IN THE KWAZULU-NATAL HIGH COURT
PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO.5179/09

In the matter between

TIM (NATAL) PALLETS & TIMBER PRODUCTS CC Applicant

and

RIHINO CASH & CARRY First Respondent

NEIL McHARDY N.O. Second Respondent
In his capacity as Liquidator of Southland Manufacturing Company (Pty) Ltd [in liquidation] formerly trading as Dexion Decking & Shelving and formerly trading as Dexion Racking & Shelving

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J U D G M E N T

Del. 3 December 2009

STEWART AJ

[1] This is an application in which the applicant seeks the return to it of 558 wooden pallets, or decks which it says belong to it. Its case in that regard is that it sold the pallets to Southland Manufacturing Company (Pty) Ltd which traded as Dexion. I shall refer to it as Dexion. In terms of the oral agreement with Dexion the pallets were to be delivered to the first respondent, Rhino Cash & Carry ('Rhino'), and that ownership would remain with the applicant until the purchase price had been paid.

The purchase price was not paid and Dexion has since been liquidated. The liquidator is the second respondent.

[2] Rhino states that it bought the pallets from Dexion, and that it has paid for them. As it happens payment was not made to Dexion but to Dexion's cessionary under a factoring agreement, but nothing turns on that. It is common cause that Rhino was not informed by the applicant or by Dexion that ownership of the pallets was reserved by the applicant pending payment to it of the purchase price.

[3] Rhino resists the application on two principal grounds. First, it states that the applicant is estopped from claiming ownership of the pallets. Second, it states that in any event ownership of the pallets passed to it by *accessio*. It is convenient to first consider the defence of estoppel.

[4] It is by now trite that to found an estoppel by representation it is necessary to prove a representation by words or conduct with regard to the fact in issue, that the representation was such that the representor should reasonably have expected the representee to act on it, reasonable reliance by the representee on the representation and, on the basis of that reliance, that the representee acted to its detriment. See *NBS Bank Ltd v*

Cape Produce Co (Pty) Ltd and Others 2002 (1) SA 396 (SCA) para 26 at 412C-E. In the present matter Rhino's case on estoppel is set out somewhat tersely in its answering affidavit as follows:

'14.

The First Respondent had absolutely no reason to believe that DEXION was not able to and not entitled to transfer ownership of the goods it was selling.

15.

At no time whatsoever was the First Respondent notified that DEXION lacked the necessary title to transfer ownership of the goods in question.

…

18.

The Applicant permitted DEXION to trade openly in the market place and to represent to First Respondent that DEXION was entitled to sell and deliver the goods in question and that, upon delivery of the goods, and/or payment of the purchase price in respect thereof to DEXION, the First Respondent would become the owner thereof.

…

21.

21.1In any event, at the behest of the Liquidators of DEXION, which is now in liquidation, the First Respondent paid all amounts due to DEXION to Merchant Commercial Finance (Pty) Ltd t/a Merchant Factors, a company which had bought the debt from DEXION.

…

27.

The items purchased from DEXION comprised various components utilised in shelving and racking for the display and storage of goods in the store.

…

29.

Decks and pallets are but two of the components utilised in an entire storage and display system.

30.

Once installed, the goods become an integral part of the system and I am accordingly advised that an accession thereof takes place.

31.

Dismantling these displays would effectively destroy the storage and display system and paralyse the First Respondent's store.

32.

The First Respondent's Ulundi store does a turnover in the order of R8 million per month.

33.

Accordingly, any disruption to its business would obviously be financially devastating.'

[5] The applicant's case in reply to the case on estoppel was to state that it had no control over what representation Dexion made and that payment for the pallets by Rhino to Dexion's cessionary occurred

after Rhino had been informed by the applicant of the latter's reservation of ownership. On the strength of that it was contended that Rhino had not suffered prejudice, or had suffered insufficient prejudice, and that the case for estoppel was accordingly not proved. It was however common cause that the applicant had delivered the pallets to Rhino and had not told Rhino of the reservation of ownership.

[6] In argument before me Mr Dheoduth for the applicant conceded that a sufficiently unambiguous representation had been made by the applicant by conduct and confined his argument to the question of detriment. I was initially hesitant with regard to the representation but was persuaded by Mr Phillips for Rhino that the applicant's conduct in delivering the pallets to Rhino in the knowledge that Dexion had sold them to Rhino and without informing Rhino of any reservation of ownership constituted a representation by conduct that the applicant relinquished any propriety rights to the pallets that it might otherwise have had. Indeed, if the applicant was thereafter to assert any propriety claim to the pallets, as it now does, it had a duty to inform Rhino of that claim before Rhino acted to its detriment on the basis that there was no such claim. Where there is a duty to speak and a duty-bound party does not speak, there is a representation by silence. Such a duty arises if it is considered reasonable in the circumstances that the party who would act

to its detriment should be warned by the other party (*Universal Stores Ltd v OK Bazaars (1929) Ltd* 1973 (4) SA 747 (A) at 761G-H). In my view there was such a duty in this case and the concession was rightly made.

[7] Whilst on the scant information on the papers before me Mr Dheoduth appears to be correct with regard to payment having been made by Rhino after it was informed of the applicant's claim, that argument does not address the prejudice suffered by Rhino in incorporating the pallets into its shelving and display systems, and more particularly the prejudice that would result if the pallets were to be removed. The argument on behalf of the applicant with regard to that prejudice relied on the following averments in the applicant's papers:

'14.[1]

> The timber decks are used as a foundation onto which bulk items are placed, for storage. It is therefore subjected to heavy loads and could break in the course of storage and moving the pallets during transportation or rearrangement in warehousing. This is the nature of the items manufacture thus ensuring that I continue to remain in the business of manufacturing palettes.' [*sic*]

'22.[2]

AD PARAGRAPH 30

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1 Paragraph 14 of the founding affidavit.
2 Paragraph 22 of the replying affidavit.

> There is no possible legal basis upon which the First Respondent can be heard to argue that *accessio* has taken place in that the decks are movable and entirely severable from any display that it may have been incorporated to.' [*sic*]

[8] The applicant's case does not address the prejudice that would be suffered by Rhino even if the decks are 'entirely severable from any display', into which they may have been incorporated. I must accordingly accept Rhino's version on this – no dispute of fact exists on the point. It may also be relevant that the value of the pallets is approximately R140,000.00, which is certainly not disproportionately more than the detriment that would be suffered by Rhino if it has to remove the pallets from its shelving and stacking system. The 'prejudice', or detriment, that has to be established by a party relying on estoppel is not limited to direct, instantaneous and palpable loss of money. It includes less gross and easily calculable detriment. See *Autolec Ltd v Du Plessis* 1965 (2) SA 243 (O) at 250H and *Absa Bank Bpk v Ramakatane* [2002] 1 All SA 559 (O) at 566e-h.

[9] In the circumstances, I find that the defence of estoppel has been established. I accordingly make the following order:

(1) The application is dismissed and the rule *nisi* discharged;

(2) The applicant is to pay the first respondent's costs.

DATE OF HEARING	27 November 2009
DATE OF JUDGMENT	3 December 2009
APPLICANT'S COUNSEL	Mr N.N. Dheoduth
APPLICANT'S ATTORNEYS	Neville J Pretorius
FIRST RESPONDENT'S COUNSEL	Mr D. Phillips
FIRST RESPONDENT'S ATTORNEYS	Shepstone & Wylie