

SOUTH AFRICA / JUDGMENT

Thompson v Johannes Gilfillan Motors (Edms) Bpk t/a Bridge Auto (A175/08) [2010] ZAGPPHC 256 (5 January 2010) [2010] ZAGPPHC 256

COURT

North Gauteng High Court, Pretoria

BEFORE

Webster, Louw

CASE / FILE NUMBER

A175/08

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IN

THE HIGH COURT OF SOUTH AFRICA

(NORTH

GAUTENG DIVISION: PRETORIA)

CASE

NO.: A175/08

DATE:05/01/2010

In

the matter between:

PETER

IAN

THOMPSON.....APPELLANT

And

JOHANNES

GILFILLAN MOTORS (EDMS) BPK t/a BRIDGE AUTO.....RESPONDENT

JUDGMENT

WEBSTER J

1. The issue in the appeal before us is whether a motor vehicle with registration number BGV 017 N was the property of the respondent or not when it was attached by the sheriff in execution pursuant to a judgment that had been granted in the appellant's favour against one LOURENS. It will be convenient to set out the chronology of events as they occurred.

2. At all material times relevant to the issues the respondent, a motor vehicle dealer, was the employer of Lourens, a motor vehicle

salesman.

3. The appellant, after obtaining the judgment referred to above against Lourens, attempted to attach property belonging to Lourens in satisfaction of the judgment for R20 102 in his favour. The appellant first issued a warrant of execution for the attachment of a motor vehicle registration number DZR 940 N which belonged to Lourens. This vehicle was attached on 13 July, 2006. Lourens moved an urgent ex-parte application for the suspension of the warrant of execution and the stay of execution pending an appeal against the judgment of the appellant against him.

4. Lourens failed to properly note an appeal against the judgment granted against him. The appellant again instructed the sheriff to attach the motor vehicle with registration number DZR 940 N. The sheriff did so on 24 October, 2006. Lourens once again moved an ex-parte application in the court a quo for the stay of the execution: such order was again granted on 26 October, 2006. On the return date, the 15th November, 2006, in the court a quo the rule /7/5/ was discharged. The court ordered that "...the attachment by the sheriff is re-issued and the return shall stand. Applicant is ordered to return the vehicle to the sheriff before 5pm today, 5-11-06". It was common cause before us that the date "5-11-06" should in fact be "15-11-06". Lourens was ordered to pay the costs of that application on the attorney and client scale.

5. By letter dated 15 November, 2006, and apparently faxed to the appellant's attorneys at 8:13:03 on 23-11-2006 the appellant's

attorneys were informed that the motor vehicle referred to in the order in the preceding paragraph that had been issued on 15 November,

2006 had been stolen on 12 November, 2006. That was the start of intrigue and subterfuge.

The appellant, ever persistent and clearly pursuant to having obtained information from the local municipal registration office issued a warrant of execution against motor vehicle registration CLR 410 S then registered in the name of Lourens. The vehicle was found by the sheriff's deputy at the premises where Mrs. Lourens conducted her business. When attachment was attempted, the deputy was telephoned by someone from the respondent's business, Bridge Auto, and informed that the vehicle belonged not to Lourens but Bridge Auto.

From exhibit "SI" a NOTIFICATION OF CHANGE OF OWNERSHIP/SALE OF MOTOR VEHICLE a motor vehicle belonging to Bridge Auto had been transferred on 13 November, 2006 to Lourens. The licence number of this vehicle had been FMD 249 N. I shall revert to this transfer later in this judgment.

The evidence by the deputy sheriff is that he was presented in the course of that day with proof of ownership of this vehicle by some person from Bridge Auto. That document is Exhibit "W1". The owner of the motor vehicle is reflected as Lourens and the buyer as Bridge Auto. The previous licence numbers of this vehicle are recorded as FMD 249 N and ND 459843. The registration particulars of the transfer are recorded on Exhibit "Y" as follows:

"Licence number:BGV 017 L

Vehicle register number:CLR 410 S

Registrasie overhead

Registering authority:LOUIS TRICHARDT

Datum en tyd

Date and time-2006-12-08 13:13:08"

The deputy sheriff, presented with these documents, did not proceed with the attachment of the vehicle on 8 December, 2006.

