GILLIAN MANHANDO
versus
IGNATIUS MUTAHWARIRA
and
WASHMATE (PRIVATE) LIMITED t/a
HARARE MOTOR CENTRE
and
WASHINGTON MATIYENGA

HIGH COURT OF ZIMBABWE
WAMAMBO & MUCHAWA JJ
HARARE, 3 November 2022 & 7 March 2024

Civil Appeal

Mr *M A Kalira*, for the appellant
Mr *G Chifamba*, for the 1st respondent

WAMAMBO J: This appeal involves the sale of a motor vehicle gone wrong. After the sale of the motor vehicle some two years later it was seized by ZIMRA officials resulting in the buyer approaching the Magistrates court seeking reimbursement of the sale price and related relief. The seller counter claimed for the sum of US$2 500 which had been given to the buyer for payment of duty. The court *a quo* found for the buyer dismissed the counter claim. The seller is unhappy about this resolution and filed this appeal.

The first respondent is the buyer of the motor vehicle a Mercedes Benz Model E240, Engine Number 112913313794055, Chassis Number WDB2110612A127933 (hereinafter called the vehicle) from the appellant. The sale was conducted through an agent (third respondent) with fourth respondent representing third respondent.

The vehicle was sold for US$8 000. When the vehicle was seized from first respondent by ZIMRA on account of it not having any proof of importation, the Regional manager, Region 1, Customs and Excise demanded the payment of duty, a fine, interest and storage fees.

The relevant portion of ZIMRA's letter directed to first respondent by the Regional manager, Region 1, Customs and Excise, which appears at p 78 of the record reads as follows:

"Having considered your submission and mitigation, I am prepared in this case to release the vehicle subject to the following conditions being met:-

1. payment of duty due amounting to US$2 962.56
2. payment of fine amounting to ZWL$50 875.75
3. payment of interest accrued; and
4. payment of storage charges.

You may approach the station manager of Zimbabwe Revenue Authority at Harare Port and arrange for the vehicle to be collected. The vehicle cannot be held indefinitely and if you have not met the terms set out above by the 16th April 2020 it will be declared forfeit and disposed of without any further reference to you."

If you are dissatisfied with my decision you have the right to appeal to the Commissioner, Customs and Excise at ZB Centre, 6th Floor, Cnr. Kwame Nkrumah and First Street, Harare."

The appellant (herein) applied for the joinder of second and third respondents which application was not opposed. It was granted. However the record of proceedings reflects that the second and third respondents chose not to file "their plea and pre-trial conference papers under case number 1221/21 within 12 days of the receipt of this order."

During the trial only two witnesses testified namely the appellant and first respondent. The appellant's notice of appeal raises five grounds of appeal as spelt out below:-

"1. The Court *a quo* grossly erred at law in imputing liability on appellant notwithstanding that third respondent had interposed himself and accepted liability to the first respondent who accepted same, for payment of outstanding duty and penalties levied on the motor vehicle. Such uncontested fact was buttressed by the joining of third respondent as a defendant later in the proceedings *a quo* and by the incontrovertible evidence of third respondent having personally paid US$2 000 to first respondent independent of the appellant.
2. The Court *a quo* grossly erred at law by making a finding that the cause of action arose when the motor vehicle was impounded by the Zimbabwe Revenue Authority notwithstanding the clear position of the law that change of ownership of motor vehicles shall be effected within fourteen days of acquisition at which point and during which period any outstanding duty would have been detected.
3. The Court *a quo* grossly erred at law by dismissing the appellant counterclaim when in fact it was not dispute that the first respondent received US$2 000 (two thousand United States dollars) from the third defendant and failed to surrender the amount to ZIMRA. By so doing the first respondent was unjustly enriched at the expense of the appellant and also benefited from his own failure properly apply the sums paid to him by third respondent (*sic*).
4. The Court *a quo* grossly erred at law by ordering appellant to pay a refund of the purchase price in the sum of US$8 000 notwithstanding that the purchase price having been paid in February 2018 was converted into RTGS dollars at a rate of 1:1 to the United States Dollars on 22 February 2019 through the Presidential Powers (Temporary Measures) Amendment of Reserve Bank of Zimbabwe Act and issue of Real Time Gross Settlement Electronic Dollars (RTGS Dollars) Regulations 2019 Statutory Instrument 33 of 2019 which was later codified through the Finance Act Number 2 Act, 2019.

5. The Court *a quo* with respect grossly misdirected itself at law in failing to discard first respondent's evidence as to draw adverse inferences against him as a consequence of first respondent giving false evidence on the aspect of whether third respondent had paid him."

I will presently deal with the grounds of appeal in the order in which they are formulated.

