REPORTABLE (19)

Judgment No. S.C. 29/02
Civil Appeal No. 14/01

UDC LTD v CHAWARA KAPENTA FISHING CO-OP LIMITED

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, ZIYAMBI JA & MALABA JA
HARARE, MARCH 11, 2002

A P de Bourbon SC, for the appellant

No appearance for the respondent

ZIYAMBI JA: At the end of the hearing of this matter we allowed the appeal and indicated that our reasons would follow.

The respondent in this matter brought six claims against the appellant in terms of a summons issued in the High Court on 4 September 1996.

The claims were based on a hire purchase agreement contracted between the respondent and Zimbabwe Motor Assemblers and ceded to the appellant on 24 June 1991. The subject of the agreement was a certain Bedford Truck ("the truck"), the purchase price of which, including finance charges, was $374 943.00.

It was alleged by the respondent that the truck had been unlawfully repossessed and sold by the appellant allegedly for arrear instalments due and owing. It was as a consequence of the unlawful repossession that the various claims for

damages arose.

All the claims failed in the High Court except for one, namely that set out in paragraph (e) of the summons, which partially succeeded and which reads:

> "(e) payment of the sum of $350 000.00 as and for damages together with interest thereon at the prescribed rate of 25% per annum from 8 May 1996, being the date of demand, to the date of payment."

It was alleged in paragraph 16 of the declaration that:

> "As a result of the unlawful sale of the truck, the plaintiff would have to acquire a similar truck at a fair and reasonable cost of $350 000.00, which sum also represents the fair and reasonable value of the truck at the time the plaintiff lost possession of same to the defendant."

The court awarded to the respondent damages in the sum of $100 000 and costs of suit. It is against these awards that the appellant appeals.

In coming to the conclusion in favour of the respondent the court accepted the argument by the respondent that the manner in which the vehicle was disposed of by the appellant after it was handed over contravened s 20 of the Hire Purchase Act [*Chapter 14:09*], (referred to hereafter as "the Act") and was accordingly unlawful. However, by virtue of s 4 of the Act, the provisions of s 20 do not apply to the agreement the subject of this dispute.

Section 4 of the Act provides as follows:

> "Except for sections *five*, *twenty-two* and *twenty-four*, which shall apply to every agreement or, as the case may be, to the parties to every agreement, this Part shall not apply to an agreement under which the purchase price exceeds the sum of three thousand dollars."

Thus the provisions of ss 16 and 20 on which the court based its finding were not applicable to the agreement in this case, by virtue of the fact that the purchase price exceeds $3 000. Accordingly, the repossession, having been effected in terms of the agreement between the parties, has not been shown to be unlawful.

It would appear from the record that, in the court below, the case was not argued on the basis of the provisions of s 4 and that the attention of the trial court was not drawn to them. Had the provisions of s 4 been brought to the attention of the court I have no doubt that the court's judgment would have been different.

Before concluding, I consider it necessary to make the following remarks.

The Act was enacted in 1957 and it would appear that the limit of $3 000 prescribed in s 4 has outlived its usefulness. In *Scotfin v Afri Trade Supplies (Pvt) Ltd* 1993 (2) ZLR 170 (HC), a call was made by ROBINSON J for a revision of this limit. At p 185 of the judgment the learned judge said:

> "At this point I feel constrained to say that I believe the time is long overdue for the limit of $3 000 prescribed in s 3 of the Hire-Purchase Act (now s 4 of the Act), to be increased to a much more realistic figure, having regard to present-day prices for goods."

I would repeat the call with the added observation that the limit of $3 000 is no longer relevant to the needs of our present day society. Not only can very little of value be purchased for $3 000, but the effect of the statutory limit is to provide protection only for purchasers of goods of little value leaving purchasers of

goods of great value unprotected.

DAMAGES

It remains to be considered whether any other basis for damages was established by the respondent. In terms of the agreement between the parties the seller was, in the event of the purchaser failing to make payment by due date, entitled to:

> "Forthwith to terminate this agreement, retake possession of the (vehicle), recover from the purchaser all instalments in arrear, and in addition any loss suffered by the seller on re-sale; which loss the parties agree shall be assessed by adding to the future aggregate of future instalments payable under this agreement as from the date of the breach, all expenses incurred by the seller in repossessing the (vehicle) (including transport costs), in repairing and renovating the same, the brokerage or commission, and handling charges, and other expenses directly relating to the recovery and re-sale of the (vehicle), interest in terms of clause 3(b) hereof and any collection charges, tracing charges and legal expenses incurred by the seller, either before or after the date of the breach up to the date of re-sale; and deducting from the total of the aforegoing the price realised on resale."

The repossession was effected in terms of the agreement. The vehicle was resold and the balance of the proceeds after deducting what was due to the seller, in terms of the above quoted provision, was paid to the purchaser.

Much was made at the trial of the price at which the repossessed vehicle was sold by the appellant. However, even if there had been *parate* execution, a point which was not argued in the court below, the obligation on the appellant was merely to take reasonable steps to obtain a fair price for the goods. See *Changa v Standard Finance Ltd* 1990 (2) ZLR 412 (SC). The *onus* is on the respondent to prove the value of the goods as at the date of resale and that the goods were sold at an unreasonable price.

Regarding the value of the vehicle as at the date of sale, the learned Judge said:

> "The defendant's contention, on the other hand, is that the author of the valuation letter, Exhibit 11, did not testify and the service history attached to Exhibit 11 indicated that the mileage which the vehicle had reached by the time it was repossessed was far more than that at which the alleged valuation had been effected, the valuation having been effected nearly a year after the last recorded service mileage.
>
> The observations made by the defendant are correct in that the plaintiff is clearly not in a position to say that the valuation is unassailable. The court has before it little information as to the condition of the vehicle at the date of repossession. The vehicle had clearly not been serviced for a considerable period and there is evidence that the vehicle had to undergo certain repairs after its repossession by the defendant.
>
> There was, in short, no evidence adduced by either party as to the actual value of the vehicle at the time the vehicle was repossessed and sold by the defendant."

Clearly the *onus* was not discharged by the respondent who was, therefore, not entitled to an award of damages.

It is for the above reasons that the appeal was allowed with costs.

CHIDYAUSIKU CJ: I agree.

MALABA JA: I agree.

Gill, Godlonton & Gerrans, appellant's legal practitioners