9. The matter lay dormant until the 13th of July, 2007, when the sheriff attached motor vehicle BGV 017 L. The respondent, trading as Bridge Auto claimed the attached vehicle "... met registrasienommer FMD 249 N", as its property. It is significant that the affidavit in the name of JACQUES GILFILLAN" bears what must be a date stamp on the document apparently in the court file. The rubber stamp is "South African Police Service, Makhado, 25 May 2007". The document was never signed. The sheriff, however, acted on this document and caused an interpleader summons to be issued on 7 June,
2007. The affidavit filed on behalf of the respondent (Exhibit "A1-2") was deposed to on 18 July, 2007, after the proceedings before the Magistrate had already commenced. It is significant that the deponent thereto, J GILFILLAN refers to the vehicle claimed by the respondent as bearing "... registrasie FMD 249 N...". Its former registration number and not its correct number, viz., BGV 017 N.
10. The respondent's case rests on the evidence of three witnesses, viz., JACQUES GILFILLAN, LOURENS, and VAN HEERDEN. The version of the first two witnesses is substantially similar. It is that Lourens, in the absence of his employer unilaterally licensed the vehicle as he needed transport for himself and his family. Van Heerden erroneously had the vehicle transferred and registered in his name. He had intended purchasing the vehicle after proper negotiations with Gilfillan. He had, on a subsequent occasion discussed this with Gilfillan.
11. Under cross-examination Lourens testified that his son who worked with him for the respondent was to pay-off"... die kar

klaarbetaal". When this was pursued he changed this to "... hy gaan begin afbetaal". Asked, "wanneer is daardie

ooreenkoms bereik..." his response was "... toe ek besluit het ek soek nie meer die voertuig nie" (Page 114 lines 14- 15).

12. Pressed for the reason why he had registered the vehicle in his name, the record reads:

uHOF: En wat was die rede om hierdie voertuig in u se naam te registreer? — Watter voertuig is dit Edelagbare? Hierdie Citi Golf? — Die Citi Golf?

Ja? — Edlagbare, ek het die papiere die sales lady voor, okay, sy was ook maar nuut gewees op daardie stadium, sy het die papierwerk vir my gedoen. Ek sou as Mnr Gilfillan teruggekom het, sou ek en hy gepraat het, dan sou ek die voertuig, dan sou ek die kar gevat het. Maar ons het nog nooit tot n ooreenkoms gekom dat dit is die bedrag wat hy soek vir die kar en dit gaan my paalement wees of niks nie. Ek het nou maar net in tussentyd het ek die voertuig gebruik. - Hoekom het u nie vir die eienaar gewag, tot hy terugkom? — Mnr Gilfillan was daar gewees want hy het vir die dag die dametjie, een van die verkoopsdames, sy het net die papiere. U praat van *n dametjie, water dametjie? — Kotie. Sy het net die papiere ingevul, dit is al. Sy moes nie die voertuig geregistreer het nie. Daardie papiere moes alies na Mnr Gilfillan toe gegaan het." (Page 115 line 12 to page 116 line 5)

13. This bit of evidence must be considered against the fact that Lourens not only signed the transfer document but allegedly paid the registration fees.

14. The evidence of Gilfillan is to the effect that Lourens had approached and discussed his predicament of transport with him and

he, Gilfillan, had made the vehicle available to him for his use.

15. Asked why the vehicle had been registered in the name of Lourens from 13 November 2006 until 8 December 2006, his response were that (i) it had been done wrongly by the ladies working there and, (ii) the lady had not done it mistakenly but that it was Lourens who had asked her to do it for him; (iii) it had been a mistake.

16. Mrs van Heerden, the stock-controller in the respondent's business testified that her duties included the registration of motor

vehicles. Her evidence was that "she thought" that in the previous year Lourens had purchased the vehicle in issue. She had been told to invoice it to Lourens. She then registered it in his name. Subsequently Gilfillan had informed her that Lourens had not paid for the vehicle and the vehicle had been taken back into respondent's stock in December.

17. The trial Magistrate found that "... not any other court can equate the question of registration with ownership". He dealt with the evidence and concluded that no contract of purchase and sale had been proved. He found that no purchase price had been agreed upon or any money paid by Lourens. He found that the formalities of a sale had not been "complied with" and that the respondent was entitled to a ret vindicatio. He went on to comment that "There are certain terms and conditions of work that may be entered into between employer and the employee at any stage, which may even develop to a situation where between the employer

and employee, it may even develop to a sale, but in this situation there is no evidence before Court that Lourens ever paid any money to the dealing ..." (Page 144 line 15 to 21).

