IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

[REPORTABLE]
CASE NO: 1122/2003

In the matter between:

ZUBAIR GOOLAM HOOSEN KADWA Plaintiff

and

GOBEL FRANCHISES CC Defendant

JAMES MACMILLAN Third Party

JUDGMENT: 14 December 2005

NDITA J:

[1] Plaintiff's claim against Defendant is for breach of the *ex lege* warranty against eviction. Plaintiff alleges that, in terms of a written, alternatively a partly oral agreement, Defendant sold him a 1995 Toyota Land Cruiser, bearing engine number H[...] 0[...], for a purchase consideration of R170 000-00. Despite the fact that Defendant had warranted that Plaintiff would not be evicted from any of his rights in and to the vehicle, particularly the right to undisturbed use and possession, Plaintiff alleges that he was evicted when the vehicle was impounded by the South African Revenue Services ("SARS"),

pending investigations whether it was liable for forfeiture because of outstanding import duties.

[2] Plaintiff is an adult, male businessman residing at Main Road Umzinto, Kwazulu Natal. Defendant is a corporation duly registered and incorporated in accordance with the revisions of the Close Corporations Act, No: 69 of 1964, as amended. The Third Party is James McMillan, an adult, male person residing at [...] A[...] Street, Glenvista, Johannesburg.

[3] Mr Nel appeared for Plaintiff whilst Mr Myburgh represented Defendant and Mr du Plessis the Third Party.

Burden of Proof

[4] In this action Plaintiff bears the onus of proving on a balance of probabilities that:

4.1 he has been evicted. (See **LAWSA**, first re-issue, Volume 24, 87-91, **Lammers & Lammers v Giovannoni** 1955 (3) SA 385, **Olivier v Van der Berg** 1956 (1) SA 802 (C).);

4.2 Plaintiff, as purchaser, gave Defendant, as seller, proper notice of the proceedings, calling on the seller for assistance in defending the case. (See **York & Co. (Pty) Limited v Jones N.O** (2) 1962 (1) SA 72 (SR).);

4.3 He conducted an unsuccessful *virilis defensio* against the claim. (See **York &Co** *supra*).

4.4 If Plaintiff gave no notice to Defendant or no *virilis defensio* was conducted, Plaintiff must establish that the claimant's title was unassailable. (See **Garden City Motors (Pty) Ltd v The Bank of OFS Ltd** 1983 (2) SA 104 N.)

Summary of Essential Facts

[5] On 22 March 2002, Plaintiff bought a 1995 Toyota Land Cruiser motor vehicle, bearing engine number H[...] 0[...] and vehicle identification number H[...] J[...], from Defendant for a sum of R170 000-00. The sale of the vehicle was subject to, and included a two-year repair and maintenance warranty commencing with effect from 22 March 2002. Plaintiff experienced a series of mechanical problems with the car and informed Defendant accordingly. On Defendant's suggestion, Plaintiff took the vehicle to the Toyota SA dealership in Durban for inspection of the engine and he was informed that the vehicle was a "grey import". This meant that the vehicle was not imported to South Africa through the legitimate dealership, namely Toyota SA. In the light of the discovery, Plaintiff informed Defendant immediately. He later took the vehicle to SARS to verify whether it was indeed a "grey" import. SARS conducted a physical examination on the vehicle and established that the model of the vehicle should be 1991, and not 1995 as advertised. Furthermore, SARS confirmed that the vehicle could have been illegitimately imported into South Africa, but this did not necessarily mean that it was imported illegally. According to SARS, no import permit was issued for the vehicle.

[6] Based on the abovementioned examination SARS issued a notice in terms of Section 87 read with 88 (1)(a) of the Customs and Excise Act 91 of 1964 ("the Act"), for the detainment of the vehicle on 13 June 2002 in order to establish whether it was liable for forfeiture. Section 87 (1) provides as follows:

> "*Any goods imported, exported, manufactured, warehoused, removed or otherwise dealt with contrary to the provisions of this Act or in respect of which any offence under this Act has been committed (including the containers of any such goods) or any plant used contrary to the provisions of this Act in the manufacture of any goods shall be liable to forfeiture wheresoever and in possession of whomsoever found"*.

