HB 14/07

Judgment No. HB 14/07
Case No. HC 3837/04

DR TANIUS MUMBENGEGWI

Versus

CLOVER LEAF MOTORS (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 2, 3 FEBRUARY 2006, 4 APRIL 2006 AND 1 FEBRUARY 2007

Mr James for the applicant
Mr D.M. Foroma for the respondent

Civil trial

CHEDA J: This is a claim based on a breach of contract by defendant.

Plaintiff issued out summons against defendant wherein he claimed the following: -

"(i)delivery of a new Nissan Wolf motor vehicle as against payment by plaintiff to defendant of
(a) $11 912 697-12
(b) $35 000 000-00
(ii) alternatively to (i) supra payment of damages in the sum of US$11500 and $60 000 000-00 as against payment by plaintiff and defendant of
(a) $11 912 697-12
(b) $35 000 000-00
(iii) further alternatively to (i) and (ii) supra damages in the sum of $85 000 000.
(iv) interest a temporae morae there on at the prescribed rate calculated from the date of issue of summons to date of full payment.
(v) Cost of suit."

Defendant entered an appearance to defend this action on the basis that it fulfilled its terms of the contract and that any other arrangements between plaintiff and one Clyde Mtungakwa (hereinafter referred to as "Clyde."), was a private one.

Plaintiff's evidence is that he visited defendant's premises, wherein, he was attended to by one Clyde. He pointed out to him a car which he wanted from the two that were on display at defendant's premises. He was, however, advised that they were on sale on behalf of certain owners.

Plaintiff was of the view that the prices of the two vehicles were too high. Clyde then suggested to him that he sources foreign currency, so that they could import a similar vehicle for him. Plaintiff agreed.

It is plaintiff's evidence that he wanted a Wolf type motor vehicle which he believed to be a 2 litre engine capacity and he pointed it out to Clyde as the type he was seeing on display for sale.

It is common cause that Clyde was employed by defendant and was therefore its agent.

Plaintiff had told Clyde that he wanted a Nissan Hardbody Wolf type single cab, 2 litre engine capacity. The vehicle arrived, but, it turned out that it was a wrong vehicle and he declined to take it. In response, Clyde advised him that the vehicle he wanted was more expensive, therefore, he would have to raise more money in order to purchase it. It appears this transaction also fell through for reasons that are not relevant to this matter.

It was further his evidence that Clyde said plaintiff had infact ordered a 2.4 litre capacity engine as there is no Wolf in the 2 litre range. A dispute as to the description of the motor vehicle that was ordered arose, but, however, a compromise was reached, wherein plaintiff was to pay a top up but not to defendant but to Tuscany Engineering a payee that was nominated by Clyde. As it now turned out, this was, an attempt by Clyde to defraud defendant.

Plaintiff's evidence with regards to the transaction is corroborated by Benson Mazarire who accompanied plaintiff to defendant's premises. He was present when Clyde pointed out the type of vehicle he wanted and it was his understanding that plaintiff wanted a single cab being a 2 litre wolf type.

Gavin Malcolm Mayers, a vehicle consultant with 6 years experience also gave evidence. He explained that the reference to J02 refers to a Nissan Pick-up and the common understanding of the term Wolf is both a single and double cab Nissan vehicles, the distinction being the appearance.

Mr Stanford Andrew Sibanda (hereinafter referred to as "Mr Sibanda") gave evidence for defendant. He is a Managing Director for defendant. His evidence was that when the dispute between plaintiff and Clyde arose he came to Bulawayo in order to try to resolve it. On perusal of the documents in his company's office he discovered that plaintiff had ordered a 2 litre J02 motor vehicle. It is further his evidence that he explained to him that, what he had ordered was not a Wolf type of motor vehicle as there was no Wolf in the category of a 2 litre J02.

From the evidence presented in court it is not in dispute that plaintiff went to defendant's premises. He saw the type of vehicle which he wanted and ordered it. He ordered a Nissan Hardbody single cab 2 litre Wolf type. This is what he understood Clyde to be ordering for him. It is also a fact that the description of a J02 only came in after Mr Sibanda had come into the picture. Infact it is when he was perusing defendant's record, that the term J02 came to light.

Firstly, Clyde was defendant's employee and at the material time, he was acting within the scope of his authority. That authority stems from defendant's objectively determined consent that Clyde should sell cars on its behalf.

Mr Sibanda's evidence only goes as far as what he saw in the documents at defendant's premises and this description had been authored by Clyde. It is his evidence that plaintiff ordered a 2 litre J02. When, asked to produce the document indicating the order he could not do so, which response in my view lacked bona fides. He was aware that plaintiff was disputing the aspect of having ordered that type of vehicle. It is also surprising that he even failed to produce a fast copy from his own records which under normal business transactions would have been kept at plaintiff's offices. Therefore, his evidence could not take defendant's case any further.

This was a sale by sample. Plaintiff was shown motor vehicles which fitted his requirements namely a Nissan Hardbody 2 litre Wolf type. He expected delivery of the same. However, a

different vehicle was delivered, plaintiff accepted this anomally, hence their attempt to rectify the problem by demanding a top-up.

In my view, Clyde misrepresented facts to plaintiff. Such a misrepresentation was material to the contract. The question of a J02 was not brought to his attention at the time of entering into the contract. The nature of this misrepresentation was such that, it deceived plaintiff into entering into the contract. The facts as presented to him by Clyde were such that they induced him into entering into a contract, the truth of which had he known he would not have entered into the said contract.

The vehicle delivered to plaintiff was not in accordance with the sample he had seen as indicated to him by Clyde. That failure on Clyde's part ultimately demonstrates on a balance of probabilities that plaintiff did not perform part of the contract. The legal position is that, where there has been a sale by sample, the goods delivered should be similar to those that had been shown to the purchaser. If the goods tendered are different from those that the purchaser had been shown he is then entitled to reject them. See *Greenshields v Chisholm* 1884 3SC; 220 Smith J.

Further, in my view, where, there now exist a material difference between the goods previously shown and those tendered, to an extent of altering the purpose of the goods for which they were intended, the terms and conditions of the said contract can not

be said to have been fulfilled. The goods tendered should be of the same kind and/or quality to those that were indicated to him as a sample. Where the goods are now different the seller can not be said to have performed his part of the contract.

The legal position is that a principal is liable in damages ex delicto for the frauds and fraudulent misrepresentations of his agent committed within the scope of his authority, see the celebrated case of *Colonial Mutual Life Assurance Society v McDonald*, 1931 AD 412 at 441-2.

In light of the above, I find that defendant in this case is liable. The following order is accordingly made: -

"WHEREFORE Plaintiff claims from Defendant

(i) delivery of a new Nissan 2.4 litre Wolf motor vehicle within seven days of this order, as against payment by Plaintiff to Defendant of

(a) $11 912 697-12

(b) $35 000 000-00

(ii) alternatively to (i) supra payment of damages in the sum of US$11 500 and $60 000 000-00 as against payment by Plaintiff to Defendant of

(a) $11 912 697-12

(b) $35 000 000-00

(iii) further alternatively to (i) and (ii) supra damages in the sum of $85 000 000.

(iv) Interest a temporae morae thereon at the prescribed rate calculated from the date of issue of the summons up to date of payment.

(v) Cost of suit."

James, Moyo-Majwabu and Nyoni, plaintiff's legal practitioners
Messrs Sawyer and Mkushi, defendant's legal practitioners