

42/94

Case No 141/92  
/MC

IN THE SUPREME COURT OF SOUTH AFRICA  
(APPELLATE DIVISION)

In the matter between

QUENTY'S MOTORS (PTY) LIMITED

Appellant

- and -

STANDARD CREDIT CORPORATION  
LIMITED

Respondent

CORAM: BOTHA, EKSTEEN, HOWIE JJA et NICHOLAS,  
OLIVIER AJJA.

HEARD: 24 February 1994

DELIVERED: 28 March 1994

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J U D G M E N T

NICHOLAS AJA:

This appeal is against an order made in motion  
proceedings in the Natal Provincial Division. The

application arose out of the activities of three persons, namely -

1. Quenty's Motors (Pty) Ltd ("Quenty's Motors"), the applicant in the Court a quo and the present appellant. It carries on business as a motor dealer in Pretoria. Mohamed Ahmed is a director and his father, Suleman Ahmed Aboo, although retired, assists in the business.

2. Standard Credit Corporation Limited ("Stannic"), the respondent in the Court a quo and in the appeal, is a general banker and is well known as a financial institution which deals extensively with the sale and leasing of new and used motor vehicles.

3. Love Motors Durban CC ("Love Motors").  
At the relevant time it carried on business as a motor dealer in Smith Street, Durban and its sole member was Howard Love.

In September 1990 Quenty's Motors acquired the

ownership of two Mercedes Benz motor cars. One, which was a 380 SEA 1984 model, bore the registration number YBA 7072. The other, which was a 250 SEA 1985 model, bore the registration number KPB 040 T. During September/October 1990 Quenty's Motors entered into two agreements with Howard Love. The first related to vehicle No YBA 7072, and the other to vehicle No KPB 040 T. In paragraph 10 of Quenty's Motors' founding affidavit, which was deposed to by Mohamed Ahmed, the following account was given of the conclusion of the first agreement -

"10. During or about the end of September 1990 my father during the course of a telephone conversation with Howard Love agreed that:

10.1 The motor vehicle, Mercedes Benz 380 SEA, 1984 model and bearing registration number YBA 7072 would be delivered to Howard Love on consignment.

10.2 The relevant registration documents would accompany the vehicle for the purposes of inspection by prospective purchasers.

10.3 Howard Love would pay Applicant for the vehicle once he sold the same.

10.4 Transfer of ownership of this vehicle would only take place upon payment by Howard Love to Applicant and upon which event the necessary transfer documents would be duly completed.

10.5 Howard Love would arrange to have the vehicle driven to Love Motor's premises."

The second agreement, which related to vehicle No KPB 404 T, was in substantially the same terms.

Howard Love duly took delivery of the vehicles. He was told by Mohamed Ahmed that the price which Quenty's Motors required for vehicle

No KBP 040 T was R59 000. (Nothing was said in the founding affidavit as to the price required for vehicle No YBA 7072). Quenty's Motors did not receive any payment in respect of either of the two vehicles, nor did it transfer ownership therein.

In about the middle of November 1990 Howard Love informed Mohamed Ahmed and Suleman Aboo in the course of telephone conversations that he had not so far sold either of the vehicles and that he was going on holiday to England until 28 November. Towards the end of that month Mohamed Ahmed received reports which gave him cause for grave concern. He went to Durban to investigate the situation, arriving at Love Motors' premises at about 11 pm on 26 November. The motor vehicles were not to be seen there. On the following day he again visited the premises. He was unable to make contact with Howard Love, but he received information which led him to go to Stannic's

repossession centre in Sidney Road, Durban, where he saw the two motor cars. On the same day Quenty's Motors made a demand on Stannic for their delivery and, when there was no satisfactory response, it applied as a matter of urgency for the issue of a rule nisi, operating as an interim interdict, which called upon Stannic to show cause why an order should not be made inter alia declaring Quenty's Motors to be the lawful owner of vehicles No YBA 7072 and No KPB 040 T, and directing Stannic to forthwith return the vehicles to Quenty's Motors. Stannic did not oppose the grant of a rule nisi, but did oppose the grant of interim relief. On 12 December 1990 a rule nisi was granted on terms to which Stannic consented, returnable on 27 February 1992.

Stannic had indicated that it would oppose the confirmation of the rule

"on the grounds that the Applicant is estopped

as against the Respondent from alleging that the [Respondent] has not acquired the ownership of the vehicles and that by virtue of the said estoppel the Applicant is precluded from denying the authority of Howard Love or Love Motors Durban CC to sell the vehicles to the Respondent."

Howard Love had left the country in order, so rumour had it, to avoid the importunities of his numerous creditors. His estate was sequestrated and Love Motors was liquidated. The liquidator of Love Motors having been joined as second respondent, he stated on affidavit that he abided the decision of the court.

