TAKAWIRA JONGONI
versus
OREN RUKWAVA

HIGH COURT OF ZIMBABWE
MHURI J
HARARE, 08 June & 24 August 2022

Civil Trial

Mr *S Mahuni*, for plaintiff
Mr *M Ndebele*, for defendant

MHURI J: On 1 June 2021, plaintiff issued summons against defendant claiming

a) an order compelling the defendant to surrender plaintiff's Mercedes benz E class registration number AFC 5822
b) payment of US$2500-00 being money advanced to defendant.
c) costs of suit.

In reconvention defendant claimed from plaintiff

a) (i) payment of US$2500
(ii) delivery of an immovable property being stand valued at US$5000

or

b) Payment of US$7500 being US$2500 money owed plus US$ 500 being the value of the stand

In summary, the brief facts giving rise to plaintiff's claim as per his declaration are that defendant and him are friends. In April 2021 defendant asked for US$2500-00 which he could only give him upon surrendering some security. Defendant gave plaintiff his motor vehicle Mercedes benz GL 320 registration number AFG 5621 together with its registration book. In turn plaintiff gave defendant his own motor vehicle Mercedes benz E class 300 registration number AFC 5822 as defendant had indicated he had no motor vehicle to use in the meantime. Upon noticing that the GL 320 was not performing well, plaintiff claimed his E class benz from defendant who refused to give it back on the ground that they had done a swap of cars.

Defendant's case in summary is as follows, that plaintiff and him are friends, having known each other for sometime. Sometime in April 2021, plaintiff approached defendant and offered to buy defendant's GL 320. They entered into an agreement in which they would exchange the GL 320 and E class 300. This was a swop and top where plaintiff would top up US$10 000-00. Plaintiff would pay an initial amount of US$2500 and another US$2500 in a few days time and that plaintiff would give defendant an immovable property ie a stand valued at the balance of US$5000.

They exchanged the motor vehicles and plaintiff paid the initial US$2500. A few days later when the second instalment of US$2500 was due and defendant wanted to be shown the .stand, plaintiff reneged on the deal.

After a pretrial conference, the issues referred to trial were:-

1. whether or not the defendant owes plaintiff the sum of US$2500 being money advanced to defendant at his specific instance and request.
2. whether or not defendant must surrender plaintiff's car being Mercedes benz E class registration number AFC, 5822 back to plaintiff.
3. whether or not the parties entered into an agreement of swop and top in terms of which plaintiff gave his Mercedes benz E 300 to defendant in exchange of defendant's GL 320 and that plaintiff would top up US$10 000 to defendant.
4. if parties entered into a swop and top agreement whether or not defendant is owed US$ 2500 plus an immovable property valued at US$5000.
5. and if defendant is entitled to the immovable property and if plaintiff fails to deliver the immovable property to defendant, whether or not defendant is entitled to payment of US$5000 as damages.

Plaintiff was the only witness in his case. He reiterated what he stated in his declaration. In his oral evidence, he testified that it was on 9 April 2021 that defendant called him requesting some money in the sum of $5000-00. He then drove to defendant's residence in his E class benz and together they went to High Glen shopping centre and from there he again went to defendant's residence where defendant repeated his request for money. Defendant suggested that he takes his GL 320 as surety. He asked defendant if the motor vehicle had no faults as he did not want to be blamed in future. They then drove into town, each driving the other's motor vehicle.

In the process, he detected some fault and brought this to defendant's attention and suggested that he be given the registration book as well. He was eventually given the registration book and he gave defendant US$2500.

Defendant then took his E class benz and he took the GL 320. He was advised by defendant that he had also detected a fault on the E class benz whereupon he advised defendant that he would have the fault fixed but in the meantime he could drive it. The next day he gave defendant a sum of US$250 for the repairs. He enquired as to when the mechanic was going to have a look at the GL 320. After having been given the mechanic's contact details, he drove to his place and as they drove the GL 320, the motor vehicle could not go up a slope, resulting in him calling defendant advising him he no longer had a car to use and told defendant to give him back his E class benz. When they met, defendant told him he had spent US$2600 in repairing the E class benz and was therefore not prepared to give him back the car, and that the GL 320 was in good condition when he took it, he had caused the problems. He stated this was the beginning of the misunderstanding between them.

