ZODELLA ENTERPRISES (PVT) LIMITED
versus
LUXMORE NDENDA

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE 4 and 5 June and 18 July 2007 and 19 March 2008

Civil Trial

G Machingambi, for the plaintiff
F G Gijima, for the defendant

GOWORA J: The plaintiff is a duly registered company trading under the name Borrowdale Motor Sales. As the trade name suggests, it, the plaintiff, trades in motor vehicles. On 6 June 2006 the plaintiff entered into an agreement with the defendant, in terms of which the plaintiff agreed to purchase a vehicle owned by the defendant, to wit a Ford Taurus registration number 720 532L. A copy of the agreement which is attached as Annexure A to the summons reveals that the purchase price of the vehicle was $ 700 000.00 (revalued) payable as to a deposit of $ 300 000 and the balance payable in two installments of $ 200 000 each within a further period of five months.

In its declaration, the plaintiff avers that it paid the deposit of $ 300 000 and a further sum of $ 200 000 being the first installment. The plaintiff further avers that on tendering the remaining installment to the defendant, the latter ~~he instead~~ made a verbal offer to buy back the vehicle from the plaintiff and that as a result a verbal agreement was concluded for the defendant to buy back the vehicle for the price of $ 3 million. The plaintiff avers further that the defendant breached the verbal agreement by paying a total amount of $ 570 000 instead of the agreed sum. The plaintiff has

therefore claimed for an order canceling the verbal agreement with the defendant and further to that, for an order that it pay back the sum of $ 770 000 to the defendant being a reimbursement of the $570 000.00 ~~monies~~ paid under the verbal agreement by the defendant and the sum of $200 000 being the balance of the purchase price of the vehicle in terms of the written agreement concluded by the parties on 6 June 2006.

The defendant, in his plea, denied that the plaintiff was entitled to the relief being sought and instead averred that the plaintiff had performed its obligations in terms of the written agreement and has averred that the plaintiff breached the ~~written~~ agreement by failing to pay any of the installments due under the written agreement. Due to such breach, the defendant avers that the parties agreed to terminate the agreement on condition that the defendant would pay back to the plaintiff the sum of $ 570 000 and the latter would return the vehicle to the defendant. The defendant further avers that he duly paid the agreed amount to the plaintiff but that the plaintiff refuses to return the vehicle. The defendant therefore has filed a ~~, in his~~ counter-claim in which he prays for the return of the vehicle and payment of damages for unjustified enrichment in the sum of $ 800 000 for use of the vehicle and for the value lost on the use of the $ 570 000.

The plaintiff purchased the vehicle from the defendant and paid a deposit of $ 300 000.00 upon signature of the agreement. Subsequently additional other sums which plaintiff puts at $ 200 000.00 were paid. The defendant puts the amount at $ 100 000.00 which amount, he states is the first breach by the plaintiff of the terms of the written agreement. The plaintiff has produced vouchers which bear the signature of the defendant and states that the defendant did receive the amount of $ 200 000.00. The defendant denies that he signed the vouchers although admitting the signature to be his. The plaintiff then claims the existence of a verbal agreement, in terms which the defendant would repurchase the vehicle at a stipulated price. The plaintiff claims that the defendant breached the

agreement and therefore prays for it s cancellation and payment to the defendant of monies not paid under the first agreement and a refund to the defendant of monies paid under the second agreement.

Most of the facts are common cause. The dispute relate to the payment of the instalments by the plaintiff due on the written agreement. It is common cause that the parties entered into a verbal agreement in respect to the vehicle, and the question for determination is what the terms of that verbal agreement were. Each of the parties has a version which differs from the version rendered by the other.

At the commencement of the trial the parties agreed to some of the issues agreed to at the pre-trial conference and captured in a joint pre-trial conference minute filed by them. The only issues left for determination at the trial were the following therefore:

c) what were the material terms of the verbal agreement between the parties ?

d) whether the defendant breached the verbal agreement by failing to pay the deposit timeously?

e) whether the defendant is entitled to the return of the motor vehicle?

f) whether the defendant has suffered any damages and whether the plaintiff is liable to the defendant in the amount claimed or any other sum at all?

