

SOUTH AFRICA / JUDGMENT

Sylco Plant Hire (Pty) Limited v Bluesky Carriers CC (44911/2015) [2020] ZAGPPHC 669 (27 November 2020) [2020] ZAGPPHC 669

COURT

North Gauteng High Court, Pretoria

BEFORE

M A Lukhaimane

CASE / FILE NUMBER

44911/2015

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IN

THE HIGH COURT OF SOUTH AFRICA(GAUTENG DIVISION, PRETORIA)

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST

TO OTHER JUDGES: YES/NO

(3)

REVISED.

27

Nov 2020

CASE

NO: 44911/2015

In

the matter between:

SYLCO
PLANT HIRE (PTY) LIMITED
APPLICANT
and
BLUESKY
CARRIERS CC
RESPONDENT

JUDGEMENT

LUKHAIMANE AJ:

1. This is an application to recover a CAT Loader which at present is in the possession of the Respondent, to which the Respondent also lays claim. The parties agreed in a pre-trial held on 26 September 2018 that the following issues will be separated for later determination:

- The market value of the CAT Loader as at April 2015;
- The value of the CAT Loader as on date of the trial.

Therefore what is to be determined now is the ownership of the CAT Loader.

2. The Applicant is based in Cape Town. The CAT Loader was imported from the Netherlands about September/October 2012 by Calmar Trading CC (“Calmar”), a close corporation of which Mr Marc De Haas is the sole member. Calmar is indicated on the bill of lading as the consignee of the CAT Loader when it arrived at the port in Cape Town. It is therefore not in dispute that Calmar, as the purchaser and consignee of the CAT Loader, obtained ownership thereof when the CAT Loader arrived in Cape Town. Mr De Haas who has since passed away, entered into an agreement with the Applicant (represented by Mr Scharrighuisen) that the Applicant will become the owner of the Cat Loader upon takING delivery thereof, as a credit sale. Applicant therefore took delivery of the CAT Loader on 8 October 2012.

3. Applicant delivered the CAT Loader to Tamarron on 20 January 2014.

Both parties are not clear as to which Tamarron entity they dealt with, whether Tamarron Plant Hire or Tamarron Asset Management,

however this is not material and for purposes of this judgement, the purchaser will be referred to as Tamarron. Applicant and Tamarron

reached the same agreement as per past transactions where Tamarron would find a purchaser for the CAT Loader. Once a purchaser is found, the Applicant will sell the CAT Loader to Tamarron for a price to be agreed upon and Tamarron would on-sell the CAT Loader to such interested purchaser, at a higher price. As usual, the agreement was that until the purchase price had been paid by Tamarron to Applicant, ownership in the Cat Loader would remain vested in the Applicant.

4. Applicant did not know on 9 February 2015 that Tamarron sold the CAT

Loader to the Respondent on 17 December 2014 in an agreement where the Respondent would pay the purchase price in instalments.

Respondent was given possession of the CAT Loader before paying the purchase price. It is Respondent's submission that later on, the Cat Loader started having problems leading to the Respondent halting payment of the remaining amount of the purchase price.

Respondent further submits that subsequent to this, the purchase agreement with Tamarron was amended, effectively reducing the

purchase price to the amount already paid. The repairs are alleged to run into hundreds of thousands of rands. However, the amount is irrelevant as Respondent himself agreed under cross examination that some of the purported invoices indicated expenses unrelated to the CAT Loader. Except for a letter from the Respondent to Tamarron DATED 4 May 2015, there is no other proof that such an agreement took place. In fact, the purported settlement reached with the liquidators of Tamarron for the CAT Loader indicates that no such agreement had taken place, because if it had, the liquidators would not have claimed any other amount from the Respondent.

5. Therefore as a start, there was never an intention on the part of the Applicant to sell the CAT Loader to Tamarron on credit. This is evidenced by the invoicing that happens on once Tamarron had

identified the Respondent as a purchaser so that Applicant may sell the CAT Loader to Tamarron who will then on-sell to the Respondent

and retain R50 000 profit.

6. From the Respondent's submissions, it is clear that he concedes

that the ownership of the CAT Loader remained with Applicant. Therefore, it is sufficient to quote Berwick's translation at p174 of what Voet says in 19, 1, 11 (page 8). Therefore, Applicant never lost ownership of the CAT Loader.

7. Now for the defence of estoppel. It is Defendant's contention

that Defendant is a bona fide possessor of the CAT Loader as per the sale agreement concluded with Tamarron. The last of what was owing on that agreement, having been settled with the liquidators of Tamarron. Further to this, Defendant indicated that it is Applicant's conduct, that of allowing for Tamarron to represent to a potential buyer that they could pass ownership of the CAT Loader, which led to Tamarron on-selling the CAT Loader.

