

FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

CASE NO:4439/2007

In the matter between

MARIUS EKSTEEN

PLAINTIFF

and

ABSA BANK LIMITED

DEFENDANT

NEDBANK LIMITED

FIRST THIRD PARTY

TOPSY WILTON

SECOND THIRD PARTY

CORAM: NXUSANI, A.J.

HEARD ON: 17 JUNE 2009

JUDGMENT BY: NXUSANI, AJ

DELIVERED ON: 30 OCTOBER 2009

JUDGMENT

[1] The action which came before me concerns a warranty against eviction in a contract of sale. It is alleged by the Plaintiff that a breach of the sale occurred.

- [2] The Plaintiff purchased a 1999 Toyota Land Cruiser 100 VX on the 12th May 2000 at Bloemfontein. The Plaintiff had negotiated with one Dr G.J. Van Niekerk of East London for the purchase of the vehicle.
- [3] The Plaintiff entered into an oral agreement with the BOE Bank for the sum of R460 000,00. Dr G.J. Van Niekerk was a customer of the BOE Bank and was in possession of the vehicle pursuant to a written instalment sale agreement that he had with the BOE Bank during 1999.
- [4] The Plaintiff and Bankfin, Absa Bank Limited trading as such, entered into the instalment sale agreement on 12 May 2000. The Plaintiff paid cash in the amount of R240 000,00 and the balance of the purchase price was to be financed in terms of an instalment sale agreement.
- [5] The Plaintiff retained the vehicle for five years and at the end thereof ownership to the vehicle passed into his name. In the last quarter of 2005 the Plaintiff decided to sell the vehicle to one Johannes Stefanus Hugo for the amount of R360 000,00. The Plaintiff delivered the vehicle to Hugo.

- [6] On the 16th March 2006 the South African Police Services seized the vehicle presumably in terms of Section 20 of the Criminal Procedure Act, 51 of 1977. The police seized the vehicle after having formed the opinion that the vehicle was concerned in or was on reasonable grounds believed to have been concerned in the commission of an offence committed or suspected of having been committed in Japan.
- [7] Captain Slabbert of the Vehicle Identification Section inspected the vehicle on 17 March 2006. When he inspected the chassis number he noticed that it had been tampered with. He then used an electro acid process in order to reveal the underlying chassis number that was originally brought onto the chassis. This process involves the use of acid which is applied to the surface area where the number exists. Thereafter, a vehicle battery was used to apply an electric current through the metal which then eats away at the surface metal to reveal the underlying number originally brought onto the metal.
- [8] When Captain Slabbert initially inspected the vehicle the number which appeared on the chassis was **“HDJ1010012544”**. After the “electro acid” process, the underlying number which then

appeared, clearly indicated that the last four digits had been changed and instead replaced with the digits “**4879**”.

[9] The South African Police Services enquired of Toyota South Africa to establish whether the altered chassis number had ever been issued by it. Toyota South Africa denied that the serial number had been brought upon the chassis number by it. There were further enquiries made through Interpol. The South African Police established that the vehicle had allegedly been stolen in Japan and that the owner of the vehicle did not wish to travel to South Africa to identify the vehicle. The Plaintiff admitted that he did not have any personal knowledge that the vehicle had in fact been stolen. He accepted that the statements made to the South African Police about the theft of the vehicle constituted hearsay evidence. I return to this aspect later in this judgment.

[10] In any event the upshot of all of this was that the South African Police Services decided to declare the vehicle forfeited to the State in terms of Section 31 of the Criminal Procedure Act. There were no criminal proceedings instituted in connection with the alleged theft of the vehicle. The police formed the opinion that no person was entitled to lawfully possess the vehicle.

- [11] As a consequence of the seizure and forfeiture of the vehicle Hugo turned to the Plaintiff for protection. He told the Plaintiff that the police had suspected that the vehicle was stolen and that it had been seized by them.
- [12] The Plaintiff approached his attorney who notified the Defendant of the eviction and called on the Defendant to assist him to obtain possession of the vehicle to no avail.
- [13] The Plaintiff alleged in his Particulars of Claim that the Defendant failed to come to his assistance and he possessed of no factual or legal grounds to challenge the forfeiture of the vehicle to the State.
- [14] The Plaintiff's attorneys wrote to the Defendant on 17th August 2006. In that letter of demand the Plaintiff's attorneys advised the Defendant that the South African Police Services had seized the vehicle in terms of Section 20 because the chassis number and/or the engine number had been altered. They notified the Defendant that the vehicle was suspected of having been stolen. They advised the Defendant that the police were involved in an investigation to determine the origins of the motor vehicle. They requested the Defendant to liaise with Captain Slabbert and

provided all the necessary contact and reference details to enable the Defendant to comply with its common law obligations.

