HC-5125/1999

SCOTFIN LIMITED	Plaintiff
and	
POLKA NOMINEES (NINETEEN) (PVT) LTD	First Defendant
and	
JOHN DUNCAN GENTLEMAN	Second Defendant
and	
PAUL MAXWELL GORE	Third Defendant

HIGH COURT OF ZIMBABWE
HLATSHWAYO J
HARARE 5 June 2001 and 10 April 2002

Opposed Application

Richard Wood, for the plaintiff
Adrian de Bourbon, *SC,* for the defendant

HLATSHWAYO J: The plaintiff, Scotfin Limited, is a company incorporated with limited liability according to the laws of Zimbabwe, as is the first defendant, Polka Nominees (Nineteen) (Private) Ltd. The second and third defendants, John Duncan Gentlemen and Paul Maxwell Gore, respectively, are company directors. The plaintiff claims as against the three defendants, jointly and severally, various amounts the origins of which appear in the following extract from the plaintiff's particulars of claim (I have left out the narration relating to the "first agreement" and the "first goods" as it is not relevant for this opinion):

> "On the 18th January 1994, at Harare, Plaintiff and First Defendant entered into an agreement of lease ("the second agreement") in terms of which First Defendant hired from plaintiff two used Crane Fruehauf refrigerated trailers for a total rental of $841 707,50. The goods were delivered to the first defendant. It was a term of the second agreement that the total rental would be payable as to a first rental of $25 000,00 upon the signing of the agreement and the balance thereafter by way of thirty-five monthly payments of $23 334,50.
> The further terms of the second agreement were, inter alia, that in the event that the First Defendant defaulted in the payment of any rental or other sum due in terms of the second agreement the plaintiff would

be entitled to terminate the second agreement and have returned to it by First Defendant the second goods without prejudice to Plaintiff's right to claim damages arising from the default.

First Defendant defaulted in the payment of the rentals due. As a result, the plaintiff repossessed and resold the goods by public auction realizing the net sum of $110 000,00 which was credited to the first defendant, leaving a balance outstanding in respect of rentals in the sum of $780 927,79 plus interest at the rate of 36 per cent per annum calculated from the date of service of summons.

On the 18th January 1994, the first defendant leased from plaintiff in terms of a written lease agreement ("the third agreement") two used Scania Tractor Units and six Twin Steer ("the third goods") for a total rental of $1 385 013,60. The total rental was to paid as to a first rental of $40 000,00 upon the date of signing the third agreement and the balance thereafter by way of thirty-five monthly instalments of $38 429,96 each. The first defendant defaulted in the payment of the rentals and plaintiff terminated the third agreement and recovered possession of one Scania Tractor which was sold by public auction realizing the sum of $117 946,00, and leaving a balance outstanding at the time of $1 410 822,21.

On the 15th December 1993 the second and the third defendants bound themselves jointly and severally as sureties and co-principal debtors with first defendant for the due fulfillment of its obligations and punctual payment of all sums due by it."

The second defendant excepted to the plaintiff's particulars of claim in relation to the second and third agreements (henceforth "the two agreements") outlined above basically on the grounds that the agreements, properly construed, were hire-purchase contracts which must have complied with the provisions of section 25 (1)(a) of the Hire-Purchase Act for the underlying agreements to be fully enforceable and for the suretyship to be enforceable at all. The actual terms of the two agreements are attached as Annexures "D" and "E" of the applicant's further particulars, and both contracts are titled, "Agreement of Lease".

In reply, Mr. *De Bourbon*, for the plaintiff, submitted, *in limine*, firstly

that the second defendant adopted the wrong procedure as the point it seeks to make does not arise *ex facie* the pleadings, and should therefore be the subject of a plea and not an exception. Secondly, that an exception has to be decided on the allegations made by the plaintiff in its pleadings, without the need for any additional evidence. The second defendant's defence that the document, which the plaintiff describes as an agreement of lease, is in fact to be treated as a hire-purchase agreement is based on allegations of fact, which have to be separately pleaded.

