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

Case no A 570/2006

In the matter between

GÖBEL FRANCHISES CC Appellant

and

ZUBAIR GOOLAM HOOSEN KADWA First respondent

JAMES McMILLAN Second respondent

JUDGMENT DELIVERED ON 15 FEBRUARY 2007

BLIGNAULT J:

Introduction

[1] Appellant, Göbel Franchises CC, is a close corporation which carries on business as a dealer in motor vehicles, *inter alia,* under the name of Cape Saab at 282 Durban Road, Tygerberg, Western Cape Province. It is appealing to a Full Bench of this Division against a judgment in terms of which it was ordered to pay the sum of R170 000,00 plus interest to first respondent, Mr Zubair Goolam Hoosen Kadwa.

[2] First respondent's claim against appellant arose from an agreement of sale concluded on 22 March 2002 in terms of which appellant sold a 1995 Toyota Land Cruiser motor vehicle ("the Toyota") to him for a purchase price of R170 000,00. First respondent paid the purchase price to appellant on 22 March 2002 and took delivery of the Toyota. On 13 June 2002 an official acting on behalf of the Controller of Customs and Excise in Durban ("the Controller") detained the Toyota in terms of section 88(1)(a) of the Customs and Excise Act 91 of 1964 ("the Act"). First respondent maintained that he had been evicted and that appellant breached its warranty against eviction. He accordingly claimed payment of the sum of R170 000,00 plus interest from appellant.

[3] Second respondent, Mr James McMillan, is an adult male residing at 2 Alzia Street, Glenvista, Johannesburg. He was joined by appellant as a third party to the action. Appellant alleged in its third party notice that it had purchased the Toyota from second respondent on 4 October 2001. In the event of it being held liable to pay the sum of R170 000,00 to first respondent, appellant alleged, it would suffer damage in that amount for which second respondent would be liable to it. Second respondent defended appellant's claim against him.

[4] The Court below (Ndita J) upheld first respondent's claim against appellant and granted judgment in his favour with costs. She also ordered appellant to pay second respondent's costs.

[5] The Court below granted appellant leave to appeal to this court against the whole of the judgment. Appellant's case on appeal is that the Court below:

(i) should have dismissed first respondent's claim against appellant; and

(ii) should have ordered first respondent to pay the costs of both appellant and second respondent.

The detention of the Toyota

[6] The primary facts in regard to the detention of the Toyota are not in dispute. First respondent, an adult male who resides in Durban, KwaZulu Natal, came to Cape Town to purchase the Toyota from appellant after he had seen an advertisement in a magazine. A written agreement of sale was concluded on 22 March 2002. He paid the full purchase price in cash and took

delivery of the Toyota that same day. First respondent soon experienced a number of mechanical problems with the vehicle and he took it to a Toyota dealer in Durban for an inspection. In the course of this inspection he was told that it might be difficult to find certain parts for the vehicle as it was a *'grey import'.* This, he understood, meant that the vehicle had not been imported into South Africa by Toyota South Africa, the authorised Toyota dealer in South Africa.

[7] On 13 June 2002 first respondent took the vehicle to the office of the Department of Customs and Excise in Durban. There he was handed a detention notice which informed him that the vehicle was being detained in terms of section 88(1)(a) of the Act. The notice, signed by Ms Bobette Lourens on behalf of the Controller, read as follows:

> *'The vehicle mentioned hereunder is hereby detained in terms of section 88(1)(a) read with section 87 of [the Act] to establish whether such goods/materials are liable to forfeiture.*
>
> ***Description of Vehicle: Toyota Landcruiser***
> ***VX Limited Edition***
> ***Colour of Vehicle : Silver Grey***
> ***Chassis Number : HDJ810009094***

Engine Number : IHD0018349

The vehicles must remain in the owner's possession.

You are required to comply with the provisions of sections 102 of the said Act on or before 13 July 2002, failing which the goods will be seized in terms of section 88(1)(c) of the said Act.'

