MAINOS MUDUKUTI
versus
FCM MOTORS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
PATEL J
HARARE, 28 February to 1 March 2006 and 2 April 2007

Civil Trial

Mr *Zhangazha*, for the plaintiff
Mr *Sibanda*, for the defendant

PATEL J: The plaintiff in this matter claims the repair and delivery of his Audi 200 motor vehicle or, in the alternative, payment in the sum of $900 million as damages in respect of the replacement value of the vehicle. The defendant disputes liability on the main and alternative claim and, in any event, invokes the owner's risk disclaimer clause in the repair contract as absolving it of any liability to the plaintiff.

Evidence for the Plaintiff

The plaintiff, Minos Mudukuti, testified that he acquired his motor vehicle in 1990. Since then he had taken it to the defendant for servicing and repairs on six separate occasions because the latter had a franchise for Audi vehicles.

In November 2001, he took the vehicle to the defendant for servicing and to effect repairs to the vehicle injector, bonnet and radiator. His instructions were reflected on the defendant's job card (Exhibit 1]. The job card was completed as showing that the service had been carried out and that the injector and radiator

had been repaired. However, the bonnet cable could not be repaired because the requisite spare parts were not available.

The job card contained a disclaimer clause, in small print, to the effect that "[the defendant] is not liable for loss or damage to [the plaintiff's] vehicle or contents therein". The plaintiff stated that he did not see this clause and that it was not brought to his attention.

He returned to the defendant's workshop on two occasions. On the first occasion, he found a mechanic strapping the engine wires together because the car had caught fire and, on the second occasion, he found that the gear-box had collapsed. About 11 months later, he received a telephone call from the defendant's foreman indicating that the engine had seized up and that there was nothing that the defendant could do about it.

The vehicle's engine had been overhauled in December 2000. Apart from the defects listed in Exhibit 1, the vehicle was performing well at the time that it was taken to the defendant's workshop. When the defendant agreed to undertake the stated repairs, the plaintiff was not told of any problem with the engine. At the present time, the vehicle is in a sorry state with its engine and gear-box dismantled and with various other parts damaged or missing.

In January 2003, the plaintiff approached three other reputable firms which declined to take on the job of repairing the vehicle because its engine had been dismantled at the defendant's workshop. Much later, in February 2006, the vehicle was examined by one Botha, the Chief Technical Officer of the Automobile Association. The latter compiled a report [Exhibit 2] in which he concluded that he was "unable to determine actual cause of engine failure" and that the vehicle "would not be repaired satisfactorily, due to the age of the vehicle and availability of parts". The plaintiff then obtained valuations from three

motor dealers [Exhibits 3A, 3B & 3C] which estimated the value of the Audi 200 in reasonable condition as being between $900 million and $950 million.

John David Kelly is an experienced motor vehicle valuator. He authored Exhibit 3B and testified that he valuated the plaintiff's vehicle. He took into account, *inter alia*, its year of manufacture and mileage as well as its equivalent value in South Africa. Its current value in South Africa was 15,000 Rands. He stated that the Audi 200T is a turbo-boosted vehicle and, as such, it is a much sought after vehicle with a premium value. He valuated the plaintiff's vehicle at $900 million applying the parallel exchange rate because that was the rate used for most imports in the motor industry. He had seen the plaintiff's vehicle in 2001 and it appeared to be in relatively good condition at that time.

Evidence for the Defendant

Chenjerai Maduma was employed by the defendant in 2001 as its Assistant Workshop Manager. He is a fully qualified motor mechanic and supervises a fairly sizeable workshop.

He testified that he supervised the work carried out on the plaintiff's motor vehicle in 2001. When the mechanic assigned to the vehicle tried to force its bonnet open, the bonnet wire snapped and caused a spark resulting in the fire which damaged the bonnet and some wiring and plastic covers under the bonnet. This damage was contracted out for repairs which were effected in January and February 2002 (Exhibts 5A, 5B, 5C & 5D]. The accelerator and clutch cables were also damaged and these were replaced by the defendant at its own cost in January 2002 [Exhibits 6A & 6B]. All the necessary repairs to and servicing of the vehicle were completed in April 2002.

