



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Case No: 686/2013
Not Reportable

In the matter between

INVESTGOLD CC

APPELLANT

and

DIRK UYS

FIRST RESPONDENT

MARIESA TROSKIE

SECOND RESPONDENT

Neutral citation: *Investgold CC v Uys & another* (686/2013) [2014]
ZASCA 166 (01 October 2014)

Coram: Bosielo, Tshiqi, Saldulker JJA and Mocumie, Gorven AJJA

Heard: 16 September 2014

Delivered: 01 October 2014

Summary: Purchase and Sale of coins – whether payment of the purchase price coupled with delivery of the coins was done with the intention to pass ownership – whether ownership of the coins passed to the purchaser – gold coins subsequently stolen from the vault by the seller’s employee – whether the subsequent theft of coins by seller’s employees vitiated its intention to transfer ownership.

ORDER

On appeal from: South Gauteng High Court, Johannesburg
(Boruchowitz J sitting as court of first instance):

It is ordered that:

- 1 The appeal is upheld with costs including the costs of two counsel where employed.
- 2 The order of the trial court is set aside and substituted with an order dismissing the plaintiffs' claim with costs.

JUDGMENT

Bosielo JA (Tshiqi and Saldulker JJA and Mocumie, Gorven AJJA concurring):

[1] The crisp legal question to be answered in this appeal is whether ownership of the coins passed to the purchaser when delivery thereof was made. Simply put, does the fact that the purchaser had paid the price in full and the seller had physically delivered the coins to the purchaser who received them into his undisturbed possession make the sale complete? At face value this legal question might appear to be simple. However, the peculiar facts of this case prove otherwise.

[2] Shorn of unnecessary frills the following facts are common cause: Early in 2011, Rudy Hugo (Hugo) and Raymond Jardine (Jardine), acting

in their capacities as the appellant's (Investgold) brokers and therefore its agents visited Dirk Uys (Uys) at his business premises in Brooklyn where they sold him gold coins for R76 000 (seventy six thousand rand). Uys indicated to them that he had R1 million which he wanted to use to buy more gold coins.

[3] This transaction was followed by another one involving the purchase of kruger rands and rare coins by Uys and Troskie during January 2001 for R1,6 million in cash. It is common cause that the quotation and tax invoice for this sale transaction were not issued in Uys' name but in the names of Hugo and Jardine. This is because Uys wished to avoid the Financial Intelligence Centre Act 38 of 2001 (FICA) and also that he did not want the South African Revenue Service (SARS) to know about it. However, this was subsequently corrected by Investgold after they became aware of it. The three agreed that as soon as the coins were available Hugo would advise Uys to come and fetch them at Investgold's premises in Killarney.

[4] On 26 January 2011, after being advised that their coins were available for collection, Uys went to Investgold's premises at Killarney to collect same. Upon arrival Uys was taken to a cubicle inside the office by Hugo where Rafique Davids (Davids), Investgold's stock controller, handed the gold coins to him Uys, together with Hugo and Jardine, inspected them to verify and satisfy himself that they were the coins which he and Troskie (the second respondent) had ordered as per the quotation. Upon being satisfied, Uys, Hugo and Jardine signed the requisite delivery note and receipt for the gold coins and returned it to

Dauids. The coins were then handed over to Uys who received them into his possession as the owner.

[5] After Uys had taken possession of the gold coins and was about to leave Investgold's premises, Hugo then suggested to him that it was not safe for him to travel with coins and, instead suggested that they be kept safe for him in Investgold's vault. At this stage, Uys telephoned his fiancée, Troskie, seeking her consent to store the gold coins in a safe as suggested by Hugo. After he had received the go ahead from Troskie, Uys packed the coins in a bag and, accompanied by Hugo, took them for safekeeping to what he believed was Investgold's vault. Unknown to him, the vault belonged to a company called Knox Titanium Vault Company (Pty) Ltd (Knox Vaults). Uys, assisted by a lady called Roxy who apparently worked for Knox Vaults, put the gold coins in a safe. This was after Roxy had explained all the security features of their vaults to him and he was satisfied that his gold coins were safe. After he had put the gold coins in the vault, Roxy gave him one key for the safe whilst she retained the other one. Uys was told that both keys were needed to gain access to the gold coins. In other words, none of them could open the vault without the other one.

[6] A tragic event then occurred. On 11 March 2011, Gert Pieter Erasmus (Erasmus) Investgold's general manager telephoned Uys and informed him that his gold coins had been stolen. It is common cause that Hugo had stolen the coins from Knox's safe after they had been placed there. Later Hugo admitted the theft in an affidavit and returned some of the coins. It is not in dispute that Hugo had already on 19 January 2011, unknown to Uys, forged Uys' signature to lease the safe from Knox

Vaults. Hugo had misled Uys to believe that he was storing his coins with Investgold when in truth it was with Knox's Vault.

