



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

No precedent significance
Case No: 357/08

In the matter between:

NAZIER KOLIA t/a NAZCO MOTORS

Appellant

and

FIRST RAND BANK LIMITED t/a WESBANK

Respondent

Neutral citation: *Nazier Kolia v First Rand Bank* (357/08) [2011] ZASCA 206 (25 November 2011)

Coram: Harms AP, Cloete and Cachalia JJA

Heard: 16 November 2011

Delivered: 25 November 2011

Summary: *Actio ad exhibendum* — tacit conferral of *ius disponendi* — estoppel.

O R D E R

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

The appeal is dismissed with costs including the costs of the appellant's application for condonation.

J U D G M E N T

HARMS AP (CLOETE and CACHALIA JJA concurring)

[1] The appellant, Mr Nazier Kolia, trading as Nazco Motors, is a wholesale motor dealer. He purchases vehicles in bulk from sellers, such as car rental companies, and supplies them to motor dealers for on-sale. During 2004, he sold seven such vehicles to Supreme Cars, a dealer in Polokwane, against delivery of a number of post-dated cheques. The invoices contained a term reserving ownership until full payment of the purchase price. Supreme, in circumstances that will be dealt with in some more detail, transferred ownership to itself and then, by entering into a floor plan agreement with the respondent bank, First Rand Bank Ltd trading as Wesbank, purported to transfer ownership to the latter. The cheques were dishonoured and Kolia sought to repossess the vehicles, relying on his reserved ownership. Wesbank had, in the meantime, taken possession of them, relying on the rights it purportedly had obtained from Supreme. Some time later Wesbank, despite knowledge of Kolia's claim, disposed of the vehicles, and this gave rise to the institution of an *actio ad exhibendum* against Wesbank in which Kolia claimed the value of the vehicles.

[2] The case in the High Court, Johannesburg, was heard by Wessels AJ, who already on or about 1 October 2007 (there are three possible dates) dismissed the

claim after upholding a plea of estoppel. The learned judge granted leave to appeal on 11 June 2008. I shall refrain from setting out the sorry saga of neglect which led to the fact that the appeal record was only filed on 20 June 2011 because the parties were agreed that condonation should be granted, something to which we reluctantly agreed.

[3] The modus operandi of Kolia, Supreme and Wesbank was the same in relation to six vehicles and it is accordingly not necessary to distinguish between them and I shall take one as an example.¹ Kolia purchased a 2002 model Toyota from CMH Car Hire on 14 January 2004, paid the purchase price in full, and took delivery of the vehicle. CMH handed to Kolia the original Natis registration certificate relating to the vehicle as well as a signed blank transfer form, documentation reflecting payment by Supreme of the vehicle, and a letter from the title holder stating that the vehicle could be registered in the name of another title holder. A Natis certificate reflects the particulars of the title holder and of the owner (as defined in the National Road Traffic Act of 1996 and see also the National Road Traffic Regulations of 2000). To effect transfer of the vehicle an original Natis document as well as a completed transfer form is required.

[4] Kolia did not register the vehicle in his name as he was entitled to do but nevertheless, having regard to the foregoing, became the common-law owner of the vehicle. This fact became common cause in the court below. He then sold the vehicle to Supreme on 25 February 2004. The tax invoice indicates that the purchase price had to be paid in two instalments, namely on 25 March and 5 April 2004, and that ownership was reserved 'until paid for in full'. The necessary post-dated cheques covering the whole of the purchase price were handed to Kolia.

[5] Kolia, in turn, delivered the vehicle with its keys to Supreme. In addition, he handed to Supreme the following documentation: (a) the original Natis certificate as received from CMH; (b) the mentioned change of ownership form duly signed on behalf of CMH; and (c) documentation from the title holder (BMW Finance who had

¹ The seventh vehicle was a new vehicle, which had not yet been registered. The factory documents were instead provided. It is not necessary to deal with this instance any further because what follows applied *mutatis mutandis*.

financed the vehicle in the hands of CMH) as reflected on the Natis document confirming that the vehicle had been paid for in full.