Ground One

Appellant's submissions can be summarised as follows:

Third respondent assumed liability for payment of the outstanding duty which first respondent accepted. Second respondent and third respondent acted as agents on behalf of appellant as evidenced by the agreement of sale. Second and third respondents had not paid duty and levies when the motor vehicle was imported. This is why they paid to first respondent the money for duty required by ZIMRA. The acknowledgement of receipt of money by first respondent from third respondent is evidence that the money was handed over specifically for payment of duty.

On the other hand first respondent submitted as follows:

This ground is improperly before the court as it contradicts an admission by appellant which admission was not withdrawn. Appellant at pages 39 to 40 of the record admitted that she had a duty to provide warranty to first respondent against any eviction by a third party. In the face of such admission appellant cannot raise the admission as a ground of appeal. Payment of money towards duty to ZIMRA is not an undertaking to provide first respondent with a warranty against eviction by a third party. First respondent was not privy to the contract between appellant and her agents when he entered into an agreement of sale with appellant. There is no evidence that appellant's agents accepted liability towards first respondent.

Appellants indeed conceded that she had a duty to warrant against eviction of the buyer by any third party. I find no evidence reflecting that third respondent accepted liability to the first respondent for payment of ZIMRA duty. In any case it does not follow that payment of duty to ZIMRA amounts to negate the appellant's responsibility and her removal from paying same. It also does not stand as a warranty against eviction by a third party.

My understanding of the evidence is that third respondent was only acting as an agent of the seller, who is the appellant.

According to the first respondent appellant directed him to the director of second respondent, Mr Matiyenga the third respondent who owed her money.

It follows that third respondent was not interposing himself in any way. He was paying off a debt on behalf of the appellant. That the acknowledgement of receipt reflects that the money was for payment of ZIMRA duty does not change the fact that the money was paid by third respondent on behalf of the appellant as spelt out above.

I also find that the case for first respondent is strengthened on the basis of an implied warranty against eviction which DUBE J (now JP) defined as follows in *Maxwell Chiweshe* v *Tinotenda Saki & Nyasha Saki* HH 75/13 at p 8:-

> "An implied warranty against eviction is a warranty where the seller undertakes undisturbed use of the merx to the buyer and warrants that the buyer will not be evicted by a third party with a stronger title to the merx. If the merx is taken away, the buyer is entitled to a refund. *JTR Gibson* in Mercantile and Company Law, 5th ed, Juta and Company Ltd 1983 explains the warranty as:
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> 'The implied warranty against eviction is no more than a term implied by law in a contract of sale by virtue of which the seller undertakes that the buyer will not be disturbed whether by the seller himself or by a third party in his *vacuo* possession as a result of any defect in his title …… should there, be a threat to the buyer's possession it is the duty of the seller to spring to his defence even before actual eviction by judicial process takes place.'"

In this case appellant entered into a written agreement of sale with first respondent. First respondent paid for the motor vehicle in full as agreed. There was also the use of an agent in the form of second respondent. Second respondent company reduced the agreement of sale into written form. The agreement reflects the letterhead of the second respondent. The first respondent took possession of the motor vehicle and made use of it. It was only after a whole two years that the motor vehicle was seized from him.

I find that the circumstance above reflect not only that first respondent bought the motor vehicle as an innocent buyer, but also that appellant (as per her testimony) admitted she had a legal duty to warrant first respondent against eviction by a third party.

I find in the circumstances that the first ground of appeal has no merit and I dismiss it.

Ground Two

Applicant's submissions on this ground can be summarised as follows:-

From the date when the parties entered into an agreement of sale (1 February 2018) first respondent was entitled to register the motor vehicle in his name and this process would have involved verification of the excise duty of the motor vehicle. When first respondent bought the

vehicle he was entitled to claim for payment of any outstanding excise duty. The non-payment of duty did not arise upon the seizure of the vehicle by ZIMRA. It existed even before first respondent bought the vehicle.

First respondent submitted that the issue of change of ownership per s 14 of the Vehicle Registration and Licencing Act [*Chapter 13:14*] was not argued in the court *a quo* and was raised for the first time in the heads of argument I agree that this ground was not raised before the court *a quo*.

I do not, with respect agree with appellant's submissions. I do not agree that one should stretch the cause of action to the date when the parties entered into the agreement of sale.

In *Siqokoqela Mphoko and Phelekezela Mphoko* v *Nanavac Investments Private Ltd* & 2 *Ors* HB 209/22 at p 6 MAKONESE J said:-

> "What constitutes a cause of action has been set out in the seminal decision of *Abrahamse & Sons* v *SA Railways & Harbours* 1933 CPD 636 as follows:-
>
> 'The proper meaning of the expression cause of action is the entire set of facts which gives rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim. It included that all a plaintiff must set out in his declaration in order to disclose a cause of action. Such cause of action does not "arise" or "accrue" until the last of such facts and consequently the last of such facts is sometimes loosely spoken of as the cause of action.'"

