

A QUENTY'S MOTORS (PTY) LTD v STANDARD CREDIT CORPORATION LTD

APPELLATE DIVISION

BOTHJA JA, EKSTEEN JA, HOWIE JA, NICHOLAS AJA and OLIVER AJA

B 1994 February 24; March 28

Case No 141/92

- E** *Estoppel—By representation—Representation—What amounts to—Motor car dealer A delivering two vehicles to motor car dealer B on consignment for sale by B—Agreement between A and B that transfer of ownership of vehicles only to take place when A paid for vehicles by B—Vehicles sold by B to respondent under 'Used goods floor plan agreement' but A not paid for them by B—Vehicles displayed in B's showroom with other vehicles of B displayed for sale—B dealing with A's vehicles with A's consent in such manner as to proclaim that dominium or jus disponendi vesting in B—A should reasonably have contemplated that prospective purchaser might act on representation to his prejudice—A negligent in not taking steps to prevent it—Although facts (including B's invoice showing vehicles bought of A) indicating that respondent must have known that B not the owner of vehicles, nothing to suggest to respondent that B did not have jus disponendi—B's conduct in entering into agreements of sale with respondent, in issuing invoices and requesting cheque for purchase price in favour of A to be handed to B, indicating to respondent that B had jus disponendi—Although A had probably not contemplated sale of vehicles to financial institution such as respondent under a 'Used goods floor plan agreement', representation nevertheless made to all potential purchasers from B—Estoppel raised by respondent to claim by A for order declaring that it was the owner of the vehicles and for return of the vehicles by respondent to A held to have been established.*
- F** *Words and phrases—'On consignment'—Meaning of in context of the delivery of motor vehicles on consignment' by one motor dealer to another for sale by latter.*

- I** *In terms of an agreement between the appellant and L Motors, the appellant delivered, during September 1990, two motor vehicles to L Motors on consignment for sale by the latter. The relevant registration documents were to accompany the vehicles for the purpose of inspection by prospective purchasers. L Motors were to pay the applicant for each vehicle once it had been sold. It was furthermore agreed that transfer of ownership of either vehicle upon its sale would only take place upon payment by L Motors to the appellant upon which event the necessary transfer papers would be completed. At the end of November 1990 a director of the appellant discovered that the two vehicles were in the possession of the respondent. L Motors was subsequently placed in liquidation. After the appellant had unsuccessfully demanded delivery of the vehicles from the respondent, it applied, as a matter of urgency, in a Provincial Division for a rule nisi, operating as an interim interdict, calling upon the respondent to show cause why an order should not be made declaring that the appellant was the lawful owner of the vehicles and directing the respondent to return them to the appellant. On the return day of the rule, the respondent opposed confirmation of the rule on the ground that the appellant was*

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- A** *estopped as against the respondent from alleging that the respondent had not acquired the ownership of the vehicles and that by virtue of the estoppel the appellant was precluded from denying the authority of L Motors to sell the vehicles to the respondent. In its opposing affidavit the respondent averred, inter alia, that the appellant had entrusted the vehicles to L Motors which was a well-known dealer in motor vehicles and well knew that L Motors would place the vehicles in its showroom and expose them for sale as ordinary stock-in-trade of its business; that the vehicles were in fact brought onto the floor of the showroom of L Motors and exposed for sale as ordinary stock-in-trade of the business; that pursuant to this and by virtue of an agreement between the respondent and L Motors known as a 'Used goods floor plan agreement' the respondent purchased the vehicles from L Motors. The invoices in respect of the vehicles issued by L Motors to the respondent indicated that each vehicle was 'bought of the appellant and contained the following: 'To deliver on your behalf to L Motors ... 62 000' (62 000 being R62 000, the price of the vehicle). The deponent of the respondent's opposing affidavit went on to aver that he had personally seen the two vehicles on L Motors' showroom floor and had assumed that they were ordinary stock-in-trade; that the respondent would not have acted as it had, had the vehicles not been regarded as ordinary stock-in-trade; that the respondent had paid L Motors for the vehicles by means of a cheque in favour of the appellant as instructed on the invoice; and that the respondent was accordingly the owner of the vehicles. The respondent contended that the appellant must have contemplated that L Motors would exhibit the vehicles for sale at its business premises with its other stock-in-trade, that L Motors dealt with the vehicles with the appellant's consent in such a manner as to proclaim that either the dominium therein vested in L Motors or that it had the jus disponendi thereof, that the respondent had firmly believed that L Motors was in fact the owner of the vehicles and had the jus disponendi thereof and had acted in reliance thereon to its prejudice in acquiring and paying for the vehicles. On the return day the application was dismissed with costs, in an appeal.*
- E** *Held, that by delivering the vehicles 'on consignment' to L Motors, the appellant had delivered so that they were to be exhibited for sale at L Motors, and it was contemplated that they would be sold and that when each was sold L Motors would pay the appellant therefor. (At 199H/J-200A.)*
- F** *Held, further, that, on the facts, having regard to the fact that the vehicles were displayed in the showroom of L Motors, together with other vehicles displayed by it for sale, L Motors had dealt with the vehicles with the appellant's consent in such a manner as to proclaim that the dominium or jus disponendi was vested in L Motors. (At 200A-B.)*
- G** *Held, accordingly, that requirement (i) for the establishment of estoppel as set out in Oakland Nominees (Pty) Ltd v Gelfin Mining & Investment Co (Pty) Ltd 1976 (1) SA 441 (A) at 452E, namely that (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, had been satisfied. (At 200B/C read with 199I/A-1.)*
- H** *Held, further, as to the second requirement stated in the Oakland Nominees case at 452F, namely that (ii) the representation must have been made negligently in the circumstances, that the appellant should reasonably have contemplated that a prospective purchaser might act on the representation to his prejudice, and the appellant had been negligent in not taking reasonable steps to prevent it. (At 200B/C read with 199A/B.)*
- I** *Held, further, as to the third and fourth requirements stated in the Oakland Nominees case at 452F/G-3, namely (iii) The representation must have been relied upon by the person raising the estoppel, and (iv) Such person's reliance upon the representation must be the cause of his acting to his detriment, that, as the appellant had not in the Court a quo sought to test the respondent's evidence by cross-examining the respondent's deponent and as it could not be said that such evidence was so far-fetched or clearly untenable that the Court would have been justified in rejecting it on the papers, the matter had to be approached on the basis of the allegations in the respondent's affidavits. (At 200E-F read with 200C and 199A/B-B.)*
- J** *Held, further, that there was much to be said for the view that the invoices issued by L Motors to the respondent must have indicated to the respondent that L Motors was not the owner of the vehicles and that the respondent recognised this by issuing the cheque in favour of the appellant. (At 200G-H.)*
- J** *Held, further, however, that the documents contained nothing which could have sug-*

