

SOUTH AFRICA / JUDGMENT

Absa Bank Ltd and Another v Eksteen

(81/10) [2011] ZASCA 40 (29 March 2011)

[2011] ZASCA 40

COURT

Supreme Court of Appeal

BEFORE

NAVSA, NUGENT, HEHER, CACHALIA, MALAN

CASE / FILE NUMBER

81/10

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 81/10

No precedential significance

In the matter between:

ABSA BANK LIMITED1st Appellant

NEDBANK LIMITED2nd Appellant

and

MARIUS EKSTEENRespondent

Neutral citation: Absa Bank v Eksteen (81/10) [2011] ZASCA 40 (29 March 2011)

Coram: NAVSA, NUGENT, HEHER, CACHALIA and MALAN JJA

Heard: 7 MARCH 2011

Delivered: 29 MARCH 2011

Summary: Sale – warranty against eviction – seizure of vehicle by police – s 86(6) National Road Traffic Act prohibiting buyer from being in possession – seller liable for repayment.

ORDER

On appeal from: High Court Bloemfontein (Nxusani AJ sitting as court of first instance)

Both appeals are dismissed. The appellants are ordered to pay the costs of the respondent jointly and severally. No further costs order is made as between the appellants.

NUGENT JA (NAVSA, HEHER, CACHALIA and MALAN JJA concurring)

- [1] The decision of this court in *Marvanic Development (Pty) Ltd v Minister of Safety and Security*¹ is decisive of this appeal. In that case the police seized certain vehicles on suspicion that they had been stolen after discovering that their identification numbers had been tampered with. The appellants, alleging that they were the owners of the respective vehicles, claimed their return from the police. Their claim failed on the ground that s 68(6) of the National Road Traffic Act 93 of 1996 prohibited them from being in possession of the vehicles – even if they were owners.
- [2] This case arises from a series of sales of a Toyota Land Cruiser motor vehicle. The evidence does not disclose how the vehicle came into her possession but Ms Wilton sold it to Nedbank (the second appellant). Nedbank sold it to Absa Bank (the first appellant) who sold it to Mr Eksteen (the first respondent). Mr Eksteen sold the vehicle to Mr Hugo.
- [3] The police seized the vehicle from Mr Hugo. Investigations revealed that the original chassis and engine numbers had been tampered with. In response to enquiries made of Interpol the police were told that the vehicle had been stolen from its owner in Japan.
- [4] When he was told that the vehicle had been seized Mr Eksteen repaid the purchase price to Mr Hugo. He then instructed his attorney to write to Absa Bank, informing it that Mr Eksteen was of the view that he had had no defence to a claim by Mr Hugo for return of the purchase price. Absa Bank was informed that Mr Eksteen intended in turn to claim repayment of the purchase price that he had paid to Absa Bank. He invited Absa Bank to assist him to resist the seizure of the vehicle by the police and said that unless Absa Bank furnished either Mr Eksteen or Mr Hugo with information that would enable one or other to recover possession it would be assumed that Absa Bank agreed with the view that was held by Mr Eksteen. Absa Bank failed to reply.
- [5] Mr Eksteen duly sued Absa Bank in the Free State High Court for return of the purchase price that he had paid for the vehicle, relying upon the breach by Absa Bank of the warranty against eviction that is inherent in a contract of sale. In response to the claim Absa Bank pleaded that Mr Eksteen could and should have resisted the dispossession by instituting proceedings against the police for the return of the vehicle. In response to that portion of the plea Mr Eksteen replicated as follows (my translation):

‘The plaintiff admits that he did not institute legal proceedings for the return of the vehicle by the SAPS but pleads that the plaintiff is prohibited by law to possess the vehicle and to claim its return in that:

the engine and chassis numbers of the vehicle have been unlawfully altered; and

possession of the vehicle by the plaintiff is prohibited by the provisions of Section 68(6) of Act 93 of 1996; and

plaintiff has no valid title to the vehicle.'

[6] Absa Bank joined Nedbank as a third party to the proceedings, claiming an indemnification from Nedbank in the following terms:

'In the event of:

the above Honourable Court finding that the vehicle had been stolen and was a stolen vehicle at the stage that it was sold to [Mr Eksteen]; and

that the South African Police Services were entitled to confiscate the vehicle in terms of Section 31 of the Act; and

the above Honourable Court granting judgment in favour of [Mr Eksteen] for the amount claimed as aforesaid

then and in that event [Absa Bank] will be entitled to be indemnified by [Nedbank] in terms of the provisions of Rule 13(1) of the Uniform Rules of Court ...'

