

ZIMBABWE AGRICULTURAL SOCIETY

Versus

CONFINED AUTO [PRIVATE] LIMITED

And

KUDAKWASHE MATYOKUREBWA

IN THE HIGH COURT OF ZIMBABWE

COMMERCIAL DIVISION

NDLOVU J

HARARE 16, 29 JUNE 2023, & 7, 12, 14 JULY 2023, & 15 FEBRUARY 2024

CIVIL TRIAL

Mr. H. Mutasa, for the Plaintiff.

Mr. K. Maeresera, for the Defendants.

INTRODUCTION

NDLOVU J: On *30 November 2018*, Plaintiff and 1st Defendant entered into a verbal agreement. Under that agreement, Plaintiff paid an amount of *US\$87,000.00* in return for the delivery of a motor vehicle, a *Toyota Land Cruiser Prado VX Chassis Number JJEBH3FJ4OK20718*. [*the motor vehicle*]. The motor vehicle described above was imported into Zimbabwe from South Africa by the 1st Defendant. In or around *June 2021*, the aforesaid motor vehicle was seized from Plaintiff by the Zimbabwe Revenue Authority [*ZIMRA*] on the basis that its importation into Zimbabwe had been done fraudulently. The Defendants were duly notified of that development. Despite making representations to ZIMRA, the Parties herein failed to protect the Plaintiff's title to the motor vehicle.

After protracted engagements between the parties without success, the Plaintiff issued summons out of this court claiming the refund of the purchase value and damages being the

difference between the refund value and the replacement cost of the motor vehicle concerned. The Plaintiff alleged that the Defendants breached an implied warranty against eviction, alternatively fraudulently misrepresented to it that the motor vehicle had been lawfully imported causing the Plaintiff to act on that misrepresentation to its prejudice.

ISSUES

The issues referred for trial in terms of the Case Management Order are;

- 1. Whether or not there was a buyer and seller relationship between the parties.*
- 2. Whether or not Defendants fraudulently misrepresented to Plaintiff, that the motor vehicle had been lawfully imported.*

THE PLAINTIFF'S CASE

Plaintiff contends that the agreement that it entered with the 1st Defendant was an agreement of sale for the aforesaid motor vehicle. Its evidence led through Chipso Katsidzira is that, after carrying out its market survey, a verbal agreement of sale was concluded in terms of which the 1st Defendant would sell the aforesaid motor vehicle to Plaintiff for the sum of **US\$87,000.00**. The 1st Defendant issued an invoice in favour of the Plaintiff on **28 November 2018**. The subject of that invoice was described therein as "**vehicle supply**". According to the aforesaid invoice, Plaintiff instructed its bank to transfer the purchase price of **US\$87,000.00** to the 1st Defendant's Bank account on **29 November 2018**. Having met its side of the verbal agreement of sale, the Plaintiff eventually received delivery of the aforesaid motor vehicle in **January 2019**. She denied that the Plaintiff and the First Defendant entered an Agency contract. She stated that at no point did the 1st Defendant act as an Agent of the Plaintiff. Plaintiff opined that it is entitled to a refund of the purchase price. She was unaware of the allegation that the motor vehicle had diminished in value to the sum of **US\$37,000.00** at the time of its seizure insisting that the appropriate remedy is a refund.

THE DEFENDANTS' CASE

Through the testimony of the 2nd Defendant, the Defendants told the court that the parties agreed on a relationship of agency as opposed to an agreement of sale. According to

them, Plaintiff instructed the 1st Defendant to act as its agent to import a motor vehicle from South Africa on its behalf. The 1st Defendant accepted the proposal. In terms of that agreement, the 1st Defendant would import a motor vehicle from South Africa and be paid a commission of **US\$3,000.00**. It issued an invoice of **US\$87,000.00** simply to facilitate the Plaintiff's internal processes for the release of the purchase price. At all material times, it was acting as an agent of the Plaintiff, not the seller.

Regarding the quantum of the Plaintiff's claim, the Defendants testified that the motor vehicle in question had been used by the Plaintiff before its seizure and had accordingly diminished in value and further alleged that, at the time of its seizure, the motor vehicle concerned had been involved in two traffic accidents which further diminished its value. They argued that the value of the motor vehicle had diminished to **US\$38,000.00**, at the time of its seizure, therefore, Plaintiff cannot be entitled to damages that are beyond that figure.

ANALYSIS & FINDINGS

From the evidence before this Court, the facts of this matter are largely common cause, save, for those dealing with the nature of the verbal agreement made by and between the parties. The individual who negotiated the agreement on behalf of the Plaintiff did not testify for either party. In resolving the central issue regarding the nature of the agreement in question it is pertinent that the Court looks to the conduct of the parties as well, concerning this transaction.

