IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No: 139/2001

In the matter between

STANDARD BANK SWAZILAND
LIMITED t/a STANDARD BANK
VEHICLE AND ASSETS FINANCE APPLICANT

And

GRAHAM N. W. DUKE 1ST RESPONDENT
SABELO MASUKU N. O.

Neutral citation: *Standard Bank Swaziland Limited t/a Standard Bank Vehicle and Assets Finance v Graham N.W. Duke and another.(139/2001) [2012] SZHC 178 (4th September 2012)*

Coram: OTA J.

Heard: **26th July 2012**

Delivered: **4th September 2012**

Summary: **Rei vindicatio: contract of sale containing reservation of ownership clause: estoppel by**

conduct: estoppel by lien: principles thereof.

OTA J,

[1] This is a rei vindicatio, wherein the Applicant contends for the following orders:-

1. Ordering the First Respondent to deliver to the Applicant a GWM Sailor Single Cab Lux 2.2 Motor Vehicle, bearing:-

1.1 registration number SD 898 YN;
1.2 engine number D070612744;
1.3 chassis number LGWCA237X8A053638,

2. Authorising and directing the deputy sheriff in whose area of jurisdiction the motor vehicle may be found to attach the same and to deliver the motor vehicle to the Applicant.

3. Ordering the first Respondent to pay the costs of this application.

4. Further and/or alternative relief.

[2] The Applicant launched this application to vindicate the motor vehicle which particulars are enumerated in paragraph 1 ante.

[3] The Applicant claims ownership of the said motor vehicle. It is common cause that the said motor vehicle is currently in the possession of the 1st Respondent who purchased it from Classic Motors (Pty) Limited (in liquidation) (hereinafter called Classic). The 2nd Respondent is the liquidator of Classic, cited in his position as such and against whom the Applicant seeks no reliefs. Consequently, the 2nd Respondent filed no processes and did not participate in these proceedings.

[4] The grounds upon which the Applicant claims ownership of the said motor vehicle are that the Applicant purchased the vehicle from GWM Motors (Pty) Limited on the 10th of September 2007 via an oral cash sale agreement. That the Applicant paid GMW Motors a cash purchase price of ZAR 103,100-00 (E103,100-00) as evidenced by annexures B and C. That this oral agreement was concluded at the instance

of Classic. That on the 12th of September 2007, a lease agreement was entered between the Applicant as leasor and Classic as leasee as evidenced by annexure A, to be found on page 33 of the book of pleadings. That by annexure A, the Applicant leased the vehicle to Classic for a total rental price, including charges, of E147,514,20, to be paid by monthly installments of E2,458.57, commencing on the 15th day of October 2007, and to be finalized on the 11th day of September 2012. That Classic took delivery of the vehicle from GWM Motors from whom Classic elected that the vehicle should be purchased by Applicant on behalf of both Classic and Applicant in terms of annexure A.

[5] That on the 29th of January 2009, Classic was liquidated and the 2nd Respondent was appointed liquidator as evidenced by annexures D1 to D3. The Applicant alleged that by virtue of Classic's liquidation, it breached the lease agreement, annexure A, in terms of clause 12.1.3 and the Applicant acquired the right to cancel the lease agreement and to demand the return of the motor vehicle. At the date of liquidation Classic was indebted to the Applicant in respect of the vehicle in the sum of E84,121-89 as appears in annexure F. In the face of these facts, the Applicant

cancelled the lease agreement and demanded the return of the said motor vehicle, as well as other motor vehicles which it had leased to Classic (annexure E1). That it was then notified by the 2nd Respondent that the vehicle was not in the possession of Classic, (annexure E2). Applicant thus contended, that the 1st Respondent to whom Classic sold the said vehicle and who has possession of same, is in unlawful possession by reason of the fact that ownership in the said vehicle did not pass to Classic as envisaged by clause 4 of annexure A, which says that Applicant will retain ownership until Classic pays the full purchase price. Therefore, Applicant is entitled to vindicate same from the 1st Respondent.

[6] The 1st Respondent for his part contends, that a close reading of annexure A, shows that the agreement between the Applicant and Classic was a hire purchase transaction. That title thus passed to Classic since the vehicle was purchased on credit basis. The 1st Respondent also raised the legal defence of estoppel under different heads. I will come to these matters anon. Let me first settle the question as to

whom ownership of the said vehicle vests in, whether Applicant or 1st Respondent.

[7] Since the Applicant placed heavy reliance on clause 4 of annexure A in contending this issue, a starting point in the consideration of the question at hand would be a recital of clause 4 of annexure A, which states as follows:-

‘‘ *the goods shall at all times, be and remain the property of the lessor, and no act shall be done or permitted by lessee to cause the goods to become immovable property, or to become affixed to other movable property in such manner or with the intention that the goods accede thereto. Lessee hereby waives and undertakes to procure and furnish lessor with a written waiver of any right of accession by any other person as lessor may from time to time direct’’*

[8] It cannot be gainsaid from clause 4 ante, that the intention of the parties in the lease agreement annexure A was that the leasor i.e the Applicant, retains ownership of the motor vehicle pending the finalization of payment. The contention of the 1st Respondent that the agreement between the parties was a credit sale of hire purchase, and that ownership passed

to Classic upon delivery of the motor vehicle to it, does not hold any water in the circumstances. I say this because it is a trite principle of law, that where the parties decide to reduce the terms of the transaction between them into written form, no contrary or extrinsic evidence can be given of the content of such a document.

