THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No 402/2001
REPORTABLE

In the matter between

Absa Bank Ltd t/a Bankfin
Appellant

and

Jordashe Auto CC
Respondent

Before: Schutz, Farlam, Nugent JJA, Jones and Heher AJJA

Heard: 20 September 2002

Delivered: 27 September 2002

Competing claims to vehicles between seller of alleged consignment stock with reservation of ownership and bank claiming ownership under a floor plan agreement in form of a sale – bank failing to establish estoppel as it did not rely on a possible representation by consignor – bank alleging fraud by consignor – referred back for evidence.

JUDGMENT

SCHUTZ JA and HEHER AJA

[1] This is a dispute about who owns certain 31 motor vehicles. One contender relies upon its reservation of ownership when 27 of the vehicles were delivered to a second-hand motor dealer for sale on consignment. The other relies upon an alleged fictitious delivery of the same 27 vehicles to it by the dealer, under a floor plan agreement. The remaining four were not delivered to the dealer and Absa's lack of defence to the claim for these vehicles will be dealt with below. The dealer was one Marais who traded at Nelspruit under the name of Ritchies Motors ("Ritchies"). That he acted dishonestly is clear. He and his close corporation are not parties to the appeal.

[2] The party who sold on consignment is Jordashe Auto CC ("Jordashe"), which traded at Florida as a second-hand motor dealer. It is the respondent in this Court, having been successful in obtaining a final order for the return of the vehicles in its urgent application in the Transvaal Provincial Division. The party who provided Ritchies with finance under the floor plan and who claims that it has acquired ownership of the vehicles by a fictitious delivery by Ritchies is Absa Bank Ltd ("Absa"). Bankfin was the division of Absa with whom Ritchies dealt. Jordashe cited and served Ritchies as the first respondent in the Court of first instance and Absa as the second. Ritchies did not oppose the application. The vehicles had already been or were about to be attached by Absa. In this Court Absa is the appellant, having obtained special leave to appeal. Jordashe was successful not only before the judge of first instance (Coetzee AJ) but also before the Full Court (Roux J with Roos and Bertelsmann JJ concurring).

[3] The record has swelled to 908 pages, but the founding affidavit of Jordaan was simple and short – 19 pages long. He alleged that in 1998 he, as the representative of Jordashe, concluded an oral agreement with Marais,

acting for Ritchies. The terms were that Jordashe would deliver vehicles to be sold on consignment, that any profit over the pre-determined cost price would be divided equally, that Ritchies was to pay over Jordashe's share (the cost price plus half the profit) upon receiving moneys from the persons to whom Ritchies sold, that Ritchies would not be entitled otherwise than as agreed to sell, pledge or burden the vehicles, and, finally, that ownership would remain vested in Jordashe until it had been paid in full. No mention was made in the founding affidavit as to the ownership of vehicles which Ritchies might accept as trade-ins as part payment of the price of vehicles sold by it. However, in the replying affidavit, in response to a challenge that certain of the vehicles had never been owned by it, Jordashe stated that the agreement extended also to vehicles that had been traded in, so that when Ritchies took possession of them it did so as agent for Jordashe, which became the owner.

[4] Jordashe's treatment of its acquisition of the vehicles it itself delivered to Ritchies was brief. Jordaan said that vehicles identified in a Schedule C were bought in the ordinary course of business, that the price was paid to the sellers and delivery was taken. Registration papers were received from the sellers, but the vehicles were not registered in Jordashe's name, as this would have entailed unnecessary expense and administration.

[5] When vehicles were delivered by Jordashe to Ritchies from time to time the keys and registration papers were handed over and signed acknowledgements of the reservation of ownership were obtained.

