

MAXWELL CHIWESHE
versus
TINOTENDA SAKI
and
NYASHA SAKI

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 24 June 2012, 27 November 2012

Civil Trial

S. Ushewekunze, for the plaintiff
C. Mucheche, for the defendants

DUBE J: This is a delictual claim for delivery of a vehicle or alternatively payment of damages. At the beginning of the trial the plaintiff withdrew its claim against Kudzai Shaba.

The dispute between the parties arises from the following brief facts. On 25 August 2008 Kudzai Shaba, acting as an agent of the first and second defendants sold to the plaintiff a Mercedes Benz C180, 2004 model. Sometime in February 2009 the plaintiff was arrested by the South African Police Service, SAPS, for possession of a suspected stolen motor vehicle. The vehicle was impounded and the plaintiff was charged, convicted and fined for possession of the vehicle. The plaintiff's claim is for an order jointly and severally against the defendants for delivery of a 2004 model Mercedes Benz, C180 Compressor, or alternatively \$13000,00, being the average price of the vehicle at present, R15000,00 in damages, being money which he paid as an admission of guilt fine. The plaintiff contends that the defendants are responsible for the loss and expenses he incurred as they sold him a stolen vehicle.

The first defendant admits instructing Kudzai Shaba to sell the vehicle in issue on his behalf but contends that the motor vehicle he sold to the plaintiff and the motor vehicle impounded by SAPS are two different vehicles. He denies that he knew that the vehicle he sold was stolen and denies making a misrepresentation to that effect. He maintains that the plaintiff should not have pleaded guilty to the offence of being found in possession of stolen property in the absence of evidence that the vehicle had been reported stolen. The second defendant denies that she was involved in the sale of the vehicle.

The issues referred to trial are as follows.

- “1. Whether or not the defendants are jointly and severally liable to deliver to the plaintiff a Mercedes Benz C180 motor vehicle or alternatively pay damages in the sum of US13000.00 together with interest thereon?
2. Whether or not the defendants are jointly and severally liable to pay the plaintiff damages in the sum of R15000.00, together with interest thereon?”

The plaintiff testified as follows. He was approached by Kudzai Shaba sometime in August 2008 and he was selling a Mercedes Benz C180 Compressor 2004 model registration number ABD 8845, Chassis number WDC 2030462R076039 and engine number 27196430008191. He bought the vehicle for Z\$16 million and he was given a customs clearance certificate and registration book in the name of Brightgin Investments. The Customs Clearance Certificate indicated that there was a change of ownership from Brightgin Investments into his name. All he was required to do was to go to the Central Vehicle Registry, (hereinafter referred to as CVR) or the Post Office to get new vehicle registration plates and a new registration book in his name. He started to drive the car using the Customs Clearance Certificate and the old registration book because vehicle plates were not available at that time. Sometime in February 2009 he visited South Africa. Before he embarked on his journey, he took the vehicle registration book, agreement of sale and customs clearance certificate for clearance at the Vehicle Theft Squad, (hereinafter referred to as VTS) and the vehicle was cleared. He travelled to South Africa and on his way back he was arrested by SAPS at the Beitbridge Border Post. They alleged that the vehicle he was driving was reported stolen in South Africa. The engine and chassis numbers of his vehicle matched those of the suspected stolen vehicle. He was shown details on computer that revealed that the vehicle had originated in South Africa and that it was reported stolen from that country. He was convinced that the vehicle had been stolen from South Africa. The vehicle was confiscated together with the original Zimbabwean registration book. He was taken to court where he pleaded guilty to the offence of possession of a suspected stolen vehicle and was fined R15000.00.

When he returned to Zimbabwe he reported the matter to the police resulting in the arrest of Kudzai Shaba. Kudzai Shaba led him to the defendants who he indicated as the ones who gave him the vehicle to sell. He met the first and the second defendants who agreed to refund him \$11500.00 which is what they had received from Shaba. The defendants explained to him that they had bought the vehicle from Fungai Kangai, (Kangai). Later the police advised him that Kangai had been interviewed and released. The indications from

police investigations were that Kangai had bought the vehicle from another person. The witness offered to go to South Africa with the defendants so that they could confirm that the vehicle had indeed been impounded and they did not cooperate.

