THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 266/2015

In the matter between:

ABSA BANK LTD **APPELLANT**

and

KNYSNA AUTO SERVICES CC **RESPONDENT**

Neutral citation: *Absa Bank Ltd v Knysna Auto Services CC* (266/15) [2016] ZASCA 93 (1 June 2016)

Coram: Majiedt, Seriti, Swain, Zondi and Mathopo JJA

Heard: **18 May 2016**

Delivered: **1 June 2016**

Summary: Contract — floor plan agreement (FPA) — Sale and financing of motor vehicles — reservation of ownership until receipt of payment — payment not received – rei-vindicatio — estoppel — possessor not acting reasonably in construing representation by owner that seller entitled to pass ownership – any representation ambiguous – possessor obliged to enquire from owner as to true position – possessor obliged to return vehicle.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Masuku AJ sitting as court of first instance):

1. The appeal is upheld with costs.
2. The order of the court a quo is set aside and replaced with the following:

> '1. Respondent is ordered to forthwith return to Applicant a 2011 Volkswagen Polo 1.4 Comfortline sedan with engine number CLP034196 and chassis number AAVZZZ6RZBU030970.
>
> 2. Respondent is ordered to forthwith return/or supply to Applicant the original NATIS documentation, together with duly signed Notification of Change of Ownership Forms (NCO(5)) of the Polo.
>
> 3. That, in the event of Respondent failing and/or refusing to return/or supply to Applicant forthwith the aforesaid vehicle and documents, the Sheriff be and is hereby authorised and requested to enter into and upon Respondent's premises, or wherever same may be found, to attach the vehicle and documents referred to in 1 and 2 above, and to return the vehicle and documents to Applicant as a matter of urgency.
>
> 4. That in the event of Respondent failing and/or refusing to forthwith sign and return to Applicant the Notification of Change of Ownership Forms (NCO(5)), the sheriff be and is hereby authorised and requested to sign such documents.
>
> 5. The respondent is ordered to pay the costs of this application.'

JUDGMENT

Mathopo JA (Majiedt, Seriti, Swain and Zondi JJA concurring):

[1] On 16 July 2014 the appellant (Absa Bank) on an urgent basis obtained a rule nisi calling upon the respondent (Knysna Auto Services CC) to show cause why a Polo

motor vehicle should not be declared to be the property of the bank and why the respondent should not be ordered to return the motor vehicle to the bank. The Western Cape Division, Cape Town (Masuku AJ) held that although the bank was the owner of the motor vehicle it was estopped from vindicating it. On 30 January 2015, the court a quo discharged the rule nisi with costs and thereafter granted leave to appeal to this court.

[2] The facts giving rise to this appeal can briefly be summarized as follows. On 21 August 2013 Absa Bank concluded a written floor plan agreement (FPA) with an entity called Business Zone 2157 (the Corporation). In terms of the FPA the Corporation acknowledged and agreed that the bank would at all times remain owner of any motor vehicle which was subject to its terms. It would only cease being the owner and title holder once it had received payment for a vehicle sold by the Corporation and had notified the Corporation accordingly in writing.[1]

[3] The respondent is a vehicle dealership that trades in second-hand motor vehicles in Cape Town. Before the respondent started trading in second hand vehicles, it traded in new vehicles from 2006 to 2009. During that period it operated through a floor plan agreement with Wesbank Ltd. It is not in dispute that the respondent was well-acquainted with floor plan agreements, even though it had no dealings with the appellant. The respondent, represented by Mr Van Vuuren and the Corporation represented by Mr Smit, regularly bought and sold vehicles from and to each other and had a good business relationship.

---

[1] 2.10 The Dealer acknowledges and agrees that the Bank will at all times remain the owner, title-holder and financier of the financed Goods, and that the Bank will only stop being the owner and title-holder of the financed Goods once the Bank has received payment for the financed Goods and have notified the Dealer accordingly in writing.
2.11 The Dealer undertakes not to do anything or to take any steps, which will give the impression that the Dealer is the owner of the financed Goods.
2.12. The Dealer shall not represent to any third party that it is the owner of any of the financed Goods for as long as any amount remains unpaid in respect of such financed Goods. In particular the Dealer undertakes to conduct all transactions in respect of the sale, lease, rental or other finance agreement of the financed Goods to its clients in such a way that the client understands and is correctly informed by the Dealer, through the negotiations and the required documentation, that the Bank is the owner, title-holder and financier of the financed Goods, and that the financed Goods are subject to the Bank's right of ownership.