The Controller is defined in the Act as an officer designated as such in respect of an area or matter by the Commissioner for the South African Revenue Service. According to first respondent he was told by the officials concerned that he could keep the vehicle in his possession but he was not allowed to use it. He stored it in the backyard of a friend.

[8] First respondent instructed his attorney, Mr Ayoub Kadwa, to attend to the matter. On 2 August 2002 his attorney wrote a letter to appellant informing him that first respondent was cancelling the sale by reason of numerous defects in the vehicle as well as the fact that he had established that the vehicle was in fact a 1991 model whilst appellant had sold it to him as a 1995 model. First respondent's attorney tendered the return of the vehicle to appellant and claimed a refund of the purchase price plus the cost of fitting an alarm/immobiliser and travelling costs. Appellant's

attorney responded on behalf of appellant on 13 August 2002. He rejected first respondent's demands.

[9] On 3 October 2002 first respondent's attorney informed appellant in writing that the vehicle had been impounded by the Department of Customs and Excise and that first respondent had been evicted. Appellant, he said, had breached his warranty against eviction and it was its responsibility to restore possession of the vehicle to first respondent.

[10] On 23 October 2002 Ms Lourens, acting on behalf of the Controller, addressed a letter to first respondent in the following terms:

> *'Further to our Detention notice dated the 13th of June 2002 an investigation has been conducted. In order to expedite this matter we require any/all documentation in terms of section 102 of the Customs and Excise Act Number 91 of 1964 relating to the subject vehicle. Please note that the date reflected on the detention notice is hereby been extended to the 16th of November 2002. The documents are requested in order to prove that the Customs Duties and VAT was paid.*

If the documents are not produced within thirty days from the date hereof, the vehicle would be seized in terms of section 88(1)(c) and would be placed into the States Warehouse.'

First respondent's attorney forwarded a copy of this letter to appellant's attorneys on 28 October 2002.

[11] The Toyota was in fact taken to a state warehouse on 1 July 2004 after an official acting on behalf of the Controller informed first respondent that he was required to take it there.

[12] It is common cause that neither appellant nor first respondent attempted to furnish any proof to the Controller that customs duty had in fact been paid on the Toyota.

Mr Essop's evidence

[13] First respondent called Mr Farhaz Essop to give evidence. He is a senior anti-smuggling officer in the Department of Customs and Excise in Durban. Ms Bobette Lourens worked under him in the same department. They dealt with the problem in regard to first respondent's Toyota in June 2002. His department was approached by first respondent and informed about the

background and that the vehicle was possibly a *grey import.* He caused the detention notice to be issued. His department subsequently investigated the matter. He contacted the International Trade and Administration Commission ("ITAC") in the Department of Trade and Industry and they informed him no import permit had been issued for this vehicle. That meant, according to him, that no customs duty had been paid on the vehicle. He also contacted Toyota South Africa and they informed him that they had no record in respect of the importation of the vehicle. (Whilst preparing for the trial in the present matter he discovered that the queries sent to ITAC and Toyota South Africa contained a wrong chassis number. On 8 February 2005, the day before he actually testified in the court below, he repeated his queries to these two entities and both confirmed that they had no record of the Toyota's importation.) Essop's department also sent a query, dated 11 May 2004, to the Trade and Compliance section of Business Against Crime in order to find out whether the vehicle had been registered on the National Transport Information System ("NATIS"). The documentation received from them revealed that the vehicle had been registered for the first time in this country in Dundee, KwaZulu-Natal but it contained no relevant information on the

question whether customs duty had been paid. Essop confirmed that the Toyota had not been forfeited in terms of the Act.

Second respondent's evidence

[14] Mr James McMillan, second respondent, testified that the Toyota was acquired by JMC Electricals CC from Classique Auto Sales by way of a lease concluded on 5 December 1997. He was a member of JMC Electricals and the Toyota was registered in terms of the Road Traffic Act in his own name with registration No DRT067GP. The rights of the lessor of the vehicle were transferred to Wesbank, a division of Firstrand Bank Limited, and JMC Electricals paid the rentals in terms of the lease to Wesbank. On 4 October 2001 the Toyota was traded in by him to Saab Sandton, a division of appellant, as part of the purchase price of a Suzuki motor vehicle which he purchased from Saab Sandton.