The plaintiff carried out further investigations and confirmed that the vehicle allegedly stolen in South Africa was manufactured in South Africa in 2002. Its engine and chassis numbers are similar to those on the vehicle he had bought. Its white and was first bought by McCarthy Ltd in 2006 and registered under NXS 469 GP. S.M. Mguni later bought the vehicle on 25 April 2007 and allegedly did not pay for the vehicle as he was using fraudulent documents through Standard Bank of South Africa. The engine and chassis numbers of the vehicle bought by Mguni correspond with those of the vehicle sold to him. Records indicate that the vehicle went missing in South Africa on 28 April 2007 and the vehicle comes back into the system on 18 February 2009 when it was impounded. From then on it was taken back to McCarthy Ltd in South Africa which later disposed of the vehicle. The vehicle is currently owned by one Jacobs.

Upon making enquiries with CVR, he was advised that vehicle registration number ABD 8845 was registered with them in June 2006. Although it is registered as a diesel vehicle, it is a petrol vehicle. They could not confirm the origins of the vehicle and kept referring him to ZIMRA and the suggestion was that it originated from Singapore. The vehicle had not been reported stolen in Zimbabwe. The plaintiff is of the firm view that the vehicle sold to him was stolen from South African as the Zimbabwe Revenue Authority, ZIMRA has no records regarding the importation of the vehicle.

The plaintiff resolved to sue the sellers for the recovery of the vehicle. He refuted suggestions under cross examination that he was involved in the theft of the vehicle because he was employed by Stanbic Bank Zimbabwe, a sister bank of Standard Chartered Bank of South Africa through whom S M Mguni stole the vehicle. He insisted that the vehicle he bought was stolen from South Africa. The witness was subjected to lengthy and gruelling cross examination. He gave his evidence well and remained consistent with his story.

The first defendant is a mechanic and he is a director of Accident Panel Beaters. The second defendant is his mother. He testified that the vehicle in issue, a Mercedes C180 was brought to his garage by Kangai for panel beating and he repaired it. Kangai failed to meet the cost of the repairs. The witness had a Mercedes Benz which he was selling. He entered into "a swop deal" and exchanged his vehicle with the one that Kangai had brought. He contacted the CVR and he was advised that the vehicle was clean and the exchange went

through after he was satisfied that the vehicle was registered in the name of Brightgin Investments. No change of ownership of the vehicle into his name was effected as he intended to sell the vehicle. Later he gave the vehicle to Kudzai Shaba to sell and that is how the plaintiff purchased the vehicle. He insisted that he did not know that the vehicle in issue was reported stolen as there was nothing to show that it was stolen. CVR indicated to him that the car had been imported from Singapore . He denied that the plaintiff offered to take him to South Africa to confirm that the vehicle had been impounded. I found the witness evasive especially with regards questions directed at the origins of the vehicle under cross examination. The witness was not very impressive.

The second defendant testified that she is a director of Accident Panel beaters. She confirmed the defendant's story that the vehicle was brought to their garage by Kangai for repairs. After Kangai failed to pay for the repairs he entered into an exchange agreement with his son resulting in the first defendant taking ownership of the vehicle in issue. She was not directly involved in the acquisition of the vehicle. She was aware of the swop but was not aware that this vehicle had been sold to the plaintiff until after the plaintiff made a report to the police. The police wanted to arrest the first defendant and she pledged her vehicle a Mercedes S280. The pledge was that if Kangai was not located, she would reimburse the plaintiff. She made this arrangement because she did not want her son to be arrested. She did not give the plaintiff the pledged vehicle as Kangai was subsequently located, interviewed and cleared by the police.

Kangai is a friend of the first defendant. He gave evidence to the following effect. He purchased the vehicle in issue from a representative of Brightgin Investments, Kennedy Machinga in June 2008 for his parents. He took it to CVR and VTS for a clearance check and they confirmed that the vehicle was in the system and he could purchase it. He lost the agreement of sale he signed with Kennedy Machinga. The vehicle was later involved in an accident and he took the vehicle to the first defendant for panel beating. He failed to raise money for the repairs and the first defendant offered him an older Mercedes Benz model vehicle in exchange for the accident damaged vehicle. He got a vehicle of lesser value and he received top-up cash from the first defendant. He signed an agreement of sale with the first defendant. He produced an agreement of sale of a Mercedes Benz registration number ABD 8845 with chassis and engine numbers. He went with the first defendant to CVR for a vehicle check and took the book as well. Both the VTS and CVR gave him the go ahead to purchase the vehicle after it was checked and was confirmed to be in the system. The vehicle was a C

Class Mercedes Benz 2002 or 2004. The witness did not pay Value Added Tax when he purchased the vehicle from Brightin Investments as he did not change ownership of the vehicle into his name. His evidence was intended to show how the first defendant ended up owning the vehicle in issue.

