THE HIGH COURT OF SWAZILAND

Civil. Trail No.175/02

In the matter between:

SIPHO GAMEDZE **Plaintiff**

And

DUMISANIMATSEBULA **Defendant**

CORAM **MASUKUJ.**

For Plaintiff **Mr M. da Silva**
For Defendant **Ms L. Zwane**

JUDGEMENT
7th April, 2004

In October 2001, the above-named Defendant sold a motor vehicle to the Plaintiff for the sum of El8,000.00. The vehicle was described as a 1985 Toyota Bakkie, bearing registration number SD 544 KL, Engine No.0650696 and Chassis No.YM 50-0042320. The *pretium* was paid and delivery of the vehicle was effected in the same month of October 2001.

In November 2001, the said vehicle was impounded by the South African Police Services, on the suspicion that it was stolen and refused to have same released. It was in appreciation of those facts that the Plaintiff moved the present action in which it claimed cancellation of the contract and *restitutio-in-integrum,* the refund of the purchase price of El 8, 000.00 and costs of suit.

The Defendant, on the other hand, in his Plea denied liability, averring that the said vehicle was not stolen as it previously belonged to the Government of Swaziland and that it had been impounded, investigated and released by the Royal Swaziland Police in 1999. The Defendant

further averred that the Plaintiff had no cause of action against him and prayed for a dismis, of the claim with costs.

Chronicle of Evidence

The Plaintiff, in support of its claim, adduced the Plaintiffs evidence, which was to the following effect; That in October 2001, on a Friday, the Defendant sold him the above described motor vehicle for El 8, 000.00. The Plaintiff paid the *pretium* in cash but the vehicle was not delivered there and then as the Defendant had to use if for attending a funeral. Delivery was effected two days later on a Sunday.

It is the Plaintiffs evidence that on delivery of the vehicle, he demanded the blue book of the vehicle but the Defendant promised to deliver it on the following day, when he delivered the same eventually, the Defendant informed the Plaintiff that the blue book was not in the former's name but remained reflecting the name of the person who sold the vehicle to the Defendant as the registered owner of the vehicle i.e. one Phineas Simelane.

The Defendant further informed the Plaintiff that the engine of the vehicle was not the original one and had not been cleared by the relevant authorities. The Plaintiff thereafter evinced the clear intention of clearing the engine and the Defendant promised to contact Simelane in that regard. When the Plaintiff contacted Simelane subsequently, he found that the Defendant had not alerted Simelane regarding the Plaintiffs desire to clear the engine.

Later, Simelane was alerted by the Defendant and Simelane signed the relevant documents of transfer of ownership and which documents were subsequently taken by the Plaintiff to the Central Motor Registry in Mbabane. The Central Motor Registry however refused to transfer the ownership of the vehicle to the Plaintiff on the grounds that the vehicle had been fitten with a new engine and which fact necessitated that the vehicle be taken to Oshoek Border Post for the clearance of the engine and where certain documents would be given to the Plaintiff.

The Plaintiff reported his difficulties at C.M.R. to the Defendant, whereupon the latter advised that it was not important for the Plaintiff to take the vehicle to Oshoek because, the engine was bought from Bametts Auto Spares and the vehicle was in Swaziland. He undertook to enquire from Barnetts on the necessity of taking the vehicle to Oshoek in the meantime.

The Defendant returned to the Plaintiff with a letter from the R.S.P. Lobamba in which it w, recorded that Barnetts Auto Spares is no longer operating in Swaziland. The Defendar advised the Plaintiff to submit this letter to the C.M.R. Notwithstanding that this letter was submitted, C.M.R still refused to transfer ownership but insisted that the clearance from Oshoek was a prerequisite and that that is where newly fitted engines are cleared.

