

## REPUBLIC OF SOUTH AFRICA



## IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: A305/2016

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

11/9/2017

DATE

SIGNATURE

In the matter between:

NEDBANK LIMITED

APPLICANT

and

DIVAN ADRIAN LE GRANGE

RESPONDENT

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J U D G M E N T

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KUBUSHI, J

## INTRODUCTION

[1] The appellant, Nedbank Limited (Nedbank"), is appealing the whole of the judgment and order granted by Preller J on 29 May 2015. The appeal appeared before us, leave to appeal having been granted to the appellant with the direction that the appeal be heard by a full court of this Division.<sup>1</sup>

[2] The appeal emanates from a judgment and order granted in favour of the respondent ("Mr Le Grange") at the hearing wherein Mr Le Grange had instituted a vindicatory claim for an order directing Nedbank to deliver to him (Mr Le Grange) three luxury motor vehicles being a Range Rover sport, Volkswagen Golf GTI and a BMW 320 Sport line ("the three motor vehicles"). The vindicatory claim was met with a defence of *estoppel*. The issue before the trial court was, in the main, that of *estoppel*. Besides other ancillary issues, the trial court had to decide whether Nedbank succeeded in establishing all the requirements of *estoppel*. The trial court found in favour of Mr Le Grange and ordered Nedbank to return the three motor vehicles to Mr Le Grange. It is this order that is being appealed by Nedbank.

## FACTUAL BACKGROUND

[3] The relevant background facts are largely undisputed and arose in the following circumstances: Mr Le Grange inherited a sum of money from his late father's estate. With this money he bought the three motor vehicles from Wesbank at an auction with the intention of on-selling them at a profit. It is not in dispute that

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<sup>1</sup> See section 17 (6) (a) of the Superior Courts Act.

he became the owner of the motor vehicles. Mr Le Grange was not a motor vehicle dealer and did not have experience in that field. His only experience with motor vehicles was that he had earlier on bought a second hand motor vehicle, 'student car', from one Rudi van der Westhuizen ("Mr van der Westhuizen"), who was trading in used motor vehicles under the name and style of EJ Exclusive Auto Sales ("EJX Auto"). Mr Le Grange entrusted the three motor vehicles to EJX Auto with a mandate to sell the motor vehicles on his behalf. After negotiations pertaining to Mr van der Westhuizen's commission and the agreement on the minimum price that Mr Le Grange would accept for any of the motor vehicles, he handed the three motor vehicles to Mr van der Westhuizen together with their registration of transfer documents, duly completed and signed. He said that at the time he handed the motor vehicles to Mr van der Westhuizen, he had 21 days from the date of purchase within which to register the motor vehicles in his name. He accordingly mandated Mr van der Westhuizen to sell the motor vehicles and within 21 days to register the three motor vehicles in the name of the purchaser or otherwise to register them in his own (Mr Le Grange's) name, before the expiry of that period.

[4] Unbeknown to Mr Le Grange, EJX Auto had concluded a written agreement in respect of a so-called floor plan facility with Nedbank. The agreement itself was not disclosed at the hearing but from the allegations in the opposing affidavit read with a 'floor plan letter' attached thereto, it appears that Nedbank had extended a credit facility of R14m to EJX Auto enabling EJX Auto to purchase used motor vehicles for resale. Nedbank states in its answering affidavit that in terms of this agreement, EJX Auto could purchase motor vehicles from members of the public such as Mr Le Grange and finance such purchases through the use of the floor plan facility.



Should a motor vehicle be sold, payment of the full outstanding balance in respect of that motor vehicle was to be effected immediately. (This is also stated in Clause 3 of the 'floor plan letter'). As security for the credit facility Mr van der Westhuizen had to sign a general notarial bond over his stock on the business floor to Nedbank.