The deponent to Stannic's opposing affidavit was Stephen Frederick Potgieter, who was Stannic's "Area Manager Credit Control" in Durban. The affidavit included the following statements -

"11. ...LOVE MOTORS DURBAN CC is a well known

firm of motor dealers in Smith Street, Durban with which the Respondent has dealt ..... extensively.

The premises of LOVE MOTORS DURBAN CC is solely that of a motor dealer, in other words there is no repair shop to which members of the public take their vehicles for repair and LOVE MOTORS DURBAN CC sells vehicles as its sole business.

.....

13. Ad Paragraph 10

It is clear from the allegations herein, the details of which are not known to the Respondent, that the Applicant has entrusted to the said LOVE who is a well known dealer in motor vehicles the said vehicles and well knew that the said LOVE would place same in his showroom and expose them for sale as ordinary stock-in-trade of LOVE's business LOVE MOTORS DURBAN CC.

14. I aver that both vehicles were in fact

brought onto the floor of the showroom of LOVE MOTORS DURBAN CC and appeared as exposed for sale as ordinary stock-in-trade of the business.

15. Pursuant to this and by virtue of an agreement between the Respondent and LOVE MOTORS DURBAN CC in terms of an agreement known as a 'Used Goods Floor Plan Agreement' the Respondent purchased from LOVE MOTORS DURBAN CC all motor vehicles brought into the business of LOVE MOTORS DURBAN CC.

I annex hereto marked 'SCC1' a copy of the agreement subsisting between the Respondent and the said close corporation. I further annex hereto marked 'SCC2' an invoice from the close corporation (which traded purely as LOVE MOTORS) in respect of the 380 SE Mercedes Benz and I annex hereto marked 'SCC3' a similar invoice in respect of the 280 SE Mercedes Benz both of which is dated the 17th October 1990 for the prices therein mentioned."

(Clause 3 of Annexure SCC1 provided -

"3 REQUEST, INVOICE AND DELIVERY

- 3.1 The Dealer may from time to time request Stannic to purchase goods from the Dealer for the purpose of selling the same back to the Dealer who will purchase the goods from Stannic in terms of this agreement for the sole purpose of resale.
- 3.2 If Stannic accedes in principle to a request referred to in 3.1 the Dealer will sign a completed Agreement of Sale relating to the goods in question and deliver the signed original of the same to Stannic as soon as possible after the request referred to in 3.1 has been made.
- 3.3 The Dealer will provide Stannic with an invoice for the goods stating the full description of the goods and the purchase price payable by Stannic to the Dealer.
- 3.4 Upon receipt of the signed agreement referred to in 3.2 and the invoice referred to in 3.3 Stannic shall pay

the purchase price to the Dealer who shall henceforth hold and procure that any other persons who may from time to time obtain possession of the goods shall hold the same for Stannic with the intent that Stannic shall become and remain the owner thereof."

In terms of clause 5 -

"The Dealer shall -

- 5.1 until ownership of the goods passes to the Dealer,
  - 5.1.1 hold the goods on behalf of Stannic as owner;
  - 5.1.2 not sell, dispose of or in any other manner whatsoever deal in or with the goods on terms which oblige or may oblige the Dealer to part with possession thereof before Stannic has received payment in full of all amounts owing in terms of the relevant Agreement of Sale;
  - 5.1.3 at its cost and expense keep the goods in good working order and condition, properly maintained, serviced and

lubricated;

5.1.4 not use the goods for any purpose whatsoever except to display the same in the Dealer's premises on the showroom floor and shall in particular not permit the goods to be used or driven;

....."

The object of the Used Goods Floorplan Agreement was manifestly to enable Love Motors to obtain finance from Stannic against the security of the vehicles sold.

The invoices Annexures SCC2 and SCC3 are, except for the respective descriptions of the motor vehicle concerned, substantially identical. They do not have a printed heading and what is recorded therein is in manuscript. Omitting matter which appears to have been added in another hand (presumably by employees of Stannic) SCC2 reads as follows:

"INVOICE/FAKTUUR

STANNIC / MOTORTOWN

195 WEST STREET, DURBAN 4001

Bought of QUENTYS MOTORS  
Gekoop van

510 MITCHELL STREET, PRETORIA 2000.

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1 x 84 Mercedes Benz 380 SE

62000-00

TO DELIVER ON YOUR BEHALF TO :

LOVE MOTORS

143 SMITH STREET

DURBAN

4001

62000-00")

Potgieter's affidavit continued -

"16. I also annex hereto marked 'SCC4' and 'SCC5' two agreements in terms of which the Respondent in turn re-sold to the close corporation under a suspensive sale agreement the vehicles in question and in terms of which the full purchase price was to be paid by the close corporation to the

Respondent on the 15th January 1991. I personally saw the vehicles on the showroom floor of the close corporation, and accordingly assumed they were ordinary stock-in-trade. The Respondent would not have acted as it did had not the vehicles been regarded as ordinary stock-in-trade.