[7] Plaintiff, being the owner of the vehicle, was called upon to comply with Section 102 of the Act on before 13 July 2002 failing which the goods would be seized in terms of Section 88(1)(C). Section 102 compels Plaintiff to provide documents in order for SARS to determine whether customs duties and V.A.T had been paid in respect of the vehicle. Plaintiff did not provide the documents and SARS impounded the vehicle.

[8] Subsequent to the notice of detention, Plaintiff wrote a letter to Defendant on 3 October 2002, informing him that he has been evicted. In the same letter Plaintiff requested Defendant to intervene and restore the vehicle into his possession.

[9] It is common cause that Defendant did not intervene. To this day the vehicle remains in the possession of SARS. Thus, Plaintiff claims the return of the purchase price in the sum of R170 000-00.

The Defendant's Defence

[10] After service of summons, Defendant entered an appearance to defend and filed its plea. Defendant denied having breached any warranty against eviction. In amplification of its plea, Defendant pleaded that:

(a) in terms of the written agreement, all other warranties are specifically excluded other than the specific warranty reflected thereon;

(b) Clause 8(f) of the Conditions of Sale states that:

> "*Subject to any express warranty or guarantee given by the company in writing and which is intended to form part of the contract the company does not- (i) give any warranty or guarantee, or make a representation whatsoever in respect of the goods, of the fitness of the goods, or any part thereof for any particular purpose is known to the company (ii) accept any liability for any defect (latent or patent) in the goods or any part*

of them".

(c) in the premises, any alleged warranties are excluded thereby.

[11] The Third Party, on the other hand, cannot admit or deny any of the allegations by Plaintiff, except to deny that he sold the vehicle to Defendant.

[12] Plaintiff's evidence is primarily what is set out in the summary of the essential facts. Perhaps it should be mentioned that Plaintiff personally approached SARS in connection with the vehicle after being advised by Toyota SA that the vehicle was a "grey" import. Mr Essop of SARS confirmed Plaintiff's testimony with regard to the detainment of the vehicle, but explained that the vehicle had not been forfeited to the state. The crisp legal question which arises in the light of the established facts is whether SARS's conduct amounts eviction. Before I consider this question, it is necessary to consider, firstly, whether Plaintiff is entitled to the protection of the *ex lege* warranty against eviction.

Is Plaintiff entitled to the protection of *ex lege* warranty against eviction?

[13] The whole purpose of the *ex lege* warranty against eviction is to provide for a purchaser's basic needs in respect of a title which he, in good faith, expects to acquire by his purchase, namely, that he receives a good clean title transferred to him so that he will not be exposed to a lawsuit in order to protect it. In his pleadings and his evidence Defendant specifically denies being bound by any warranty protecting Plaintiff against eviction. It has been argued on his behalf that, in terms of the written agreement, the warranty against eviction had been excluded. From the reading of clause 8(f), it is clear that the exclusion refers to the condition of the vehicle sold, as well as latent and patent defects. The document that purports to exclude the warranty against eviction merely refers to a "*motorite/warranty*" sold to Plaintiff for a sum of R3 500-00. It also contains the provision "*no other warranty implied or offered*". In my view, if the parties had intended to exclude the warranty against eviction, then the contract should have specifically contained words to that effect. Besides, Mr John Loyd White, who testified on behalf of

Defendant, confirmed that he knew nothing about the warranty against eviction at the time the written agreement was signed. This clearly demonstrates, in my view, that there was no meeting of the minds for the specific exclusion of the warranty against eviction. As in **Van Der Westhuizen v Arnold** 2002 (6) SA 453 SCA at 467 para 31, there is no suggestion that the parties were excluding all common-law rights available to a buyer against the seller in their agreement. See **Van Der Westhuizen** supra para 42:

> *"If appellant wished to exclude liability for a breach of the warranty against eviction which warranty arose ex lege and existed whether or not the parties turned their minds to it, it behoved him to say so plainly and unambiguously".*

[14] Thus, even, if at the time of sale, no stipulation was made respecting the warranty, the seller is obliged by law to warrant the purchaser against eviction which he may sustain in the whole or in part of the thing sold, or against encumbrances not declared at the time of the sale. In the circumstances of the instant case, the warranty against eviction applies to the contract between Plaintiff and Defendant. Having found that the common-law warranty against eviction should apply in the circumstances of this case, the next point to consider should be whether or not Plaintiff has been evicted.