I would like to make two observations pertaining to the points raised *in limine*. Firstly, regarding when an exception should be taken, it is settled that the remedy of an exception is available where the complaint goes to the root of the opponent's claim or defence. The position is stated by DAVIS J in *Kahn v Stuart* 1942 CPD at 392 as follows:

> "In my view, it is the duty of the court when an exception is taken to a pleading, first to see if there is a point of law to be decided which will dispose of the matter in whole or in part. It there is not, then it must see if there is any embarrassment, which is real and as such cannot be met by the asking of particulars as a result of the faults in pleading to which exception is taken and, unless the excepient can satisfy the court that there is such a point of law or such real embarrassment, then the exception should be dismissed."

In this case, the exception appears to have been well taken in that if the second defendant proves that the two agreements fall under the Hire-Purchase Act, then the collateral contract of suretyship will not be enforceable and that would dispose of the matter as far as the second and third defendants are concerned. Nonetheless, the court still does retain a discretion, on grounds of convenience, to reserve decision on the exception until it has had full argument on the merits where either the point of law is purely academic or where a proper decision on exception is bound up with the merits of the dispute (*see* Herbstein and Van Winsen, *The Civil Practice of the Supreme Court of South Africa*, 4th ed., and the authorities quoted

therein). In my view, the grounds for the exercise of the discretion seem to be absent here as the point of law is not purely academic and there appears to be no other dispute than the subject matter of the exception.

Secondly, and conversely, where an exception is taken, but additional evidence would have been required to sustain it, the party raising the exception runs the risk of having the matter decided without the hearing of such additional evidence. Accordingly, I propose to proceed to consider the merits of the exception.

Although it is trite that the court will not be bound by what the parties choose to call their transaction (*see*, BLAKEWAY J in *Scharfeneker v Duly & Company, Limited* 1940 RLR 222 at p.235), it is equally true 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 (*see* Diamond, Marais and Aronstam, *The Law of Hire-Purchase in South Africa* 4th ed., Juta & Company, 1978 at p.20).

In this case and on face value, the two agreements are leases, described as such by the parties. Significantly, the first agreement was described and understood by the same parties as a hire-purchase agreement. Now, there was no evidence given to show why the parties who had earlier conducted their transaction on hire-purchase basis would describe their subsequent (second and third) transactions as lease agreements if they still intended to continue on a hire-purchase basis. There may well have been some valid reasons for this change in form, if indeed it was that, including the usual one of wanting to avoid the requirements of the Hire-Purchase Act, but the defendant was not in a position to lead any such evidence because of the option they adopted of responding by way of an exception instead of a plea. Yet again, there may well have been no sinister motive, the parties having genuinely for valid economic reasons decided to change from a hire-purchase to a lease arrangement.

The exception taken by the second defendant relies on the application of section 25(3)(b) as read with section 25(1)(a) of the Hire-Purchase Act in that the two agreements are compromised by the fact that each does not contain a statement of the cash price and that the suretyship agreement is

consequently unenforceable. It is not disputed that the subject of each agreement was a used heavy commercial vehicle having a cash value in excess of $125 000,00, that each agreement failed to comply with the requirement of section 25(1)(a) as read with the Second Schedule to the Act, as it applied at the time the agreements were entered into and that at that time, the exclusion of a "financial lease" from the definition of "hire-purchase agreement" had not yet been introduced under legislation amending the Hire-Purchase Act. But do the agreements fall within the concept of a hire-purchase agreement as understood then?

