

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-CON-2020/00224

In the matter between:

TAIMI NDASILOHENDA IIPINGE

PLAINTIFF

and

TAUNO SACKARIA HIPONDOKA

DEFENDANT

Neutral Citation: *Ipinge v Hipondoka* (HC-MD-CIV-ACT-CON-2020/00224) [2021]
NAHCMD 338 (20 July 2021)

CORAM: RAKOW, J

Heard: 14 and 18 June 2021

Delivered: 20 July 2021

Flynote: Common Law – Warranty against eviction from movable property - Duty of seller to shield the buyer from dispossession – Restoration of the purchase price - Law of Contract – ‘Voetsoots’ - Costs – the rules relating to costs – considerations for granting punitive costs.

Summary: The plaintiff purchased a motor vehicle from the defendant for the amount of N\$ 145 000.00. This motor vehicle was still on hire purchase from the bank and the plaintiff was not aware of this fact at the time of concluding the contract of sale. This motor vehicle was eventually repossessed by the bank. The plaintiff claims damages from the defendant, which were suffered as a result of a motor vehicle which was repossessed by the bank. The defendant denied being liable to the plaintiff for any damages suffered by the plaintiff.

Held that, the seller has a duty to protect the purchaser against eviction by another party who may have a better title.

Held further that, a purchaser who claims performance of a warranty against eviction is entitled to repayment of the purchase price and interest on the purchase price

Held further that, a natural person or an entity that is not a banking institution cannot claim interest at the rate at which a bank charges interest unless proper evidence was adduced at trial to justify it or unless the specific rate was agreed to in writing between the parties.

Held that, an award of attorney and client costs is not lightly granted by the court: the court leans against awarding attorney and client costs and will grant such costs only on "rare" occasions.

Held further that, a punitive costs order cannot merely be made to punish a defendant for defending an action brought against him.

ORDER

1. The plaintiff's claim is upheld.
2. The defendant is ordered to pay an amount of N\$ 145 000.00 to the plaintiff.

3. Interest at a rate of 20% per annum on the aforesaid sum or any balance thereof outstanding, calculated from the date of summons to date of final payment.
4. Costs of suit.
5. The matter is removed from the roll and regarded as finalized.

JUDGMENT

RAKOW J:

Introduction

[1] The plaintiff Ms. Taimi Ndasilohenda lipinge and the defendant Mr. Tauno Sackaria Hipondoka entered into a contract of sale in terms of which the plaintiff purchased a motor vehicle, a certain Toyota Hilux SRX with vin number AHTFR22G006065520, hereinafter referred to as 'the motor vehicle', from the defendant for the amount of N\$ 145 000.00. This motor vehicle was subsequently repossessed by First National Bank pursuant to a judgment obtained in respect of the motor vehicle under case number HC-MD-CIV-ACT-CON-2018/02265. The plaintiff instituted action against the defendant for the damages suffered as a result of the repossession.

[2] The plaintiff avers that there existed a common law duty for the seller to protect the buyer against any eviction or dispossession of the motor vehicle and therefore seeks repayment of the full purchase price. It is further the plaintiff's position that she had no right in law to contest the claim by First National Bank as it had a better title in law than she did. It is for this reason that action was instituted against the defendant.

[3] On the morning of the trial Mr. Nanhapo, counsel for the defendant, sought leave from the court to withdraw his representation as a result of conflicting instructions. The court allowed Mr. Nanhapo and his client an adjournment to iron out their differences,

however, the position remained the same when the court resumed. As a result, the court granted Mr. Nanhapo leave to withdraw his representation.

[4] The court then explained the withdrawal of representation to the defendant as well as his legal rights of either seeking an adjournment to obtain a new legal representative or to proceed on his own. Mr. Hipondoka elected to proceed with the matter and conduct his defense. The trial procedure was then explained to Mr. Hipondoka and the trial commenced.

The plaintiff's case

[5] The plaintiff testified that she is an adult female, who is self-employed and resides in Windhoek. It was her testimony that she was interested in purchasing a pre-owned pick-up truck to use for her business and approached her brother a certain Mr. Blasius limbili to assist her in looking for a vehicle. She testified that she got to know the defendant through her brother. In January 2018, her brother informed her that his neighbour, the defendant, has a pick-up truck for sale. She instructed her brother to inspect the motor vehicle for her and report back. He carried out the inspection and reported that the vehicle was in good condition.

