent’s mother that the Applicant had boasted that he had bought First Respondent a motor vehicle. Therefore, nowhere did the First Respondent allege, or even imply that the Applicant was ceding his personal rights of ownership to her.
- [16] On the contrary, First Respondent went as far as denying that the Second Respondent is the owner of the motor vehicle. She contended that Second Respondent did not even file an affidavit confirming Applicant’s allegations. As such, it is evident that the First Respondent believed the donation was completed by the Applicant “delivering” the motor vehicle to her. The contention by Mr Swart is therefore an afterthought and cannot be sustained.
- [17] In the premises, I find that the First Respondent has failed to prove on a balance of probabilities that the Applicant

donated the motor vehicle to her.

Order

- [18] In the result, I make an order in the following terms:

1. The First Respondent is ordered to return to the Applicant the Ford Everest 2.2 TDCI XLT A/T Ford with registration letters and numbers JZW 995 NW within 5 days of this order; alternatively
2. The Sheriff or his/her deputy is authorised and directed to take control of the said motor vehicle wherever it may be found and return it to the Applicant;
3. The First Respondent pay the costs.

P.L NOBANDA

ACTING JUDGE OF THE HIGH COURT

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[1] LAWSA 8 (1) 304

[2] 2006

(4) SA 195 (C)

[3] Opcit at 315; Myers v Lesch 1954 (2) SA 487 (C)

[4] No. 50 of 1956

[5] At [25]

[6] Marx NO (supra); Savvides v Savvides and Others 1986 (2) SA 325 (T)

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