Thereafter, between May and September 2002, it was discovered that the gear-box and clutch assembly were worn and faulty. With the plaintiff's

agreement the clutch was reconditioned and reassembled with the gear-box. The vehicle was taken for a road test by the foreman but the engine stopped turning after a short distance from the defendant's workshop. The engine was then stripped and it was found that the main bearings on the crankshaft were excessively worn.

According to Maduma, the engine had probably not been properly repaired when it was overhauled or had been insufficiently serviced over the years. The damage to the engine was not caused by the fire or during the defendant's custody of the vehicle. The engine is presently in pieces in stripped condition.

Under cross-examination, this witness was asked to explain the statement in the defendant's summary of evidence [at paragraph 6] to the effect that the fire was caused by a cable coming into contact with the battery. He conceded that the statement was misleading as the battery for this particular vehicle was not located under the bonnet but under the rear seat. He was also unable to explain why the clutch and gear-box problems manifested themselves four months after the vehicle had been serviced by the defendant. He further conceded that when Botha inspected the vehicle in February 2006, he was not shown the worn bearings on the crankshaft. Lastly, he confirmed that the defendant had previously worked on the vehicle on several occasions. He also agreed with the plaintiff that it was a special car and one of a kind.

The Issues

The issues for determination in this matter are as follows:-

1. Whether the agreement between the parties was subject to the owner's risk disclaimer clause.
2. The legal effect and validity of the said disclaimer clause.

3. Whether the defendant breached the implied warranty to return the vehicle to the plaintiff in a condition not worse than it was in when it was delivered to the defendant's garage.
4. If so, whether the plaintiff is entitled to claim specific performance or payment of damages as pleaded.

Whether Agreement Subject to Disclaimer Clause

As is evident from the job card prepared by the defendant (Exhibit 1), the plaintiff undeniably appended his signature below the disclaimer clause under review. His evidence, however, is that he did not read this clause.

As a rule, where a party signs a document containing specific contractual conditions, but simply does not bother to read them, he may still be bound by those conditions as having assented to them – unless he can show that he was misled as to their meaning and purport. See *George v Fairmead (Pty) Limited* 1958 (2) SA 465 (A) at 470 & 472; Christie: *The Law of Contract in South Africa* (3rd ed.) at p. 196.

In casu the plaintiff is an educated man who through his business experience is familiar with contracts, including the job cards compiled by the defendant on previous occasions. On these facts, his acceptance of the disclaimer clause immediately above his signature must be inferred from the circumstances even though the clause was not specifically drawn to his attention.

Legal Effect and Validity of Disclaimer Clause

For present purposes, it is necessary to consider the validity of the disclaimer clause under review in the context of the Consumer Contracts Act [*Chapter 8:03*]. According to its long title, the object of the Act is:

"to provide relief to parties to consumer contracts where the contracts are unfair or contain unfair provisions or where the exercise or non-exercise of a power, right or discretion under such a contract is or would be unfair; and to provide for matters connected therewith or incidental thereto."

It is not in dispute that the agreement *in casu* is one that falls within the ambit of the Act, in accordance with the definition of "consumer contract" in section 2, as being a contract for the supply of services in which the supplier is dealing in the course of business and the user is not.

Under the common law, the dictates of public policy restrict the broad use of oppressive exemption clauses. See *Tubbs (Pvt) Ltd v Mwamuka* 1996 (2) ZLR 27 (S) at 31-32. The provisions of the Act as to what constitutes an unfair contract are manifestly wider in their scope and effect. In terms of section 5(1) of the Act:

"A court may find a consumer contract to be unfair for the purposes of this Act—

(a) if the consumer contract as a whole results in an unreasonably unequal exchange of values or benefits; or
(b) if the consumer contract is unreasonably oppressive in all the circumstances; or
(c) if the consumer contract imposes obligations or liabilities on a party which are not reasonably necessary to protect the interests of any other party; or
(d) if the consumer contract excludes or limits the obligations or liabilities of a party to an extent that is not reasonably necessary to protect his interests; or
(e) if the consumer contract is contrary to commonly accepted standards of fair dealing; or
(f) in the case of a written consumer contract if the contract is expressed in language not readily understood by a party."