The plaintiff submitted that the defendants failed in their legal obligation as sellers to protect the plaintiff against dispossession of the motor vehicle by third parties in that they failed to grant the plaintiff undisturbed possession and hence failed in their common law duty of implied warranty against eviction. The defendants' stand is that the vehicle impounded in South Africa is not the same vehicle sold to the plaintiff and further that the plaintiff failed to adduce credible evidence to support the allegation of theft of the disputed vehicle. That there is no basis upon which the plaintiff can state that the defendants breached the implied warranty against eviction.

The first defendant is being jointly sued with his mother. The evidence led discloses that the second defendant was not directly involved in the sale of the vehicle and did not even know the plaintiff until after the report to the police. She only knew that the vehicle was given to Shaba to sell. Her testimony to this effect went unchallenged. The claim against her is based on the claim that Kudzai Shaba told the plaintiff that his instructions were from both defendants. No evidence was led to that effect and Kudzai Shaba was not called as a witness to confirm that these instructions were from both defendants. Her explanation was that she pledged her vehicle because she did not want her son to be arrested and not because she was a party to the contract was not disproved. She has not been linked directly to the sale of the vehicle. Ultimately the claim against her is dismissed.

I now turn to determine the issues that fall for determination. The first issue that this court is required to resolve is whether the vehicle that was impounded is the same vehicle the plaintiff bought from the defendants. There was clear and satisfactory evidence from the plaintiff that he drove a white Mercedes Benz C 180 registration number ABD 8845 white in colour into South Africa and that it was subsequently impounded. Documents from SAPS confirm that the vehicle he was found in possession of is ABD 8845 and its chassis and engine numbers match those of the vehicle plaintiff bought. I have difficulties in comprehending the defence submission that the evidence led establishes the existence of three vehicles. The suspected stolen vehicle had a different registration number previously allocated to it in South Africa under NSX 469 GP. The story is that it was then stolen and brought to Zimbabwe under ABD 8845. The year of manufacture of the vehicle the plaintiff

bought is given as 2004 but there is no proven basis for this position. This does not make it a different vehicle from ABD 8845 or the vehicle in issue. The evidence establishes that the vehicle impounded is the vehicle the plaintiff bought from the first defendant. It is clear that the plaintiff drove the vehicle he bought into South Africa.

It is common cause that the vehicle in issue was not reported stolen in Zimbabwe. The next question is whether there is evidence to support the assertion that the vehicle had been stolen in South Africa. South African police had a report of theft of a vehicle with a similar description. The chassis and engine numbers of the plaintiff's vehicle are identical to those of a vehicle stolen in South Africa. This fact is confirmed by documents and correspondence from South Africa. The coincidence that two vehicles of the same make and colour share identical engine and chassis numbers is out of the ordinary. A vehicle is identified by its engine and chassis numbers. This confirms that we are talking of the same vehicle. The only difference between the two cars is the year of manufacture. The South African records show that the vehicle was manufactured in South Africa in 2002. It is not clear where the year 2004 recorded in Zimbabwe originates from as ZIMRA has no record regarding the importation of the vehicle. The vehicle is recorded as a diesel vehicle when it is a petrol vehicle. This simply shows that the records in Zimbabwe were doctored. The fact that Interpol may not have had a report of the theft does not detract from the fact that the vehicle was reported stolen in South Africa and was indeed stolen there.

There is a clear sequence of ownership of this vehicle from the time of manufacture up to date. The only time that the vehicle could not be accounted for in South Africa is during the period that the vehicle was in Zimbabwe up to the time it was impounded. The vehicle disappears when Mguni fraudulently purchases the vehicle at Andy Low Motorverkope using fraudulent documents and steals the vehicle in 2007. It surfaces in Zimbabwe in 2008 when Kangai buys it. This again shows that we are dealing with one vehicle.

