I. 653/99

ALOYSIUS ABRAHAMS vs FIRST NATIONAL BANK

2001/04/25
Levy, AJ

Defendant sold to plaintiff by way of a written suspensive sale agreement two trailers for NS198 905-32.

Plaintiff alleged that there was a term (specific or implied) in the agreement that defendant would give plaintiff ownership of the trailers when plaintiff had discharged its obligations under the agreement.

During the currency of the agreement, defendant sold to a third party one of the trailers by way of a suspensive sales agreement and gave the third party possession and eventually ownership thereof. According to plaintiff this constituted a repudiation of the agreement which plaintiff accepted and sued defendant for damages which was refund of all monies paid pursuant to the agreement.

Defendant admitted concluding the agreement but denied that there was a term specific or implied that ownership would pass.

Defendant pleaded a host of alternative pleas some contradictory and confusing. The plea finally amounted to the denial of each and every allegation and conclusion by plaintiff except that the contract of sale had been concluded.

The Court found:

(1) that the contract of sale to plaintiff contained a term that defendant was the owner and that ownership would pass to plaintiff when plaintiff discharged its obligations under the contract.
(Laing v S.A.Milling Co Ltd 1921 AD at 398
As to the application of the *contra stipulatorem* and *contra proferentem* rules, see *Arprint Ltd v Gerber Goldschmidt SA Ltd* 1983(1) SA at 262)

(2) that the sale to the third party by defendant constituted breach of contract with plaintiff entitling the latter to accept the breach and to sue for damages.
Mc Cube v *Burisch* 1930 TPD at 269

Defendant had pleaded that plaintiff had previously breached the suspensive sale agreement and therefore could not repudiate the current agreement and claim damages but the Court found that even if defendant had been entitled to terminate the contract between the parties by virtue of plaintiffs alleged breach, defendant had not in fact or in law done so.

Meredian Financial Service (Pty) Ltd v Ark Trading 1998 (Nm) 74

On the contrary defendant held plaintiff to the contract and according to defendant's Books of Account the full amount for the trailers had been paid and therefore had been paid twice for one trailer namely by the Third Party and by plaintiff.

Books of Account show receipts, where such are against the interests of the owner and such books, can constitute admissions that such receipts were received by the party concerned. *Naik v Pillay 's Trustee* 1923 AD 476

Plaintiff could not return the trailers as one was sold by defendant to the third party and the other was already in the possession of defendant.

Plaintiff was therefore entitled to repayment of N$198 905-32 which was standing to his correct in defendant's books.

Case No.: I. 653/1999

IN THE HIGH COURT OF NAMIBIA

In the matter between:

ALOYSIUS ABRAHAMS PLAINTIFF

and

FIRST NATIONAL BANK OF NAMIBIA LTD DEFENDANT

CORAM: LEVY, A.J.

Heard on: 2000.3.28; 2000.9.7&8; 2000.10.03; 2000.12.12&13

Delivered on: 2001-04-25

JUDGMENT

LEVY, A.J.: Plaintiff is represented herein by Mr Maselle instructed by the firm Basil Bloch and defendant is represented by Ms Vivier instructed by the firm of Diekmann Associates.

During the course of this trial the pleadings of both parties were amended from time to time, the principal amendments being initiated by the plaintiff. According to the particulars of claim, on 16th March 1994, plaintiff purchased two trailers, a Zali and a Zelna, from defendant by way of a written suspensive sale agreement, the chassis number of the Zali being 880315143060. An almost illegible copy of the agreement is annexed to the particulars of claim. During the trial the Zali was frequently referred to by both counsel and witnesses as a Zali or Zanli. Plaintiff alleges in paragraph 4 of the particulars of claim that it was a material express, alternatively implied, term of the agreement that defendant was the owner of the trailers and would pass the ownership to plaintiff, when the latter had discharged its obligations under the agreement. Plaintiff then alleged that defendant breached the aforesaid written suspensive sale agreement in that defendant during or about March 1995, entered into a written suspensive sale agreement with one Bindeman in terms whereof the defendant sold to Bindeman who purchased from defendant, the Zali trailer with chassis number 880315143060 and pursuant to that agreement, Bindeman obtained ownership of the trailer. As a consequence of the aforegoing defendant was not able to pass ownership of this trailer to the plaintiff. As a result of the said breach plaintiff cancelled or cancels the written sale agreement.