[9] This principle of law found expression in **Jourbert Law of South Africa, volume 9** at paragraph 538, as follows:-

‘‘ *Inadmissibility of extrinsic or parole evidence. When a jurat act is incorporated in a document, it is not generally permissible to adduce extrinsic evidence of its terms. Thus, when a transaction has been reduced to writing, the writing is regarded as the exclusive memorial of the transaction and no evidence may be given to contradict, alter, add to or vary its terms’’.*

[10] Similarly, in my decision in the case of **MTN Swaziland v ZBK Services and another Case No. 3279/2011 paragraph 24, 25 and 28,** I demonstrated this position of the law with reference to the case of **Busaf (Pty) Limited v Vusi**

Emmanuel Khumalo t/a Zimeleni Transport, Case No. 2839/08, as follows:-

*‘‘24 In their work entitled The South African Law of Evidence (formerly **Hoffman Zeffert), Lexis Nexis, 2003**, the learned author Zeffert say the following at page 322, regarding the proper position relating to agreements reduced in writing.*

25 If however, the parties decide to embody their final agreement in written form, the execution of the documents deprives all previous statements of their legal effect. The document becomes conclusive as to the terms of the transaction which it was intended to record. As the parties previous statements on the subject can have no legal consequences, they are irrelevant and evidence to prove them is therefore inadmissible

28 The import of the foregoing is that because the parties to the agreement, namely, the Plaintiff and the Defendant decided to embody all the terms of the agreement in a single memorial, the Defendant may not seek to lead evidence tending to prove anything contrary to the express terms of

the agreement. To the extent that he seeks to do so, he is totally out of order----''.

[11] It is however permissible in limited circumstances like in the face of the existence of ambiguity in an agreement, to lead parole evidence in order to ascertain the true form of the agreement. Ultimately the meaning of the document can only be derived from the language used therein. See **Dalmas Minning Co Lttd v Du Plessis 1955 (3) SA 447 (a) at 454.**

[12] In casu, since no ambignity exists in annexure A, It follow therefore, that annexure A is binding on the Applicant and Classic, and the 1st Respondent cannot now seek to set up any new terms which were not included in the said agreement.

[13] Now by the reserve clause 4 ante, the Applicant and Classic covenanted that ownership of the vehicles shall reside in the Applicant until final payment. Since Classic breached the terms of the lease agreement, when it was liquidated, and prior to completion of payment for same, consequently, the ownership of the motor vehicle had continued to vest in the Applicant. In these circumstances, the lease agreement was discharged and I hold that the dominium remained with the

Applicant who would be entitled to vindicate the said vehicle from the 1st Respondent.

[14] These sort of agreements which contain reservation clauses, are no strangers to our jurisprudence.

A situation similar to the one in casu, presented in the case of **Equistock Group cc t/a Autocity Motor Holdings v Mentz (2004) 2 ALL SA 46 (T).** In that case the Applicant had agreed to sell a motor vehicle to the Respondent, who agreed to pay half the sum and take immediate possession of the vehicle. The remaining balance of the purchase price was to be paid at a later date. An invoice manifesting the transaction contained a reserve clause, which read:-

‘‘ *OWNERSHIP: Notwithstanding anything else where provided or implied, the ownership in the goods sold both before and prior delivery, shall remain with us pending in full whether on the date or during default, but the risk shall pass to you’’.*

[15] Subsequently, the Applicant discovered that the Respondent had countermanded the cheque presented for payment of the

outstanding amount owed. The Applicant brought an urgent ex parte application against the Respondent asking for the return of the vehicle because there was a reasonable apprehension that the vehicle would be disposed of or hidden away by the Respondent. A rule nisi was issued by the court. On the return date, the rule was confirmed and the court held that if a contract was subject to a suspensive condition, then the rights of the parties would remain in abeyance pending the fulfillment of the condition. The court defined a ‘‘*suspensive condition*’’ as a condition suspending the operation of the obligations from the contract, pending the occurrence or non-occurrence of a particular specified event. The court held that the agreement between contracting parties would be discharged ipso lure on non-fulfilment of the condition. Upon close examination of the reservation clause, the court identified that the agreement of sale of the vehicle was made subject to a suspensive condition, which was not fulfilled by the Respondent because he stopped payment of the cheque. The Respondent was therefore in default of payment. Consequently, the ownership of the vehicle had continued to vest in the Applicant. Accordingly, the court held that since the Respondent had failed to honour the payment on due date, the contract of sale was discharged

ipso lure and the Applicant was entitled to vindicate the vehicle.