Has Plaintiff been evicted?

[15]It is common cause that Plaintiff's claim is based on a warranty for eviction. In order to succeed in his claim, he needs to prove that he has been evicted. Any lawful deprivation of possession (even if only in part) constitutes eviction. This position has been succinctly summarised by Didcot J in **Garden City Motors (Pty) Ltd v The Bank of OFS Limited** 1983 (2) SA 104 (N) 107 F-G. It reads as follows:

> *"Eviction has a wider meaning, however in the law of sale. The purchase does not have to be disposed of the property he has bought before such occurs, or be disturbed in his possession of it. He is also evicted when he surrenders it voluntarily or pays its value in order to*

retain it, and even when he agrees to do one or the other without yet having done either, provided that in each instance it has been claimed on the grounds he could not have successfully contested".
(See also **LAWSA vol 24 SALE** para 88).

[16] Mr Myburgh relied on **Moyo v Jani** 1985 (3) 362 ZHC in his argument on behalf of Defendant that physical dispossession is not sufficient to constitute eviction. The physical dispossession must be lawful in the sense that there was a proper legal basis for doing so. In my view, this contention overlaps with the requirement that Plaintiff must establish that the claimant's title was unassailable. Clearly, if there is no proper legal basis for the dispossession, then the claimant's title is not unassailable. Section 88 of the Customs and Excise Act provides that a vehicle may be detained for the purpose of establishing whether that vehicle is liable to forfeiture. In this matter there is enough evidence to effect and keep the vehicle in detention. There is no indication that customs officials acted inappropriately in terms of the empowering legislation. Toyota, a company with vast knowledge on the subject, did not import the vehicle and describe it as a "grey" import. The registration papers indicate that the vehicle was previously registered in Swaziland. Physical inspection by custom officials revealed that the vehicle may not be a traditionally local vehicle. In my view, this information constitutes reasonable grounds for commencing an investigation whether the vehicle is liable foe seizure. Furthermore, section 88 does not seem to require clear evidence of a contravention of the Act before SARS issues a detention order. Defendant did not offer any testimony that to contest that Plaintiff was disposed of the car by SARS.

[17] According to the defendant, Plaintiff voluntarily relinquished custody of the vehicle by walking "*into the proverbial lion's den*". I deem the argument unpersuasive. Plaintiff's consent was irrelevant to the impoundment. It is common cause that the original complaint Plaintiff lodged with Defendant was for the mechanical defects in the vehicle and it is Plaintiff's undisputed evidence that he approached Toyota SA because of the mechanical problems. In my view, it is improbable that Plaintiff was on the lookout for a

way to get out of the deal. Toyota SA cast some doubts on the legitimacy of the vehicle. Not only that, the same vehicle advertised as a 1995 model, was according to Toyota SA manufactured in 1991. What could Plaintiff have done with a vehicle labelled as a “grey” import by its alleged manufacturer? Even if the dispute between Plaintiff and Defendant had nothing to do with the payment of customs duty, it does not negate the fact that Plaintiff has been evicted because SARS acted within the ambit of the enabling legislation by impounding the vehicle. It is my judgement, therefore, that Plaintiff has been evicted. The question whether Plaintiff was lawfully evicted requires an examination of the relevant sections of the Customs and Excise Act. I turn to consider the relevant provisions.

[18] Plaintiff, being the owner of the vehicle, was called on upon to comply with section 102 of the Act on or before 13 July 2002, failing which the vehicle would be seized in terms of section 88(1)(c). Section 102 provides as follows:

> *” Any person selling or offering for sale or dealing in imported or excisable goods or fuel levy goods or any person having such goods entered in his books or mentioned in any documents referred to in section 75(4A) or 101, shall when requested by an officer, to produce proof as to the person from whom the goods were obtained and, if the importer or manufacturer or owner as to the place where the duty thereon was paid, the date of payment, the particulars f the entry for home consumption and the marks and numbers of the cases, packages, bales and other articles concerned, which marks and numbers shall correspond to the documents produced in proof of the payment of the duty”.*

