MUNYARADZI CHIKUMBU
versus
VIOLET NHAMO

HIGH COURT OF ZIMBABWE
BERE J
HARARE, 15,16,17 and 25 February 2010

Civil Trial

N. Bherebhende, for the plaintiff
S. Tsaurai, for the defendant

BERE J: On 18 December 2001 the plaintiff bought a mazda motor vehicle bearing registration numbers 538-982Z from the defendant. The defendant filled in an affidavit to confirm the transaction. The affidavit in question was tendered as exh 1 in these proceedings.

Subsequent to the conclusion of the sale of the motor vehicle the plaintiff and the defendant went to Southerton Vehicle Theft section to have the motor vehicle cleared to facilitate its registration into the plaintiff's name. The result of that process was the vehicle registration book (exh 5) bearing the plaintiff as the new owner of that motor vehicle.

Having kept and used the motor vehicle in question for almost 11 months from the date of purchase, the plaintiff sought to dispose of it through ABC Auctions in November 2002.

As is the procedure before disposing of any vehicle, ABC Auctions sought to have a pre-sale police clearance of the vehicle in question and they wrote to the Officer Commanding Criminal Investigations Department Car Theft Section, Zimbabwe Republic Police, Southerton Branch, Harare to check the motor vehicle.

It was the plaintiff's evidence that upon the motor vehicle being examined by the Car Theft Section in conjunction with Willowvale Mazda Motor Industries, the manufacturers of the motor vehicle in issue, he was advised by the police that the engine number, the chassis number and the registration number of the motor vehicle did not match with the same mazda model which the manufacturers had manufactured. As a result of these anomalies the police impounded the vehicle from the plaintiff. At this stage no document was given to the plaintiff.

However, subsequent enquiries by the plaintiff resulted in the police writing to him on 8 October 2009 advising the impounded motor vehicle was forfeited to the State on 21

June 2007. See exh. III which was submitted into evidence by consent. After advising of the forfeiture of the motor vehicle exh. III concluded as follows:-

> "…(b), The relevant papers are held by this station pending possible receipt of further information. In the event of any new development you will be advised.
>
> Please advise this Station of any change of address …"

In instituting this action it was the plaintiff's contention that the defendant had represented to him that the motor vehicle was hers when in fact it turned out such representation was false as the vehicle turned out to have been a stolen one.

In the alternative it was the plaintiff's contention that in selling him the vehicle the defendant had given the plaintiff a warranty that the motor vehicle belonged to her and that the defendant could legally pass ownership to the plaintiff.

It was further contended in the alternative that the defendant was negligent in that before passing ownership to the plaintiff she had not made proper enquiries as regards the true ownership of the motor vehicle.

Finally, it was also contended in the further alternative by the plaintiff that the defendant had failed, neglected or refused to assist the plaintiff when he was evicted by the police of his ownership of the motor vehicle.

In defending her position, the defendant in line with her tendered plea confirmed that she was indeed the seller of this motor vehicle to the plaintiff.

It was the defendant's uncontroverted evidence that before she sold this motor vehicle to the plaintiff, she had herself bought it from SV Motors, a car dealer.

It was further the defendant's position that after purchasing the motor vehicle she had herself verified the previous ownership of the vehicle and it was cleared by both the Vehicle Theft Squad Southerton Police and the Central Vehicle Registry after which she got the motor vehicle registered in her own name.

The defendant went on to say that when she sold the same motor vehicle to the plaintiff, she together with the plaintiff took the motor vehicle to the Zimbabwe Republic Police, Car Theft Section, Southerton Branch, Harare where it was cleared to enable the plaintiff to have the motor vehicle registration book issued in his name.

The defendant went on to say that, having assisted the plaintiff change ownership of the motor vehicle, the latter went on to enjoy the use of the same motor vehicle for close to eleven months.

It was the defendant's unchallenged evidence that she only got to know that there was a problem with the motor vehicle when the plaintiff tried to sale the motor vehicle after he had used if for close to a year.

In her testimony the defendant denied that she had chosen to stay aloof, when advised the motor vehicle had been impounded. Her testimony was to the effect that she went to Southerton Car Theft Section and gave an affidavit explaining what she knew about the motor vehicle in question. This evidence stands challenged in the record of proceedings.

Under cross-examination from the defence the defendant revealed that upon their last visit to Southerton Police Station, they were advised that the vehicle had been cleared by forensic department.

It is important to note that before this matter was sat down for trial the parties had filed a joint pre-trial conference minute to try and guide the court at the trial itself and the three issues agreed for determination were basically the following:

"(a) whether or not the said motor vehicle was indeed stolen

(b) whether or not the defendant knew that the motor vehicle was stolen at the time of sale.

(c) whether or not the defendant is liable for any damages and if so the quantum thereof".

In my view, the issues agreed by the parties at the pre-trial conference cannot just be looked at in a vacuum but must lean heavily on the accepted legal position which governs a situation where a purchaser has been evicted of his possession of the purchased item by a third party.

The legal position

Authorities are clear that before a purchaser who has been evicted by a third party can have recourse to the seller, he must not easily give up possession.

MFALILA J put the mater very clearly when he stated:

"that the rules which govern the purchaser before he can recover from the seller include the following:

(a) The purchaser should not when threatened by a third party give up possession voluntarily – unless the right of the third party is clearly beyond doubt not only against himself but against the seller as well;
(b) If he retains possession as he should, and is sued, he must give the seller notice of the proceedings; and

(c) He should put up a spirited defence against the claim of a third party"[1].