[16] Similarly in **Blackwood Hodges South Africa (Pty) Ltd v Elco Steel Dealers 1978 (3) SA 852 (T),** the agreement of sale of some excavators to B a second hand dealer had a reservation clause that

(a) ownership of the excavators would remain vested in the Applicant and would not pass to B until the whole purchase price therefore had been paid, and

(b) B would not part with possession, create any charge upon or dispose of the excavators until the purchase consideration, a total of R17,000 had been paid in full.

B sold the excavators. In a rei vindicatio B initially contended that the delay in taking judicial proceedings against him, estopped the Applicant from asserting ownership. Though he subsequently abandoned this line of argument, the court however held that whether or not the Applicant granted credit to B, there was an express reservation of ownership in the Applicant, and no delay in

the institution of judicial proceedings could have had the consequence that ownership passed to B.

[17] In casu, since Classic was liquidated before it completed payments to the Applicant, it is therefore beyond dispute, that dominion remained with the Applicant who has the right to vindicate the said motor vehicle. In these circumstances, the Common Law position is that the Applicant will only forfeit his right to vindicate the said motor vehicle if he is estopped by doing so because, by the conduct of the Applicant, including it's culpa or negligence, the 1st Respondent was misled into the belief that the person from whom he bought the said motor vehicle (i.e Classic), is entitled to dispose of it. For the owner of the goods to be deprived of the right to vindicate his property in these circumstances, there must be clear proof of estoppel. The standard is whether a reasonable prudent person in the position of 1st Respondent would have had the same belief based on Applicants conduct. If the court comes to the conclusion that the Applicants conduct created a representation that Classic was the owner of and had the right to sell the said motor vehicle, then the court must conduct a further enquiry to ascertain whether the

Applicant's conduct was ''*the real and direct cause*'' or ''*the proximate cause*'' which led the 1st Respondent to believe that Classic was entitled to sell the said motor vehicle.

[18] In the case of **Ectrolux (Pty) Ltd v Khota and another 1961 (4) SA 244 (W) Trollip J,** put the foregoing Common Law position in the following language:-

'' *In cases like the present where both the owner and the Respondent have been defrauded, the essence of the defence of estoppel is that the owner by his conduct, which might include or consist of his negligence, has represented or caused to be represented to the Respondent thereby misleading him to believe, that the Swindler was the owner of, or was entitled to dispose of the article. Consequently, I think that generally and logically, the first enquiry should be into what was the specific conduct of the owner that the Respondent relies upon for the estoppel. If that conduct is not such as would in the eyes of a reasonable person, in the same position as the Respondent constitute a representation that the Swindler was the owner of, or entitled to dispose of, the articles, then cadet – quaestio-no estoppel could then*

arise. But if such conduct does beget that representation, then the next enquiry would logically be whether the Respondent relied upon, or was misled by that representation in buying the articles''

[19] Further, in the case of **Oakland Nominees (Pty) Ltd v Gelria Mining & Investments Co (Pty) Ltd 1976 (1) SA 441 A**, **Holmes JA** stated that the law in South Africa *''jealously protects the right of ownership and the correlative right of the owner in regard to his property''*, and citing **Grosvenor Motors (Potchesfstroom) Ltd v Douglas and Johaaden v Stanley Porter (Paarl) (Pty) Ltd 1956 (3) SA 420 (A),** he stated that it has been authoritatively laid down by the appellate division 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) (possibly) where, despite the absence of culpa, the owner is precluded from asserting his rights by compelling considerations of fairness within the broad concept of the exception doli

To establish estoppel as per (a)above, **Holmes JA** stated that the purchaser must prove 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.

(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.

[20] The questions that loom large at this juncture in the light of the position of the law detailed above are (1)what conduct of

the Applicant does 1st Respondent rely on in raising estoppel (2) Does this conduct constitute representation capable of misleading the 1st Respondent into the belief that Classic was the owner of the said vehicle (3) if said conduct constitutes such representation, was the representation the real or direct or proximate cause of 1st Respondents belief?

[21] Now, 1st Respondent premised his defence of estoppel on the following grounds as appear in paragraphs 16 and 17 of his opposing affidavit (see pages 65 and 66 of the book).

‘‘ *16*

In the alternative to paragraph 15 and in the event of the court finding that Applicant is the lawful owner of the motor vehicle, I humbly submit that Applicant is estopped from relying on its ownership for the following reasons:-

16.1 The Applicant as a financial and reporting institution is supposed to know the nature of its customer’s business:-

16.1.1 On its own papers, Applicant knew that classic was a second-hand dealer in motor vehicles. Such fact is corroborated in the Applicant's own affidavit at paragraphs 10.1.2 and 10.2 and the annexures referred to herein.

16.2 Applicant entrusted the possession of the motor vehicle to classic and allowed the latter to have the same registered in its name.

