

THE APPRAISAL OF THE ‘MARKET OVERT’ PRINCIPLE VIS-À-VIS SALE OF GOODS IN ZAMBIA: A COMPARATIVE STUDY OF NIGERIAN AND SOUTH AFRICAN COMMERCIAL LAW

<https://doi.org/10.29053/pslr.v16i1.4508>

by Mainess Goma*



Abstract

This article is inspired by a need to clarify and appraise the law relating to the sale of goods with particular attention to the market overt principle in Zambia. This will be done by conducting a comparative study between Zambia, South Africa, and Nigeria. The article investigates methods for constructing a preferable legal regime for individuals and businesses, particularly economic transactions. It further assesses the Zambian Sale of Goods Act of 1893 (56 & 57 Vict. c.71) as it relates to the market overt principle. I also highlight weaknesses in the current law requiring remedial action.

1 Introduction

Britain Zambia is a common law jurisdiction like most other formerly colonised countries. This is supported by Zambia’s history, current statutory guidelines, and judicial declarations. As a result of its colonial legacy, Zambia has a dual legal system comprised of general law, including the Constitution, statutes, case precedents, subsidiary legislation, English common law, principles of equity and selected

* University of Zambia (UNZA) LLB, AHCZ candidate. ORCID iD: 0000-0002-7914-8643.

statutes and customary law.¹ Although Britain has amended some of the same legislation, Zambia continues to utilise various old British statutes, such as the Sale of Goods Act (56 & 57 Vict. C. 71). The Sale of Goods Act, which came into force in 1893, is the principal law regulating the sale of goods in Zambia.² The rules of common law supplement this Act.³ The primary aim of the Act is to provide clear guidelines for transactions involving the buying and selling of certain goods. After its enactment, it was hailed as a convenient answer to the problems and malpractices encountered when buying and selling goods at the market.⁴ Among the many principles, the market overt principle deals with buying and selling goods.

Although the Act was a convenient solution to obstacles associated with buying and selling goods, it still has many shortcomings. It is for this reason that this paper endeavours to examine the shortcomings of the market overt principle as contained in the Sale of Goods Act of 1893 in Zambia. South Africa and Nigeria have been selected as countries of comparison as they share similarities in their relationship with Zambian commercial law.

2 The sale of goods

In commercial transactions, not everyone who agrees to buy or sell goods is fortunate enough to conclude a valid and enforceable transaction. In many cases, those disappointed with a transaction often seek legal recourse to enforce the rights created by their agreement, as the law protects the interest of both the seller and the buyer.⁵

The Sale of Goods Act defines ‘goods’ as ‘all chattels personal other than things in action and money’.⁶ By this definition, the Act covers the sale of chattels which are personal and moveable possessions. This includes the sale of goods agreements, which can be defined as contracts in which the seller transfers or agrees to transfer their property rights in the goods to the buyer for a monetary consideration, such as ‘the price’.⁷

From this definition, salient characteristics may be observed. First, the seller and buyer are the parties to this sale of goods

1 H Chuma & T Banda ‘Customary law in Zambia’s new Constitutional dispensation: A tale of lost opportunities’ (2022) *Inequality in Zambia* at 239.

2 M Malila *Commercial law in Zambia: cases and materials* (2006) at 5.

3 See, J Coetzee ‘The role and function of trade usage in modern international sales law’ (2015) 2(20) *Uniform Law Review* at 243-270. The traditional position is that trade usage operated as implied terms of the contract where more emphasis was placed on the requirement of knowledge.

4 Chuma & Banda (n 1) 222.

5 *Mweempe v Attorney General International Police & Another* (2012) ZMSC 29.

6 The Sale of Goods Act of 1893 sec 62.

7 Sale of Goods Act (n 6) sec 1.

agreement. Second, two kinds of transactions are recognised from the sale of goods, namely, a sale where the property rights in the goods are transferred from the seller to the buyer; and an agreement to sell, in which the transfer of the property rights in the goods takes effect in the future or upon the fulfilment of certain conditions.⁸ An agreement to sell becomes a sale when time elapses or conditions are fulfilled, upon which the property rights in the goods are to be transferred.⁹ The 'property in the goods' refers to ownership of the goods.¹⁰

3 Relevance of the market overt exception in Zambia

As Zambian commercial law has developed, two main principles have become apparent: The first is the property protection principle, meaning, no one can give a better title than he possesses.¹¹ The second is the protection of commercial transactions, meaning, the person who takes good faith and for value without notice should get a better title. It must be noted that selling any property or chattel is the most decisive act of dominion by the seller and is incidental to ownership.¹² It does not merely imply the transfer of possessory rights by the seller to the buyer but relates to the true change of ownership.

