

SOUTH AFRICA / JUDGMENT

Absa Bank Limited v Mykatrade 361 CC t/a CMC Boksburg (46917/2010) [2011] ZAGPJHC 251 (9 December 2011)

[2011] ZAGPJHC 251

COURT

South Gauteng High Court, Johannesburg

BEFORE

EF Dippenaar

CASE / FILE NUMBER

46917/2010

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IN

THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(REPUBLIC

OF SOUTH AFRICA)

CASE

NUMBER: 46917/2010

DATE:

09 DECEMBER 2011

In

the matter between

ABSA

BANK

LIMITED.....Applicant

And

MYKATRADE

361 CC t/a CMC

BOKSBURG.....Respondent

JUDGMENT

EF Dippenaar AJ

- [1] This is an application for an order in terms of which the Applicant seeks an order that the Respondent be directed to forthwith deliver certain documents relating to five motor vehicles to the Applicant. Both parties claim ownership in and to the said vehicles.

[2] It is common cause between the parties that the Applicant is currently in possession of the aforesaid motor vehicles, having obtained possession of them pursuant to an Order granted by the Eastern Cape High Court, Grahamstown in its favour under Case Number 2789/2009, provisionally on 16 July 2009 and finally on 13 August 2009. The respondent in that application was CMC East London Distributors CC.

[3] The Respondent, who was not a party to those proceedings, has instituted rescission proceedings against that Order relating to the motor vehicles here in question. It contends that appropriately, these proceedings should have been consolidated and moved to the Eastern Cape High Court to be determined with the rescission application. I have no detail of the nature and extent of the papers in that application and have not been favoured with those papers. There is however no formal application for such relief before

me and I need not determine this issue.

[4] The present application before me relates to obtaining certain eNatis documents relating to vehicles which are currently in possession of the Applicant, pursuant to the aforesaid Court Order. The parties are undoubtedly aware of the risks involved of selling the vehicles before the proceedings in the Eastern Cape High Court have been determined, and I need not dwell on this issue.

[5] The Applicant contends that it is the owner of the said vehicles and is accordingly entitled to the said documents.

[6] The Applicant in the alternative seeks a referral of the matter to the hearing of oral evidence in the event that there is a bona fide and genuine dispute of fact on the papers. The Applicant however primarily contends that no genuine dispute is raised by the Respondent, that the issue of ownership is a legal one and that it is entitled to the relief sought.

[7] The Respondent agrees that it is central to the dispute which of the parties is the owner of the said five vehicles and in turn contends that it is the owner of the said vehicles and that the application falls to be dismissed with costs.

[8] The Respondent contends that to the knowledge of the Applicant, there were serious factual disputes regarding ownership of the vehicles and that application proceedings were inappropriately instituted. It contends that the application should be dismissed on this basis alone.

[9] The Respondent has further challenged the authority of the deponent to the Applicant's affidavit, Crause, to represent it in the proceedings and contends that Applicant's attorney is not properly authorised. I am of the view that there is no merit in this point and am of the view that the resolution attached by the Applicant to its replying affidavit is sufficient to provide the necessary authority. The resolution is clear in its terms and requires no further comment.

- [10] The central issue which needs to be determined is whether the question of ownership can be determined on the papers in the present proceedings and whether the Respondent obtained ownership in and to the five vehicles or whether the Applicant is the owner thereof.
- [11] There appears to be a number of factual disputes on the papers, but the question is whether those disputes impact on the issue of ownership or whether the issue is capable of determination on the papers as based on common cause and/or undisputed facts.
- [12] Mindful of the relevant principles enunciated, inter alia, in *Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd*[1], I have considered the Respondent's version carefully, together with the admitted facts set out in the Applicant's affidavits.

I am of the view that the matter can be decided on paper and that a referral to trial would not be appropriate.

[13] The Respondent's version amounts to the following:

[13.1] The Respondent was registered as a close corporation during 2009 and commenced trading on the 1st of March 2009, although no proof of such allegations are provided.

[13.2] When it commenced trading, the Respondent had no dealer code in order to secure finance for purchasers of vehicles and CMC East London, the Respondent in the Eastern Cape High Court matter referred to above, agreed to allow the Respondent to use its dealer code.