Faced with this difficulty, the Plaintiff testified that he therefor took the vehicle to Oshoek. On inspecting the vehicle the S.A.P.S. enquired where the Plaintiff had obtained the vehicle from and he informed them that it was from the Defendant. It was the Plaintiffs further evidence that he was advised by the S.A.P.S. to revert to the seller and to ask for the purchase price as they were proceeding to impound the vehicle. He was advised by the S.A.P.S that the tag on the vehicle did not correspond with the chassis number, hence the impoundment. He was further advised to remove any improvements effected on the vehicle and he obliged.

This unfortunate turn of events was reported by the Plaintiff to the Defendant. The Plaintiff demanded his money back but the Defendant retorted that he no longer had the money and that he had used it. What the Defendant suggested was securing the services of an attorney to recover the vehicle through the Courts. The Defendant suggested Maphalala & Co., where they met Mr Maphalala, who after taking instructions, instructed Mr Nzima, a Professional Assistant to proceed to Oshoek.

At Oshoek, Mr Nzima was given the same story as that told to the Plaintiff. Nzima advised him that it was not possible, in the circumstances to reclaim the vehicle and that the only remedy open was to recover the purchase price. This intended line of action was disclosed to the Defendant by the Plaintiff and the Defendant's attitude was that the vehicle was so far as he was concerned, clean. The Defendant at that point revealed that the said vehicle was once impounded by the Big Bend R.S.P. for three months but released it after completion of investigations.

The Plaintiff concluded his evidence in chief by testifying that had he known that the vehicle had been impounded before and that the blue book did not reflect the seller's name and further that the engine was not original before the conclusion of the sale, he could not have entered into the contract with the Defendant.

In'cross-examination, it Was put to the Plaintiff that the blue book reflected Simelane Samsc and that ownership was therefor passed from Phineas Simelane to Samson Simelane. This th. Plaintiff vehemendy denied. It was his evidence that he intended to use Samson Simelane's permit to conduct a for hire business with the merx and that the change of ownership was not effected as the C.M.R., although they inserted Samson's name refused to affix the Registrar's date stamp to prove change of ownership in the absence of the clearance from Oshoek.

It was further put to the Plaintiff that he could not have attempted to register the vehicle in his or Samson's name because Phineas never signed the necessary documents. The Plaintiff testified that Phineas did sign the documents but they were in C.M.R's possession. It was further put to the Plaintiff that the Defendant had told the Plaintiff about the engine, the blue book and the impoundment before the sale was concluded but this the Plaintiff vehemently denied, insisting that these issues only came to light after the conclusion of the agreement of sale.

The Plaintiff was further taxed on why after the impoundment of the vehicle at Oshoek, he went to demand the purchase price from the Defendant without tendering the vehicle. In response, the Plaintiff testified that he was labouring under the misapprehension that the vehicle was in order and that the Defendant never warned him of anything untoward regarding the vehicle and which if he had known about, he would not have taken the vehicle to Oshoek. He further told the Court that he was unable to tender the vehicle since it was impounded and he could not secure its release.

Finally, it was put to him that the vehicle was clean that there was nothing wrong with it. This the Plaintiff denied, reasoning that something was indeed wrong with the vehicle and this was evidenced by a letter from the S.A.P.S marked Exhibit "B" (whose contents will be adverted to later in the course of this judgement) and the fact that the vehicle was and remains in the custody of the Police.

The Plaintiff closed his case. It was at this juncture that it became evident that both the Defendant and his witness sat in Court throughout the Plaintiffs evidence in chief and cross-examination. The effect if any of the Defendant's witnesses presence in Court will be examined at the point of evaluating the evidence tendered by the respective parties.

The Defendant was the first witness to be called. He gave a lengthy history of how he came t be in possession of the vehicle in question in this action. The long and short of it is that h< bought the said vehicle from one Phineas Simelane after selling his sedan and obtaining a loan from the bank to put up the purchase price which was E22,000.00.