The term "hire-purchase" is defined in section 2(1) of the Hire-Purchase Act [then Chapter 284 and now Chapter 14:09] which then read as follows:

> "hire-purchase agreement" means –
>
> (a) any contract whereby goods are sold subject to the condition that, notwithstanding delivery of the goods, the ownership in such goods shall not pass except in terms of the contract and the purchase price is to be paid in two or more instalments;
>
> (b) any contract which provides for the hiring of goods whereby the hirer has the right –
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> (i) to purchase such goods after two or more instalments have been paid in respect thereof; or
>
> (ii) after two or more instalments have been paid in respect thereof, to continue or renew from time to time such hiring at a nominal rental, or to continue or renew from time to time the right to be in possession of the goods without any further payment or against payment of a nominal amount periodically or otherwise; whether or not the payment may at any time be terminated by either party or one of the parties;
>
> (c) any other contract which has, or contracts which together have, the same import as either or both the contracts defined in paragraph (a) or (b) of this definition, whatever form such contract or contracts may take."

Mr. *Wood*suggested usefully that there are alternative three rungs to the above definition, the first of which refers to "a contract whereby goods are sold", the second of which refers to "a contract which provides for the hiring of goods" and the third,

which refers to any other contract "which has, or contracts together which have, the same *import*as either or both contracts defined in (a) or (b) of this definition whatever form such contract or contracts may take". I shall not endeavour to test the two agreements against each of the three alternative definitions of a hire-purchase agreement. Rather, I will examine whether the two agreements satisfy the broad effect of the definition of hire-purchase, which covers every contract under which the price is payable in two or more instalments and the seller has the right to the return of the property if the price is not paid.

Mr. *Wood*further submitted that in arriving at the characterization of the contracts one must look not so much at the incidents of a cancellation of the contract (clause 5 of the Lease Agreements, Annexures "D" and "E") or its premature termination (clause 6 and 7), but to the position pertaining with the contracts being duly performed by the parties as originally contemplated when they entered into the agreement, and running to their expiry dates, when there are no unperformed obligations of the parties, and accordingly suggested that the important provisions are those contained in the subparagraphs of clause 8 of each contract.

While I agree that it is useful to have a bird's eye view of the agreement as a whole in order to ascertain its true nature, I am of the opinion that its individual clauses must also be examined for conformity to the basic understanding of the whole contract,

unless they are shown to be merely formal clause intended to deceive, otherwise a completely misleading picture might emerge. (*see Scharfeneker v Duly & Co supra*p. 235) To use a homely example, a bird's eye view of a mermaid is that of a dazzling damsel until one realizes on closer examination the presence of fins in the place of legs and feet. Yet again, the inspection of the fins on their own may lead to a completely erroneous conclusion that the subject matter was some kind of fish. The best approach, therefore, is to examine both the bigger picture and the individual components thereof.

Now, applying the bird's eye view or holistic approach, a hire-purchase agreement arises when a purchaser concludes an agreement either with a financial institution or with the seller of goods, which is then financed through a specific arrangement of hire-purchase. Or as RUSSELL, CJ in *Scharfeneker v Duly & Co, Ltd*, *supra*., put it:

> "The authorities on hire-purchase agreements deal with contracts that differ considerably in their terms. A number of features are common to all. The parties to these agreements may be styled the trader and the customer. The trader, to protect himself, invariably stipulates that during the continuance of the agreement the ownership of the goods is to remain in him. To meet the customer it is provided that periodical payments are to be made. These payments are commonly designated as rent. The sum total of the payments correspond with the value of the car, and it is always provided that when all the payments have been made the customer may become owner of the car without further payment, except perhaps a nominal sum." at page 228.

A lease agreement, on the other hand, is no more than a form of financial arrangement whereby either the lessor or the lessee sources goods,

which are paid for by the lessor, but delivered to the lessee for use upon payment of an agreed lease fee. At the end of the hire-purchase agreement, i.e., when the contract is fully performed on both sides, the ownership in the goods passes or reverts to the purchaser who would have ceded ownership for the duration of the hire-purchase to the finance company or the seller. In a lease agreement the ownership of the goods vests at all times in the finance company as the lessor, and at the end of the contract of lease, the ownership remains vested in the finance company. Where the lease agreement allows the finance company to sell the goods to a third party, it can exercise that right. On the other hand it can determine not to exercise its rights of ownership and to allow the goods to remain in the possession of the lessee, without demanding any further rental; but this is done outside the terms of the agreement and the finance company cannot be compelled to act in this manner.

