

SUCCESSIVE SALES: CORDIALITY DOES NOT GIVE YOU *LOCUS STANDI*

Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd 2005 4 SA 389 (D&CLD)

1 Introduction

Under normal circumstances, the seller is the owner of the *merx* and ownership is transferred to the purchaser on transfer of possession. However, the seller does not undertake to make the purchaser the owner. His obligation is to deliver the *merx*, and guarantee the purchaser free and undisturbed possession, that is, to protect the buyer in his possession from eviction (see Zulman and Kairinos *Norman's Law of Purchase and Sale in South Africa* (2005) 145). Eviction means any lawful interference with this free and undisturbed possession (*vacua possessio*), whether by the seller himself or by a third party. The warranty against eviction is in effect a promise by the seller that he will compensate the purchaser if the purchaser is evicted (Kerr *The Law of Sale and Lease* (2004) 188).

Constitutum possessorium, as a mode of delivery of ownership of movables, plays an important role in financial arrangements in the motor trade industry. A motor dealer may, for example, arrange with a credit institution that the motor vehicles on its floor, purchased from a manufacturer, be sold to the credit institution and then be resold to the motor dealer. Ownership is transferred to the credit institution by *constitutum possessorium* (see Van der Merwe "Things" *Lawsa* vol 27 (first reissue) 308). The arrangement between the motor dealer and the credit institution is referred to in the trade as a floor plan agreement.

2 Facts

The facts of this case may be briefly summarised as follows: In terms of a floor plan finance agreement, the respondent, Daimler Chrysler Financial Services (Pty) Ltd (DCFS) sold motor vehicles to a dealer, Fourways Motors. In terms of the agreement, ownership of the vehicles remained vested in DCFS until any dealer buying the said vehicles had paid the purchase price in full (392G). A separate agreement with Mercedes-Benz of SA (Pty) Ltd provided for DCFS to pay the manufacturer within 30 days of invoice or 24 hours of payment of the full purchase price (392G-H).

The applicant, Cordiant Trading CC (Cordiant), purchased 16 vehicles at a cost exceeding R3-million from Fourways Motors (392A-B). Cordiant paid for the vehicles with cheques and cash and took "delivery" thereof. At the time of the sales, Cordiant received invoices and vehicle registration papers (392C-D). DCFS, the credit institution, had not been paid for the vehicles by

the dealer, Fourways Motors (392D-E). Cordiant, thinking it was the owner of the vehicles, sold the vehicles to different car dealers who in turn sold them to "final customers" (398G-H; and 398B-C). DCFS submitted that ownership of the vehicles vested in it in terms of the floor plan agreement (392E). DCFS dispatched letters to the possessors of the vehicles that had emanated from Fourways Motors, calling upon the possessors to pay for the vehicles or return them, and threatened them with legal proceedings for the recovery of the vehicles (392E-F).

Cordiant applied for an interdict restraining DCFS from attaching and removing some of the vehicles and for an order directing it to return certain others, pending finalisation of an action for the declaration that the respondent had no right to seek recovery of the vehicles (391G-H). Cordiant argued that it brought the application on behalf of the dealers who had on-sold to other customers because the customers would have recourse to the dealers who had bought the vehicles from Cordiant (398B-C).

3 Legal issue

At issue was, amongst others, whether under the circumstances Cordiant had *locus standi* to interdict DCFS from attaching the vehicles (398D-E).

4 Decision

At the outset, it must be remembered that none of the vehicles were still in the possession of the purchasers (motor dealers) who had bought the vehicles from Cordiant but had been on-sold to customers (398E). Normally the seller is the owner of the *merx* and ownership is transferred to the purchaser on transfer of possession. The purchaser will have an action against the seller who sells a *merx* he knows that he does not own (Kerr 187; and Kahn, Havenga, Havenga and Lotz *Principles of the Law of Sale and Lease* (1998) 21). But what is the position if the seller *bona fide* believes himself to be the owner? The purchaser will then have an action against the seller when he is evicted, or threatened with eviction, by a third party with a better legal title than the seller (Kahn *et al* 21; and Kerr 188 and further). Eviction usually involves the purchaser being deprived of possession of the *merx* by the true owner (*Par Excellence Colour Printing (Pty) Ltd v Ronnie Cox Graphic Supplies (Pty) Ltd* 1983 1 SA 295 (A) 307A).