In less than twelve months after he purchased the motor vehicle, the vehicle was impounded by the Big Bend Police on suspicion that it was stolen. It was detained for about three (3) months and underwent investigations and tests by the local and South African Police. It was thereafter released to the Defendant through an Order of Court and he was told by the Police that there was nothing untoward with the vehicle. The Defendant testified that after its release, he drove to South Africa on numerous occasions and was satisfied therefor that the vehicle was clean as it was regularly subjected to tests by the South African Police.

It was the Defendant's evidence that after being injured in a motor vehicle accident, he was retired on medical grounds and needed to supplement his income by selling the vehicle. He put up the vehicle for sale and the Plaintiff showed a keen interest in purchasing the vehicle but failed to raise the necessary cash initially. The Plaintiff later raised the money unexpectedly and handed it over to the Defendant, who could not immediately deliver the vehicle because of a funeral, as aforesaid.

It was the Defendant's evidence that when the Plaintiff came to effect payment, he (Plaintiff) enquired about the earlier impoundment of the vehicle by the Police to which the Defendant advised that the vehicle was found to be clean, hence it was released back into his custody. The Defendant further testified that he also handed the documents of the vehicle to the Plaintiff i.e. the blue book to which was attached a receipt in respect of the purchase of the engine. It was his evidence that the new engine had already been fitted at he time the purchased the vehicle.

The Defendant further testified that the Plaintiff evinced an intention to have the vehicle registered in his name as he wanted to use it for business purposes. The Defendant undertook to assist in contacting Simelane who sold the vehicle to him (Defendant) as he had not changed the ownership from Simelane. It was the Plaintiffs evidence that the Plaintiff then went about changing the ownership of the vehicle using unorthodox means.

The Defendant confirmed that the Plaintiff informed him about the difficulties he met at th C.M.R. and Oshoek regarding the clearances and registration of the vehicle and its subsequen impoundment. The Defendant's evidence was that neither he nor Simelane were involved in the attempted registration.

When the Plaintiff returned and demanded the purchase price, the Defendant is on record that he was unhappy because of the unorthodox ways employed by the Plaintiff in registering the vehicle, which were also clandestine. It is the Defendant's evidence that he refused to repay the purchase price because the vehicle was not tendered and the Plaintiff did not contact him or Simelane immediately he encountered difficulties in registering the vehicle as aforesaid.

The Defendant testified that he was only persuaded to assist after the Plaintiffs parents intervened and requested him having understood and accepted his explanation. He thereafter called the officer who was investigating the earlier impoundment and the officer, Vakazu Mdluli expressed surprise at the latest turn of events since the vehicle had been found to be in order. Eventually, the offices of Maphalala & Co. were instructed as testified by the Plaintiff. The Defendant says he contributed E400.00 towards the opening of the file with the attorneys.

In conclusion, the Defendant asked the Court to call Simelane, who sold the vehicle to him to explain and that if it becomes apparent that the vehicle is not clean, to Order Simelane to repay his E22,000.00, so that he could in rum pay the money to the Plaintiff.

In cross-examination, the Defendant stated that he purchased the vehicle in August 1997 and sold it in 2001. When taxed why he did not register the vehicle in his name in the interim, he stated that there was no pressure upon him to do so. Furthermore, it was his evidence that Simelane was difficult to locate. The Defendant denied that the Plaintiff did not know of the earlier impoundment after the vehicle was detained in Oshoek. It was his evidence that the Plaintiff knew about the impoundment as he used to take his vehicle for repairs with the Defendant and actually asked about the impoundment before he purchased the vehicle.

The Defendant further denied as put to him that the issue of the new engine only came to light after the failed attempt to register the vehicle. It was further denied that the defendant initially refused to assist the Plaintiff when the problems with the registration first came to light.

The Defendant also called Mahlokohla Phineas Simelane, from whom the vehicle wa purchased by the Defendant for E25,000.00. He testified that after the sale, he gave the blue book to the Defendant which had attached to it the receipt in respect of the new engine. Simelane stated that he bought the engine from B-arnett Auto Spares and had it fitted to the motor vehicle.

