

IN THE HIGH COURT OF SWAZILAND

CIVIL CASE NO. 197/2001

In the matter between:

JOHN'S TRANSPORT (PTY)	LTD PLAINTIFF
AND MANUEL RIBERIO	DEFENDANT
CORAM	SHABANGU A J
FOR THE PLAINTIFF	MR C. NTTWANE
FOR DEFENDANT	MR Z. MAGAGULA

JUDGEMENT

3rd November, 2003

In this matter I made an order on 24th September, 2003 in which the plaintiff's claim was dismissed with costs. I stated at the time that reasons were to be given later, which reasons I now hand down.

It appears from the facts which appeared common cause during the trial that on or about 29th April, 1993 at Matsapha the plaintiff which was represented by one John Ndzabandzaba purchased a certain vehicle being a 1988 Toyota Hiace Commuter 2200, registered as SD 104 PM with chassis number 9004345 and engine number 34D46418. This is the description of the vehicle as it appears in paragraph three of the

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particulars of claim. There was a dispute as to who the other party, namely the seller, of the vehicle was. Whereas the plaintiff contends that the defendant was the seller, the defendant's contention on the pleadings and during the trial was that the seller, in fact was not him, but was a certain company of which he was merely a director. The name of the company alleged by the defendant to have been the seller was Matsapha Panel Beaters and Spray Painters (Pty) Ltd. The agreed purchase price for the vehicle was E32,000-00. What appears from the evidence even though not pleaded is that the purchase price for the vehicle was paid by the plaintiff and the vehicle was delivered to the plaintiff in 1993. Payment of the purchase price of E32,000-00 was made by cheque drawn by the Plaintiff's financier described as Northcon Finance, drawn in favour of the defendant. It also appeared to be common cause and not disputed that when the vehicle was initially delivered to the plaintiff after the conclusion of the sale, prior to the transfer of registration the vehicle was inspected and certified by the Police to be one that is not stolen and the police issued a Police Clearance to this effect in accordance with the procedures normally applicable to transfer of registration in respect of a vehicle.

Five years later from the date of delivery in July, 1998 the vehicle was seized by members of the Royal Swaziland Police on the basis that it was a stolen vehicle. The circumstances leading to the seizure of the vehicle by the Royal Swaziland Police were as follows. The vehicle was temporarily parked by the driver, a certain Mr Maziya at the premises of the Royal Swaziland Police in Manzini whilst he went on errands in town. It appears to have been a sheer coincidence that on the day in question the Police were scheduled to conduct an examination or inspection together with members of the South African Police Services of

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the vehicles kept at their premises which had been seized from the members of the public. From a casual observation of the vehicle the local police officers who were still preparing for the work of the day, namely the examination of the vehicles, by counting and identifying the vehicles which were to be examined,

mistakenly identified this vehicle as being amongst those vehicles which were to be examined on the day in question. The aforementioned mistake is said to have occurred because by mere casual observation the identifying numbers of the vehicle which were reflected on the windows were not the same. The Police were surprised when they learned later, perhaps as a result of the Plaintiff's driver coming to collect the vehicle from their premises, that the vehicle was not amongst those scheduled for examination on that day. In spite of this fact however the Police at that stage decided to seize the vehicle because of the apparent discrepancy on the identifying features which were apparent on the windows of the vehicle.

Following the seizure of the vehicle the plaintiff is said to have gone to see the defendant demanding his money back alternatively another vehicle. There is a dispute as to what the defendant's response was on the aforementioned demand. The defendant says that he told the plaintiff that the fact that his vehicle had been seized by members of the Royal Swaziland Police on suspicion that it was stolen was none of his business because he himself did not sell stolen vehicles. On the other hand the plaintiff says the defendant kept promising that he would deliver another vehicle or refund the purchase price.

I may mention further that it appeared to be common cause on the evidence that the vehicle the defendant had purchased which was described as a 1988 Toyota Hiace Commuter 2200 with Chassis number

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9004345 Engine Number 34D46418 registered SD 104 PM was purchased by the defendant from the liquidator of Swaziland Meat Industries. The plaintiff has led evidence which was directed at showing that even though the defendant had purchased the aforementioned vehicle from the Liquidator of Swaziland Meat Industries as an accident damaged vehicle the defendant had in repairing the vehicle joined a portion of the chassis which had a different chassis number from that of the vehicle. It was further suggested that the vehicle was so extensively damaged that a different engine with a different engine number had to be fitted on the damaged vehicle which was to be later purchased by the Plaintiff. The argument that was made following on the above on behalf of the plaintiff was that replacement of the engine as above stated and the repair to the chassis as alleged not only explains why the identifying features of the vehicle did not correspond to those on the registration, but further that when the repairs were done the defendant knowing that he had replaced both the engine and the chassis decided to change the identifying numbers of this replacement parts so that they conform with those in the registration book. The Plaintiff's attorney further argued that the replacement parts must have been stolen and that the defendant must not only have known this but he actually knew the parts to have been stolen. This is the background which has led to the present proceedings.

