CASE NO. SA 25/2003

IN THE HIGH COURT OF NAMIBIA

In the matter between:

T A EYSSELINCK **APPELLANT**

versus

STANDARD BANK NAMIBIA LIMITED **FIRST RESPONDENT**

STANNIC DIVISION

ABLE TRADING (PTY) LTD **SECOND RESPONDENT**

CORAM: Strydom, A.C.J., Teek, J.A. *et* O'LINN, A.J.A.,

Heard on: 05/07/2004

Delivered on: 15/12/2004

APPEAL JUDGMENT

O'LINN, A.J.A.: I have divided this judgment for the sake of easy reference into the following sections:

I: Introduction

II: The pleadings

III: The legal principles applicable

IV: The relevant circumstances and facts

V: The powers of Standard Bank to act in terms of its contract with PRETORIUS and his company ABLE TRADING (Pty) Ltd

VI: An analysis of the argument

VII: Conclusion

I: INTRODUCTION

This is an appeal against the judgment of Frank AJ in the Court *a quo*, being the High Court of Namibia.

This matter concerns a motor vehicle (a Toyota Raider double cab) which had been sold by Standard Bank Namibia Ltd, Stannic Division, the first respondent, to Able Trading (Pty) Ltd, a private company, in terms of an instalment sales agreement.

The vehicle was resold by Pretorius, purporting to act on behalf of Auto Toy Store (Pty) Ltd, to T A Eysselinck, the appellant in this appeal, at a time when the balance owing by Able Trading (Pty) Ltd to Standard Bank Namibia Ltd, Stannic Division, was still unpaid.

Acting on information received at the end of February 2001, Standard Bank brought an urgent application in March 2001 to attach the vehicle in Eysselinck's possession, pending an action which was then instituted against him and the Able company.

Tim Eysselinck died prior to the hearing of the appeal and his wife, in her capacity as executrix of the deceased estate, was substituted as appellant.

The parties will hereinafter, for the sake of convenience, be referred to as follows: "Eysselinck" for the appellant, "Standard Bank" for the first respondent and "Able Trading" for second respondent. Auto Toy Store (Pty) Ltd will be referred to as "Auto Toy Store" and Ockie Pretorius as "Pretorius". The Raider double cab vehicle will be referred to as "the vehicle".

Pretorius was not cited as a party, *inter alia* because he fled from Namibia soon after his fraudulent activities became public knowledge in the media and his house of cards collapsed.

The application against Eysselinck in the High Court was granted and Eysselinck had to surrender the vehicle. Able Trading did not defend the action which followed but Eysselinck did.

The Court *a quo* confirmed the interim order against Eysselinck and thereby confirmed the legality of Standard Bank's claim of ownership and the return of the vehicle from Eysselinck to Standard Bank. Eysselinck appealed to this Court.

Mr Heathcote appeared before us for Eysselinck and Mr. Smuts S.C. for Standard Bank.

II: THE PLEADINGS

Although Standard Bank's claim of ownership was also disputed in the Court a quo on behalf of Eysselinck, this defence was abandoned in the appeal and Eysselinck only continued the appeal on the basis of his alternative defence. This defence was correctly set out in the judgment of the Court *a quo* and it will consequently suffice for present purposes to quote that defence as set out in that judgment:

> "Alternatively, and in the event of the court finding that the plaintiff is the owner, and that the plaintiff is entitled to repossess the vehicle from the first defendant, then and in that event the second defendant pleads that the plaintiff is estopped from relying on his ownership to claim the vehicle from the second defendant, and for the following reasons:
>
> (a) the plaintiff negligently represented to the second defendant, alternatively the plaintiff negligently allowed the first defendant and/or Auto Toy Store (Pty) Ltd (hereinafter jointly and severally referred to as the first defendant) to represent to the second defendant that the first defendant was the owner of the vehicle and/or had the right to dispose of the vehicle and/or transfer ownership and possession of the vehicle to the second defendant, and more particularly in the following circumstances:

(i) the plaintiff was aware alternatively should have been aware of the fact that the first defendant was a trader in motor vehicles; and/or

(ii) the plaintiff was aware alternatively should have been aware (if reasonable investigations were made) that the first defendant and/or the first defendant's representative (one Ockert Pretorius) would sell the vehicle to the public at large and/or to the second defendant, in circumstances where the second defendant would have been unaware of the agreement that was entered into between the plaintiff and the first defendant; and/or

(iii) the plaintiff allowed the vehicle to be possessed by the first defendant, in circumstances where the plaintiff was aware (alternatively should have been aware) that the vehicle would be sold to the public at large and/or would be displayed as a vehicle which could be purchased by any member of the public and/or the second defendant; and/or

(iv) after the plaintiff delivered the vehicle to the first defendant, the plaintiff knew alternatively should have known (on reasonable investigation) that the vehicle would be sold to the public at large and/or the second defendant, such circumstances, creating a duty on the plaintiff to warn the public at large and/or the second defendant not to purchase the said vehicle from the first defendant, which the plaintiff failed to do; and/or

(v) the plaintiff stood by, well knowing that the first defendant was going to sell the vehicle to the public at large and/or the second defendant, without taking any steps to secure its ownership; and/or

(vi) the plaintiff allowed such registration documents to be in possession of the first defendant and/or the plaintiff allowed and/or co-operated with the first defendant in order for the vehicle to be registered into the name of the second defendant, thereby representing to the second defendant that the first defendant could indeed dispose of the vehicle by transferring ownership to the second defendant. In particular the second defendant failed to comply alternatively did not ensure that there was compliance with regulation 15 A 57-1 of the regulations promulgated in terms of the Ordinance, when the plaintiff

sold the vehicle to first defendant and while plaintiff knew, alternatively ought to have known that there would have been compliance with the said regulation when first defendant sold the vehicle to second defendant (which in fact there was).

(vii) the plaintiff failed to act as a reasonable bank would have acted in the circumstances, and particularly in that the plaintiff did not take the necessary investigative steps in order to ensure that the public (and particularly the second defendant) should be protected against the first defendant and/or other entities in which one Ockert Pretorius had an interest; and/or

(viii) the plaintiff allowed the first defendant to display the vehicle (as for sale) to the public and/or to the second defendant, in circumstances where the plaintiff knew alternatively should have known that it was accepting a risk in respect of this particular vehicle, and in circumstances where the plaintiff also allowed other vehicles to be sold by the first defendant in similar circumstances."

The Court summed up the further particulars provided on behalf of Eysselinck as follows:

"The gist of the further particulars are to the following effect. That the information of Pretorius' checkered career was available to the Bank had it made the necessary enquiries and that it should have known in the circumstances to have dealings with him in whatever guise ran the risk of him selling the vehicle contrary to the agreement with first defendant. That the Bank by handing over possession of the vehicle to Pretorius acted negligently in that this allowed the further "sale" of the vehicle to second defendant. Subsequent to the reports in the newspapers the Bank should

have warned the public at large or second defendant. In this regard it is alleged that the Bank should have published particulars of the vehicle in the newspapers, contacted the registration authority to establish that the vehicle was still registered in the first defendant's name and have

> acted in terms of clause 7.3 of the contract, i.e. inspected the vehicle presumably to ascertain that it was still in the possession of first defendant. In a catch-all it is alleged that if the Bank had acted in the manner of a reasonable bank, it would have established the dangers inherent in dealing with Pretorius and the vehicle's on-sale to the public or second defendant."

III: THE LEGAL PRINCIPLES APPLICABLE:

1. There is no serious dispute between the approach of the Court *a quo* and counsel for the parties in regard to the legal principles applicable to a defence of estoppel. The dispute is rather in the application of those principles to the facts.

2. The Court *a quo* dealt with the requirements for a successful defence of estoppel by referring to several of the leading decisions and the principles therein discussed.

I repeat the following extracts:

> "Oakland Nominees Ltd v Gelria Mining Investment Co Ltd 1976 (1) SA 441 (A) at 452 sets out the approach in the following terms:
>
> 'South African law of estoppel in regard to ownership.
> 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) (possibly) where, despite the absence of culpa, the owner is precluded from asserting his rights by compelling considerations of fairness within the broad concept of the exceptio doli.