A gested to the respondent that L Motors did not have the *jus disponendi* of the vehicles, indeed, L's conduct in entering into the agreements of sale with the respondent and in issuing the invoices and requesting that the cheque be handed to L all indicated to the respondent that L had the *jus disponendi*. (At 200H-1)

B Held, further, as to a contention that whatever representation might have been made to 'an ordinary purchaser' entering the showroom of L Motors, it had not been made to a purchaser such as the respondent who purchased under a 'Used goods floor plan agreement', that it was probably correct that the appellant had not had such a sale in contemplation, but the fact was that the representation had been made to all potential purchasers from L Motors (At 200H-J)

C Held, accordingly, that the estoppel raised by the respondent had clearly been established and the decision of the Court *a quo* dismissing the application was correct. (At 201A.) The decision in the Natal Provincial Division in *Quenry's Motors (Pty) Ltd v Standard Credit Corporation (Pty) Ltd* and *Another* confirmed

D Application for condonation of the non-compliance with certain Rules of the Appellate Division in an appeal from a decision in the Natal Provincial Division (*McLaren J*). The facts appear from the judgment of Nicholas AJA.

F *M J D Wadlis SC* for the appellant: The appellant owned the two motor vehicles in issue in this case. This is not disputed by the respondent's deponent, *Porgrieter*. Both vehicles were delivered to one *Howard Love* on a consignment under agreements in terms of which ownership would only be transferred to any purchaser found by him once the appellant had received payment for the vehicles. Love sold both vehicles to the respondent in terms of the floor plan agreement. The appellant then sold the vehicles back to Love in terms of the floor plan agreement. The respondent was aware that Love was not the owner of the two vehicles because: (a) The invoices presented to it reflected that the vehicles were in the one case:

'Bought of
Gekoop van: Quenrys Motors, 510 Mitchell Street, Pretoria 2000'
and in the other:

'Bought of
Gekoop van: Quenrys Motors, 170 Bloed Street, Pretoria 2000'.

H On any basis therefore the acquisition was not from *Howard Love* but from the appellant. (b) The invoices identify the purchaser as being 'M/S Stannic Motorown'. (c) According to the rubber stamp imprinted on the invoices by the respondent: (i) a supplier's cheque, that is, one in favour of the appellant, was requested; (ii) the supplier was approved by the respondent; and (iii) a cheque PH82057 was issued. (d) The cheque was issued in favour of the appellant. This was in accordance with Love's instructions. On the face of the documents, therefore, the purported acquisition of the vehicles by the respondent was on the basis that the respondent purchased the vehicles for cash from the appellant. It follows from the nature of this transaction that the respondent cannot have believed that it would acquire ownership of the vehicles unless the appellant was paid. The person who approved of this transaction on behalf of the respondent was one *John Cruikshank*, as is reflected on the invoice, and it is significant that he has not deposed to an affidavit suggesting that the transaction was anything other than as set out above. There is nothing

A to indicate that the deponent *Porgrieter* had anything to do with the transaction at all, nor does he expressly claim to have done so. On the face of the documents the respondent knew that the cars were being purchased from the appellant and that it had not been paid therefor. It was the respondent's intention to pay the price to the appellant, as is evidenced by its issuing the cheque in favour of the appellant, but that intention was defeated by Love's dishonesty. In the circumstances the respondent cannot have believed either that Love was the owner of the cars or that Love was authorised to dispose of them without the appellant receiving payment therefor. Accordingly the appellant was entitled to the vindicatory order which it sought.