In the alternative, plaintiff alleged other grounds for claiming the same relief. In view of the decision to which this Court has come, it is unnecessary to canvass those.

Plaintiff alleges that as a result of the defendant's breach of contract, plaintiff has suffered damages in the amount of N$198 905-32 which is the amount paid by plaintiff to the defendant and which represents the credits as reflected in the defendant's books of account relating to plaintiffs indebtedness to defendant and as set out in an annexure which was annexed by plaintiff to his particulars of claim.

Plaintiff avers that he is not in a position to tender the return of the trailers inasmuch as defendant alternatively a third party is in possession thereof.

Accordingly, plaintiff claims payment by defendant of the sum of N$198 905-32 plus interest at 20% per annum *a tempore morae* and costs.

There was a request for further particulars by the defendant and an answer thereto by plaintiff, the relevance whereof, is that plaintiff alleged that the agreement was cancelled by plaintiff by the service of the summons herein.

Defendant filed a plea wherein it admitted concluding the agreement annexed to the particulars of claim and delivering the trailers pursuant thereto, to plaintiff.

Subject to what is said hereunder, defendant thereafter virtually denied each and every material allegation contained in the particulars of claim and accompanied each denial with pleas in the alternative also in effect constituting denials of plaintiffs allegations. More particularly, defendant denied the allegation by plaintiff that there was a term (express or mplied) in the agreement that defendant was the owner of the trailers and that defendant would or would be able to pass ownership of the trailers to plaintiff. As an alternative to the said denial defendant pleaded that there was an implied term that once plaintiff had complied with the terms of the agreement that no one with a better title to the trailers would claim the trailers from "defendant" (sic) and that defendant guaranteed plaintiff *"vacua possessio"*. Although defendant alleged that this warranty against eviction only arose after plaintiff had complied with all it's obligations under the agreement, defendant alleges that "during the duration" (sic) of the agreement, plaintiff was not evicted or threatened with eviction. Immediately after this allegation and still as part of that alternative plea, although defendant had previously denied that there was a term in their contract obliging defendant to pass ownership, when plaintiff had discharged its obligations, defendant nevertheless pleads that plaintiff had "breached the terms of clause 5.1 and clause 10" and "never became entitled to demand transfer of ownership" and then defendant alleges in

paragraph 2.2.2.(c) of its plea;
"Plaintiff parted with the trailers of his own accord during or about September 1994 by returning the trailers to the seller who sold the trailers to defendant."

Inasmuch as it is admitted by Defendant that the seller of these trailers, is the defendant, these allegations are, to say the least, uncomprehensible. These allegations are also in conflict with subsequent allegations in the plea, that defendant was placed in possession of the trailers by the deputy sheriff who had apparently attached them.

Thereafter, defendant denied that it breached a material term of the agreement and denied that it entered into an agreement with Bindeman in terms whereof Bindeman purchased a Zanli or Zali trailer from defendant. However, defendant then pleaded in the alternative that if it had sold a trailer to Bindeman such trailer was not the same trailer which it had sold to plaintiff and it then denied that Bindeman became owner of the trailer which defendant had sold to Bindeman.

Defendant alleged further that plaintiff could not cancel the suspensive sale agreement as alleged by plaintiff, in that at that time there was no longer an agreement in existence. In one of its many alternative pleas, defendant alleges that the agreement between the parties was only terminated on 23rd October, 1998 "when the outstanding balance on the account was settled following the sale of one of the trailers". This would appear to be a categorical statement by defendant that on 23rd October 1998, plaintiff paid and discharged all its obligations in terms of the suspensive sale agreement.