16.3 Applicant foresaw or should have foreseen the possibility that members of the public would be induced to believe and reasonably act on the assumption that classic was the owner of the vehicle and that it was entitled to dispose of it.

16.4 I accepted as correct this representation and acted thereon by purchasing the vehicle from Classic and paid the purchase sum of E112 650.00, and thereby acting to my prejudice.

16.5 I humbly state that the Applicant cannot set up its private arrangements that Classic was not to deliver the vehicle to me or any other potential purchaser until it had been paid the full purchase price.

16.6 The Applicant does not allege that I know or did know of the relationship between itself and classic.

16.7 In the premises I respectfully submit that the Applicant is estopped from asserting that it is the owner of the vehicle concerned.

17

In the further alternative to paragraph 16 above, I am advised and do submit that I have a lien over the vehicle. Until I am fully compensated for the necessary and useful improvements effected thereon whilst in possession as an innocent third party. The tax invoice referred to in paragraph 8 hereof reflect (sic) the said improvements and its value''.

[22] From the foregoing depositions in paragraph 16, the following allegations emerge. (1) The Applicant knew that Classic was a dealer in second hand motor vehicles, (2) Applicant entrusted the motor vehicle in possession of Classic and (3) allowed Classic to register same in its name. (4) The Applicant is thus estopped because it foresaw or ought to have foreseen the possibility that

members of the public would be induced, in these circumstances, to believe and reasonably act on the assumption that Classic was the owner of the vehicle and was entitled to dispose of it.

[23] Now there is no where in the totality of the evidence before court where it is established that Applicant knew that Classic was a dealer in second hand motor vehicles. Paragraphs 10.1.2 and 10.2 of the founding affidavit to which 1st Respondent has referred, do not establish this fact. I do not also think that this knowledge can be imputed to the Applicant just because it is a financial and reporting institution as is alleged by the 1st Respondent. In any case, even if I were to agree with the 1st Respondent that in the circumstances of this case, the Applicant knew that Classic was a dealer in second hand motor vehicles, I cannot however agree with the 1st Respondent, that the conduct of the Applicant in delivering possession of the motor vehicle and its registration documents to Classic, with the full knowledge that Classic was a dealer in second hand motor vehicles without more, are sufficient representations to found estoppel . This is because case law has shown that for this

conduct to suffice, the 1st Respondent must show that the Applicant consented to or comived in the said sale.

[24] A case in point is the case of **ABSA bank Ltd t/a Bankfin v Jordashe Auto cc (2003) 1 ALL SA 401 (SCA)**, wherein the owner of the motor vehicle, i.e the Respondent, exhibited conduct akin to that of the Applicant in casu. The facts of that case briefly stated are that, the Respondent regularly bought cars and delivered them to a motor dealer, one R, for sale on consignment. The Respondent did not register the vehicles in its own name but would hand them over (along with the keys and registration papers) to R and allegedly obtained signed acknowledgments of reservation of ownership. R subsequently fraudulently registered some of the consignment of vehicles in its own name and had subjected some to a floor plan agreement entered into between R and ABSA bank, purportedly vesting ownership in ABSA bank.

[25] In an appeal from the decision of the lower court, which held that the Respondent was entitled to vindicate the said motor vehicle, ABSA bank relied on estoppel, claiming that the Respondent, by allowing the vehicles to be displayed for sale

by R and by delivering the registration papers of those vehicles to R, had represented that R was entitled to alienate the vehicles and could not therefore be heard to be said that R was not so entitled.

[26] The court held as follows in paragraphs 25 and 26 of that decision:-

(25) On the facts of this case we are of the view that no estoppel has been established. The submission was, that by placing the vehicle on Richies floor without any warning of a reservation of ownership, jordashe had held out to the world and thus to ABSA that Ritchies was authorized to sell them. However, this is not a case in which passer-by was attracted into Ritchies premises by a display of cars. There is no evidence that ABSA inspected vehicles before ‘‘buying’’ them, and if there were later inpections their purpose was to make sure that what it had ‘‘bought’’ was either still there or had been paid for rather was ABSA induced by papers. Marai’s fraudulent papers, in which jordashe had no part. The papers which jordashe had sent to Ritchies were not used. Marias had fraudulently acquired new registration papers in his own name. Those were what he used. Those

were what helped to induce ABSA. In Badenhort's own words, the inducement was the presentation of a Ritchies invoice, proof of full payment for the vehicle and a registration document. So little did ABSA rely on what was on the floor, that in one case it placed on the floor plan a vehicle that had never been sent to Nelspruit. Nor was the registration certificate.

