THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case no: 70/05

In the matter between:

HAROLD PLIT **APPELLANT**

and

IMPERIAL BANK LIMITED **RESPONDENT**

Coram: **FARLAM, MTHIYANE, MLAMBO JJA COMBRINCK *et* CACHALIA AJJA**

Date of hearing: **15 September 2006**

Date of delivery: **26 September 2006**

Summary: **Purchase and sale – warranty against eviction – whether excluded in instalment sales agreement with bank**

Neutral Citation: This judgment may be referred to as Plit v Imperial Bank Ltd [2006] SCA 113 RSA

JUDGMENT

COMBRINCK AJA/…..

COMBRINCK AJA:

[1] At issue in this appeal is whether on a proper interpretation of two written instalment sale agreements concluded between the parties the implied warranty against eviction was excluded.

[2] The respondent ('the Bank') sued the appellant ('the defendant') for payment of R1 851 534.73 and R1 144 895.59 being the amounts outstanding on the two agreements. The first agreement concluded on the 24th December 1999 reflected the sale by the Bank to the defendant of a used light aircraft, described as a 'LET 410 UVP aircraft'. The second was in respect of the sale of two aircraft engines (2 x new M601 B engines) for fitment to the aircraft which was the subject matter of the first sale. This second agreement was concluded on the 17th February 2000. In its particulars of claim the Bank alleged that the defendant was in breach of both agreements in that he had failed to make punctual payment of the instalments due. In addition, and in further breach of the agreements, he had allowed the aircraft and engines to be attached and/or removed from his possession. Invoking the acceleration clause in the agreements the Bank claimed the full outstanding balance in respect of both agreements.

[3] The defendant in his plea denied liability for payment of the amounts claimed. He raised two defences. The first was that he had been induced to conclude both agreements by fraudulent misrepresentations as to the ownership of the aircraft and engines made by employees of the Bank. On becoming aware of the falsity he cancelled the agreements. The second defence was that the aircraft and engines had during December 2000 or January 2001 been attached by the Sheriff pursuant to a judgment obtained by the true owner, a company known as PINACLE TRADE AND COMMERCE LTD. The Bank, so defendant alleged, had failed to warrant him against eviction. Consequently he was not liable for any further payment. On these grounds the defendant then counter-claimed for repayment of the instalments he had paid on the two agreements. In

addition he sought a declaratory order to the effect that the agreement had been validly cancelled. The Bank filed a lengthy replication in essence denying the material allegations contained in the plea. For the purpose of this judgment it is not necessary to repeat the allegations of fact made in this pleading.

[4] What gave rise to the dispute in the court *a quo* is a notice to amend his plea filed by the defendant on 23 September 2004. The proposed amendment reads thus:

'Alternatively

3.8 The written instalment sale was subject to the implied warranty that the defendant would enjoy full and undisturbed possession of the aircraft.

3.9 In and during December 2000 or January 2001 the aircraft was attached by the Sheriff of the High Court of South Africa, pursuant to a judgment granted by the High Court of South Africa (Transvaal Provincial Division) in an application brought by Pinacle Trade and Commerce Limited against Aircraft Services Africa (GESA) (Pty) Limited, as first respondent, and Aircraft Management Services International (Pty) Limited, as second respondent.

3.10 The said Pinacle Trade and Commercial Limited was at all times material hereto the owner of the aircraft.

3.11 Pinacle Trade and Commerce Limited's claim to title of the aircraft was unassailable.

3.12 As a result of the attachment of the aircraft as aforesaid, the defendant's full and undisturbed possession of the aircraft was lost and as a result thereof the plaintiff was in breach of its implied warranty aforementioned, as the defendant was precluded from enjoying vacua possessio of the aircraft.

3.13 As result of the plaintiff's breach aforementioned, the defendant has cancelled the agreement, alternatively hereby cancels the agreement.'