Notwithstanding the aforesaid allegation defendant thereafter alleges in it's plea that plaintiff tailed to comply with the provisions of the agreement and therefore defendant terminated the agreement.

Defendant thereupon pleads that it took possession of the trailers afer the deputy sheriff had attached them, plaintiff being in arrear with its monthly instalments. Defendant denies plaintiff s allegation that a third party has taken possession of a trailer and adds that it has no knowledge of whether a third party took possession of the other trailer and puts plaintiff to the proof of its allegations.

The balance of the plea relates mainly, but not entirely, to those portions of the particulars of claim which I have said are unnecessary to consider. However, relevant in the balance of the plea, is the allegation that plaintiff is claiming "restitutional damages" but has failed to tender the return of the trailers. In addition, defendant says that plaintiff

breached the agreement in that he failed to keep the trailers in his possession and control and allowed one of these trailers to be attached by the deputy sheriff. Defendant enlarged upon the breach of this term and pleads that this "entitled" defendant to terminate the agreement. However, defendant did not plead that it in fact terminated the agreement and hereunder I refer to clause 10 of the agreement and defendant's failure to terminate the agreement in terms thereof. Defendant in fact recognised that it had not terminated the agreement and pleads that it "tendered delivery of the trailer previously attached by the deputy sheriff. Defendant then says that plaintiff failed to take delivery thereof.

Defendant does not dispute the allegations by plaintiff concerning its book-keeping records but defendant denies that plaintiff is entitled to the relief, he claims and asks that such claims be dismissed with costs.

Ms Vivier submitted detailed heads of argument and the Court is grateful to her for this courtesy. She stressed that in a contract of sale at common law, there is no implied term that the seller is the owner of the subject matter of the sale or that the seller would pass ownership to the buyer. At common law there is only an implied warranty against eviction and the buyers rights to undisturbed possession is referred to as *avacuapossessio.* The seller impliedly warrants that the buyer will not be disturbed in his possession by someone who has a better title than he has. Ms Vivier stressed the difference between ownership and possession and that plaintiff had not been evicted or threatened with eviction.

In Gibson's *South African Mercantile and Company Law* (3rd ed at p 132) the learned author writes:

"If the buyer is, therefore, to have a title which is impregnable he must become the owner of the article sold and not have simply *vacua possessio* plus the protection afforded by the warranty against eviction."

According to *Grotius* (2.3.10) "ownership is the state where a person is entitled to do with a thing, anything he wishes for his own benefit, provided he remains within the law. But, from the buyers point of view, the importance of becoming owner is that no one can then have a better title to the thing and eviction becomes impossible".

Vacua possessio falls far short of ownership and the parties can by mutual agreement, agree to vary the common law and to record that the seller is the owner and will remain the owner and will pass such ownership to the purchaser when the buyer discharges his obligations in terms of the contracts. Implied terms from the common law which are not varied, will still be applicable.

Frequently there are terms which are tacitly included in a contract, which is otherwise agreed upon. Such terms are referred to as implied terms. The implied warranty against eviction is a good example and was referred to by Ms Vivier. Implied terms may be implied by law, (as the warranty against eviction), or, they may be implied by reason of the facts and surrounding circumstances. Frequently contracting parties fail to express their intention clearly in respect of a particular clause, in a written deed of sale. That intention may in fact be gathered without having to have recourse to an "implication" or there may be a necessary implication in order to make the contract operative, or, the facts may lead to an implication arising from law, common or statute.

In the instant case there are two clauses in the agreement to which I will refer and which refer to ownership.

Clause 2.1 provides as far as is relevant:

"Buyer is aware that all seller's rights in this agreement including the right to ownership in the goods are to be ceded to FNB and together therewith ownership of the goods transferred in contemplation thereof."