[15] The Plaintiff's attorneys notified the Defendant that he possessed no defence against the claim of Hugo for the return of the purchase price and that he was calling upon the Defendant to repay the purchase price. In particular the attorneys requested the Defendant to assist him to challenge the forfeiture. They notified the Defendant that unless it reverted to them by 31 August 2006 by providing information to assist the Plaintiff to obtain restoration of possession of the vehicle the Plaintiff would accept that they were in agreement with the attitude of the Plaintiff.

[16] The Defendant contends in its Plea that the Plaintiff should have resisted the seizure and forfeiture of the vehicle by the South African Police Services. It also contends that the Plaintiff did not raise a *virilis defensio* to the claim of the South African Police Services. The Defendant also contends that the South African Police Services attached and confiscated the vehicle without proper proof of the theft thereof and without being in possession of sufficient facts so to do.

[17] The Defendant also contends that the vehicle was not a stolen vehicle at the time of the sale of the vehicle to the Plaintiff and that he in fact caused the registration and transfer into his name.

[18] The Defendant issued a third party notice against Nedbank Limited who in turn issued a third party notice against Topsy Wilton.

[19] The Second Third Party, Topsy Wilton did not file a Plea nor did it take any further steps in the action.

[20] Stefan Carl Buys and Shariff Abdulla gave notice of their joinder as third parties but they too have failed to take any further steps in the action. The Second, Third and Fourth Third Parties are accordingly in default.

[21] In response to the Defendant's Plea, the Plaintiff filed a Replication. The Plaintiff admitted that he failed to institute any legal steps to obtain the return of the vehicle but pleaded that he was in law prohibited from possessing the vehicle by virtue of the fact that the engine and chassis numbers were unlawfully altered; that he had no lawful title to the vehicle and that his possession of

the vehicle was hit by Section 68(6) of the National Road Traffic Act No. 93 of 1996.

[22] The evidence that was led by the Plaintiff was very brief. He called Captain Slabbert whose evidence remained unchallenged. He testified that he performed the electro acid test on the chassis number. He discovered that the last four digits had been tampered with. He also ascertained that the engine number had been tampered with but was not able to reveal the true number. He caused the letter of 22 June 2007 to be written in terms whereof he notified the recent purchaser Mr Hugo that the vehicle had been stolen in Japan and that the vehicle had been forfeited to the State.

[23] Captain Slabbert, however, admitted that he did not have any personal knowledge about the alleged theft of the vehicle in Japan. His evidence insofar as it relates to any alleged theft is hearsay and accordingly inadmissible.

[24] The parties agreed that the value of the vehicle as at March 2006 was R292 000,00 and as at July 2007 R260 200,00.

[25] The Defendant and the Third Parties did not lead any evidence and chose to close their cases. I must therefore decide the issues in dispute on the evidence of the Plaintiff.

[26] The first question which ought to be determined is whether the Plaintiff has taken such preliminary steps so as to apprise the seller, the Defendant, of the eviction and has called upon the seller to intervene so as to protect his possession.

Joubert (Ed) The Law of South Africa (first re-issue)
Vol 24 para 91

[27] I am satisfied that the Plaintiff gave the necessary notice to the Defendant and called upon the Defendant to intervene. This much is common cause.

[28] The second question which I must determine is whether the Plaintiff has put up a *virilis defensio*. If he has not then the Plaintiff cannot succeed against the Defendant. If the Plaintiff had not called upon the Defendant to protect him he would, in accordance with trite law, still be entitled to demonstrate that the present possessor of the vehicle had “a legally unassailable” claim.

See: **Olivier v Van der Bergh 1956 (1) SA 802 C**

**Garden City Motors (Pty) Limited v Bank of the
Orange Free State Limited 1983 (2) SA 104 N**

[29] As to what is meant by a *virilis defensio*, I believe that the judgment which illuminates the proposition best is that of **Lammers and Lammers v Giovanoni 1955 (3) SA 385 A**. In an erudite judgment, Shreiner J.A., had the following to say at 392 F – H:

“Once the seller is called upon to defend the buyer in his possession but washes his hands off the whole matter, it does not seem to me to be open to him to meet the buyer’s claim by saying that the latter could or should have resisted the true owner’s claim more energetically or skillfully; for it was open to him, the seller, to have taken steps to protect the buyer and himself. What those steps would be in any particular case will depend on the available procedure; including, in appropriate cases, ie. where it is the right of the buyer and not the right of the seller that may provide the means of resisting the true owner, the taking of a *procuratio in rem suam*.”

[30] Instead of demonstrating that the vehicle had been stolen in Japan, a cost probably out of the reach of the Plaintiff, he elected to rely upon the provisions of Section 68 of the National Road Traffic Act 93 of 1996. Section 68(6)(b) provides that no person shall “without lawful cause be in possession of a motor vehicle of

which the engine or chassis has been falsified, replaced, altered, defaced, mutilated or to which anything has been added, or from which anything has been removed, or has been tampered with in any other way”.