[5] Shortly after Mr Le Grange parted with possession of the three motor vehicles the business of EJX Auto went under liquidation. Whilst looking for the whereabouts of the three motor vehicles, Mr Le Grange discovered that, on the same day that he delivered the motor vehicles to EJX Auto, Mr van der Westhuizen registered the three motor vehicles into EJX Auto's name. Nedbank, in its papers, allege that it allowed EJX Auto to utilise the floor plan facility, in respect of the three motor vehicles, on the strength of this registration which signified that EJX Auto purchased the three motor vehicles from Mr Le Grange.

[6] Pursuant to the liquidation, Nedbank, acting upon the general notarial bond registered in its favour and in enforcing and protecting its rights as well as those of other creditors, took into its possession, with the cooperation of Mr van der Westhuizen and EJX Auto, more than 60 motor vehicles, including the three motor vehicles, for safekeeping in Nedbank's storage facilities. When Nedbank refused to hand over the three motor vehicles to him, Mr Le Grange approached court on an urgent basis for an interim order, preserving the three motor vehicles pending the outcome of the vindicatory application. The interim order was, *per* agreement between the parties, granted on 21 October 2014.

## THE PROCEEDINGS BEFORE THE TRIAL COURT

[7] Before Preller J, Mr Le Grange sought a final order for the return of the three motor vehicles on the basis that he is the lawful owner thereof and that the motor vehicles were fraudulently registered by Mr van der Westhuizen into EJX Auto's name. In resisting the final order, Nedbank denied that Mr Le Grange was the lawful owner of the three motor vehicles because they were registered, with the consent of Mr Le Grange, in the name of EJX Auto. Nedbank further averred that Mr Le Grange, in delivering the three motor vehicles with the registration of transfer documents negligently represented and/or caused and/or allowed his duly authorised agents, Mr van der Westhuizen and EJX Auto to represent, to the public, including Nedbank, that EJX Auto was lawfully entitled to sell the three motor vehicles or to deal freely therewith as the owner thereof. Nedbank further alleged in its papers that Mr Le Grange should rather claim from Mr van der Westhuizen or EJX Auto for the price at which the three motor vehicles were sold or the minimum selling price Mr Le Grange and Mr van der Westhuizen agreed upon; or the motor vehicles *prima facie* belong to the insolvent EJX Auto on the basis of the registration certificate and stand to be dealt with in the liquidation process by the liquidators. Based on these grounds, Nedbank submitted that Mr Le Grange should be *estopped* from relying upon his purported right of ownership. In the alternative Nedbank's plea was that there are clear, material factual disputes that are not capable of decision on the papers and that the application stood to be adjudicated based upon Nedbank's version read together with those facts admitted in Mr Le Grange's version or that the application should be referred to trial.



[8] Mr Le Grange's averments in his reply is that he never sold the three motor vehicles to Mr van der Westhuizen or EJX Auto; and that he never agreed that Mr van der Westhuizen register the three motor vehicles in the name of EJX Auto or dealer stock the motor vehicles. Registration of the three motor vehicles into the name of EXJ Auto was effected fraudulently and contrary to the express agreement with Mr van der Westhuizen. As such, ownership of the three motor vehicles never passed to Mr van der Westhuizen or EJX Auto. When he mandated Mr van der Westhuizen to sell the motor vehicles on his (Mr Le Grange's) behalf ownership was reserved, and did not pass to Mr van der Westhuizen or EJX Auto merely as a result of delivery of the motor vehicles and or fraudulent registration of the motor vehicles into the name of EJX Auto; Mr van der Westhuizen was not allowed to effect transfer of ownership without Mr Le Grange having received payment of the purchase price. Further, Mr van der Westhuizen was not to represent to the public that he was selling the motor vehicles on behalf of EJX Auto. EJX Auto falsely represented to Nedbank that it was the lawful and registered owner of the three motor vehicles and presented Nedbank with tax invoices which made Nedbank to pay EJX Auto for the said motor vehicles but Mr Le Grange never received payment of the purchase price for the three motor vehicles. As regards the alternative defence, Mr Le Grange's submission is that the matter can be dealt on the papers before court as there are no genuine and serious challenges to the claims of ownership.