[6] During October 1999 Jordaan became concerned over Ritchies's payment record. On 4 November he went to Nelspruit and confronted Marais. He was shocked to discover that certain of the vehicles held on consignment had been registered in the name of Ritchies, contrary to the agreement, and presumably by the use of falsified transfer of ownership forms. That is Jordaan's version. He demanded the return of all the Jordashe vehicles, only ultimately to discover that Marais had subjected some of them to a floor plan agreement with Absa that purports to vest ownership in Absa. Not all the vehicles on the floor were subject to this agreement, and eventually Marais agreed that Jordashe could remove those vehicles not subject to it.

[7] On the same day, 4 November, Jordaan came to an agreement with Ritchies's attorneys that, pending an application to the High Court by Jordashe for the return of the vehicles, Ritchies would not deal with, alienate or hypothecate any of those to which Jordashe laid claim. We do not find it necessary to deal with the manner in which this undertaking was respected or not respected, save to state that before Jordashe reached the High Court, Absa had issued summons in the Nelspruit magistrate's court claiming possession of the vehicles. The basis of the claim was ownership. Marais had consented to judgment. The messenger then attached the vehicles on behalf of Absa. This all happened on one day, 9 November 1999.

[8] Jordaan contends that the floor plan agreement is a simulation. What is in truth a loan of money secured by a pledge of movables which have not been delivered to the pledgee, has been dressed up as a sale and delivery.

[9] Absa's answer is contained mainly in the affidavits of Messrs Crous and Badenhorst. The latter's various affidavits are lengthy. Much of them was hearsay and important parts were struck out. I shall seek to abstract the essence of the defences. Absa is said to have obtained ownership from Ritchies by delivery under the floor plan. The basis for this contention is to be found in the dealings between Absa and Ritchies, in that Ritchies issued invoices to Absa, Absa paid out Ritchies and Ritchies has not repaid Absa. The affidavits are not directed towards showing that Ritchies acquired ownership from the persons from whom it bought the vehicles. Thus, apart from the possible presumption arising from Ritchies's apparent possession of them, *nemo dat quod non habet* rears its head.

[10] Jordashe's contention that the floor plan is a simulation is contested. Delivery is said to have occurred by Ritchies's continued holding of the vehicles being a holding on behalf of Absa. In other words, no physical transfer having taken place, Absa relies on *constitutum possessorium*.

[11] Badenhorst then challenges Jordashe's version of what had happened between that firm and Ritchies. In the first place the alleged delivery for sale on consignment is challenged. Far from Jordashe being the victim of Marais, it is charged with having conspired with Marais to secure finance from Absa by deceit. There is no direct evidence to support this, but there are deponents who claim that Jordashe knew of the existence of the floor plan well before 4 November 1999. As will appear later in this judgment

the issue of deceit is now to be referred for evidence, but for the moment it is convenient to proceed on the assumption that Jordaan's evidence is truthful.

[12] Then Absa disputes that Jordashe has proved that it ever acquired the vehicles from sundry sellers. Jordashe is challenged to prove its acquisition of ownership. A constant refrain is that if Jordaan is shown to have erred in one particular the whole body of evidence becomes suspect. This challenge elicited a very lengthy replying affidavit in which Jordashe seeks to establish its ownership vehicle by vehicle and document by document. Certain of the vehicles were acquired by Ritchies not from Jordashe but from other persons. Jordashe's response is, yes, that is true, these were the vehicles which were taken by Ritchies as trade-ins, and as such were also subject to the ownership agreement. This is how the trade-ins came to be dealt with only in the replying affidavit. Absa also makes a point about certain of the vehicles which Jordashe had claimed that it owned and had delivered to Ritchies – that those vehicles were not to be found on Ritchies's floor on the day of the attachment, but were on the floor of Jordashe's premises at Florida. Some of them had been advertised for sale in a magazine called Auto-Trader. Jordaan's response is that one of these vehicles (No 33 on Schedule C) had indeed been delivered to Ritchies but had been returned for sale by Jordashe as Ritchies had not managed to sell it.