It was Simelane's evidence that after he sold the vehicle to the Defendant, the latter came to report that it had been impounded, a fact that took him by surprise because the vehicle was clean. The Defendant however later reported that it had been released back to him. Simelane confirmed that he did sign change of ownership documents for the Plaintiff at the Defendant's behest but the process was never completed. Simelane further testified that the vehicle is clean and that he purchased it from Moses Motsa. It was his evidence that he registered it in terms of the law and the Police checked it before it was registered in his name.

In cross-examination, Simelane stated that the Defendant never asked him to sign the necessary documents for effecting change of ownership into the Defendant's name and that he had no reason to refuse. He testified that because he is a busy person, the Defendant possibly did not find him. He further confirmed that he, signed the disposal forms for the Plaintiff but the process was not completed as he (Simelane), did not produce his identity document. It was his evidence that it was the Plaintiff who informed him of the impoundment at Oshoek and denied that the Defendant ever told him.

When asked by the Court, Simelane testified that the Defendant did have his (Simelane's) contact numbers and did eventually contact him by telephone. The defence then closed its case.

Assessment of Evidence

The Plaintiff although a simple and unsophisticated man, struck me as an impressive witness. His story was clear, consistent and corroborated in material respects by the defence, especially Simelane. He stood up well to cross examination, exhibiting no signs of overheating. I was persuaded to accept his evidence as credible and worthy of belief.

The same cannot however be said of the Defendant. He proved to be evasive in certa respects and bis evidence in certain aspects collided head on with That of Simelane, a witne: called by him to corroborate his story in all relevant and material respects.

I find it necessary to highlight a few incidents which have compelled me to make the assessment that I have of the Defendant as a witness.

Firstly, the Defendant testified that the Plaintiff did not immediately contact him or Simelane after the motor vehicle was impounded in Oshoek. This is palpably false because the Plaintiffs evidence in that regard is very clear. Furthermore, the Plaintiff also finds support in both the Defendant and Simelane's evidence.

The Defendant further denied that he initially showed reluctance in assisting the Plaintiff after the impoundment of the vehicle in Oshoek. This is also explicitly false for the reason that not only is the Plaintiff s evidence in that regard clear but it goes against the Defendant's own evidence in chief where he testified to an initial reluctance to assist for the reason that the Plaintiff used unorthodox means to register the vehicle and of which he (Defendant) did not approve.

One of the main reasons why the Defendant's story is highly suspect is his failure to explain why he did not register the vehicle in his own name immediately after its purchase in terms of the Road Traffic Act, 1965. His initial reason was that there was no pressure upon him to do so. When told about the dictates of the law in that regard, he immediately changed, alleging that he could not trace Simelane not withstanding his attempts to do so.

This is totally unconvincing because Simelane testified that the Defendant never contacted him regarding the change of ownership and furthermore, the Defendant did have Simelane's telephone number and when the Defendant needed him, he called him on the telephone and found him. There is evidence that on two occasions, the Defendant did call Simelane i.e. when the Plaintiff wanted to register the vehicle and when Simelane was required to come to Court to testify.

It is inconceivable that the Defendant, who did not plead ignorance of the law regarding the mandatory registration of vehicles could not register the vehicle in his name for about four

years. The reasons he furnished are unconvincing and lead to the reasonable inference that 1 knew that there was something untoward with the vehicle. It is also clear that he dragged hi feet in contacting Simelane when the Plaintiff wanted to register die vehicle in his name Another eerie aspect is the Plaintiffs uncontroverted evidence that the Defendant attempted to dissuade the Defendant from going to oshoek since the vehicle was local. What did the Defendant stand to fear?