[6] She then met with the defendant at the defendant's house, she inspected the vehicle and asked for the registration documents, which the defendant presented to her. It was her testimony that the registration documents presented to her indicated that the defendant was the owner of the Toyota Hilux SRX with vin number AHTFR22G006065520. She then, with the reasonable belief that the defendant was indeed the owner of the motor vehicle, made an offer for N\$ 145 000 to purchase the motor vehicle.

[7] It was her testimony that the defendant accepted this offer and on 28 January 2018, she and the defendant visited her bank where she transferred an amount of N\$ 140 000 into the defendant's Nedbank account. They orally agreed that she would pay

the remaining N\$ 5 000 on a later date. They then signed a written agreement and proceeded to the defendant's where she took possession of the motor vehicle.

[8] She testified that the defendant withheld the registration documents due to the outstanding amount. In February 2018, she paid the defendant the balance of N\$ 5 000 after which he handed over the registration documents to her. She subsequently transferred and registered the vehicle to her name.

[9] It was her testimony that she had peaceful possession of the motor vehicle from the date on which she took possession of the vehicle until sometime in May 2018 when she received a phone call from First National Bank who informed her that he was contacting her with regards to the motor vehicle. She met up with this First National Bank representative who enquired from her as to the whereabouts of a certain Mr. Aron Sakeus, to which she responded that she does not know anyone by that name. The First National Bank representative informed her that he was looking for Mr. Sakeus as he was the owner of the motor vehicle in her possession and that the vehicle was financed by the bank and it was not fully settled.

[10] She then informed the bank representative that she purchased the vehicle Mr. Hipondoka. They then made a phone call to the defendant and the bank representative had a conversation with the defendant. The defendant revealed to them that he purchased the vehicle from Mr. Sakeus. The bank representative enquired about the whereabouts of Mr. Sakeus, to which the defendant responded that he is not sure but he suspects that Mr. Sakeus might be in the northern parts of the country. The bank representative informed the defendant that the vehicle still belonged to the bank.

[11] When the bank representative left, she went to the defendant's house where he informed her that he did not know that Mr. Sakeus still owed the bank when he sold him the vehicle. She then informed him that she would report the matter to the police as she believed that the defendant had fraudulently taken her money for the vehicle which she stood to lose.

[12] She left the defendant's house and continued to use the vehicle until about August 2018, when the deputy sheriff arrived at her house and presented her with a writ of execution, under case number HC-MD-CIV-ACT-CON-2018/02265. She was informed that the motor vehicle would be attached and removed from her possession. She then made a phone call to the defendant, informing him of what was taking place and requesting him to immediately come to her house. The defendant arrived with her brother and tried to speak to the deputy sheriff, however, they were not successful in stopping the execution. She testified that she never saw the vehicle again after that day.

[13] She testified that she made the defendant aware of the eviction from the motor vehicle and that the defendant, besides knowing of the impending eviction and witnessing it, did not take any steps to assist her to regain possession of the motor vehicle. She then demanded a refund of her purchase price, and the defendant refused and suggested that she should rather claim her money from Mr. Sakeus. She informed him that she is cannot get her purchase from Mr. Sakeus as she does not know him and because she never entered into any agreement with him.

[14] It was her testimony that at all relevant times during the conclusion of the sale agreement with the defendant, upon which she paid the purchase price, received possession of the motor vehicle, and subsequently registering the vehicle, she reasonably believed that the defendant was the true owner of the motor vehicle and that no other person than the defendant had a legal claim to the vehicle. She, therefore, believes that the defendant is liable to reimburse her of her purchase price.

[15] In cross-examination the plaintiff confirmed that she is aware of the clause in the sale agreement which precludes claims against the defendant after the conclusion of the agreement, she, however, stated that such exclusion was in respect of the fact that the motor vehicle was purchased 'voetstoots' and that she couldn't claim against the defendant for subsequent mechanical defects to the vehicle. It is her position that this clause does not refer to a legal claim if she is dispossessed of the motor vehicle because it does not belong to the defendant. She stated that she never had an intention to waive her right to pursue legal action in this regard.

[16] The defendant put it to the plaintiff that when they traveled to Owamboland to meet Mr. Sakeus, she gave her account number to Mr. Sakeus which was an indication of her agreeing to claim the purchase price from Mr. Sakeus, and that she only instituted action against him when Mr. Sakeus failed to pay her. She responded that according to her understanding, Mr. Sakeus has no obligation to reimburse her of the purchase price as she never paid the money to him but the defendant. She further added that she equally has no legal claim against Mr. Sakeus as she never entered into an agreement with him and that it is rather the defendant who has a proper legal claim against Mr. Sakeus but chooses not to exercise it.

