

**IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA**

14057/2009

**SILVER RUBY TRADING 1003 CC
T/A THE RANCH AUTO**

Applicant

versus

ABSA BANK LIMITED

First Respondent

PAXINOS MOTOR LINK CC

Second Respondent

Judgment

Delivered on: Friday 21 May 2010

Steyn J

[1] The historical background to this case is rather protracted. It commenced as an urgent application on 16 October 2009 and as the matter progressed a number of orders were granted including an order granting some relief against the second respondent. First respondent has throughout opposed the application and on 26 January 2010 the application was adjourned for oral evidence to be heard. At the commencement of the trial the parties agreed that the following issues should be

dealt with:

- a) Whether the applicant is the owner of the 17 (seventeen) vehicles scheduled in Annexure “A”;
- b) Whether the applicant appeared to have granted the second respondent the *jus disponendi* of the said vehicles to any third party, including the first respondent;
- c) Whether the applicant is estopped from alleging that the second respondent did not have, or appear to have, the *jus disponendi* of the vehicles;
- d) Whether the applicant, Mohamed Suleman Haffejee is duly authorised to institute these proceedings on behalf of the applicant.

In closing argument Mr Tobias conceded that issue (d) is no longer relevant. The reasons that follow hereafter will deal only with issues (a) to (c).

[2] On behalf of the applicant’s case Messrs Haffejee and Kaka testified and on behalf of the respondent Mr Crause testified. Mr

Vahed SC assisted by Mr Pillay acted for the applicant and Mr Tobias for the first respondent.

[3] On 5 May 2010 the parties held a second pre-trial conference where it was agreed by all that the papers before court will stand as pleadings. Other than an application to compel set down on the same date no further application was lodged to compel further and better discovery.

[4] The background, as ascertained from the papers filed, is that the applicant instituted proceedings against the respondents as a matter of urgency to have 17 vehicles returned to him as the lawful owner. Applicant claimed that even though a purchase and sale agreement was concluded with the second respondent, such agreement did not result in passing ownership. He claimed that he remained the owner of the vehicles until final payment of the purchase price was made.

The first respondent Absa bank, contended that ownership of the vehicles had passed and relied on the defence of estoppel.

Moreover it was contended that the second respondent was clothed with the authority to dispose of the said vehicles. In main, reliance was placed on the invoices allegedly issued by Glenvale Motors, that showed that Glenvale Motors was the previous owner of some of the vehicles and that it had passed title to the second respondent.

[5] **Parties**

The applicant is a motor dealer who purchased vehicles either on auctions or from dealerships. First respondent is ABSA Bank Limited, represented by its national manager working at the Floorplan Department, ABSA Towers, Johannesburg.

[6] **Evidence**

Mr Mohamed Y Kaka's testimony was that he is the sole member of Glenvale Motors CC, based in Johannesburg. He had stated that Paxinos Motorlink CC is known to him since he has been conducting business with the aforementioned business for the past twelve years.

His evidence was that the tax invoice 904 on page 15 of Bundle 'A', is indeed an invoice of his business, but he denied that the vehicle listed on the invoice were sold by them, he could also not identify the handwriting on the invoice. According to him neither the vehicles listed on invoice 1040, nor those listed on invoice 1070 belonged to him.

He was asked to identify the document filed per page 16, Bundle 'A', and he unequivocally stated that he had never seen this document, furthermore that it had never been generated by his business. Mr Kaka concluded that his business does not have a stamp as depicted on the document, and in addition that the identity number on the document stating M Kaka is incorrect, his number is 430303 2512 082 as opposed to the number 430305 120058, that appears on the document.

Mr Kaka's evidence was hardly disputed in cross-examination certainly not to extend that Paxinos purchased the listed vehicles as per the invoices filed on pages 15, 17 and 18.