As indicated above, there was a contradiction between the evidence tendered by Simelane and that adduced by the Defendant. First, this was in relation to the purchase price and to which I do not attach much weight. It is a contradiction though. Secondly, it was in relation to whether or not Simelane signed the transfer of ownership forms. The Defendant said Simelane never signed these, thereby casting aspersions on the Plaintiff, suggesting that he resorted to clandestine and illegal means to register the vehicle. Simelane's evidence was that he signed the necessary document, at the Plaintiffs behest but did not exhibit his identity documents to the Police to conclude the process.

Third, the Defendant testified that the Plaintiff did not inform him or Simelane about the impoundment at Oshoek. According to Simelane, it was the Plaintiff who did but the Defendant never did so, whereas it was the Defendant who he should have told Simelane as the seller of the vehicle. The Defendant's failure or neglect to do so may lead to in inference about the nature of the vehicle and its status.

It is also worth considering that there are many aspects of the Defendant's case that were never suggested nor put to the Defendant. These only emerged when the Defendant took .the witness box and some were very material and deserved to be put to the Plaintiff in order to see and hear his reaction thereto.

An example is where the Defendant testified that the Plaintiff knew that the vehicle had been impounded before and had asked about him before he bought the vehicle. It was not put to the Plaintiff how this came to light. In chief, the Plaintiff testified that the Defendant knew about the impoundment because they lived together in the same compound. He proceeded to say that the Plaintiff asked about it when he bought the vehicle. The two statements are irreconcilable. Why would the Defendant ask about impoundment if he knew about it. Furthermore, the impression was created by the Defendant that he was very close to the Plaintiff and that the

Plaintiff would on account of the closeness know about the impoundment, coupled with tl fact that the Plaintiff tobk his vehicles to the Defendant for repairs. This was not put nc suggested to the Plaintiff.

It was also not put, as transpired in the Defendant's evidence in chief, that the Plaintiff saw the blue book before he bought the vehicle and that both parties inspected both vehicles.

The importance of putting a party's case to the opposing witnesses cannot be emphasised. Failure to put the case entitles the Court and the other side to assume that the undisputed portions of that witness' evidence remain unchallenged. This was stated in trenchant remarks by Classen J. in SMALL VS SMITH 1954 (3) SA 434 (S.VV.A.) at 438 as follows:-

> *"It is in my opinion, elementary and standard practice for a party to put to each opposing witness so much of his own case of defence as concerns that witness, and if need be, to inform him, if he has not been given notice thereof, that other witnesses will contradict him so as to give him fair a warning and an opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness' evidence go unchallenged in cross examination and afterwards argue that he must be disbelieved. "*

This statement finds support in the more recent case of THE PRESIDENT OR THE REPUBLIC OF SOUTH AFRICA VS SOUTH AFRICAN RUGBY FOOTBALL UNION 2000 (1) SA 1 (cc) at 37 B, where the following is recorded:-

> *"If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness' testimony is accepted as correct. This rule was enunciated by the House of Lords in Brown vs Dunn and has been adopted and consistently followed by the Courts."*

See also SIFISO MOTSA VS ATTORNEY-GENERAL CIV. TR. NO. 1888/98 (unreported per Masuku J.) at pages 6 -7.

In view of the foregoing, it becomes clear that when the Defendant bought the vehicle, he di not know that the vehicle had been impounded before. Furthermore, it is clear that he did no know that the vehicle had not been registered in the Defendant's name until after the delivery of the blue book, which was done after the delivery of the vehicle. I reject the Defendant's story in regard to the above issues for the reasons alluded to above. Furthermore, the Plaintiff did not know that the engine to the vehicle had been replaced until he saw the blue book, which is when the Defendant explained about the engine.