#### THE JUDGMENT OF THE TRIAL COURT

[9] In its judgment, the trial court made the following findings:

1. Firstly, it found that due to the appellant's failure to obtain an affidavit from Mr van der Westhuizen, to gainsay the evidence of Mr Le Grange, Nedbank's opposing affidavit in the circumstances consisted to a large extent of argument and inferences it sought to draw from Mr Le Grange's founding affidavit.
2. Secondly, it found that from Mr Le Grange's version of the mandate that was given to Mr van der Westhuizen, it was clear that ownership of the three motor vehicles concerned never passed to Mr van der Westhuizen. The trial court rejected Nedbank's version that Mr Le Grange delivered the three motor vehicles to Mr van der Westhuizen together with a signed registration transfer documents with the intention that they should be sold but without reservation of his right of ownership.
3. Thirdly, in so far as Nedbank sought to infer that Mr Le Grange intended to pass ownership to Mr van der Westhuizen that inference was not justified in view of the clear version of the events in Mr Le Grange's founding affidavit.
4. Fourthly, the trial court found that absent an explanation from Nedbank with regard to the details of the floor plan agreement and more in particular, the details of the manner in which Mr van der Westhuizen satisfied Nedbank that he had obtained a valid title to the three motor vehicles and which in turn passed on to Nedbank, the defence of *estoppel* was not sustainable. The trial court found that this was the kind of information that Nedbank had at its disposal and which should have been disclosed by it to the court.

5. Lastly, in the alternative, the trial court, relying on the judgments in *Peterson v Cuthbert*<sup>2</sup> and *Roux Meter v Jeppe Street Mansions*,<sup>3</sup> concluded that Nedbank's bare denial of Mr Le Grange's allegations were not sufficient to generate a real dispute of fact. The court made a finding that in the absence of an affidavit by Mr van der Westhuizen denying the negotiations between Mr Le Grange and Mr van der Westhuizen, Nedbank could not really dispute any of the facts deposed to by Mr Le Grange.

#### ON APPEAL

[10] Before us, it is argued on behalf of Nedbank that Mr Le Grange is *estopped* from relying upon his purported right of ownership, alternatively, that Mr Le Grange and Nedbank's competing claims stands to be adjudicated in the liquidation of EJX Auto. It was also argued from the bar that since the relief claimed by Mr Le Grange is final, the matter ought to have been referred to trial due to the existing material factual disputes.

[11] For Mr Le Grange it is argued that Nedbank failed to establish all the requirements of *estoppel* and in particular failed to establish that: Mr Le Grange, by conduct or otherwise, represented that EJX Auto was the owner of the motor vehicles or was entitled to dispose of the motor vehicles; the alleged representation by Mr Le Grange had been made negligently in the circumstances; Nedbank had relied upon the alleged representation by Mr Le Grange; Nedbank's reliance upon the alleged representation had been the cause of Nedbank's acting to its detriment;

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<sup>2</sup> 1945 (AD) 420 at 428.

<sup>3</sup> 1949 (3) SA 1155 (T).



and, given the fact that EJX Auto never acquired ownership of the motor vehicles, the motor vehicles do not form part of the assets of the insolvent estate of EJX Auto – the competing claims of the parties can as such not be left for the adjudication of the liquidator of EJX Auto. It was also argued from the bar that there are no disputes of fact in the application regarding *estoppel* because Nedbank cannot dispute the negotiations between Mr Le Grange and Mr van der Westhuiizen.

## THE ISSUE

[12] Thus there are two issues before us, namely

1. Whether the trial court was correct in finding that Nedbank is not entitled to rely on *estoppel* as a defence to Mr Le Grange's claim for the return of the three motor vehicles; and
2. Whether the trial court was correct in deciding that there are no genuine material disputes of fact, in this instance.

[13] But, before I deal with the merits of the appeal I pause to deal first with the preliminary issue raised by the respondent in argument before us.