In this case the parties entered into an agreement of sale for the motor vehicle. First respondent used the car for two years. The car had been awarded to the appellant in a divorce order. It was only when ZIMRA officers impounded the motor vehicle that the first respondent issued summons in this case. There is nothing on record that reflects that the non-payment of duty had come to the fore earlier. What is proven and what triggered the issuance of summons in this case was the impounding of the motor vehicle by ZIMRA officers.

The motor vehicle was impounded in January 2020. On that date every fact material to be proved entitling plaintiff to succeed in his claim were in place. I find therefore that the trial court was correct when it found that the cause of action arose when the ZIMRA officers impounded the motor vehicle. To that end I find ground two without merit and dismiss it.

Ground Three

Appellant's submission on ground three are as follows:-

First respondent received money for payment of duty and levies by the third respondent and he did not account for the money. The effect of the court *a quo*'s judgement amounts to unjust enrichment in first respondent's favour.

First respondent's submissions are that the deadline for the payment of the penalty amount is clearly spelt out in the letter of seizure at p 78 of the record. The said deadline was 16 April 2020 while as at that date appellant's agents had only paid US$1 000 to the first respondent.

Further that appellant distanced herself from any refund of the payments made by her agents.

It was also submitted that the third ground of appeal is a contradiction in itself.

The payment by appellant's agents was to remedy the fraudulent importation of the motor vehicle wherein duty was not paid in full and on time consequently resulting in the motor vehicle's forfeiture. Appellant's evidence was that the money given to first respondent by her agent was not hers. The issue of unjust enrichment is thus not available. The trial court made a finding that appellant in cross-examination said she did not want the refund as she was not the one who gave first respondent the US$2 500.

Clearly appellant blew hot and cold. In one breath she testified that the US$2 500 was not hers. In another she made a counter claim for the same money.

It is also important to note that at p 42 appellant was cross-examined and gave the following responses:-

> "Q. In your pleadings you had said you want the refund so you are now reversing?
> A. I do not want it because I am not the one who gave him."

The appellant left the trial court with no choice but to dismiss her counter claim after she effectively withdrew her claim as reflected above.

To that end I find ground three also without merit and I dismiss it.

Ground Four

Appellant submitted that first respondent should not have been awarded payment of the purchase price in US dollars but in ZWL dollars as per the case of *Zambezi Gas (Pvt) Ltd* v *NR Barber & Anor* SC 3/20.

First respondent submitted that the cause of action arose in January 2020 when the motor vehicle was seized by ZIMRA officials which date was after 22 February 2019 (the effective date).

I have already found that the liability in this case arose when the motor vehicle was seized. This was a date after the effective date.

To bring this case in conformity with the *Zambesi Gas* case (*supra*) the liability arose after the effective date.

That brings the claim in this case after the effective date. To that end the debt was correctly found to be in US dollars.

To that end I find the fourth ground devoid of merit and I dismiss it.

Ground Five

According to the appellant first respondent in chief testified that he had not received money for payment of duty from third respondent. In cross-examination he shifted his position and testified that he received money for payment of duty from third respondent. This was after he was cornered with documentary evidence. Further that adverse inferences should be drawn against the first respondent as he misled the court.

First respondent makes reference to pages 28 to 31 wherein he admitted receipt of the money from third respondent. Further that this ground of appeal reflects that appellant is employing delaying tactics to frustrate finality in litigation.

The record of proceedings reflects first respondent's testimony as follows on this aspect. At p 28 the testimony of first respondent unfolded as follows:-

"Q. Did the first defendant pay the amount?
A. She paid only the partial amount (*sic*).
Q. Did she give you the money?
A. No.
Q. Who gave you the money for the penalty?
A. She directed me to the agent Harare Motor Centre.
Q. Was Harare Motor Centre the owner of the vehicle?
A. No.
Q. Why did first defendant refer you to Harare Motor Centre?
A. She directed me to the Director, Mr Mativenga. She indicated that she was owed money thus the payment would be from that.
Q. How much did you get?
A. US$2 000 which was split into part payments US$1 000 which was paid before deadline the rest was paid after."

A reading of the above evidence proves that first respondent did confirm in examination in chief that he indeed received money from the third respondent.

It follows therefore that the fifth ground of appeal is factually incorrect, as the record of proceedings proves otherwise and is also dismissed.

In the circumstances I find that the appeal stands to be dismissed.

First respondent proposes that costs be awarded on a higher scale on the combined grounds, that appellant employed delaying tactics, applied for joinder, absolution from the instance and maintained this appeal on meritless grounds.

I find however that appellant made applications that are permissible at law. While her grounds have all be dismissed in exercising judicial discretion I find no reason to mulct her with higher costs in the circumstances.

I therefore order as follows:-

1. The appeal be and is hereby dismissed with costs.

WAMAMBO J:…….

MUCHAWA J: Agrees…….

Musengi & Sigauke, appellant's legal practitioners
Mugomeza & Mazhindu, respondents' legal practitioners