The basis of the plaintiff's claim can more accurately be described as being the seizure of the vehicle by the Police. At paragraph eight of its particulars of claim the plaintiff pleads as follows:

"During July, 1988 members of the Royal Swaziland Police seized the motor vehicle in question on the basis that it was a stolen motor vehicle and defendant could not have passed ownership. "

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In so far as it is stated in the aforesaid paragraph nine that the defendant could not have passed ownership, such statement may be misconceived because in our law a seller does not warrant that he is able to pass ownership of the res vendita nor does he even warrant that he is the owner thereof. All that the seller warrants is of vacua possessio to the purchaser in respect of the res vendita. See J. T. R. GIBSON, SOUTH AFRICAN MERCANTILE AND COMPANY LAW at page 123 wherein the learned author states;

"The seller does not engage to transfer ownership to the buyer by delivery and cannot be compelled to do so. He undertakes only to give the buyer a lesser right in the article - namely possession (vacua possessio)."

See also the seventh edition at page 118.

In the case of *KLEYNHAN'S BROS V. WESSELS' TRUSTEE* 1927

AD 271 AT 282 also quoted with approval by a number of text book and academic writers; the principle which is rather trite in any event was formulated thus;

"A contract of sale with us does not have the effect of a *translatio dominii* (transfer of ownership; it is simply an obligation to give *vacua possessio* coupled with the further legal consequence of a guarantee against eviction."

Even though this principle is trite it becomes necessary to cite same having regard to the manner which the plaintiff adopted in formulating its cause of action. It is not only a strangely formulated cause of action, but it indicates total misapprehension of the obligations and warranties a seller undertakes and makes in a contract of sale. What is further clear from the aforesaid principle is that, implied by operation of law in every contract of sale is the so-called warranty against eviction and the

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obligation to give *vacua possessio*. A consequence of this is as observed in *J. T. R. GIBSON* supra seventh edition at page 129, that

" It is thus possible in our law for one person to sell property of which he is not the owner and without the owner's authority. If, however, he does so knowing he is not the owner and yet representing to the innocent purchaser that the property is his, he has fraudulently misrepresented a material fact, thereby entitling the purchaser to set the contract aside. If however, the seller is *bona fide* and there is no misrepresentation, there is no question of voidability. The contract is valid and the buyer cannot set it aside. It is these circumstances that he is protected by the implied warranty against eviction if he suffers any interference in his *vacua possessio*."

The implied warranty against eviction which is an incident of the sellers obligation to give *vacua possessio* is no more than a term implied *ex lege*, that is, by operation of law, by which the seller warrants that the purchaser will not be disturbed, whether by the seller himself or by a third party, in his *vacua possessio*, as a result of defective title. In *LAMMERS and LAMMERS V. GIOVANNONI* 1955 (3) SA 385 A at 397 the learned judge observed in relation to the implied warranty against eviction;

"The seller... is not an insurer. His implied warranty is not that the purchaser will not be vexed by the unlawful acts of others. All he warrants is that the purchaser will not be lawfully evicted because of defective title."

For a purchaser who has been evicted from the *res vendita*, to be entitled to any remedy arising from a breach of the warranty against eviction he must allege in his pleadings and prove at the trial

"(a) the purchaser was evicted. This does not necessarily mean a physical loss but includes a case where an unassailable claim to the goods has been compromised or delayed. *LAMMERS AND LAMMERS V GIOVANNONI* 1955(3) SA 385A *OLIVIER V. VAN DER BERGH* 1956 (1) SA 802 (C).

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GARDEN CITY MOTORS (PTY) LTD V. BANK OF THE OFS LTD 1983 (2) SA 104(N).

(b) The purchaser gave notice to the seller of the proceedings to assist him in defending the case; and the purchaser conducted an unsuccessful *virilis defensio* against the claim. *WESTEEL ENGINEERING (PTY) LTD V. SIDNEY CLOW AND CO LTD* 1968(3) SA 458 (T).
YORK AND CO PUT V. JONES(2) 1962 (1) SA 72 (SR)

(c) If no notice was given or no *virilis defensio* was conducted, the claimants' title was unassailable.