[4] In January 2014, the respondent purchased a Toyota Fortuner vehicle (the Fortuner) from the Corporation. The agreed purchase price had initially been R265 000. The Fortuner was delivered to the respondent on 17 January 2014, and after inspecting it, the respondent, noted certain defects, which according to Mr van Vuuren required repair. As a result of these defects the purchase price was reduced to R260 000, which amount was ultimately paid to the Corporation. Despite the agreement that the Corporation would deliver the original National Traffic Information System (NATIS) documents in respect of that vehicle, it failed to do so.

[5] Four months later, on 28 May 2014, and after making several attempts to obtain the NATIS documents, Van Vuuren returned the Fortuner to the Corporation and asked to be reimbursed the purchase price. Instead of refunding the respondent Smit suggested that the Fortuner be exchanged for two motor vehicles. These vehicles were subject to the terms of the Absa FPA with the Corporation, being a Polo (valued at R100 000) and a Toyota Hilux (valued at R170 000). The shortfall of R10 000, was paid by the respondent to the Corporation. Contrary to the FPA this exchange transaction was concluded without the knowledge and consent of the bank.

[6] On 20 May 2014 the bank realised that these vehicles, of which it was the owner, were not at the premises of the Corporation. The bank then demanded an explanation regarding their whereabouts, as well as payment for them in terms of the FPA. The Corporation responded by saying that:

'We have a crisis on hand. We unfortunately do not have a cheque book since Friday. We still had two left but when we went to collect from ABSA, they said it would take 2 or 3 days to order. We will send the settlement as soon as we received our cheque book.'

Dissatisfied with this response, the bank then cancelled all agreements with the Corporation and demanded possession of the vehicles. The Corporation failed to provide the appellant with the vehicles, or details as to their whereabouts. The appellant then launched an investigation through NATIS searches and discovered that the two motor vehicles had been registered in the name of the respondent. The respondent

refused to return the motor vehicles to the appellant, contending that it had acquired ownership of them.

[7] On 14 July 2014, the appellant accordingly lodged an urgent application before the court a quo for the return of these vehicles. The respondent opposed the application and raised two main defences: first that the FPA was a simulated transaction and secondly, that the appellant was estopped from asserting ownership. Only the latter defence remains for determination, the respondent having abandoned the first. The interim order was therefore only granted in respect of the Polo motor vehicle. As pointed out above, on the return date the court a quo discharged the rule nisi with costs concluding that:

'It follows that the common law rei-vindicatio remedy must not be used to effect arbitrary deprivation of property belonging to third party purchases of vehicles.'

The court further reasoned that the respondent became owner of the motor vehicle on registration by the licensing authority and that unless the registration certificate was impugned or set aside the respondent's ownership could not be challenged.

[8] In this conclusion, the court a quo erred and the only issue in this appeal is whether the appellant is estopped from vindicating the Polo motor vehicle in the respondent's possession, of which it is the owner.

[9] The respondent contended that the appellant should be estopped from asserting its ownership against the respondent or estopped from denying the Corporation's right to dispose of the vehicles to the respondent. It was argued that by permitting Smit to furnish the respondent with letters from the bank (namely KA5 and KA6, purportedly signed by a bank official Mr Faizal Banoo) and authorising Smit to sign the RVL form (being an application for registration and licensing of a motor vehicle), Smit acted, as the appellant's agent and misrepresented to the respondent that the Corporation was entitled to exchange the vehicles. This was contrary to the FPA which specifically barred the Corporation from making representations to any third party that it was owner of the vehicles, for as long as the bank had not been paid. Moreover, the FPA bound

the Corporation to conduct all transactions in respect of the vehicles in such a manner that the client understood and was informed by the Corporation that the bank is owner.

[10] The contention advanced on behalf of the respondent was that since all the documents emanated from the appellant, it was estopped from alleging that Smit or the Corporation, were not entitled to sell the motor vehicles. By making all the documents available to the respondent, the appellant should have reasonably contemplated that any prospective buyer might act on the representation to his detriment. The appellant had been negligent in not taking reasonable steps to guard against that possibility. Smit or the Corporation must be taken to say that the appellant by making the documents KA5, KA6 and the NATIS documents available to the respondent relinquished its rights to retain ownership of the motor vehicles. The appellant accordingly represented to the respondent that the Corporation was the owner of the vehicles and had the right to dispose of them.

[11] The respondent also argued that by displaying the vehicles in the showroom of the Corporation, together with other vehicles displayed by it for sale, the Corporation had dealt with the motor vehicles with the bank's consent. The bank had by its conduct created the impression to an innocent purchaser in the position of the respondent, that the Corporation had dominium in the vehicles or the jus dispondendi was vested in the Corporation. In the respondent's affidavit which was deposed to by Van Vuuren, it resisted the bank's claim for the return of the motor vehicle on several grounds. The affidavit included the following statements:

'24 I did, however, insist on being satisfied that the Corporation was entitled to sell the vehicles. Smit agreed to show me the NATIS documents and he did so. Along with the NATIS documentation, I was provided with a letter in respect of each vehicle, dated 28 May 2014, addressed by Mr Faizal Banoo (a manager of Applicant, employed in the Applicant's Credit Control Floorplans section, in turn a part of Absa Vehicle and Asset Finance) to the licensing department and headed "confirmation of re-registration".'