There were no issues to be decided on the written agreement but in the presentation of their evidence it would seem as if the parties were focused on issues mainly to do with the written agreement. The defendant in its counter-claim alleges breach of the agreement by the plaintiff and denies the existence of a verbal agreement involving a buy back of the vehicle. The plaintiff in turn claims ownership of the vehicle based on the written agreement. If the plaintiff premises its claim on the written agreement, the dispute, it appears to me, cannot be resolved without an examination at the outset of what the terms of the written agreement were and what rights the parties retained in the vehicle pursuant thereto. It is

clear therefore that the ~~court. The issues that remained were those recorded in paragraphs c) to f) on the joint pre-trial conference minute filed by the parties. There were no issues to be decided on the written agreement but in the presentation of their evidence it would seem as if the parties were focused on issues mainly to do with the written agreement. The defendant in its counter-claim alleges breach of the agreement by the plaintiff and denies the existence of a verbal agreement involving a buy back of the vehicle. The plaintiff in turn claims ownership of the vehicle based on the written agreement and it seems to me that the~~ terms of the written agreement then are an issue for determination as to whether the defendant is entitled to a return of the vehicle or if ownership by virtue of the agreement vested in the plaintiff. I propose to deal with the matter by examining each of the issues in turn based on the evidence adduced by the parties.

What were the terms of the written agreement? The pertinent terms of the contract are contained in clause 2 of the written agreement. ~~Clause 2~~The clause is in the following terms;

2. The parties have agreed on the following terms:

(i) The first agreed deposit payable on signing of this agreement shall be $ 300 000 000.00 (old currency) (Three Hundred Million Dollars) shall be paid in cash i.e.

(i) $192 000 000-00 directly to Legacy Financial Services No 13 Van Praagh Avenue Milton Park, Harare to clear a debt incurred with them by Mr Ndenda and

(ii) a cheque in favour of Old Mutual Properties for $50 000 000.00. The balance of $ 58 000 000,00 shall be paid in cash to Mr Ndenda on the day of signature of this agreement.

(ii) The balance of $ 400 000 000-00 shall be paid at a rate of $200

000 000-00 (two hundred million dollars) after the first two weeks and the last payment from the third week of the second payment or at such time as shall be agreed by the parties and in a manner determinable and agreed and documented by the parties.

(iii) The parties to this agreement agree that ownership of the said vehicle shall pass on to the buyer on signing of this agreement of sale.

The first two sub-clauses do not, in my view, require any examination as they are clear. They deal with the terms of the payment and it is obvious from the evidence of the parties that each of the parties understood the times within which the purchase price had to be paid by the plaintiff. It is the clause providing for the passing of ownership that is at the root of the dispute. Each of the parties is claiming the right of retention of the vehicle on the basis that it is the owner. Any rights that the plaintiff claims to ownership of the same can only have been acquired by virtue of the agreement of sale, and specifically clause 2 (iii). The defendant, on the other hand, would claim that he owned the vehicle and that ownership of the same was not transferred to the plaintiff by virtue of the written agreement.

According to the plaintiff the agreement in respect of the sale by the defendant of the vehicle to the plaintiff was a credit sale and as a result, bearing in mind the provisions of clause 2(iii), ownership passed when the agreement was signed and delivery made to the plaintiff. In written submissions filed on its behalf, the plaintiff poses a further question as to whether, in the event that ownership passed on 6 June 2006, it would

revert to the defendant assuming that the defendant has proved breach of the written agreement on the part of the plaintiff.

The defendant's view is however that the agreement was not a credit sale and that ownership did not pass to the plaintiff on delivery of the vehicle. It is accepted by the defendant that the agreement was not one for hire purchase. The stance by the defendant is that what was concluded was not a credit sale but a sale by installment ~~instalment~~ and that as such ownership in the vehicle did not pass to the plaintiff until the full purchase price would have been paid. In his evidence the defendant's stance was ~~The contention by the defendant however is~~ that ~~since~~ ownership in the vehicle never passed to the plaintiff ~~the vehicle still belongs to him~~.