From the Defendant's evidence, it is clear that he was desirous of securing a purchaser for the vehicle to alleviate his financial burden in view of his impending retirement from work and the fact that his children had reached College level. Had he told any purchaser about the manifold problems of the vehicle i.e. impoundment in Big Bend, the substituted engine, and that the vehicle was in another person's name, then these would have potentially scared away any willing purchaser. It is clear from the evidence that the Plaintiffs initial attempt to purchase the vehicle failed because of insufficient funds. He only succeeded on the second, with no one from the evidence, enquiring or evincing an intention to purchase.the vehicle from the Defendant in the interim.

There is also nothing to gainsay the Plaintiffs evidence that had he been told of the problems relating to the vehicle recorded above, he certainly would, if he decided to purchase the vehicle, not take it for registration or drive it to the border as he would have been put on notice that the vehicle was grounded within this country's territorial precincts. His behaviour, in immediately seeking to register the vehicle and transferring it from Simelane is clearly inconsistent with knowledge of the defects relating to the vehicle.

I am of the opinion that the fact that the Defendant drove the vehicle to the Republic of South Africa on numerous occasions and the inspections done on the vehicle by the Police do not necessarily mean that the vehicle was unblemished. It would appear that the problem was not detected by the Police then until the Plaintiff sunendered the vehicle for clearance purposes. I point out that it has not been suggested, alleged or shown in evidence by the Defendant that the Plaintiff after purchasing the vehicle tampered with it in a manner that subsequently led to its impoundment at Oshoek.

It is abundantly clear from the foregoing analysis that there are two mutually destructi\ versions that were preserited before the Court by the respective parties. The proper approach fa be adopted in such cases was enunciated admirably by Eksteen J.A. in NATIONAL EMPLOYERS' GENERAL INSURANCE CO. LTD VS JAGERS 1984 (4) SA 437 (A) at 440 E-G. He held that the Plaintiff will have made out a case if:-

> *"He satisfied the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not, the Court will weigh up and test the plaintiffs allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance ofprobabilities favours the plaintiff, then the Court will accept his version as being probably true. If however, the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and the defendant's version is false. "*

It will be apparent from the analysis of both versions and conclusions reached that the Plaintiffs version is, on a balance of probabilities true and accurate and therefor acceptable. The glaring imperfections and falsehood in the Defendant's case were identified. The balance of probabilities therefor favour the Plaintiff *in casu* and are heavily adverse to the Defendant, whose evidence has been put on the scales and was found seriously wanting.

The one outstanding issue is with regard to the treatment to be given to DW 2's evidence as he sat in Court while the Plaintiff was on the stand. This is unacceptable, for the Court is entitled to hear independent and reliable evidence which will not be flavoured, coloured or tailored to counter the evidence adduced in this case by the Plaintiff; to open gaps or to close loopholes for the Defendant. Although this desirable rule of practice was breached by the Defendant, I am of the view that careful a analysis of DW 2's evidence shows that he did not seek to insidiously bolster the Defendant's case in reference and response to the Plaintiffs case.

I am of the view that the evidence of DW 2 was in fact independently given and rather than bolstering the Defendant's case, it corroborated the Plaintiffs case more, showing that DW 2's

staying in at the commencement of the hearing was an oversight on the Defendant's leg; representative. Practitioners ought to be vigilant about this rule of practice.

The Law Applicable to the facts

Butterworths Forms and Precedents: Commercial Transactions 2 "Purchase and Sale of Movable Property" at page 608 states the following:-

> *"There is an implied warranty against eviction in every sale agreement in that the seller is deemed to guarantee undisturbed possession to the purchaser. The guarantee involves an implied undertaking by the seller (i) that he will not disturb the purchaser's possession; (ii) that if the purchaser's possession is threatened by a third party, the seller will defend the purchaser against such threats; and (Hi) that if the third party is successful in his attempts and the purchaser is evicted, the seller will make good to the purchaser such loss as he may have suffered. This will be the equivalent of the purchase price, legal costs incurred by the purchaser in resisting the claim, improvements he has made to the property and any other damages which the purchaser may have incurred by reason of the seller's breach of contract. "*