C The facts set out above were not dealt with by the Court *a quo* and it appears that the case was argued before it on a different footing. An owner can only be deprived of his right to vindicate his goods where he is estopped from doing so on the grounds that he (the owner) has negligently misrepresented to the purchaser of the goods either: (a) that the person purporting to dispose of the goods was the owner thereof; or (b) that such person has been vested by him with the power of disposal in regard thereto. *Grosvenor Motors (Pretchessroom) Ltd v Douglas* 1956 (3) SA 420 (A); *Oaklands Nomines (Pty) Ltd v Gehria Mining and Investment Co Ltd* 1976 (1) SA 441 (A) at 452. Whatever representation might have been made to an ordinary purchaser entering the showroom of Love Motors, no such representation was made to the respondent, which knew that the vehicles were being supplied by the appellant which had not been paid therefor and which required payment to be made to it. Accordingly cases such as *United Cape Fisheries (Pty) Ltd v Sizeman* 1951 (2) SA 612 (T) at 615, *Electrolux (Pty) Ltd v Khola and Another* 1961 (4) SA 244 (W) at 246G-248A and *Akooye v Sibanyoni and Another* 1976 (3) SA 440 (W) at 442F-H are distinguishable on their facts. It is therefore unnecessary to consider whether in those cases the requirement of negligence laid down by this Court in the cases referred to above was overlooked. (1977) 94 SA *Law Journal* at 1, 256 and 260. The present case is similar to those of *Grosvenor Motors (Pretchessroom) Ltd v Douglas (supra)*; *Pretorius v London* 1985 (3) SA 845 (A); and *Blackwood Hodge South Africa (Pty) Ltd v Elco Steel Dealers* 1978 (3) SA 852 (T), where there was held to be no estoppel even though the goods in the latter two cases were in the possession of a dealer in that type of goods. The Court *a quo* based its decision on the statement in *Morim Bros Ltd v Neppgen* 1916 CPD 392 at 395-6, but that statement is not applicable to the facts of the present case. In any event that statement has correctly been criticised: *Barclays Western Bank Ltd v Faurie* 1979 (4) SA 157 (C) and *Pretorius v London (supra)* at 860C-862D). Insofar as that statement suggests that the owner's right to vindicate his property is restricted in circumstances other than where an estoppel can properly be raised against the owner, the statement is incorrect. The fact that goods have been placed with a factor or agent for sale is nothing more than a fact which may support the existence of a representation on which an estoppel can be based. This still leaves open the question of whether that representation was in the circumstances of a particular case negligently made. Where the agent, as with Love in this case, tells the prospective purchaser of the existence of the owner and of the fact that the

A owner has not been paid for the goods, there is no reason in law or equity to protect the purchaser who does not ensure that it is acquiring a title good against the true owner.

A *J Dickson SC* for the respondent: Appellant sought what amounts to a vindictory order by notice of motion. On the date of the hearing B appellant sought final relief on the papers thereby disavowing any referral of the matter to oral evidence. In these circumstances the approach of the Court is to be in accordance with the principles set out in *Plassen-Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd* 1964 (3) SA 623 (A) at 634E-635C. The following are the facts on which any judgment should be based: (1) Love Motors traded under that name but that it is a close C corporation, Love Motors Durban CC, the member of which is Howard Love. (2) Love Motors is a well-known motor dealer trading at Smith Street, Durban, and respondent has dealt with it extensively. (3) Love Motors is a motor dealer in motor cars, and it has no repair shop, ie it sells motor vehicles exclusively. (4) Appellant entrusted the two Mercedes-Benz vehicles, which are the subject of the application, to Love Motors to sell. (5) Both vehicles were placed on the floor of Love Motors and were D exposed for sale as the ordinary stock-in-trade of the business and appellant knew this. (6) Potgieter, the respondent's area manager, saw the vehicles on the floor of Love Motors showroom and accordingly assumed that they were Love Motors' ordinary stock-in-trade. (7) Respondent E purchased the two vehicles and paid for them under a 'Used goods floor plan agreement'. (8) Respondent would not have purchased the vehicles had they not been regarded by Love Motors as Love Motors' stock-in-trade. (9) The invoices issued by Love Motors reflect that Love Motors had in respect of the vehicles 'bought of Quenty's Motors' which indicates the F source of supply. (10) Love Motors was handed a cheque for the two cars in the sum of R122 000. (11) The cheque was made payable by respondent to 'Quenty's Motors' in accordance with Love Motor's instruction and not as a recognition of appellant's special arrangement with Love Motors, of which respondent was unaware. (12) During the period of their display the vehicles had no marking or indication on them that they were consignment G stock.