LAMMERS supra, GARDEN CITY MOTORS supra"
See AIMLER'S PRECEDENTS OF PLEADING, 1st edn, by
L.T. CHARMS at page 311."

In the present case it is clear from both the pleadings and the evidence that the plaintiff was evicted in the sense that it physically lost the vehicle to the Police who seized the vehicle. However there is clearly no allegation in the pleadings that the plaintiff gave notice to the defendant requiring the latter's assistance in defending his title to the vehicle. There is also no allegation that the plaintiff put up a virilis defensio. This is a clear indication that there was no intention on the part of the plaintiff to base its cause of action on the breach of warranty against eviction. Indeed even during the trial no evidence of a notice requiring the defendant to assist the plaintiff in defending his title to the vehicle was tendered at all. The only evidence which might come close to this was evidence of a demand the plaintiff allegedly made to the defendant for either a return of the purchase price or a replacement of the vehicle. This is not the same thing as notice calling upon the seller to give assistance in defending the plaintiff's title to the vehicle. Further there is no evidence that the plaintiff put up a virilis defensio in as much as even though there may have been proceedings instituted by the plaintiff through attorney Leo Gama there is nothing to indicate that such proceedings were brought

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to finality or concluded either for or against the plaintiff. The plaintiff could not therefore have succeeded on the basis of a breach of the warranty against eviction.

The plaintiffs case as pleaded is as follows in so far as same may be relevant in this proceedings.

"3. On the 29th April, 1993 at Matsapha Plaintiff duly represented by John Ndzabandzaba its director entered into an agreement of sale with the defendant in terms of which the latter entered into an agreement of sale with the defendant in terms of which the latter sold to the former the undermentioned motor vehicle for a sum of E32,000-00, 1988 Toyota Hiace Commuter, 2200 Chasis Number 9004345, Engine Number 34D46418 Registration Number SD 104 PM. ...

4.3 Delivery of the motor vehicle to plaintiff would be effected on payment of the purchase price.

5. At the time the agreement of sale referred to above was entered into defendant represented to plaintiff that he was entitled to sell the motor vehicle and could pass ownership in same and that it was not a stolen motor vehicle.

6. When making the representation defendant knew it to be false in that he knew he could not pass ownership in the motor vehicle as it was a stolen one.

7. When defendant made the representation he intended plaintiff to act thereon and to pay him the purchase price of the motor vehicle as it was material to the sale agreement

8. Plaintiff was induced by the representation to purchase the motor vehicle on the terms of the agreement referred to in paragraphs 3 and 4 hereto and on the 29th April, 1993 he took delivery of the motor vehicle.

9. During July, 1998 members of the Royal Swaziland Police seized the motor vehicle in question on the basis that it was a stolen motor vehicle and defendant could not have passed ownership in it.

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10. As a result of Defendant's representation as aforesaid Plaintiff suffered damages in the sum of E45,564-44 being the amounts paid by plaintiff to his financiers. Alternatively, as a result of Defendant's representation he has been unjustly enriched at the expense of the plaintiff in the sum of E32,000 being the sums received by the Defendant in respect of the purchase price of the motor vehicle.

11. Notwithstanding demand to pay the aforesaid sums Defendant fails and/or refuses to do so. "

Whatever may be said for or against the soundness of the plaintiff's cause of action as pleaded, the said plaintiff's case simple cannot succeed because;

(a) There is simple no evidence of the alleged misrepresentations attributed to defendant. In other words there is no evidence that defendant stated at any stage when the sale was concluded that "he could pass ownership in the vehicle and that it was not a stolen vehicle." Such representation was not expressly made nor does the law imply same. There is no basis upon which such a term could be consensually implied on the evidence. Further there is no evidence to support the allegation that defendant knew that he could not pass ownership or that the vehicle was stolen. Indeed there was not even evidence that the vehicle was stolen. All that the evidence presented on behalf of the plaintiff said was that a different chassis with a new chassis number was welded into the old chassis of the vehicle and that the portion of the chassis which was joined and welded to the original might have been stolen.

(b) On a balance of probabilities I am not satisfied that the vehicle had at the time of its delivery in relation to its identifying features, (e.g. the engine and chassis number) the discrepancies

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which led to its seizure by the Police five years after its delivery by the defendant, particularly if one has further regard to the fact that it is common cause the vehicle had been checked for such discrepancies by Police in 1993.

In the circumstances and on the basis of the foregoing the plaintiff's claim was dismissed with costs.

Alex S. Shabangu

Acting Judge