In view of the fact that in terms of the agreement and the pleadings, the seller is FNB itself, that is, defendant, the clause makes no sense and is inapplicable to present circumstances. However, it may well be possible to refer to it should the necessity arise in respect of other clauses. It is unnecessary to dwell on this, save to expand on the inapplicability of the clause in present proceedings.

Defendant (FNB) is a bank and one of its commercial activities is to finance the purchase and sale of property including vehicles. The agreement under consideration is a stereotype printed agreement used by defendant (see the agreement in the sale to Bindeman hereunder) with blank spaces to be completed on each occasion. Clause 2.1 of the agreement indicates that had the seller not been defendant but a different party as from the very commencement of the agreement, defendant would have acquired all the rights including ownership from the seller and defendant would therefore have become the seller. Where FNB is in fact the seller from the commencement of the agreement there seems to be no logical reason why FNB's legal position should be any different. However, factually the clause was meant to be applicable where defendant was not the initial seller.

Clause 4.1 of the agreement provides:"Ownership of the goods shall remain vested in seller and not pass to buyer until receipt by seller of all amounts payable by buyer under this agreement."

Unlike clause 2.1, this clause is clearly applicable in the present case. The terms thereof are explicit. Defendant who drafted the agreement and was the stipulator, described itself as having "ownership". If defendant was not the owner, defendant would have been dishonest in so doing, and one must accept that all parties are honest unless the contrary

is proved.

Furthermore, in terms of the common law when goods are sold on credit and the seller is the owner, ownership therein *ipso facto* and *ipso jure* passes when the price is fully paid and delivery is given.
Laing v S.A. Milling Co Ltd 1921 AD at 398

One does not have to provide for this eventuality in a deed of sale. But to ensure that it will happen, one can provide that the seller remain vested with ownership until the buyer pays after the goods are delivered.

The contract therefore specifically provides that defendant is the owner and will remain owner until the plaintiff discharges its obligations under the agreement and it is then implied that it will pass ownership to plaintiff when this happens.

The "golden rule' of interpretation of written instruments such as written deeds of sale is that the grammatical and ordinary sense of the words must be adhered to, unless this would lead to some absurdity, or, some repugnancy with the rest of the instrument.
Kalil v *Standard Bank of South Africa Ltd* 1967(4) SA 550 (A) at 556 *Crispette and Candy Co Ltd* v *Oscar Michaelis, N.O. and Leopold Alexander Michaelis, N.O.* 1974(4) SA 521 (A) at 543

The meaning of clause 4.1 as analysed above, does not lead to any absurdity or repugnancy with the rest of the agreement. It is in fact in conformity therewith. I accordingly hold that it is expressly provided that the defendant is the owner of the trailers and that it must remain owner of the trailers until, plaintiff has paid all amounts payable under the agreement and that it is then implied that thereupon defendant must pass ownership therein to plaintiff. I hold that this term by its very nature is a material term of the contract.

Any ambiguity in the interpretation of this clause which may tend to be unfavourable to plaintiff is eliminated by the application of the *contra stipulatorem verba interpretanda* and the *contra proferentem* rules of interpretation of written instruments. In terms thereof where ambiguity exists, the contract is interpreted against the stipulator and person who drew the agreement. They need not be invoked where the meaning is clear.
Arprint Ltd v Gerber Goldschmidt SA Ltd 1983(1) SA 254 at 262 (A)

Plaintiff alleged that the aforesaid term was breached by defendant in March 1995, when defendant sold the Zali trailer, chassis number 880315143060, to one Bindeman and gave the latter ownership thereof pursuant to such agreement. Defendant denied each and every one of those allegations.

Plaintiff called Bindeman to testify. Bindeman said that he had purchased from defendant the Zanli trailer (I have pointed out that the parties referred to the Zanli as the Zali and vice versa) with chassis number 880315143060, and handed into the Court a copy of a suspensive sale agreement dated 29th March 1995, in support thereof. In the copy, however, the trailer is described as a "rebuild (sic) Henred Trailer" with a chassis number 880315143060, but inspite of the said description, Bindeman said it was not a Henred Trailer but that it was a Zanli (Zali) and he had therefore struck out the name "Henred" and substituted the name "Zanli". Bindeman had no doubt on this issue.