~~The defendant has not attempted to explain to the court how he would have retained ownership in the face of the provision in the contract that ownership would pass to the plaintiff upon the signing of the agreement. Concurrent with the signature of the agreement was a requirement that the plaintiff pay the sum of $300 000 000 (old currency) as a deposit. The balance was to be paid in two instalments over a period of a further five weeks from the date the agreement was signed. The plaintiff was given delivery of the vehicle at the time the agreement was signed and it is then difficult to comprehend the contention being made by the defendant that he never gave ownership in the vehicle to the plaintiff. The defendant has submitted that the court should tell the parties the nature of the agreement that they entered into. I take that to mean that the court is being asked to interpret the agreement placed before it. It cannot mean that the court should in such exercise rewrite the contract for the parties.~~

The defendant did not, in pleading to the summons and declaration filed and served upon him by the plaintiff, allege or aver that the agreement was an installment sale governed by the provisions of the Act. In the written submissions the defendant accepts that ownership had passed to the plaintiff, but that the agreement was cancelled due to breach

on the part of the plaintiff. This is one of those matters where the pleadings do not bring out clearly and concisely the facts upon which the cause of action is based. It would have been appropriate for the plaintiff to have pleaded that ownership had passed in terms of the agreement of sale and the defendant would then have responded appropriately. The question of whether or not ownership had passed is central to the resolution of the dispute and should have been one of the issues extracted for trial. Unhappily it was not. However, with the defendant having accepted that ownership did pass, it then becomes necessary to determine if the agreement that was concluded was an installment agreement as contended by the defendant.

In the written submission made on his behalf, it appears that a concession is made that ownership did pass but that the agreement, being an agreement of sale by installment, then in the event of breach, the defendant would be entitled to the return of the vehicle. The defendant has submitted that the court should tell the parties the nature of the agreement that they entered into. I take that to mean that the court is being asked to interpret the agreement placed before it. It cannot mean that the court should in such exercise rewrite the contract for the parties.

The defendant seeks reliance on a passage from Willie and Millin's Mercantile Law of South Africa 16 ed at p 156 which is as follows;

> "If credit is given for part of the purchase price on condition that the balance is paid in cash, the sale is one for cash and delivery does not pass the ownership. It is otherwise if the sale is on credit for there the ownership of the goods passes to the buyer on delivery to him though he has not paid the price."

The passages quoted by Mr *Gijima* refer to the cases decided in South Africa but I have not been referred to any authorities in this jurisdiction dealing with installment~~instalment~~ sales other than those

governed by the Hire Purchase Act in our jurisdiction. At p 164 of their book Willie & Millin[1] the learned authors state:

'Installment sale agreements are defined as agreements of sale where ownership passes on delivery and the price is to be paid in installments, two or more of which are payable after delivery and the buyer is prohibited from alienating or encumbering the goods sold until the purchase price has been paid in full, or the full purchase price becomes payable if the buyer alienates or encumbers the goods sols, or the seller is entitled to return of the goods if the buyer fails to comply with any one or more of the provisions of the contract: section 1'.

A closer reading of that passage leads me to conclude that the learned authors were discussing a section of the South African Hire-Purchase Act. That passage cannot have the meaning ascribed to it by Mr *Gijima* that any agreement within this jurisdiction where payment has been provided for in installments~~instalments~~ is an installment~~instlament~~ sale as provided for by the Hire-Purchase Act of South Africa. As I have mentioned earlier on our own Hire-Purchase Act [*Chapter 14:09*] makes reference to installment~~instalment~~ sale agreements. These are defined in section 3 of the Act as follows;

"instalment sale agreement means any contract of sale under which-

a) the ownership in the goods sold passes either before or upon delivery; and

b) the purchase price is to be paid in installments of which one or more are payable

after delivery; and

c) the seller is entitled to the return of the goods sold if the purchaser fails to

comply with any of the provisions thereof;

and includes any other contract which has, or contracts which together have, the

same import, whatever form such contract or contracts may take."