(26) In these circumstances, the forth requirement for an estoppel (see ***NBS Bank Ltd v Cape Produce Co (Pty) Ltd and Others 2002 (1) SA 396 (SCA) at 412 D-E)*** *has not been established. Supposing that Jordashe did make a representation, ABSA did not rely on it. This being so it is unnecessary to consider the other aspects of estoppel. The plea of estoppel must fail---''.*

[27] Furthermore, in the case of **Ectrolux (Pty) Ltd v Khonta and another (supra) Trollip J,** buttressed the law that the mere fact that the owner of goods knew that the possessor was a dealer in that particular brand of good, will not amount to effective representation except it can be shown that the possessor dealt with the goods with the consent or connivance of the owner, in the following words:-

‘‘ *The fact that the possessor is a dealer or trader in the particular article is by itself of no significance. That is illustrated by* ***Weiner v Gill, 1905 2 K.B.172 and Truman v Attenborough 103 L.T 188*** *referred to in* ***Morum Bross’’ case, supra, on pp 401/12****. In both cases the owner was a manufacturing jeweller who entrusted jewellery to a retailer or merchant jeweller on sale for cash or return, the former retaining the ownership until the price was paid, the latter disposed of it without paying the price and it was held that the former was not estopped from recovering his property. It follows that to create the effective representation the dealer or trader must, in addition, deal with the goods with the owners consent or connivance in such a manner as to proclaim that the dominum 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’’.*

[28] Also, still in **Ectolux (supra) Trollip J,** further demonstrated that mere possession is insufficient to found the

representation that the possessor is the owner and is entitled to dispose of the goods, in the following words:-

‘‘ *It is clear from the authorities in our law as well as in English Law, that the owner's mere entrusting a person (not being a factor, broker or agent for selling) with the possession of its articles is not sufficient to produce the representation that the dominium or jus disponendi was vested in the possessor* ***(Grosvenor Motors case, supra at*** *425E,* ***Morum Bros v Nepgen, 1916 CPD 392, Champions Ltd v Van Staden Bros, 1929, CPD 330 at p 334 Halsbury, 3rd ed. Vol. 15 para 425p 226, Central Newburg Car Auctions Ltd v Unity Finance Ltd, 1959 (1) 4QB 371 at pp 381,388)*** *The Respondent would not be entitled to assume from such mere possession that the possessor was authorized to dispose of the articles. If he made such an assumption he would only have himself to blame for his gullibility. I think that principle underlies all the motor car cases, like* ***Grosvenor Motors supra****, in which it has been held that the owner is not estopped from vindicating his motor car which had been fraudulently acquired from him and sold to an innocent third party(for example* ***Broekman v T.C.D Motors***

(Pty) Ltd 1949 (4) SA 418 (T), Bold v Copper 1949 (1) SA 1195 (W) and the Central Newburg case supra)''

[29] More to the above, is the case of **Blackwood Hodge South Africa (Pty) Ltd v Elco Steel Dealers (supra)**. In that case the Applicant had sold excavators to a second hand dealer, B, and it was agreed that ownership of the excavators would remain vested in the Applicant and would not pass to B until the whole of the purchase price had been paid and that B would not part with possession, create any charge upon or dispose of the excavators until the purchase consideration had been paid in full. Against the delivery, B handed the Applicant a post dated cheque which was dishonoured. Applicant proved that one of the excavators was in the possession of the Respondent who had purchased it from B and claimed its return and costs. The Respondent relied upon an estoppel which it based upon the following conduct of Applicant (a) the Applicant placed and left B in possession of the excavator in such a way that B was able sell and deliver it to the Respondent (b) the Applicant allowed the Respondent to remain in possession of the excavator for some weeks prior to the date on which the post-dated cheque was made payable and against payment of which

ownership would have passed to B (c) the Applicant took no judicial proceeding against B from about the beginning of May 1977, when B's cheque was dishonoured, until 19 July 1977.

[30] The court held as follows:-

1. *That the conduct of the Applicant in giving B possession of the excavator was not sufficient to constitute a representation that ownership, or the right to dispose of the excavator vested in B.*

2. *That the delay in taking action against B, if there was a delay, did not constitute a representation or an acquiesence in the frandulent dealing with the excavator by B.*

3. *That if the Applicant's conduct constituted the necessary representation that the Respondent did not establish that such representation was the proximate cause of the Respondent having acted to its detriment.*

[31] Then these is the case of **Bold v Cooper and Another (1949) (1) S.A.L.R 1195)** a case which in my view is on all

fours with this one. In that case, Applicant entrusted his motor-car to his son B to sell. B. concuded a sale of the car with one H, Payable in cash against delivery. B accepted a cheque and handed over the car, its registration and licence papers, and a duly completed form of notice of change of ownership from Applicant to H as required by Section 9 of ordinance 17 of 1931 (Transvaal) The cheque was dishonoured. H. fraudulently sold the car to the Respondents, handing over the same registration and licence papers together with a notice of change of ownership from Applicant to Respondents. In a vindicatory action, the court held (a) that as the cheque had not been paid H, had not become vested with the ownership and had no tittle to pass to Respondents (b) that the delivery of the registration and licence papers to H, by B was insufficient to clothe H with the apparent right of an owner and did not constitute any implied representation of power to dispose.