## PRELIMINARY POINT

[14] From the bar, Mr Le Grange's counsel argued that Nedbank's answering affidavit was deposed to by the National Manager of Nedbank who was not involved in the transaction in question. The contention is that the evidence contained in the answering affidavit is hearsay and should be rejected.

[15] The paragraphs to which the argument relates are stated as follows in Nedbank's answering affidavit:

- "1.1 I am a major male and National Manager: Special Investigations, High Risk Recovery in the employ of Nedbank Limited who trades as MFC, a division of Nedbank Limited  
...
- 1.2 The facts contained herein fall within my personal knowledge, unless stated expressly to the contrary, and are to the best of my belief both true and correct.
- 1.3 The documents, agreements and other information herein fall within my personal knowledge and control. I am personally involved in dealing with the motor vehicles, the agreements and claims as described herein after on behalf of Nedbank Limited."

[16] The Supreme Court of Appeal in *Dean Gillian Rees v Investec Bank Limited*<sup>4</sup> dealing with an affidavit in support of an application for summary judgment complying with the requirements of Uniform Rule 32 (2) in which the deponent employee of a bank swore to have personal knowledge, and confirming the principles enunciated in *Maharaj v Barclays National Bank Ltd*,<sup>5</sup> had this to say:

'[14] Ms Ackermann relied on the information at her disposal which she obtained in the course of her duties as the bank's recoveries officer, to swear positively to the contents of her affidavit. It is not in dispute that in the discharge of her duties as such she would have had access to the documents in question and upon a perusal of those documents she would acquire the necessary knowledge of the facts to which she deposed in her affidavit on behalf of Investec. . .

[15] The fact that Ms Ackermann did not sign the certificates of indebtedness nor was present when the suretyship agreements were concluded is of no moment. Nor should these be elevated to essential requirements, the absence of which is fatal to the respondent's case. As stated in *Maharaj*, "undue formalism in procedural matters is always to be eschewed" and must give way to commercial pragmatism. At the end of the day, whether or not to grant summary judgment is a fact-based enquiry. Many summary judgment applications are brought by financial institutions and large

<sup>4</sup> (330/13) [2014] ZASCA 38 (28 March 2014)

<sup>5</sup> 1976 (1) SA 418 (A) at 423A-H

corporations. First-hand knowledge of every fact cannot and should not be required of the official who deposes to the affidavit on behalf of such financial institutions and large corporations. To insist on first-hand knowledge is not consistent with the principles espoused in *Maharaj*.’

[17] On that basis I am satisfied that the evidence of Nedbanks’ deponent contained in its answering affidavit is within his (the National Manager’s) knowledge and not hearsay. It is not necessary that the deponent should have been involved in the transaction in question for him to have had personal knowledge of the facts pertaining to this matter. It suffices that he had access to and was in control of the documents, agreements and other information referred to in the affidavit. Importantly, he says that he is personally involved in dealing with the motor vehicles, the agreements and claims as described in the answering affidavit on behalf of Nedbank Limited.

I turn now to consider the merits of the appeal

## THE MERITS OF THE APPEAL

### The Issue of *Estoppel*

[18] The legal principles to be applied are elucidated in *Oakland Nominees (Pty) Ltd v Gelria Mining Investment Co (Pty) Ltd*<sup>6</sup> where the following is stated –

‘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 –

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<sup>6</sup> 1976 (1) SA 441 (A) at 452A – G.



- (a) Where the person who acquired the 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 Khota & Another* 1961 (4) SA 244 (W), with its reference at 247 to the entrusting of possession of property with the *indicia of dominium or jus 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."

