BURTON CONSTRUCTION LIMITED v ZAMINCO LIMITED (1983) Z.R. 20 (S.C.)

SUPREME COURT
NGULUBE ,D.C.J., GARDNER AND MUWO, JJ.S.
20TH OCTOBER AND 14TH DECEMBER ,1983
(S.C.Z. JUDGMENT NO. 18 OF 1983)
APPEAL NO.13 OF 1981

Flynote
Civil Procedure - Pleadings - Amendment by Court - When Available.
Tort - Conversion - Transfer of ownership under hire - purchase agreement- Seizure of property subsequently.
Commercial transactions - Credit Sale - Reservation of ownership- Effect of.
Commercial Law - Hire - purchase agreement - Provisions of s.25 of Hire - Purchase Act - Effect of non-compliance with.
Civil Procedure - Estoppel - Acquiescence of Plaintiff- Proof thereof.

Headnote
The parties had a contract for the sale and purchase of captain quarry the equipment, the purchase price being paid in several instalments. The plaintiff defaulted in making the payments and a clause was added to the agreement of sale retaining ownership in the hands of the defendant until all payments had been made. After making several payments able plaintiff defaulted again and the defendant retrieved the equipment and sold it to a third party for the balance owing. The plaintiff, upon going into voluntary liquidation sued for damages to and conversion of the quarry equipment. The trial court held that the agreement was a Bill of Sale and awarded damages to the plaintiff on the grounds that the Bills of Sale Act, 1882 had been breached. To reach this conclusion the Count added an additional paragraph to the statement of claim. The defendant appealed and the plaintiff cross-appealed.

Held:
(i) The court's power to amend as contained in 0.18 of the High Court Rules does not extend to the introduction of a new cause of action for the plaintiff.
(ii) Under a hire-purchase agreement, in contravention of the requirement for a 20 per cent down payment before delivery, goods are sold on credit and any seizure by the seller thereafter constitutes a trespass and conversion.
(iii) The amendment to the agreement, reserving ownership to the seller, ejected a radical alteration to the character of original transaction, bringing it within the provisions of the Hire Purchase act.
(iv) Non-compliance with s.25 of the Hire- Purchase Act - meant that the goods were sold on credit without reservation as to ownership thereof.
(v) Mere presence at the auction sale without more i.e. evidence that the plaintiff was aware of its own rights as well as the defendants'

mistaken belief, cannot lead to the inference that the plaintiff encouraged the defendant to incur the expenditure, and therefore acquiesced, resulting in it being estopped from taking legal action.

Cases cited:

(1) Byrne v Kanweka (1967) Z.R. 82.
(2) Chikuta v Chipata Rural Council S.C.Z. Judgment No. 6 of 1983
(3) Mumba v Zambia Publishing Co. Ltd (1982) Z.R 53.
(4) Kearney and Co. Ltd v Taw International Leasing Corporation (1978) Z.R. 329.

Legislation referred to:
(1) Bills of Sale Act, 1882.
(2) Hire - Purchase Act, Cap. 691.

For the appellant: E .A. Gani, instructed by Solly Patel, Hamir and Lawrence.
For the respondent: J.H. Jearey, D.H. Kemp and Co.

Judgment
NGULUBE, D.C.J.,

For convenience, we will refer to the respondent as the plaintiff and to the appellant as the defendant which is what they were in the action. The events giving rise to this appeal started some eleven years ago, on 20th December, 1972, to be precise when, by an agreement bearing that date (hereafter called the first agreement), the plaintiff agreed to buy and the defendant agreed to sell certain quarry equipment therein listed at total price of K65,500. The terms of the sale stipulated that the ownership of the equipment passed upon the signing of the agreement. The price was payable by instalments and for this purpose nine Bills of Exchange were given by the plaintiff to the defendant and payment was secured by guarantee given by third party. No problem arose at this stage and the sale of the goods was completed on the terms agreed by the parties.

The first of the Bills of Exchange matured on 20th March, 1973, but it was dishonoured. The plaintiff was in default. There was a discussion between the parties the result of which was that, on 16th May, 1973, new schedule of payments was agreed upon under which the final payment would be affected by 26th November, 1973. There was also introduced what the parties called "a Suspensive Condition" to be applied to the contract of the sale set out in the first agreement. The relevant document (hereafter called the second agreement) reads:

> "We would like to introduce as an amendment to our contract of sale dated 20th December 1972.
> The plant and machinery covered on page 1 of above agreement should be subject to suspensive sale conditions and remain the property of the owners i.e. Burton Construction Ltd, until such time as final payment, for this equipment has been received by seller i.e. 26th

December, 1973.
We would appreciate your signing, the copy of this letter in agreement to the inclusion of this amendment and also to obtain the signature of the guarantor Messrs Entrint Limited"

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The plaintiff made some payments but eventually defaulted so that by 27th March, 1974, when, the defendant took out a writ, there was a sum of K39,316.29 due to the defendant as the balance on the price. The defendant entered a judgment against the plaintiff for this amount. The defendant took out a Writ of execration which was latter suspended by the defendant. On 1st October, 1974, the defendant's advocates gave notice to the plaintiff that the defendant was then re-possessing the quarry equipment in terms of the first and second agreements. On 9th October, 1974, the defendant auctioned the goods to a Mr Daka, or Daka Limited, at a price exactly equal to the balance due on the purchase price from the plaintiff to the defendant. A few days later the plaintiff went into voluntary liquidation. Two years later, on 26th October, 1976, the Writ, in this case was issued, undoubtedly for the benefit of the creditors in general.