[13] The four other vehicles previously referred to (Nos 24, 31, 32 and 35 on Schedule C) had not yet been sent to Ritchies but their registration papers had. Jordashe deposed without contradiction that no consignment price had been agreed with Ritchies in respect of these vehicles. Ritchies had then fraudulently put registration papers of the four vehicles forward to Absa under the floor plan agreement as being available on its floor. As the uncontested evidence is that these four vehicles were never in the hands of Ritchies, even if *constitutum possessorium* were a valid method of delivery to Absa, that would not avail Absa, as one of the requirements, possession by the 'seller', would be absent. Accordingly it can be stated at once that

Absa has no claim to these four vehicles.

[14] Absa also relies upon estoppel. Jordashe is said to have made a representation that Ritchies could alienate the vehicles, this by permitting them to be displayed for sale on Ritchies's floor and by handing over the registration certificates. Absa is said to have acted on this representation to its prejudice by entering into the floor plan agreement and by making payments to Ritchies pursuant to it. In response Jordaan, apart from stating that the agreement is a simulation, contends that the representation was made by Marais and not by Jordashe, and that, far from its misleading Absa, Absa misled itself by not asking for proof of Ritchies's acquisitions of ownership. Attention is also drawn to the fact, already mentioned, that Absa makes no attempt to prove that Ritchies acquired ownership of the vehicles from persons other than Jordashe. Accordingly, in so far as Jordashe may prove that it was the one which acquired and thereafter retained ownership, there is nothing to contradict that proof.

[15] We now turn to consider whether Absa has established that it acquired ownership.

Has Absa acquired ownership by delivery?

[16] In order to have acquired ownership in this manner Absa has to prove five things: 1. A delivery. 2. In a form that the law allows. 3. By a person entitled to pass ownership. 4. Marais intended to pass ownership. 5. Absa intended to receive ownership.

[17] Whether the third requirement is satisfied depends largely upon whether Jordashe's version of the contract reserving ownership and its ignorance of the existence of the floor plan until 4 November 1999 is accepted. If it is, then Marais could never have intended to pass ownership because he knew he could not. His purpose would have been to defraud both Absa and Jordashe. Absa has produced no direct evidence to contradict the terms of the contract but it claims that there are clear pointers that Jordashe knew of the floor plan well before 4 November. The fact that it then remained silent, the argument proceeds, indicates that it was colluding with Marais in order to obtain finance from Absa by fraud. If this suspicion becomes established the whole of Jordaan's testimony collapses. Instead of being an innocent victim of Marais he would emerge as one acting in concert with Marais to persuade Absa to part with its money. Hence the need to probe the matter in evidence.

Jordashe's complicity? Reference to evidence.

[18] The pointers to complicity relied on are those that follow. On 13 October 1999 one De Necker, an Absa official, visited Jordashe's premises at Florida where he met Jordaan. That much is common cause.

According to De Necker he told Jordaan that he wished to inspect certain vehicles which were subject to a floor plan agreement. Jordaan was co-operative and pointed out vehicles. De Necker then asked why the vehicles which were subject to a floor plan agreement between Absa and Ritchies were were not at the latter's premises at Nelspruit, to which Jordaan responded that Ritchies had difficulty in selling certain models. Jordaan has a different version of the conversation in which he denies that there was any mention of a floor plan.

[19] Another Absa official, one Auckamp, visited the Florida premises on 28 October 1999, where he spoke to an employee who was presumably Mr Boersma. According to Auckamp, after he had identified himself as an Absa official he stated that his purpose was to see if he could find whether certain vehicles which could not be found at Ritchies's premises at Nelspruit were at Florida. Boersma co-operated in pointing out vehicles. Boersma's version is slightly different, to the effect that all that was said was that as a bank official Auckamp was inspecting certain vehicles on behalf of Ritchies.