See Grosvenor Motors (Potchefstroom) Ltd. V Douglas, 1956 (3) SA 420 (AD); Johaadien v Stanley Porter (Paarl) (Pty) Ltd., 1970 (1) SA 394 (AD) at p.409.

These two cases relate to estoppel in respect of ownership of movables. There seems no reason for not applying these principles to a case such as the present one where the plaintiff seeks a declaration that it is the 'owner' of shares.

As to the formulation in (b), supra, the occasion has not yet arisen for its further development by this Court. Certainly it does not arise in the present appeal, having regard to the pleadings, the evidence, and the arguments in this Court.

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 and Another, 1961 (4) SA 244 (W), with its reference at p 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. As to (iii) and (iv), see Standard Bank of SA Ltd v Stama (Pty) Ltd., 1975 (1) SA 730 (AD).'"

This test has been consistently followed by the courts and was reaffirmed in Quenty's Motors (Pty) Ltd v Standard Credit Corporation Ltd 1994 (3) SA 188 (A) at 198-199 and in particularly at 199 C-G in the following terms*:*

> "In the Electrolux case referred to by Holmes JA, Trollip J said at 247 B-E:
>
> > 'To give rise to the 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, 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"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):
>
> > '…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 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.'"

In the context of an attempted reliance on estoppel by conduct in respect of a motor vehicle subject to instalments sale agreements, the Supreme Court of Appeal in South Africa in *Info Plus v Scheelke and Another* 1998 (3) SA 184 (SCA) at 194 – 195 held as follows:

> "The requirements for a successful reliance on estoppel in the context under consideration have been set out in a number of decisions of this court. See, for example, Quenty's Motors (Pty) Ltd v Standard Credit Corporation Ltd 1994 (3) SA 188 (A) at 198-9. The first requisite is that there must be a representation by the owner (or possessor) that the person who disposed of his property ('the defrauder') was the owner, or entitled to dispose, of it. In most cases, of course, the ultimate representation is made by the defrauder. The real question then is whether the conduct of the owner effectively contributed to the making of that representation.
>
> In casu the second defendant did not rely upon a representation that, apart from ownership, the jus disponendi of the Mercedes vested in Sharman Motors. As has appeared, Gavin represented to the second defendant that Sharman Motors was the owner of the vehicle. No doubt the prior delivery of the vehicle to Sharman Motors causally assisted Gavin in making that representation, but the mere delivery of property by one person to another does not by itself constitute a representation that the latter is the owner (or is entitled to dispose) thereof: Electrolux (Pty) Ltd v Khota and Another 1961 (4) SA 244 (W) at 246H, cited with apparent approval in Oakland Nominees (Pty) Ltd v Gelria Mining and Investment Co (Pty) Ltd 1976 (1) SA 441 (A) at 452E, and Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk 1996 (3) SA 273 (A) at 286E. Nor does the fact that the transferee is a dealer or trader in the particular commodity transform the transfer of possession into such a representation. As was said by Trollip J in Electrolux at 247-8:
>
> > '…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 a 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.'
>
> Apart from placing Sharman Motors in possession of the Mercedes the appellant did nothing that could have created the impression, vis-à-vis the second defendant, that the dominium of the vehicle vested in Sharman Motors. Hence I do not think that the first requirement set out above has been satisfied."

See also: *Konstanz Properties (Pty) Ltd v Wm Spilhaus & Kie 1996 (3) SA 273 (A) at 288.*

Grosvenor Motors (Potchefstroom) Ltd v Douglas 1956 (3) SA 420 at 428 F-G."

I accept this exposition of the law by the Court a quo as correct and appropriate.

3. Mr Smuts for Standard Bank however also relied on the following passage from *B&B Hardware Distributors (Pty) Ltd v Administrator*, Cape, 1989 (1) SA 957 (A) at 964:

> "In order to found an estoppel, a representation must be precise and unambiguous."

I do not agree with this dictum and do not believe that it should be followed in Namibia. I fully agree with the criticism contained in the book – "Law of Estoppel

in South Africa" by the Honourable P J Rabie, former Chief Justice of the Republic of South Africa, where he says:

> "As will be shown below, in South African law an estoppel can be based on a representation by conduct if the representee can show that he reasonably understood the representation in the sense contended for by him and that the representor should have expected that his conduct could mislead the representee. It is not required that he must show that the conduct in issue amounted to a precise and unequivocal representation. In *B & B Hardware Distributors (Pty) Ltd* v *Administrator, Cape* the court said, referring to an alleged representation by conduct, that a representation on which an estoppel is founded must be precise and unambiguous. The court referred to *Hartogh* v *National Bank* and to *Southern Life Association Ltd* v *Beyleveld NO* and failed to note that in those cases the rule that a representation must be precise and unambiguous was mentioned in connection with representations made by words.
>
> In South African law a person can found an estoppel on a representation by conduct if he reasonably understood it in the sense contended for by him and if, at the same time, the representor should reasonably have expected that his conduct could mislead the representee. It follows from this that the rule that a representation must be precise and unambiguous if it is to be capable of founding an estoppel can, at most, be considered to be of application to representations made in words. It is submitted, however, that the rule that a representation must be precise and unambiguous is, even if it were limited to representations in words, an unsatisfactory one. Experience teaches that representations made in words can sometimes be reasonably capable of more than one meaning, but according to the rule that a representation must be precise and unambiguous, no estoppel can arise in such a case. If the rule applicable to representations by conduct were made applicable to representations made in words, a representee would be able to claim an estoppel if he reasonably understood the representation made to him in the sense contended for by him and if, in addition, the representor should reasonably have expected that the representation made by him could mislead the representee."

It will be noted that Rabie ACJ, as he then was, wrote the judgment from which Mr Smuts took the quotation. The criticism of that dictum quoted above, is made by the same learned jurist when he wrote his above quoted book on estoppel.

4. It is also made clear in the above treatise that "a person can also base an estoppel on a representation that was not made to him personally, but to the public or class of persons of which he was a member at the material time if the representation came to his notice and he acted on the faith thereof."[1]

5. It must also be pointed out that in the Electrolux case, Trollip J said in a dictum quoted with approval in the Quenty's Motors decision, and referred to in the Konstanz Properties decision, that the indicia of dominium or *jus disponendi*, "may be documents of title and/or authority to dispose of the articles…….[2]

In *Kajee v H M Gaugh (Edms) Bpk*, a full bench decision of the Natal Provincial Division,[3] the fact that the owner delivered the vehicle to a buyer and at the same time assisted the buyer to obtain registration of the vehicle in the buyers name together with a piece of paper titled "Order Contract" indicating the payment in cash of the purchase price, constituted such *iudicia of dominium* or *jus disponendi*.

In actual fact the buyer had given the owner a cheque which was dishonoured. The buyer however told the owner that the cheque would be honoured and produced his

[1] The Law of Estoppel, by Rabie,
[2] p.33 1996 (3) SA, 273 AD at 287 A-C.
[3] 1971 (3) SA 99 at 104 C-E

chequebook as proof. The said buyer immediately resold the vehicle without paying the amount due to the owner.

When the owner tried to vindicate the vehicle, the new purchaser raised the defence of estoppel. The Court found that the owner could foresee as a reasonable possibility, that the original purchaser, who was unknown to him, would not meet the cheque and could resell the vehicle. The owner/seller was thus negligent. In the result, the innocent purchaser, who bought the vehicle from the original purchaser, succeeded in his defence of estoppel.

It must be obvious that if the owner/seller, does in fact know or has reason to suspect that the buyer has a shady past, with a record of selling encumbered vehicles fraudulently, and nevertheless sell to such person on credit, such conduct would amount to culpa, but in the form of recklessness, aggravated by not even taking any deposit.

