IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

In the matter between **CASE NO: 12313/14**

ABSA BANK LIMITED **Applicant**

and

MEADSIE VAN ZYL **Respondent**

And in the matter between **CASE NO: 12314/14**

ABSA BANK LIMITED **Applicant**

and

LENNOX TYHALIBONGO **Respondent**

JUDGMENT DELIVERED ON 10 APRIL 2015

BLIGNAULT J:

[1] These two applications were heard together as they involve the same issues of fact and law. They were brought on notice of motion and then referred for the

hearing of oral evidence. In the case in which Ms Van Zyl is the respondent (case No 12313/14) Absa Bank Limited ("Absa Bank") seeks to vindicate a Mercedes Benz C 300 vehicle which is in her possession. In the case in which Mr Lennox Tyhalibongo is the respondent (case No 12314/14) Absa Bank seeks to vindicate a Mercedes Benz B 200 vehicle which is in his possession. I propose to discuss application against Ms van Zyl first and thereafter the application brought against Mr Tyhalibongo.

[2] Absa Bank's claim is the *rei vindicatio,* a remedy which is available to the owner of a thing to recover it from any person in possession thereof. It claims to be the owner of the Mercedes Benz C 300. Ms van Zyl does not dispute that she is in possession of the vehicle. Her defences to the claim are that Absa Bank is no longer the owner of the vehicle, alternatively that it is precluded from asserting its ownership through the application of the doctrine of estoppel.

[3] The corporation Business Zone 2157 CC ('Business Zone') plays a vital role in these proceedings. It carried on business in Worcester as a dealer in motor vehicles. It was at all material times controlled by one Jaco Smit. On 21 August 2013 Absa Bank and Business Zone concluded a Floorplan Agreement. The nature of this agreement appears from clause 1 thereof which reads as follows:

> *'1.1 The Dealer carries on the business of selling and/or distributing certain goods, new and/or used, being vehicles, equipment, implements or other goods ("Goods").*

1.2 The Dealer requires financial assistance for the effective conduct of its business and the Bank is willing to provide such assistance on the terms and conditions of this agreement.

1.3 This form of financial assistance is commonly known as a "floorplan" in the motor trade/industry and this agreement represents the floorplan agreement linked to a floorplan facility approved by the Bank for this purpose.

1.4 The terms and conditions of the floorplan facility are contained in a floorplan facility letter signed by the bank and accepted by the Dealer. The floorplan facility is subject to the terms and conditions set out in the floorplan facility letter and the terms and conditions contained in this agreement.

1.5 The terms and conditions of the floorplan facility may be reviewed and/or amended by the Bank from time to time.

1.6 To the extent of the floorplan facility limit approved by the Bank, the Dealer may from time to time request the Bank to purchase Goods, all of which the Dealer must choose and approve, from the manufacturer, importer, dealer, other institutions or persons ("the Seller") or alternatively to purchase Goods from the Dealer.

1.7 The Bank shall be entitled to comply with such request and to make payment for the Goods ("financed Goods") from the floorplan facility to the Seller or the Dealer, whichever may apply, or to turn down such request without giving any reason therefor.

1.8 In the event of the Bank having complied with the request, the Dealer shall be obliged to purchase or re-purchase the financed Goods from the Bank.

1.9 It is agreed that the financed Goods, which the Bank acquires and pays for, be delivered to the Dealer or remain in the Dealer's possession, on behalf of the Bank and subject to certain terms, to enable the Dealer to market and sell or dispose of such financed Goods to its clients in terms of a sale, lease, rental or other finance agreement in the normal course of business.

1.10 The Dealer acknowledges and agrees that the Bank will at all times remain the owner, titleholder 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.

1.11 The Dealer acknowledges that it has been given an adequate opportunity to read and understand these terms and conditions and that the Dealer is aware of all the terms printed in bold.'

[4] Clause 2.10 of the Floorplan Agreement reads as follows:

'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 the title-holder of the financed Goods once the Bank has received payment for the financed Goods and have notified the Dealer accordingly in writing.'

[5] Clause 3 of the Floorplan Agreement is headed *'Sale of Financed Goods by the Dealer'.* Sub-clauses 3.1, 3.4 and 3.7 read as follows:

3.1 The Dealer shall purchase the financed Goods from the Bank and shall be entitled to sell such financed Goods and/or dispose of such financed Goods in terms of sale, lease, rental and/or other finance agreements in the ordinary course of the Dealer's business, subject to the terms and conditions of this agreement and the floorplan facility letter.