[19] It cannot be disputed that Plaintiff did not comply with the directive of section 102. He explains in his evidence that he did not have any documents to prevent the seizure of the vehicle. However, it has been argued on Defendant’s behalf that section 102 is not applicable to Plaintiff because it is clear from the evidence that he was not:

1. "*Any person selling;*

2. *Offering for sale or dealing in imported goods or fuel levy of goods; or*

3. *Any person removing the same; or*

4. *Any person having such goods entered in his books or mentioned in any documents referred to in Section 75(4A) or 101."*

Furthermore, SARS seized and removed the vehicle to its warehouse in terms of section 88(1)(c), purportedly for non-compliance with section 102, when it was not entitled to insist on compliance with the provisions. So far SARS could not establish the validity of the vehicle in this country, because the vehicle apparently originated in Swaziland. It would have been imported into South Africa at one stage or another. Clearly, the vehicle should be regarded as being imported in terms of section 10(1)(e) because it was brought into the country at no specified time and in an unspecified manner. Similarly, Plaintiff, as the owner of the vehicle, is deemed in terms of section 1 as the importer because he owns the imported vehicle. Although Mr Essop from SARS conceded that the remedy provided by sections 87, 88 and 102 were drastic and did not forgo doing the normal thorough investigations in order to recover the relevant duties from the relevant party, this does not necessarily render the conduct of SARS unlawful. The fact that SARS did not investigate the matter is irrelevant for eviction. In my view, the conduct of SARS was lawful and therefore Plaintiff has been evicted. I now consider whether Plaintiff gave proper notice of the proceedings after eviction.

Did Plaintiff give Defendant a proper notice of the proceedings?

[20] Plaintiff testified that he telephoned Mr John White of Gobel Franchise and informed him of the eviction and the directive to comply with section 102. Defendant does not dispute this contention. Mr White informed him that he had purchased the vehicle voetstoets. Indeed, defendant substantiated Plaintiff's claim that notice was served in a letter dated 1 October 2002, asking for the details of the purported "removal". No aspersions have been

cast on the Plaintiff's credibility as a witness. Plaintiff further confirmed that all correspondence from SARS, including the eviction notice and notice in terms of section 102, was forwarded to Defendant. In fact, in a letter dated 3 October 2002, Plaintiff notified Defendant through his attorneys that his warranty against eviction had been breached and that it was Defendant's responsibility to restore the motor vehicle to Plaintiff. The court has no reason to reject his evidence. In any event, there is sufficient evidence to satisfy the notice requirement. Accordingly, I am satisfied that Plaintiff has fulfilled the requirement of serving the notice on Defendant. The next point to consider is whether Plaintiff's title is unassailable.

Is claimant's title unassailable?

[21] Defendant has correctly pointed out in his heads of argument that, if no notice was given by Plaintiff to Defendant or no *virilis defensio* was conducted, Plaintiff must establish that the claimant's title was unassailable. (See **Harms**, *Amler's precedents of Pleadings,* 6th Edition, 2003 at 357, **Lammers and Lammers**, **Garden City Motors,** *supra*). I have indicated elsewhere in this judgement that, in order to decide whether SARS's conduct was unlawful overlaps with the consideration whether claimant's title was unassailable. According to Mr Essop, SARS is unable to confirm whether the vehicle is liable for forfeiture for outstanding import duties or not. Clearly, the vehicle is still in the possession of SARS. Having decided that SARS lawfully detained the vehicle, it stands to reason that the claimant's title in the circumstances was unassailable.

Has Plaintiff conducted a *virilis defensio* against the claim?

[22]On the facts of this case, it has already been established that Plaintiff issued a notice conveying a clear indication that the seller is required to intervene. Similarly, it is my judgement that SARS acted lawfully by issuing a detainment notice. Because the allegation that Plaintiff did not conduct a *virilis defensio* permeates throughout these proceedings, and for the sake of completeness, I now consider whether or not Plaintiff complied with this requirement. It has been submitted, on behalf of Defendant, that it is clear that

Plaintiff did not conduct any defence whatsoever. He brought the situation upon himself and then failed to do anything to assert his rights *vis a vis* SARS. Indeed, it is a well-established principle that a purchaser must not lightly give up possession to a third party claiming a better title.