In another decision, referred to by Mr Heathcote, namely *Ross v Barnard*[4], it was held:

> "Ordinarily where an owner has entrusted property to another, or known that another has his property with knowledge of his ownership, the only risk of disposal of his property to a *bona fide* purchaser is the likelihood of a dishonest act by the possessor. In such cases ordinarily the proximate cause of the prejudice to the bona fide purchaser is the dishonest act of the possessor. Here what the owner might anticipate

[4] 1951 (1) SA 414 at 420 C

> was not a possible dishonest act by a possessor, but an almost certain sale by a possessor who claimed the right to sell, whose business it was to sell and to whom the general public came to buy…"
>
> "On the test given by de Villiers JA in that case, it can I think only be said that the purchaser was led to believe that the garage had the right to sell. And I think that the proximate cause that Dr Barnard bought the car was that Mrs Ross failed to give any indication to Mr Ruysenars that his belief that he was entitled to sell the car, may not be well-founded." (My emphasis added)

The distinction between a case where the owner's goods are unexpectedly removed or alienated in a theftuous or fraudulent manner by an intermediary and where this is not the position, was again drawn in the decision of the South African Appellate Division in the Konstanz Properties case.[5]

The distinction was also emphasized in *Boland Bank v Joseph and Another*, where the Court said:

> "In the present matter the applicant had substantial previous dealings with Lenbou and had no reason to doubt the honesty of those conducting its business affairs. Against this background it accepted the assurance of Hamlett and could not have been said to have been culpably negligent in so doing."

It was held in this decision that the Bank (Boland Bank Bpk) had not been shown to have been culpably negligent in trusting the motor dealer (Lenbou Motors (Pty) Ltd) because it had known that dealer for a long time without that dealer having committed any dishonest actions and thus the Bank had no reason to doubt the

[5] 1996 (3) SA 273 at 288 F-G

honesty of the said motor dealer and its officials. The Bank was therefore not culpably negligent in not taking steps to ensure that members of the public were not deceived into believing that the motor dealer had the right to dispose of the vehicle. The Bank was therefore not estopped from asserting such a right.

It follows that if the Bank, as in the instant case, knew, or should have known that the dealer was a crook, the result would have been the opposite. It follows also that even if the crookedness of the dealer is discovered after the transaction between the Bank and such person, the duty of care will continue and so also the need to continue to take steps to prevent harm to innocent buyers who may believe that the dealer has the right to sell.[6]

The instant case differs from the facts of *Kajee v Gough*, *Ross v Barnard and Boland Bank* in one fundamental respect. Here the owner either knew at an early stage of the dishonesty of Pretorius or should have known. The owner thus could not have reasonably believed that Pretorius will not sell the vehicle whilst still encumbered. Even if it is assumed in favour of the Bank that at the stage when it sold the vehicle to Pretorius, it could reasonably believe that Pretorius will not sell the vehicle whilst encumbered, that belief could not be sustained when Standard Bank on 4th April 2000 received reliable information that Pretorius is a fraudster, notorious for precisely that sort of fraud – selling vehicles whilst still encumbered and then pocketing the proceeds. There then arose a duty of care towards members

[6] 1977 (2) SA 82 (D & CLD at 90. See also Rabie, the Law of Estoppel, and the discussion therein of Union Government v National Bank of South Africa Ltd, where the person who committed the fraud and theft was known to the official for many years and there was no reason to distrust him.

of the public who were potential buyers and thus innocent third parties and an urgent need to take reasonable steps to prevent prejudice to such innocent third parties.

The instant case however does not only differ from *Kajee v Gough and Ross v Barnard* in this respect, but also from all the other decisions referred to by the Court *a quo* and by counsel in that Court and before us on appeal.

It is thus necessary before I proceed with the final evaluation of the Court *a quo's* judgment, to analyse carefully the special circumstances and facts applicable in the instant case.

IV: THE RELEVANT CIRCUMSTANCES AND FACTS:

1. During or about June 1999, Pretorius approached one Vermeulen of Standard Bank's Ausspannplatz branch in order to obtain an overdraft facility for A.B.L.E TRADING. The overdraft facility was granted for a limited period, on the strength of an invoice according to which Rössing Uranium had to pay ABLE TRADING COMPANY, N$1.5 million. The Bank granted this facility without enquiring from Rössing or verifying from any other source whether or not the alleged transaction would indeed yield N$1.5 million. When the Bank for the first time enquired approximately 20 months later, i.e. during February 2001, Rössing informed the Bank, without raising any problem, that the amount due was not N$1.585 000 as

alleged by Pretorius, but N$6380 for a single item, being the repair of a Gear and Shaft.

2. The company ABLE, was purportedly doing business in buying and selling mining equipment. Standard Bank sold two or three motor vehicles to ABLE, one of which was the motor vehicle resold by Pretorius to Eysselinck. Pretorius was the sole shareholder and managing director of ABLE as well as surety and co-principal debtor. The business of ABLE, in particular the payments due on the vehicle, were financed by the overdraft provided by Standard Bank.

As Eysselinck and his counsel argued, Pretorius paid Standard Bank with monies provided by Standard Bank.

3. Towards the end of March 2000, Auto Toy Store applied to Standard Bank for approved status as a motor dealer. The company had been incorporated as such on 24.2.2000. This private company just as in the case of ABLE, was in effect owned by Pretorius. Once again he was the sole shareholder, managing director and surety and co-principal debtor. He conducted the business of the company.

Standard Bank was, according to witnesses testifying on its behalf, disinclined to grant Auto Toy Store approved dealership, because it was a new player in the field and also because certain information concerning Pretorius came to the knowledge of Mr Blaauw, the head of Standard Bank’s Stannic Division.

The most explicit information was an e-mail forwarded to Blaauw of Standard Bank by a Mr Chris Hastings employed by South African Standard Bank dated 4 April 2000. It was quite clear this communication related to a prior enquiry by Standard Bank Namibia. The e-mail was marked as "IMPORTANCE – High" and read as follows:

> "Attie Maritz investigated a case against Okkie (OP) Pretorius during July 1987 for advertising and selling encumbered vehicles – belonging to banks and also obviously Stannic.
>
> He then also investigated Exclusive Toys for Boys during 1995 (Okkie) for trading Stannic vehicles, selling same, but not settling the amounts in respect thereof. I obtained settlements for an amount of R352 000 from various accounts from him during May 1995 – months after he had traded and sold it. Toys for boys were never an approved dealer as a result of Attie's investigation.
>
> Shortly thereafter, he fled the country. It was widely published in the press at the time.
>
> Chris, that is what I know about Mr Pretorius and my recommendation to Stannic Namibia is not to sign him as an approved dealer – you know the story about a leopard and his spots…"

Notwithstanding the aforesaid information on 4 April 2000, Standard Bank granted Auto Toy Store, a qualified dealership status. The dealership was qualified in that it was limited to deals with Standard Bank's own customers who wished to purchase vehicles from Auto Toy Store and was subject to conditions that would protect the Bank's customers and ensure they would not be evicted in respect of the vehicles

bought. It is significant that apparently no thought was given to steps to protect members of the public who were not clients of Standard Bank.

During August 2000 (according to the judgment of the Court *a quo*), "at a meeting where the relevant divisions of the Banks were present, the business of Auto Toy Store (Pty) Ltd was discussed in passing. The representative of First National Bank indicated that her bank did not deal with Auto Toy Store at all. According to Blaauw, the representative of Standard Bank, he did not even respond as the matter was mentioned in passing and that at that stage the relationship with his Bank had been terminated."

The aforesaid limited dealership was withdrawn by Standard Bank on 18th July 2000. The reason as stated by the Court *a quo* was:

> "…after information reached the plaintiff that irregularities were occurring in respect of deposits paid on deals to Auto Toy Store (Pty) Ltd or Pretorius." (It is noteworthy that the court at this stage of its judgment apparently accepted that Auto Toy Store (Pty) Ltd was essentially synonymous with Pretorius).

The reason given by Blaauw, a senior manager of Standard Bank when he testified in the Court *a quo* was:

> "…My Lord, we were closely monitoring this because given the warnings we had from South Africa and the question or the fact that the snake could again rear its head. We were closely monitoring this and

> when it came to light it wasn't one of our customers but we were informed that he took deposits that were not returned to customers. And then suddenly the lights began flashing and turning red and we said look, this is what we were waiting for. Lets kill this before it hurts our customers and so that we just follow such. Because we are in the risk business but risk has a certain or certain limitation or certain limits."

The following further questions and answers appear from the record:

Q: "You didn't want to take any further risk?"

A: "That's right My Lord."

Q: "For your customers?"

A: "That's correct."

When asked by counsel for Standard Bank to respond to argument on behalf of Eysselinck – that given Pretorius's history, the Bank should have known that Pretorius could have sold the vehicle to Eysselinck, Blaauw replied:

> "It could have happened yes. He could have sold that vehicle at any day.."