Mr Haffejee's evidence confirms that he apposed to two affidavits filed in these proceedings. He is the managing member of The Ranch Auto and also the owner of the 17 vehicles listed in Annexure 'A' that is annexed to his founding affidavit. According to him, he received postdated cheques from Paxinos Motorlink CC, and the vehicles were then given to Paxinos. His evidence is that ownership of these vehicles did not pass since the parties agreed that it would only pass, once full payment had been made to the Ranch Auto. In addition to this, each invoice is endorsed with the following "*All vehicles are sold voetstoets; Goods remain the property of the Ranch Auto, Until fully paid for.*" Mr Haffejee confirmed that the form filed per page 13, is a regular copy of his particulars and his signature. Pages 4-12(g) of Bundle 'A', reflects a signature that is not his. According to him Paxinos Motorlink did not pay for the 17 vehicles listed and he remained the owner thereof.

In cross-examination he was asked about the cheques that were handed to him by Paxinos and to explain the fact that the one cheque dated 19 May 2009, indicated 'refer to drawer', and the one dated 1 July 2009, indicated 'payment stopped' and the

one dated 12 September 2009, showed 'refer to drawer'. A fourth cheque was also handed in and marked Exhibit 'D', dated 8 September 2009. This cheque is for an amount of R143 880.00

Mr Haffejee at times explained that Paxinos replaced cheques that he had in his possession with others and that he was not concerned about the fact that some bounced, since Paxinos business was not far from his place of business and he was satisfied that the vehicles were safe and the business was up and running.

He was questioned and challenged on the fact that he had handed the original Natis documents to Paxinos¹ and that such is deemed by ABSA to be irregular. Mr Haffejee denied that such business practice was irregular. He was questioned about when he started his investigation into the whereabouts of the said vehicles that were delivered to Paxinos. Mr Haffejee

1 Paxinos was run by a husband and wife team, Mrs Anthea Paxinos and Mr Gerhard Oosthuizen. It has been noted that on some of the documents filed, especially the eNatis motor vehicle owner's query forms, that Mrs Paxinos used the surname Paxinos-Oosthuizen.

remained adamant that he never concerned about the transactions between Paxinos and him, since he was assured that the vehicles even after 19 May 2009, were still on the floor of Paxinos. He personally observed this as a fact when he drove past Paxinos's place of business.

A great part of Mr Haffejee's cross-examination was spent on when he received the cheques that were put up as examples and whether there were more cheques and why those cheques were not filed. This witness has explained the manner in which he conducts his business and the fact that he never signed any form that passed ownership to Paxinos Motorlink CC. In re-examination he re-affirmed that he had not been paid for the 17 vehicles, forming the subject matter of this case. No further witnesses were called by applicant.

- [7] After Mr Tobias completed his cross-examination and re-examination had been completed, the applicant closed its case.

Mr Jakobus Francois Crause a National Manager, Floorplan

Department, working at ABSA Towers, Johannesburg testified that the most important document, in his opinion in obtaining ownership is the original eNatis document. He had testified that the bank relied on the invoices presented by Paxinos as well as the eNatis documents. His testimony was that it was not considered who the previous owners were, since such information played no role in placing the vehicles on ABSA's floor plan. An inspection of the vehicles however took place but such inspection was conducted after payment had been made. He explained the purpose of the floorplan as filed in Bundle 'B', pages 1-4. In addition he confirmed that ABSA had an agency agreement with the second respondent Paxinos Motorlink CC that was concluded on 29 April 2008.

In cross-examination Mr Crause was questioned on his experience and his previous positions in the bank. On a direct question of how long he has been employed as a national manager, he responded by saying "a number of years". He was asked to elaborate on his knowledge of the Natis system of registration, whereupon he acknowledged that he is no expert.

He was asked to explain whether ABSA would inform employers of recent judgments of the SCA, especially if it impacts directly on the way the bank conducts its business. His evidence is that he is not aware of such communications nor was any such advice given to him.