[15] Second respondent testified that he contacted Classique Auto Sales when he received a letter of demand from first defendant's attorneys in this matter. They told him that the Toyota had been acquired by them from Toyota Dundee. He telephoned Toyota Dundee and they referred him to Mr Jakes Pandor, the

previous owner of Toyota Dundee. Pandor had apparently sold the Toyota franchise and moved to Durban. He (second respondent) telephoned Pandor who informed him that the Toyota had been imported and sold to Toyota Dundee. It was registered at the Dundee motor vehicle registration office. Shortly before the trial Pandor's attorney confirmed this information in a letter addressed to him.

Relevant provisions of the Act

[16] In terms of section 39 of the Act an importer of goods is obliged to make due entry of the goods and pay all duties due on the goods. Section 87(1) of the Act provides as follows;

> ***87 Goods irregularly dealt with liable to forfeiture***
>
> *(1) 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: Provided that forfeiture shall not*

affect liability to any other penalty or punishment which has been incurred under this Act or any other law, or liability for any unpaid duty or charge in respect of such goods.

[17] Section 88 of the Act, insofar relevant, provides as follows:

88 Seizure

(1) (a) An officer, magistrate or member of the police force may detain any ship, vehicle, plant, material or goods at any place for the purpose of establishing whether that ship, vehicle, plant, material or goods are liable to forfeiture under this Act.

(b) Such ship, vehicle, plant, material or goods may be so detained where they are found or shall be removed to and stored at a place of security determined by such officer, magistrate or member of the police force, at the cost, risk and expense of the owner, importer, exporter, manufacturer or the person in whose possession or on whose premises they are found, as the case may be.

(bA) No person shall remove any ship, vehicle, plant, material or goods from any place where it was so detained or from a place of security determined by

an officer, magistrate or member of the police force.

(c) If such ship, vehicle, plant, material or goods are liable to forfeiture under this Act the Commissioner [for the South African Revenue Service] may seize that ship, vehicle, plant, material or goods.'

[18] Section 89 of the Act provides for the institution of proceedings by the owner or the person from whom the goods have been seized, to claim the goods. Any such litigant must give notice of such proceedings to the Commissioner within 90 days after the date of seizure and the proceedings must be instituted within 90 days of such notice. If no proceedings are instituted the goods shall be deemed to be forfeited.

[19] Section 93(1) of the Act provides as follows:

'(1) The Commissioner may, on good cause shown by the owner thereof, direct that any ship, vehicle container or other transport equipment, plant, material or other goods detained or seized or forfeited under this Act be delivered to such owner, subject to-

(a) payment of any duty that may be payable in respect thereof;

(b) payment of any charges that may have been incurred in connection with the detention or seizure or forfeiture thereof; and

(c) such conditions as the Commissioner may determine, including conditions providing for the payment of an amount not exceeding the value for duty purposes of such ship, vehicle container or other transport equipment, plant, material or goods plus any unpaid duty thereon.'

[20] Section 102(1) of the Act reads as follows:

'102 Sellers of goods to produce proof of payment of duty

(1) Any person selling, offering for sale or dealing in imported or excisable goods or fuel levy goods or any person removing the same, 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, produce proof as to the person from whom the goods were obtained and, if he is the importer or manufacturer or owner, as to the place where the duty due thereon was paid, the date of payment, the particulars of 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.'

