

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA

Appeal No. 55 of 1993

(Civil Jurisdiction)

CHIBOTE FARMS LIMITED

Appellant

and

BUCCANEER PRODUCTS LIMITED

Respondent

Coram: Sakala, Chirwa and Muzyanba JJ.S.

9th November and 19th December.....1993

Mr. E.J. Showwana SC of Showwana and Company, for the appellant.

Mr. M.K. Makoto of Christopher, Russell Cook & Company, for the respondent.

J U D G M E N T

Sakala JS., delivered the judgment of the court.

Case referred to: Duly Motors (Zambia) Ltd and another v Livingstone
Motor Assemblers Ltd (1) SCZ Judgment 172 of 1986.

This is an appeal against a judgment of the High Court in which the High Court awarded the respondent damages equivalent to the total cost of procuring new or similar vehicles today, less the advance of K383,209 and the actual cost incurred by the appellant in duty sales tax and letter of credit establishment in securing the two vehicles in dispute. The damages were to be assessed by the Deputy Registrar.

For convenience we shall refer to the appellant as the defendant and to the respondent as the plaintiff which they were in the court below.

The facts accepted by the learned trial judge were that the defendant company had entered into a contract of sale of meat products to a buyer in the Republic of Angola. Following upon that Contract the defendant company approached the plaintiff company, which was also a dealer in meat products, and requested it to supply the defendant company

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processed meat products to meet the order of the Contract for the buyer in Angola. According to the evidence which was also accepted by the learned trial judge, the plaintiff company agreed to supply the processed meat products on terms that once the consignment had been paid for by the buyer in Angola; the defendant company would make available to the plaintiff company a portion of the foreign exchange realised from the fifty percent retention scheme for the purchase of two specific motor vehicles and the plaintiff company would pay the kwacha cover for the said foreign exchange.

It was common cause that subsequent to the agreement with the defendant company, orders were placed by the plaintiff company through Mobile Motors Zambia Limited to Toyota Motors Corporation of Tokyo, Japan for the purchase of two specific motor vehicles with specific accessories. On or around 12th June 1989, the defendant company entered into a Contract of Sale with the plaintiff company for the purchase of one Toyota Landcruiser Registration No. AAJ 5204 Engine No. 216711 and one Toyota Hilux Registration No. AAJ 5205 Engine No. 2048081. The consideration for the said Contract was the amount in kwacha required to cover the portion of the foreign exchange promised by the defendant company to the plaintiff company. Subsequent to the Contract the defendant company raised letters of credit through its bankers the Meridien Bank Zambia Limited for the purchase of the said two motor vehicles ordered by the plaintiff company. The plaintiff company subsequently paid the sum of K383,209.00 being the kwacha cover required for the purchase of the said two motor vehicles which represented the plaintiff's share of the foreign exchange from the defendant's Angolan Contract. Due to foreign exchange fluctuations the defendant company informed the plaintiff company that the kwacha cover for the plaintiff's share of the foreign exchange had risen to the sum of K1,459,560.00. The plaintiff company agreed to pay the difference. According to the evidence the defendant company subsequently refused, failed or neglected to complete the Contract of Sale.

The foregoing facts as already observed were not in dispute and were accepted by the learned trial judge as proved. The court found that on the totality of the evidence before it, the plaintiff had proved on a balance of probabilities that there was a Contract between it and the defendant company for the sale of meat products to the defendant company on condition that the defendant company would avail to the plaintiff company twenty-five percent of the foreign exchange to be earned for the import of the vehicles in dispute. The court further accepted that upon the arrival of the two vehicles in the country, they were offered to the plaintiff company at a higher cost than that originally agreed. This, the court found, was a complete breach of contract on the part of the defendant company.

The court noted that the plaintiff company prayed for specific performance of the Contract with the defendant; but observed that specific performance is an equitable remedy granted at the discretion of the court and cited with approval the words of Mergarrey and Baker; Snells Principles of Equity 27th Edition at page 573 where the learned author stated:-

"Jurisdiction in specific performance is based on the inadequacy of the remedy at law and so it follows as a general principle that equity will not interfere where damages at law will give a party the full compensation to which he is entitled and will put him in a position as beneficial to him as if the agreement had been specifically performed."