[7] Based on these facts Uys and Troskie issued summons against Investgold in the main for specific performance by way of delivery of the coins which they had purchased and which were stolen by Hugo. The court below granted judgment in favour of the respondents on this claim. As indicated, the issue was whether Hugo and Troskie had established that, when the coins were delivered to Uys, Investgold did not have the intention to transfer ownership to Uys and Troskie

[8] In motivating his judgment, the learned judge held that, because Investgold was an artificial person, it could only act through a natural person. These natural persons, through whom it acted, had to have the intention to pass ownership. He found that these natural persons from whom the intention to pass ownership must be inferred were Hugo and Jardine, and not Erasmus, the manager or the stock controller, Davids. This is because he found them to be the people who were instrumental in the sale transaction and therefore Investgold's directing minds. The learned judge held as follows:

'It is clear therefore that there was no intention on the part of the defendant to transfer ownership of the coins to the plaintiffs.... The presence of an intention to steal the coins on the part of the persons who were the directing minds of the defendant would have prevented the transfer of ownership.'

He proceeded further as follows:

'The element of physical possession or detentio has also not been established. It is clear on the evidence that Hugo, assisted by Jardine, were at all material times in control of the coins. Even though the coins were pushed through the glass enclosure by the stock controller, Davids, they exercised de facto control. The fact that Uys

handled the coins momentarily during the verification process did not make him the possessor of the coins. Even if I am incorrect in this regard, Uys' physical possession was not accompanied by a concurrent intention by the defendant to convey ownership to the plaintiffs.'

[9] Investgold appeals against this judgment with the leave of the court below.

[10] Counsel for Investgold submitted that at the critical time when Uys received the coins from Davids, delivery of the coins was completed. It was contended further that when Uys decided, after a telephonic consultation with Troskie, to take the coins for safekeeping to Investgold, he exercised free and independent election as the owner of the coins. At this stage, so the contention went, he had full dominium of the coins and enjoyed undisturbed possession.

[11] On the other hand, although admitting the handing over of the coins, the respondents' counsel submitted that the mere physical handing over of the coins did not constitute delivery as Hugo and Jardine never intended to pass ownership of the coins to Uys and Troskie. This is evidenced by the fact that as far back as 19 January 2011, Hugo had already formed the intention to steal the coins when he forged Uys' signature to procure the safe from Knox Vaults. He contended further that the intention to steal by Hugo and possibly Jardine negated any intention on the part of Investgold to transfer ownership of the coins to Uys and Troskie. It suffices to state that this submission ignores the fact that with the systems set up by Investgold, Hugo would not succeed in stealing the

coins whilst they were in Investgold's custody. This is the reason why he had to ensure that Uys received them in his possession.

[12] Relying on *Consolidated News Agency (Pty) Ltd (In Liquidation) v Mobile Telephone Networks (Pty) Ltd*¹ it was submitted that as Hugo and Jardine were Investgold's agents and directing minds, their actions and intentions were those of Investgold. In other words their actions and intentions are attributed to Investgold. Based on this it was contended that because Hugo and Jardine never intended to pass ownership in the coins to Uys and Troskie, Investgold never discharged its legal obligation to transfer ownership. It was submitted that what happened on 26 January 2011 was not actual and genuine delivery but a mere sham or ruse.

[13] A contract of purchase and sale, *emptio vendito* is described as a contract whereby one person promises to deliver a thing to another and the latter in return promises to pay a price therefor. The obligation of the seller is to give the purchaser undisturbed possession (*vacua possessio*) of the *merx* coupled with a guarantee against eviction to the purchaser.²

[14] In a cash sale where payment has taken place, ownership will be transferred on delivery.³ It is trite that the intention to transfer and receive ownership (*animus transferandi dominii and animus accipiendi dominii*) is proved in various ways and can be inferred from the circumstances.⁴ In this regard, Watermeyer JA stated:⁵

¹ *Consolidated News Agency (Pty) Ltd (In Liquidation) v Mobile Telephone Networks (Pty) Ltd* 2010 (3) SA 382 (SCA) paras 30 and 31.

² G R J Hackwill M A Mackeurtan's *Sale of Goods in South Africa* 5 ed (1984) at 66.

³ *Electra Home Appliances (Pty) Ltd v Five Star Transport (Pty) Ltd* 1972 (3) SA 583 (W) at 585-6.

⁴ *Commissioner of Customs and Excise v Randles Brothers & Hudson Ltd* 1941 AD 369, at 398-400.