The defendant's case

[17] The defendant testified that he was an adult male Namibian person, who resides in Windhoek. It is his testimony that during July 2016, he was traveling in a Taxi when he saw a white double cab 4x4, 2.5 D4D Toyota Hilux SRX, with an advert attached on the left side window. He asked the taxi driver to stop so he can take a closer look at the vehicle, which is when he saw the "For Sale" notice. He dialed the number on the advert and the man who answered made his way to where the vehicle was. When he arrived, the man introduced himself as Amon Sakeus. He proceeded to inspect the vehicle and he and Mr. Sakeus took it for a test drive, after which he was satisfied that the vehicle was in good condition.

[18] It was his testimony that he accompanied Mr. Sakeus to his home in the Suidershof location, where Mr. Sakeus produced the certificate of registration in respect of the motor vehicle, the motor vehicle license, and the license disc. In terms of the certificate presented to him, Mr. Sakeus appeared to be the owner of the motor vehicle. He and Mr. Sakeus then agreed for him to purchase the vehicle and he paid an amount of N\$ 140 000 for it. Mr. Sakeus handed over the registration in respect of the motor vehicle, the motor vehicle license, and the license disc to him and he took possession of the vehicle. He subsequently registered the motor vehicle into his name at the National Traffic Information System in Windhoek.

[19] He testified that he used the vehicle for his personal use from about June 2016 until around January 2018. He had decided to sell the vehicle in December 2017 and on 28 January 2018, the plaintiff approached him with an interest to purchase it from him. The plaintiff made an offer which he accepted and they entered into a written vehicle sales agreement. He testified that N\$140 000 was transferred by the plaintiff into his account that same day, and she paid the balance of N\$ 5 000 in cash. He then handed over the registration in respect of the motor vehicle, the motor vehicle license, and the license disc to the plaintiff and she took possession of the vehicle.

[20] It was further his testimony that sometime during 2018 a representative from First National Bank made a call to him and they spoke regarding the vehicle. It was his testimony that about April or May 2019, the plaintiff called him and informed him that she is at her house with people who came to dispossess her of her vehicle. I went to her house and found the motor vehicle being towed away. The plaintiff informed him that it was towed away by the bank because Mr. Sakeus owed an amount to the bank in respect of the motor vehicle.

[21] He testified that he was not aware that Mr. Sakeus owed an amount to the bank in respect of the vehicle and that he was further not aware of any claims in respect of the vehicle. He testified that just as the plaintiff reasonably believed that he was the true owner of the motor vehicle, he equally had a reasonable belief that Mr. Sakeus was the rightful owner at the time of purchasing the vehicle and registering it into his name, as well as at the time of selling it to the plaintiff.

[22] He further testified that he never warranted to the plaintiff that no other person had a better legal title to the motor vehicle other than himself and that the written agreement entered into between the two of them stated that no claim would be entertained after the conclusion on the agreement. Particularly the clause which reads:

‘Herewith to declare that the vehicle with the mentioned details has been sold “voetstoots” for the amount of N\$ 145 000 cash. Date 28/01/2018.

The buyer understands that he has inspected the vehicle and is satisfied with its all-around condition. No claim will be entertained after this agreement of sale, although the vehicle is in good faith. Buyer agrees to register the vehicle in his/her name. Registration papers handed over to the buyer.'

[23] It was his testimony that when the vehicle was repossessed he did not neglect to assist the plaintiff as much as he could. He stated that she accompanied the plaintiff to Owamboland and assisted her in locating Mr. Sakeus. He facilitated an agreement between Mr. Sakeus and the plaintiff, for the plaintiff to claim her money from Mr. Sakeus. He further accompanied her to the police station to make a criminal case against Mr. Sakeus, and it was when the pace of that case was too slow that she decided to institute action against him.

[24] During cross-examination, it was put to him that he became aware of the claim by the bank around May 2018, but he did nothing to protect the plaintiff from the dispossession of the motor vehicle until 2019 when the vehicle was repossessed. It was put to him that it was only then that he tried to act in terms of tracing Mr. Sakeus and accompanying the plaintiff to Owamboland and to make a criminal case. To this he responded that this was not correct, as he started looking for Mr. Sakeus as soon as she spoke to the bank representative in 2018, he was however unable to locate him, and he left it in the plaintiff's hands to get back to him if the matter is not resolved.