[31] The Supreme Court of Appeal dealt with the provisions of Section 68(6)(b) of **The National Road Traffic Act in Marvanic Development v Minister of Safety and Security 2007 (3) SA 159 SCA.**

[32] In a majority judgment Lewis J.A. held that the Act had introduced a new regime after those cases which held that stolen vehicles [and whose chassis may have been interfered with] were required to be returned to those from whom they were seized where the State had not proved on a balance of probability that their possession was not legal. These cases are:

**Minister van Wet en Order en Ander v Datnis Motors
(Midlands) (Edms) Bpk 1989 (1) SA 926 (A)**

**Choonara v Minister of Law and Order 1992 (1) SACR
239**

Booi v Minister of Safety and Security and Another
1994 (2) SACR 4650

[33] According to the majority, Section 68(6) of the Act expressly precluded possession of vehicles in particular circumstances.

Marvanic at 162 para 10, F

[34] The majority stressed that it was possession of a vehicle with false engine or chassis numbers that was without lawful cause, a concept quite disparate and discreet from the concept of *justa causa possessionis*.

[35] Speaking for myself, I prefer the interpretation brought thereon by Farlam J.A. I am however bound by the majority decision. In pursuing their argument the Defendant and the First Third Party contended that the Plaintiff ought in his *virilis defensio* to have applied for a special number [known as a SAPVIN]. Regulation 56 of the National Road Traffic Regulations 2000, creates a mechanism whereby an owner whose vehicle has been tampered with or a person otherwise entitled to possess such a vehicle to obtain new engine or chassis numbers from the police in circumstances where there has been a tampering. A police clearance is apparently issued to the local transport authority.

[36] Such a proposition, however, presupposes that the Plaintiff was the lawful owner or a person entitled to possess the vehicle. I am not satisfied that he was so entitled to do. The fact that there had been a transfer of the vehicle into his name does not necessarily mean that he was entitled to transfer of the property into his name. Take a situation, for example, where immediately prior to the transfer or registration of the vehicle into his name the Plaintiff and the registration authority found out that the vehicle had been tampered with. He may well in such circumstances not have been entitled to utilize the machinery provided by Regulation 56.

[37] Professor P. Van Warmelo in a helpful discussion on the question on the nature of a *virilis defensio* wrote in 1955 72 SALJ 340 as follows:-

Na ons beskeie mening word daar somtyds te veel en somtyds te weinig verstaan onder die vereiste van *virilis defensio*. Dit wil voorkom dat die Romeins-Hollandse reg (en daar is seker geen rede om van so 'n billike G standpunt afstand te doen nie) die koper sowel as die verkoper wil beskerm. Daarom die vereiste dat die koper 'n verweer teen die eiser moet voer (sodat die verkoper as

auctor die stappe kan neem om die koper te beskerm); daarom ook die vereiste van kennisgewing (sodat die auctor van die moeilikheid weet en die nodige stappe - indien moontlik - kan neem). Maar virile defensio wil nie sê dat die koper tot in die laaste loopgraaf teen die eiser stand moet hou nie: dit wil slegs sê hy moet die korrekte stappe neem wat prosessueel vereis is om die vermoedelike reghebbende nie onmiddellik alles gewonne te gee nie en die auctor die geleentheid te gee om stappe te neem om die vacua possessio vir die koper te handhaaf.'

[38] In my judgment the Plaintiff did everything reasonably possible in the circumstances to allow the Defendant to defend his possession. He was not required to defend the claim trench by trench.

Göbel Franchises CC v Kadwa and Another 2007 (5)

SA 456 C at 466 para 38 C to D

[39] The Plaintiff was not obliged to apply for a SAPVIN number and even if he had there was no guarantee that he would have been granted possession of the vehicle.

[40] I am satisfied that the Plaintiff has put up a *virilis defensio* and that he has done everything reasonably possible to permit the Defendant to protect his possession.

[41] I am satisfied that the Plaintiff has discharged the onus resting on him. He has claimed R460 000,00 being the purchase price and interest. I propose to grant judgment in the Plaintiff's favour for an amount of R260 200,00 which was the value of the vehicle as at July 2007.

[42] I therefore grant an order in the following terms:

[42.1] The Defendant is ordered to pay the Plaintiff an amount of R260 200,00 plus interest at the rate of 15.5% per annum a tempore morae.

[42.2) The Defendant is ordered to pay the costs of the action.

[42.3] The Defendant is granted an order as against the First Third Party, Nedbank Limited to indemnify the Defendant in respect of R260 200,00 payable by it

to the Plaintiff and an order of costs against the First Third Party.

[42.4] I grant an order in favour of the First Third Party Nedbank Limited that the Second Third Party, Topsy Wilton be and is hereby ordered to indemnify the First Third Party in the amount of R260 200,00 payable by the First Third Party to the Defendant and an order of costs as against the Second Third Party.

[42.5] Insofar as the parties before me may be entitled to any orders as against the defaulting Third Third Party and the Fourth Third Party I make no orders.

[42.6] Topsy Wilton was in default. I make no order in its
favour.

Dated at this day of 2009.

NXUSANI AJ
ACTING JUDGE
FREE STATE HIGH COURT
BLOEMFONTEIN