- [8] It needs to be noted that Mr Tobias during cross-examination of Mr Haffejee requested that all other dishonoured cheques issued by Paxinos to Haffejee be produced as well as bank deposit books, and bank statements. Mr Vahed SC objected on the basis that the trial proceedings would be unnecessarily delayed for the production of more dishonoured cheques and bank statements. In his view the 4 cheques produced should suffice. He submitted that first respondent was aware of the existence of the cheques as early as October 2009 and certainly never elected to compel discovery of the applicant's bank statements or deposit books until this late stage of the trial. Moreover he argued that the pre-trial minutes signed by all, showed that as early as 13 April 2010 it was noted that no

prejudice was suffered due to any party not complying with the rules of court.

In reply Mr Tobias argued that the number of cheques has an impact on the degree of negligence attributed to Mr Haffejee in doing business. Having considered all the arguments and the papers, I ruled that the matter proceed without any further delay and on the documents that were filed. Mr Tobias thereafter proceeded to cross-examine Mr Haffejee.

[9] **Legal Framework**

The requirements for a defence of estoppel to succeed are that the owner by conduct or otherwise must have represented negligently that the person who disposed of the property was the owner or had the power to dispose thereof. Such representation must have been the cause of the claimant's detriment.²

2 See Wille's Principles of SA Law, 9th ed (2007) 552 – 553 and LAWSA vol 9, 2nd ed para 652.

With regard to the first respondent's view that the second respondent had the required *jus disponendi* I shall bear in mind the principles stated by Trollip J in *Electrolux (Pty) Ltd v Khata and Another*.³

"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 of 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."*⁴

[10] From the documents submitted, and in light of Mr Kaka's testimony it is evident that the first respondent acquired ownership through fraudulent representations made to the Bank by second respondent.

3 1961 (4) SA 244 (W).

4 At 247B-E.

Mr Vahed SC, has argued that this case falls squarely in the factual scenario of *Absa Bank Ltd t/a Bankfin v Jordashe Auto CC*⁵ and if the principles setout in *Jordashe* are applied then ultimately this court should come to the conclusion that estoppel had not been established and that the applicant should succeed in his claim to a final order. Mr Tobias argued that this court ought to consider an earlier decision of the SCA, namely *Quenty's Motors (Pty) Ltd v Standard Credit Corporation Ltd*⁶ and that it has far greater significant in this matter. He has also argued that the 'new version' of the applicant could not have been anticipated and that this court's earlier ruling had seriously prejudiced the first respondent in presenting it's case. In his opinion this court should grant absolution.

[11] **Evaluation**

With regard to the defence of estoppel Mr Crause as the representative of the first respondent, was the only witness.

5 2003 (1) SA 401 (SCA).

6 1994 (3) SA 188 (A).

In my view should I grant absolution as has been asked by Mr Tobias then I need to be persuaded on the evidence that a representation was made to the first respondent that was precise and unambiguous⁷ and that it was caused by Mr Haffejee. The question is whether the applicant through any of his conduct made a representation by which the first respondent was misled. Much of the first respondent's case depended on Mr Haffejee being negligent if not reckless by handing over to Paxinos original eNatis documents. In my view the circumstances and the facts of this case rather begs the question whether ABSA would not have become aware of the true facts, namely that these vehicles were owned by The Ranch Auto, had ABSA instituted the necessary enquiries relating to the true ownership. In this regard proper consideration should be given to the evidence of Mr Crause as to what ABSA did when money was advanced to the business of Paxinos.

I remain mindful of the fact that I need to be persuaded that the

⁷ See *Concar Holdings (Pty) Ltd t/a Concor Tehcnicrete v Potgieter* 2004 (6) SA 491 (SCA) at 494 H.

respondent had acted reasonably when reliance was placed on any representation made to the Bank. No evidence was tendered on behalf of the first respondent that the vehicles were inspected before payment was made for the said vehicles. In my view such an inspection would have been prudent and would have assured that what is bought in deed belongs to the seller. Instead reliance was placed on a paper trail, similar to that in *Jordashe*. The matter is further compounded by the fact that the first respondent had an agency agreement with the second respondent. I don't intend for purposes of this judgment to analyse the duties and obligations between the first and second respondent.