[6] It is convenient to quote Wessels AJ at this juncture. He said:

'It is clear from what is set out and from the scheme of the Act that the Natis system, as it is called, has been designed to prevent the sale and registration of transfer of motor vehicles without the consent of the title holder which are often the financial institutions that provide the finance for the purchase of motor vehicles. In this regard, it is one of the salient features of the Natis system that a change in registration of the title holder and owner can only take place if the person effecting such change has in his possession the original Natis certificate in respect of the vehicle as well as proof emanating from the title holder (usually financier) of the vehicle to the effect that the vehicle has been fully paid for. This envisages a situation where registration can only take place if the original holder of the Natis certificate has relinquished it for the purposes of registration of the vehicle. The Plaintiff, by supplying Supreme Cars with the original certificate of registration in respect of the vehicles obtained from CMH, the signed change of ownership form and the original Natis document with a letter from the title holder confirming that the vehicle had been paid for in full, made it possible for Supreme Cars to register the vehicles into its name as owner and title holder and thereafter to register the vehicles in the name of Supreme Cars as the owner and the Defendant as the title holder respectively. [All this occurred on 11 March 2004.] The Defendant was registered as a title holder by virtue of financing it provided in terms of the floor plan agreement.'

[7] The handing over of the documentation was done to enable Supreme to sell the vehicle and to transfer ownership to any purchaser. In other words and in spite of the reservation of ownership, Kolia gave Supreme a tacit *ius disponendi*. Supreme could sell and transfer title and ownership of the vehicle as reflected in the Natis registration certificate. This much is apparent from Kolia's evidence:

'You knew that in selling the vehicles and delivering them in the manner that you did; that the vehicles were going to be on-sold, you knew that? --- Yes I did.

And you delivered them to the dealer for the purpose of them being on-sold, is that correct?

--- Yes.

You knew that they would not be used for the dealer's personal use, but that their aim was that they go out to third parties. --- That is correct.

And that they would come perhaps the subject matter of financial arrangements, leases financing of some nature. --- In most cases yes, but we never know the ultimate fact, because I do not do the account for Supreme, but generally yes.

You knew also, that in delivering the documentation that you did, to Supreme or its representative, that that would enable Supreme to register itself as an owner and a titleholder, you were aware of that? --- I was aware.

You were aware also that those documents that you delivered into the possession of Supreme, would have been delivered for the purposes of allowing Supreme to sell the vehicles to somebody else? --- Yes I did.'

[8] The value of the reservation of ownership was accordingly limited: it could have been used to reclaim the vehicle from Supreme in the event of non-payment but for nothing more. I am aware that Kolia sought to distinguish a disposition to a third person from that of one to a bank under a floor plan but I am unable to discern the difference.

[9] The common cause facts set out above were pleaded and formed the basis of the judgment below. However, since the focus was on the defence of estoppel they were relied upon to establish a representation by Kolia. The trial court agreed, as do I. But they are in my view dispositive of the anterior legal question of whether Supreme was clothed by Kolia with the *ius disponendi*.

[10] That disposes of the appeal. I therefore do not find it necessary to deal in any detail with the main point argued on behalf of Kolia on appeal, namely that the bank had failed to establish that it had relied on the documentation in purchasing the vehicle and that it, therefore, could not have relied on estoppel. The intervening act of Supreme of transferring the vehicle must be ascribed to Kolia. This is not a case where Supreme committed fraud. It only failed to honour its cheques after the transfer of the vehicle to the bank. If regard is had to ordinary banking practice, as set out in the evidence, there can be little doubt that the bank would not have acted as it did had it not been for the representations of Kolia. The trial court was obviously of the view that more specific evidence was not required in the circumstances of the case. The ability of a court of appeal to interfere with factual findings is limited and I am not satisfied that the trial court erred.

[11] The appeal is dismissed with costs including the costs of the appellant's application for condonation.

L T C Harms
Acting President

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