[13.3] The Respondent alleges that an agreement was concluded with CMC East London, but a paucity of detail regarding thereto is provided by the Respondent. It further alleges that it was agreed that CMC East London would purchase new vehicles from CCE Holdings and the Respondent would pay CCE Holdings for such vehicles. In order to obtain finance for its customer, it would utilise the services of CMC East London. CCE Holdings would thereafter deliver the vehicles to the Respondent at Boksburg and payment would be made to CMC East London.

[13.4] It bears mentioning that the vehicles had been found by the Applicant in East London in the possession of CMC East London. I return to the issue of delivery later.

[13.5] Once the Respondent sold the vehicles, CMC East London would complete the necessary documentation and utilise its dealer code to secure finance for the Respondent's customer and would retain any commission paid.

[13.6] The Applicant would then pay CMC East London for the vehicles in terms of a written floorplan agreement concluded between it and CMC East London and the latter would pay such amount to the Respondent less the commission.

[13.7] The Respondent further alleges that during April 2009, it purchased three vehicles from CCE Holdings and paid for those vehicles whereafter the Respondent took delivery of the vehicles. CMC East London arranged finance for the payment of the vehicles and retained the commission, but failed to pay the purchase price to the Respondent upon receipt thereof.

[13.8] During April / May 2009, the Respondent demanded payment of the aforesaid amount. As CMC East London could not pay, it offered to pay its indebtedness to the Respondent by delivery of five other motor vehicles (being the vehicles here in issue) to the value of the amount owed to the Respondent by CMC East London.

[13.9] The Respondent contends that it was then arranged that CMC East London would obtain the eNatis documents from CCE Holdings in order to enable the Respondent to register the vehicles as dealer stock at its premises in Boksburg.

[13.10] It contends that CMC East London did so and thereafter handed the eNatis documents to the Respondent. The Respondent then entered the vehicles in its register as “dealer stock”, without the vehicles being on its floor.

[13.11] The Respondent contends that it is the owner of the said vehicles as delivery of the import certificates and eNatis documents had been given to it and it had registered the vehicles in its name. It further contends that CCE Holdings delivered the vehicles to CMC East London on behalf of the Respondent.

[13.12] It does however not appear to me from the papers that CCE Holdings was aware that delivery of the vehicles was to be made, not to CMC, but to the Respondent, nor is such an averment made by the Respondent. This too is important in the context of delivery.

[14] The contention of ownership is the only defence raised by the Respondent to the relief sought. It must accordingly be determined whether the Respondent has proved that it is the true and lawful owner of the five vehicles.

[15] The Applicant’s version on the other hand, is the following:

[15.1] It purchased the vehicles from CCE Holdings on behalf of CMC East London in terms of a written floorplan agreement, which is to be read with a written agency agreement, both having been concluded between the Applicant and CMC East London.

[15.2] In terms of the aforesaid agreements, ownership of the vehicles vested in the Applicant until payment was received in full in respect of all five vehicles.

[15.3] Delivery of the vehicles to the Applicant took place by delivery to CMC East London.

[15.4] At the time when CCE Holdings delivered the vehicles to CMC East London, it had the intention of transferring ownership to the Applicant and CMC East London held the vehicles as agent for and on behalf of the Applicant who became the owner thereof.

[15.5] The Applicant paid the full purchase price of the vehicles to CCE Holdings.

[15.6] The Applicant accepted delivery of the vehicles with the intention of becoming owner thereof and became owner of the said vehicles.

[15.7] The floorplan agreement concluded between it and CMC East London was thereafter cancelled after which the Eastern Cape High Court granted an Order whereby CMC East London was ordered to return the vehicles to the Applicant, which Order was executed.

[16] In summary the Applicant contends that:

[16.1] A valid agreement had been concluded between the Applicant and CCE Holdings.

[16.2] Valid delivery of the vehicles took place to CMC East London on behalf of the Applicant and the Applicant inspected the vehicles in order to ensure that the vehicles were at the premises of CMC East London.