In argument Ms Vivier contended that Bindeman was a poor witness, unsatisfactory in many respects and that his evidence should be rejected.

Bindeman is a person who makes a living out of the transport business and does not have any skills outside his occupation. He has been in the transport business and involved with trailers for many years. He certainly impressed the Court with a sound knowledge relating to trailers. This knowledge was tested in cross-examination but not dented. He said he could identify his own trailer at night and from a distance and even if it had a false registration number. I am convinced that he could do this. It is true that on the question of dates he was somewhat vague but some matters on which he was questioned occurred some five years previously and it is not surprising that he could not recall dates which he had no reason to remember. He was prepared to concede that chassis numbers could be tampered with and that they could be altered and substituted. There was, however, no evidence that the chassis number 880315143060 on the trailer he bought from defendant, or, that the chassis number on the Zali that plaintiff bought had been tampered with, altered, or substituted. They were identical unaltered chassis numbers.

The necessity for giving an adequate description of the subject matter in suspensive sale agreements has been commented on by learned judges and academics from time to time. *In R v Vermeiden* 1959(1) SA 303 (G.W.) the Court somewhat aptly said:

"No doubt it may be difficult to describe an armchair in such a way that it can readily be identified later, but that does not seem to be any justification for giving a vague or casual description of a motor vehicle which can be identified by its serial number or its engine number. Anything short of that may not be sufficient to identify the vehicle in the event of a dispute and an innocent third party may be prejudiced as a consequence."

While store is placed on the name and description of a vehicle sold in a suspensive sale agreement, a major element for an accurate description's the engine number or serial number or chassis number.

In the course of his cross-examination, Bindeman produced two documents. One such document appears to be an extract of the official Motor Vehicle Licence Register. This document records the name of Bindeman and that the Zanli trailer model 1988, has a chassis number 880135143060. Inasmuch as this information would probably have been given by Bindeman himself to the licencing authority, it does not constitute proof of the information therein stated.

(Cf. *R v de Villiers* 1944 A.D. 493) But if this information was given by him it was furnished along time before these

proceedings

were instituted. Bindeman is an objective witness with no interest in this matter. The document was elicited in cross-examination and was not produced to bolster his evidence. The licence and the information in the register therefore substantiate the reliability of Bindeman as a witness.

The second document is an invoice of a sale on 4"[1] December 1998 of the aforesaid "1998 Zanli Trailer" to one J G Thompson by Bindeman who declared therein that the trailer was his property and that it was fully paid for. Bindeman who has testified that he purchased this trailer from defendant had handed a copy of the deed of sale concluded by him with defendant into Court. This deed of sale save for the necessary variations as to thedescription of the property sold, the price and terms of payment, is the identical document to the one defendant used in its sale of the two trailers to plaintiff. I have already pointed out that in terms of that agreement defendant was obliged to transfer ownership to the purchaser who was plaintiff, when the purchase price was paid. In respect of the sale to Bindeman by defendant, Bindeman testified that he had discharged all his obligations to defendant and pursuant to the sale he had been given possession and ownership. Although in its plea, defendant had denied that Bindeman became owner, defendant did not call any witnesses to support its denial.

At no stage did defendant deny that Bindeman had discharged his obligations under the agreement. Bindeman's evidence therefore that he paid the purchase price in full and that he was the owner is not gainsaid and it is substantiated by the invoice in respect of the sale of the Zali to Thompson.

In its plea, defendant has alleged that he was indeed in possession of the two trailers after the sale to plaintiff in March 1994. How it came to be in its possession is not material. However, being in possession if the Zali Trailer, defendant was in a position to sell the Zali Trailer to Bindeman and to give him possession and to pass ownership thereof, to him, in due course.