The warranty only applies to eviction by a third party with a better legal title, which means that all the seller warrants is that the purchaser will not be lawfully evicted because of defective title (*Lammers and Lammers v Giovannoni* 1955 3 SA 385 (A) 397B-C). The warranty therefore does not protect the purchaser against the unlawful acts of others.

If a third party, in this instance DCFS, claims ownership of the *merx* and demands possession, the purchaser, in this instance the persons that purchased from the dealers, who bought from Cordiant, should inform the seller and call on him to assist in his defence. If the purchaser is not able to find the seller to notify him, the purchaser should conduct a proper and competent defence (*York & Co (Pvt) Ltd v Jones NO (1)* 1962 1 SA 65 (SR) 68C-F). These steps are, however, no longer absolute requirements. If the

purchaser is able to show that the third party's claim is unassailable in law, he may simply give up possession of the *merx* on demand and then claim for performance of the warranty (*Garden City Motors (Pty) Ltd v Bank of the OFS Ltd* 1983 2 SA 104 (N) 107G-108G; and see also Zulman and Kairinos 150-151). In this instance, the legally unassailable claim was constituted by the reservation of ownership in the floor plan agreement between Fourways Motors and DCFS (399C-D). The court, by implication, accepted that DCFS was the real owner (398G-H).

If the purchaser does conduct a proper and competent defence but is unsuccessful, this is sufficient to show the seller that the third party's claim was unassailable in law. If the purchaser defends and is successful, he cannot claim reimbursement from the seller because the warranty does not cover eviction by claimants with inferior title (*Lammers and Lammers v Giovannoni supra* 397B-C).

The question then arises as to who can sue on account of eviction. It often happens that A sells to B and B sells to C and C to D (possession being transferred in each case) before the true owner makes his claim. In this instance, Fourways Motors sold to Cordiant who sold to the various dealers who later sold to the "final customers" (399E). There is a decided body of case law which shows that once a claim has been made against D (in this case the final customer), and he has surrendered the thing sold, whether after judgment or because he can show that the claimant (DCFS) has a legally unassailable right, he may claim compensation from C (the dealers who purchased from Cordiant), and C may claim from B (Cordiant) who can then claim from A (Fourways Motors). (See *Westeel Engineering (Pty) Ltd v Sydney Clow & Co Ltd* 1968 3 SA 458 (T) 462C; *Olivier v Van der Bergh* 1956 1 SA 802 (C) 803D-H, 804C-D, 806E-F; *Garden City Motors (Pty) Ltd v Bank of the Orange Free State Ltd supra*; *Louis Botha Motors v James & Slabbert Motors* 1983 3 SA 793 (A) 798H; and Kerr 194-195.) If D (the final customer) wishes to sue the original seller (Fourways Motors) direct, it may only do so on obtaining cession of action (*Louis Botha Motors supra* 801A; and Zulman and Kairinos 146). Unfortunately, in this instance, Fourways Motors had been placed under provisional liquidation, leaving Cordiant in an unfavourable position with regard to its claim in terms of the warranty (393A). Cordiant therefore saw fit to bring an interdict on behalf of the dealers who had on-sold the vehicles, in order to prevent DCFS from claiming the vehicles from the end customers.

Applying these principles of successive sales, the court concluded that Cordiant could not protect purchasers of vehicles from the dealers to whom it sold (400D-E). The court therefore held that the applicant had no *locus standi* to interdict DCFS from reclaiming the vehicles (400E-F). The court held that, at best, Cordiant could have protected its own purchasers but not those who purchased from them (400B).

It is also interesting to note that counsel for Cordiant argued that the action of eviction by DCFS on the customers who bought from Cordiant's purchasers was a delict or tort and that Cordiant was entitled to protect them against DCFS (400B). The court, citing *Trimble v Plunkett* (1910 WLD 220 224), rejected this argument (400C-D). The notion of "torts" does not form part of the South African law of delict.