The plaintiff sued the defendant for damages for trespass to and conversion of the quarry equipment. The defendant in its defence contended that the first and second agreements created a mortgage being or, absolute assurance of the equipment and that, as such, the equipment became the property of the defendant to do with it as it pleased after the date of redemption, being the date when the final instalment should have been paid. There was an, alternative defence to the effect that the plaintiff had acquiesced to the sale. In its reply to the defence, the plaintiff denied having acquiesced and contended to the effect that the two agreements constituted a Hire- Purchase Agreement and that as a result of non compliance with the Hire - Purchase Act the goods must be deemed to, have been sold without any reservation as to ownership. In the alternative, the plaintiff contended that the two agreements, or the second one constituted a Bill of Sale which was void for non-registration. There were other contentions relating to waiver and an estoppel connection with the defendants action, for the balance but these have not been pursued this court. The learned trial judge dismissed the plaintiff's claim in trespass and conversion holding that the seizure and sale were lawful. He found that the two agreements were in fact single agreement; that it did not amount to a Hire - Purchase agreement; but that it amounted to a Bill of Scale which was not void for non-registration, the learned trial judge holding that Bill of Sale by an, incorporated company is not, required to be registered. Accordingly, the learned trial judge found that the defendant was entitled under the agreement to take possession of, and to sell, the equipment.

Judgment was entered not for the defendant but for the plaintiff and this came about this way. After finding that the agreement constituted a Bill of Sale and as there was evidence that the auction sale had taken place prematurely before the lapse of five days stipulated by the Bills of Sale Act, 1882, the defendant was found to have acted in breach of Statutory duty under that Act. In consequence, the court below, acting under what was called an inherent power to amend, composed for the plaintiff an additional paragraph to be added to the statement of claims in

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which damages were to be claimed for breach of the Statutory Duty. Such damages were in fact assessed and awarded in the sum of K10,000.

The case comes before us as an appeal by the defendant and cross appeal by the plaintiff.

The substance of the defendant's appeal is to the effect that the learned trial judge was not entitled to introduce new cause of action for the plaintiff and that, therefore, he had erred in so doing. The plaintiff agrees with the defendant and does not seek to defend the judgment given on those premises. In the event, we find it unnecessary to dwell at any length on this valid complaint which must result in the immediate reversal of that part of the learned trial judge's judgment as foisted the new cause of auction upon the plaintiff. The judgment entered on that basis must also be set aside. However, it is necessary to point out that the power to amend is contained in Order 18 of the High Court Rules. In *Byrne v Kanweka* (1), Doyle, J.A. observed, in relation to this order, that:

> "(It) is not directive to the judges spontaneously to raise further issues where the issues have already been clearly pleaded and joined by the parties."

Again in *Chikuta v Chipata Rural Council* (2), we said:

> "In our opinion, the general rule is that an amendment under this order would be justified if it results in the mere recasting of the case in order to agree with the evidence and without the introduction of any new cause of action or defence."

Similar sentiments were expressed by this court in *Mumba v Zambia Publishing Company Limited* (3). The reversal to which we have referred was inevitable and it is understandable that the plaintiff should have cross-appealed. Indeed the arguments before this court have been confined to the cross-appeal.

The plaintiff submits that judgment ought to have been, and should now be, awarded to it in respect of its claim for trespass and conversion. Mr Jearey and Mr Gani argued, the former for and the latter against, the cross-appeal and we must say that it has been a most pleasurable experience to listen to the well-researched and well-presented arguments from both Counsel.

The major ground of the cross-appeal was that, taken together, the two agreements constituted a Hire - Purchase Agreement. As a matter of fact, this was the plaintiff's principal argument in the court below. Mr Jearey has argued that the two agreements constituted a Hire - Purchase Agreement and that, by reason of non-compliance with the Hire - Purchase Act, the goods had been sold on credit at price 25 per cent less than that agreed and that, accordingly, the defendant had no title and that the seizure and sale therefore constituted a trespass and conversion. Mr Jearey has drawn our attention to a decision of ours in *Kearney and Company Limited v Taw International Leasing Corporation* (4), where a letter of sale (the effect of the terms of which are very similar to the two

agreements in this case, if read together as one), was held to have brought about a transaction which was caught by the Hire - Purchase Act. The relevant portion of that letter read:

"This letter serves to confirm the discussion we have had on the above subject. The total price agreed upon is K28,000.00 payable over a period of six months. The details of the vehicles are:....
We shall retain the absolute ownership until full payment has been made. In the meantime we will appreciate the first payment as soon as possible".

on behalf of the defendant, Mr Gani has strenuously opposed the application of the Hire - Purchase Act to this transaction. He argues that the two agreements constituted two distinct and separate transactions, the first being an outright sale under which title passed to the purchaser and the second being an independent transaction of giving back ownership with the object of providing security as a result of the re-scheduling of payments. He submits that the second agreement therefore, was an assurance in the nature of a mortgage. It was argued that the Hire- Purchase Act cannot be attracted where the reservation as to ownership does not occur at the time of sale and that the true intention of the parties was the provision of security and not the bringing about, six months later, of a fundamental alteration to the original contract which as a technicality in the law might be thought to impose on the parties who were laymen.

