REPORTABLE ZLR (21)

Judgment No. S.C. 32/2002
Civil Appeal No. 49/01

UDC LIMITED v

(1) DORBA DORBA TRANSPORT (PRIVATE) LIMITED
(2) LILSTOCK FARM (PRIVATE) LIMITED
(3) CHARLES GRAHAM MURRAY TAYLOR
(4) DEBORAH ODILE TAYLOR

SUPREME COURT OF ZIMBABWE
SANDURA JA, CHEDA JA & MALABA JA
HARARE, MARCH 5 & MAY 20, 2002

A P de Bourbon SC, for the appellant

E W W Morris, for the respondents

SANDURA JA: This is an appeal against a judgment of the High Court which upheld with costs the respondents' special plea to the appellant's claims of the sum of $761 954.70 and the sum of $1 326 214.54 together with interest, costs of suit and collection commission.

The background facts are as follows. On 28 September 1993 the first respondent entered into a hire purchase agreement with Turnpan Zimbabwe Limited in respect of two tractors. The purchase price was payable by way of a deposit and nineteen instalments, the last of which was due on 27 September 1995. The hire purchase agreement was ceded to the appellant.

Subsequently, on 14 March 1994, the first respondent entered into another hire purchase agreement with Goya Enterprises (Private) Limited, in respect

of two caterpillar dozers. The purchase price was payable by way of a deposit and twenty-seven instalments, the last of which was due on 13 March 1997. This agreement was also ceded to the appellant.

The second, third and fourth respondents stood as sureties and co-principal debtors to the first respondent.

Subsequently, the first respondent defaulted in its payments under the agreements, and a summons claiming the outstanding amounts under both agreements was issued by the appellant on 4 September 2000. The summons was served on the respondents on 20 September 2000.

Thereafter, on 15 November 2000 the respondents filed a special plea of prescription which was subsequently upheld by the learned judge in the court *a quo*. Aggrieved by that decision, the appellant appealed to this Court.

The issue between the parties in the court *a quo* was whether on a proper interpretation of subss (1), (2) and (3) of s 27 of the Hire-Purchase Act [*Chapter 14:09*] ("the Act"), as read with s 2 of the Hire-Purchase (Limitation of Time) (Variation) Notice, 1984 ("the Notice"), published in Statutory Instrument 149 of 1984, the appellant's claims were prescribed.

Section 27 of the Act, in relevant part, reads as follows:

"27 (1) A seller shall have no right to institute a suit or action for –

(a) the return of goods to which an agreement relates; or

(b) the recovery of a portion of the purchase price due under an agreement;

after the lapse of the period prescribed by subsection (2).

(2) The period after the lapse of which no suit or action referred to in subsection (1) may be brought shall be the period, fixed by or under subsection (3), which was so fixed at the time the right to institute the suit or action first accrued.

(3) The period to which subsection (2) relate(s) shall be –

(a) such number of days, being not less than one hundred and fifty, as the Minister may, by notice in a statutory instrument, fix; or

(b) if no period is fixed in terms of paragraph (a), three hundred and sixty-five days;

commencing on the day following the last day of the appropriate period within which this Act requires the full purchase price to be paid."

In terms of s 2 of the Notice, the period fixed by the Minister in terms of s 27(3)(a) of the Act is seven hundred and thirty days.

I should add that there is a Schedule to the Act which specifies maximum periods within which the full purchase prices of various classes of goods are payable. According to that Schedule, the maximum period within which the full purchase price of the goods which were the subject of both hire purchase agreements in this case is sixty months.

Mr *de Bourbon*, who appeared for the appellant, submitted that on a proper interpretation of s 27 of the Act the appellant's right to institute its action only prescribed after the expiration of a period of sixty months plus seven hundred and thirty days, reckoned from 28 September 1993 in respect of the first agreement and from 14 March 1994 in respect of the second agreement. He added that as the appellant's summons was issued and served on the respondents before that period expired, the appellant's claims were not prescribed.

