

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

Appeal No.: **A 59/09**
Case No. : **30763/03**

In the matter between:

ABSA BANK LIMITED

Appellant (Plaintiff)

and

MR WM WOLMARANS

Respondent (Defendant)

JUDGMENT HANDED DOWN ON WEDNESDAY, 24 FEBRUARY 2010

DESAI J

[1] This matter comes before us as the two judges to whom it was previously allocated were unable to agree upon an outcome.

[2] It is an appeal by Absa Bank Ltd ("Absa") against a decision in the Bellville Magistrate's Court dismissing their claim for the balance of the purchase price of a motor vehicle sold in terms of an Installment Sale Agreement ("the sale agreement"). The purchaser of the said motor vehicle, a Mr WM Wolmarans, is the respondent herein.

[3] While one's sympathy in the matter would be with the respondent who was the victim of a fairly sophisticated scam, we are, in effect, called upon to decide whether there is a proper legal basis upon which he could evade the liability to repay Absa.

[4] The facts giving rise to the claim, and this appeal, are largely common cause.

[5] On 24 April 2002 the parties concluded the sale agreement at Bellville. The terms of the said agreement are not in dispute. It appears that the respondent purchased a Nissan motor vehicle for R308 193-67. The money was to be repaid in 59 equal monthly payments of R4 178-80 as and from 1 June 2002. A final payment of R61 644-47 was payable on 1 May 2007. On 17 May 2003 the respondent sold the vehicle and, since then, no further payments have been made in respect of the said debt. An amount of R187 990-59 was allegedly outstanding to Absa on the date the summons was issued.

[6] When the respondent decided to sell the vehicle in May 2003, he placed an advert in the Auto Trader offering to sell the vehicle for R198 000-00. The price was based upon the settlement amount in terms of the sale agreement. In response to the said advert, he received a call from an unknown person, one Mr Stefan Maseko, ("Maseko") who

eventually agreed to purchase the vehicle for R194 000-00. Subsequent thereto, on 16 May 2003, two cheques of R100 000-00 and R94 000-00 each were deposited in the account specified in the sale agreement. It appears that the respondent was not told, nor did he enquire, how the payments were made.

[7] The next day, a Saturday, Maseko telephoned the respondent, told him that the purchase price had been paid and asked for the delivery of the vehicle. The respondent telephoned Absa's Call Centre and spoke to one Triumph Marula ("Marula") who told him, *inter alia*, that there was a zero balance on the sale agreement account. As the calls to Marula are of some significance in this matter, I shall revert to them in due course. In any event, later that day the respondent met Maseko at the Cape Town International Airport and handed over the vehicle. The respondent has not seen either Maseko or the car since then. A few days later he was informed by Absa that they had been obliged to reverse the credits in respect of the payments by Maseko as the cheques had been dishonoured.

[8] Besides the plea of estoppel, the respondent had also filed a conditional counter-claim for damages. Perhaps unwisely, the counter-claim was withdrawn prior to the trial commencing in the Magistrate's Court.

[9] In any event, the sole issue which had to be decided by the trial Court was whether the plaintiff, that is Absa, was estopped from relying on the sale agreement for its claim against the respondent. It was the respondent's case that Absa had represented to him that the purchase price had been paid in full by Maseko and/or that he would be released from the sale agreement and/or that Absa would not have any further claim against him in terms of the sale agreement.

[10] The factual basis for the plea of estoppel emerges from the telephone conversations which the respondent had with the Absa Call Centre and with Marula in particular. As great reliance is placed on these calls for the purposes of the respondent's case, the more significant parts of the said calls are noted.

The record of appeal at p241 – 244 refers:

At 09:07:44 on 17 May 2003

"Consultant : Thank you for calling Bankfin you speaking Triumph. Good morning, hoe kan ek u help?"

Client : Morning Triumph, my name is Wayne. Eh, I just went through . . . no, I just phoned the settlement place now, eh, there was R194 000.00 paid into my Bankfin account so I

just want to know if they can settle the bakkie.