He insisted that there was no swap and top of motor vehicles.

Defendant gave evidence and also called one witness Tinashe Zanda a tyre dealer.

Defendant's case is as per the summary captured earlier in this judgment. He attested further that in 2020 plaintiff saw him with the GL320 black in colour and requested that they do a swop and top with his E Class 300 benz. They could not agree on the amount to be topped up. In April 2021 plaintiff called him and indicated that he had seen him driving another GL and since he was now financially stable, he was prepared to enter into a deal.

Defendant valued his car at US$25 000 and plaintiff valued his at US$13000. After some negotiations, plaintiff offered US$5000-00 and a residential stand in Warren Park worth $5000-00. They reached an agreement. He gave him the GL 320 and plaintiff paid US$2500 with a promise to pay the balance later. They drove to town, each in the other's car and it was during this drive that he noticed the E class had some fault. They both drove to the tyre dealer where he bought tyres for the E class. Plaintiff was present but soon left as he indicated he was rushing to Mabvuku for a football match. He drove away in the GL 320.

He had a bearing fixed for US$250-00 which amount was reimbursed by plaintiff. On the day he was to collect the balance from plaintiff, he received a message from plaintiff to the effect that they could not proceed with the transaction as the motor vehicle was not performing well. A misunderstanding arose between them which led them to go to the Police where they were told their matter was a civil one.

Defendant insisted that there was a swap and top that is why plaintiff was using his GL 320. What was left on the deal is US$2500, registration book and stand or its value of US$5000.

Defendant's witnesses Tinashe Zanda then testified to the effect that both plaintiff and defendant are regular customers of his. They buy tyres from him. In April 2021 the two came to his workshop, plaintiff driving a silver GL Benz and defendant driving a black E class benz. After defendant had alighted and got into the GL 320, he told him he wanted tyres for the E class. He fitted 4 tyres onto the E class. He produced the invoice for the tyres as exhibit 3. He testified that it was on a Saturday when the two came to purchase the tyres and he issued the invoice on a Monday as defendant could not wait for it.

With Tinashe's evidence, defendant closed his case.

He who seeks a remedy must prove the grounds thereof. This is trite. KORSAH JA aptly stated this general principle that he who makes an affirmative assertion bears the *onus* of proving the facts so asserted

Nyahondo v *Hokonya & Ors* 1997 (2) ZLR 457(S)

In the present case, plaintiff was to prove issues 1 and 2 and defendant to prove issues 3,4 and 5 as per the joint pretrial conference minute.

Plaintiff's case was that he loaned the defendant an amount of US$2500-00 and as security the defendant gave him his GL 320 mercedes benz together with its registration book and defendant asked for his E class 300 mercedes benz to use for the time being.

Defendant's case was that he entered into a swop and top deal with plaintiff after plaintiff had indicated that he wanted the GL 320 which he had seen defendant driving. The GL 320 was more valuable (US$25 00-00) than the E class 300 (US$13 000-00) which plaintiff owned. They finally reached an agreement that they swop the cars and plaintiff pays US$5000 and on top of that gives defendant a stand worth US$5000 in Warren Park. Plaintiff then paid US$2500 leaving a balance of US$2500 and the stand.