In our opinion, an inquiry into the true intention of the parties involving an investigation beyond the terms and words actually used by them only arises if there is some manifest ambiguity or absurdity on a plain reading and understanding of the language which they have used. We do not think that the language of the documents in this case poses any such difficulty. The parties clearly stated that they were introducing an amendment the effect of which was to bring about a fundamental alteration in as far as the, question of ownership and title was concerned. As a matter of fact, even the learned trial judge found that the two agreements were in truth one transaction and one agreement. The real issue, in our view, is whether or not a Hire - Purchase Agreement resulted. The parties may very well not have contemplated such a result but the laws, statutory or otherwise, have been known to catch many transactions, whether the participants desired the consequence or did not; even know that some law or other lurks behind the transaction called in question. The legal categorisation and consequences of transactions frequently arise by operation and application of law and what the lay parties themselves thought or sought is beside the point. The variation introduced by the parties, albeit some six months later, effected radical alteration to the character of one and the same transaction, transforming it, at that later date, into an agreement whereby the seller would retain ownership until final payment.

The basic question is whether or not the agreement in its amended form is Hire - Purchase Agreement. Section 3 (1) of the Hire - Purchase Act defines, at (a) and (c), a Hire - Purchase Agreement as:

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"(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;
(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;"

In our considered view, the amended agreement has the same import as a contract referred to in section 3 (1) (a) of the Act and falls squarely within the contemplation of the Act. The agreement is caught by the Act. Since there was non-compliance (i.e. no down payment of 20 per cent, was made before delivery as required by section 25) it, is our view that the same result, must be reached as was reached in *Kearney;* namely, that the goods must be deemed to have been sold to the purchaser without any reservation as to the ownership thereof on credit at a price as penalised by s. 25 of the Act. For the reasons given in *Kearney,* the Hire - Purchase Act is not to be circumvented, whether through inadvertence or ignorance.

It follows from what we have been saying that we would uphold the ground of appeal to which we have addressed ourselves.

In our opinion, the agreement was not Bill of Sale. It was not in the statutory form for valid Bill of Sale.

Finally, we must deal with the issue of acquiescence which, if upheld, would, notwithstanding our conclusion on the question of there being Hire - Purchase Agreement, defeat the plaintiff's claim. It was contended that the plaintiff had acquiesced to the auction sale and that an estoppel must arise against it. It has been pointed out that, in order for acquiescence to arrive, the defendant must be mistaken as to his own legal rights and must expend money or do some act on the faith of his mistaken belief. To the extent that these contentions relate to the defendant we are prepared to accept, in its favour, that it was so mistaken and did do the act complained of on the basis of its mistaken belief. But the other elements are that the plaintiff must be aware of his own rights and must know of the defendant's mistaken belief. In addition, the plaintiff must have encouraged the defendant in his expenditure of money or other act either directly or by abstaining from asserting his legal right. It has been argued that, because a number of individuals convicted with the plaintiff were present at the auction sale, we must infer that the elements relating to the plaintiff were satisfied. We can find no basis for acceding to this submission. In our considered opinion, mere presence was not evidence that the plaintiff was aware of its own rights; nor that the plaintiff knew of the defendant's mistaken belief. Indeed mere presence, without more, is not evidence from which it can be inferred that the plaintiff has encouraged the defendant, in its expenditure or other act. Positive evidence was required to establish that the elements of acquiescence, in so for as they related to the plaintiff, had arisen in favour of the defendants. For

example, to show that party had knowledge of a matter (such as his own legal rights or the other's mistaken belief) relevant facts and circumstances must be proved to establish such knowledge. In the event we do not uphold Mr Gani's submission in this respect.

The net result is that we allow the cross-appeal and enter judgment for the plaintiff for trespass and conversion. Since the only reliable evidence as to the value of the goods is that they were sold for sum of K39,316.29, we assess the damages at that suns and award the same to the plaintiff. There

was considerable, and in our view, unjustifiable delay in the prosecution of this action; for that reason we order that interest shall be calculated not from the date of the sale which gave rise to this action but from the date of the issue of the writ. We order that interest at the rate of 7 per cent per annum from the date of the issue of the writ until the date of this judgment shall be paid by the defendant to the plaintiff. Each party will bear its own costs in this court and in the court below.

Cross-appeal allowed

JOSEPH GERETA CHIKUTA v