The provisions of sub-section 102(4) of the Act are also relevant. They read as follows:

> *'(4) If in any prosecution under this Act or in any dispute in which the State, the Minister or the Commissioner or any officer is a party, the question arises whether the proper duty has been paid or whether any goods or plant have been lawfully used, imported, exported, manufactured, removed or otherwise dealt with or in, or whether any books, accounts, documents, forms or invoices required by rule to be completed and kept, exist or have been duly completed and kept or have been furnished to any officer, it shall be presumed that such duty has not been paid or that such goods or plant have not been lawfully used, imported, exported, manufactured, removed or otherwise dealt with or in, or that such books, accounts, documents, forms or invoices do not exist or have not been duly completed and kept or have not been so furnished, as the case may be, unless the contrary is proved.'*

[21] The judgment of the Appellate Division in *Secretary for Customs and Excise and Another v Tiffany's Jewellers (Pty) Ltd* 1975 (3) SA 578 (A) is of some relevance in regard to the nature of the Commissioner's discretion in terms of the Act. The court held that the Secretary (now the Commissioner) had no discretion in

regard to the forfeiture of the goods once it is clear that a prohibited act had been committed. See the following passage, at 587G – 588A:

> *'The wording in sec. 87 (1) indicates that the goods become liable to forfeiture, wherever they may be, if the prohibited or irregular acts have been committed, no matter who commits them, whereas in the other sections it is the act of the individual who commits the offence in relation to particular goods which causes those goods to be liable to forfeiture. This means that under sec. 87 (1) or 113 (8) it matters not whether the owner exported or attempted to export the goods in contravention of the law. No doubt, if circumstances exist which show that the true owner is innocent, e.g. where a thief seeks to export stolen goods, the Secretary will exercise his discretion in terms of sec. 93. Hence, for the purposes of this case, even assuming Tiffany's was in no way party to the wrongful conduct of Favarolo, the diamonds were liable to forfeiture.*
>
> *In the Vincent and Pullar case [Vincent & Pullar Ltd. v Commissioner of Customs and Excise, 1956 (1) SA 51 (N)], at p. 53, it was held that once the seizure was not illegal the Court had no discretion. I am in respectful agreement with what was there said. This means that once the relevant breach of the statutory provisions has been proved the goods are liable to forfeiture and once seized "are deemed to be condemned and forfeited" (see sec. 89).'*

This approach was referred to with approval in *Capri Oro (Pty) Ltd and Others v Commissioner of Customs and Excise and Others* 2001 (4) SA 1212 (SCA) paras [19] and [20], at 1220D-1221B.

The judgment of the Court below

[22] The learned trial judge held that first respondent had been evicted as he had been deprived of his possession of the Toyota. The conduct of the Controller, she held, was lawful. Appellant had been duly notified by first respondent of the eviction and it did nothing to defend the claim. The Controller's rights to the goods, she held, were unassailable. First respondent had accordingly proved all the required elements for a successful reliance on the breach of the warranty against eviction. His claim against appellant succeeded with costs.

[23] It appears that appellant did not in the Court below ask for any substantive relief against second respondent. The learned trial judge accordingly did not deal with the merits of appellant's claim against second respondent. She held that second respondent had been *'unnecessarily dragged into court'* by appellant. Appellant was accordingly ordered to pay his costs.

The warranty against eviction: Common law principles

[24] The warranty against eviction is one of the obligations imposed under the common law upon the seller of a thing sold. If the purchaser is evicted, ie deprived of his possession of the thing sold, or threatened with eviction, by a person with a better legal title than the seller, he is entitled to claim compensation from the seller for the loss suffered by him.

[25] There is no eviction, however, if the third person's claim is not a lawful one. The demand, it has been said, has to be one that can *'legally be substantiated'.* See *Westeel Engineering (Pty) Ltd v Sidney Clow & Co Ltd* 1968 (3) SA 458 (T) at 462A and *Garden City Motors (Pty) Ltd v Bank of the Orange Free State Ltd* 1983 (2) SA 104 (N) at 108FG.

[26] In order to rely upon the warranty against eviction the purchaser is required, upon eviction or when threatened with eviction, to take what is described in Joubert (ed) *The Law of South Africa (LAWSA)* (first reissue) vol 24 para 91 as *'preliminary steps',* namely to give notice of the eviction to the seller and, if the seller does not intervene to protect his possession, to put up

proper defence (a *virilis defensio*). The meaning and effect of the latter requirement are in dispute in the present case and will be discussed more fully hereunder.