In everyday sale transactions, the seller asserts that he is the owner of the article he has offered for sale by the act of selling to the buyer.¹³ Thus, a person must first acquire, own, and, in most instances, possess property before they can legitimately sell, convey, or transfer ownership or title of the property to another person.¹⁴

However, some cases arise where the title in the goods is purportedly passed or transferred to a buyer by a non-owner of the goods.¹⁵ Such circumstances raise the common law principle expressed in the Latin maxim *nemo dat quod non habet* (no one can give what he does not have or transfer a right that he does not

8 ME Nwocha 'Law of Sale of Goods in Nigeria: Interrogating key elements of the Sale of Goods Act relating to the rights of parties to a Sale of Goods Contract' (2018) 9 *Beijing Law Review* at 211.

9 Nwocha (n 8) 218.

10 This is the phrase used in the Sale of Goods Act of 1893.

11 Malila (n 2) at 56.

12 H Weinberg 'Market overt, voidable titles and feckless agents: Judges and efficiency in the Antebellum Doctrine of Good Faith' (1981) 56 (1) *Tulane law review* at 141.

13 A Perzanowski & J Schultz 'The end of ownership: Personal property in the digital economy' (2016) *MIT Press* at 32.

14 Perzanowski & Schultz (n 13) 27.

15 C Roisin '*Nemo dat quod non habet* (no one can give what they do not possess): the faith development needs of the authentic and authoritative Catholic teacher' unpublished PhD thesis, University of Glasgow, 2008 at 47.

possess).¹⁶ The *nemo dat*-rule embodies the idea that the transferee cannot acquire a better title to the goods than his transferor.¹⁷ Hence, it favours the original owner over any other purchaser.

Various exceptions to the *nemo dat*-rule, as contained in the Zambian Sale of Goods Act of 1893, have been formulated to maintain a balance between the original owner and the innocent purchaser. The exceptions include the entrenchment of the defence of estoppel, sale by an agent, sale under voidable title and sale in a market overt. Estoppel is where the owner is precluded from denying the seller's authority to sell.¹⁸ However, there are two distinct cases where the owner is so precluded. First, by his words or conduct, he has represented to the buyer that he as the seller is the true owner or that the owner has the authority to sell; this is called estoppel by representation. The second relates to where the negligent owner fails to act and allows the seller to appear as the owner or as having the owner's authority to sell.¹⁹

The term 'sale by an agent' refers to a seller that is a mercantile agent. A 'sale under the voidable title' refers to a seller of goods that has a voidable title, but his title was not void at the time of the sale.²⁰ The buyer acquires a good title to the goods provided that he buys them in good faith and without notice of the seller's defective title.²¹ 'Disposition by a seller' is when a person, having sold goods, remains in possession of the goods. Thus, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods under any sale to any person receiving the goods has the same effect as when the person making the delivery or transfer were expressly authorised by the owner of the goods to make the sale.²² The final exception is the 'sale in a market overt', which will be discussed in the section below.²³

With regards to the aforementioned, an innocent purchaser faced with a claim for a return of the goods from the original owner could argue that one of these exceptions to the *nemo dat*-rule applies to his or her situation, enabling and allowing them to retain ownership over the goods.²⁴ In other words, an innocent purchaser whose title to the goods has been challenged by the original owner could bring the

16 Malila (n 2) 43.

17 Sale of Goods (n 5) sec 21.

18 Malila (n 2) 43.

19 Malila (n 2) 56.

20 Malila (n 2) 53.

21 Sale of Goods (n 6) sec 23.

22 Nwocha (n 8) 218.

23 Malila (n 2) 63.

24 JL Yap 'Appraising the Market Overt Exception' (2008) 3(4) *Journal of International Commercial Law and Technology* at 25.

transaction under any one of these exceptions in order to retain said ownership.²⁵ This article will focus mainly on the market's overt rule.