Pursuant to the factual basis set out above, it must be accepted that (1) H appellant's conduct in allowing the vehicles to be displayed without any reservation or qualification displayed is a representation of ownership or the right to sell; (2) such a representation results from the *dokus* or *culpa* of I appellant in that it allowed such unqualified display to be made. In the light of the above Potgieter concludes that respondent relied upon the representation to its prejudice. In our law the owner of property may be met with the defence of estoppel on vindication. *Grossenor Motors (Potchefstroom) Ltd v Douglas* 1956 (3) SA 420 (A); *Johannsen v Stanley Porter (Part) (Pty) Ltd* 1970 (1) SA 394 (A). The requirements of such an estoppel are: (1) A representation by the owner, by conduct or otherwise, J that the person who disposed of the property was the owner of it or was entitled to dispose of it. (2) The representation must have been made negligently in the circumstances. (3) The representation must have been relied upon by the person raising the estoppel. (4) Such person's reliance upon the representation must be the cause of his acting to his detriment.

Oaklands Nominees (Pty) Ltd v Gelra Mining and Investment Co (Pty) Ltd A 1976 (1) SA 441 (A) at 452. Whether the defence of estoppel will succeed will depend on the facts of each particular case. Certain cases with similar facts are illustrative of this. See *Akoogee v Starnort and Another* 1976 (3) SA 440 (W), especially at 442C-H; *Electrolux (Pty) Ltd v Khota and Another* 1961 (4) SA 244 (W), especially at 246G-250F; *United Cape Fisheries (Pty) Ltd v Sibaerman* 1951 (2) SA 612 (T); *Grossenor Motors (Potchefstroom) Ltd v Douglas* (supra); *Blackwood Hodge South Africa (Pty) Ltd v Elco Steel Dealers* 1978 (3) SA 852 (T). In the premises, on the facts the defence of estoppel is established and appellant is not entitled to the order prayed for.

Alternatively, the ratio of the Court *a quo* is correct and on that basis C appellant is not entitled to the order prayed for. The ratio of the Court *a quo* was the so-called rule in *Morrum Brothers Ltd v Negeen* 1916 CPD 392, which is that the owner of a movable thing cannot vindicate his property from the *bona fide* purchaser who has purchased the thing from an agent for sale or factor to whom the owner entrusted the thing for the purpose D of selling it. Respondent relies upon the facts set out above save that it would no longer be necessary to prove the essentials of estoppel, especially that of negligence of the owner of the thing. *Pretorius v Loudon* 1985 (3) SA 845 (A) at 860H-1. It has been held that such a rule did exist in Holland but whether it is recognised in South African law is still an open question. *Pretorius v Loudon* (supra) at 860G-H and 862H-863B. A rule in a similar form was recognised in *Adams v Mochke* (1906) 23 SC 782. The existence E and recognition of the rule is referred to in various decisions: *Ross v Barnard* 1951 (1) SA 414 (T) at 418E-421A; *Grossenor Motors (Potchefstroom) Ltd v Douglas* (supra) at 426C-D; *Electrolux (Pty) Ltd v Khota and Another* (supra) at 246G; *Blackwood Hodge South Africa (Pty) Ltd v Elco Steel Dealers* (supra) at 856G; *Barclays Western Bank Ltd v Fourie* 1979 (4) SA 157 (C) at 162A-E; *Pretorius v Loudon* (supra) at 860B-863G). The rule has also been the subject of commentary by writers: *Blecher* (1977) 94 SA *Law Journal* 1; *Amicus Curiae* (1977) 94 SA *Law Journal* 256; *Kerr* (1977) 94 SA *Law Journal* 260; *Rabie The Law of Estoppel in South Africa* 1st ed at 12-16; *Kleyn and Borraine Silberberg and Schoeman's The Law of Property* 3rd ed at 294-5; *Lewis* (1986) 103 SA *Law Journal* 69; *Harker* 1986 *THRHR* 411; *Carey Miller The Acquisition and Protection of Ownership* 1st ed at 324-5; *Van der Walt and Pretorius* 1989 *TSAR* 625. The said rule was recognised in Roman-Dutch law and has become an integral part of modern South African law. On the facts of this matter respondent must H succeed because the rule is in its favour and the requirements thereof are satisfied.

Watts SC in reply.

Cur advo vult.

Postea (March 28).