The learned trial judge observed that from the facts of the case the vehicles in dispute were received by the defendant company in January / February 1990 more than two years by the time the judgment was being delivered. The learned trial judge further noted that by that time the vehicles must have depreciated considerably whereby to order specific performance would mean the plaintiff company ending up with second hand vehicles. She found that the nature of the case was such that damages would adequately compensate the plaintiff company. Accordingly, she made an order that the defendant company should pay the plaintiff company damages

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equivalent to the total cost of procuring new similar vehicles today, less advance and the actual cost incurred by the defendant company for duty sales tax and letters of credit establishment in securing the two vehicles. As already said these damages were to be assessed by the Deputy Registrar. Costs were awarded to the plaintiff company.

From the three grounds of appeal as well as from the appellant's heads of argument; it is quite clear to us that the appellant's attack of the learned trial judge's judgment is centred on the contention that the findings and the conclusions are not supported by the manner the plaintiff company pleaded its case. The endorsement on the writ of summons reads as follows:-

"The Plaintiff's claim is for the specific performance of a contract of sale for a Toyota Land Cruiser and Toyota Hilux made on or around 12th June, 1989 and an injunction restraining the Defendant whether by itself or it's agents from disposing of, tampering with or in any other way dealing or handling the said Motor vehicles pending the determination of this action and other such relief as the court may grant and costs."

PARTICULARS

1. TOYOTA LANDCRUISER
REGISTRATION NO. AAJ.5204
MODEL: H.J. 75RP-KR
CHASSIS NO. 0037850
ENGINE NO. 1216711

2. TOYOTA HILUX 4X4 D/CAB
REGISTRATION NO. AAJ 5205
MODEL: LN 10GR-PRHRS
CHASSIS NO. 0022087
ENGINE NO. 2048081

Paragraph twelve of the statement of claim reads as follows:-

"The plaintiff therefore claims for specific

performance of a contract of sale of one Toyota Landcruizer Registration No. AAJ5204 and Toyota Hilux Registration No. AAJ5205 to the plaintiff which contract was entered into in or about the 12th June, 1989 AND damages for breach of contract AND costs and interest at the ruling bank rate or any damages which may be awarded by the court."

And paragraph twelve of the defence reads as follows:-

"The vehicles referred to in the statement of claim are ordinary goods of commerce and are of no special value and interest. Further or in the alternative the Defendant will contend that specific performance is not the appropriate remedy in that the vehicles of a similar type are readily available on the open market. In the premises the Defendant will contend that an order for the specific delivery of the said vehicles ought not to be made."

The defendant company's three grounds of appeal were that the learned trial judge erred in law in awarding to the plaintiff damages equivalent to the total cost of procuring new or similar vehicles today when in fact the plaintiff specifically prayed for specific performance to purchase specific vehicles with an injunction to restrain the defendant company from selling the specific vehicles; that the learned trial judge was wrong to award what she did in the absence of evidence to that fact; and that the learned trial judge exceeded her powers that although a discretion is given to the court, the court can only act by the evidence before it.

In arguing the first ground before us Mr. Shanmuga contended that the plaintiff having made a specific claim for specific performance for the sale of specific vehicles and having also endorsed the writ of summons

with a claim for an injunction it was a misdirection to award damages in lieu of specific performance. Mr. Shamwana submitted that where specific performance is claimed together with an injunction the plaintiff company could not in addition seek damages because, according to him, these claims are exclusive and in the present case the plaintiff company asked for specific performance for a specific item. Mr. Shamwana also contended that, even accepting for purposes of argument that this was a proper case for specific performance, the learned trial judge misdirected herself by awarding damages equivalent to the purchase of new motor vehicles today basing the award on the authority of Duly Motors (Zambia) Limited and another V. Livingstone Motor Assemblers Ltd (1) which was a case for a claim of loss of a motor vehicle and that what was in issue was to put the plaintiff in a position he would have been in if the specific motor vehicle had not been lost. He further pointed out that the claim in that case was for damages and not specific performance.