Consultant : You want to know if they can settle the bakkie?

Client : Ja. Because he says the account still active but there was money paid into the account.

Consultant : Oh, the settlement was paid in?

Client : Ja.

Consultant : Okay sir. Can you please give me your Bankfin account number?

Client : It's 585 . . .

Consultant : Okay. Wayne could you please hold the line for me. We just need to finalise this account.

Client : Alright.

Consultant : Eh, Wayne?

Client : Yes?

Consultant : Your account has been finalized.

Client : Has it been finalized?

Consultant : Ja, it says zero zero now.

Client : Is it? Is there any credit balance or nothing, no?

Consultant : No sir, it turn on zero and then there isn't any credit balance sir.

Client : Sorry?

Consultant : There isn't any credit balance.

Client : Is it?

Consultant : Yes.

Client : But I'm sure they said to me the other day my credit balance settlement was 193 700, or something. But anyway, it doesn't matter, I'll look into that. So it's been settled.

Consultant : Yes Wayne.

Client : And tell me, the pay slip for the bakkie, where did that get sent to?

Consultant : Okay. You have to tell me where do you want us to send the documents to.

Client : I think, I will . . . could I phone about that later, to tell them where exactly . . . because somebody has bought the bakkie that's why they paid the money into my account.

Consultant : Oh, okay.

Client : I just want to send, because we live in Pretoria, so I just want to send it here.

Consultant : Oh, all right.

Client : Is it possible you could send it to a Bankfin branch in Pretoria?

Consultant : Okay. In that case Wayne, we need to get a contact person . . .

Client : A Bankfin person?

Consultant : Ja. The person is going to await the documents.

Client : Okay. And who could I phone when I've got a contact person and stuff?

Consultant : Just phone the same number and any person who answers the phone, you just arrange with him to get the documents through.

Client : Okay. All right.

Consultant : Okay?

Client : Thank you very much.

Consultant : Thank you Wayne."

The record of appeal at p245 – 249 refers:

At 11:25: 33 on 17 May 2003

"Consultant : Hello?

Client : (Mrs Wolmarans) Hello!

Consultant : How are you?

Client : Hi. Ek wonder of jy my kan help asseblief.

Consultant : Okay, mevrou.

Client : My bakkie is verkoop en die persoon wat dit gekoop het, het dit afgelos by julle.

Consultant : Uh-huh?

Client : Ekke wil net graag hê jy moet asseblief vir my dit net op 'n brief faks as bewys dat ek net kan sien dit is afgelos.

Consultant : Met wie praat ek nou?

Client : L??s. Kan ek sommer vir jou my rekening-nommer gee?

Consultant : Ja mevrou...

Consultant : 29. Met wie praat ek nou?

Client : Dis mev Wolmarans, . . .

Consultant : Kan ek saam met mnr Wolmarans praat mevrou?

Client : Hou net aan.

Consultant : . . .

Client : (Mnr Wolmarans): Hallo!

Consultant : Hallo meneer?

Client : Yes sir!

Consultant : Goed, hoe gaan dit?

Client : Goed en self?

Consultant : Goed. Praat ek saam met mnr Wolmarans.

Client : That's right yes...

Client : Ja, that guy bought my bakkie and he says he settled it and they have told me it is settled, but I just want . . . you can fax me a confirmation that it has been settled.

Consultant : Ok, that we'll do sir, but that can only be on Monday, is that okay with you?

Client : It can only be on Monday?

Consultant : Yes sir.

Client : But it is definitely settled, so I can give him the car?

Consultant : It is . . . it is settled, yes."

[11] On 19 May 2003 the respondent was informed in writing that Absa, without prejudice to its rights, confirmed that the account had been paid in full. The letter, however, contains the rider that ownership of the vehicle

still rests in the bank until the outstanding amount has been paid in full to the bank.

[12] Two days later, that is on 21 May 2003, the respondent became aware for the first time that Maseko's cheques had been dishonoured and that he was to be held liable for the repayment of the balance of the purchase price.