By virtue of section 5(2) of the Act:

"A court shall not find a consumer contract to be unfair for the purposes of this Act solely because—

(a) it imposes onerous obligations on a party; or
(b) it does not result in substantial or real benefit to a party; or

(c) a party may have been able to conclude a similar contract with another person on more favourable terms or conditions."

For the purpose of assessing the justifiability of a contract section 5(3) provides that:

> "In determining whether or not a consumer contract is unfair for the purposes of this Act a court shall have regard to the interests of both parties and, in particular, shall take into account, where appropriate, any prices, charges, costs or other expenses that might reasonably be expected to have been incurred if the contract had been concluded on terms and conditions other than those on which it was concluded."

As regards the relief available under the Act, section 4(1) in its relevant portions provides as follows:

> "Subject to subsection (3), if a court is satisfied—
>
> (a) in accordance with section *five*, that any consumer contract is unfair; or
>
> (b) .....; or
>
> (c) that any consumer contract contains a scheduled provision;
>
> the court may make an order granting any one or more of the following forms of relief—
>
> (i) cancelling the whole or any part of the consumer contract; or
>
> (ii) varying the consumer contract; or
>
> (iii) enforcing part only of the consumer contract; or
>
> (iv) .....; or
>
> (v) .....; or
>
> (vi) .....;
>
> and any such order may be made subject to such conditions as the court may fix."

The right to relief under the Act in relation to a scheduled provision is excluded in certain instances by section 4(3) which provides that:

> "A court shall not grant relief under this section—
>
> (a) .....;
>
> (b) solely on the ground that a consumer contract contains a scheduled provision—

(i) if the contract was concluded before the provision concerned became a scheduled provision; or

(ii) if the court, having regard to the factors set out in section *five*, is satisfied that in all the circumstances the consumer contract is fair despite containing the scheduled provision; or

(c) ……."

For the purposes of sections 4(1)(c) and 4(3)(b), scheduled provisions are set out in the Schedule to the Act. Of direct relevance to the present case is paragraph 2 which proscribes:

> "Any provision whereby the seller or supplier of goods or services excludes or limits the liability which he would otherwise incur under any law for loss or damage caused by his negligence."

Looked at from the perspective of section 5 of the Act and having regard to the interests of both parties *in casu*, the exemption clause under review is challengeable on two separate grounds. Firstly, the clause excludes the liability of the defendant to an extent that is not reasonably necessary to protect its interests as a motor vehicle repairer. Secondly, the clause is patently contrary to commonly accepted standards of fair dealing. It seems to me unconscionable that a business enterprise engaged in motor vehicle repairs, having agreed to undertake specific repairs to a customer's vehicle and taken custody and charge of the vehicle, simultaneously renounces all responsibility for any loss or damage to the vehicle or its contents. In my view, such a broad and unqualified exemption is neither reasonably necessary nor congruent with acceptable standards of fair dealing in the motor repair industry. As such, it operates to vitiate the fairness of the contract in which it is contained. I therefore hold that the agreement *in casu*, if taken with the exemption clause intact, is an unfair contract within the meaning of paragraphs (d) and (e) of section 5(1) as read with section 5(3) of the Act.

The clause under review is also impeachable under section 4(1)(c) of the Act as being a scheduled provision whereby the defendant purports to exclude the liability which it would otherwise incur under the common law for loss or damage caused by its negligence. Having regard to the factors set out in section 5 of the Act, as the Court is enjoined to do by section 4(3), I can find nothing in all the circumstances of this case to persuade me that the contract between the parties is fair despite containing the scheduled provision. As I see it, the objectionable clause renders the agreement *in casu* palpably unfair and its inclusion in the contract cannot be palliated by the surrounding circumstances.

To conclude this aspect of the case, I find that the exemption clause under review not only renders the agreement as a whole unfair within the meaning of section 5 but is also a proscribed scheduled provision as contemplated in section 4 of the Act. It therefore warrants the intervention of this Court by virtue of both paragraphs (a) and (c) of section 4(1) of the Act. Accordingly, the exemption clause under review is cancelled and declared to be null and void for the purposes of interpreting and applying the agreement between the parties.

Implied Warranty

According to the evidence before the Court, the plaintiff's motor vehicle was in a reasonable running state when it was handed over to the defendant for service and specific repairs. The defendant tendered no evidence to the contrary.