[27] Where the purchaser does not comply with the preliminary steps it is still open to him to prove that the third person had *'a legally unassailable'* claim. See *Olivier v Van der Bergh* 1956 (1) SA 802 (C) at 804BC and the *Garden City Motors* judgment*, supra,* at 107FG.

[28] The warranty against eviction, I may add, is a term implied by law. The parties to an agreement of sale may agree, expressly or tacitly, to exclude its operation. In the present case the question of such exclusion was raised by appellant in the Court below but it was accepted on appeal that the agreement between appellant and first respondent did not exclude the operation of the warranty.

Appellant's contentions on appeal

[29] Mr P Myburgh appeared for appellant on appeal. His principal contention was that first respondent had not established that he had been lawfully evicted. Mr Myburgh submitted that

although first respondent was physically dispossessed of the vehicle, the Controller (as represented by Essop) acted unlawfully and first respondent was therefore not lawfully evicted. For that reason, although appellant was in fact notified of the Controller's detention of the Toyota and took no steps to protect first respondent's possession, appellant did not incur any liability by reason of the warranty of eviction.

[30] In support of this contention Mr Myburgh submitted that the Controller could only have detained the vehicle in terms of section 88(1)(a) of the Act for the purpose of establishing whether the vehicle was liable to forfeiture under the Act. This depended upon the factual question whether customs duty had been paid at the time of its importation. The Controller, he submitted, acted unlawfully in two respects. In the first place he referred first respondent to the provisions of section 102 of the Act which did not apply to him. In the second place, he submitted, the Controller detained the vehicle in terms of section 88(1)(a) without properly establishing whether customs duty had in fact been paid or not. He could only have detained the vehicle lawfully once it had been shown to have been liable to forfeiture.

[31] Mr Myburgh's alternative contention was first respondent had failed to put up a *virilis defensio*. He submitted that first respondent was required to prove not only that he had given proper notice of the eviction to appellant (which was not disputed) but also that he had conducted a *virilis defensio.* This, he submitted, first respondent had failed to do. First respondent had merely referred the matter to appellant and failed to provide any resistance to the Controller's detention of the vehicle. First respondent was accordingly required to prove that the Controller's right to detain the vehicle was unassailable. The question of the assailability of his right, according to this argument, depended upon the question whether customs duty had in fact been paid at the time of the importation of the vehicle or not. First respondent, he submitted, failed to prove that customs duty had been paid.

[32] I propose to consider Mr Myburgh's principal contention first and thereafter his alternative contention.

Was the eviction lawful?

[33] Mr JAB Nel appeared on behalf of first respondent. He disputed appellant's contention that the Controller acted unlawfully.

Mr Nel pointed out that the Controller took reasonable steps to establish whether customs duty had been paid or not. He contacted Toyota South Africa and the Department of Trade and Commerce and the information received by him as a result of these enquiries tended to confirm that customs duty had not been paid. It may be, Mr Nel conceded, that the Controller's reference to section 102 of the Act in the detention notice was not particularly appropriate but this did not affect the validity of the action taken by him. He gave ample notice to first respondent of the imminent seizure of the vehicle and he was entitled to assume that first respondent would raise it with person that sold the vehicle to him. Mr Essop was criticised under cross-examination for not contacting appellant but this, Mr Nel submitted, did not render his conduct unlawful. In terms of section 102(4) of the Act, he pointed out, the onus was on the person disputing the detention of the vehicle to establish the facts on which he relied.

[34] I agree with Mr Nel's submission that it has not been shown that the Controller's actions in respect of the Toyota was unlawful. He gave proper notice of the detention to first respondent and he took reasonable steps to establish whether customs duty had been paid. If the customs duty had indeed not been paid then it is

difficult to understand what further investigations would have revealed that negative fact. No specific suggestions were made in the course of the cross-examination of Essop as to what further steps he could or should have taken. The Controller was assisted by the onus contained in section 102(4) of the Act and he gave first respondent and his predecessors ample opportunity to establish that a proper importation of the Toyota took place.

[35] I am accordingly satisfied that first respondent established that he had been lawfully evicted.