I am persuaded that there was a need for the applicant to bring this application on an urgent basis given the facts of this case. It is evident from the papers that first respondent through its employee, Mr Horn was made aware of the intended application and that Horn, elected to forward the received correspondence to the Bank's legal department in Johannesburg.⁸ Without urgent intervention, the risk remained

8 See page 162 of papers.

that the listed vehicles may be destructed or removed and that the applicant would have suffered. I am satisfied that urgency was proved.

[12] It has been established on a balance of probabilities that applicant acquired ownership of the said vehicles. In my view it has not been established that applicant should be estopped from claiming his right to these vehicles for any reason.

Accordingly the following order is made:

a) Directing first and second respondents, alternatively such other persons who may retain possession thereof to deliver to the applicant each of the following 17 motor vehicles listed:

| <u>No.</u> | <u>Vehicle Description</u> | <u>Vin Number No.</u> | <u>Amount</u> |
|------------|----------------------------|-----------------------|---------------|
| (i) | Nissan TIIDA | ADNH370000A000413 | 130 000.00 |
| (ii) | Isuzu KB | ADMTFR77S5C271699 | 96 000.00 |
| iii) | BMW 5 Series | WBANR72036CR85464 | 265 000.00 |
| iv) | BMW 318 Ti Series | WBAAU52020KM86721 | 75 000.00 |
| v) | VW Caddy | AAVZZZ17Z3U015963 | 40 000.00 |
| vi) | A4 Jetta | AAVZZZ1JZ5U001847 | 84 000.00 |

| | | | |
|-------|-----------------|-------------------|------------|
| vii) | Corsa | ADMRF68AN3F180458 | 71 000.00 |
| viii) | Gonow | LCR1B41E17L019146 | 96 000.00 |
| ix) | Ford Ranger | AFADXXMJ2D5U01345 | 99 000.00 |
| x) | Ford Bantam 1.8 | AFAPVFC01PR480409 | 48 000.00 |
| xi) | Yaris | JTDJG923105117133 | 86 000.00 |
| xii) | VW Polo | AAVZZZ9NZ7U037425 | 99 000.00 |
| xiii) | Caravelle | WV2ZZZ7HZ7X009833 | 184 000.00 |
| xiv) | Honda Civic | JHMEU37304S201353 | 75 000.00 |
| xv) | Citi Golf | AABZZZ17Z5U008063 | 40 000.00 |
| xvi) | Mazda 6 | JM6GG10F100176906 | 75 000.00 |
| xvii) | BMW 323 | WBAVB56000ND17655 | 181 000.00 |

b) That in the event of the first and/or second respondents, and/or such other persons who may retain possession of the said vehicles failing to surrender possession to the applicant, the Sheriff of the Honourable Court is hereby authorised to:

- (i) enlist the assistance of the South African Police Services where necessary;
- (ii) take such steps as are necessary to locate and to take into his possession each of the vehicles listed in paragraph (a) *supra*; and

(iii) to deliver the said vehicles to the applicant for safekeeping.

- c) Directing the first and second respondents to pay the costs of this application, jointly and severally, the one paying the other to be absolved. Costs to include the costs of two counsel and, costs to include previously reserved costs in the application, excluding, however, the costs to compel discovery, which costs should be paid by the applicant; and
- d) It is declared that the applicant is the lawful owner and entitled to lawful possession of the aforementioned vehicles listed in this order.

Steyn J

Date of Hearing: 18 May 2010

Date of Judgment: 21 May 2010

Counsel for the applicants: Adv R Vahed SC with
Adv Pillay

Instructed by: Govender, Pather and Morgan

Counsel for the respondents: Adv D G Tobias

Instructed by: Jay Mothabi Incorporated