3.4 The total amount payable by the Dealer to the Bank in respect of the financed Goods, including all interest, costs and other chares shall, subject to clause 3.5 be paid by the Dealer to the Bank in full –

3.4.1 upon the sale of such financed Goods or upon the disposal of such financed Goods by the Dealer by way of a lease or rental or other finance agreement or upon delivery of such vehicle pursuant to a sale or disposal, whichever date shall first occur; or

3.4.2 within such other period as may have been stipulated in writing by the Bank at the time such financed Goods was acquired by the bank from the Seller or the Dealer in terms of this agreement.

> *3.7 Against receipt by the Bank of the amounts owing to the Bank by the Dealer in respect of such financed Goods, the Bank, shall at the cost of the Dealer, sign all such documents and do all such things as may be required in order to effect transfer of ownership of the Goods in question to the Dealer.*

[6] On 12 July 2013 Business Zone received a letter from Absa Bank ('the Facility Letter') in terms of which Absa Bank advised Business Zone that its floorplan facility had been approved. The Facility Letter was countersigned by Mr Smit on behalf of Business Zone on the same date. By his signature he confirmed *'that the facility is accepted subject to the stipulations and conditions contained herein'.* This letter contains certain salient terms of the proposed Floorplan Agreement. Clause 7.5 of the Facility Letter reads as follows:

> *'Vehicles sold and on floorplan must be settled within 48 hours.'*

Clause 7.7 of the facility letter reads as follows:

> *'The conditions in this letter can change at the discretion of the Bank.'*

[7] Absa Bank purchased the Mercedes Benz C300 from Business Zone pursuant to the Floorplan Agreement. It then became the owner of the vehicle although it remained physically in possession of Business Zone for purposes of its business. It is common cause that Business Zone sold and transferred the vehicle to Ms van Zyl although it never paid Absa Bank for it. Business Zone was later placed in liquidation and there is no prospect of recovering any damages from it. It is further not in dispute that Ms van Zyl was not aware of any defect in the title of Business Zone when she took transfer of the vehicle.

[8] The first issue is whether Absa Bank passed ownership of the vehicle to Business Zone. There was a fair amount of evidence in regard to the registration procedures that were applicable to the transfer of vehicles from one owner to another. There is a nationwide register of all motor vehicles that are registered by the various registering authorities. It was referred in the evidence as NATIS, an acronym for the National Traffic Information System. In each case the register would indicate the *title holder* and the *owner* of the vehicle. These terms are defined in the National Road Traffic Act 93 of 1996 but for present purposes it is sufficient to note that a common law owner would fall within the definition of a *title holder* and a lawful possessor within the definition of an *owner.* It appears from the evidence that the registration of a person as a *title holder* is generally regarded in the trade as proof that he is indeed the common law owner.

[9] Counsel for applicant relied primarily on clause 2.10 of the Floorplan Agreement for the contention that ownership of the Mercedes Benz C300 did not pass to Business Zone as Absa Bank was never paid for the vehicle. Counsel for Ms Van Zyl argued, however, that one must have full regard to the circumstances in which the vehicle was sold and delivered to Ms Van Zyl.

[10] It appears from the evidence that prior to the delivery of the vehicle to Ms Van Zyl Business Zone received a document in electronic form and addressed to the *'Licensing Department'.* It bears the heading *'Confirmation of reregistration'* and

confirms that Business Zone may be reregistered as the title holder and owner of the Mercedes Benz C 300. The letter is signed by Mr Faizal Banjoo as a Manager Credit Control Floorplan of Absa Bank. I shall refer to this kind of letter as a reregistration confirmation letter.

[11] Mr Raoul Arendse was employed by Absa Bank as the National Manager for Absa Vehicle and Asset Finance, Wholesale Division at the time when he gave evidence. He was not involved in the transaction in question and his evidence was confined to the procedures applied by Absa Bank in the implementation of their floorplan agreements. The reregistration confirmation letter is delivered by Absa Bank to the dealer in order to enable him to pass transfer of the vehicle to a purchaser thereof. On receipt of such a letter the dealer is authorised to cause the vehicle to be reregistered without the need to refer back to Absa Bank. Mr Arendse also explained the working of the Geolock/FAST system. It is a computer system which is used for the interaction between floorplan dealers and banks, in this case Absa Bank. It was used inter alia for the conveyance of reregistration confirmation letters to Business Zone including the letter that features in this case.