[25] When it was put to him that he did not attempt to settle the outstanding balance with First National Bank, he agreed that he did not. Plaintiff's counsel Mr. Alexander asked the defendant why he has not returned to the plaintiff's purchase price and instead insisted that she had to claim it from Mr. Sakeus and why he does not claim from Mr. Sakeus for what he paid to him. To this, he responded that he cannot repay the purchase price to the plaintiff because that would mean that he would also lose out. He further responded that he cannot claim from Mr. Sakeus as this is the same person who was unable to settle the debt owed to the bank and therefore won't be able to pay him, and this would once again mean that he would lose out.

[26] It was then put to him as to why then he insists that the plaintiff should claim her purchase price from this same Mr. Sakeus that he is wary of claiming from and whether he has reconciled himself with the fact that the plaintiff should be the one to lose out. To this, he did not have much to say other than that the plaintiff should then rather patiently wait for Mr. Sakeus to get money to pay him back and then he will pay the plaintiff back but until then, he cannot assist her.

[27] When it was put to him that the protection of the seller from future claims after the conclusion of the contract related to the fact that the vehicle was sold as-is, and that it was only in respect of mechanical problems or defects with the vehicle that the plaintiff could not claim against him. He agreed that he understood it to mean that the buyer agreed that she inspected the car before purchase and concluded that it was in good condition and she, therefore, could not later come back and claim for problems with regards to the vehicle.

Applicable law

[28] Under common law, the seller and buyer both have certain rights and obligations. The seller's obligations include amongst others the duty to take due care of the thing from date of sale until date of handing over, the duty to make the thing available to the seller, the duty to transfer ownership to the buyer, and the duty to warrant against eviction. What the court is tasked to determine is whether the seller *in casu* had a duty to warrant the seller against eviction and whether he did do so, and whether the buyer is entitled to the available remedies if the court finds that the seller failed to exercise this duty.

[29] The seller has to protect the purchaser against eviction by another party who may have a better title. The purchaser who buys a *merx* with the bona fide belief that the seller is the owner of the *merx* has an action against the seller when he or she is evicted or threatened with eviction by someone with a better title than the seller. The most common form of eviction occurs when a purchaser is deprived of possession from

merx by its true owner or where someone who has taken possession from the purchaser is deprived of possession and seeks recourse from the purchaser. The purchaser is only entitled to remedy if he or she can show that the third party's claim was indefensible in law. The warranty against eviction protects the purchaser against these occurrences and binds the seller to compensate the purchaser if certain circumstances arise. The action is for the performance of the warranty and this performance includes the payment of compensation of damages. The purchaser who claims the performance of a warranty against eviction is entitled to repayment of the purchase price and interest on the purchase price.¹

[30] This position has been cemented in several judgments. In *Lammers and Lammers v Giovanni*² it was held that:

'If a seller fails to shield the buyer against eviction he must restore the price and pay the damages suffered by the buyer as a result of the eviction.'

[31] In support of the above-mentioned position, the court in the matter of *Alpha Trust (Edms) Bpk v Van der Watt*³, the court held that upon eviction, the innocent purchaser is entitled to the repayment of the purchase price already paid, cancellation of the contract of sale, and damages for his full *id quod* interest.

[32] The warranty against eviction need not form part of a contract of sale as it is residual in nature unless the parties expressly or impliedly exclude it. Where the contract contains a voetstoots clause it should be scrutinized with care as it may have been the parties' intention to exclude the warranty against eviction when entering into such a clause. However, this would need to be proven as the usual meaning of voetstoots is that all that is excluded is the liability for defects and the warranty against eviction is distinct from liability for defects.⁴

¹ E. Khan, M. Havenga, P. Havenga and J. Lotz. *Principles of the law of sale and lease*. 1998. Juta. At 21.

² *Lammers and Lammers v Giovanni* 1955(3) SA 385 (A) at 390B..

³ *Alpha Trust (Edms) Bpk v Van der Watt* 1975 3 SA 734 (AD) 755.

⁴ A.J. Kerr. *The law of sale and lease*. Third Edition. 2004. Lexis Nexis. Butterworths. Durban. At 196.

[33] From the interpretation of the 'voetsoots' clause contained in the written agreement between the parties, this court is not convinced that the parties intended to exclude the warranty against eviction from their contract. This clause will therefore be interpreted to carry its ordinary meaning and consequence.

[34] When a seller is called upon to defend the buyer in his possession but washes his hands of the whole matter, it is not open to him to meet the buyer's claim by saying that the buyer could or should have resisted the true owner's claim more energetically or skillfully, for it was open to him as the seller to have taken steps to protect the buyer and himself.⁵

[35] This court is in agreement with the above, in that it was not simply enough for the defendant to have placed the duty of defending the claim by the bank on the plaintiff and then further requiring the plaintiff to enforce a non-existent contract against Mr. Sakeus, while he had and still has a claim against Mr. Sakeus and he could have exercised it to protect himself as well as the plaintiff.