Accordingly, I accept the evidence of Bindeman that on 29th March 1995, he purchased from defendant by way of a written suspensive sale agreement the Zali tailer, also known as a Zanli trailer, with chassis number 880315143060 and that he became the owner thereof and sold and delivered it to one Thompson.

In *McCabe* v *Burisch* 1930 TPD 261 (T) at 269, Tindall, J., with whom Gey van Pittius, J., concurred, held that;

" where the buyer can claim transfer by paying the balance due, it is inherent in the contract that the seller shall not disable himself from giving transfer by transferring to a third person while the contract is pending."

Defendants action therefore in selling on 29th March 1995, by way of a written suspensive sale agreement, the Zali trailer and by transferring possession and ownership to Bindeman thereof at some future date, pursuant to such sale, constituted a breach of the contract that defendant had concluded with plaintiff.

Defendant, however, pleads that by reason of plaintiffs breaches of contract particularly its failure to pay its instalments punctually in terms of the contract, there was no longer a binding contract capable of being breached by defendant.

Clause 10 of the deed of sale concluded by plaintiff and defendant on the 16th March 1994, provides *inter alia* that should plaintiff commit a breach of the said agreement such as defaulting in punctual payments of the instalments or by "allowing the goodsto be seized under due process of law", the defendant is "entitled but not obliged to terminate", the agreement between the parties. (My emphasis)

Should the defendant have wanted to terminate the contract by accepting the alleged breach, it was obliged to communicate the acceptance of the alleged repudiation or breach, to plaintiff.

(Swart v *Vosloo* 1965(1) SA 100 (A) at 100 and 105 and 112-113 *Meridian Financial Service (Pty) Ltd v Ark Trading 1998 (Nm) 74)*

There is no evidence whatsoever that defendant elected to terminate the said agreement and, if it had wished to do so,

that it communicated to plaintiff the acceptance of the breach. On the contrary, there is evidence which is incontrovertible, that notwithstanding the alleged breaches of the agreement by plaintiff, the defendant elected to abide by the contract and did not accept the breaches as terminating the contract. Firstly, this evidence is to be found in defendant's very own books of account. Plaintiff annexed to its Particulars of Claim, the full account relating to plaintiff as it appears in defendant's books. This was not denied by defendant. Indeed it could not be denied. Defendant as it was obliged to do discovered the said account in its books and this discloses that the account was never closed off until the full purchase price was paid. By agreement between counsel, no witness was necessary to hand the account in. Its very existence was regarded as adequate. Ms Vivier did not admit anything other than that the account discovered, was the account in the books of defendant. I shall return hereunder to the significance in law of entries in the books of account of a party. It has been held that statements contained in a persons' books of account are evidence against such person as admissions of their contents.

Naik v Pillay's Trustee 1923 A.D. 476.

Mr Maselle did not call plaintiff to testify. Defendant called plaintiff as a witness. He testified that whatever was paid into the said account to discharge his indebtedness with defendant, was paid by him or on his behalf. He enlarged on this and said that at one stage he had given a certain Schneider possession of the trailers and that Schneider undertook to pay defendant for those trailers on his behalf. When Schneider died his deceased estate was made to pay. Any dispute between Schneider and plaintiff is obviously irrelevant.

In regard to plaintiffs account another contradiction appears in defendant's plea. Despite pleading that the agreement was terminated by reason of plaintiff defaulting in its payments of instalments, defendant pleads in paragraph 4.2 as follows:

"Defendant pleads that the agreement was terminated already on 23 October 1998 when the outstanding balance on the account was settled, following the sale of one of the trailers."

This is an admission by defendant that the fullbalance of the account was paid and furthermore this occurred on 23 October 1998 which was some three years after Bindeman purchased the Zali trailer.

Notwithstanding the aforegoing, defendant tried a further defence pleading that after it had gained re-possession of the trailers, it had tendered the return thereof to plaintiff in order to

For the Plaintiff:

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For the Defendant:

Instructed by:

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