Nicholas AJA: This appeal is against an order made in motion proceedings in the Natal Provincial Division. The application arose out of the activities of three persons, namely:

- A 1. Quenty's Motors (Pty) Ltd ('Quenty's Motors'), the applicant in the Court *a quo* and the present appellant. It carries on business as a motor dealer in Pretoria. Mohamed Ahmed is a director and his father, Suleman Ahmed Aboo, although retired, assists in the business.
- B 2. Standard Credit Corporation Ltd ('Stannic'), the respondent in the Court *a quo* and in the appeal, is a general banker and is well known as a financial institution which deals extensively with the sale and leasing of new and used motor vehicles.
- C 3. Love Motors Durban CC ('Love Motors'). At the relevant time it carried on business as a motor dealer in Smith Street, Durban, and its sole member was Howard Love.
- In September 1990 Quenty's Motors acquired the ownership of two Mercedes-Benz motor cars. One, which was a 380 SEA 1984 model, bore the registration number YBA 7072. The other, which was a 250 SEA 1985 model, bore the registration number KPB 040 T. During September/October 1990 Quenty's Motors entered into two agreements with Howard Love. The first related to vehicle No YBA 7072, and the other to vehicle No KPB 040 T. In para 10 of Quenty's Motors' founding affidavit, which was deposed to by Mohamed Ahmed, the following account was given of the conclusion of the first agreement:
- E '10. During or about the end of September 1990 my father during the course of a telephone conversation with Howard Love agreed that:
- 10.1 The motor vehicle, Mercedes-Benz 380 SEA 1984 model, and bearing registration number YBA 7072, would be delivered to Howard Love on consignment.
- F 10.2 The relevant registration documents would accompany the vehicle for the purposes of inspection by prospective purchasers.
- 10.3 Howard Love would pay applicant for the vehicle once he sold the same.
- 10.4 Transfer of ownership of this vehicle would only take place upon payment by Howard Love to applicant and upon which event the necessary transfer documents would be duly completed.
- G 10.5 Howard Love would arrange to have the vehicle driven to Love Motors' premises.'
- The second agreement, which related to vehicle No KPB 404 T, was in substantially the same terms.
- Howard Love duly took delivery of the vehicles. He was told by Mohamed Ahmed that the price which Quenty's Motors required for vehicle No KPB 040 T was R59 000. (Nothing was said in the founding affidavit as to the price required for vehicle No YBA 7072.) Quenty's Motors did not receive any payment in respect of either of the two vehicles, nor did it transfer ownership therein.
- In about the middle of November 1990 Howard Love informed Mohamed Ahmed and Suleman Aboo in the course of telephone conversations that he had not so far sold either of the vehicles and that he was going on holiday to England until 28 November. Towards the end of that month Mohamed Ahmed received reports which gave him cause for grave concern. He went to Durban to investigate the situation, arriving at Love Motors' premises at about 23:00 on 26 November. The motor vehicles were not to be seen there. On the following day he again visited the

- premises. He was unable to make contact with Howard Love, but he A received information which led him to go to Stannic's repossession centre in Sidney Road, Durban, where he saw the two motor cars. On the same day Quenty's Motors made a demand on Stannic for their delivery and, when there was no satisfactory response, it applied as a matter of urgency for the issue of a rule *nisi*, operating as an interim interdict, which called B upon Stannic to show cause why an order should not be made *inter alia* declaring Quenty's Motors to be the lawful owner of vehicles No YBA 7072 and No KPB 040 T, and directing Stannic to forthwith return the vehicles to Quenty's Motors. Stannic did not oppose the grant of a rule *nisi*, but did oppose the grant of interim relief. On 12 December 1990 a C rule *nisi* was granted on terms to which Stannic consented, returnable on 27 February 1991. Stannic had indicated that it would oppose the confirmation of the rule
- 'on the grounds that the applicant is estopped as against the respondent from alleging that the (respondent) has not acquired the ownership of the vehicles and that by virtue of the said estoppel the applicant is precluded from denying the authority of Howard Love or Love Motors Durban CC to sell the vehicles to the respondent.'
- Howard Love had left the country in order, so rumour had it, to avoid the importunities of his numerous creditors. His estate was sequestrated and Love Motors was liquidated. The liquidator of Love Motors having E been joined as second respondent, he stated on affidavit that he abided the decision of the Court.
- The deponent to Stannic's opposing affidavit was Stephen Frederick Potgieter, who was Stannic's Area Manager Credit Control in Durban. The affidavit included the following statements:
- F '11. . . . Love Motors Durban CC is a well known firm of motor dealers in Smith Street, Durban, with which the respondent has dealt . . . extensively. The premises of Love Motors Durban CC is solely that of a motor dealer, in other words there is no repair shop to which members of the public take their vehicles for repair and Love Motors Durban CC sells vehicles as its sole business.'
- G
13. *Ad* para 10
- It is clear from the allegations herein, the details of which are not known to the respondent, that the applicant has entrusted to the said Love, who is a well known dealer in motor vehicles, the said vehicles and well knew that the said Love would place same in his showroom and expose them for sale as H ordinary stock-in-trade of Love's business Love Motors Durban CC.
14. I aver that both vehicles were in fact brought onto the floor of the showroom of Love Motors Durban CC and appeared as exposed for sale as ordinary stock-in-trade of the business.
15. Pursuant to this and by virtue of an agreement between the respondent and Love Motors Durban CC in terms of an agreement known as a "Used goods floor plan agreement" the respondent purchased from Love Motors Durban CC all motor vehicles brought into the business of Love Motors Durban CC. I annex hereto marked "SCC1" a copy of the agreement subsisting between the respondent and the said close corporation. I further annex hereto marked "SCC2" an invoice from the close corporation (which traded purely as Love Motors) in respect of the 380 SE Mercedes-Benz and I annex hereto marked J

A "SCC3" a similar invoice in respect of the 280 SE Mercedes-Benz both of which is dated 17 October 1990 for the prices therein mentioned.'