Blaauw however contended throughout that as long as Pretorius paid his instalments on the vehicle bought by ABLE, the Bank had no power to interfere and "there was no ways that we would have known it unless the amount was settled with us."

Furthermore Blaauw contended that the Bank could not act to prevent it unless there was a breach of the contract with ABLE.

Questioned on the issue of the realization that Pretorius was the real risk, Blaauw conceded that it "doesn't matter in which form he comes …whether he comes in the form of a company, or a cc.."

He further conceded that "the snake" and "the leopard" referred to by him continued to be Pretorius. He explained that what he meant by the snake rearing his head again was that "he is going to do what he had done in the past."

Blaauw was further asked:

Q: "And you must have foreseen otherwise you would have continued doing business with him that if the opportunity arises (he) is going to repeat his old tricks?"

A: "We foresaw that yes."

Blaauw further testified that the Bank did take steps to protect their own customers against the risk but took no steps to protect persons who were not customers of the Bank.

The following questions and answers crystallize the attitude of the Bank.

Q: "So you say that before you can protect somebody when you let your vehicle in possession of a crook, a fraudster, he must be a customer of you."

A: "No My Lord, that was not my intention – I didn't leave the vehicle in possession of a crook to catch out on an innocent third party, that was not our intention at any stage of this whole saga."

Q: "But you must accept that in the normal course of events if Mr Eysselinck came to the shop Auto Toy Store and there was part of the lot this vehicle, he would have accepted the vehicle can be sold to him?"

A: "He could have done that he took the risk – he went there out of his own free will – he took the risk on him. That is what happened."

Blaauw also admitted that he knew, that all Pretorius needed in order to give transfer, was the licence registration documents, and he knew that those registration documents, were placed by Standard Bank in possession of Pretorius.

As an excuse for the alleged practice of his bank and that of other banks, he said:

> "Because a duplicate can be easily obtained so that could defeat the objective of the exercise."

Greef, the manager: Credit Control of Standard Bank testified as follows when it was put to her in cross-examination that if Standard Bank took the trouble to enquire from Standard Bank South Africa, Standard Bank would have informed

Standard Bank Namibia of the shady past of Pretorius: *"I agree, but cannot answer whether they did or not."*

She also agreed that *"in normal circumstances if this information is available, then no go, the Bank wouldn't do business."*

It was then put to her: This is so "because it is obviously such a risk to the Bank's own clients and to the public at large that you simply would refuse to do business with such a fraudster, do you agree?

A: "I agree."

This testimony must be seen against the background of information reflected in explicit newspaper stories in various South African newspapers, *inter alia* in "The Star" in 1997.

Greef agreed that it did not matter whether the company's name is ABLE TRADING, AUTO TOY STORE, once the name Pretorius comes up – "the red lights go on". However she contended that at the time when the agreement was entered into with ABLE TRADING, "those facts were not known to us."

She conceded that the Bank accepts it has a duty to organise it so as to avoid the kind of malpractices discussed not only to its own customers, but to the public at large.

4. There was also evidence that Pretorius traded at the same premises with motor vehicles under another name, prior to the name Auto Toy Store (Pty) Ltd being registered.

5. The history of the overdraft facility was summarized by the Court *a quo* as follows:

> "During May 1999 first defendant was granted overdraft facilities on the basis of an alleged transaction with Rössing Uranium Mine. This facility was extended to 30 June 1999 on the basis of this transaction which Pretorius indicated exceeded N$1.5 million. Thereafter this facility was extended on various occasions. In the meantime financial statements were also called for during July 1999. Despite repeated reminders by the time it came to April 2000, neither the Rössing deal nor the financials had realized. Subsequent to April 2000, further extensions were granted. It would appear that sometime during June 2000 financial statements were provided. The overdraft limit was again extended pending the Rössing transaction. This portion was renewed virtually on a monthly basis but always extended on the basis of the Rössing deal. In fact, the overdraft was called up and cheques dishonoured during September and beginning of October 2000. After a lawyer intervened on behalf of Pretorius, the overdraft was reinstated pending the Rössing deal. Prior to the cheques being dishonoured second defendant bought the vehicle. Needless to say, the matter just continued as before and on 29th November 2000, the overdraft was again called up and as from December 2000 cheques were dishonoured. On 8th January 2001 the account was placed in "lock-up", which as I understood, meant that it would be referred to plaintiff's legal department so that steps could be taken so as to attempt to collect the amount due.

> From June 1999 when the transaction with Rössing was mentioned up to the 8th January 2001 (the date of lock up) no one from the Bank bothered to check with Rössing whether there was in fact such a transaction as alleged by Pretorius. Not surprisingly, when this matter was eventually, during February 2001, taken up with Rössing the deal was for just over N$1.500 and not N$1.5 million.
>
> I have no doubt that the bank was negligent in the way it allowed this continual extension of the overdraft based on the Rössing deal without reference to Rössing. Here it must be born in mind that the April 2000 information received from South Africa specifically referred to the fraud allegedly committed by Pretorius and more specifically to him selling encumbered vehicles and pocketing the monies in respect thereof. Furthermore as a result of new information in the same vein relating to misappropriation of deposits paid on vehicles, the Bank during July 2000 cancelled the limited agreement they had with Auto Toy Store (Pty) Ltd. In these circumstances I would have expected the Bank to have taken more care prior to, basically routinely, and based on the ipse dixit of Pretorius extend his overdraft facilities."
> (My emphasis added.)

It must be noted that the statement – "Prior to the cheques being dishonoured second defendant bought the vehicle," is incorrect. The vehicle was bought on 17 October 2000 and the cheques, according to the judgment above quoted, began to be dishonoured in September 2000.

On 24th November 2000 the story about Pretorius's fraudulent dealings broke in the Namibia press and some of his fraudulent activities became public knowledge.

6. In the application by Standard Bank to the High Court for return of the vehicle Ms Greef, manager of Credit Control of Standard Bank, *inter alia* stated in the founding affidavit dated 4th March 2001 on behalf of Standard Bank:

> "The said Pretorius is the same Pretorius who has recently become notorius as a result of various fraudulent motor vehicle transactions either he or his business concerns have been involved with. It has now become common knowledge that Mr Pretorius left Namibia under suspicious circumstances but that he has been arrested and kept in custody in the Republic of South Africa on account of various fraudulent charges that are presently investigated against him in that country."
>
> "Since the departure of Mr Pretorius from the Republic of Namibia and since the first respondent (ABLE) has ceased with its operations various judgments have been granted against the former's business concern which have remained unsatisfied for a substantial period of time."

When Pretorius absconded, a substantial part of the amount owing at the time of purchase, being N$278, 743.20, was still owing to Standard Bank.

It is apparent from this affidavit, that the whole aforesaid balance was payable in instalments of N$4 645.72 per month and that no provision whatever was made for any cash deposit payable.

6.1 The Bank thus took a grave risk, also in regard to this particular transaction. It is quite clear from the above and the testimony given at the trial in the Court *a quo*, that not only could Standard Bank have discovered with the minimum of exertion at the very beginning that the overdraft was obtained by fraud, but would have established Pretorius's fraudulent *modus operandi* from their colleagues in Standard Bank South Africa. That bank was designated in clause 3.1 of Standard

Bank's contract with ABLE as its agent for the purpose of paying monies due to Standard Bank in Namibia in terms of its contract with ABLE.

6.2. It is clear from the above that Standard Bank knew at a relatively early stage, that it was dealing with a callous and devious fraudster. With ordinary and reasonable care Standard Bank could have made this discovery much earlier, if not at the very beginning of heir relationship. What Standard Bank however managed to do, was to clothe Pretorius with the cloak of respectability and reliability and to finance and launch this fraudster, with his particular expertise in selling vehicles whilst still the property of Banks and other financial institutions and then pocketing the proceeds. Even after receiving credible information and experiencing Pretorius's continuous default, the Bank only took some steps to safeguard itself and its own customers, but continued its relationship with Pretorius without taking any steps whatever to protect other members of the public, who are innocent third parties.

7. The business premises of the ABLE TRADING and AUTO TOY STORE were situated in the same street, namely Newcastle Street.