[20] A further Absa official, one Van Heerden, deposes that he telephoned Jordaan on 13 October 1999. His stated purpose was to find out whether certain vehicles which Ritchies *wished to place* on the floor plan and which it claimed had been bought from Jordashe, had been paid for. He received an affirmative answer. Van Heerden concludes his affidavit by stating that Jordaan was fully aware that vehicles *had been* subjected to the floor plan

by Ritchies, but he does not explain why he makes that statement. Jordaan denies the telephonic conversation entirely.

[21] Mr van Rensburg was Marais's attorney. He states that on 2 November 1999 there was a meeting held in Pretoria at which Jordaan, Marais and he were present. At the meeting, according to Van Rensburg, a list of vehicles subject to the floor plan was drawn up at the request of Jordaan and handed to him. That list is Annexure C to Jordaan's founding affidavit. It is headed 'Vloerplan Voorraad Soos Op 2 November 1999'. The floor plan was then discussed with a possible view to Jordashe taking it over and employing Marais. Van Rensburg's impression was that Jordaan had known of the floor plan for some time. Jordaan agrees that the meeting took place on 2 November but states that is was concerned with Marais's financial crisis and denies that there was any mention of a floor plan. Jordaan does not explain why the list was dated 2 November or why it referred to floor plan stock.

[22] The probability or improbability of the versions put forward by either side was debated. In view of the course that the matter has taken the less we say on that subject the better.

[23] In the court of first instance Absa argued, in the alternative, that should its main defences fail, Jordashe could not obtain a final order without evidence, because of certain conflicts of fact. Neither party asked for a reference to evidence. Mr van der Merwe, for Absa, whilst conceding that it bore the onus to prove the fraud alleged, relied on

Ngqumba en 'n Ander v Staatspresident en Andere etc 1988 (4) SA 224(A) at 259C-263D, which holds that, even where the onus is on the respondent, it is for the applicant claiming final relief to call for evidence (We shall assume for the purposes of the present case that that case was correctly decided). The Court consequently pointed out to Mr Davis, for Jordashe, the difficulty which might face him whilst this decision stood. Bound by Absa's version and unready to have the witnesses tested, his client might lose its case. After an adjournment we were informed that the parties had agreed that the matter be referred back and had prepared a draft order to regulate the next stage in this protracted case. That draft forms part of the order at the end of this judgment.

[24] A further matter, however, had already been fully argued by Mr van der Merwe, and we intend to express our views, adverse to Absa, on this point.

Has an estoppel been established?

[25] On the facts of this case we are of the view that no estoppel has been established. The submission was, that by placing the vehicles on Ritchies's floor without any warning of a reservation of ownership, Jordashe had held out to the world and thus to Absa that Ritchies was authorized to sell them. However, this is not a case in which a passer-by was attracted into Ritchies's premises by a display of cars. There is no evidence that Absa inspected vehicles before 'buying' them, and if there were later inspections their purpose was to make sure that what it had

'bought' was either still there or had been paid for. Rather was Absa induced by papers, Marais's fraudulent papers, in which Jordashe had had no part. The papers which Jordashe had sent to Ritchies were not used. Marais had fraudulently acquired new registration papers in his own name. Those were what he used. Those were what helped to induce Absa. In Badenhorst's own words, the inducement was the presentation of a Ritchies invoice, proof of full payment for the vehicle and a registration document. So little did Absa rely on what was on the floor, that in one case it placed on the floor plan a vehicle that had never been sent to Nelspruit. Nor was the registration certificate.

[26] In these circumstances the fourth requirement for an estoppel (see *NBS Bank Ltd v Cape Produce Co (Pty) Ltd and Others* 2002 (1) SA 396(SCA) at 412D-E) has not been established. Supposing that Jordashe did make a representation, Absa did not rely on it. This being so it is unnecessary to consider the other aspects of estoppel. The plea of estoppel must fail. It is therefore also unnecessary to give further consideration to the issues of simulation or delivery by *constitutum possessorium*.

[27] Overall, then, Absa has not established that it acquired ownership of the vehicles.

What remains?