(Clause 3 of annexure SCC1 provided:

3. Request, invoice and delivery

B 3.1 The dealer may from time to time request Stammic to purchase goods from the dealer for the purpose of selling the same back to the dealer who will purchase the goods from Stammic in terms of this agreement for the sole purpose of resale.

C 3.2 If Stammic accedes in principle to a request referred to in 3.1 the dealer will sign a completed agreement of sale relating to the goods in question and deliver the signed original of the same to Stammic as soon as possible after the request referred to in 3.1 has been made.

D 3.3 The dealer will provide Stammic with an invoice for the goods stating the full description of the goods and the purchase price payable by Stammic to the dealer.

E 3.4 Upon receipt of the signed agreement referred to in 3.2 and the invoice referred to in 3.3 Stammic shall pay the purchase price to the dealer who shall henceforth hold and procure that any other persons who may from time to time obtain possession of the goods shall hold the same for Stammic with the intent that Stammic shall become and remain the owner thereof.'

In terms of clause 5:

F 'The dealer shall—

5.1 until ownership of the goods passes to the dealer;

5.1.1 hold the goods on behalf of Stammic as owner;

5.1.2 not sell, dispose of or in any other manner whatsoever deal in or with the goods on terms which oblige or may oblige the dealer to part with possession thereof before Stammic has received payment in full of all amounts owing in terms of the relevant agreement of sale;

5.1.3 at its cost and expense keep the goods in good working order and condition, properly maintained, serviced and lubricated;

G 5.1.4 not use the goods for any purpose whatsoever except to display the same in the dealer's premises on the showroom floor and shall in particular not permit the goods to be used or driven;

H The object of the used goods floor plan agreement was manifestly to enable Love Motors to obtain finance from Stammic against the security of the vehicles sold.

I The invoices, annexures SCC2 and SCC3, are, except for the respective descriptions of the motor vehicle concerned, substantially identical. They do not have a printed heading and what is recorded therein is in manuscript. Omitting matter which appears to have been added in another hand (presumably by employees of Stammic) SCC2 reads as follows:

J 'INVOICE/FAKTUR
STANNIC/MOTORTOWN
195 West Street, Durban 4001
Bought of Quenty's Motors
Gekoop van
510 Mitchell Street, Pretoria 2000.

A 1 x 84 Mercedes Benz 380 SE 62000
To deliver on your behalf to
Love Motors
143 Smith Street
Durban 4001 (62000)

Potgieter's affidavit continued:

B '16. I also annex hereto marked "SCC4" and "SCC5" two agreements in terms of which the respondent in turn re-sold to the close corporation under a suspensive sale agreement the vehicles in question and in terms of which the full purchase price was to be paid by the close corporation to the respondent on 15 January 1991. I personally saw the vehicles on the showroom floor of the close corporation, and accordingly assumed they were ordinary stock-in-trade. The respondent would not have acted as it did had not the vehicles been regarded as ordinary stock-in-trade.

C 17. In terms of the two invoices for R62 000 and R60 000 respectively the respondent paid the close corporation therefor. Accordingly, the respondent maintains that it is the owner of the said vehicles, alternatively that when the applicant delivered the vehicles to the close corporation for the purpose of selling them the applicant must have contemplated that the said Love or his close corporation would exhibit the vehicles for sale at his business premises with its other stock-in-trade. Furthermore it is clear that the close corporation dealt with the vehicles with the applicant's consent in such a manner as to proclaim that either the *dominium* therein was vested in the close corporation or at the very least that the close corporation had the *ius disponendi*.

D 18. I aver that acting through me the respondent firmly believed that, since the vehicles had been brought onto the premises of the close corporation, in truth and in fact and by virtue of the nature of the trade of the dealer, namely the close corporation, the close corporation was in fact the owner thereof and had the *ius disponendi* thereof. It was the reliance [on] this by the respondent (acting through me) that occasioned the transactions above-mentioned.

E 19. On the strength of the representations made to the respondent by the applicant in allowing the close corporation to have the vehicles on its premises for sale and as a direct result of such representations the respondent has acted to its prejudice in acquiring and paying for the said vehicles.

F 20. There was nothing to indicate to the respondent that the goods were merely consignment stock. There were no markings on the vehicles in question to show that the vehicles had been delivered to the close corporation other than as ordinary stock-in-trade.

G 21. *Ad para 10*

H I have no knowledge of the allegations herein nor of the private arrangements made between the applicant and Howard Love personally or his corporation.'

