

Sellers beware

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This issue recently came before the Supreme Court of Appeal in the case of *Van der Molen v Fagan* [2013] ZASCA 203. Fagan sold a vehicle to Amod and the agreement of sale provided that payment must be made by Amod to Fagan a month after delivery of the vehicle.



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Fagan gave Amod the registration papers for the vehicle to enable him to secure finance but then Amod did not pay Fagan in terms of the contract. Fagan then discovered that the address given by Amod was a vacant stand and that she had been the victim of a fraud.

In fact Amod's associate had registered the vehicle in his own name and thereafter had sold the vehicle to a car dealership. That dealership registered the vehicle in its name and sold it to Van der Molen who in turn registered the vehicle in his name. Fagan asked the court to order the return of the vehicle from Van der Molen claiming that she was still the owner.

Default position of our law

If you are selling moveable property, make sure your sale agreement clearly states that ownership of the property will only pass to the buyer when you are paid. The default position of our law is that ownership of moveable property passes on delivery to the buyer. Where the buyer does not pay the seller against delivery the seller cannot reclaim the property itself, only the purchase price.

The court found that it could never have been the parties' intention for ownership to pass to Amod before Fagan was paid. Since Fagan was never paid for the vehicle, Amod's associate was never the owner of the vehicle. Consequently he could not have transferred ownership to the dealership and the dealership could not have transferred ownership to Van der Molen. The court then held that as Fagan was the owner of the vehicle, Van der Molen only had a claim against the dealership and the dealership in turn had a claim against Amod's associate.

Even though the court came to Fagan's assistance in this matter a seller of moveable property should take heed. Sellers should be proactive and insist on a "reservation of ownership" clause that makes it clear that ownership will not pass until payment has been made. The inclusion of a simple clause in an agreement of sale would probably have saved Fagan the not insubstantial cost of going all the way to the Supreme Court of Appeals.

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