[13] The respondent contends that when he delivered the vehicle to Maseko, he was under the belief that the purchase price had been paid in full by Maseko and that he would be released from the sale agreement. The said belief was premised upon the correctness of the representation made by Absa, or its agent, during the course of the telephonic conversations referred to above.

[14] A representation made by one person to another who, believing the representation to be true, acts thereon to his prejudice, may raise the doctrine of estoppel in order to prevent the person who made the representation from denying the truth of the said representation. Based upon considerations of fairness and justice it affords a defence to a claim which must be pleaded and proved by the party who raises it, in this instance the respondent. (See in this regard *Lawsa Volume 9 (second edition)* para 652.

[15] With regard to the plea of estoppel, the respondent, in effect, was the only witness. It is the respondent's case that when the sale agreement was concluded he was given a "Bankfin Contact Card" which contained the telephone numbers to call with regard to "settlements" and "account services". These were the numbers to call when information was required with regard to the sales agreement account. At no stage was he told, that is neither when the card was forwarded to him nor when he spoke to Marula, that the communications with the Call Centre were "without prejudice" or that the information furnished may be incorrect. The respondent alleged that Marula was made aware of the fact that the vehicle was being sold to another person. Respondent further alleged that Marula was also made aware that a third party, not the respondent, was going to settle the outstanding balance.

[16] Adv. P.A. Botha, who appeared on behalf of the respondent, contended that this aspect was important in that the respondent had no way of verifying the payment other than contacting the Call Centre. Furthermore, the respondent was repeatedly told that the account had been settled without any attempt to qualify the said response. When pertinently asked whether the vehicle could be handed over to the purchaser, Marula expressly confirmed it. The latter aspect is open to some debate.

[17] Adv. Botha argued that the respondent did not rely upon an oral cancellation of the sale agreement. His case was simply that Absa was stopped from relying upon the sale agreement for the purposes of its claim against the respondent. In any event, he submitted, while clause 14 of the sale agreement – the so-called non-variation clause – prohibited an oral cancellation or amendment of the sale agreement, it did not prohibit confirmation that its terms had been fulfilled.

[18] Adv. P. de B. Viviers, who appeared on behalf of Absa, pointed out that “in order to found an estoppel, a representation must be precise and unambiguous” (See *Concor Holdings (Pty) Ltd t/a Concor Technicrete v Potgieter* 2004 (6) SA 491 (SCA) at 494H). In this context Adv. Viviers argued that at no stage did Marula make any representations to the effect that the respondent would be released from the terms of the sales agreement or that Absa would have no further claims against him.

[19] During cross-examination, the respondent conceded that in his conversations with Marula he focused on whether or not there was a debit balance in his sale agreement account and inferred from Marula’s responses that he was released from the terms of the sale agreement. The cancellation of the sale agreement was simply not discussed by the parties.

[20] In the circumstances it seems that the argument advanced by Mr Viviers, namely that the representations made by Marula were not sufficiently precise and unambiguous to be capable of founding an estoppel, is not without merit.

[21] It was the respondent's case that he was misled by the representations made to him by Marula. The question which then arises is whether he would not have become aware of the true facts with regard to the representations if he had instituted the necessary enquiries which the peculiar facts of this matter warranted. (See ***Trennery v Matoti* 1921 EDC 319**). It seems that a plea of estoppel would fail if the respondent would probably have become aware of the true facts upon a proper enquiry.

[22] In this instance Maseko did not disclose the manner in which the payment was to be effected. The respondent did not pursue any enquiry in this regard. He simply accepted that the funds would be transferred electronically. He knew that if payment had been made by cheque, the cheque could be dishonoured. Nothing prevented him from asking Maseko how payment was to be made, yet he failed to do so.

[23] The respondent furthermore had to show that he acted reasonably in relying upon the representation (see: *Lawsa supra* para 661; and *NBS*

Bank Ltd vs Cape Produce Company (Pty) Ltd and Others 2002 (1) SA 396 (SCA) at 411I-J). At the very least the respondent herein failed to see what would have been pretty obvious in the course of ordinary business. With the exercise of reasonable care on his part, the respondent should have approached Maseko's proposal with a great deal of circumspection.