It is clear from the evidence led that the Defendant breached this implied warranty and failed to protect the Plaintiffs possession from the successful eviction of the *merx* by the Police. Ordinarily, this should lead the Court to finding in the Plaintiffs favour, subject to the Court's finding on whether the exceptions to the application of the warranty exist *in casu.* These are the following:-

(i) where the parties agree otherwise and the seller is acting in good faith;

(ii) where the purchaser is aware, at the time of the sale agreement is concluded, that a third party is the owner; and

(iii) where the cause of dispossession arose after the sale and was not due to the seller's fault. See Butterworth Forms and Precedents *(supra)* at page 610.

In respect of (i) immediately above, it is clear from the evidence that there was no agreemei otherwise than that the warranty was to operate. Furthermore, thefe can be no doubt that th. Defendant did not act *bona fide.* He concealed facts which if he had disclosed to the Plaintifl before the conclusion of the sale, would have precluded or persuaded the latter from entering into the contract i.e. the fitted engine, the registration of the vehicle and the earlier impoundment. All these were revealed at different stages after the conclusion of the sale agreement.

Regarding (ii), there is no suggestion, intimation or evidence that the Plaintiff knew or had reason to believe that a third party was the owner or had a right to evict the Plaintiff from possession of the *merx.* There is also no allegation or evidence that the cause of the dispossession only arose after the sale. All the indications are that there was nothing done or allowed to be done to the vehicle after the sale that caused or led to the eviction of the Plaintiff. Wesselswork entitled, "The Law of Contract in South Africa, Vol. II, 1937, says the following at page 1237 para. 4595:-

> *"We may remark that as a general rule the causa evictionis must not have arisen after the contract of sale in concluded, for after the conclusion of the sale, the risk is with the purchaser. "*

As stated above, it is clear that there is nothing after the conclusion of the sale which could have led to the conclusion that the risk lay with the purchaser, the Defendant herein.

As will be seen from the Pleadings, the Plaintiff claims cancellation of the contract, *restitutio in integrum* and a return of the purchase price. In respect of the issue of cancellation, R.H. Christie, in the work entitled "The Law of Contract in South Africa," 3rd Edition, Butterworths, 1996, states the following at page 597:-

> *"Notice of cancellation must be clear and unequivocal, and takes effect from the time it is communicated to the other party. If it has not previously been communicated, it takes effect from service of summons or notice of motion. "*

I hold therefore, in view of the service of summons that ***in casu,*** the notice of cancellation w communicated and took effect on service of summons. In view of the materiality of the breac ***in casu,*** I hereby grant the Order for cancellation.

There are difficulties regarding *restitutio in integrum* in this case. Classen's Dictionary of Legal Words and Phrases, Vol.4, Butterworths, 1977, describes the above remedy at page 15 as follows;-

> *"Restitution in full, by which the parties to a contract are restored to the same position as they occupied before the contract was entered into... Where there is a claim for restitution, there must be a tender to return what has been received."*

The peculiar circumstances of this case clearly indicate that restitution is not possible. Firstly, there was no tender by the Plaintiff to return the *merx* and in point of fact, it was virtually impossible to do so having regard to the lawful confiscation of the merx. I am, in the circumstances, especially in view of the stark absence of a tender for the return of the merx, of the view that an order for *restitutio in integrum* is incompetent and I decline to grant it.

It is however clear that the Defendant breached the warranty against eviction and the circumstances of the case are such that he was aware of the defect in the motor vehicle and concealed these material facts until after the conclusion of the sale agreement. In the circumstances, I am of the view that the Plaintiff is entitled to a return of the purchase price, in addition to the cancellation of the contract.

In sum, I grant the following prayers.

(1) Cancellation of the contract

(2) A refund of the purchase price of El 8,000.00 to the Plaintiff by the Defendant; and

(3) Costs of the suit.

T.S. MASUKU