IN THE SUPREME COURT OF ZAMBIA Appeal No. 31 of 1992

HOLDEN AT NDOLA

(Civil Jurisdiction)

TANZANIA ZAMBIA RAILWAY AUTHORITY Appellants

and

COSMAS P. KANOMA Respondent

CORAM: Bweupe, D.C.J., Sakala and Chaila JJ.S.

On 9th September, 1993 and 9th March, 1994

For the Appellant : Mr. D.C. Mutale of Ellis and Company, Ndola
For the Respondent : Mr. I. Chali of Mwanawasa and Company

J U D G M E N T

Chaila, J.S. delivered the judgment of the court.

This is an appeal against an award of damages by the learned trial judge for breach of contract. The respondent's (hereinafter referred to as the plaintiff's) claim was for order of specific performance of a contract of sale of a motor vehicle Jayfong truck Registration No. AQA 12 which was made between the plaintiff and the appellant (hereinafter referred to as the defendants) on 10th October, 1986. In the alternative, the plaintiff's claim was for damages for breach of contract.

The brief facts of the case were that the defendant on 1st April 1986 issued notices inviting tenders to long serving employees for purchase of motor vehicles indicated on the list. The list included the motor vehicle the subject of this case. The plaintiff offered to purchase the same motor vehicle for the sum of K250. By letter from the defendants to the plaintiff written on 10th October 1986 the plaintiff was informed that his offer had been accepted and that the motor vehicle would be r d

/2... to him upon

to him upon payment of the sum of K250 and appropriate duty tax. The conditions were to be complied with in one month of the said letter. The plaintiff who was willing and ready to comply with the conditions offered the money to the defendants' Cashier. The Cashier told him to wait for further instructions. Subsequently the plaintiff received a letter dated 11th November, 1986 from the defendants informing him of the defendants' decision to withdraw the initial offer made to the plaintiff. No reasons were given at that time. When the case came up for trial the defendants pleaded in their defence that the motor vehicle in question had been put on the list by mistake and as such no offer could be made for it.

The learned trial judge found that the defendants were bound by it, and he found that the plaintiff proved his case. As to remedy, the learned trial judge found that he could not exercise discretion for specific performance in favour of the plaintiff and he awarded him damages to the tune of K300,000 with interest at the rate of 25% from the date of the action.

The appellants through their Advocate Mr. Mutale have advanced two grounds of appeal. The first ground is that the learned trial judge misdirected himself by disregarding the defence of mistake as pleaded by the appellant. He argued in suport of that ground that the appellant had pleaded inter alia that the motor vehicle had been tendered by mistake. The evidence clearly showed that the appellant, was at the material time of tendering the vehicle, labouring under a fundamental mistake as to the state of its road worthness, and if it had been fully alert that the vehicle had just been rehabilitated, it would have been withdrawn from the list of vehicles that had been put on tender. The learned counsel referred us to Halsbury's laws, 3rd Edition Vol. 26 at para 1677 where it states:

> "In order to obtain relief on the ground of mistake, the party seeking it must prove that his conduct has been determined by mistake, and that the mistake is of such a character as to affect the essentials of the transaction. If his conduct would have been the same even if he had never made the mistake, then he is not entitled to relief; nor, even if his conduct has been induced by the mistake, is he entitled to relief, if the mistake

/3....merely affected

merely affected his motives and was not fundamental to the contract."

Mr. Mutale maintained that since the appellant had proved that they acted under mistake it was in the circumstances justified to withdraw from the transaction.

The second ground was in the alternative. They have contended that the learned trial judge should have treated the case as ideal for an award for nominal damages, since there was no basis of awarding K300,000 as this was the market price of the motor vehicle at the material time. Mr. Mutale argued that the judge over looked the fact that the abortive sale related to tender offer and that the respondent did not effect any payment. He submitted that the measure of damages in a sale of goods by tender ought to consider the refund of the actual monies paid by the party making the offer. This is contrary to an ordinary sale in which the measure of damages due to a buyer is the market price of the chattel at the material time. Mr. Mutale argued that the plaintiff did not offer any evidence of loss on the breach of contract and was therefore entitled to nominal damages only. Mr. Mutale further argued that there were no damages suffered apart from alluding to the breach of contract. He argued further that awarding the plaintiff the figure obtaining on the market was not only a misdirection but was an unjust enrichment on the part of the plaintiff. He argued that the assessement was not in accordance with the Sale of Goods Act. He Further contended that the plaintiff ought to have known that a new engine had been fitted to that truck. He maintained that the parties were not ad idem and the parties were therefore supposed to be discharged from the obligations of the concluded by saying that the contract was void abinitio.

Mr. Chali, counsel for the respondent filed written heads of argument on which he relied during his submission. The first point was on the defence offered in the lower court. He argued that the motor vehicle mentioned had not been tendered by mistake. He based his argument on the learned authors views in Halsbury's laws of England 4th Edition Volume 42 which states:-

/4..."Where.....

"Where the error is that of the Defendant but was contributed to by the Plaintiff, the Plaintiff cannot enforce the contract.

