ENOS MARIMO
versus
MR BRANCOS
and
BRANCOS PANEL BEATERS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
CHINHENGO J
HARARE 10 May and 21 August 2002

H. Simpson, for the plaintiff
A. Nagar, for the defendants

CHINHENGO J: This is a special case in terms of Order 29 of the High Court of Zimbabwe Rules, 1971. The question in dispute is one of law. The parties have agreed on the facts and in terms of Order 29 Rule 204 I may give judgment without hearing any evidence.

The facts agreed upon by the parties are the following. The first defendant operates a panel beating business and is also a used car dealer. Prior to April 1997 the plaintiff had purchased a Mazda 626 motor vehicle from the first defendant.

In April 1997, the plaintiff purchased from the first defendant a Toyota Hilux pick-up with registration numbers 617-536T for the sum of $90 000. The first defendant had himself purchased the same motor vehicle from a Mr N. Keown. The plaintiff paid the purchase price and took delivery of the motor vehicle.

On 3 November 2000, the plaintiff attempted to sale the motor vehicle at a public auction. At the sale the motor vehicle was impounded by the Department of Customs and Excise who demanded an outstanding import tax and surtax in an amount of $254 053,51. The plaintiff informed the first defendant immediately of the impounding of the motor vehicle and of the demand for the payment of the import tax and surtax. The first defendant, as seller, did not take up the matter with the Department of Customs and Excise on behalf of the plaintiff. On 9 July, 2001 the plaintiff paid the import duty and surtax in order to secure the release of the motor vehicle. The plaintiff also paid storage charges in an amount of $24 757,70 to secure the release of the motor vehicle. He also paid $3 968,65 being the cost of a new battery. The defendants have failed and refused to reimburse the plaintiff these amounts.

On these facts the issues placed before me for determination are these –

1. Whether or not the first defendant, as the seller and a car dealer, was under an implied contractual duty to sell and deliver the motor vehicle free from any encumberance?

2. Whether there was a duty on the seller (the defendants) to intervene on plaintiff's behalf after the motor vehicle had been impounded by the Department of Customs and Excise.

3. Whether the defendants are liable to reimburse the plaintiff with those amounts which he has paid to secure the release of the motor vehicle?

4. Whether the defendants have any valid defence for their refusal to reimburse the plaintiff?

It is not in dispute that the parties entered into a contract of sale of a motor vehicle. The first issue for determination raises the question whether in a contract of sale it is an implied term of the contract that the *res vendita* is free from any encumbrances. It will, in my view, be quite hazardous to lay down a general principle of law arising from this question. Encumbrances on property sold may be of many and different kinds and their nature equally varied. There will be cases, in my view, where the freedom from encumbrances of a *res vendita* will depend on the facts of the case so that as a general rule is will not be possible to say that there is an implied term that the *res vendita* is not encumbered in any way. I will therefore restrict myself to the specific facts of this case.

The first defendant is a motor car dealer. This means he buys and sells motor vehicles as his business. A motor vehicle, at any time, is owned by someone and as such a motor car dealer either sells a motor vehicle which he himself owns or sells a motor vehicle owned by someone else for a commission. Generally speaking, in so far as the purchaser of a motor vehicle from a car dealer is concerned, that motor vehicle, unless expressly stated, is sold subject to the purchaser paying the purchase price and becoming the owner of the vehicle. It will be in the contemplation of the seller and the purchaser, indeed their intention, that upon payment of the purchase price stipulated and the talking of delivery, the motor vehicle becomes the property of the purchaser without the purchaser having to pay any other costs which should have been built into the cost of the motor vehicle so sold. That this should be an

implied term of the contract of such sale is so universal and notorious that the seller's intention to be bound by it can be safely presumed. It is necessary to clarify that this implied term is not one implied by law but one which aptly described by Christie in *The Law of Contract,* 3 ed. as a tacit term of a contract. A term implied by law is an unexpressed provision of a contract which is the law imports therein as a matter of course without reference to the actual intention of the parties and such a term cannot normally be in conflict with the express provisions of the contract. See *Alfred McAlpine & Son (Pty) Ltd v Tvl Provincial Administration* 1974 (3) SA 506 (A) at 531. Christie (op cit) says at p 179:-

> "The origin of many terms now implied by law was no doubt the idea that any, or at least any honest party entering into a particular type of contract would want to include such a term in it, but once the law has settled on a particular term it is fruitless to inquire into the intention of the parties except to the extent of ascertaining whether they have exercised their privilege of expressly excluding the term that would otherwise be implied as when a sale is made *vootstoots*. A term that would normally be implied by law may also be excluded because it would conflict with the express terms of the contract."