I concur with Mr. *De Bourbon's*submission that there is nothing in the two agreements to show that the first defendant, as the hirer, had the *right*, and I must add, much less the *duty*, (*Helby v Matthwes*1895 AC 471, *Garlicks Store v Caplan*1934 CPD 355) to purchase the goods after two or more instalments had been paid, or to renew the lease agreement at a nominal rental.

Firstly, if the lease was prematurely terminated, the goods had to be returned to the lessor (clause 6), and the lessor could then sell the goods to make up any deficiency in the sums due by the lessee to it. Those are not rights consistent with the legislation deeming the matter to be a hire-purchase agreement, and it cannot be said that these were merely formal provisions intended to deceive third parties.

When the lease terminated, not prematurely but upon due date, then

the lessee was obliged to deliver the goods to the lessor, and the lessor required to sell the goods for the best offer obtainable (clause 8(a)). If the goods were sold for more than the residual value, then the excess was paid to the lessee, if they were sold for less, then the lessee had to pay the shortfall to the lessor.

Mr. *Wood*put forward the view that contrary to the position under a true agreement of lease in which the event of the hirer's return of the goods in good condition restores the lessor to his full rights of dominium in the goods hired, this event does not discharge the obligations of the parties under the two agreements. However, as has already been noted, it is equally true that nowhere does the lease agreement allow the hirer, much less impose upon him the duty, to purchase the goods or to continue in possession in the circumstances contemplated in the Hire-Purchase Act.

Authors Diamond, Marais and Aronstam state the ultimate test for the resolution of this matter, thus:

> "The true test for determining whether or not the agreement is a sale is the genuine intention of the parties. This intention may be determined, for instance, by the amounts of the instalments being paid. If they bear a value that is proportionate to the use- or enjoyment-value of the goods being let, and are not proportionate to the sale- or exchange-value, the agreement should be construed as a lease. On the other hand, if the instalments are equivalent to the sale or exchange value – which is the case in the ordinary hire-purchase agreement – the contract should be regarded as a sale, no matter what the parties may choose to call it." (*The Law of Hire-Purchase in South Africa* 4th ed., Juta & Company, 1978 at pp.24-25 fn 85).

Once more, because of the manner in which the defence of this matter

was conducted, no evidence was, or could, be led to show the relationship between the use-value or the exchange-value on the one hand and the lease payments, on the other. According to the above opinion, if the aggregate instalments were proportionate to the use-value, then the agreements would be taken as leases, but if the instalments were equivalent to the exchange value, the contracts would be regarded as sales. I have my own doubts though, as to the accuracy of such a test, given that in the modern age, the use and exchange values of goods most traded under lease and hire-purchase arrangements, such as heavy motor vehicles, tend to converge, especially given such concepts as planned obsolescence.

> Be that as it may, the onus was on the second defendant to prove on a balance of probabilities that the agreements fell under the definition of hire-purchase. This they have failed to do. In fact, the probability that the agreements properly construed were lease agreements is more compelling. I have arrived at this conclusion because, it appears to me that the unusual arrangements contained in clause 8 requiring the lessor to sell the goods at the end of the lease to best advantage and to pay the lessee any receipts above the residual value of the goods and enjoining the lessee to make up the difference where a deficiency arises, are in line with the basic principles of a lease because they are meant to reward the lessee for careful use and preservation of the leased goods which would then fetch a price above their residual value and to penalize the lessee for careless and excessive depreciation of the goods, which would then fetch a price far below their expected residual value.
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> As far as costs are concerned, I see no reasons for departing from the normal rule that costs follow the outcome.

Accordingly, the exception is dismissed with costs.

Gill, Godlonton and Gerrans, plaintiff's legal practitioners

Atherstone & Cook, second defendant's legal practitioners.