

PATRICK TEVERA
versus
GODFREY MAKARANGA

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 6 JULY AND 3 SEPTEMBER 2015

Opposed Application

J T Tsvangirai for the applicant
G Sengweni for the respondent

MOYO J: This is an application wherein the applicant seeks delivery of a registration book relating to a motor vehicle namely a Mercedes Benz registration number ACR 3360. At the hearing of this application I granted the order and stated that my detailed reasons will follow, here are they:

The facts of the matter are that respondent took his motor vehicle namely a Mercedes Benz registration number ACR 3360 to an agent for sale at a price of \$12000. The applicant then bought the motor vehicle at a price of \$12000 by trading in his own car valued at \$8000 and paying the difference of \$4000.

The applicant took possession of the motor vehicle. It would appear the agent did not pay its principal the dues leading to numerous problems amongst the three parties. The respondent withheld the registration book as a result. In his opposing affidavit the respondent states that he is not aware that the purchase price of \$12000 was paid in full. He states thus:

“My so called

Agent whom applicant has chosen not to cite in these proceedings had my explicit instructions that the registration book of the motor vehicle was going to remain in my custody only to be released upon full payment to me of the vehicle purchase price.”

Respondent avers that he is not aware that the sum of \$12000 was paid in full. He does not tell us what his agent’s stance regarding that issue is. He should clearly state that my agent

was never paid and therefore applicant did not pay for the motor vehicle. Instead, he avers that that fact is not known to him. If that fact is not known to him and he has not taken it upon himself to verify that information, then it follows that applicant's allegations on payment remain uncontroverted in the court record. It follows therefore that respondent does not dispute the issue of applicant paying the sum of \$12000 to the agent. He further states in the same paragraph that:

“I have not yet been paid any meaningful part of the purchase price notwithstanding a court order against my so called agent.”

This statement clearly means that the respondent has gotten a court order for payment against his agent and that precisely means that he is not telling the truth in the same paragraph earlier where he says that the fact that applicant paid the \$12000 is not known to him for why would he then seek a court order that results in him expecting payment from the agent if to his knowledge the agent is not the custodian of the funds? This statement also shows that he has sought a court order for payment against the agent because the agent is the one who now owes him according to his knowledge and not the applicant. For if the applicant had not paid the sums due to the agent, there would be no basis upon which to sue the agent.

The respondent cannot eat his cake and still have it. On one hand he is suing the agent for the sums due and on the other hand he wants to hold on to the registration book of a car that he sold through his agent, who then clearly breached his fiduciary duties to his principal.

The respondent goes on in paragraph 4 to state as follows:

“No issues arise save that the so called agent did not honour the court order leading to the issuing by this Honourable court of a decree of civil imprisonment a condition the agent has so a breached.”

Clearly the respondent is acting against his agent, seeking enforcement for payment of the monies due by the agent to him from this transaction. He obviously has no basis at all by virtue of his own averments in opposing this application, for there is no way he can be suing the agent for the sums due in relation with this transaction and at the same time denying applicant, a third party who bought the car from his agent, the right he now holds to the motor vehicle in question.

Respondent refers to his agent as the “so called” agent in his opposing papers. One wonders why he refers to him as such. He is the one who approached him to sell a motor vehicle on his behalf, he is the one who gave the agent the mandate to sell, to now refer to him as my so

called agent in my view is inappropriate. He is the one who clothed him with those powers and that title, he thus can not behave like he is of the view that the word agent is not suitable or correct for he is the one who bestowed such title and the powers that go with it on the agent. It is therefore his agent, not his so called agent.

The fact that the agent has turned out to be untrustworthy and has embezzled the funds that were for onward transmission to his principal is not the applicant's problem, it is in fact the respondent's, for in entrusting the sale of his motor vehicle on this agent, he was taking risks of which breach of trust by the agent is one of them, like in this case.

An agent must act in accordance with, and within the limits of, the authority conferred by the principal, whether express or implied per Joubert and Van Zyl "*Mandate and Negotiorum Gestio*" LAWSA volume 17 page 8.

If an agent, either negligently or fraudulently fails to perform the mandate or performs it improperly, and thereby causing loss to the principal, the agent is liable to the principal in damages per Voet 17:1:9.

Where an agent has disclosed that he acts for a principal, and has acted within the scope of the express or implied authority conferred, a transaction effected by the agent with a third party is binding between the principal and the the third person. See the case of *Amalgameerde Afslaers (Edms) Bpk vs Louw* 1956 (1) SA 346 (A).

Even if the agent has not acted in the interests of the principal, or has actually defrauded the principal, the latter is bound by the transaction, if the third party was not a party, to the irregularity, and if the agent acted in fact within the express or implied scope of his authority. Refer to the case of *Price NO vs Allied- JBS Building Society* 1979 (2) SA 262 (F) at 268.

Clearly where an agent acts within the scope of his mandate from the principal as in the facts of this matter, the principal is bound by the same transaction and if the agent has defrauded the principal by not remitting the requisite funds, it is for the principal to deal with the agent and not to refuse to perform his part of the deal.

It is for these reasons that the application was granted in terms of the draft.

Dube-Tachiona and Tsvangirai, applicant's legal practitioners
Messrs T. Hara and Partners, respondent's legal practitioners