The origins of the vehicle the plaintiff bought are unknown in Zimbabwe. The registration book does not reflect the previous registration before Brightgin Investments. It is not clear from the evidence where Brightgin Investments in whose name the vehicle is registered acquired the vehicle from. It boggles the mind how Brightgin Investments was able to register the vehicle and get a vehicle registration book without importation papers. Although the vehicle was reportedly made in Singapore, there is no actual record of its origins and importation into Zimbabwe. This confirms the suspicion that the vehicle was improperly brought into the country. All those who checked the record of this vehicle seem to

have received confirmation from the relevant authorities that the vehicle was clean. The evidence suggests that the vehicle in issue had previously been stolen or fraudulently acquired in South Africa and later smuggled into the country and fraudulently and improperly registered as both CVR and ZIMRA have no import documents and clear and reliable history of the vehicle. The letter from SAPS and record of the vehicle from South Africa show clearly that this vehicle originated in South Africa whilst there is no clear record in Zimbabwe. It seems to me that SAP'S allegations of theft are unassailable. The probabilities are that the vehicle was stolen in South Africa

The plaintiff led evidence from only himself. The court is satisfied that he gave clear and satisfactory evidence. His evidence is corroborated by documents he produced in support of his case. The plaintiff did not lead oral evidence from SAPS, VTS, ZIMRA and CVR or any other person from South Africa to support the claim of theft. The plaintiff relied on documents from these agencies and that were admitted with the consent of both parties. Defendants in their submissions sought to challenge the admissibility of the documents after they were already admitted in evidence. Its a belated challenge. Both ZIMRA and VTS submitted documents confirming that there were no documents relating to the importation of the motor vehicle. Exhibit 7 which was admitted with consent of both parties shows that ZIMRA could not find documents relating to the importation of the vehicle. This fact was not challenged and there was no need to lead evidence to prove that fact. CVR produced details of the registration of the vehicle under exhibit 8 and 9. They had no record of the theft of the vehicle and left the issue of origin of the vehicle to ZIMRA. There was no issue regarding their position. The affidavit of the plaintiff's lawyer in South Africa, Khathushelo Sikala confirms the plaintiff's story that plaintiff's vehicle was impounded and the vehicle was detained at Musina. Documents and correspondence from SAPS outline the history of the vehicle in issue in South Africa and were also admitted with consent.

The defendants tried to make a meal of the point that theft is different from fraud and that it was not clear how the vehicle was stolen. What is clear from the evidence is that Mguni fraudulently;using fraudulent papers was able to buy the vehicle without paying for it and thus deprived the owner of its vehicle and thus stole the vehicle.

The court will now deal with the defendants' contention that the plaintiff did not put up a *virilise defensio* against the claim by South African Police as he pleaded guilty before the principal perpetrator, the thief, was apprehended. That he is not entitled to any claim against the seller.

An implied warranty against eviction is a warranty where the seller undertakes undisturbed use of the merx to the buyer and warrants that the buyer will not be evicted by a 3rd party with a stronger title to the merx. If the merx is taken away, the buyer is entitled to a refund. JTR Gibson in *Mercantile and Company Law*, 5thed, Juta and Company Ltd 1983 explains the warranty as follows:-

“The implied warranty against eviction is no more than a term implied by law in a contract of sale by virtue of which the seller undertakes that the buyer will not be disturbed whether by the seller himself or by a third party in his *vacuo possession*, as a result of any defect in his title should there be a threat to the buyer’s possession it is the duty of the seller to spring to his defence even before actual eviction by judicial process takes place”.

In order for a buyer to be successful in a claim such as this, he must satisfy the following requirements.

- (a) There must be an eviction
- (b) If the buyer retains possession of the merx, notice of the threatened eviction must be given to the seller so that the seller may assist the buyer in his defence against the third party.
- (c) The purchaser should not give up possession voluntarily unless the right of the third party is clearly unassailable and beyond doubt not only against himself but against the seller as well. The buyer is expected to conduct a proper defence – known as “*virilis defensio*” to the third party’s claim.

The term *virilise defensio* has been interpreted in a number of cases. In *Moyo v Jani* 1985 (1)ZLR 112 (H)MFALILA J said at p 121:

"The most important factor which a purchaser must establish before he can successfully proceed against his vendor is that the third party's title is legally unassailable; a mere demand which has been accepted as valid by the purchaser is (the word "not" has surely been omitted here) enough to entitle the purchaser to sue his vendor upon the warranty against eviction."