17. In terms of the two invoices for R62 000,00 and R60 000,00 respectively the Respondent paid the close corporation therefor. Accordingly the Respondent maintains that it is the owner of the said vehicles alternatively that when the Applicant delivered the vehicles to the close corporation for the purpose of selling them the Applicant must have contemplated that the said LOVE or his close corporation would exhibit the vehicles for sale at his business premises with its other stock-in-trade. Furthermore it is clear that the close corporation dealt with the vehicles with the Applicant's consent in such a manner as to proclaim that

either the dominium therein was vested in the close corporation or at the very least that the close corporation had the ius disponendi.

18. I aver that acting through me the Respondent firmly believed that since the vehicles had been brought onto the premises of the close corporation that in truth and in fact and by virtue of the nature of the trade of the dealer namely the close corporation that the close corporation was in fact the owner thereof and had the ius disponendi thereof. It was the reliance [on] this by the Respondent (acting through me) that occasioned the transactions above-mentioned.

19. On the strength of the representations made to the Respondent by the Applicant in allowing the close corporation to have the vehicles on its premises for sale and as a direct result of such representations the Respondent has acted to its prejudice in acquiring and paying for the said

vehicles.

20. There was nothing to indicate to the Respondent that the goods were merely consignment stock. There were no markings on the vehicles in question to show that the vehicles had been delivered to the close corporation other than as ordinary stock-in-trade.

21. Ad Paragraph 10

I have no knowledge of the allegations herein nor of the private arrangements made between the Applicant and HOWARD LOVE personally or his corporation."

In a supplementary opposing affidavit which was filed by consent, Potgieter referred again to annexes SCC2 and SCC3. He said :

"4. These two invoices in form and content are the normal invoices Respondent regularly received from Love Motors and also from other dealers. It is respectfully submitted that they

indicate a sale of goods to Respondent and the words 'Bought of Quenty's Motors' indicate the source of the vehicle. It does not, it is submitted, indicate a reservation of ownership in favour of Applicant.

5. In accordance with the instructions given to us by Love Motors this is the name of the person to whom he wished the cheque to be made out by Respondent. The paperwork would then be attended to and Howard Love, representing Love Motors, would take delivery of the cheque as the agent for whoever was the seller of the vehicle."

He also annexed a copy of Stannic's cheque for R122 000 dated 17 October 1990 and payable to the order of Quenty's Motors.

In Quenty's Motors' replying affidavit, Mohamed Ahmed said that the invoices did not emanate from Quenty's which does not use such handwritten

invoices but uses pre-printed stationery. The handwriting on the invoices is not that of any employee of Quenty's.

For the rest Quenty's Motors' replying affidavit, as well as the supplementary replying affidavit filed by it, consisted of argumentation and contained no new allegations of fact.

Mohamed Ahmed said that the form and contents of the invoices should have drawn Stannic's attention to the fact that Love Motors was not the owner of the vehicles and did not have the right to deal with them. Even minimal enquiry by Stannic would have revealed the falsity of the invoices. Stannic ought to have satisfied itself as to Howard Love's ownership. Having regard to the business which it conducted Stannic would know that it was accepted business practice amongst motor dealers to move stock from one dealer to another and that "the mere presence of a vehicle upon certain

premises would not indicate ownership or for that matter a right to dispose thereof". Stannic was unbelievably naive, particularly in today's business world, in suggesting that the mere presence of the vehicle on a showroom floor, without an inspection of documents and enquiry as to ownership, would justify the assumption that the vehicles were ordinary stock-in-trade. Ahmed denied that Stannic could have been prejudiced by any action on the part of Quenty's Motors and averred that any prejudice arose solely from its own actions. If Stannic was in fact misled, this was a result of the fraudulent actions of Howard Love, in which Quenty's Motors had no part.

The rule nisi was extended from time to time, and the matter was eventually argued on 2 August 1991. The judge *a quo* dismissed Quenty's Motors' application with costs. The matter is now before this Court on appeal.

The principles to be applied are clear.

They were stated by Holmes JA in *Oakland Nominees (Pty) Ltd v Gelria Mining and Investment Co (Pty) Ltd* 1976(1) SA 441(A) at 452A-G :

"Our law jealously 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 or 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) S.A. 244 (W), with its reference at p. 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.

....."

In the *Electrolux* case referred to by Holmes JA,  
Trollip J said at 247 B-E :

"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.'