[7] Nedbank in turn joined Ms Wilton as a Third Party, conditionally claiming an indemnification on a similar basis. She did not defend the claim and is not a party to this appeal, although she was been cited as such.

[8] The court below (Nxusani AJ) upheld the claim by Mr. Eksteen and ordered Absa Bank to pay him the agreed value of the vehicle at the time the action was instituted² plus interest and costs. Nedbank was in turn ordered to indemnify Absa Bank, and Ms Wilton was ordered to indemnify Nedbank. Absa Bank and Nedbank now appeal the orders made against them respectively with the leave of that court.

[9] No admissible evidence was placed before the court below to establish that the vehicle had indeed been stolen from its owner in Japan. Nonetheless, evidence that the original identification numbers had been tampered with was not in dispute.

[10] Absa Bank attacked the order made against it on two grounds. It contended that by raising the statutory prohibition against possession Mr Eksteen had introduced a new cause of action and that he was not entitled to have done so in a replication. A corresponding point was raised by Nedbank in resisting the claim by Absa Bank – it said that the claim against it in the Third Party Notice had been predicated upon the vehicle having been stolen and that Absa Bank was not now entitled to place reliance on the statutory prohibition. That was the sole basis for its appeal. It is disconcerting that major banks should have sought to avoid liability on trivial points of pleading at the outset and even more disconcerting that they persist in those points on appeal. Pleadings are the servant and not the master. The statutory prohibition was fully canvassed at the trial. Even if the issue was not strictly

raised in keeping with ordinary principles of pleading that has become immaterial.

[11] The only other ground upon which Absa Bank sought to avoid the claim was in reliance upon an observation made by Lewis JA in *Marvanic*. In that case the learned judge said that the appellant was capable of regularising its possession of the vehicles by applying for and being issued with new identification numbers. It was submitted on behalf of Absa Bank that because Mr Eksteen was equally capable of having done so in this case the dispossession was not unassailable. The submission is misconceived.

[12] It is trite that a seller of property impliedly warrants to the buyer that he or she will not be evicted from possession of the purchased property.³ The most common form of eviction occurs where a purchaser is deprived of the property by the true owner but it is not so confined. Eviction occurs as much where the police or some other official seizes the property under statutory authority.⁴ An action lies where the purchaser shows that the eviction is unassailable, and it is unassailable if the purchaser is not able to resist the eviction at the time that it occurs. The fact that he or she might be capable of later acquiring the right to possession is immaterial. On the authority of *Marvanic* the series of purchasers were indeed not capable of resisting the eviction.

[13] There is another ground, however, upon which Mr Eksteen might have succeeded. In *Lammers & Lammers v Giovannoni* ⁵ Schreiner JA pointed out that ‘the basic obligation of the seller is to protect the buyer in his possession.... If he fails to shield the buyer against eviction he must restore the price and pay the damages suffered by the buyer as a result of the eviction’.⁶ The consequence of that obligation, he went on to say, was that:

‘[once] the seller is called upon to defend the buyer in his possession but washes his hands of the whole matter, it does not seem to me to be open to him to to meet the buyer’s claim by saying that the latter could or should have resisted the true owner’s claim more energetically or skillfully; for it was open to him, the seller, to have taken steps to protect the buyer and himself.’

[14] In this case Absa Bank was indeed called upon to resist the dispossession and indeed washed its hands of the matter. On that ground alone it had no defence to the claim.

[15] Both appeals are dismissed. The appellants are ordered to pay the costs of the respondent jointly and severally. No further costs order is made as between the appellants.

R W NUGENT

JUDGE OF APPEAL

APPEARANCES:

For 1st appellant: G H Meyer

Instructed by:

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(3) 159 SA (SCA). Later followed in *Basie Motors Bk t/a Boulevard Motors v Minister of Safety and Security* [2006] SCA 35 (RSA).

2Whether that was the correct amount to be awarded is not in issue in this appeal.

3'Sale' by AJ Kerr and G Glover in *LAWSA* 2ed Vol 24 para 75.

4*Vrystaat Motors v Henry Blignaut (Edms) Bpk* [1995] ZASCA 146; 1996 (2) SA 448 (A); *LAWSA*, above, para 79. .

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(3) SA 385 (A) at 392F-G.

6At 390A-B.

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