Conclusion

[36] It is not in dispute that the plaintiff is no longer in possession or has undisturbed use of the vehicle which she purchased from the defendant, as it was eventually repossessed by the bank. It is further clear from the evidence in this case that the plaintiff immediately informed the defendant of the threat of eviction when it initially arose, after a few months she informed him again of the fact that the deputy sheriff was evicting her from the motor vehicle as they were taking possession of it on behalf of the bank. Which makes it quite evident that the defendant was aware that the plaintiff was being dispossessed. He chose to do nothing to defend the plaintiff, as it was his opinion that the plaintiff should rather seek recourse from Mr. Sakeus. Accordingly, the plaintiff is entitled to have recourse to her seller for damages for breach of the warranty against eviction.

⁵ A.J. Kerr. *The law of sale and lease*. Third Edition. 2004. Lexis Nexis. Butterworths. Durban. At 199-200.

[37] I take note that from the particulars of claim that the plaintiff seeks interest on the purchase price or any balance thereof outstanding, calculated based on the prime lending rate generally charged by First National Bank of Namibia Limited, plus 2% per annum from the date of summons to date of final payment and calculated daily and compounded monthly. It is not clear from the pleadings or the testimony as presented in court on what basis the plaintiff would be entitled to the said interest. This interest rate was not agreed to in the written agreement which forms the basis of this claim, nor is the plaintiff in a position to claim interest at the rate of First National Bank as no link was established between the plaintiff, First National Bank and the interest rate charged.

[38] The plaintiff further seeks costs on an attorney and own client scale to which it was submitted that the basis for this scale of costs is justified because the defendant should have known his obligation and should not have defended the action at all, and because he did, he should carry the full costs occasioned by his persistent denial of liability. It is prudent to state that this particular costs scale did not form part of the written agreement. The general rule is indeed that costs follow the event and the court is in agreement with the plaintiff that if she is successful in prosecuting her claim, she is entitled to cost.

[39] It, however, appears that what the plaintiff seeks is punitive costs against the defendant for noting a defense. The making of a punitive order is above the general rule and is in the court's discretion⁶.

[40] The learned author, Cilliers, states the following regarding the granting of costs on the attorney and client scale:⁷

'The ordinary rule is that the successful party is awarded costs as between party and party. An award of attorney and client costs is not lightly granted by the court: the court leans against awarding attorney and client costs and will grant such costs only on "rare" occasions. It is clear that normally, the court does not order a litigant to pay the costs of another litigant on

⁶ A.C. Cilliers, *Law of costs*, 3rd edition, LexisNexis, Durban, 1997 at p.2-3 para 2.01.

⁷ A.C. Cilliers, *Law of costs*, 3rd edition, LexisNexis, Durban, 1997 at p.2-3 para 4.09.

the basis of attorney and client unless some special grounds are present.’

[41] This was the principle adopted and applied in *Conradie v Van Dyk & Another*⁸, where Corbett AJ stated:

‘It is clear that normally the Court does not order a litigant to pay the costs of another litigant on the basis of attorney and client unless some special grounds are present, such as those alluded to in the passage just quoted, viz. that the party has been dishonest or fraudulent, or was transaction under enquiry or in the conduct of the case.’

[42] The court sees no reason to deviate from the general principles for granted punitive costs as captured above, as I believe that the defendant's conduct does not justify an order of punitive costs against him. A punitive costs order cannot merely be made to punish a defendant for defending an action brought against him. The court cannot allow such an order in this matter as it will set a dangerous precedent and deter future defendants from defending actions instituted against them, out of fear of being punished with a punitive costs order.

In the result

1. The plaintiff's claim is upheld.
2. The defendant is ordered to pay an amount of N\$ 145 000.00 to the plaintiff.
3. Interest at a rate of 20% per annum on the aforesaid sum or any balance thereof outstanding, calculated from the date of summons to the date of final payment.
4. Costs of suit.
5. The matter is removed from the roll and regarded as finalized.

E RAKOW
JUDGE

⁸ *Conradie v Van Dyk & Another* 1963 (2) SA 413 (C) 418 E.

APPEARANCES:

FOR THE PLAINTIFF:

V Alexander
Of Ellis Shilengudwa Inc.
Windhoek

FOR THE DEFENDANT:

T S HIPONDOKA
The defendant in person.