A term implied by law is thus clearly distinguishable from a tacit term which is a term implied from the facts described in *Alfred McAlpine (supra)* at 531-2 as –

> "… an unexpressed provision of the contract which derives from the common intention of the parties, as inferred by the Court from the express terms of the contract and the surrounding circumstances. In supplying such an implied term the Court, in truth, declares the whole contract entered into by the parties."

See also Christie (op cit) at p 187 – 194.

In order for me to decide whether a tacit term is to be implied I must of course examine the express terms of the contract between the parties. (*Pan American World Airways Inc. v SA Fire and Accident Insurance Co Ltd* 1965 (3) SA 150 (A) at 175C). The contract was a verbal one. It was preceded before April 1997 by another such contract in terms of which the plaintiff had purchased another motor vehicle from the defendants and had not been faced with a problem similar to the one which arose in respect of the Toyota Hilux. If the parties had been asked whether the plaintiff would be expected to pay the customs taxes they would have said, to paraphrase the words of SCRUTTON LJ in *Reigate v Union Manufacturing Co. (Ramsbotton)* [1918] 1KB 592 at 605 "We did not have to say it but, of course, the buyer is not required to pay anymore than the purchase price which he has paid i.e.

$90 000." It is quite clear to me that it was a tacit term of the contract that the motor vehicle purchased by the plaintiff was free from any encumbrances in particular that there would be no customs duty or surtax to which the plaintiff would be liable after paying the purchase price. The motor vehicle was in any case owned by the defendants which fact adds more weight to the finding that such was a tacit term of the contract. The bystander test adumbrated in *Smith v Minister of Land and Natural Resources* 1979 ZLR 421 at 426 and in *Chinyerere v Frazer N.O.* 1994 (2) ZLR 234 is clearly applicable and leads inevitably to the conclusion that the defendants as sellers would have been liable for payment of any outstanding dues in respect of the motor vehicle to the Department of Customs and Excise. The first issue is therefore answered in favour of the plaintiff. I do not agree with the submission made by counsel for the defendants in her heads of argument that the implied term here is one implied by law.

The second issue is whether when the department of Customs and Excise moved to impound the motor vehicle, there was any duty on the defendants to intervene on the plaintiff's behalf so as to ensure that the motor vehicle was not impounded. It is not in dispute that the plaintiff immediately informed the defendants about the impounding of the motor vehicle and the demand for import duty and surtax. It was submitted on behalf of the plaintiff that the defendants had a duty to intervene by addressing the concerns of the Department of Customs and Excise so that the plaintiff was not prejudiced. The defendants agree as much but it was submitted on their behalf that that duty only arises for the seller where legal action has been taken against the purchaser and not just any "indeterminate action". It was further submitted that that duty arises for the seller where the action taken against the purchaser is lawful. The defendant's counsel also submitted that where there is a duty upon the seller to intervene, there is upon the purchaser a corresponding duty to put up a *virilis defensio*.

The duty of the seller which in principle is admitted by the defendants arises from what is generally known as "the warranty against eviction" and it creates the duty on a seller to intervene in order to protect the seller. It seems obvious to me that such a duty arises for the seller where the dispossession is not as a result of some criminal activity such as theft for, quite obviously, such activity falls outside the scope of the warranty. I do not agree that it can be widely stated, as was stated in the

defendant's heads of argument, that the "warranty against eviction can only apply where the eviction is lawful." because, to my mind, it is the lawfulness or otherwise of the eviction that is tested by the seller's intervention or by the purchaser putting up a *virils defensio*. As to the meaning of *virilis defensio* see *Kanokanga v Evans & Ors* 2000 (2) ZLR 41 (H) and the cases therein cited.

In dealing with the submissions made for the defendant, I will have to examine two issues in particular. First, whether the duty on the seller arises only where legal action had been taken against the purchaser. Second, and accepting that the purchaser must put up a *virils defensio,* whether such was called for in the circumstances of this case.

On the first submission, it was contented for the defendants that –

> "the duty to intervene is only cast upon the seller of the goods if a third party commences a court action against the purchaser seeking to disposes the latter … *In casu,* of course, no such action was ever commenced. Therefore it cannot be claimed, with respect, that the defendants ought to have stopped the plaintiff from making payments of duty to the Department of Customs as the plaintiff had the option to explore his legal rights and act on the advisement of his appointed legal practitioners."