[19] In explaining the conduct and/or representation that might have induced the possessor to act to her or his detriment, the court in *Electrolux* at 247B – E said the following –

"To give rise to representation of *dominium or jus 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 jus 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 in question for sale with his other stock in trade. . . . In all such cases the owner

"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)

And at 247H – 248A

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

[20] In applying the aforementioned principles to the facts of the matter before us, I first have to determine who, between Mr Le Grange and EJX Auto is the lawful owner of the three motor vehicles. If I find that EXJ Auto is the owner it is the end of the story. If, however, I find that Mr Le Grange is the lawful owner I have to determine if he (Mr Le Grange) made any negligent representation to Nedbank on which it can be said Nedbank acted thereon to its detriment.

Did the respondent intend to pass ownership of the three motor vehicles to EJX Auto?

[21] The trial court in its finding concluded that Mr Le Grange is the lawful owner of the three motor vehicles on the ground that his evidence on the ownership of the three motor vehicles was not countenanced. I, with respect, agree with this conclusion. The evidence of Mr Le Grange is clear in this regard. He remains steadfast that he is the owner of the three motor vehicles. He submits in his papers that he never sold the motor vehicles to Mr van der Westhuizen or EJX Auto or consented to the motor vehicles being registered in the name of EJX Auto. The agreement between Mr Le Grange and Mr van der Westhuizen was that the motor vehicles were to be registered in the name of the purchaser if the motor vehicles are



bought within the 21 days period of registration, failing which they were to be registered in the name of Mr Le Grange. I, as well, agree with the conclusion of the trial court that this evidence remains unchallenged because the person who could challenge it, that is Mr van der Westhuizen, did not tender any evidence. Nedbank was not a party to these negotiations and can as such not gainsay the evidence.

[22] Nedbank asserts that the agreement to sell the three motor vehicles was without reservation of Mr Le Grange's right of ownership. This submission was, also, correctly so, rejected by the trial court in its judgment. Mr Le Grange's version of the mandate given to Mr van der Westhuizen is the only one presented in court. Absent the evidence of Mr van der Westhuizen, Mr Le Grange's version remains unchallenged. Mr Le Grange's version in this regard is quite clear and understandable. He delivered the three motor vehicles to Mr van der Westhuizen mindful of the fact that they were to be registered within a period of 21 days. He explicitly mandated Mr van der Westhuizen to register the three motor vehicles in the name of the purchaser if bought within that period of 21 days failing which they were to be registered in his (Mr Le Grange's) name. In my understanding, Mr Le Grange's right of ownership in the three motor vehicles was reserved in that ownership remained with him until there was a purchaser in place. Nedbank's submission that the motor vehicles were bought by EJX Auto is unsubstantiated mainly because if it is so, Mr Le Grange never received any payment from EJX Auto or Mr van der Westhuizen. Besides, there is no such evidence on record except speculations and inferences Nedbank sought to draw from Mr Le Grange's founding papers.



Did Mr Le Grange make any negligent representation to Nedbank?

[23] Relying on the judgement in *Qenty Motors (Pty) Ltd v Standard Credit Corporation Ltd*,<sup>7</sup> Nedbank submits that even though it can be found that EJX Auto was not the owner of the three motor vehicles but Mr Le Grange delivered the three motor vehicles on consignment to his agent, Mr van der Westhuizen. The motor vehicles were delivered with the 'trappings of ownership' and, in so doing, Mr Le Grange negligently represented to the public, including Nedbank, that, EJX Auto or Mr van der Westhuizen was the owner or were authorised to deal freely with the three motor vehicles as the owner(s) thereof.

[24] I do not agree with the statement that the delivery was on consignment but that Mr Le Grange entrusted Mr van der Westhuizen or EJX Auto with possession of the three motor vehicles together with the *indicia of dominium* or *jus disponendi* (the 'trappings of ownership'), cannot be denied. In his founding affidavit Mr Le Grange clearly states that –

"I delivered the vehicles (on different dates) to van der Westhuizen, along with the already completed and signed registration of transfer documents."