4 Background of the market overt principle

The term market overt – or *marche ouvert* in French – originates from mediaeval times.²⁶ Market overt governs the subsequent ownership of stolen goods and, thus, deals with the conflict between a *bona fide* purchaser of a chattel and the person whose rights in the property are injured by the sale.²⁷

Schematically, the three people involved are the original owner, the seller, and the purchaser. The actual term 'market overt' has not been legally defined by the Sale of Goods Act, but the court in *Lee v Bayes and Robinson* provided a helpful description.²⁸ Jervis J defined market overt as 'a public and legally constituted market that is open between sunrise and sunset and where goods are openly displayed'. Hence, if one buys an item or good in an open market and it later transpires that the person who sold the item does not have a valid good title, the title passes to the *bona fide* purchaser as long as they show that they bought it in good faith and without notice.²⁹

It is noteworthy that the market overt principle has its roots in English law, dating back to Anglo-Saxon times when transportation had not yet advanced.³⁰ Scholars have pointed out that the market overt principle has been generalised by practical considerations, born out of a desire to encourage and facilitate commercial activity by protecting purchasers of goods who bought openly in places authorised for buying and selling goods.³¹ Additionally, the owner of goods was expected to look for his goods in the market, and if he did not intervene at the market prior to the sale of the goods, the *bona fide* buyer was given an assurance of good title.³²

25 A Ekpouido 'Appraising the Market Overt Exception in the Sale of Goods Law: The Nigerian Perspective' (2020) 2(1) *International Journal of Comparative Law and Legal Philosophy* at 138.

26 Weinberg (n 12) 27.

27 R Goode *Commercial law 3rd edition* (2004) at 233.

28 (1856) 18 CB 599 para 601.

29 Ekpouido (n 25) 119.

30 Goode (n 27) 165.

31 Weinberg (n 12) 23.

32 Goode (n 22) 231.

5 The market overt principle in practice

An important question to consider at this point: What constitutes a market overt in Zambia? A market overt may be constituted by statute, prescription or custom.³³ There are many market overts in Zambia, some of which have arisen by prescription and some established via the local government, such as the Common Market For Eastern And Southern Africa (hereinafter referred to as COMESA) market situated in the central business area of Lusaka, which commonly goes by the name of 'town'. One may be tempted to think that every place where goods are sold and bought is a market overt. However, that is not the case. The court's interpretation has delineated the scope of the market overt principle. Only markets legally constituted are recognised as markets overt.³⁴ Thus, a place does not take up the term market overt merely because it is accessible to the public; and not all shops, supermarkets and minimarts are market overts.³⁵ Below, I elaborate on why the market overt principle has become irrelevant in the 21st century.

5.1 Advanced transportation

The rationale for the market overt exception is poorly suited to modern times in Zambia, and it is regarded as archaic and quaint. In the past, when transportation was more limited, it would have been feasible for a person whose goods had been stolen to expect to find them sold at a nearby market.³⁶ However, thieves can more readily dispose of goods globally with the technological age and modern transportation systems such as aeroplanes, cars, and bullet trains. Thus, stolen goods can be sold in different markets.

5.2 The internet

The market overt exception seems to be at variance with the internet, as the market has evolved over the years. The internet is a vital part of many people's livelihoods and essential to a country's economic and cultural development. The internet has created a platform where anybody with a computer, who has access to the internet, can sell and buy goods, products, and services.³⁷ The virtual marketplace has given rise to a wide scale of electronic commercial transactions using different mediums such as websites, e-mails, blogs, and text messages.

33 Ekpoudo (n 25) 138.

34 Goode (n 27) 213.

35 *Lee v Bayes and Robinson* (1856) 18 CB 599 para 601.

36 C Alistair & R Hooley *Commercial law: text cases and materials* (2003) at 94.

37 Yap (n 24) 36.

Internet platforms like Amazon and eBay are examples of global and incorporeally driven businesses without the buyer having to set foot in a physical store. Further, sellers use social media to distribute stock; these include platforms such as Facebook, Twitter, and Instagram, to name but a few. This situation goes directly against the principle laid down in the English case of *George Dunlop and Co. v Earl and Countess of Dalhousie*,³⁸ where the House of Lords held that: ‘Goods must be sold in a shop accustomed to selling such goods so that the possessor cannot change the property, and the whole must be sold in the open market, not behind a screen or cupboard, but so that passengers passing by could see it.’ This exception has been recognised as promoting trade in stolen goods, which has been exacerbated by increasing internet sales.

6 The regulation of the Sale of Goods in Nigeria

As with Zambia, the English Sale of Goods Act of 1893 was assimilated into the Nigerian legal system as a statute of general application.³⁹ Subsequently, most Nigerian states adopted the Act as a part of their principal Sale of Goods laws.⁴⁰ Just as it has become outdated in Zambia, it is also outdated in Nigeria due to the advancement of technology over the years. This problem has been aggravated by increased internet sales, as outlined above. Legislation such as section 23 of the Lagos State Sale of Goods Act does not preclude internet sales.⁴¹ Thus, stolen goods may easily be disposed of via the internet, and offenders can benefit from the relative anonymity and privacy that the internet offers. Over the past few years, there have been many calls to have the principle abolished because of its archaic and impractical nature.