Thereafter, the bonnet and some wiring under the bonnet caught fire in circumstances which the defendant was unable to explain satisfactorily. Maduma's evidence in this respect was very unreliable and, in any event, the defendant carried out the requisite repairs at its own cost and initiative. It seems reasonably clear that the fire damage to the vehicle was entirely attributable to the defendant and its staff.

Subsequently, the defendant carried out the service and repairs, as stated on the job card [Exhibit 1], without any indication on the job card or otherwise that the vehicle's engine was faulty. The engine fault was only "discovered" by the defendant several months later. Maduma's testimony that this fault predated the handing over of the vehicle to the defendant is clearly inconsistent with the proven facts and cannot be credited.

Having regard to all of the surrounding circumstances and applying the maxim *res ipsa loquitur* to the facts adduced *in casu*, I am amply satisfied that the defendant was entirely responsible for the parlous state of disrepair in which the vehicle was found when it was inspected by Botha in February 2006 [Exhibit 2].

The contract between the parties was for the defendant to service and repair the plaintiff's vehicle in accordance with his stated instructions. The plaintiff contends that the contract was subject to an implied warranty to return the vehicle to the plaintiff in no worse a condition than it was before the contract. The defendant submits that any such implied warranty cannot be written into the contract because it contradicts the express disclaimer of liability stipulated on the job card [Exhibit 1]. I agree that, ordinarily, an implied term cannot prevail over any express contractual term as that cannot have been intended by the parties. However, the exemption clause *in casu*, having been struck down in terms of the Consumer Contracts Act, must be treated as being null and void *ab initio* inasmuch as section 8 of the Act declares that "no agreement to waive any right conferred by this Act shall be of any effect". This clause must therefore be wholly disregarded in assessing the intention of the parties at the time that they entered into their contract.

The grounds upon which an implied term may be imported into a contract are elaborated in Christie, *op. cit.*, at p. 183. See also *Alfred McAlpine & Son (Pty)*

Ltd v Transvaal Provincial Administration 1974 (3) SA 506 (A) at 531-2; *Wilkins N.O. v Voges* 1994 (3) SA 130 (A).

Having regard to the facts of this case, I am of the view that the defendant did impliedly contract itself to return the vehicle to the plaintiff in a condition not worse than it was in when it was delivered to the defendant's garage. I arrive at this conclusion for several reasons. First and foremost, such a warranty is essential to any contract for the service and repair of a motor vehicle. It would be astounding and quite absurd for the owner of a vehicle to hand it over to a motor expert for repairs with the expectation of having the vehicle returned to him in any worse condition than it was in before the repairs were effected. I am also of the view that the term sought to be implied is necessary for business efficacy and must be implied by trade usage in the motor vehicle repair industry. Finally, I am satisfied that the warranty is implied from the facts *in casu* and can be derived from the common intention of the parties as inferred from the express terms of their contract and the surrounding circumstances.

Having regard to the finding made earlier that the defendant was responsible for the dysfunctional state of the plaintiff's vehicle after having assumed custody of it, it follows that the defendant breached its implied warranty to return the vehicle to the plaintiff in a condition not worse than it was in when it was delivered to the defendant's garage, viz. in a sound and running condition.

Claim for Damages

In his closing submissions, counsel for the plaintiff quite startlingly founds the plaintiff's claim for damages in some future delict which might be committed in the event that specific performance is not fulfilled or rendered impossible. This contention is clearly misconceived. What the plaintiff has succeeded in doing is establishing a breach of contract on the part of the defendant. He is accordingly

entitled to damages for breach of contract and not to any delictual damages. Even if the defendant's conduct did in fact amount to a delictual wrong, this was neither pleaded nor proven as such. The plaintiff must be confined to the facts pleaded in order to prove his claim. See *Chiviya v Chiviya* 1995 (1) ZLR 210 (H) at 213.

In order to prove his claim, the plaintiff adduced valuations from three different motor vehicle traders [Exhibits 3A, 3B & 3C]. The expert evidence given by one of those traders, Kelly, places the value of the plaintiff's vehicle at $900 million as at the time of the trial. This value was affirmed as approximating the current market value of the vehicle in Zimbabwe, applying the unofficial parallel exchange rate of the Zimbabwe Dollar to the South African Rand.