An amendment in identical terms was sought in the same notice in respect of the agreement concerning the two engines. The Bank then filed a notice, objecting to the proposed amendment in these terms:

'1.2 In terms of the agreement

1.2.1 The defendant shall hold the goods on behalf of the plaintiff, as owner, for the duration of the agreement. (Clause 2.2)

1.2.2 If the instalment sale agreement was not subject to the Credit Agreements Act (Act 75 of 1980) ("CAA") the defendant agreed that no warranties or representations had been given or made as to the state, condition or fitness of the goods. The defendant

accepted the goods with all patent and latent defects and faults and accepts all risks of whatsoever nature in the goods voetstoots. (Clause 2.5)

1.2.3 As between the defendant and the plaintiff all risk in the goods shall pass to the defendant on the earlier of signature of the agreement (by) the defendant or the date when the supplier ceases to bear the risk. (Clause 3)

1.2.4 Purchaser shall not allow the goods to become subject to any lien, hypothec, pledge or other encumbrance or judicial attachment nor part with possession nor abandon same nor offer nor attempt to do any of the aforegoing. Should the goods become subject to any lien, hypothec or other encumbrance, defendant shall within 7 days from such claim, procure the release of the goods from same. (Clause 5.4)

1.3 The agreement is not subject to the CAA.

1.4 In the premises the implied warranty relied upon by the defendant is excluded by the agreement.

1.5 Consequently the proposed amendment will result in the plea and counterclaim being excipiable.'

[5] The matter came before C J Claassen J in the Witwatersrand Local Division for trial. At the pre-trial conference the parties agreed that the only issue which would come before the court would be the defendant's application to amend his plea. At the commencement of the trial the parties requested a separation of issues and an order was made in terms of Rule 33(4) of the Uniform Rules of Court in these terms:

'1. The question whether the written instalment sale agreements were subject to an implied warranty that the defendant would enjoy full and undisturbed possession of the aircraft and the engines would be decided first.

2. All other issues are postponed *sine die*.'

[6] The matter was argued on the papers. No evidence was led. The finding of the court was the following:

'It is declared that the written Instalment Sale Agreements, Annexures "A" and "C" to plaintiff's particulars of claim are not subject to the implied warranty that the defendant would enjoy full and undisturbed possession of the aircraft and engines sold in terms thereof.'

With leave of the Court *a quo* the defendant now appeals to this court against the order.

[7] The learned judge commences his judgment by setting out what he termed 'the background facts'. These facts were gleaned from the pleadings. He then dealt with the warranty against eviction which he correctly stated was imposed by law in agreements of purchase and sale. He recorded that parties can, however, expressly or implicitly exclude such warranty from their contract. In support hereof he quoted an extract from De Wet and Van Wyk: *Die Suid-Afrikaanse Kontrakte en Handelsreg* 5 Ed Vol 1 pp 331-2. Against the background facts he then analysed the various clauses of the agreement and came to the conclusion that the warranty against eviction was excluded.

[8] The defendant in his notice of appeal and heads of argument launched a three pronged attack on the judgment. The first was that in interpreting the agreements the judge had taken into account surrounding circumstances which he could and should not have done. Furthermore the facts which he recorded as being common cause were disputed by the defendant on the pleadings. The assertions made by the defendant in his plea were not considered. This, so the argument went, constituted a misdirection. It also led to the judge incorrectly accepting that the defendant had taken the risk of the uncertainty of the Bank's title in the aircraft and engines upon himself. The second was that his reliance on the passage from De Wet and Van Wyk was misplaced. In addition he failed to distinguish between the sale of a right which was inherently uncertain and the sale of a *res aliena* where both parties were aware that the seller was not the owner of the merx at the time of the sale. The third was that the judge's interpretation of the relevant clauses of the agreements was flawed.

[9] The implied warranty against eviction was succinctly stated by Botha JA in *Alpha Trust (Edms) Bpk v Van der Watt* 1975 (3) SA 734 (A) at 743H-744A to be the following:

'Dit is duidelik dat dit vir 'n geldige koopkontrak volgens ons reg geen vereiste is dat die verkoper van die koopsaak eienaar daarvan moet wees nie. Ofskoon dit die doel van die koopkontrak is dat die koper eienaar van die verkoopte saak moet word, is die verkoper egter nie verplig om die koper eienaar daarvan te maak nie. Hy moet die koper slegs in besit stel en hom teen uitwinning

vrywaar. Dit beteken dat die verkoper daarvoor instaan dat niemand met ‘n beter reg daartoe die koper wettiglik van die verkoopte saak sal ontneem nie, en dat hy, die verkoper, die koper in sy besit van die saak sal beskerm.’