The facts of this case are similar to those in *African Distillers LTD v Matabeleland Tractor Services (PVT) LTD* 1997 (2) ZLR 503 (SC). The facts of this case are briefly that a company bought a motor vehicle from the respondent. An employee of the company drove the vehicle to South Africa, where it was impounded by the police because it had been stolen in South Africa some years earlier. The company claimed the return of the purchase price from

the respondent, which raised the defence that the company had failed to conduct a *virilis defensio*, that is, to resist strongly the true owner's claim. The court held that,

” the law today is that the buyer is not obliged to put up any, let alone a vigorous, defence against the true owner on pain of being unable to recover from the seller. If the true owner's claim is shown on a balance of probabilities to be good, a *virilis defensio* would achieve nothing. As the facts in this case showed that the true owner's claim was clearly good, the appellant was entitled to succeed.”

The court made it clear that a purchaser does not have to put up a “skilful or superior defence”

What needs to be considered is whether the plaintiff acted properly by giving up possession of the vehicle. The claim by SAPS was based on reasonable suspicion of commission of an offence. The police had a vehicle reported stolen in their country and they had just encountered the plaintiff in possession of a vehicle whose chassis and engine numbers matched those of the stolen vehicle. The plaintiff was shown details of the vehicle stolen in South Africa and he was convinced that the vehicle was reported stolen and was the same vehicle he was driving. The plaintiff was dispossessed of the vehicle and has up to now not recovered it. The police acted reasonably in impounding the vehicle. The claim by SAPS was good. The plaintiff's conduct has to be viewed from the understanding that the case being investigated was a criminal case that involved the police. Any resistance would have been useless as the police would have impounded the vehicle anyway. The plaintiff could not be expected to put up any vigorous defence when faced with allegations of possession suspected stolen property theft by the police. Where a buyer is consequently dispossessed of the merx based on theft allegations, the test to determine whether the buyer conducted a *virilise defensio* should be less onerous. Once it is established at the time of arrest that there is reasonable suspicion that the vehicle is stolen, there is nothing much the buyer can do except to hand over the vehicle. This case is different from a civil claim where one can resist the eviction or dispossession and still remain holding onto the merx until after litigation. The plaintiff satisfied himself first that there was reasonable suspicion of commission of theft before acceding to the demand to hand over the vehicle. Such conduct is reasonable. He did not in my view give up possession voluntarily and without good cause. His conduct is reasonable in the circumstances. In *Kanokanga v Evans & Ors* 2000 (2) ZLR 41 (HC) the court held that nothing more is required of a buyer threatened with eviction than that he acts reasonably. I have come to the conclusion that the plaintiff has shown on a balance of probabilities that the claim to the vehicle by SAPS was good and unassailable.

The plaintiff was charged with the offence of possession of suspected stolen property. That offence is created by s 36 of the General laws Amendment Act 62 of 1955 of South Africa. The suspect must be found in possession of the property in question by a peace officer and there must be suspicion on the part of the peace officer that the vehicle had been stolen. The key essential requirement of this charge is that the person charged is unable to give a satisfactory account for such possession. The plaintiff claims that he did not know that the vehicle was stolen and yet he pleaded guilty to the offence. The plaintiff's lawyer in South Africa advised him to plead guilty to the charge. He proceeded and paid an admission of guilt fine. While it is accepted that the vehicle may have been or was suspected to have been stolen, the plaintiff certainly had a reasonable explanation for his possession of the vehicle and had a plausible defence. The plaintiff was inappropriately advised to plead guilty in the circumstances. The defendant cannot be penalised for the plaintiff's bungling. I am not satisfied that the plaintiff has proved his claim with regards to the fine he paid.

An order for delivery of the same vehicle is incapable of performance as the vehicle was returned to the owner and subsequently sold to another person. The plaintiff did not lead any evidence to prove the average price of the vehicle at present. A fair sum is what the first defendant received from Shaba as payment for the vehicle.

Accordingly, the plaintiff is awarded damages in the sum of \$11 500 .00 together with interest at the prescribed rate.

Costs follow the event.

Marching & Partners, plaintiff's legal practitioners
Mucheche Matsikidze & Partners, defendants' legal practitioners