In the written heads of argument Mr. Shamwana pointed out that the claim for damages was not pleaded and no evidence was led to claim damages in lieu of delivery of specific motor vehicles; submitting that the judge was bound to make the orders sought and could not refuse to make an order for specific performance in the purported exercise of the court's discretionary powers. According to counsel the evidence in the present appeal showed that the plaintiff ordered specific vehicles and it was therefore proper that specific performance should have been ordered as the specifics made the vehicles to be with a special value.

At this juncture we take note that in the written heads of argument counsel had in the alternative, indicated that this was not a case where the court could order specific performance because the motor vehicles in question were common items of merchandise with no rare qualities nor beauty.

Mr. Shamwana concluded his arguments and submissions by informing the court that the arguments and submissions on the first ground also covered

grounds two and three.

In his brief reply on behalf of the plaintiff company, Mr. Maketo submitted that specific performance being an equitable remedy its application is limited by the fact of whether damages would be an adequate remedy in a particular case. According to Mr. Maketo even though the plaintiff company's claim was for specific motor vehicles, it was clear from the inception of the case that the courts view was that damages would be an adequate remedy and for this reason the court did not grant the plaintiff company an interim injunction it sought at the commencement of the action and only granted damages when the plaintiff was successful at the end of the action.

Counsel further submitted that the court having decided that damages were an adequate remedy in this particular case it correctly adopted the authority in the Duly Motors (Zambia) Limited (1) case by ordering that the defendant pay damages amounting to the present value of new similar vehicles.

We have very carefully examined the evidence on record and the judgment of the learned trial judge. We have also considered the submissions by both learned counsel.

We note that the plaintiff company's claim as endorsed on the writ was for specific performance and an injunction. On the facts of this case we are satisfied that at that time the plaintiff company was perfectly entitled to endorse the writ as it did. The plaintiff company had a contract of sale with the defendant company for specific and identifiable vehicles which had arrived in Zambia. The defendant company refused, failed and neglected to deliver them. The appropriate action to take at that time, in our view, was for specific performance and an injunction. The question for damages for loss of the two vehicles at that time had not in our view arisen. The large part of Mr. Shamwana's submission agrees with this conclusion.

The major complaint of Mr. Shammaana seems to be that the plaintiff company having made specific claims for specific performance and an injunction the court was not entitled to make an order for damages as these were not pleaded for and for doing so, the court misdirected itself. This submission in our view overlooked two important things. First, for reasons not on record the court during the proceedings did not grant an order for an interim injunction although according to the proceedings an application was made.

Mr. Maketo from the bar informed the court that he was advised by the court not to proceed with the application for an interim injunction. Secondly paragraph twelve of the statement of claim (Supra) claimed for specific performance "and" damages.

Mr. Shammaana, while conceding that in practice damages are claimed as an alternative to specific performance he pointed out that in such event, they are exclusive and in the present case it was wrong to claim specific performance together with damages. In our view Mr. Shammaana's argument would have had force had the court in the first place granted an interim order thereby preserving the status quo of the two vehicles. This was not the case here. We are prepared to accept that given the nature of the items the subject of the claim, the claim for damages was in the alternative. In his own submissions Mr. Shammaana pointed out that the court was bound to grant the order for specific performance. Indeed the court was alive to this fact but noted that at the time of the judgment it was two years after the defendant company had taken possession of the vehicles. The court was therefore correct to say granting specific performance of the vehicles in question would have meant the plaintiff company ending up with second hand vehicles. The court was also alive to the fact that specific performance was an equitable remedy granted at the discretion of the court and that its jurisdiction is based on the inadequacy of the remedy at law.

The facts of the present case are, in my own view a clear example of flagrant contumelious disregard by the defendant company of the plaintiff's rights. In our view, at the time of this case, motor vehicles in Zambia could not have been said to have been common merchandise. It was therefore reasonable at that time for the plaintiff company to seek specific performance but then the judgment came too late. We agree with the trial judge that the nature of the case at that time was such that damages could adequately compensate the plaintiff company. We find no basis to disturb the lower court's judgment.

This appeal is therefore dismissed with costs to be taxed in default of agreement.

E.L. Sakala,
SUPREME COURT JUDGE.

D.K. Chirwa,
SUPREME COURT JUDGE.

M.H. Muzyanbo,
SUPREME COURT JUDGE.