⁵ At 398

‘Ownership of movable property does not in our law pass by the making of a contract. It passes when delivery of possession is given accompanied by an intention on the part of the transferor to transfer ownership and on the part of the transferee to receive it. If it is delivered in pursuance of a contract of sale, the ownership may pass at the time of delivery or it may not.’

In *Cornelissen NO v Universal Caravan Sales (Pty) Ltd*,⁶ the majority held that:

The words “sold and delivered” do not necessarily connote that ownership in the goods has passed to the purchaser, for it is trite law that mere physical delivery of property, unaccompanied by an intention to transfer ownership, does not give the recipient *dominium*.⁷

[15] It is axiomatic that the vexed legal question whether there has been delivery accompanied by an intention to pass *dominium* depends upon the intention of the parties and the facts of each case.⁷

[16] This question resolves itself into two issues. The first is to determine who to look to as being in a position to form an intention to transfer ownership on behalf of Investgold. The second is to determine the intention of Investgold at the time. As mentioned, the court below held that the brokers were the guiding minds of Investgold. I do not agree. The sole role of the brokers at the time the coins were delivered was to counter-sign the delivery notes once Uys and the brokers had established that the correct coins had been delivered. Beyond that, the brokers played no part in the delivery of the coins. The guiding mind of Investgold was that of the general manager Erasmus in setting up the system to be implemented for cash sales and deliveries in particular. This system was set up so as to pass ownership. The evidence shows

⁶ *Cornelissen NO v Universal Caravan Sales (Pty) Ltd* 1971 (3) SA 158 (A) at 179D-E.

⁷ R Norman *Purchase and Sale in South Africa* (1919) at 290.

conclusively that the coins were delivered to Uys by Davids on 26 January 2011 with the intention to pass ownership. Uys in turn accepted ownership of the coins with the intention of becoming the owner.

[17] As regards the second question, it seems to me that the intention of Investgold was that transfer of ownership would take place when the system for delivery had been implemented and completed. This system was set up in order to ensure that delivery took place in accordance with an accepted quotation (order) and that documentary proof of this delivery was obtained. It is therefore my view that, in the present matter, because effect was given to the system for delivery and the process was followed to completion, the intention to pass ownership was proved. In any event, if the 'guiding mind' must be determined at the time of a particular delivery, it could not have been those of Hugo or Jardine but that of Davids whose job was to select coins in accordance with the order, deliver them to Uys and ensure that delivery was documented by way of his signature and those of the broker or brokers who had been responsible for the sale.

[18] Even if it can be argued that the mind of Hugo must be looked to, it is inconceivable that, knowing as he did that he could not steal coins in the possession of Investgold, he held a mental reservation concerning transfer of ownership when delivery took place for the sole reason that he wanted to steal from Investgold rather than from Uys and Troskie. He was intent on stealing the coins at some future date. The only persons he could successfully persuade to adopt his scheme were Uys and Troskie. No inference can be drawn that he did not intend them to become owners because he did not want to steal from them.

[19] It follows that the court below erred in finding that ownership of the coins had not passed to Uys and Troskie. It further erred in finding that, despite physical delivery having been effected, the coins were at all times under the control of Hugo. If this were in fact so, Hugo would not have needed to ask Uys whether he wished to deposit the coins for safekeeping. He may have thought, with justification that Uys was under his influence to place the coins where he could steal them but he was not in control of the coins. Investgold accordingly discharged the onus to prove the transfer of ownership of the coins to Uys and Troskie. In doing so Investgold discharged its obligations under the cash sales. As such, the claim for specific performance ought to have failed.

[20] Uys and Troskie relied on two alternative claims. The first one was based on the fact that after becoming aware that Hugo and Jardine had ordered the coins in their names, Investgold intentionally or negligently omitted to advise them of this fact which resulted in them failing to take steps to protect their interests, and allowing Hugo to steal their coins. The second one is based on an alleged misrepresentation by Hugo and Jardine which led to Uys storing his coins at Knox Vaults after they led him to believe that they would be safe whereas they were not safe as Hugo subsequently stole them from the safe. The learned judge did not deal with the two alternative claims. Save to state that they persisted with the two alternative claims, counsel for Uys and Troskie did not make any submissions in support of the two claims. As regards the first of these, the law recognises no such legal duty. As regards the second, the theft by Hugo has nothing to do with carrying out his employment with Investgold. No vicarious liability for his actions thus arises. It suffices to state that the two alternative claims have no merit.

[21] In the result, the following order is made:

1 The appeal is upheld with costs including the costs of two counsel where employed.

2 The order of the trial court is set aside and substituted with an order dismissing the plaintiffs' claim with costs.

L O BOSIELO
JUDGE OF APPEAL

Appearances:

For Appellant : AG South

Instructed by:
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Symington & De Kok, Bloemfontein

For Respondent : H van Eeden SC (with him JW Steyn)

Instructed by:
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