8. The essentials for estoppel are as follows (Oakland Nominees (Pty)

Ltd v Gelria Mining & Inv Co (Pty) Ltd 1976 (1) SA 441 (A) at 452):

- there must have been representation by words or conduct of a certain factual position
- the representee must have acted on the correctness of the facts as represented
- the representation must have been made negligently (this need not always be the case)

- it must have been possible for the representor to bind the defendant by means of the representation

9. In paragraph 3.16 of the amended plea, Defendant states as follows:

“3.16 The Plaintiff is estopped for relying on its ownership as a result of the following:

3.16.1 The Plaintiff allowed Tamarron Asset, alternatively Tamarron Plant, to make a representation vis-à-vis the Defendant, which misled the Defendant to believe that Tamarron Asset, alternatively Tamarron Plant, whether as owner or agent, was entitled to transfer ownership of property to the Defendant;

3.16.2 Such representation was made negligently;

3.16.3 The Defendant accepted the representation and acted on the strength thereof as it concluded the sale agreement with Tamarron Plant, alternatively Tamarron Asset on strength of such representation;

3.16.4 The Plaintiff mandated Tamarron Asset, alternatively Tamarron Plant (Pty) Ltd to sell the CAT Loader;

3.17 The Defendant acted to its detriment and paid payment for the CAT Loader and took delivery;

3.18 As a consequence the Plaintiff is estopped for relying on its ownership of the CAT Loader.”

10. In this matter, both the Applicant and Respondent have been left worse off by the behaviour of Tamarron. Respondent therefore seeks to rely on estoppel. The court has to consider the conduct of Applicant that Respondent alleges, he relied upon – such conduct must be viewed through the eyes of a reasonable person in Respondent’s

position. The only conduct that Respondent is relying on is that Applicant put the CAT Loader in Tamarron’s possession, the

latter being a dealer in all sorts of machinery etc, creating the impression to a reasonable man that Tamarron had the requisite

authority to sell the CAT Loader. It is now settled in our law that the fact that an owner has entrusted to another (not being a factor, broker or agent for selling) the possession of his articles is not sufficient to result in a representation that a dominium or jus disponendi was vested in the possessor “...This amounts to a representation, by silence and inaction ... as well as by conduct, that the person so armed with the external indications of independence is in fact unrelated and unaccountable to the representor (in casu applicant) or otherwise.”

11. Further, that a Respondent would not be entitled to assume from such mere possession that the possessor was authorised to dispose of the articles if he made such assumption he would only have himself to blame for his gullibility (Trollip J IN Electrolux (Pty) Ltd v Khota and Another 1961 (4) SA 244 W at 247).

12. In this matter, the Applicant did not give Tamarron any documents indicating that the latter was the owner of the CAT Loader. Respondent's evidence was that Tamarron had a yard where there were quite a few second hand items, including the CAT Loader. Given the price of the CAT Loader, it is odd that Respondent did not ask for any other information/document indicating that Tamarron had the authority to dispose of the CAT Loader. The fact that the possessor

is a dealer or trader in the particular article is by itself of no significance (*Electrolux supra*). It was Respondent's evidence

that the CAT Loader was in the yard and he enquired about its sale. All the more reason for the Respondent to enquire as to the ownership etc of the CAT Loader, that is, its history and if Tamarron was able to provide any information in that regard to satisfy the purchaser of such a large item.

13. Respondent contended that Applicant was negligent in several ways by leaving Tamarron in possession of the CAT Loader and allowing the sale. It was Tamarron's conduct that defrauded the Respondent. Nothing in the manner that Applicant dealt with the CAT Loader could have led the Respondent to believe that Tamarron had the authority to dispose of the CAT Loader, thereby transferring ownership. It was indeed Respondent's own gullibility that led him to conclude that such authority to dispose of was present. It is not clear why after receiving communication from the Applicant, Respondent

continued to deal with the liquidators of Tamarron, even when the latter could not provide Respondent with any proof to dispel the claim by Applicant to the CAT Loader. It is irrelevant and would in any case be imprudent of this court to hazard a guess in that respect. Quite a lot is made of the bona fides of the Respondent in that of a R1.2 million sale, it still owes R568 000 which it claims was off set against the repairs and finally settled with the liquidators. Therefore a declaratory order in respect of ownership of the CAT Loader is warranted. The representation averred in the Defendant's Plea was not established.

14. The order is therefore as follows:

- the Applicant and not the Respondent is the owner of and is entitled to the CAT Loader mentioned herein, which at present is in the possession of the Respondent
- the Respondent must pay the costs of these proceedings on a party party scale.

M A LUKHAIMANE

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Appearances:

On behalf of the Applicant : Adv AM Heystek, SC

Instructed by

: Harmse Kriel Attorneys

On behalf of the Respondent : Adv C RIP

Instructed by

: Spies Bester Potgieter Attorneys

Date of hearing

: 19 October 2020

Date of judgment

: 27 November 2020

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