7 The regulation of the Sale of Goods in South Africa

Compared to Zambia, South African Courts have developed the common law – comprising of Roman-Dutch law and English law – to protect consumer interests better. The sale of goods contracts in South Africa is generally subject to common law rules unless statutory

38 (1830) HL.

39 F Bamisile ‘What if you innocently buy stolen goods’ <https://pmnewsnigeria.com/2015/03/17/what-if-you-innocently-buy-stolen-goods-2/> (accessed 27th June 2022).

40 See El Sagay *Nigerian Law of Contract* (1993) at 33. The term ‘statute of general application’ can be defined as Acts of Parliament which apply to the people at large.

41 Bamisile (n 39).

or other provisions are varied.⁴² The Consumer Protection Act⁴³ (CPA) is the primary legislation regulating consumer rights in South Africa. This Act sets out the threshold required to ensure adequate consumer protection. Generally, laws that provide for consumer protection in particular sectors must be read in tandem with the CPA to ensure a common protection standard.⁴⁴ The suppliers of goods and services must, in turn, ensure that they comply with the CPA to the extent that it applies.

Further, lawmakers in South Africa enacted the Second-Hand Goods Act 6 of 2009,⁴⁵ which aims to regulate business surrounding trade in second-hand goods and pawnbrokers. This Act directly tackles trade in stolen goods and, in the process, promotes ethical standards in the second-hand goods market. It is a contingent requirement that every person carrying on business in the second-hand goods market is classified as a 'dealer' and must be registered in accordance and compliance with the Act.

8 Recommendations and conclusion

It is puzzling that Zambian legislatures, unlike in Britain and South Africa, have failed to amend the Sale of Goods Act to bring it in line with the ever-changing nature of mercantile law due to technological advancement. The drafters of the Sale of Goods Act in the 19th century could not foresee the rapid developments in transport and communication technology of the present day. Thus, the market overt principle has become redundant and irrelevant to modern-day trade of goods and services yet persists as a legal doctrine in Zambia. It is, therefore, submitted that it is an archaic and anomalous rule and repealing it in its entirety may be the best option. If anything is to be done, the demands of consumer protection and the protection of trade in Zambia would require that the market overt exception be replaced with new legislation or that the rule be tinkered with accompanying legislation to enhance consumer protection similar to South African legislation.

Just as the South African Parliament enacted the Consumer Protection Act and the Second-Hand Goods Act, legislation that considers Zambian society's unique nature, challenges, and peculiarities is crucial to the country's development. Thus, Zambia should have legislation that can remain abreast with today's local and international commercial transactions. Legislation that blissfully

42 S Meltzer & C Smith 'Sale and Storage of Goods in South Africa: Overview' (2021) at 64.

43 68 of 2008.

44 Meltzer & Smith (n 42) 127.

45 68 of 2008.

ignores society's dynamism can be described as a 'wet blanket' stifling development.

Lord Justice Lloyd, in the British case of *Shaw v Commissioner of Metropolitan Police*,⁴⁶ held that 'it is a frequent occurrence that the courts have to decide which of two innocent parties is to suffer by the fraud of a third'.⁴⁷ In this day and age, it is pretty tough to determine contradicting rights between two innocent parties, even if the market overt rule is laudable as it mainly aims to protect an innocent purchaser who has through unfortunate circumstances acquired a defective title. However, a delicate balance must be maintained between the original owner and innocent purchaser's rights.

A key tenant of commerce is that goods should be freely alienable and move in the supply chain with little or no hindrance.⁴⁸ However, with the advancement of technology in commerce, commercial transactions have become increasingly complex, hence, the need for the law to develop exceptions to the common law rule of *nemo dat* or merely to enact new legislation altogether. As such, this paper has illustrated that reaching an equilibrium between protecting the interests of contending parties is laborious, complex, incoherent, and susceptible to misconception.

Parties involved in such transactions benefit from some law principles in the Sale of Goods Act, such as the *nemo dat*-rule and its exceptions. However, some of these exceptions were formulated when technology was not as advanced as it is today and, as such, lost relevance with the advent of time. Thus, there is a need for review of the Zambian Sale of Goods Act of 1893 to ensure relevance and avoid persisting injustices. In so doing, the philosophy behind the law must be evaluated while considering modern-day economic and social conditions in Zambia.

46 (2016) QDC 327.

47 (1987) 1 WLR 1332.

48 C Eisenstein *Sacred economics: Money, gift, and society in the age of transition* (2011) at 22.