I think that the defendants' position has again been overstated on this point. The law does not require that an action should have been commenced against the purchaser for him to be able to claim against the seller. It may be the position that in most of the decided cases legal action had been commenced against the purchaser before the purchaser could ask for the seller's intervention but that does not establish a principle such as has been argued for the defendants in this case. My reading of cases such as *Oliver v Van Der Bergh* 1956 (1) SA 802 (C) does not lead to such a conclusion. I am satisfied that if a demand is made against the purchaser and such demand appears to him sustainable at law, the purchaser may call upon the seller to intervene to ensure that he is not evicted. I would again find for the plaintiff on this point.

The only argument which favours the defendants is that the plaintiff should have put up a *virilis defensio*. A *virilis defensio* must be made where the third party's claim is not unassailable. Where the claim is unassailable, the purchaser is not required to put up such a defence. See again *Kanokanga v Evans & Ors (supra)* and *Moyo v Jani* 1985 (1) ZLR 112 (H). The argument made for the defendants is that the claim by the Department of Customs and Excise was not unassailable. It was

argued that the seizure of the motor vehicle was in breach of s 193(3) of the Customs and Excise Act [*Chapter 23:02*] because the extinctive period of two years had expired when the motor vehicle was seized by the Department of Customs and Excise. Section 193(3) provides that –

> "No seizure shall be made in terms of subsection (1) where more than two years have elapsed since the articles first became liable to seizure or where such articles have been acquired after importation for their true value by a person who was unaware at the time of his acquisition that they were liable to seizure:
>
> Provided that –
>
> (i) goods imported in contravention of section *forty-seven, fourty-eight* and *one hundred and seventy-five* or exported or attempted to be exported in contravention of section *sixty-one* shall be liable to seizure at any time from any person;
>
> (ii) proof that a person was unaware that the goods he acquired were liable to seizure shall lie on him."

The first proviso is not relevant.

It is agreed that the plaintiff bought the motor vehicle in April 1997 ad that the motor vehicle was impounded on or about 3 November 2000 when the plaintiff attempted to sell it at an auction. It is also agreed that the motor vehicle had been owned by a Mr Keown before it became the defendants property. Quite clearly a period of more than three years had elapsed from the time that the said Mr Keown owed it to the time that it was impounded in the hands of the plaintiff who had possessed it for at least three years. It is not clear on the facts as to when the motor vehicle first became liable to seizure. But whatever that time may be the motor vehicle was liable to seizure for the whole period from when it was purchased first by the defendants and then by the plaintiff. The plaintiff submitted that he had no knowledge of the date when the motor vehicle became liable to seizure and that it was the defendants' duty to ascertain this fact and to intervene on his behalf. I do not agree. As I stated the date from which the motor vehicle became liable to seizure is self-evidently before the plaintiff bought it which was on or before November 1998.

In an action based on a warranty against eviction, the purchaser is not absolved, unless the third party's claim is unassailable, from putting up a *virilis defensio* merely because the seller has not intervened or assisted the purchaser in any other way. The inactivity of the seller is not a licence for the purchaser to give up possession or ownership without putting up a reasonable defence. It seems to me that in this case when the Department of Customs and Excise demanded the payment of the outstanding import taxes, the plaintiff, in defendants' counsel' words "just rolled over and submitted without question" to pay the taxes demanded and as such he made a "gratuitous and voluntary gift to the State". It may well have been the position, if the facts were different, that it was the

defendants only who could have provided the means of resisting the claims by the Department of Customs and Excise by producing the import papers. But on the facts of this case and having regard to the provisions of s 193(3) of the Customs and Excise Act, in particular, the extinction of the period within which the seizure was competent and the fact that the plaintiff was a purchaser for the true value of the motor vehicle and was unaware at the time of the purchase that the motor vehicle was liable to seizure, there seems to me to have been no excuse for the plaintiff's failure to put up a *virilis defensio*. The provisions of s 193(3) did not require the defendants to have assisted the plaintiff in order for the plaintiff to defeat the Department's claims.

The plaintiff did not in his pleadings or in the prayer to the summons allege that the Department of Customs and Excise's claim was unassailable or that he put up a reasonable defence against the department's claims. That failure to allege in the pleadings, and in any manner whatsoever to put up a reasonable defence is fatal to his claim. I am satisfied that the seizure of the motor vehicle may not have been warranted and that the plaintiff should have put up a reasonable defence on the basis of s 193(3) of the Customs and Excise Act. He failed to do so and he has himself to blame.

Accordingly the plaintiff's claim is dismissed with costs.

Mushonga & Associates, plaintiff's legal practitioners.
Messrs Scanlen & Holderness, defendants' legal practitioners.