The warranty is imposed *ex lege* and has nothing to do with the consensus or absence thereof between the parties to the contract. (*Van der Westhuizen v Arnold* 2002 (6) SA 453 (SCA) at para 43 per Marais JA.) The parties may agree that the warranty shall be excluded. What must be decided in this case is whether on an interpretation of these contracts they did so.

[10] At the hearing of the appeal appellant‘s counsel abandoned the argument that the judge *a quo* had misdirected himself by taking into account disputed surrounding circumstances when interpreting the arguments. He conceded not only the correctness of the facts taken into account but also that they were background circumstances which the judge was entitled to have regard. The latter concession was rightly made. See the passage from *Reardon Smith Line v Hansen-Tangen* [1976] 3 All ER 570 (HL) quoted with approval in *Cinema City (Pty) Ltd v Morgenstern Family Estates (Pty) Ltd* 1980 (1) SA 796 (A) at 805B:

‘No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as “the surrounding circumstances” but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.’

The ‘surrounding circumstances’ referred to are what we understand as background facts.

[11] The circumstances which the judge *a quo* had regard to can be summarized as follows: the Bank is registered as such. Its business is to advance finance to clients to enable them to buy goods. The client sources and selects the goods from the supplier. The Bank in most cases never sees the goods as delivery is effected directly from the supplier to the client. In order to

provide security for the financing of the transaction the Bank concludes an instalment sale agreement with the client where the Bank is the seller and the client the purchaser. Reservation of ownership in the goods by the Bank until the full purchase price and finance charges are paid secures the Bank's 'loan'. In this matter the defendant through an agent, Peter Henderson personally and/or his company, identified an aircraft and later two engines for the aircraft, which would be fit for defendant's purpose, namely the hiring out of the aircraft to others for reward. The aircraft and engines were delivered to Henderson acting as defendant's agent by the supplier, Planetrade (Pty) Ltd t/a Aircraft Sales International. The Bank played no part in the sourcing, selection and delivery of the aircraft and engines. It received invoices from the supplier which it paid. In my view the judge correctly sought to interpret the agreements against the backdrop of these facts.

[12] Before turning to the interpretation of the agreements I need to deal with the second attack referred to above by the defendant on the judgment *viz* the misplaced reliance on the passage in De Wet and Van Wyk. The argument was that the judge's general approach when interpreting the arguments was to place substantial reliance on his finding that the Bank had known that the defendant was not the owner of the aircraft and engines when the defendant selected them. On the strength thereof the judge eventually concluded that the defendant had taken the risk of uncertainty of the Bank's title upon himself. To understand the argument it is perhaps necessary to quote the passage in De Wet and Van Wyk referred to by the learned judge:

'Die verkoper se aanspreeklikheid vir uitwinning is 'n natuurlike gevolg van die koopkontrak, wat deur afspraak van partye gewysig kan word. Partye kan dus afspreek dat die verkoper nie vir eviksie aanspreeklik sal wees nie. Die effek van so 'n afspraak is dat die koper na uitwinning geen skadevergoeding op die verkoper kan verhaal nie, maar darem terugbetaling van die koopprys kan vorder. Die koper kan selfs nie die koopprys terugvorder nie waar hy die risiko van die onsekerheid van die verkoper se titel op hom geneem het. Weet die koper dat die verkoper geen titel het nie, kan hy, in geval hy uitgewin word, hoegenaamd niks op die verkoper verhaal nie, tensy die verkoper onderneem het om vir uitwinning aanspreeklik te wees. Weet die verkoper dat hy 'n gebrekkige titel het, maar doen hy hom nogtans as geregtigde voor, maak hy hom

natuurlik skuldig aan wanvoorstelling, en is hy in elk geval weens wanvoorstelling aanspreeklik, of die koper nou uitgewin word of nie.'