(Spencer Bower on Estoppel by Representation, p. 208)."

Trollip J said further (at 247 in fine to 248 in pr.) :

".... 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."

It is clear from Ahmed's affidavit that Quenty's Motors entrusted the possession of the two motor cars to Love Motors. He stated that the delivery was "on consignment". This phrase belongs to the vocabulary of commerce. It imports "the consigning of goods ...esp. to an agent for sale or disposal". (Oxford English Dictionary s.v. consignment 4.) Webster's Third New International Dictionary gives (s.v. consignment) a more precise definition of on consignment, namely,

"- on consignment: adj (or adv):

shipped to a dealer who acts as agent (as for a manufacturer) to sell, auction, or exhibit with the agreement that he may take title to and pay for what he sells, that he must remit the proceeds of sales less commission to the shipper, and that he may return anything left unsold (goods shipped on consignment.)"

It is more or less in that sense, I think, that the phrase was used in paragraph 10 of the founding affidavit. The vehicles were to be delivered to Howard Love; they were to be exhibited for sale at Love Motors; and it was contemplated that they would be sold, and that when each was sold Howard Love would pay Quenty's Motors therefor. It is not disputed that the two vehicles were displayed in the showroom of Love Motors, together with other vehicles displayed by it for sale. When Mohamed Ahmed went to Durban on 26 November 1990 he looked for the vehicles at the premises of Love Motors. Adapting the words of Trollip J, Love Motors dealt with the vehicles with Quenty Motors' consent in such a manner as to proclaim that the dominium or jus disponendi was vested in Love Motors. Holmes JA's first requirement was satisfied.

In regard to the second requirement, Mohamed Ahmed should reasonably have contemplated that a

prospective purchaser might act on the representation to his prejudice, and he was negligent in not taking reasonable steps to prevent it.

In regard to the third and fourth requirements, Potgieter said in paragraphs 18 and 19 of his affidavit which are quoted above, that he and hence Stannic firmly believed that since the vehicle had been brought on to the premises of Love Motors and because of the nature of its business, Love Motors was in fact the owner and had the *jus disponendi* of the vehicles, and that it was because of Stannic's reliance on this that it entered into the transactions with Love Motors and acted to its prejudice in acquiring and paying for the vehicles.

Mohamed Ahmed's arguments in his replying affidavits which are summarized above, were not such as to raise a genuine dispute of fact. In the Court *a quo* Quenty's Motors in asking for final relief did not seek

to test Potgieter's evidence by cross-examining him. And it cannot be said that that evidence was so far-fetched or clearly untenable that the Court would have been justified in rejecting it merely on the papers. Consequently the matter had to be approached on the basis of the allegations in Potgieter's affidavits. (Cf Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623(A) at 634E-635C.)

In the appeal it was submitted on behalf of Quenty's Motors that in the light of the circumstances relating to the invoices and the issue of the cheque Stannic could not have believed either that Love Motors was the owner of the cars or that it was authorised to dispose of them without Quenty's Motors receiving payment therefor.

In regard to the first leg of this submission, there is much to be said for the view that the invoices must have indicated to Stannic that Love

Motors was not the owner of the vehicles and that Stannic recognized this by issuing the cheque in favour of Quenty's Motors.

In regard to the second leg, however, the documents contain nothing which could have suggested to Stannic that Howard Love did not have the *jus disponendi*. Indeed, Howard Love's conduct in entering into the agreements of sale with Stannic, and in issuing the invoices and requesting that the cheque for R120 000 be handed to himself all indicated to Stannic that he had the *jus disponendi*.

Then it was argued that whatever representation might have been made to "an ordinary purchaser" entering the showroom of Love Motors, it was not made to a purchaser such as Stannic who purchased under a Used Goods Floor Plan Agreement. It is probably correct that Quenty's Motors did not have such a sale in contemplation, but the fact is that the

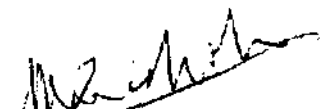
representation was made to all potential purchasers from Love Motors.

In my opinion, therefore, the estoppel raised by Stannic was clearly established, and the order by the Court *a quo* dismissing the application was correct.

There were before the Court two applications for condonation, one arising from the late filing and lodgment of the record, and the other arising from the late delivery and lodging of security. Neither was opposed by the respondents. The applications were not argued in *initio* because it seemed that the only question was whether the applicant had reasonable prospects of succeeding in the appeal. That question has now been decided against the applicant.

It is accordingly ordered that the

applications for condonation be dismissed with costs,  
including the costs of the appeal.

  
H C NICHOLAS AJA.

BOTHA JA)  
EKSTEEN JA)  
HOWIE JA)  
OLIVIER AJA)      Concurred.