[12] Mr Lawrence Graham was, at the time that he gave evidence, a manager employed by Absa Bank as a Team Leader in its Retail Business Bank Commercial Asset Finance Legal Recoveries Department He testified that the 48 hours period mentioned in clause 7.5 of the Facility Letter normally applied to cases where ownership of the vehicle was about to be transferred by the dealer to a financial institution. In that event the dealer was allowed the period of 48 hours in order to

reregister the vehicle into its name so that it could in turn be reregistered in the name of the financial institution. Without such reregistration the financial institution would not pay the dealer for the vehicle.

[13] Mr Graham testified that Absa Bank often sent reregistration confirmation letters to Business Zone before receiving any payment from it for the vehicle in question. He stated that Absa Bank would normally assume that a vehicle is sold for cash unless it is notified by the dealer that it is to be transferred to a financial institution.

[14] Ms Cecile Heyns testified that she was formerly employed by Business Zone in its administration section. She was responsible for the operation of the GeoLock/FAST system. Its purpose was to maintain a full record in electronic form of all vehicles covered by a floorplan agreement. The system was controlled by Absa Bank's head office in Johannesburg. One of its functions was to convey the reregistration confirmation letters from Absa Bank to Business Zone. She said that she could obtain such letters without any difficulty. All she had to do was to click at the right place on the computer. In some cases this letter was obtained only after payment for the vehicle had been made by the dealer to Absa Bank, in other cases before payment was made. She did not know why the one or the other procedure was followed, she simply acted on instructions. She estimated that she probably received a reregistration confirmation letter before payment was made to Absa Bank in 80% of all cases. In about 20 to 30% of all cases the vehicle in question was transferred by Business Zone to a financial institution.

[15] I turn to the parties' respective contentions. Absa Bank's case is straightforward. It is founded on clause 2.10 of the Floorplan Agreement. It contends that ownership of the Mercedes Benz C300 did not pass to Business Zone because it did not pay Absa Bank for the vehicle.

[16] Counsel for Ms van Zyl, on the other hand, submitted that Absa Bank's conveyance of the reregistration confirmation letter to Business Zone amounted to a transfer of ownership to it. This letter enabled Business Zone to change the reregistration of the title holder of the Mercedes Benz C300 from Absa Bank to Ms van Zyl. Counsel pointed to the evidence of Mr Graham that reregistration confirmation letters were regularly sent to Business Zone through the Geolock/FAST system in cases where Absa Bank had not been paid for the vehicle. This evidence was corroborated by that of Ms Heyns. Such a letter was sufficient to change the registration information on the NAFTIS documentation which it did in the case under consideration.

[17] In my view the contention advanced on behalf of Ms Van Zyl is sound. The conveyance of the reregistration confirmation letter to Business Zone was a typical form of symbolic delivery and it was understood and treated as such by the parties to the transaction. See, as to symbolic delivery, *LAWSA* second edition Vol 27 Things para 221:

> *'Closely analogous to clavium traditio and also called "symbolic delivery" in practice is the case where goods are transferred by delivery of the documents of title, bills of lading or warehouse receipts.'*

[18] Counsel for Absa Bank advanced three contentions in answer to Ms van Zyl's claim. The first is based on clause 2.10 of the Floorplan Agreement. Counsel argued that this clause is couched in peremptory terms. As Business Zone never paid Absa Bank for the vehicle ownership thereof never passed to it.

[19] It seems to me that there are two flaws in this argument. The Floorplan Agreement must be read together with the Facility Letter. Both form part of a composite agreement. The latter was intended to deal specifically with Business Zone. The former is a standard agreement which was intended to be of general application. In my view this is an appropriate case for the application of the maxim *generalia specialibus non degorant* (general words do not derogate from special ones). Although the maxim is more often applied in the interpretation of statutes it is also found in the interpretation of contracts. See *Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA) para [11]. Absa Bank was in any event in terms of clause 18.2 the Floorplan Agreement entitled to waive its rights thereunder in writing which is exactly what it did in the present case.

[20] Absa Bank's second contention is that Ms van Zyl did not prove that it (Absa Bank) had abandoned its ownership of the vehicle. I do not agree with this submission. Ms van Zyl's case is not that Absa Bank abandoned the vehicle. Her defence is that Absa Bank transferred ownership of the vehicle to Business Zone who in turn transferred it to her. The principles that apply to abandonment are materially different from those that relate to the transfer of ownership and are not relevant to the case at hand.