In para 26 the respondent further stated that the NATIS documents were shown to him on 28 May 2014 by Smit. These documents indicated that the vehicles had previously been registered in Absa's name (as title holder and owner). According to the

respondent, the vehicles were re-registered in the name of the Corporation and thereafter in the name of the respondent. The effect of this argument is this: once the vehicles were registered in the name of the respondent, the respondent became the owner and title holder by virtue of the NATIS registration documents. As pointed out above this argument incorrectly found favour with the court a quo, which erroneously held that unless the registration was impugned or set aside, ownership vests in the respondent.

[12] The appellant argued that: The registration documents KA5 and KA6 were headed 'without prejudice to our rights' and should have drawn the respondent's attention to the fact that the Corporation was not the owner of the vehicles. Accordingly the Corporation did not have the right to deal with the vehicles, without the express consent of the appellant. A minimum enquiry by the respondent would have revealed that these letters were electronically generated through the Geolock system/Fast system, which could be accessed by any dealer familiar with the Absa floor plan agreement. To safeguard its interest, the bank marked the letters with the words 'without prejudice to our rights' to enable the dealer to register the vehicle as stock and then into the purchaser's name. The dealer is then offered a period of forty-eight hours within which it has to pay the appellant.

[13] The appellant submitted that the Corporation abused this system and through fraudulent means represented to the respondent that it was the owner and entitled to dispose of the motor vehicles. In terms of the agreement (FPA) the Corporation failed to pay the money outstanding with the result that ownership of the motor vehicles remained vested in the appellant.

[14] Quite clearly the Corporation and the respondent knew that without the registration letters and NATIS documents they would not be able to effect registration of the vehicles. It was argued that the version of the respondent is improbable, because as a dealer with experience since 2004, the respondent must have known and accepted that it was business practice amongst motor dealers, especially where floor plan

agreements were involved, that the reservation of ownership remains with the appellant until payment has been made to it in full. During argument counsel for the appellant submitted that the conduct of the respondent in respect of the two motor vehicles, constituted an exchange in contravention of clause 8.1 of the FPA which provides:

'The Dealer may under no circumstances whatsoever exchange any of the Goods with other goods *without obtaining the prior written consent of the Bank*. If consent has been obtained from the Bank such exchange would amount to a new transaction in terms of this agreement. All amounts owing to the Bank in respect of the Goods so exchanged will immediately become due and payable.' (My emphasis.)

[15] A reading of the clause indicates clearly that the exchange transaction between the Corporation and the respondent fell foul of the FPA. It was not in dispute that, no such consent was obtained from the bank prior to the conclusion of the exchange transaction agreement between the respondent and the Corporation.

[16] The legal principles to be applied are clear and were stated by Holmes JA in *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd* 1976 (1) SA 441 (A) at 452A-G where he held:

'Our law jealousy protects the right of ownership and the correlative right of the owner in regard to his property, unless, of course, the possessor has some enforceable right against the owner. Consistent with this, it has been authoritatively laid down by this Court that an owner is estopped from asserting his rights to his property only─

(a) Where the person who acquired his property did so because, by the *culpa* of the owner, he was misled into the belief that the person, from whom he acquired it, was the owner of was entitled to dispose of it; or

(b) . . .

. . .

As to *(a)*, *supra*, it may be stated that the owner will be frustrated by estoppel upon proof of the following requirements─

(i) There must be a representation by the owner, by conduct or otherwise, that the person who disposed of his property was the owner of it or was entitled to dispose of it. A helpful decision in this regard is *Electrolux (Pty) Ltd v Khota and Another* 1961 (4) SA 244 (W), with its reference at 247 to the entrusting of possession of property with the *indicia* of *dominium* or *jus disponendi*.

(ii) The representation must have been made negligently in the circumstances.
(iii) The representation must have been relied upon by the person raising the estoppel.
(iv) Such person's reliance upon the representation must be the cause of his acting to his detriment.'