The need for the buyer to prove that the third party has an incontestable title to the merx (sold item) and to offer a *virillis defensio* to the claims of a third party is further highlighted in the case of *Olivier v Van der Bergh*[2].

What these authorities demonstrate is that courts are not keen to come to the aid of those buyers who when threatened with eviction decide to give up possession without putting up a spirited defence against the claim of the third party.

Instant Case

The greatest challenge which the plaintiff had to overcome was to convince the court that his eviction was due to a defect in the title and that the defendant was negligent in the manner she conducted herself.

In the light of the uncontested evidence given in this court, there is no doubt that the defendant was unaware of the defect in the title of the motor vehicle in question (if at all).

It was accepted by both parties and consequently accepted by this court that before the defendant herself accepted title in the car she took the trouble to go and verify the authenticity of the seller to her. The result of that enquiry which was conducted through Car Theft Section was the motor vehicle registration book in the defendant's name.

After selling the motor vehicle to the plaintiff, again both the defendant and the plaintiff repeated the same exercise with Car Theft Section, Southerton and the result of that verification exercise was exh 5, the car registration book in the plaintiff's name. The plaintiff enjoyed the use of this motor vehicle for close to eleven months.

It is quite clear to me that if the defendant knew of any defect in the title of the motor vehicle, she could not have gone that far.

The plaintiff must simply not be believed when he tries to convince the court that there was some clandestine arrangement with the defendant and the police at Southerton Car Theft Section when the motor vehicle was examined in order to facilitate change of ownership from the defendant to the plaintiff, for, if it were so, the plaintiff could not have been so reckless to accept transfer to his own name. Such an approach would have been a monumental assumption of the risk involved and the plaintiff would have to be estopped from crying fowl now.

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[1] Moyo v Jani 1985(1) ZLR 112@113
[2] Olivier v Van Der Bergh 1956(1) SA 802

I accept that there is very little which the plaintiff could have done to prevent the police from impounding the motor vehicle inorder to carry out whatever investigations they may have intended.

Impounding and forfeiture are two different things. Whilst it is accepted that there was little that the plaintiff could have done to prevent the police from impounding the motor vehicle the same cannot be said of forfeiture.

As is clear from the cited authorities, a party cannot be evicted until a third party has established a better title to either the possesser or the seller. The plaintiff did completely nothing to challenge Southerton Police to demonstrate they had better title than him. There is reference to the motor vehicle having been stolen but the matter ends there. There is no conclusive evidence that this motor vehicle was indeed stolen. If it was, then the motor vehicle ought to have been given to the owner of that motor vehicle and not to be forfeited to the State.

If there was no owner then the plaintiff appears to me to have had better title to the motor vehicle but this would only have been the position if the plaintiff had challenged the alleged forfeiture. As it is, there is no third party with an unassailable claim to the motor vehicle.

Exhibit III does not in any way advance the plaintiff's cause. If anything it shows the plaintiff's lackadaisical attitude to the whole process. From this exhibit it looks like the motor vehicle was impounded on 11-12-02 and was allegedly forfeited almost five years later. This notification of forfeiture was only written on 18/10/09.

If the plaintiff was keenly following the investigations surrounding his motor vehicle it certainly could not have taken the police (Vehicle Theft Squad) seven years to advise on the outcome of their investigations into the status of this motor vehicle.

The defendant's uncontested position was that she was advised that the forensic section had cleared the motor vehicle in which case the plaintiff ought to have either received the motor vehicle or sued the State for its release to him because if there was no complainant, his title to the vehicle remained incontestable or unassailable.

Exhibit III which makes reference to forfeiture clearly states that Southerton Vehicle Theft Squad are holding "the relevant papers …….. pending possible receipt of further information……"

Surely it was up to the plaintiff to make a follow up because the rules of natural justice require that he makes representations before any court can confirm forfeiture of the motor vehicle by the State or grant such an order.

The plaintiff cannot casually accept forfeiture of the motor vehicle to the State particularly in the light of the defendant's assertion that the motor vehicle in question has been cleared. Doing so would not be consistent with putting up a *virilis defencie* to the claims by the police. The plaintiff has a duty thrust upon him to make the police demonstrate they have a far more superior right to the motor vehicle than his. The police must demonstrate that theirs is an unassailable right and this can only happen if the plaintiff challenges the forfeiture before he can have recourse to the seller - the defendant.

Throughout these proceedings, it has not been easy for the plaintiff to state with clarity his cause of action.

It is trite that he who drags someone to court must himself or herself bear the onus. Davis A.J.A admirably summed up the position when he stated as follows:-

> "But there is a third rule which Voet states …. "He who assets, proves and not he who denies since denial of a fact cannot naturally be proved provided it is a fact that is denied and the denial is absolute" .. The onus is on the person who alleges something and not on whose opponent who merely denies it" [3].

The same position was re-stated by KORSAH JA in the following:-

> "The general principle is that he who makes an affirmative assertion, whether the plaintiff or the respondent, bears the onus of proving the facts so asserted"[4] .

In the instant case, which ever way one looks at the facts – either from the position of the issues agreed at the joint pre-trial conference or the legal position as perceived the plaintiff has hopelessly failed to discharge the onus to have the defendant visited with liability.

Consequently the plaintiff's claim is dismissed with costs.

Mavhunga & Sigauke, plaintiff's legal practitioners
Chinganga & Company, defendant's legal practitioners

[3] Pillay vs Krishna 1946 AD 946 at 952
[4] Nyahondo vs Hokonya and Ors 1997(2) 457 (S)