A perusal of the Act reveals that it is meant to apply to specified agreements whose provisions are regulated by the Act. A feature of these agreements is that there should be reservation about the passing of

[1] Mercantile Law of South Africa

ownership to the buyer. Whereas in an agreement for Hire-Purchase the purchaser obtains ownership after payment in full of the purchase price, in an installment sale agreement, the Act provides that ownership passes to the purchaser on delivery whether or not an installment has been paid. In the event of breach on the part of the purchaser the seller is entitled to return of the goods that are the subject matter of the sale. It is the submission of Mr *Gijima* that in defending the claim by implication the defendant claimed the return of the vehicle when the plaintiff failed to pay the last installment. I do not think that the submission can stand scrutiny. The agreement executed by the parties did not provide that in the event of breach on the part of the plaintiff ownership in the vehicle would revert to the seller. Instead the plaintiff was granted unreserved right to ownership upon the signing of the agreement. No conditions were placed upon the passing of such ownership and it is my view that the conditions upon which the parties intended to perform their contract is different to the conditions or provisions governing an installment sale agreement as stipulated in the Act. In an installment sale, even if ownership passes, there is a reservation on the passing of such ownership and the Act provides for the seller to be able to recover the property which is the subject of the contract upon breach by the purchaser. I do not regard the agreement as falling in the category or form of agreements that are described in the Act as installment sale agreements.

The next question is whether this agreement can be termed a credit agreement as claimed by the plaintiff. Neither of the legal practitioners who appeared before me was able to point me to an authority in this country where the court had to decide what constitutes a credit sale. I have not been able myself to find one within this jurisdiction. According to Christie[2] the contract for sale does not always state whether it is for cash or credit so the law presumes that the sale is for cash, which presumption

[2] Business Law in Zimbabwe p151

is not rebutted by the mere fact that the seller has made delivery without receiving immediate payment.

In casu ownership was to pass to the plaintiff upon the signing of the agreement. It was therefore not a cash sale. The agreement itself does not, despite that ownership is to pass to the plaintiff upon signature, state that the agreement is one for credit or that the plaintiff has been given credit for the payment of the purchase price. In the absence of the parties having made specific averment as to whether or not the contract is one for credit, the court would have to examine the contract and deduce what the intention of the parties was.

I was referred to a plethora of authorities from South Africa. It is clear from the South African authorities that I have had to consider that the courts have not always found it an easy task to decide whether or not an agreement is one for credit or when it is that ownership is said to have passed. It appears that the matter first received attention from the courts in South Africa in the cases of *Daniels v Cooper (1 E.D.C. p. 174) Sadie v Standard Bank (7 J. 87) and Quirk's Trustees v Assignees of Liddle & Co (3 J. 322)* which are referred to in *Laing v S South African Milling Co. Ltd*[3]. I have not been able to access the earlier authorities. It would appear however that those cases are the ones that settled the law as regards sales on credit in South Africa according to the dicta in *Laing's* case. JUTA J.A.[4] summarized the law thus:

> "The authorities in our law were fully considered in the cases of Daniels v Cooper (1 E.D.C. p. 174), Quirk's Trustees v Assigness of Liddle & Co. (3.J. 322.), and Sadie v Standard Bank (7 J. 87), and are to this effect that on a sale of movables followed by delivery the property does not pass until the purchaser has paid the money or secured the seller for the same, or unless the sale is on credit. And there is ample authority for the further proposition that in the case of a sale where nothing is said as to ready money or credit and the goods are delivered to and taken away by the purchaser, the property does not pass; in other words delivery to the purchaser and

[3] 1921 A.D. 387
[4] At p 398

> his taking away of the goods raise no presumption of the sale being on credit. On the contrary the presumption is that the sale was for cash."