It is the second part of this passage starting with the words: 'Die koper kan selfs nie die koopprys . . . .' which the defendant says the judge relied upon. The argument is in my view misconceived. The judge prefaced the quotation by the words: 'The parties can however expressly or impliedly exclude the warranty from their contract.' It is in support of this proposition that he quoted the passage from De Wet and Van Wyk. The passage he quoted is one complete paragraph in the book and it seems that for the sake of completeness he quoted the whole paragraph. No-where in his judgment does he refer to the fact that the defendant had assumed the risk of the Bank's uncertain title. The attempt by counsel to spell this out of certain passages is unpersuasive.

[13] I deal now with the interpretation of the agreements. The judge *a quo* relied on clauses 2.1, 2.2, 2.3, 2.5, 3 and 5.4 of the agreements for his conclusion that the warranty against eviction was excluded. I consider clauses 2.1 and 2.2 to be conclusive of the issue and consequently do not deem it necessary to rely on the other clauses. *Prima facie* I have some doubt as to whether clauses 2.3, 2.5, 3 and 5.4 assist the Bank. Clause 2.3 takes the matter no further and merely repeats what is stated in clause 2.2. In 2.5 the words relied upon are ' . . . (purchaser) accepts all risks of whatsoever nature in the goods voetstoots'. These words, read *eiusdem generis* with the preceding words in the clause, would seem to refer to the aedilition remedies rather than the risk of defective title. In clause 3 the agreement deals with the ordinary incidence of risk once the contract becomes *perfecta*. It does not have a bearing on defective title. Clause 5.4 imposes an obligation on the purchaser '. . . not to allow the goods to become subject to . . . judicial attachment.' It is difficult to see how the purchaser could have any choice in such an event. Read in context I do not think it is an indication that the warranty is excluded.

[14] Clauses 2.1 and 2.2 read as follows:

'2.1 Purchaser has selected the goods and seller has no knowledge of the purpose for which the goods are required by the purchaser and does not guarantee that the goods are suitable for that purpose.

2.2 Purchaser shall at its own cost, procure and take delivery of the goods from Seller or Supplier in such manner that Seller becomes owner and shall hold the goods on behalf of the Seller, as owner, for the duration of the agreement. Delivery or tender of delivery by Seller or Supplier to Purchaser within 30 (thirty) days from date hereof shall be deemed to be delivery of the goods by Seller to Purchaser. Supplier shall not act as Seller's agent except for the purposes of delivery.'

In my judgment these two clauses read together against the background facts set out earlier make it clear that the parties intended to exclude the warranty. In clause 2.1 the parties record that the Bank has in effect had no part in the selection of the goods. In claim 2.2 it is acknowledged that the Bank is not the owner and an obligation is then placed on the defendant to ensure that the Bank becomes the owner. It is repeated in clause 3. As stated by the learned judge, it makes commercial sense for the parties to place such an obligation on the defendant, onerous as it may be, to ensure for the purpose of its security, that the Bank becomes the owner of the goods on delivery. This obligation is inimical to the concept that the bank in accordance with the implied warranty will protect the defendant in his possession of the aircraft and engines.

[15] I conclude therefore that the court *a quo* rightly answered the question posed in terms of Rule 33(4) in favour of the Bank. Counsel for defendant expressed concern that the declaratory order was too widely stated and as it stood it in effect excluded a claim by the defendant for return of the part payment of the purchase price. After making the order the learned judge added the following sentence:

'I have only been called upon to decide the aforesaid issue and specifically refrain from expressing any opinion as to the parties' rights which may flow from such agreements containing no warranty against eviction.'

This judgment must similarly not be construed as expressing any view on the defendant's aforesaid rights.

[16] The appeal is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel.

_____

P C COMBRINCK
ACTING JUDGE OF APPEAL

CONCUR:

FARLAM JA

MTHIYANE JA

MLAMBO JA

CACHALIA AJA