The position of the law is that:

*“... the court will assume that the nature of a transaction is what it purports to be and the onus of showing the contrary will be on the party who asserts that the transaction is something else.” **Scotfin Ltd v Polka Nominees (Nineteen) (Pvt) Ltd HH 58/2002.***

Diamond, Marais & Aronstam in *The Law of Hire Purchase in South Africa 4th Edition @ P- 20.*

The Plaintiff's Capital Expenditure Approval Form shows that on its part, it understood that it was purchasing the aforesaid motor from the 1st Defendant for a purchase price of *US\$87,000.00*. The 1st Defendant described the nature of the transaction and the basis of its invoice as being for "*vehicle supply.*"

The evidence shows that the plaintiff did not identify a particular motor vehicle to be imported from South Africa. The Plaintiff did not give the Defendants the particulars of the motor vehicle in question. The motor vehicle in question was identified by the Defendants. It was previously owned in South Africa. Its procurement from South Africa was negotiated between the Defendants and its previous owner. The plaintiff had no connection with the previous owner of the motor vehicle in South Africa. The import documents cite the Defendants or their agent as the importers. When the motor vehicle arrived in the country it was registered in the name of one of the 1st Defendant's Directors before being transferred to Plaintiff.

The Defendants had to prove their allegation that the agreement under discussion was something else other than an agreement of sale. Nothing was produced to support that allegation. The Defendants were confronted with documents that point to an agreement of sale, and they only made bald allegations of the existence of a Principal and Agent relationship. There is no evidence that the Defendants was paid commission which is linked to this particular transaction. No evidence was adduced of an invoice for the agent's commission or the receipt of its subsequent settlement.

Why would the Defendants facilitate the internal processes of the Plaintiff regarding the release of the funds to pay for a motor vehicle needed by the Plaintiff? What were those processes? What challenges, if any, did Plaintiff have with its processes to the extent that it needed strangers in the form of the Defendants to come to its rescue? In any case, Plaintiff's evidence is that on 28 November 2018, it generated a payment requisition to facilitate the payment of the purchase price to the 1st Defendant which payment we now know was accordingly effected by Plaintiff's Bankers.

The question relating to the true nature of the contract is therefore determined in favour of Plaintiff.

In *Chiweshe v Saki & Anor HH 75/13 @ p- 8*, this Court stated that;

“An implied warrant against eviction is a warrant where the seller undertakes undisturbed use of the merx to the buyer and warrants that the buyer will not be evicted by a third party with a stronger title to the merx. If the merx is taken away, the buyer is entitled to a refund.”

“...a seller of goods warrants that the buyer will not be evicted. Eviction includes voluntary surrender of the goods to the owner who has an incontestable claim to the goods”

Kanokanga v Evans & Ors 2000 (2) ZLR 41 where the Court ordered the refund of the full purchase price where the Plaintiff had, before its dispossession, been in the use of that motor vehicle.

In *casu*, no professional valuation of the motor vehicle was commissioned by the Defendants at the time of its seizure. No evidence was adduced by the Defendants to show the details of the alleged accidents the motor vehicle had been involved in and the extent of the damages on the motor vehicle. Given the above-stated position of the law, the value of the motor vehicle at the time of its seizure bears no significance because, of the nature of the Plaintiff's claim, the law prescribes a remedy which is the refund of the purchase price.

There has been no evidence adduced in motivation for an award of **US\$50,000.00** damages representing an alleged difference between the refund and the replacement value of the motor vehicle. The witness for the Plaintiff testified that Plaintiff prays for that award *“if”* the refund is awarded in Zimbabwean Dollars. Plaintiff's counsel did not even motivate that claim in his closing submissions. This claim has not been proven.

No evidence was adduced by Plaintiff proving that at all material times the 2nd Defendant was acting in his personal circumstances and interests and not on behalf of the 1st Defendant. We now know that the purchase price was paid to the 1st Defendant after the 1st Defendant originated an invoice. The claim against the 2nd Defendant must therefore fail.

Charles Nhamo Nyambuya v Sakunda Holdings [Private] Limited & Anor SC 620/22.

DISPOSITION

The Plaintiff's claim against the 1st Defendant succeeds.

I accordingly order as follows:

1. The 1st Defendant be and is hereby ordered to pay the Plaintiff a sum of US\$87,000.00 [payable in ZWL\$ at the Interbank Exchange Rate prevailing at the time of payment] being the refund of the purchase price of a Toyota Land Cruiser Prado VX **Chassis No. JJEBH3FJ4OK20718**
2. The 1st Defendant shall the aforesaid amount with interest at the prescribed rate calculated from the date of Summons to date of full and final payment.
3. The Plaintiff's claims against the 2nd Defendant be and are hereby dismissed with costs.
4. The 1st Defendant shall pay Plaintiff's costs of suit.

NDLOVU J.

15/02/2024.

Gill, Godlonton & Gerrans, Plaintiff's Legal Practitioners.

Chizengeya Maeresera & Partners, 1st & 2nd Defendants' Legal Practitioners.