[32] See **Akojee v Sibayoni and Another 1976 (3) SA 440 at 442 (W) E-G,** where the court stated that registration certificates and annual licences do not constitute documents of title to the motor vehicle. Therefore, delivery of these documents to another does not constitute an implied

representation of power to dispose of the vehicle. It takes the matter no further than the delivery of the vehicle itself.

I am highly persuaded by the foregoing authorities.

[33] In casu, there is no allegation of fact in the totality of the papers serving before court, that shows that the Applicant knew that Classic was a well known dealer in second hand vehicles as at the time Applicant delivered the motor vehicle to Classic. Even if it is presumed that Applicant knew this fact, the wealth of judicial authorities, which I have paraded above, have put it beyond any per adventure, that the mere fact that Applicant delivered the said motor vehicle and its registration documents to Classic, a well known second hand dealer, is insufficient to found representation that ownership of the said motor vehicle had passed to Classic or that Classic was entitled to dispose of same. This is because for this conduct of Applicant's to amount to such representation, it must be shown that the Applicant consented to or connived with Classic in the sale of the motor vehicle to the 1st Respondent. There is however no evidence to show that the Applicant consented to, participated in or connived with Classic in the said sale. Applicant did not consent to or permit classic to display the said motor vehicle together with

other second hand vehicles on its showroom floor where the 1st Respondent allegedly saw the motor vehicle displayed. There is no evidence to show that Applicant knew or foresaw or ought to have forseen, that Classic intended to display the motor vehicle on his showroom floor or sell it, especially in the face of clause 4 in annexure A. There is no evidence to show that the Applicant consented to or connived in the transfer of the registration documents of the vehicle into the name of Classic. Even if it did, this does not amount to representation sufficient to found estoppel. See **ABSA bank (supra) and Blackwoo Hodges (supra**).

[34] Counsel for the 1st Respondent contended in oral argument, that the conduct of Applicant in leaving the said motor vehicle for so long in the possession of Classic was sufficient to found representation that Classic was the owner of same. Counsel contended, that Applicant was contented, with Classic being in possession, in so far as it received its monthly installmental payment. That Applicant only began to complain when the company went into liquidation and the installments stopped. That this conduct of the Applicant is tantamount to aquiesence in these circumstances. Therefore, Applicant is estopped from vindicating the vehicle.

[35] I do not think that this contention can avail the 1st Respondent. This is because there is no evidence to show that the Applicant knew that Classic had sold the said motor vehicle to the Respondent prior to Classic being liquidated.

[36] Rather, the evidence shows that it was after Classic was placed in liquidation in August 2009, that the Applicant wrote a letter to the liquidator on the 6th October 2009, as evidenced by annexure E1, demanding a return of the said motor vehicle among others which the Applicant had leased to Classic on condition that ownership would not pass to Classic until their full purchase price had been paid. It was then that the liquidator informed the Applicant via annexure E2, letter dated 1st December 2009, that the motor vehicle in issue was not in Classics possession. Suffice it to say that, thereafter, the Applicant discovered that Classic had sold the said motor vehicle to 1st Respondent round about August 2008. It appears to me that in these circumstances, the conduct of the Applicant which Mr Mamba complains of, is insufficient to found the requisite representation. See **ABSA bank (supra).** Besides even if there was delay in bringing these proceedings, this cannot deprive the Applicant

of the right to vindicate the vehicle in the face of the reservation of ownership clause see **Blackwood Hodges (supra)**

[37] I also see no culpa on the part of the Applicant. Applicant did not have any duty to show to 1st Respondent or any third party, that Classic was not the owner of the motor vehicle and was not entitled to dispose of it. This I say in view of clause 4, which reserved ownership in Applicant, thus giving Classic no title to pass to a purchaser. Applicant did not therefore know or foresee, that Classic would display the vehicle in it's show room for sale, to warrant Applicant to require Classic to display some form of notice, with regard to Applicants ownership, as is contended by Mr Mamba in 1st Respondent's head of argument. Since the Applicant did not know or foresee that Classic intended to sell the said motor vehicle, it did not therefore, owe any duty to the 1st Respondent or any 3rd party to notify them that Classic was not the owner of the vehicle and was not entitled to dispose of it. As **Innes CJ** said in the case of **Carr v London and North Western Railway Company CR 10 C.P at 29 and 134**

‘‘ *If there was any duty to take care--- It must be looked for--- in the circumstances of the case. Every man has a right that others shall not injure him in his person or property by their actions or conduct but that involves a duty to exercise proper care. The rest as to the existence of the duty is, by our law, the judgment of a reasonable man. Could the infliction of injury to others have been reasonably foreseen? If so, the person whose conduct is in question must be regarded as having owed a duty to such others:- whoever they might be--- to take due and reasonable care to avoid such injury---. Now negligence is a neglect of a duty and where there is no duty towards the party affected there can be no negligence’’.*