But, Mr Le Grange denies that he had expected that the three motor vehicles would be sold by EJX Auto in the ordinary course of business and that they would be displayed on the floor together with the other motor vehicles of EJX Auto. I do not agree with this contention. How else would EJX Auto have sold the motor vehicles unless it displayed them on its showroom? The contention that the three motor vehicles were displayed in the showroom of EXJ Auto is not disputed by Mr Le Grange his papers. He does not indicate in what manner he expected Mr van

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<sup>7</sup> 1994 (3) SA 188 (AD).

der Westhuizen or EXJ Auto to sell the three motor vehicles. I am satisfied that the only way in which the motor vehicles would have been sold was by displaying them on the floor of the business together with the other motor vehicles of EXJ Auto. I conclude, also that in this sense Mr Le Grange's conduct would have given rise to representation of *dominium or jus disponendi*.

[25] As already stated earlier in this judgment, in rejecting Nedbank's defence of *estoppel* the trial court held that absent the details of the floor plan agreement and more in particular, the details of the manner in which, EJX Auto should satisfy Nedbank that it, that is EJX Auto, had obtained a valid title to the three motor vehicles and which in turn passed on to Nedbank, the defence was not sustainable. In other words, the trial court accepted Mr Le Grange's version that his three motor vehicles were fraudulently registered in the name of EJX Auto and as such the representation to Nedbank, if any, was by EJX Auto and not by Mr Le Grange, as Nedbank wanted to suggest.

[26] Before us, the argument on behalf of Nedbank is that the trial court should have applied a flexible test to determine the issue of legal, as opposed to factual, causation. The fraud of the second-hand car dealer, EJX Auto, did not superimpose a proverbial "*new picture*" on the existing common cause facts being that Mr Le Grange mandated EJX Auto to sell all three motor vehicles at a pre-agreed price, which EJX Auto did by selling and financing the motor vehicles with Nedbank. In the premises the trial court should have held that Mr Le Grange is *estopped* from relying upon his ownership in respect of the three motor vehicles and that he



(Mr Le Grange) has a claim against EJX Auto for failing to pay over the amount paid in respect of the three motor vehicles, so it was argued.

[27] It was, nevertheless, argued on behalf of Mr Le Grange that even though it may be said that Mr Le Grange's conduct gave rise to representation of *dominium or jus disponendi*, but, the new intervening circumstances, that is, the fraudulent conduct of Mr van der Westhuizen in registering the three motor vehicles in the name of EJX Auto, conjured a new image on which Nedbank acted upon. The contention is that Mr Le Grange cannot on that basis continue to be held responsible for any negligent representation. I agree.

[28] In *Electrolux* at 250C – E it was stated that –

'In its practical application I think that the statement means that the Court should not be quick or over anxious to infer an owner's conduct, including negligence, as representation that the possessor is vested with the *dominium or jus disponendi*; the conduct should be such as to proclaim clearly and definitely to all who are concerned that the possessor is vested with the *dominium* and *jus disponendi*; secondly, if the owner's conduct does measure up to that high standard, the Court should then scrutinise the evidence of the respondent carefully and closely to ascertain whether the representation was indeed the real and direct or proximate cause of the respondent believing that the possessor did have the *dominium* and *jus disponendi*.'

[29] The court in *Van der Molen v Fagan*<sup>8</sup> had this to say –

[11] . . . The basis for holding someone liable for holding out something is the image he conjured up which prompted the other party to react to his prejudice, and if due to some new circumstances (in this case Amod's fraud) a new image is superimposed on the old one (in this case Choonara's image of ownership which may be created by the respondent's handing over the

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<sup>8</sup> (41/2013) [2013] ZASCA 203 (02 November 2013) at para 11.



vehicle's 'trappings of ownership'), it is the new image to which the other party responds and on which he relies; the original party can no longer be held to it even if he would otherwise have remained liable.'

[30] In *Fagan* the applicant claimed the return of his motor vehicle from the respondent, who had bought it from a third party, to whom it was fraudulently sold. The respondent resisted the applicant's claim and raised a defence of *estoppel*. The court found that by the fraudulent action a new image was superimposed on the old image which was initially created by the respondent's handing over of the motor vehicles with the 'trappings of ownership'.