In my analysis of the two parties evidence, I am satisfied that defendant's version of events is more probable than that of plaintiff. Plaintiff's version is too porous to be worth believing. There are a lot of improbabilities and questions which lead to the inescapable conclusion that there was no loan agreement between the two parties. For example, if according to plaintiff, defendant called him asking for some money, why did it have to be the defendant who rushed to defendant's

residence and upon his arrival, why would defendant immediately say he was in a hurry to go to High Glen shopping centre before he was given the money (loan)

At High Glen shopping centre, why would defendant (the one in desperate need of some money) drive away leaving plaintiff there before he was given the loan. It does not make economic sense for one to surrender a car worth US$25 000 as security for a US$2500 loan. It also boggles the mind why plaintiff would insist on being given the registration book for the GL 320. Why would plaintiff give defendant his own E class over and above the loan he had advanced to him. Plaintiff's evidence that defendant had indicated that he no longer had a car to use since he had surrendered his as security is difficult to believe. If the GL 320 was given as security, why would plaintiff drive it around. When he noticed that it had some fault, instead of returning it to defendant, plaintiff asked for a mechanic and was given contact details of defendant's mechanic.

As regards the E class 300 one wonders why plaintiff did not repossess it from defendant the very day it was reported to him that the car had a fault, in view of the fact that it had been given to defendant for temporary use as per his version.

Further it was not controverted and was admitted by plaintiff under cross –examination that he drove the GL 320 while defendant drove the E class 300 when they went to the tyre trader for tyres. It was not an issue that during their negotiations they discussed the values of <u>both</u> motor vehicles. This goes to confirm that the discussions were not for a loan but a motor vehicle swop. If the discussion was for a loan, there would be no need to discuss the value of the E class 300.

It was not disputed by plaintiff that he left the tyre trader's workshop rushing to Mabvuku for a football match in the GL 320. The other piece of evidence that was not controverted by plaintiff was that when they went to the Police Station, plaintiff reported that he had given defendant his motor vehicle which was in good condition and yet defendant had given him a malfunctioning motor vehicle and was refusing to give him back his motor vehicle. Similarly on the second occasion at Southerton Police Station where they were referred to because he had accused defendant of theft, he reported that he could not accept a faulty motor vehicle when defendant had asked him to top up a lot of money and was refusing to reverse the deal, plaintiff did not refute this. He again did not refute the evidence by defendant that on the day (Monday) defendant was to go and collect the balance of US$2500-00 and to be shown the stand, plaintiff

sent him a message to the effect that they cannot proceed with the transaction as the motor vehicle (GL 320) was not performing well.

Considering the above I find that plaintiff's version of events cannot reasonably be true. It leaves a lot to be desired as such cannot be believed.

On the other hand, I find defendant's version to be credible. It was also corroborated by Tinashe in as far as the issue of the two of them went to Tinashe's workshop each one driving the other's motor vehicle. He also corroborated the evidence that 4 tyres were fixed on the E class at the instance of defendant and issued exhibit 3 on Monday.

Both defendant and his witnesses were credible witnesses.

That being the case, defendant in my view managed to prove his claims in reconvention whereas plaintiff on the other hand failed to discharge the onus on him to prove that he lent defendant some money and his E class 300 for use temporarily.

It is my finding that the plaintiff and defendant entered into swop and top agreement. The fact that it was not reduced into writing is neither here nor there. The conduct of the parties clearly reveals the swop and top agreement.

The plaintiff and defendant were not strangers to each other. They had known each other for some time. They live in the same neighborhood and had previously entered into similar transactions with each other.

To that end I will dismiss plaintiff's claim and grant defendant's claim in reconvention with costs as prayed.

The following order is therefore made

1. that plaintiff's claim be and is hereby dismissed.

2.(i) that defendant's claim in reconvention be and is hereby granted with costs on the legal practitioners and client scale.

(ii) plaintiff be and is hereby ordered to pay US$2500 or ZWL equivalent calculated at the prevailing RBZ rate applicable on the day of payment.

(iii) plaintiff be and is hereby ordered to deliver an immovable property being a stand valued at US$5000-00.

In the alternative, plaintiff be and is hereby ordered to pay defendant a sum of US$7500-00 or its ZWL equivalent calculated at the prevailing RBZ rate applicable on the day of payment, being the total of the balance of US$2500 from the sale of the motor vehicle and the US$5000 the value of the stand.

Mahuni and Mutatu Attorneys at Law, plaintiff's legal practitioners
Mvhiringi and Associates, defendant's legal practitioners