[38] In any case, even if the conduct of the Applicant as alleged by the 1st Respondent could be viewed as constituting representation that Classic was the owner of the said motor vehicle and was entitled to dispose of it, I however find that Applicant’s conduct was not the real and direct or proximate cause of 1st Respondent believing that Classic did have dominium or just disponendi. This is because the 1st Respondent did not rely on any of these alleged representations. Rather it was the fraudulent representations of Classic and its employees that induced the belief in 1st

Respondent that Classic was the owner of the motor vehicle and was entitled to dispose of it. This is because by the 1st Respondents own showing in paragraphs 7 and 9 of its opposing papers, after he saw the vehicle displayed in Classic's show room, he approached Classic's sales director one Lionel Wasserman, about the purchase price of the vehicle. Wasserman told him the purchase price. 1st Respondent paid a deposit on the vehicle Classic then delivered the motor vehicle to him. Thereafter, 1st Respondent paid the balance on the purchase price. Then Classic's representatives gave him a registration book reflecting that Classic had been owner of the vehicle in question and that ownership had changed into 1st Respondent's name. From the above, I find that Classic fraudulently represented to the 1st Respondent that it was the owner of the said vehicle and was entitled to dispose of it, in the following instances:-

(1) When Wasserman told 1st Respondent the purchase price of the vehicle.

(2) When Classic accepted the deposit of E50,000-00 from 1st Respondent on 15th August 2008.

(3) When Classic delivered the vehicle to 1st Respondent after he paid the deposit.

(4) When Classic accepted the sum of E62,000-00 being balance of the purchase price from 1st Respondent

.

(5) Classic put the final nail in the coffin of the effect of these fraudulent representations, when it delivered to the 1st Respondent a registration book showing that it had been owner of the vehicle and that ownership had changed into 1st Respondents name. See annexures GD1 to GD5.

[39] By these activities, Classic represented to 1st Respondent that it was the owner of the said vehicle and was entitled to alienate it, knowing fully well that it had no title to pass as per clause 4 of annexure A. Therefore, it was not the mere fact that Classic was in possession of the said vehicle had its registration papers and had displayed it on the floor of its show room that was the proximate cause of 1st Respondent's belief that Classic had ownership, but the subsequent fraudulent acts of Classic and its employees.

[40] The 1st Respondent has referred me to some authorities in contending that the Applicant is estopped from vindicating the said vehicle. I am compelled to discuss some of those authorities to show that their facts are easily distinguishable from the facts of this case, in that the owners of the goods in those cases consented, or connived in their sale. One of which is the case of **Worldwide Vehicle Supplies Ltd v Auto Elegance (Pty) Ltd and others 1998 (2) SA 1075 (W).** In my view the facts of **worldwide (supra)** is distinguishable from the facts of this case. This is because that case was an Agency agreement where the Applicant had sold the motor vehicle to the 1st Respondent in his own name as an undisclosed agent. Therefore, the Applicant did not prove that the ownership of the goods remained with him. Further, when the agency agreement terminated, the Applicant should have forseen that 1st Respondent's continued control of the vehicle and its situation as part of its stock in trade continuing after termination of the agency or consignment agreement, that a third party could have been misled to his or her prejudice in buying and paying for the vehicle and the Applicant should have taken prompt action to recover possession. The court therefore held that even if the

Applicant was the owner of the vehicle, it was estopped from vindicating it, in the circumstances.

[41] Similary, the case of **Akojee v Sibanyoni 1976 (3) (supra)** – cannot avail the 1st Respondent. This is because in that case the Applicant specifically delivered the motor vehicle to one P.for sale though he retained the registration document. The court held that in delivering the vehicle to the purchaser for the purpose of selling it, Applicant must have contemplated that the purchaser would exhibit the vehicle for sale at its business premises with its other stock in trade. Therefore, the purchaser in the circumstances dealt with the vehicle with the Applicants consent in such a manner as to proclaim that the dominium or jus disponendi was vested in the purchaser. Accordingly, Applicant was estopped from vindicating the vehicle. In casu, I have already held that the Applicant did not consent or connive with Classic in the sale of the vehicle.

[42] Also in **United Cape Fisheries (Pty) Ltd v Silverman 1951 (2) SA 612 ac 615 A-B, D 616 C-D**, the Applicant had

consented to the sale of a refrigerator, by one T a dealer in electrical equipment. The refrigerator was exposed for sale as ordinary stock-in-trade in T's shop as the Applicant intended. The only condition was that T should refer any price offer to the Applicant before sale. T however sold the vehicle outrightly in the ordinary cause of business to a bona fide purchaser. The court held that since there was nothing to indicate to the buyer that T had no right to sell the refrigerator, the Applicant was estopped from vindicating it, since he consented to the sale in these circumstances. In casu, the consent and connivance of the Applicant in the sale by Classic, is absent.