[31] Similarly in this instance, the fraudulent conduct of Mr van der Westhuizen in registering the three motor vehicles in the name of EJX Auto, without the consent of Mr Le Grange, superimposed a new image upon which Nedbank acted when it allowed EJX Auto to utilise the floor plan facility. Nedbank ought to have acted reasonably in the circumstances and satisfied itself that the three motor vehicles were legally owned by EJX Auto or Mr van der Westhuizen.<sup>9</sup> On the other hand it can be said that there is no reason in law to protect the purchaser who does not satisfy itself that it is acquiring a title in goods against the true owner. Nedbank ought to have satisfied itself as to EJX Auto's ownership of the three motor vehicles. But it failed to do so. It accepted merely at face value when it was shown the registration certificates that EJX Auto, was the lawful owner thereof. Nedbank should have required proof from Mr van der Westhuizen that EJX Auto bought the motor vehicles and had paid the purchase price for them. Having not done so, Nedbank cannot rely on the fact that EJX Auto is the owner of the three motor vehicles. Nedbank in fact

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<sup>9</sup> See *ABSA Bank Limited v Knysna Auto Services CC*.

relied on EJX Auto's fraudulent misrepresentation that it is the owner of the three motor vehicles when in fact it was not. I am satisfied that in the circumstances of this matter, Mr Le Grange can no longer be held to the representation made by him.

### Material Disputes of Fact

[32] It was submitted on behalf of the appellant that since the relief claimed by the respondent in the application was final a clear case based on probabilities should have been made. The contention is that the trial court should have decided the application based upon the appellant's version read together with the common cause facts conceded by the respondent in his replying affidavit. Alternatively, the application should have been referred to trial due to the existence of material factual disputes. In this regard appellant's counsel referred us to the judgment in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*.<sup>10</sup>

[33] I am, with respect, in agreement with the trial court's conclusion in this regard. Mr Le Grange's version on ownership of the three motor vehicles is not seriously contested by Nedbank. The contradictions, if any, are caused by Nedbank's speculations and inferences it sought to draw from the evidence provided by Mr Le Grange in his founding papers, and are not based on fact. As already stated earlier in this judgment and as concluded by the trial court, correctly so, absent the evidence of Mr van der Westhuizen and the details of the floor plan agreement, the ownership and at the very least the negotiations between Mr van der Westhuizen and Mr Le Grange, cannot be challenged.

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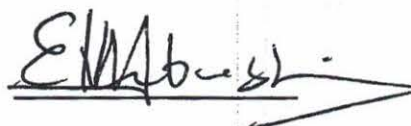
<sup>10</sup> 1984 (3) SA 623 (A) at 634 – 635.

[34] I hold as well that absent the evidence of Mr van der Westhuizen and the details of the floor plan agreement, Nedbank's defence on ownership of the three motor vehicles can be regarded as farfetched and untenable and should be rejected out of hand. As decided by the trial court, there is no need to have referred the application for trial as there are no genuine disputes of facts. The trial court was correct to have decided the matter on the papers as they stood before it.

## CONCLUSION

[35] In the premises I would propose that the appeal be dismissed with costs.

I agree and it is so ordered



**E.M. KUBUSHI**

**JUDGE OF THE HIGH COURT**



**T.J. RAULINGA**

**JUDGE OF THE HIGH COURT**

I agree



**R.G. TOLMAY**

**JUDGE OF THE HIGH COURT**



**APPEARANCES**

HEARD ON THE	: 31 MAY 2017
DATE OF JUDGMENT	: 01 SEPTEMBER 2017
APPELLANT'S COUNSEL	: ADV. J.P. VAN DEN BERG
APPELANT'S ATTORNEYS	: VHI ATTORNEYS
RESPONDENTS' COUNSEL	: ADV. M. A. KRUGER
RESPONDENTS' ATTORNEYS	: SCHOLTZ ATTORNEYS