[23] As pointed out, the customs officials had sufficient information to start an investigation in terms of section 88 of the Act. They could therefore detain the vehicle for that purpose. Plaintiff had no more information about the vehicle than the information supplied to him by the customs officials and Toyota SA. By issuing the notice that he had been evicted, calling upon Defendant to intervene he was turning to Defendant (the dealership) to provide the answers required by SARS. After all, Defendant was the party burdened with a warranty against eviction. What defence could Plaintiff possibly raise against the claim by SARS that the vehicle was being impounded pending investigations whether the vehicle was liable for forfeiture? Surely, the investigations involved a history of how the vehicle was brought into the country. Defendant, as seller of the vehicle, would have been in a better position to explain or investigate whether import duties were paid or not. In my view, Defendant could quite clearly have intervened if he so wished. The only reason that he did not intervene appears to be that he was under the impression that, in terms of the written agreement, the warranty against eviction was excluded. Defendant‘s letter dated 1 October is telling of this attitude. The second paragraph of the letter reads as follows:

> ”*As already indicated to you, ownership has passed and our client has no further obligations in respect of the vehicle”.*

[24] The claim by Defendant that Plaintiff was complicit in the detainment of the vehicle by SARS, in my view, has no basis. Had Defendant intervened when called upon to do so by Plaintiff, any collusion or perceived collusion with SARS would have been stopped in its tracks. Neither would it have been necessary to drag the Third Party to court. I cannot see how the Plaintiff could have put up a defence in the circumstances of the instant case. Schreiner JA in **Lammers and Lammers** *supra* at p 391deals with this

question more clearly citing from a passage from **Voet** as follows:

> "*The notice having been given, whether the '**aucto**r' takes part in the suit to prevent collusion, or suffers that the purchase constitute him **'procurator in rem suam**; or whether he does openly associate himself with suit, but supplies the defendant with assistance and proof of assertion of the right – or whether he does none of these after being cited once or oftener according to the usages of the place, but altogether neglects the suit, he (the Purchaser) has recourse against his **'auctor'** after eviction, provided the purchaser himself has not failed to defend it with all his power; lest otherwise the **'auctor'** should be considered to have been defeated rather on account of absence than because he has a bad cause".*

[25] Indeed, in the circumstances of the present case, Defendant knew exactly what the proceedings were all about and the assistance required from him. His intervention would have effectively put an end to any complicity Plaintiff might have had with SARS. Putting up a *virilis defensio* does not mean that Plaintiff must search for a defence until he finds one, even if he does not know one exists. Plaintiff is the one protected by the guarantee and not Defendant. Defendant is required to act in terms of that, which he clearly did not do. It is not enough for seller to merely claim that the purchaser should have resisted the claimant's claim more vigorously for it is his duty to protect the purchaser. Again, this principle is affirmed in **Lammers and Lammers** *supra* at 392:

> "*Once the seller is called upon to defend the buyer in his possession but washes his hands of the whole matter, it does not seem to me 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 skilfully; 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 would depend on the available procedure; including, in appropriate cases, i.e. 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 the of a procuratio in rem suam."

[26] Although the facts of this case may be substantially the same as in the **Moyo** case, I am not persuaded to follow the persuasive authority, because in this case SARS's claim was clearly unassailable.

Conclusion

[27] I have held in this matter that Plaintiff has been evicted, proper notice was served, and it was impossible for Plaintiff to conduct a *virilis defensio* in a title that is unassailable. It follows that Plaintiff's claims should succeed. I accordingly grant judgement in favour of Plaintiff for the payment of the sum of R170 000-00 with interest thereon at the prescribed legal rate of15, 5% per annum**.**

[28] The only question that remains is that of costs.

Costs

[30] I have indicated in this judgment that the third party was unnecessarily dragged into court. Clearly he is entitled to his costs. In the circumstances, therefore, I make the following order. Judgment is hereby granted for Plaintiff. Defendant is ordered to pay Plaintiff's and the Third Party's costs.

NDITA, J