[43] Similarly in **Concor Holding (Pty) Ltd t/a Concor Technicrete v Potgieter 2004 (6) SA 491 (SCA) at 497**, an Applicant res vindicato was defeated, because as at the time he was selling paving stones to a builder, he knew the following:- that the paving stones were going to form part of the works being constructed by the builder for the Respondent. That the paving stones were purchased for this specific purpose. That without them the building works could not be completed. That they were needed urgently. Some of the paving stones had to be cut and fitted. The

majority colour had to fit the building. The paying stones once laid were going to remain permanently in place in the Respondents premises. Though there was a reserve clause that ownership would not pass to the builder until full payment, the court held that the Applicant was estopped from vindicating the paving stones in these circumstances. In casu there was no knowledge, consent or connivance in the sale by Classic.

[44] In **Kajee v H M Gough (EDMS) BPK 1971 (3) SA 99 (N) AT 106 B-F**

The owner sold a motor vehicle to R on cash sale basis, with a condition that ownership will not pass until full payment is made. The owner delivered the motor vehicle, with its registration documents in the name of R as well as a contract order which indicated that the price had been paid in full to R. The court held that when R substituted the cash payment for payment by cheque, the owner ought to have forseen, that R who was a total stranger to him, might disappear with the motor vehicle and sell it to another on the strength of the contract order and registration documents, therefore, he was not entitled to vindicate the vehicle. In casu, the Applicant had leased other vehicles to Classic which was not a

stranger to it and Applicant did not foresee that Classic would go into liquidation and thus be unable to pay the full purchase price. Applicant did not also foresee that classic would sell the motor vehicle to a third party in view of the reservation clause in annexure A.

[45] The facts of the foregoing cases urged by the 1st Respondent, are therefore easily distinguishable from the facts of this case and they cannot aid the 1st Respondent.

[46] In the light of the totality of the foregoing, I hold that the requisite representation sufficient to found estoppel by conduct has not been established by the 1st Respondent. This plea is accordingly dismissed.

[47] Let me now turn to the lien which 1st Respondent alleges in paragraph 17 of its opposing affidavit (page 66). He says he has made improvements on the motor vehicle and that the tax invoice annexure GD 4 is proof of it. Annexure GD 4 is a tax invoice from **Classic Motors (Pty) Ltd**, detailing a break down of the amount of K112.650-00 which the 1st Respondent alleged in paragraphs 7.1 and 8 of its founding affidavit, is the purchase price it paid to Classic for the said

vehicle. Annexure GD 4 does not detail any improvements which the 1st Respondent made to the said motor vehicle as alleged. In fact, in paragraph 7.1 of his affidavit, the 1st Respondent alleged that the full purchase price of E112,650-00 which he paid included extras to the said vehicle. 1st Respondent did not state what these extras were. Whether they were improvements or any other assessories to the said vehicle. The 1st Respondent has thus failed to demonstrate what useful and necessary improvements he made on the vehicle for the court to assess the improvement lien claimed, whether it is one that could be separated from the vehicle or one that could have been made by the Applicant see **The law of South Africa vol 15 para 105**. **Groblen v Boikhutsong Business undertaking (Pty) Ltd 198 7 (2) SA 547 (B) 598 A.**

[48**]** In the absence of clear and unambiguous facts demonstrating the alleged improvements, the court cannot embark on a venture of speculation and surmise in this regard. This would be a dangerous journey. One not allowed by law. I am thus inclined to agree with **Mr Motsa** that this plea cannot avail the 1st Respondent and it is accordingly dismissed.

[49] I notice that **Mr Mamba** raised and argued the question of unjust enrichment in 1st Respondents heads of argument. He also raised the interest of public policy in oral submissions. **Mr Motsa** argued the issue of public policy in reply on points of law, but was compelled to file supplementary heads of argument to address the question of unjust enrichment. I will however not concern myself with any of these issues. This is because they were not raised by the 1st Respondent in his opposing papers. The law, interest of justice and fair hearing demand, that where a case is fought on the strength of affidavits, that all necessary evidence pertaining to the relevant issues are contained in the affidavits serving before court. A situation where such evidence is brought to court via embellishing submissions of counsel from the bar, will not help the course of justice. This is because it is tantamount to counsel leading evidence, which is not allowed in law. This practice ought to be discouraged. I thus refuse to join both counsel in this venture by countenancing these issues.

[50] It is in the light of the totality of the foregoing that I hold that Applicants application has merits. It succeeds. I accordingly make the following orders:-

(1) That the 1st Respondent be and is hereby ordered to deliver to the Applicant the GWM Sailor Single Cab Lux 2.2 Motor vehicle, which particulars appear in paragraphs 1.1, 1.2 and 1.3 of the notice of motion.

(2) That the deputy sheriff in whose area of jurisdiction the motor vehicle is found, and his lawful officers, be and are hereby authorized and directed, to attach the same and to deliver the motor vehicle to the Applicant.

(3) That the 1st Respondent be and is hereby ordered to pay the costs of this application.

For the Applicant: K Motsa

For the 1st Respondent: L. R. Mamba

DELIVERED IN OPEN COURT IN MBABANE ON THIS

……...DAY OF ……..2012

OTA J

JUDGE OF THE HIGH COURT