[17] Furthermore in *Electrolux Pty Ltd v Khota and Another* 1961 (4) SA 244 (W) 247B-C, Trollip J said the following:
'To give rise to the representation of *dominium* or jus *disponendi*, the owner's conduct must be not only the entrusting of possession to the possessor but also the entrusting of it with the *indicia* of the *dominium* or *jus disponendi*. Such *indicia* may be the documents of title and/or authority to dispose of the articles, as for example, the share certificate with a blank transfer form annexed . . . or such *indicia* may be the actual manner or circumstances in which the owner allows the possessor to possess the articles, as for example, the owner/wholesaler allowing the retailer to exhibit the articles in question for sale with his other stock in trade. . . In all such cases the owner
"provides all the scenic apparatus by which his agent or debtor may pose as entirely unaccountable to himself, and in concealment pulls the strings by which the puppet is made to assume the appearance of independent activity. 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, as agent, debtor, or otherwise."
Trollip J said further (at 247H– 248A):
'It follows that to create the effective representation the dealer or trader must, in addition, deal with the goods with the owner's consent or connivance in such manner as to proclaim that the *dominium* or *jus disponendi* is vested in him; as for example, by displaying, with the owner's consent or connivance, the articles for sale with his own goods. It is that additional circumstance that provides the necessary "scenic apparatus" for begetting the effective representation.'

[18] As regards estoppel by conduct in *Concor Holdings (Pty) Ltd t/a Concor Technicrete v Potgieter* 2004 (6) SA 491 (SCA) at 495A-C and 496D-E it was held that:
'Our law is that a person may be bound by a representation constituted by conduct if the representor should reasonably have expected that the representee might be misled by his conduct and if in addition the representee acted reasonably in construing the representation in

the sense in which the representee did so. . . Nevertheless if a representation by conduct is plainly ambiguous, the representee would not be acting reasonably if he chose to rely on one of the possible meanings without making further enquiries to clarify the position.'

[19] The respondent based its argument primarily on the registration letters from the bank and the NATIS documents. An examination of these letters indicate that they were marked 'without prejudice to our rights'. As to how the respondent could possibly believe that the said letters granted the Corporation authority to alienate the motor vehicles to the exclusion of the appellant's right of ownership is startling. Accordingly reliance on these documents cannot assist the respondent. These documents clearly referred to the appellant as owner and title holder of the motor vehicle. The respondent as an experienced motor dealer, who had dealt with floor plan agreements before, must have known that in such transactions ownership of the goods was reserved to the owner. In this case there is no suggestion that the appellant expressly, or by conduct, conveyed an impression that it was relinquishing ownership of the motor vehicle.

[20] Once it became clear that the Corporation was unable to refund the respondent the purchase price or provide the NATIS documents in respect of the sale of the Fortuner, for a period of four months, Van Vuuren on behalf of the respondent as an experienced motor dealer should have made enquiries regarding the Polo and Toyota Hilux motor vehicles, which were exchanged for the Fortuner. There were warning signs which should have alerted the respondent to make further enquires and not rely on the representations made by the Corporation. The fact that the Corporation was unable to repay the purchase price for the Fortuner, or supply the necessary transfer documents, should have alerted the respondent that the appellant had not been paid by the Corporation for this vehicle. The respondent nevertheless elected to adopt a supine attitude and decided not to make any enquiry from the appellant regarding the ownership of the Polo and Toyota Hilux motor vehicles. At the very least, any representation by the conduct of the appellant that the corporation was entitled to pass ownership of the vehicles, was plainly ambiguous. By not making any enquiries from the appellant, the respondent did not act reasonably. The defence of estoppel was

accordingly not established by the respondent. The appellant as owner of the Polo is accordingly entitled to its possession.

[21] I accordingly make the following order:

1. The appeal is upheld with costs.
2. The order of the court a quo is set aside and replaced with the following:

> '1. Respondent is ordered to forthwith return to Applicant a 2011 Volkswagen Polo 1.4 Comfortline sedan with engine number CLP034196 and chassis number AAVZZZ6RZBU030970.
>
> 2. Respondent is ordered to forthwith return/or supply to Applicant the original NATIS documentation, together with duly signed Notification of Change of Ownership Forms (NCO(5)) of the Polo.
>
> 3. That, in the event of Respondent failing and/or refusing to return/or supply to Applicant forthwith the aforesaid vehicle and documents, the Sheriff be and is hereby authorised and requested to enter into and upon Respondent's premises, or wherever same may be found, to attach the vehicle and documents referred to in 1 and 2 above, and to return the vehicle and documents to Applicant as a matter of urgency.
>
> 4. That in the event of Respondent failing and/or refusing to forthwith sign and return to Applicant the Notification of Change of Ownership Forms (NCO(5)), the sheriff be and is hereby authorised and requested to sign such documents.
>
> 5. The respondent is ordered to pay the costs of this application.'

_____

R S Mathopo
Judge of Appeal

Appearances

For Appellant:	L M Olivier SC Instructed by: Jay Mothobi Inc, Johannesburg Phatshoane Henney Attorneys, Bloemfontein
For Respondent:	B C Wharton Instructed by: Meyer Inc, Cape Town Horn & Van Rensburg, Bloemfontein