I In a supplementary opposing affidavit which was filed by consent, Potgieter referred again to annexures SCC2 and SCC3. He said:

J 4. These two invoices in form and content are the normal invoices respondent regularly received from Love Motors and also from other dealers. It is respectfully submitted that they indicate a sale of goods to respondent and the words "Bought of Quenty's Motors" indicate the source of the vehicle. It does not, it is submitted, indicate a reservation of ownership in favour of applicant.

5. In accordance with the instructions given to us by Love Motors this is the name of the person to whom he wished the cheque to be made out by respondent. The paperwork would then be attended to and Howard Love, representing Love Motors, would take delivery of the cheque as the agent for whoever was the seller of the vehicle.'

A He also annexed a copy of Stannic's cheque for R122 000 dated 17 October 1990 and payable to the order of Quenty's Motors.

In Quenty's Motors' replying affidavit, Mohamed Ahmed said that the invoices did not emanate from Quenty's which does not use such handwritten invoices but uses pre-printed stationery. The handwriting on the invoices is not that of any employee of Quenty's.

B For the rest Quenty's Motors' replying affidavit, as well as the supplementary replying affidavit filed by it, consisted of argumentation and contained no new allegations of fact.

C Mohamed Ahmed said that the form and contents of the invoices should have drawn Stannic's attention to the fact that Love Motors was not the owner of the vehicles and did not have the right to deal with them. Even minimal enquiry by Stannic would have revealed the falsity of the invoices. Stannic ought to have satisfied itself as to Howard Love's ownership. Having regard to the business which it conducted Stannic would know that it was accepted business practice amongst motor dealers to move stock from one dealer to another and that 'the mere presence of a vehicle upon certain premises would not indicate ownership or for that matter a right to dispose thereof'. Stannic was unbelievably naive, particularly in today's business world, in suggesting that the mere presence of the vehicle on a showroom floor, without an inspection of documents and enquiry as to ownership, would justify the assumption that the vehicles were ordinary stock-in-trade. Ahmed denied that Stannic could have been prejudiced by any action on the part of Quenty's Motors and averred that any prejudice arose solely from its own actions. If Stannic was in fact misled, this was a result of the fraudulent actions of Howard Love, in which Quenty's Motors had no part.

F The rule nisi was extended from time to time, and the matter was eventually argued on 2 August 1991. The Judge *a quo* dismissed Quenty's Motors' application with costs. The matter is now before this Court on appeal.

G The principles to be applied are clear. They were stated by Holmes JA in *Oakland Nominees (Pty) Ltd v Cetria Mining & Investment Co (Pty) Ltd* 1976 (1) SA 441 (A) at 452A-G:

'Our law jealously protects the right of ownership and the correlative right of the owner in regard to his property, unless, of course, the possessor has some enforceable right against the owner. Consistent with this, it has been authoritatively laid down by this Court 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) . . .

As to (a) *supra*, it may be stated that the owner will be frustrated by estoppel upon proof of 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. A helpful decision in this regard is *Electrolux (Pty) Ltd v*

A *Kraai and Another 1961* (4) SA 244 (W), with its reference at 247 to the entrusting of possession of property with the *indicia* of *dominium* or *ius disponendi*.

(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.

In the *Electrolux* case referred to by Holmes JA, Trollip J said at 247B-E:

C 'To give rise to the representation of *dominium* or *ius disponendi*, the owner's conduct must be not only the entrusting of possession to the possessor but also the entrusting of it with the *indicia* of the *dominium* or *ius disponendi*. Such *indicia* may be the documents of title and/or of authority to dispose of the articles, as for example, the share certificate with a blank transfer form annexed . . . ; or such *indicia* may be the actual manner or circumstances in which the owner allows the possessor to possess the articles, as for example, the owner/wholesaler allowing the retailer to exhibit the articles in question for sale with his other stock in trade. . . . In all such cases the owner

D 'provides all the scenic apparatus by which his agent or debtor may pose as entirely unaccountable to himself, and in concealment pulls the strings by which the puppet is made to assume the appearance of independent activity. This amounts to a representation, by silence and inaction . . . as well as by conduct, that the person so armed with the external indications of independence is in fact unrelated and unaccountable to the representor, as agent, debtor, or otherwise.'

(Spencer Bower on *Estoppel by Representation* at 208).

Trollip J said further (at 247 *in fine*—248 *in pr*):

F ' . . . It follows that to create the effective representation the dealer or trader must, in addition, deal with the goods with the owner's consent or connivance in such manner as to proclaim that the *dominium* or *ius 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.'

G It is clear from Ahmed's affidavit that Quenty's Motors entrusted the possession of the two motor cars to Love Motors. He stated that the delivery was 'on consignment'. This phrase belongs to the vocabulary of commerce. It imports 'the consigning of goods . . . *est* to an agent for sale or disposal'. (*The Oxford English Dictionary* sv 'consignment' 4.) Webster's *Third New International Dictionary* gives (sv 'consignment') a more precise definition of 'on consignment', namely

'—on consignment: *adi* (or *adv*): shipped to a dealer who acts as agent (as for a manufacturer) to sell, auction, or exhibit with the agreement that he may take title to and pay for what he sells, that he must remit the proceeds of sales less commission to the shipper, and that he may return anything left unsold (goods shipped *on consignment*).'