[28] Mr Davis conceded that two vehicles had been wrongly included in the order. Following the numbering in annexure C, no 36 was fully paid for by Ritchies. VW Jetta BFB202GP had not been claimed in the original

claim. It does not appear on annexure C so that it should not have been included in the order. These two vehicles are no longer in issue.

[29] In the papers there was some debate about the vehicles numbered 12, 14, 16, 25 and 28. Mr Davis says they should have been included in the order. But they were not and there is no cross-appeal. Accordingly Mr Davis agrees that they are not subjects of this appeal and that separate proceedings will have to be brought.

[30] There may yet be room for argument about whether certain of the vehicles allegedly traded in have been identified as consignment stock. In this connection I would point out that they fall into different classes and that it may not be necessary for Jordashe to prove ownership. Possession may suffice – see *Shenker v Bester* 1952 (3) SA 664(A) at 674H-676B and *Makakole v Officer Commanding* C I D, *Maseru and Another* L A C (1985-1989) 207 (a decision of the Lesotho Court of Appeal). These cases may be relevant if it is established that Absa has no title to the vehicles.

[31] The main issue remaining is to be the subject of evidence, whether Jordashe knew of the floor plan, consented to or acquiesced in it and remained quiet.

Costs

[32] Mr Davis asked that the costs of appeal be reserved to that they may follow victory in the oral hearing. Mr van der Merwe asks for costs, contending that an unnecessary appeal was occasioned by Jordashe's failure to ask for evidence at first instance. We agree with this argument.

[33] Although we were not addressed on the matter it seems to us that the costs orders in favour of Jordashe against Absa both at first instance and in the appeal to the Full Court should be set aside and reserved.

Order

[34] 1. The appeal succeeds with costs, including the costs of two counsel, in respect of all vehicles except the vehicles numbered 24, 31, 32 and 35 on Schedule C. The appeal fails in the case of those excepted vehicles.

2. The matter is referred for hearing of oral evidence in the Transvaal Provincial Division of the High Court of South Africa at a date to be arranged with the registrar on the following questions:

2.1 Whether or not Jordashe Auto CC knew of the existence of the floor plan agreement before the 4th November 1999 and if so,

2.2 since when had it known of the said floor plan agreement,

2.3 if so, whether Jordashe Auto CC consented to or acquiesced in it.

3. The evidence shall be that of any witnesses whom the parties or either of them may elect to call, subject, however to what is provided in para 4 hereof.

4. Save for the witnesses whose affidavits are already filed, neither party shall be entitled to call any witnesses unless:

(a) It has served on the other party, at least 14 days before the date appointed for the hearing (in the case of a witness to be called by Jordashe Auto CC) and at least 10 days before such date (in the case of a witness to be called by Absa Bank Ltd), a statement signed by the witness wherein the evidence to be given in chief by such person is set out; or

(b) the court, at the hearing, permits such person to be called despite the fact that no such statement has been so served in respect of his evidence.

5. Either party may subpoena any person to give evidence at the hearing, whether such person has consented to furnish a statement or not.

6. The fact that a party has served a statement in terms of para 4 hereof, or subpoenaed a witness, shall not oblige such party to call the witness concerned.

7. Within 20 days of the making of this order, each of the parties shall make discovery, on oath, of all documents relating to the issue referred to in para 2 thereof, which are or have been at any time in the possession or under the control of such party. Such discovery shall be made in accordance with rule of court 35 of the High Court Rules, and the provisions of that rule, with regard to the inspection and production of documents discovered shall be operative.

8. The costs orders granted in favour of Jordashe against Absa, at first

instance and on appeal to the Full Court, are set aside and those costs are reserved. The parties are allowed to make written submissions with regard to the alteration of this order 8 within three weeks.

W P SCHUTZ

JUDGE OF APPEAL

J A HEHER AJA

ACTING JUDGE

OF APPEAL

CONCUR

FARLAM JA

NUGENT JA

JONES AJA