On the other hand, Mr *Morris*, who appeared for the respondents, submitted that the appellant's right to institute its claims in respect of each agreement prescribed after the expiration of the period within which the full purchase price was payable in terms of the agreement plus seven hundred and thirty days. In other words, he submitted that the seven hundred and thirty days were to be added, not to the period of sixty months, as submitted by Mr *de Bourbon*, but to the period within

which the full purchase price was payable in terms of the agreement. He added that as the appellant's summons was issued and served after the expiration of the period of prescription, the appellant's claims were prescribed.

Nevertheless, both counsel agreed that the critical words in s 27(3) are "the appropriate period within which this Act requires the full purchase price to be paid". However, the question which arises is whether that period is the period of sixty months specified in the Schedule to the Act, as submitted by Mr *de Bourbon*, or the period within which the full purchase price is payable in terms of the agreement, as submitted by Mr *Morris*.

The learned judge in the court *a quo* followed the decision in *Expedite Haulage (Pvt) Ltd v Scotfin Ltd* 2000 (2) ZLR 113 (H) and concluded that the appropriate period referred to in s 27(3) of the Act was the period within which the full purchase price was payable in terms of the agreement, and not the period of sixty months specified in the Schedule.

> In my view, that decision is correct. In the first place, though the maximum period within which the full purchase price is payable is sixty months, as specified in the Schedule, the parties may agree upon a period shorter than that. In this regard, s 25(1)(b), in relevant part, reads as follows:
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> "… the period within which the full purchase price is payable shall not exceed the period specified in the third column of the Schedule for the particular class of goods sold under the agreement." (the emphasis is added)
>
> Thus, in the present case the Act requires that the full purchase price be paid within any period not exceeding sixty months. In my view, that period is the period agreed upon by the parties as the period within which the full purchase price should be paid, provided it does not exceed sixty months.

The wording of s 2 of the Notice supports that conclusion. Its reads as follows:

> "2 With effect from 1st May, 1984, the number of days from the end of the period within which the full purchase price is payable under an agreement within which a suit or action shall be instituted for the return of any goods to which the agreement relates or for the recovery of any portion of the purchase price due under the agreement is hereby increased to seven hundred and thirty days." (the emphasis is added).

The wording of this section has remained substantially the same since 1958. See: Hire-Purchase (Limitation of Time)(Variation) Notice, 1958 (No. 2), i.e. Federal Government Notice No. 224 of 1958.

In order to show that the intention of the legislature was that the seven hundred and thirty days should be added to the period within which the full purchase price is payable in terms of the agreement concluded by the parties, and not to the maximum period specified in the Schedule, I propose to redraft s 2 of the Notice, by re-arranging the words therein but without changing its meaning, so that it reads as follows -

> "With effect from 1st May, 1984, the number of days within which a suit or action shall be instituted for the return of any goods to which an agreement relates or for the recovery of any portion of the purchase price due under the agreement is hereby increased to seven hundred and thirty days, from the end of the period within which the full purchase price is payable under the agreement".

It is, therefore, clear beyond doubt that the period of seven hundred and thirty days is to be added to the period within which the full purchase price is

payable in terms of the agreement concluded by the parties. This is the most telling argument in favour of the respondents.

Another reason why I say that the decision by the learned judge in the court *a quo* is correct is that, subject to certain qualifications, the prescription period begins to run as soon as there is a complete cause of action, with a plaintiff who can sue, and a defendant who can be sued.

In this regard, Professor Loubser, in his book entitled *Extinctive Prescription*, first published in 1996, states the following at p 47:

> "Certainty requires that the prescription period should begin to run as soon as there is a completed cause of action, with a plaintiff who can sue and a defendant who can be sued. … In South African law, as in many other systems of law, there is a general rule that the prescription period begins to run as soon as the cause of action is complete, but this general rule is subject to certain qualifications, most importantly the requirement of knowledge on the part of the creditor."

I entirely agree. In my view, the above comments apply to our law.

In the present case, the cause of action is founded upon the agreement between the parties that the full purchase price shall be paid within a certain period, and not on the maximum period within which the full purchase price should be paid, as specified in the Schedule.

In the circumstances, the appeal is dismissed with costs.

CHEDA JA: I agree.

MALABA JA: I agree.

Gill, Godlonton & Gerrans, appellant's legal practitioners

Wickwar & Chitiyo, respondents' legal practitioners