H It is more or less in that sense, I think, that the phrase was used in para 10 of the founding affidavit. The vehicles were to be delivered to Howard Love; they were to be exhibited for sale at Love Motors; and it was contemplated that they would be sold, and that when each was sold

A Howard Love would pay Queny's Motors therefor. It is not disputed that the two vehicles were displayed in the showroom of Love Motors, together with other vehicles displayed by it for sale. When Mohamed Ahmed went to Durban on 26 November 1990 he looked for the vehicles at the premises of Love Motors. Adapting the words of Trollip J, Love Motors dealt with the vehicles with Queny Motors' consent in such a manner as to proclaim that the *dominium* or *ius disponendi* was vested in Love Motors. Holmes JA's first requirement was satisfied.

In regard to the second requirement, Mohamed Ahmed should reasonably have contemplated that a prospective purchaser might act on the representation to his prejudice, and he was negligent in not taking reasonable steps to prevent it.

C In regard to the third and fourth requirements, Poygieter said, in paras 18 and 19 of his affidavit which are quoted above, that he and hence Stannic firmly believed that, since the vehicle had been brought on to the premises of Love Motors and because of the nature of its business, Love Motors was in fact the owner and had the *ius disponendi* of the vehicles, and that it was because of Stannic's reliance on this that it entered into the transactions with Love Motors and acted to its prejudice in acquiring and paying for the vehicles.

E Mohamed Ahmed's arguments in his replying affidavits, which are summarised above, were not such as to raise a genuine dispute of fact. In the Court *a quo* Queny's Motors, in asking for final relief, did not seek to test Poygieter's evidence by cross-examining him. And it cannot be said that that evidence was so far-fetched or clearly untenable that the Court would have been justified in rejecting it merely on the papers. Consequently the matter had to be approached on the basis of the allegations in Poygieter's affidavits. (Compare *Piascon-Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C.)

F In the appeal it was submitted on behalf of Queny's Motors that in the light of the circumstances relating to the invoices and the issue of the cheque Stannic could not have believed either that Love Motors was the owner of the cars or that it was authorised to dispose of them without Queny's Motors receiving payment therefor.

G In regard to the first leg of this submission, there is much to be said for the view that the invoices must have indicated to Stannic that Love Motors was not the owner of the vehicles and that Stannic recognised this by issuing the cheque in favour of Queny's Motors.

H In regard to the second leg, however, the documents contain nothing which could have suggested to Stannic that Howard Love did not have the *ius disponendi*. Indeed, Howard Love's conduct in entering into the agreements of sale with Stannic, and in issuing the invoices and requesting that the cheque for R120 000 be handed to himself all indicated to Stannic that he had the *ius disponendi*.

I Then it was argued that whatever representation might have been made to 'an ordinary purchaser' entering the showroom of Love Motors, it was not made to a purchaser such as Stannic who purchased under a Used goods floor plan agreement. It is probably correct that Queny's Motors did not have such a sale in contemplation, but the fact is that the representation was made to all potential purchasers from Love Motors.

A In my opinion, therefore, the estoppel raised by Stannic was clearly established, and the order by the Court *a quo* dismissing the application was correct.

B There were before the Court two applications for condonation, one arising from the late filing and lodgment of the record, and the other arising from the late delivery and lodging of security. Neither was opposed by the respondents. The applications were not argued *in initio* because it seemed that the only question was whether the applicant had reasonable prospects of succeeding in the appeal. That question has now been decided against the applicant.

C It is accordingly ordered that the applications for condonation be dismissed with costs, including the costs of the appeal.

Botha JA, Eksteen JA, Howie JA and Olivier AJA concurred.

D Appellant's Attorneys: *Naren Sangham & Associates*, Pietermaritzburg; *Israel & Sackstein*, Bloemfontein. Respondent's Attorneys: *Van Klempener & Davis*, Pietermaritzburg; *Goodrick & Franklin*; Bloemfontein.

McCALL v McCALL

CAPE PROVINCIAL DIVISION

KING J

1993 June 2, 3, 7-10, 14-17; October 18, 19, 21, 25-27; December 8, 9
1994 January 14 Case No 369/91

H **Husband and wife—Divorce—Custody of children—Application by non-custodian parent for variation of consent paper (made an order of Court) granting custody of minor child to other parent—Onus on non-custodian parent to show that existing situation detrimental to child's interests and that variation of custody arrangement would be to child's advantage—What is in the best interests of the child—Factors or criteria to be applied in determining such best interests—When Court to have regard to child's preference.**

I In an application by a divorced non-custodian parent for the variation of a consent paper, which has been made an order of Court, granting custody of a minor child to the