18. It is important to note that the trial Magistrate nowhere in his judgment ever dealt with the credibility of the witnesses who

testified before him. It was submitted in argument before us that the trial Magistrate had erred in this regard particularly in the light of the material contradictions in the evidence of the witnesses who testified on behalf of the respondent.

19. In interpleader proceedings the claimant to the attached property bears the onus of proving that ownership of the attached property

vests with him (Greenfield NO v Blignaut 1953(3) SA 597 (S.R.) at 598; Gleneagles Farm Dairy v Schoombee 1949(1) SA 830 (A) at 836). In the present case the respondent bore the onus of proof.

20. The evidence of Gilfillan and Lourens that the vehicle was merely lent to Lourens is contradicted by van Heerden. Her evidence as summarised above is clear that she was instructed to invoice the vehicle to Lourens. That was followed by the registration of the vehicle in the name of Lourens. Van Heerden was designated by the respondent as one of the people with the right of authority to register vehicles sold/purchased by the respondent.

21. The evidence of the three witnesses referred to in the above paragraph has to be viewed against the facts prevailing at the

various times. Lourens was the registered owner of the vehicle on 8 December, 2006, when the sheriff attempted to attach it. Some person from the respondent's firm claimed it belonged to the respondent. That allegation was false. The respondent then hurriedly transferred the vehicle to the respondent that afternoon. The documents provided to the sheriff that afternoon had clearly not been in existence when the deputy sheriff had been told the vehicle belonged to the respondent.

22. The evidence of Lourens on its face value shows clearly that there was more to the lip of the tongue when he testified that his son was paying off the motor vehicle. His effort to change that version by adding that it would be upon reaching an agreement with the respondent was clearly a belated fabrication which flies against the probabilities and the fact that such payment was without having discussed the purchase of the vehicle with the respondent.

23. The evidence of van Heerden is supported totally by documentary proof. The transfer to Lourens followed upon the transaction being "invoiced" on the instructions of Gilfillan. Van Heerden's duties included the registration of vehicles. She was expressly authorised to do so. Even the re-transfer of the 8th of December 2006 was delegated expressly to her on that date.

24. It is clear upon the evaluation of the facts that the transfer of the vehicle to the respondent on 8 December, 2006 was to avert a lawful attachment of the vehicle and the transfer to the respondent was a ploy to prevent it.

25. The trial Magistrate in insisting upon proof of payment played into the trap set up by Lourens and the respondent. He failed to take into account the relationship between the respondent and Lourens. As an employee the parties were at liberty to make any arrangements with regard to the purchase price of the vehicle without reducing anything to writing. The arrangement could have been one of credit. Instalments could have been deducted from the salary or commission on sales or bonus earned by Lourens. There was clearly no apprehension on the part of the respondent that Lourens would abscond or dispose of the vehicle surreptitiously. This observation finds support in the fact that Lourens was still having the vehicle in his possession when it was attached in May 2007.
26. The "say-so" of Lourens has to be considered in the light of the history of his conduct towards evading payment of the judgment debt against him. On 15 November 2006 when the Magistrate ordered that his motor vehicle DZR 940 N be returned to the sheriff before 5pm it was not brought to the Magistrate's attention that the vehicle had already been "stolen" on the 12th. Further, the letter advising the appellant's attorney of the alleged fact was faxed or e-mailed six (6) days after it was typed. This impact negatively on the credibility of Lourens.
27. It is clear upon the evaluation of all the facts in this case that there was clearly collusion between Lourens and Gilfillan when the respondent claimed the vehicle and had it transferred on 8 December, 2006 and on 17 May, 2007. It is further my considered view that by transferring ownership to Lourens the respondent, if the purchase price had not been paid in full must have agreed to credit being given to Lourens. That, coupled with delivery and registration of the vehicle in Lourens' name constituted the necessary tradition.
28. It was argued further that the documents evidencing the registration of the vehicle were inadmissible or if admissible, the contents thereof were not admitted. It is not necessary to deal at any length with this argument. Firstly, the documents were official documents: that was never disputed. Secondly, the transfer recorded in the documents was admitted in evidence by the witnesses particularly by Lourens and van Heerden.
29. It is my considered view that the trial Magistrate erred in finding that the vehicle BGV 017 N was the property of the respondent.
30. The appeal is accordingly upheld and the attachment in execution of the said vehicle by the sheriff is confirmed.

G. Webster

JUDGE IN THE HIGH COURT

I agree.

A. Louw

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