7.1 The *domicilim citandi executandi* of both companies was the same, namely 6984 Newcastle Street, Northern Industrial Area, Windhoek which was the physical address of ABLE TRADING.

7.2 Standard Bank knew at all times where the business premises of Pretorius were situated.

7.3 The premises were within easy reach of Standard Bank should its officials have wished to visit it at any stage.

7.4 The business premises of AUTO TOY STORE had impressive premises to the knowledge of Standard Bank.

8. The vehicle bought by Eysselinck, was exhibited by Pretorius as one of his vehicles for sale at the premises of AUTO TOY STORE.

8.1 It was at the said premises where Eysselinck noticed the vehicle, where it was offered to him for sale and where it was bought by Eysselinck.

9. Eysselinck had no knowledge whatsoever that Standard Bank had any interest in the vehicle at any time when he bought it or at any time when he paid the purchase price. The first time that he was apprized of such interest, was when he was contacted on 28th February 2001 by Greef, an official of Standard Bank, to claim the return to Standard Bank of the vehicle.

10. Standard Bank at no stage took any steps to inform the public at large of its interest in this vehicle and to its knowledge, an innocent member of the public had

no protection, should Pretorius sell the vehicle to such member, before payment of the balance due to Standard Bank.

V: THE POWERS OF STANDARD BANK TO ACT IN TERMS OF ITS CONTRACT WITH PRETORIUS AND HIS COMPANY ABLE TRADING:

The contract between Standard Bank and Able Trading had the following sections and provisions:

(i) A section dealing with the terms and conditions of the agreement; and

(ii) A section dealing with the terms of the suretyship.

The relevant clauses of the first section are:

> CLAUSE 4.1: OWNERSHIP:
>
> "Notwithstanding the delivery and transfer of possession of the goods to the purchaser, ownership thereof shall remain vested in seller until purchaser has discharged all purchaser obligation hereunder."
>
> CLAUSE 6.3
>
> "The goods shall not without sellers prior consent (and then subject to such conditions as seller may stipulate) be removed from the area which formed the Republic of Namibia on 21 March 1990."
>
> CLAUSE 7.3
>
> "Seller, its servants and/or agents may at all reasonable times inspect the goods on any premises where they are kept."

CLAUSE 10

"Notification to the Landlord.

If the goods are to be kept or stored at any time at premises not owned by purchaser, purchaser shall immediately and from time to time as may be necessary notify seller in writing of the name and address of the owner of such premises, and purchaser shall, and (seller may) similarly notify the Landlord of sellers ownership of the goods."

CLAUSE 12: BREACH

"12.1 An event of default shall occur if purchaser –

12.1.1 defaults in the punctual payment of any of the payables; or

12.1.2 commits any breach of any of the terms hereof or of any other agreement between the parties (all of which are agreed to be material)……

12.1.9 Generally does or omits to do anything which may prejudice the sellers rights in terms of this agreement or cause seller to suffer any loss or damage…."

The reason for clauses 12.1.2 and 12.1.9 is obvious. Agreements may be technically separate but substantially interlinked as in the instant case where the Bank did business with nominally two companies – but they were one-man enterprizes, owned and driven by the same person, where the default in one affects the other and where dishonesty and fraud by that person, permeates the whole business relationship and affects the whole business relationship.

It is in such cases where the remedy lies in invoking clauses 12.1.2 and 12.1.9 and where it becomes prudent if not imperative, to invoke those clauses.

It is obvious that:

1. If any enquiry was made about the Rössing deal before granting the overdraft, Pretorius would have been exposed as the crook that he is and there would have been no business with him and no further fraud on Standard Bank and Eysselinck.

2. If an enquiry was made at a later stage, e.g. when the e-mail from Standard bank, South Africa was received on 4th April 2000 exposing Pretorius, Standard Bank would have been entitled in terms of clause 12.1.2 to cancel any or all the agreements with Pretorius and Able Trading and again, Pretorius would not have been able to defraud the Bank and Eysselinck.

There were many occasions apart from the above instances, when the agreement could have and should have been cancelled. So eg:

(i) When the meeting between representatives of various Namibian Banks were held, whether or not it was in August 2000 or already in 1999, information was given that some other Banks refused to do business or further business with Pretorius, due to his shady past. That in itself should have been a spur to Standard Bank to make conclusive enquiries and act on it.

The fact is that Pretorius removed the vehicle in question at some stage from the premises of Able Trading to that of Auto Toy Store before the sale to Eysselinck. That act constituted a breach of another very important term of the contract, being clause 10, read with clause 12.1.2 and 12.1.9.

The argument that Standard Bank did not know of this breach, is unconvincing. The whereabouts of the vehicle could have been established by asking Pretorius about it and inspecting the premises of Able Trading in terms of Clause 7.3.

The duty of Standard Bank to make such enquiry became pressing at least when on 4th April 2000, the fraudulent activities of Pretorius in regard to taking in second hand motor vehicles, was pertinently brought to the notice of Standard Bank. That should have alerted Standard Bank and shocked it into action even before Eysselinck was defrauded.

A simple enquiry about the whereabouts of the vehicle and/or an inspection of the premises, would have indicated to Pretorius that he was not dealing with a Bank who would be easy to defraud. A system of regular inspections of the venue where vehicles bought from the Bank are required to be kept, would have been prudent and reasonable measure to protect not only the Bank and its customers, but the public at large, particularly in a case where, as here, the dealer’s fraudulent past was known. But once again, the Bank's officials and representatives, did not avail themselves of this available and obvious remedy and preferred to plead helplessness

and ignorance of the fraudster's movements. Even if action was taken which was too late to prevent the sale to Eysselinck, some of the loss to him could have been averted if timeous action was taken by Standard Bank, e.g. the large amounts of cash paid by Eysselinck to Pretorius subsequent to the sale, in order to comply with his obligations to Pretorius and his company Auto Toy Store, could have been prevented.

(ii) The continuous failure of Pretorius to produce financial statements and to honour undertakings given, was not only breaches of trust but breaches of express and/or implied conditions of the financial facilities provided.

(iiii) When cheques were dishonoured during September and the beginning of October, these non-payments again constituted breaches of clauses 12.1, 12.1.1, 12.1.2 and 12.1.9 of the agreement. This took place before Eysselinck bought the vehicle from Pretorius on 17th October 2000.

When considering the aforementioned breaches, the full picture must be kept in mind. This was not a case where a client of a bank committed one or more breaches by not paying one or more instalments or by paying late. This was a case where these breaches were committed by a client who, according to reliable information, was a fraudster – a "snake" who could strike at any time", a "leopard who does not change his spots."

VI: AN ANALYSIS OF THE ARGUMENT

1. THE REGISTRATION IN THE NATIS OFFICES

Standard Bank had provided Pretorius with the registration papers indicating his Company "ABLE" as the "owner", and leaving the space open provided on the NaTis registration certificate for "title holder". Pretorius then arranged for Eysselinck to be registered as owner and title holder at the NaTis offices. (NaTis is the abbreviation for Namibia Traffic Information System and is provided for by law).

The Court pointed out that "the regulations (contemplate and are entirely premised upon) a dual form of registration – in the context of instalment sale agreements of the present nature – in the registering authority. The regulations specifically provide for the separate registration of a title holder and owner. Mr Tjozongoro, the manager of the authority registering vehicles in his evidence explained that this was done in order to seek to make the system of registration operate on the same basis as in South Africa."

For some obscure reason, at the time of judgment, the regulations, according to the Court, provided in subsection (2) that until a date determined by the Minister in the Gazette, "the 'title holder' is to be construed as a reference to the owner of a vehicle

and the owner of a vehicle is to be charged with all the duties and responsibilities imposed upon a title holder under the provisions of the regulations.

As was confirmed by Mr Tjonzongoro, the Government of Namibia has not implemented the two concepts of title holder and owner in the registration of motor vehicles. He further confirmed in his evidence that such separate registration is not in place and is not possible within his registering authority. Accordingly, certificates issued by the registering authority in Namibia, will only contain particulars of owner as defined.

The Court correctly pointed out that according to the evidence, “a person thus recorded as ‘owner’ of a vehicle, would be able to hold out, by virtue of that certificate, that he or she is owner of a vehicle and seek to transfer it".