[24] The respondent did not know Maseko prior to the telephone call from him. He did not know where Maseko lived or where he operated his business. He could not, and did not, confirm Maseko's credentials with anyone. Save for a cellphone number, he had no way of contacting Maseko. Despite being a businessman himself, he did not find out how payment was to be effected by Maseko. He did not have the transfer documents for the vehicle but he handed over the vehicle to Maseko. This was at the Cape Town International Airport. The entire transaction was concluded over the telephone and, it seems he only had a brief meeting with Maseko to hand over the vehicle. Moreover the transaction took place over a weekend when banks are generally closed. The vehicle was in fact handed over to Maseko at 7pm on the Saturday.

[25] The manner in which Maseko elected to run this transaction would have alerted any reasonable businessman to the possibility that something was amiss. It would have resulted in further enquiries being instituted. The respondent's failure to do so quite patently displays a lack of reasonable

care and diligence on his part in placing reliance on the representations that were made.

[26] One further aspect of this matter warrants some comment. Clause 14 of the sale agreement contains the 'non variation' clause which reads as follows:

“(this agreement comprised (*sic*) the full agreement of the parties on the subject matter and no amendment or cancellation of this agreement, including this provision, will be valid unless it has been reduced to writing and signed by both parties”.

With regard to the above clause the parties are in agreement that it negates any reliance on an oral cancellation of the sale agreement. However, the respondent contends that he does not rely on an alleged oral cancellation of the agreement. He maintains that the appellant's agent orally represented to him that the purchase price was paid in full and that he was therefore entitled to deliver the vehicle to Maseko, and in the light of that representation, he was released from the sale agreement and the appellant had no further claim against him. The respondent, it was argued, relied on an oral representation that the sale agreement had been “discharged or terminated”, due to the performance of his obligations,

namely the payment of the full performance of his obligations, namely the payment of the full outstanding amount.

[27] There are several problems with this argument.

[28] It seems that the respondent relies on a representation which relates to the legal consequences of the payment of the purchase price, that is it resulted in the respondent's discharge from his obligation in terms of the sale agreement. It is trite law that a statement of one's opinion on a matter, including a question of law, cannot sustain a plea of estoppel.

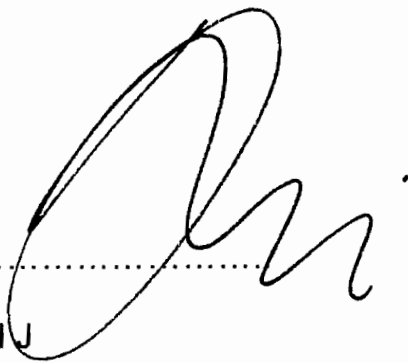
[29] As is apparent from the transcript of the relevant conversation, Marula did not at any stage inform the respondent that as a consequence of the payments he would be released from the sale agreement or that the appellant would have no further claim against him. There is, in any event, no "precise and unambiguous" representation in this regard.

[30] Furthermore, as Mr Viviers correctly pointed out although full performance by the debtor of his contractual obligations would normally result in the release of the debtor, this does not necessarily mean that the contract itself no longer exists. It merely "passes into history" (see: RH Christie, *The Law of Contract in South Africa* 5th Edition p 430). If it subsequently transpires that the payment was in fact no payment at all (ie

a dishonoured cheque), the creditor would be fully within his rights to demand from the debtor, proper payment in terms of the contract.


[31] In the result the appeal succeeds. The judgment of the court below is set aside. There will be substituted the following:

“Judgment in favour of the plaintiff in the sum of R187 990-59. Interest thereon at the agreed rate as on from 8 August 2003 until date of payment and costs of suit”.



.....
DESAI J

I agree



.....
VELDHUIZEN J

I agree

A handwritten signature in black ink, appearing to be 'Zondi J.', written over a horizontal dotted line.

ZONDI J