A *virilis defensio*

[36] Mr Myburgh's alternative contention raises questions regarding the meaning and effect of the requirement that the purchaser must put up a *virilis defensio*.

[37] The judgment of Schreiner JA in *Lammers and Lammers v Giovannoni* 1955 (3) SA 385 (A) contains an important analysis of the purchaser's position upon eviction. There are passages in the judgment which make it clear that the purchaser is not obliged to resist the claim at all costs when he has given proper notice

thereof to the seller, he is only required to take reasonable steps. See, in particular, at 392F/G-392H :

> *'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 to be open to him to meet the buyer's claim by saying that the latter could or should have resisted the true owner's claim more energetically or 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 of a procuratio in rem suam.'*

[38] The requirement of a *virilis defensio* was discussed in a helpful note on the *Lammers* judgment by Prof P van Warmelo in (1955) 72 *SALJ* 340. He pointed out that the nature of the required *virilis defensio* to be put up by the purchaser, would depend upon the circumstances of the particular case. The purchaser, according to him, is not required to defend the claim trench by trench. He is merely required to take steps that are reasonably required to allow the seller to defend his possession of the thing sold. The following passages, at 343 – 344, reflect Prof van Warmelo's views:

'Dit bring ons weer tot die geaardheid van die virilis defensio. Wat beteken dit? Wil dit sê dat die koper die eis van die vermoedelike reghebbende op alle maniere en tot die bitter einde moet beveg? Indien wel, kan dit beteken dat hy met baie koste uit die saak uitkom en sonder die koopsaak, wanneer die verkoper nie die reghebbende was nie en miskien 'n persoon wat nie juis solvent genoem kan word nie. Moet ons egter die vereiste van virilis defensio interpreteer in die sin "That today the buyer is not obliged to put up any, let alone a vigorous, defence against the true owner on pain of being unable to recover from the seller"? Dit wil voorkom dat hierdie woorde miskien die indruk kan skep dat die koper hoegenaamd, en onder geen omstandighede nie, 'n defensio moet voer nie. So 'n interpretasie sou weer die verkoper, wat miskien bona fide is en 'n goeie verweer het, op 'n onbillike manier tref.

Na ons beskeie mening word daar somtyds te veel en somtyds te weinig verstaan onder die vereiste van virilis defensio. Dit wil voorkom dat die Romeins-Hollandse reg (en daar is seker geen rede om van so 'n billike standpunt afstand te doen nie) die koper sowel as die verkoper wil beskerm. Daarom die vereiste dat die koper 'n verweer teen die eiser moet voer (sodat die verkoper as auctor die stappe kan neem om die koper te beskerm); daarom ook die vereiste van kennisgewing (sodat die auctor van die moeilikheid weet en die nodige stappe – indien moontlik – kan neem). Maar virilis defensio wil nie sê dat die koper tot in die laaste loopgraaf teen die eiser stand moet hou nie: dit wil slegs sê hy moet die korrekte stappe neem wat prosessueel vereis is om die vermoedelike reghebbende nie onmiddellik alles gewonne te gee nie en die auctor die geleentheid te gee om stappe te neem om die vacua possessio vir die koper te handhaaf.'

[39] Prof van Warmelo's interpretation of the *virilis defensio* requirement is in my view persuasive. It is consistent with the authorities and it is both logical and equitable. I propose to apply it to the facts of this case.

[40] In the present case, so it seems to me, first respondent did what could reasonably have been expected of him in the circumstances. He was not in possession of any information in regard to the question whether customs duty had been paid on the Toyota or not. Such information could only be provided by the person who was responsible for the importation of the vehicle. In these circumstances he acted reasonably by informing appellant of the problem and leaving it to appellant to obtain and provide such information. He did nothing that prejudiced appellant's rights to prove that customs duty had in fact been paid.

[41] In support of his alternative contention Mr Myburgh placed much reliance on the judgment of the High Court of Zimbabwe in *Moyo v Jani* 1985 (3) SA 362 (ZH). The facts in that case are in some respects similar to those in the present case. The circumstances of that case must, however, be considered carefully as there is a significant point of difference.