Why the Minister had failed to determine a date for the contemplated implementation of the above stated dual system, was not explained in Court. The proviso referred to as subsection (2) of the regulations, is ambiguous and confusing, and is in need of urgent amendment.

As the regulations stand with aforesaid proviso in place, it designates a person an owner when such person is not. In my respectful view, it can only contribute to fraud, as was the result in the instant case.

2. AVAILABLE REMEDIES:

Mr Tjozongoro also testified that there were other remedies for owners in position of Banks, such as withholding of the registration certificate, from the buyer, until full payment has been made or even registration in the name of the real owner.

The Court held that whatever the legal position may be, the registration authorities function in this way – i.e. only register a person as "owner" – come what may. This then is also the manner in which "all the banks operate" and this was indeed "the only manner acceptable to the authorities."

The Court continued to hold that

> "the fact that the vehicle was registered in the name of the first defendant was thus no indication that first defendant could dispose of the vehicle given the legislature backdrop to this registration and was in any event not a representation by plaintiff, but by the registering authorities." (My emphasis added).

The administration certainly deserve part of the blame, but I cannot agree with the total exoneration of the Bank. Could one not at least expect from Banks and Financial Institutions, registered under Namibian laws and playing a very important role in any society, to take up such a matter with the authorities and apply pressure to rectify it, or to devise a practice such as suggested by Tjozongoro, to protect innocent third parties? Instead of all the Banks operating in this manner, as the

Court accepted, why should they make use of a practice they know or should know, and so contribute to fraudulent and criminal transactions?

I also cannot see why the Bank and the Court should shrug off the suggestions made by Mr Tjozongoro as possible alternatives. So eg. for the Court to say that a witness had commented that it could not be of any use for the owner to keep the registration papers, is no reason for the Court to reject the suggestion.

However, if this cannot be done, the Banks, in the exercise of the necessary foresight and reasonableness, must be aware, that the issued registration certificate will amount to a fraudulent misrepresentation, and that, for that very reason, other and additional precautionary measures must be taken to protect their own interests, as well as that of innocent third parties.

3. The Court failed to place any blame on the Bank in this regard but instead used this fraudulent system to blame Eysselinck, and Eysselinck alone, for his loss and prejudice. The Court also stated that Eysselinck must have been aware that his registration certificate did not correctly reflect ownership and consequently, he could not rely on the certificate wherein one of the Pretorius companies was designated as owner. That may be correct. The difference is that he knew that he had to pay within three months and he did so. But when Pretorius sold the vehicle to him, Pretorius sold the vehicle on the premises of his dealership, and acted in other respects as a person or a company with the necessary dominium and/or *jus*

disponendi. In this representation, Pretorius was assisted by Standard Bank's act of delivery, the financing of Pretorius, the refusal to blow his cover as a crook, in addition to the handing over of the certificate.

4. The Court further contended:

> *(i)* "The only question that remains is whether the plaintiff should have done something after they received the information bout the character of Pretorius…. 'Hindsight is the most exact science but cannot play any role in the enquiry'."

Comment: That is correct. But no one relied on "hindsight," but rather insisted on foresight.

> *(ii)* "Here it must be borne in mind that the first defendant was the purchaser of the vehicle and that this vehicle was fully paid up until March 2001 or shortly before that date."

Comment: The payment, for as long as it lasted, was primarily dependant on an overdraft which was fraudulently obtained and by minimal diligence, would never have been granted.

> *(iii)* "To have expected plaintiff to have placed advertisements in the press is simply unrealistic when plaintiff only had information and could not prove the factual basis for the suspicion."

Comment: I have indicated in section V, several steps that could have been taken, other than the one here suggested.

However, in regard to the suggestion of advertisements, the information was reliable but if not, the slightest effort at further investigation would have brought forward sufficient and reliable information and/or evidence about the fraudulent activities by Pretorius in South Africa.

As far as Namibia is concerned, a call to Rössing about the N$1.5 million, would immediately have disclosed the fraud committed by Pretorius at the very outset. Surely then, an appropriate advertisement was justified, not necessarily defaming Pretorius, but warning the public that certain vehicles with certain Registration numbers and description presumably in possession of Pretorius, are the property of Standard Bank and that the public must take care not to buy such vehicles, without the consent of Standard Bank.

(iv) "There is no evidence that plaintiff knew the vehicle was displayed at Auto Toy Store as being for sale."

Comment: It may be true that Standard Bank did not know. The problem is that Standard Bank would not know if it does not make use of its powers to inspect the address where the vehicle must be kept in terms of the contract between the parties. The Bank will also not know if they do not even ask

their client, where the vehicle is kept. Surely that is the least the Bank and its officials could have done when it received the 4th April 2000 e-mail. Or can the Bank still shield behind a policy of "ignorance is bliss".

(v) "He also knew from the documentation delivered to him with the vehicle that the original purchaser was first defendant (i.e. ABLE TRADING) and not Auto Toy Store (Pty) Ltd."

Comment: Yes, he must have known that the first purchaser was, technically speaking, the Pretorius private one-man company, completely owned and controlled by Pretorius and Auto Toy Store, a similar company.

Every person with reasonable intelligence would have regarded Pretorius, as the human being doing these business deals. The real party who made the fraudulent misrepresentations, aided and abetted by Standard Bank as I have shown repeatedly, is Pretorius, and not one or more of his private companies.

That is how Eysselinck obviously saw it. He should not be blamed for having done so.

(vi) "Thus in respect of events subsequent to November 2001, he did not establish that any representation by the plaintiff was the cause of him acting to his detriment. In fact the further losses, incurred by him in paying off the balance of the purchase price after what he read in the newspaper and in view of his knowledge at the time and what one could reasonably expect from him as set out above, is solely of his own making." (My emphasis added)

Comment: By the time that Eysselinck read in the newspaper, he had already bought and paid the major part of the balance due before 24th November 2000. The amount paid by him in January 2001, was apparently about N$37700. It must further be pointed out that Eysselinck did not claim money lost, but retention of the vehicle he had bought.

Mr Smuts pointed out that Standard Bank had thousands of instalment sale clients to attend to and could not be expected to take special precautions for the protection of a single member of the public who was not their client, such as Eysselinck.

The point is that Standard Bank cultivated and assisted Pretorius, one of its clients, and sold to him a vehicle on the instalment sale system, when that particular client from the outset, or soon thereafter, posed a threat and a risk to members of the public, who were not the clients of Standard Bank, by virtue of his record as fraudster, particularly in regard to the resale of encumbered vehicles and the pocketing of the proceeds.

6. Statement: "I have no doubt that the Bank was negligent in the way it allowed this continual overdraft based on the Rössing deal without reference to Rössing."

The Court then however said:

> "The question is whether this negligence allowed or contributed to Pretorius making the representation that the vehicle was for sale by putting on display on the premises of Auto Toy Store (Pty) Ltd and whether this caused second defendant to purchase the vehicle."

The Court summarized its reasons and concluded that: "…on the evidence it is impossible in my view to state that the negligence by the Bank in its conduct of the account of first defendant allowed or contributed to the presentation made by Pretorius or Auto Toy Store (Pty) Ltd that the latter was entitled to sell the vehicle." Consequently the Court dismissed Eysselinck's plea of estoppel and granted the relief claimed by Standard Bank, which included the return of the vehicle to Standard Bank. Eysselinck thus lost the vehicle and the cash amount of N$160 000 which he had paid to Pretorius, purporting to act for Auto Toy Store.

7. Statement: "I have already indicated that at the time of the sale of the vehicle to first defendant the Bank was not negligent."

Comment: Standard Bank sold the vehicle to Pretorius, purporting to act for Able Trading on 11th November 1999, but Standard Bank already granted overdraft facilities to Able Trading during May 1999, six months earlier.

It was then already, when the overdraft facilities were granted, i.e. in May 1999 that the fraudulent activities of Pretorius began and in regard to which the Court had found that Standard Bank was negligent. This overdraft, fraudulently obtained, was used to pay the instalments on the vehicle.

This initial negligence, permeated the whole business relationship between Standard bank and Pretorius. It was this financing by overdraft, which obviously assisted Pretorius in launching his business and continuing it until such time as he resold the vehicle to Eysselinck on 17th October 2000. In my respectful view, the learned judge gravely misdirected himself on this point.