Laing's case (supra) was followed by the case of *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and Another*[5], in which the court found that even though there had been delivery to the purchaser and payment had been made by cheque despite the fact that the seller was aware that the vehicle was being sold to another person by the purchaser, the sale was for cash and credit had not been given. In a cash sale payment of the purchase price is made against delivery of the *merx* and where payment is made by cheque even where it is drawn against a bank in a different town it is cash sale with payment being made only when the cheque has been cleared. Even in these circumstances if the cheque is not met the property does not pass.

On the other hand, a ~~A~~ credit sale is one where the purchaser has been given time for payment of the purchase price, which time has been postponed for a substantial period. Where the period for payment has been postponed for an insubstantial period, the courts have held that the sale was for cash and not credit and that therefore ownership had not passed. The courts in South Africa have said that a period of ten days would be a reasonable period to hold that a sale is for cash where the seller has made no attempt to collect payment from the purchaser. A period in excess of that ten days is sufficient for the court s to find that credit had been afforded to the purchaser and that therefore the property had passed. The rule is based on the requirement in the Insolvency Act that an unpaid seller for cash must claim his goods within ten days of delivery. In terms of our own Insolvency Act [*Chapter 6:04*] a seller who has not been paid in full after delivery, where the purchaser has gone insolvent is allowed to reclaim his property if he has given notice within ten days of delivery to the insolvent or the trustee of his intent to reclaim his property.

[5] 1973 (3) S.A. 685 (A.D.)

The principles that have been stated by the courts therefore are to the effect that unless there is a specific provision to the contrary, every sale is presumed to be for cash even where delivery has been made. Where the seller has not granted credit to the purchaser or has not accepted security for payment by the purchaser, the sale is for cash unless the seller has not given the purchaser a period which is not insubstantial for payment of the purchase price. As to whether or not the seller wanted to pass ownership the intention of the parties can be gathered from the facts. Where the seller contracts for passing of the property to the buyer where payment in full has not been made nor secured then it is a sale on credit and ownership would pass upon delivery of the goods.

In an installment sale, even if ownership passes, there is a reservation on the passing of such ownership and the Act provides for the seller to be able to recover the property which is the subject of the contract upon breach by the purchaser. In the instant case, the contract provided for the unreserved passing of the –property to the purchaser upon the signing of the agreement by the parties. There can be no other meaning to be ascribed to the clause 'that ownership shall pass to the plaintiff upon the signing of the agreement.' The wording is clear and unambiguous and this court cannot ascribe any other meaning to that clause. There was no provision for ownership to revert to the defendant in the event of any alleged breach on the part of the plaintiff. There was no provision for the seller to reclaim the vehicle in the event of breach on the part of the buyer. The features of the contract between the plaintiff and the defendant have all the hallmarks of a credit sale. I can understand the difficulties that Mr *Gijima* faced in trying to argue that it was a cash sale. It was not a cash sale. As to whether it can be termed an installment sale, I believe the onus was on the defendant to place before the court facts such as would make me conclude that what I had before me was such. That was not done. Instead what the facts show is an agreement where one of the parties sold his property to a buyer where the buyer was afforded an opportunity to pay

the balance of the purchase over a period in excess of ten days. The only conclusion that the court can come to in such a situation is that the defendant wished to pass ownership to the plaintiff and I find that indeed ownership passed.

In so far as the first agreement is concerned, the defendant stated that he had not been paid for the second installment.~~instlment.~~ The plaintiff has proved vouchers allegedly signed by the defendant when he was paid the $200 000.00 which was due under the second installment.~~instalment.~~ The vouchers bear what the defendant confirms is his signature, but he claims that the plaintiff superimposed his signature on a document which he had not signed. The documents that were tendered in evidence were all originals. The signature itself has not been disputed but the plaintiff did not adduce evidence to show how his signature was affixed to an original document. I find that the documents are genuine and show that the defendant was paid in full for the second installment. ~~instalment.~~ In so far as the payment by the plaintiff of the balance of the purchase price is concerned, it is surprising that the defendant did not at any stage prior to the plaintiff bringing these proceedings ever call upon the plaintiff to rectify its breach if it was in breach. Despite such alleged breach, having delivered the vehicle to the plaintiff when the agreement was executed, the defendant never demanded the return of the vehicle until the plaintiff sued for the cancellation of the second agreement on the basis that the defendant was in breach thereof.