[16.3] CCE Holdings at all times intended to transfer ownership to the Applicant and not to CMC East London or to the Respondent and the Applicant at all times intended to acquire ownership and accept delivery.

[16.4] The Applicant obtained delivery, by delivery of the vehicles to CMC East London and eventually obtained physical delivery of the vehicles subsequent to an Order granted by the Eastern Cape High Court.

[17] These facts are not strenuously contested by the Respondent, other than contending that pursuant to the cancellation of the floorplan agreement, the Applicant could no longer retain ownership of the vehicles. I do not agree with this argument as once ownership was obtained, it was retained until at least another real agreement was concluded and the Applicant formed the intention to transfer ownership to another party. It is common cause that this never occurred.

[18] The Applicant relies on its ownership of the said vehicles for the current relief sought. The Respondent relies on its ownership of the vehicles for its right to defeat the Applicant's claim and to retain the eNatis documents. Insofar as the issue of an onus is relevant, I shall consider the matter on the basis that the Applicant must prove its entitlement to relief. Even if I am wrong on this issue and the onus is ultimately on the Respondent, for purposes of considering this application, I have gone

from the premise that the Respondent at least has a duty to adduce evidence in support of its contentions so that its version can be considered in accordance with the principles in *Plascon-Evans, supra*.

[19] This matter further requires an analysis of the relevant principles applicable to the transfer of moveable corporeal things.

[20] The Respondent relies upon derivative acquisition of ownership:

[20.1] by CMC East London from CCE Holdings; and

[20.2] thereafter by CMC East London on behalf of the Respondent.

[21] For derivative acquisition of ownership of a movable, such as a vehicle, delivery of the vehicle to the acquiree is required. Delivery can take place either through actual delivery or fictitious delivery, such as *constitutum possessorium*, attornment, tradition *brevi manu* or through delivery to an agent.

[22] For the passing of ownership by delivery, there must be compliance with, *inter alia*, the following requirements[2]:

[22.1] The transferor must be capable of transferring ownership. In accordance with the maxim *nemo iuris ad alium transfere potest quam ipse haberet*, a non-owner cannot transfer ownership;

[22.2] At the moment of the passing of ownership, the transferor must have the intention of transferring ownership and the transferee must have the intention of accepting ownership (the so called “real agreement” between the parties)[3];

[22.3] Delivery must take place in a form which the law allows;

[22.4] The purchase price must be paid, alternatively credit or security must be extended for such payment.

[23] If the Respondent’s version is evaluated against these principles; the Respondent did not and could not have had the intention of acquiring ownership of the five vehicles here in issue, which were delivered to CMC East London by CCE Holdings as, on its own version, the vehicles were originally delivered by CCE Holdings to CMC East London, not as delivery to the Respondent, but as delivery to CMC East London itself.

[24] Moreover, the Respondent contends that as CMC East London could not pay for the three other vehicles referred to in the answering affidavit it, in exchange, supplied the five vehicles here in issue to the Respondent.

[25] It is not the Respondent’s case that these vehicles had originally been delivered to CMC East London on its behalf, but by necessary inference that the vehicles were delivered to CMC East London on some other basis.

[26] On its own version, and at the time when ownership is alleged to have passed from CCE Holdings to CMC East London, the Respondent could not have had the intention of acquiring ownership of the vehicles here in issue from CCE Holdings. It is not contended that the Respondent had such intention.

[27] Moreover, at the time when ownership is alleged to have been transferred from CMC East London to the Respondent, CMC East London had not acquired ownership of the vehicles and was therefore incapable of transferring ownership to the Respondent based on the *nemo plus iuris* rule referred to above.