8. Statement: "I have further already indicated that from the time the story broke in the press about Pretorius's dealings, which incidentally was 24 November 2000, the Bank cannot be said to have caused second defendant to have relied on the representations by Pretorius."

Comment: By 24th November, when "the story broke in the press" Eysselinck had already bought the vehicle from Pretorius, one month earlier on 17th October 2000; had already paid a deposit of N$60 000 before that date and a further amount of N$62 300 on 11 October 2000. The remaining balance of N$37 700 plus a fee for the extension of the warranty was paid on 18th January 2001. The vehicle was already registered in the name of Eysselinck as owner and title holder on 19 October 2000 and the clearance certificate obtained was for the same date.

The Court finding that as from the 24 November 2000, the Bank could not be responsible for Eysselinck's reliance on representations by Pretorius can at best be relevant to the balance of approximately N$37 700 paid by Eysselinck after the story broke in the press.

Compared to this story which became public knowledge on 24th November 2000, Standard Bank had credible information at least from 4th April 2000, that Pretorius was a crook, notorius for pocketing cash obtained from selling of encumbered vehicles, such as the one eventually sold to Eysselinck on 17 October 2001.

When Eysselinck bought the vehicle and right up to 28th February, 2001 when Standard Bank suddenly pounced on Eysselinck, he had not the slightest indication of Standard Bank's interest as owner and title holder and Standard Bank had done nothing whatsoever to inform potential buyers from Pretorius or any of the two private companies owned by him, of Standard Bank's interest, notwithstanding the fact that Standard Bank had delivered the vehicle to Pretorius acting on behalf of Able Trading and had registered the vehicle in the name of Able Trading, already in November 1999, indicating Able Trading as owner and title holder.

Although Eysselinck had sufficient indication as from 24th November that Pretorius was a crook, this fact did not disclose to him that Standard Bank was the real owner and title holder. He confronted Pretorius, who denied to him the allegation in the newspaper. He thought it best in the circumstances to keep his side of the bargain and to pay the balance due by him to Pretorius and in that way protect his interests.

Notwithstanding the fact that the "story broke" on 24th November 2000, Standard Bank only took legal steps against Able in March 2001, at the time when it launched

the application against Able Trading and Eysselinck. By then Pretorius had absconded and his business ventures closed down.

If Standard Bank acted expeditiously after 24th November 2000, it may have saved Eysselinck the loss of the last payment N$37 700, made on 18th January 2004.

In my respectful view the Courts finding in this regard is not only incorrect, but irrelevant.

9. Statement: "This narrows the scope of the enquiry down to the period between April 2000 when it received information indicating Pretorius was not to be trusted and 1st October 2000. I know there is a gap from 1st October 2000 when second defendant purchased the vehicle up to 24th November 2000 when he as a result of the press report also came to know that there were problems with Pretorius. There is however no evidence whatsoever that the Bank did anything in this period that could have reinforced the opinion of second defendant that Auto Toy Store (Pty) Ltd was entitled to sell the car."

Comment: This finding in my respectful view, amounts to a further misdirection. Second defendant did not buy the vehicle on 1st October but only on approximately the 17th October 2000 when the essential formalities embodying the sale were completed, although payments were already made in advance.

It is not a question of something specifically done during this period that could have reinforced Eysselinck's opinion that Auto Toy Store (Pty) was entitled to sell the vehicle. It is rather a question of acts of commission following by acts of omission.

There was a continuous representation beginning with a delivery of the vehicle to Pretorius, purporting to act for Able Trading, and leaving the vehicle in his care with registration papers indicating Able Trading as owner and title holder. Thereafter, in March 2000, Standard Bank granted the Pretorius company, Auto Toy Store, a limited dealer status and thereby assisted and financed his deals in second hand motor vehicles.

The bringing into existence of this dealership and the assistance given to it until the dealership was revoked only on 18th July 2000. The business nevertheless continued and was still in existence when Pretorius sold the vehicle to Eysselinck. Although it became more likely, since the establishment of this dealership, that Pretorius will now sell second hand vehicles at this outlet, including the vehicle belonging to Standard Bank and later sold to Eysselinck, Standard Bank stood by in silence, without in any way disclosing to the public or potential buyers, that it was in fact the owner and title holder of the said vehicle.

Notwithstanding the increasing pressure over months on Pretorius during this period to fulfil his financial obligations to Standard Bank, which increased the probability that the “snake” will strike by selling any encumbered vehicle he could lay his hands on, Standard Bank stood by, without disclosing its interest.

These circumstances, as elaborated in Section (IV) *supra*, including delivery to Pretorius of the vehicle and the papers indicating Pretorius’s company as owner and

title holder, gave to Pretorius and the companies he owned and controlled, the indicia of dominium and/or the *jus disponendi*. It provides as was said in the Electrolux decision, “all the scenic apparatus” of ownership or *jus disponendi*, and as such, by “silence and inaction as well as by conduct, “constitutes a representation, 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".[7]

Furthermore, insofar as Pretorius made a representation that he has the dominium and/or *jus disponendi*, Standard Bank by its acts and omissions, connived with him in doing so or effectively contributed to the making of that representation.[8]

This is not a case where the goods of the owners were suddenly and unexpectedly removed and alienated by theftuous and/or fraudulent means, but where the vehicle in question has been left in possession of a fraudster with the *indicia* of *dominium* and/or the right to dispose of the vehicle and where this state of affairs was allowed to continue from 11 November 1999 to 28 February 2001.[9]

10. Statement: “The extension of the overdraft in this period could likewise not assist to create this impression as second defendant or any other member of the public, would not know about this, and by that time the vehicle had already been bought so that subsequent events could not have had any effect on second defendants decision to purchase the vehicle.” (My emphasis added).

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[7] Quenties Motors (Pty) Ltd, v Standard Credit Corporation, 1994 (3) SA 188.
[8] *Infoplus v Scheelke & Another* 1998 (3) SA 184 (SCA) at 194/5.
[9] (vii) See Section III, 5 *supra* for a fuller discussion.

Comment: (1) The assumed factual premise is confusing and at best, incorrect. The vehicle was only bought by Eysselinck during the period 11-17th October 2000. If the overdraft was not extended during the period 4 April 2000 to 11th November 2000, the business of Pretorius would probably have collapsed before the sale to Eysselinck and his ability to pose as a respectable motor dealer would probably have been destroyed long before he could offer the vehicle to Eysselinck. If Standard Bank was not grossly negligent in granting the overdraft in the first place, Standard Bank itself would have uncovered Pretorius as a fraudster already in 1999 and there would have been no business leading up to the eventual sale by Pretorius to Eysselinck.

(2) The calling up of the overdraft, in the light of the reasons for such a step, should have led to a cancellation of the instalment sale agreement, pertaining to the vehicle.[10]

The members of the public, including Eysselinck, would then soon have known about the collapse of the business of Pretorius and the sales to Eysselinck and others would then in all probability never have taken place. The vehicle sold by Standard Bank to Able Trading would also have been reclaimed by Standard Bank and no longer available for the fraud on Eysselinck.

[10] See also Section (V) *supra.*

Consequently the Court's argument rests on a false premise and is completely unrealistic.

11. Statement: (i) "As the vehicle was paid up during the period in question (April 2000 – September 2000) the only relevant consideration, is to see whether a call up of the overdraft at that stage would have led to the instalments on the vehicle falling due and hence a repossession of the vehicle prior to it being sold. The answer to this question is not clear."

(ii) "In fact had the account been called up, the probabilities are taking Pretorius background into consideration that he would have sold the vehicle to raise money if he needed this. He would then probably have defrauded someone else but that cannot take the matter any further."

(iii) "Furthermore, he might have kept the instalments up to date from the account of Auto Toy Store (Pty) Ltd, which during this period was generally in credit and sometimes for substantial amounts which would have prevented the vehicle from being repossessed (save perhaps on the technicality of a breach of one agreement is a breach of all with which aspect I have dealt above)."

Comment:

Ad 11(i) The answer is clear. See my comment on point 6 *supra* which is repeated for the purpose hereof.