[21] Absa Bank's third contention is that ownership in the vehicle did not pass to Business Zone because the transaction was tainted with fraud. Its counsel relied in this regard upon a judgment of the Supreme Court of Appeal in *Quartermark Investments (Pty) Ltd v Mkhwanazi and Another* 2014 (3) SA 96 (SCA) in particular paras [24] and [25]:

> *'[24] This court, in Legator McKenna Inc and Another v Shea and Others* [2010 (1) SA 35 (SCA) paras 20-22] *confirmed that the abstract theory of transfer applies to movable as well as immovable property. According to that theory the validity of the transfer of ownership is not dependent upon the validity of the underlying transaction. However, the passing of ownership only takes place when there has been delivery effected by registration of transfer coupled with what Brand JA, writing for the court in Legator McKenna, referred to as a 'real agreement'. The learned judge explained that 'the essential elements of the real agreement are an intention on the part of the transferor to transfer ownership and the intention of the transferee to become the owner of the property'.*
>
> *[25] As has already been mentioned, a valid underlying agreement to pass ownership, such as in this instance a contract of sale, is not required. However, where such underlying transaction is tainted by fraud, ownership*

> *will not pass, despite registration of transfer. The high court correctly found that the contract of sale between Ms Mkhwanazi and Quartermark was tainted by fraud. It follows from this and the fact that Ms Mkhwanazi had no intention to transfer ownership to Quartermark that the purported registration of transfer to Quartermark has no effect and Ms Mkhwanazi remained the owner of the property.'*

[20] At first sight the phrase in para [25] '*where such underlying transaction is tainted by fraud, ownership will not pass'* appears to support counsel's submission. It must, however, be read in context. The learned judge referred with approval to *Legator McKenna Inc and Another v Shea and Others* 2010 (1) SA 35 (SCA). In para [22] of the *Legator* judgment Brand JA said the following:

> *'[22] In accordance with the abstract theory the requirements for the passing of ownership are twofold, namely delivery - which in the case of immovable property is effected by registration of transfer in the deeds office - coupled with a so-called real agreement or 'saaklike ooreenkoms'. The essential elements of the real agreement are an intention on the part of the transferor to transfer ownership and the intention of the transferee to become the owner of the property (see eg Air-Kel (Edms) Bpk h/a Merkel Motors v Bodenstein en 'n Ander 1980 (3) SA 917 (A) at 922E - F; Dreyer and Another NNO v AXZS Industries (Pty) Ltd supra at para 17). Broadly stated, the principles applicable to agreements in general also apply to real agreements. Although the abstract theory does not require a valid underlying contract, eg sale, ownership will not pass - despite registration of transfer - if there is a defect in the real agreement (see eg Preller and Others v Jordaan 1956 (1) SA 483 (A) at 496; Klerck NO v Van Zyl and Maritz NNO supra at 274A - B; Silberberg and Schoeman op cit at 79 - 80).'*

[21] It follows from these authorities that the proper test is not whether the underlying transaction was tainted by fraud. It probably was in the sense that Smit knew that he did not intend to pay Absa Bank for the vehicle. The true question, however, is whether the real agreement between Absa Bank and Business Zone was void by reason of Business Zone's fraud. In my view it was not. Absa Bank had the intention to pass ownership of the vehicle to Business Zone and Business Zone obviously had the intention to become the owner thereof.

[22] I am accordingly of the view that Absa Bank's contention that Business Zone's fraud vitiated the transfer of ownership of the Mercedes Benz C300 to Business Zone, is without merit.

[23] Absa Bank's vindicatory action against Ms van Zyl thus falls to be dismissed. It is accordingly not necessary for me to consider her alternative defence of estoppel.

[24] It remains to deal with the case against Mr Tyhalibongo. The facts in his case are in the main similar to those in the application against Ms van Zyl. The one difference is that in his case a reregistration confirmation letter or consent to reregistration was not produced as evidence in court. It also appeared from the Natis register and that transfer of ownership of his vehicle was registered directly from Absa Bank to Mr Tyhalibongo and not first to Business Zone and then to him. In the light of Ms Heyns' evidence in regard to her operation of the GeoLock/FAR system the inference is, however, inescapable that a similar letter or consent

emanating from Absa Bank preceded the transfer of ownership of the Mercedes Benz B200 to him.

[25] In the result, I make the following orders:

(1) Absa Bank's application against Ms van Zyl (case No 12313/14) is dismissed with costs.

(2) Absa Bank's application against Mr Tyhalibongo (case No 12314/14) is dismissed with costs.

A P BLIGNAULT