- [28] It is undisputed that the five exchanged vehicles, being the vehicles here in issue, were entered onto the floorplan agreement concluded between the Applicant and CMC East London and formed part of CMC East London's dealer stock. By virtue of the provisions of the floorplan agreement as read with the agency agreement concluded between the Applicant and CMC East London, ownership of those vehicles at the time vested in the Applicant.
- [29] CCE Holdings and/or CMC East London did not and could not have had the intention of transferring ownership of the vehicles to the Respondent at the time when the vehicles were delivered to CMC East London as those vehicles were not earmarked for the Respondent, but for CMC East London under the floorplan agreement and on behalf of the Applicant.
- [30] In addition, the Respondent does not contend for, nor could it have had the intention of acquiring ownership of the vehicles at the time when CCE Holdings delivered the vehicles to CMC East London.
- [31] The factual disputes which the Respondent raise are not aimed at these issues and in my view, these issues can be determined on the relevant legal principles.
- [32] In order for the Respondent to successfully defeat the application and rely on its ownership of the said vehicles here in issue, it must, inter alia, prove that CCE Holdings delivered the said vehicles to CMC East London with the intention of transferring ownership to the Respondent. This element is lacking in the Respondent's case.
- [33] In addition, it must show that CMC East London became the owner of the said vehicles; as if it never became the owner of the vehicles, CMC East London could not transfer ownership of the vehicles to any other party.
- [34] It is not contended that the Applicant ever intended to transfer ownership of the vehicles to the Respondent under circumstances where the Applicant contends that it at all material times was the owner of the vehicles.
- [35] It is further not disputed that the said vehicles had been delivered to CMC East London and that CCE Holdings had been paid for the vehicles by the Applicant.
- [36] The Respondent's reliance on its possession of the eNatis documents to support its allegation of ownership appears misplaced as it, on its own version, obtained delivery of the eNatis documentation from CMC East London, which was never the owner thereof. Moreover, on the Respondent's own version, the purpose of obtaining the eNatis documents from CMC East London was to enable it to register the vehicles as dealer stock at its premises and not to obtain transfer of ownership of the vehicles to it.
- [37] It is not disputed that the vehicles here in issue, which were given to the Respondent in exchange for the amount allegedly owing by CMC East London to the Respondent, were expressly included on the floorplan agreement concluded between the Applicant and CMC East London.

[38] The Respondent cannot contend that the delivery of the eNatis documents to it pertaining to the said vehicles, supports its allegations of ownership to the said vehicles, as:

[38.1] the mere fact that a vehicle is registered in the name of a person on an eNatis document does not prove that he is the true owner thereof as such registration may have come about as a result of fraud;[4] and

[38.2] the Respondent does not contend that it enquired as to whether the vehicles were subject to a floorplan agreement concluded with the Applicant or any other financial institutions, in circumstances where it, on its own version, must have known of the existence of such a floorplan.

[39] The Respondent's knowledge of the floorplan agreement and the true facts would also put pay to a successful reliance on the estoppel raised by the Respondent on its papers. In my view and in applying the relevant test on the evidence presented, the Applicant is entitled to its relief.

[40] I accordingly make the following order:

[40.1] The Respondent is ordered to forthwith deliver to the Applicant the original eNatis documents, together with duly signed Notification of Change of Ownership forms (NCO95) of each of the vehicles referred to in the schedule attached to the founding papers;

[40.2] In the event of the Respondent failing to comply with the Order in [40.1] hereto forthwith, the Sheriff of the High Court is authorised and directed to enter upon the Respondent's premises, to attach such documents and to deliver same to the Applicant's attorneys of record;

[40.3] In the event of the Respondent failing to comply with the Order in [40.1] hereto forthwith, the Sheriff of the High Court is authorised and directed to sign such documents on behalf of the Respondent;

[40.4] The Respondent is directed to pay the costs of this application.

E F DIPPENAAR

ACTING JUDGE OF THE HIGH COURT

Date of hearing : 22 September 2011

Date of judgement : 9 December 2011

For Applicant : Adv GH Meyer

:Jay Mothobi Inc

For Respondent : Adv M Basslian, SC

:Saders Attorneys

[1] 1984

- (3) SA 623A
- [2] ABSA Bank Ltd v Jordasche Auto CC, 2003 (1) SA 401 SCA para 16.
- [3] Trustbank v Western Bank, 1978 (4) SA 281 A pp301H-302A; See also Info Plus v Schelke and Another, 1998 (3) SA 814 SCA.
- [4] Akojee v Sibanyoni, 1976 (3) SA 440 (W)
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Prepared on 11 October 2026 · Esheria