Ad 11(ii): This argument acknowledges the obvious as argued on behalf of Eysselinck, that it was reasonably foreseeable that Pretorius could sell the encumbered vehicle at any time, but once pressurized, for payment, the probability would increase. The acknowledgement by the Court that he would then "probably have defrauded someone else, is significant and underscores the recognition of the

fraudulent potential of Pretorius. To say that this realization however "cannot take the matter any further", is difficult to comprehend. It certainly takes the matter further and provides the strongest possible reason for Standard Bank to have acted decisively in accordance with the powers it had available in its contract with Able Trading, in order to protect not only itself, but members of the public who were potential victims of Pretorius fraud[11]

Ad 11(iii): It is unlikely that he would have paid the heavy instalments on Able's Trading's account, if the overdraft was called up. And as shown previously, if the reason for the call-up of the overdraft was the discovery of the Pretorius fraud in representing that Rössing owed him N$1.5 million which would become due in due course, then it become imperative to cancel each and every agreement with Pretorius, not only that of Able Trading, as was the right of Standard Bank in terms of its contract as discussed in Section (V) *supra*. To regard the right of Standard Bank in terms of its agreement with Able Trading as a "technicality", cannot be correct. Even less so would making use of such procedure be "senseless and oppressive" as suggested by the Court *a quo* in an earlier part of its judgment.

12. Statement: The Court *a quo* also stated:

> "To every time when an overdraft limit is exceeded cancel instalment sales agreements of such persons is simply absurd".

[11] (x) See Section (v) *supra*.

This approach is a simplification of the problem, as appears from a later part of the judgment. Nobody argued that every time an overdraft limit is exceeded instalment sale agreements must be cancelled. Here the "exceeding of the overdraft limit", must be seen against the total picture of the failure by Pretorius to keep other commitments and above all the fraudulent acquisition of the overdraft facilities, the information indicating that Pretorius was a fraudster, inclined to commit fraud by selling encumbered vehicles and pocketing the proceeds.

13. The Court on occasion also found justification for Standard Bank's attitude in the alleged views and practices of other Banks. However, there is a stark distinction between the attitude of Standard Bank and other Banks in at least one fundamental respect.

At a conference a substantial time before the sale to Eysselinck, representatives of other Banks conferred with those of Standard Bank in Windhoek, the precise date was in dispute.

The representatives of some other banks indicated that they either refrained from doing business with Pretorius or stopped doing business with him, *inter alia* because of the information of his fraudulent and shady past.

So eg. First National Bank as well as Commercial Bank had declined to do business with Pretorius. Ms Cilliers, representative and Branch Manager of Wesbank branch

of First National Bank, testified that Pretorius came to Namibia in 1988 and applied to Wes Bank for an approved dealership but it was refused. She disclosed that she had received a call from South Africa that Pretorius had a dealership in South Africa with the name of "Toys for Boys". Customers will put consignment stock on his floor – he sold the vehicles but not settled the specific financial institutions so the customer will lose his money…"

It was not certain when this meeting had taken place, i.e. whether it was 18th August 2000 as suggested by Blaauw or much earlier even August 1999 as suggested by Ms Cilliers or some other date earlier then 18th August 2000. The purpose of the meeting was *inter alia* the discussing of double discounting – the selling by dealers of encumbered vehicles and pocketing the proceeds. Pretorius was notorius for this type of activity also in Namibia, at least from 4th April 2000. But Blaauw, on behalf of Standard Bank, testified that the business of Auto Toy Store was just discussed in passing.

If the meeting took place during August 2000, one would have expected that because of the "E-mail dated 4th April 2000, Blaauw or any other representative of Standard Bank would have conveyed this information to his colleagues – which he apparently did not.

Blaauw also testified that he revoked the dealership of Auto Toy Store in July 2000 and since then he would not have done any business with Pretorius or Auto Toy Store.

If the aforesaid meeting with colleagues from other banks took place in August 2000, the 4th April "E-mail, followed by the July revocation, would then have been fresh in his mind and one would have expected him to inform his colleagues from other banks. But he testified that he just discussed Auto Toy Store in passing.

The Court *a quo* said – "and it is clear it was after Auto Toy Store (Pty) Ltd had commenced doing business, the probabilities are that this meeting took place in August 2000." The Court unfortunately failed to consider that although the company Auto Toy Store (Pty) Ltd was only registered as such on 24 February 2000 and applied to Standard Bank for the status of recognized dealership towards the end of March 2000, Pretorius had apparently already done motor dealer business before that time in Namibia, either under the name Auto Toy Store, before it was registered as a company, or under or a completely different name.

I cannot understand the Court's argument that the meeting must have been in August 2000, because, so the Court argued, it was after Auto Toy Store had commenced doing business. Why then did Blaauw not disclose to his colleagues that he felt it necessary to cancel its recognition already in July? The probabilities thus point to a meeting much earlier than August 2000.

Be that as it may – whereas some other Banks took action, or refrained from doing business with Pretorius, Standard Bank however, appeared to keep the relationship alive and failed to take any legal action to cancel and to recover its property, until March 2001.

In a case like this, making use of the so-called "technical clause" above to terminate all agreements and business with Pretorius, was not only reasonable and prudent, but imperative in the circumstances to protect Standard Bank's true interests, and that of the public including that of Eysselinck.

VII: CONCLUSION

This is a case where, if there ever was one, the owner should, even if there was no culpa on its side, be "precluded from asserting his rights by compelling considerations of fairness within the broad concept of the *exceptio doli*."[12]

The above principle has been referred to in the decisions quoted in the argument before us. In my respectful view, the principle therein stated can only enrich our law, if incorporated therein.

[12] *Oakland Nominees Ltd v Gelria Mining Investment Co Ltd*, 1976(1) SA 441 (A) at 452.

However, it has not been fully argued and it is not necessary to decide in this appeal, in view of my view that culpa has been proved in this case.

I also find that the plea of estoppel by appellant should succeed, because the following requirements have been proved by the appellant, on a balance of probabilities:

Eysselinck, who acquired Standard Bank property did so because, by the *culpa* of Standard Bank, he was misled into the belief that the person, from who he acquired it, was the owner or was entitled to dispose of it.

In this regard I find that Standard bank was the proximate and/or decisive cause of Eysselinck's prejudice, because, was it not for the actions and omissions of Standard Bank as set out in detail in this judgment, the prejudice to Eysselinck would not have resulted.

In my respectful view, it cannot be said on the available evidence and in the circumstances aforesaid, that Eysselinck was the sole or proximate cause of his own prejudice.

Although Pretorius was the person in the forefront, the prejudice would not have occurred if Standard Bank had not, by its actions and omissions over a long period of time, effectively contributed to the making of the fraudulent representation.

I have consequently come to the conclusion, after carefully considering all the argument and the applicable facts, circumstances and the law, that the plea of appellant of estoppel, should have succeeded in the Court *a quo*.

Eysselinck also appealed against a cost order in the Court *a quo* when the proceedings were postponed because of incomplete discovery by Standard Bank. The Court ordered that the wasted costs of the postponement be costs in the cause. Mr. Smuts referred to the fact that certain amendments of the pleadings were also moved by Counsel for Eysselinck and submitted that no order as to costs should be made. I am, however, not persuaded that there is any basis on which this Court can interfere with the discretion exercised by the Court *a quo* and the order, that the wasted costs of the postponement shall be costs in the cause, must remain.

In the result:

1. The appeal of appellant succeeds.

2. The order of the Court *a quo* is set aside in so far as it affects the appellant.

    2.1 The interim order as confirmed by the Court *a quo* relating to the possession of the vehicle, is set aside, and the vehicle shall be returned to the appellant as substituted.

3. The first respondent, Standard Bank Namibia Ltd, is ordered to pay appellants costs in the Court *a quo* and on appeal.

_____
O'LINN, A.J.A.

I agree.

_____
STRYDOM, A.C.J.

I agree.

_____
TEEK, J.A.

COUNSEL ON BEHALF OF APPELLANT: **MR. R. HEATHCOTE**

INSTRUCTED BY: **THEUNISSEN, LOUW & PART**

COUNSEL ON BEHALF OF **MR. D.F. SMUTS, S.C.**

RESPONDENT:

INSTRUCTED BY: **VAN DER MERWE-GREEFF**