I turn now to the terms and conditions of the verbal agreement. According to the plaintiff the verbal agreement concerned the buy-back of the vehicle by the defendant. The defendant's position however is that because of the breach of the terms of the written agreement the parties agreed to cancel the written agreement and for the defendant to pay back the sum of $570 000.00 which was the total amount paid by the plaintiff and interest and for the return of the vehicle to him. I have already found

that there was no breach on the part of the plaintiff in paying the installments under the written agreement.

It would therefore make sense for the plaintiff to state that the defendant offered to buy back the vehicle from the plaintiff at the increased price of —$3 million and that as a result an oral agreement was concluded whereby the defendant had to pay a deposit of $700 000. This is the only explanation for the deposit of $570 000 in the plaintiff's account by the defendant. According to the plaintiff's witness the deposit of $700 000 should have been made by the 17 July 2006. The defendant was given until 31 July to pay the balance on the deposit and when he failed the plaintiff cancelled the agreement between the parties.

In my view the probabilities of the case favour the plaintiff's version. It was in the business of selling vehicles and it would have no problems to sell back to the defendant a vehicle that had belonged to him. All it wanted was to make a profit out of the process. The version by the defendant that the amount deposited into the plaintiff was repayment of the amount paid by the plaintiff under the failed agreement of sale did not ring true. On the defendant's version the amount constituted repayment of the initial $300 000 paid by the defendant when the agreement was signed and another $100 000 which was paid instead of $200 000 as had been agreed. The additional $170 000 would then constitute interest. The defendant was unable to say what the rate of interest agreed was. As a result he was not able to state with any conviction what the amount he had deposited into the represented. It also turned up in the evidence that the plaintiff had in fact had the vehicle repaired and serviced. The plaintiff had required the defendant to pay for the costs of such repairs under the verbal agreement. The defendant admitted that the vehicle was indeed repaired and he had not reimbursed the plaintiff for the costs thereof. It would be inconceivable in my view for the plaintiff to agree to an arrangement where it returns the vehicle to the defendant against a payment of $570 000. It would at the least demanded that it be reimbursed for the sums expended on the

vehicle which according to the evidence of the plaintiff's witness were far in excess of $570 000. The only verbal agreement entered into in my view is the one that the plaintiff told the court and the terms of which was able to explain. The defendant was unable to state with certainty the terms upon which he was to have the vehicle returned to him by the plaintiff. He was unable to prove the existence of the verbal contract that he alleged had been formed by the parties.

The defendant had as part of his counter-claim made a claim for damages based on the alleged use of the vehicle, but no evidence was led by the defendant on that claim and Mr *Gijima* in his oral address indicated that the claim was being abandoned.

Overall, I find that the version rendered by the plaintiff is to be preferred to the evidence of the defendant and I find for the plaintiff on all the issues. This means that the plaintiff succeeds in its claim and the counter-claim fails.

In the premises I make an order in the following terms:

It is ordered as follows:

1. The verbal agreement concluded between the plaintiff and the defendant on 4 July 2006 be and is hereby cancelled.

2. The plaintiff shall pay to the defendant the sum of $770 000being the balance due on the purchase price of the vehicle and reimbursement of the amount deposited into the plaintiff's account by the defendant in respect of the second agreement.

3. The defendant's counter claim is hereby dismissed

4. The defendant shall pay the costs of suit.

G. Machingambi legal practitioners, plaintiff's legal practitioners
F. G. Gijima legal practitioners, defendant's legal practitioners