[42] The plaintiff in *Moyo* had bought a video cassette recorder from the defendant who was not permitted to sell the recorder without the payment of duty thereon. Two months after the sale the recorder was seized by the customs authorities acting under the relevant provisions of the Zimbabwean Customs and Excise Act. The plaintiff was informed at the time of the seizure that, if he wished, he could make representations for the release of the recorder or institute proceedings for the recovery thereof. The plaintiff did not take any steps against the Controller. He instituted an action against the defendant. The defendant raised a defence that the plaintiff had a complete defence against the seizure by the Controller as he had acquired the recorder bona fide and for value. The learned judge, Mfalila J, held that plaintiff had been evicted from his possession of the video cassette recorder upon its seizure by customs authorities. He then summarised the rules under which a purchaser could proceed against the seller in these circumstances. These included the rule *'that he should put up a spirited defence against the claims of the third party'.* The learned judge then considered the position of the plaintiff in that case and he upheld the defence that he had failed to put up a *virilis defensio* to the claims and seizure by the Controller. He pointed out that there had been adequate statutory machinery available to the

plaintiff for the recovery of his seized goods. Having failed to use this machinery, he was not entitled to turn to the seller for redress.

[43] It seems clear to me that there is a vital point of distinction between the circumstances of this case and those in *Moyo.* In *Moyo* the purchaser could, in terms of the relevant statute, protect his own possession of the goods in question by proving to the Controller that he his acquisition of the goods was *bona fide* and for value. The South African statute does not contain a comparable provision. First respondent's *bona fides* might have been relevant in regard to a claim under section 93 of the Act but that is an entirely different matter. First respondent would only have been able to resist the detention of the Toyota by the Controller if he could provide proof that the import duty had been paid. His own *bona fides* at the time of the acquisition of the vehicle were accordingly entirely irrelevant. In these circumstances it seems to me that first respondent did what was required of him, namely to give proper notice of the eviction to appellant.

Was the Controller's right to detain the vehicle unassailable?

[44] Mr Nel submitted in the alternative, I may add, that first respondent had in any event shown on a balance of probabilities that the Controller's right to detain the vehicle was indeed unassailable. In view of the conclusion reached above it is strictly speaking not necessary for this court to decide that question. Having considered the issue, however, I propose to deal with it briefly.

[45] In my view there is merit in Mr Nel's alternative submission. The question of the unassailability of the Controller's rights, according to this submission, was dependent upon the factual question whether customs duty had been paid on the importation of the Toyota or not. In view of the limited nature of the Commissioner's discretion as explained in the *Tiffany's* case above, it seems clear that the Controller would have had no discretion to release the Toyota if customs duty had in fact not been paid. The evidence of Essop's unsuccessful attempts to obtain proof of that fact is indeed relevant circumstantial evidence which justifies the inference that it had not been paid. The drawing of this inference is strengthened by the fact that second

respondent, despite his efforts to obtain such proof, was nevertheless unable to provide any evidence thereof. Appellant itself adduced no evidence to justify the inference that the customs duty had in fact been paid. The onus which rested upon first respondent was only to prove this element of his cause of action against appellant upon a balance of probabilities. He was not required to meet a more stringent onus. In the circumstances I am of the view that first respondent discharged that onus.

[46] For the reasons set out above I am of the view that the Court below did not err in granting judgment in favour of first respondent and against appellant.

Liability for second respondent's costs

[47] As appellant did not pursue the claim which he possibly had against second respondent in the Court below it is not necessary for this court to consider the merits of such a claim. In the circumstances it appears that second respondent was not only unnecessarily dragged through the Court below, he was also unnecessarily dragged through this court. There are in my view no grounds for interfering with the order made in the court below that

appellant should pay his costs. Appellant should also pay his costs relating to the appeal.

[48] In the result I would dismiss the appeal and order appellant to pay first and second respondents' costs of appeal.

A P BLIGNAULT

HLOPHE JP: I agree. It is so ordered.

J M HLOPHE

BOZALEK J: I agree.

L BOZALEK