The general rule is that damages for breach of contract are to be assessed at the time of the breach of contract, the time of performance or the time of cancellation. See *Munhuwa v Mhukahuru Bus Services (Pvt) Ltd* 1994 (2) ZLR 382 (H) at 388, citing Visser & Potgieter: *Law of Damages*, at pp. 76-7. I apprehend, however, that there will be instances where it becomes necessary to assess the quantum of damages as at the time of trial in order to achieve justice between the parties. This is particularly so in an hyperinflationary environment where the replacement value of the thing in dispute will vary quite substantially from the time of the alleged breach to the time of trial. Be that as it may, it is not necessary for me to delve into or decide this aspect for the purpose of determining the matter at hand.

It is trite that in order for the evidence of an expert witness to be admissible it must be given by a person with special knowledge and skill. Moreover, it must render material assistance to the trial court. See Hoffmann & Zeffertt: *South African Law of Evidence* (4th ed.) at pp. 100-104.

The three valuations proffered by the plaintiff are not *ipso facto* admissible as such without any verification of the qualifications of the valuators. In this respect, only the valuation tendered by Kelly, premised on his professional experience and expertise, is properly admissible. However, the difficulties that I perceive with Kelly's expert valuation are manifold. Firstly, he did not directly inspect the plaintiff's motor vehicle at the time of his valuation. He simply recalled having seen the vehicle on the road approximately five years before and based his assessment on a reasonable estimate of its current market value. In this fundamental respect, his testimony lacks the probative value that is necessary to justify reliance on any expert evidence. Secondly, he based his valuation on the unofficial parallel exchange rate equivalent of 15,000 South African Rands. It is trite that the courts cannot recognise and give effect to the illegal parallel exchange rate. See my observations in this respect in *Zimbabwe Development Bank v Zambezi Safari Lodges (Pvt) Ltd & Others* HH 95-2006, at p. 10.

For the reasons stated above, the expert evidence adduced on behalf of the plaintiff cannot be relied upon to justify the valuation of the replacement cost of the vehicle that he claims as contractual damages. Accordingly, his claim for damages cannot be sustained and must be dismissed.

Specific Performance

It is trite that an aggrieved party is entitled to claim specific performance of a contract where it has been breached by the other party. The classic statement of this rule is that of INNES JA in *Farmers' Co-operative Society v Berry* 1912 AD 343, at 350:

> "*Prima facie* every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party, as far as is possible, a performance of his undertaking in terms of the contract."

In the instant case, the defendant has breached its implied warranty to return the vehicle to the plaintiff in a sound and running condition. Consequently, the plaintiff is entitled to demand specific performance of that warranty, insofar as such performance is possible.

Botha, in his terse report [Exhibit 2], states as follows:

> "*It is my contention that the vehicle in its present condition would not be repaired satisfactorily, due to the age of the vehicle and availability of parts.*"

Botha's report is extremely brief to the point of being laconic and, in my view, does not exclude the possibility of having the engine repaired by the defendant. According to Maduma, the defendant firm specialises in repairs to Audi vehicles and has serviced and repaired the plaintiff's vehicle on many occasions. At the end of his testimony, he indicated that the defendant would attempt to repair the vehicle engine, if this is possible.

On balance, I am satisfied that the plaintiff is entitled to claim specific performance, albeit not in the terms prayed for. As he has succeeded in his alternative claim, he is also entitled to his costs.

In the event that the defendant fails for any practical reason to comply with the decree for specific performance, the plaintiff will be at liberty to institute a new action to recover damages. See Kerr: *The Principles of the Law of Contract* (3rd ed.) at p. 416.

Order

In the result, judgement is entered in favour of the plaintiff as against the defendant as follows:

(i) The defendant be and is hereby ordered, at its own cost and expense, to repair the plaintiff's motor vehicle, an Audi 200 Turbo

(Reg. No. 358-4495), and to deliver the vehicle to the plaintiff in a sound working condition.

(ii) The defendant shall commence the aforesaid repairs within 5 days of the date of this order and shall deliver the vehicle to the plaintiff within a period of 3 months thereafter.

(iii) The defendant shall pay the costs of suit.

Chinamasa, Mudimu, Chigowenya & Dondo, plaintiff's legal practitioners
Mawere & Sibanda, defendant's legal practitioners