As mentioned above, the court, by implication, accepted that DCFS was the “real owner” (398G-H). Whether acquisition of ownership by DCFS took place by *constitutum possessorium* and whether the requirements for this form of delivery were met were not raised in this decision. Let us assume, which is not clear from the decision, that initially the manufacturer, Mercedes-Benz of SA (Pty) Ltd sold the vehicles to Fourways Motors. Let us further assume that Fourways Motors sold the vehicles to DCFS in order to pay the manufacturer. DCFS in turn sold the vehicles in terms of the floor plan agreement to Fourways Motors. At issue would then be whether DCFS acquired ownership by means of delivery by *constitutum possessorium*. The applicant (or “final customers” in respective proceedings for the recovery of the vehicles) should then rather have attempted to show that DCFS did not acquire ownership from Fourways Motors by *constitutum possessorium* by showing that the requirements had not been complied with (see Van der Merwe 308 as to the requirements of *constitutum possessorium*). Floor plan agreements have been used in the motor industry since the 1960s by providing for security in stock by means of the retention of ownership (*Nedcor Bank Ltd v ABSA Bank Ltd* 1998 2 SA 830 (W) 838G; and Van der Merwe and Smith “Financing the Purchase of Stock by the Transfer of Ownership as Security: A Simulated Transaction” 1999 *Stell LR* 304 305). Upon non-compliance with the requirements of *constitutum possessorium* or a court finding that a particular floor plan agreement between a motor vehicle dealer and a financial institution was nothing more than a simulated transaction to constitute a form of pledge without possession, ownership is not acquired by the financial institution (see *Bank Windhoek Bpk v Rajie* 1994 1 SA 115 (A) 142A-G; and *Nedcor Bank Ltd v ABSA Bank Ltd supra* 834I-838G). Perhaps a totally different outcome could have been achieved had the modes of transfer of ownership been more closely scrutinised. For purposes of our further discussion we, however, accept that DCFS was the true owner of the vehicles.

On the facts of this case Cordiant was entrusted with the possession of the motor vehicles, the registration papers thereof, and invoices, and was “allowed” to deal with the vehicles. For purposes of the defence of estoppel, these actions may be construed as entrusting Cordiant with the *indicia* of ownership or *ius disponendi* (see *Electrolux (Pty) Ltd v Khota* 1961 4 SA 244 (W) 247B; *Oakland Nominees (Pty) Ltd v Gelria Mining and Investment Co (Pty) Ltd* 1976 1 SA 441 (A) 452E-F; *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie* (WP) Bpk 1996 3 SA 273 (A) 287A-288D; *Qenty’s Motors (Pty) Ltd v Standard Credit Corporation Ltd* 1994 3 SA 188 (A) 199A-200B; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman’s Law of Property* (2003) 247; and Van der Merwe 340). If the other requirements of estoppel (see Van der Merwe 339-340; Badenhorst, Pienaar and Mostert 236-237) had been met, the defence of estoppel could probably have been raised by the “final customers” against the *rei vindicatio* of DCFS in the respective proceedings for recovery of the vehicles.

On the evidence the court accepted that Cordiant (a) was unaware of the floor plan agreement between Fourways Motors and DCFS (398G); (b) thought it was becoming the owner because Fourways Motors was the “real owner”; and (c) thought it was the owner of the vehicles when it sold them to the dealers (398G-H). For purposes of the transfer of ownership and the

application of the *rei vindicatio*, which is a real action by an owner, these factors are, of course, of no avail to a possessor in terms of a contract of sale. An owner deprived of his property, whether against his will or on his own accord, is entitled to vindicate it from any possessor, whether such possessor is *bona fide* or *mala fide* (Sonnekus (with Neels) *Sakereg Vonnisbundel* 467 and further; Badenhorst, Pienaar and Mostert 227). Centlivres CJ decided as follows in *Grosvenor Motors (Potchefstroom) Ltd v Douglas* (1956 3 SA 420 (A) 425E):

“If I seek to recover my property from a man in the street, he cannot be heard to say that he is under no obligation to restore it to me because he bought it from a third person and paid for it under the belief that that person was the owner of it because I allowed him to be in possession of it.”

5 Conclusion

The correctness of the decision is not questioned. Applying the principles relating to successive sales found in the warranty of eviction, it is clear that the court could not have come to a different conclusion. Cordiant would, at best, only have been able to protect its immediate purchasers, and not the “final customers”.

It is submitted, however, that the court could perhaps have placed more emphasis on the dichotomy between contract and delivery of ownership and the operation of an owner’s *rei vindicatio*. This decision therefore illustrates the importance of the distinction between personal rights arising from contracts between parties and the transfer of real rights in terms of real agreements and delivery. Different remedies and defences are available depending on whether the right is a real right or a personal right.

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