The Defendant's error may, on the other hand, be one to which the Plaintiff did not contribute.

In this case the contract is not enforced if the Defendant's mistake was due to some ambiguity, or if there was some misconception on the part of the agent or some special circumstances rendering the Defendant's mistake excusable, or where the plaintiff must have known of the Defendant's mistake.

However, where the Defendant cannot rely on some such excuse as mentioned above, and if the mistake is simply the result of his own carelessness, he is not allowed to evade performance simply by alleging that he made a mistake."

The counsel further referred the court to the case of Tamplin v James (1880) 15 CH.D.215 at pages 217 to 218 where Bagcally, L.J said:

"It is doubtless, well established that a court of Equity will refuse specific performance of an agreement when the Defendant has entered into it under a mistake, and where injustice would be done to him were performance to be enforced. The most common instances of such refusal on the ground of mistake are cases in which there has been some unintentional mispresentation on the part of the Plaintiff or where from the ambiguity of the agreement different meanings have been given to it by the different parties.. But where there has been no mispresentation, and where there is no ambiguilty in the terms of the contract, the Defendant cannot be allowed to evade performance of it by the simple statement that he had made a mistake.

Were such to be the law performance of a contract could rarely be enforced upon an unwilling party who was also unscrupious.

I think that the law is correctly stated by Lord Romally in Swaisland v Dearsley.

'The principle on which the court proceeds in cases of mistake is this if it appears upon the evidence that there was in the description or the property a matter on which a person might bonafide make a mistake, and he swears positively that he did make a mistake, and his evidence is not disproved, this court cannot enforce the specific performance against him.

If there appears on the particulars no ground for the mistake, if no man with his senses about him could have misapprehended the character of the parcels, then I do not think it is sufficient for

/5.... the purchaser

> the purchaser to swear that he made a mistake, or that he did not understand what he was about."

Mr. Chali further referred us to Halsbury's p. 10 paragraph 14:

> "Where the contract is clear the mistake of one party only will not usually prevent the formation of a contract and consequent liability in damages being incurred for no-performance for a person who does not take reasonable care to ascertain what he is contracting about must take the consequences. Even if the mistake is such as a reasonably diligent person might fall into, a party cannot successfully resist an action for damages, nor, as a rule, specific performance, by a simple statement that he has made a mistake where there has been no mispresentation nor knowledge of the mistake of the other party in circumstances amounting to equitable fraud, and where there is no ambiguity in the terms of the contract".

Relying on the authorities referred to above Mr. Chali argued that the circular inviting tenders was compiled by the appellant's servants only after the motor vehicle had been inspected physically. The decision to include the motor vehicle in question was made by the Committee of the appellant after consultation with the workshop Foreman. He argued further that the respondent was not a member of the committee which made recommendation to dispose of the motor vehicle. The new engine was fitted to the vehicle before the invitation of tenders and that the offer was made to the respondent a year after rehabilitation. Mr. Chali argued that the appellant had more than ample time between the invitation of tenders and the offer to rectify the mistake. He concluded that in the circumstances all the ingredients which would have been available to the appellant to support its defence of a mistake had been excluded. As regards the damages Mr. Chali submitted that the respondent had outlined how he came up with the figure of K300,000 for the value of the motor vehicle and his testimony was not even challenged in cross examination. He argued that in awarding damages of this nature, the court is guided by the provisions of section 51 of the sale of Goods Act, 1893 as to available market for the goods in question.

We have considered the submissions of the two learned counsel on behalf

/6.... of the two

of the two parties and the evidence before the lower court. It is evident from the submissions that the matter centres around the intentions of the parties. Mr. Mutale for the appellants has maintained that the appellants made a mistake in placing the vehicle on tender. Counsel for the respondent has maintained that there was no mistake and that the learned trial judge did not misdirect himself in any way on the issue.

We have been referred to various authorities by both counsel. Mr. Mutale has invited this court to consider the position stated in the Halsbury's laws, 3rd Edition Vol. 25 at para 1677 already referred to. As against this argument, Mr. Chali has invited the court to consider the authorities already referred to. It is evident from the authorities relied upon by the counsel that courts will not order specific performance in cases of bonafide mistakes. In the lower court the learned trial judge in considering the evidence before him stated simply that the facts spoke for themselves and had no difficulty whatsoever in finding that the plaintiff had proved his case on the balance of probabilities. Mr. Mutale has argued that the judge fell in error in not considering that there was a genuine mistake in putting up the vehicle for tender. The evidence before the learned trial judge showed that when the respondent went to pay to the Cashier, he was told to wait for further instructions and no payment was made. Later he was told that the vehicle had been withdrawn from the sale. In the lower court the appellant gave evidence to the effect that a mistake had been made and that it was not their intention to put the vehicle in question on tender. The learned trial judge did not consider the evidence regarding the mistake. The learned trial judge however, refused to award specific performance because of the circumstances of the case and unwillingness of the defendant to part with the vehicle in question. The learned trial judge did not go into detail to specify the circumstances of the case. The circumstances of this case as shown by the evidence were that that particular vehicle had been fitted with new engine and other parts before it was put on tender. The evidence showed that they had fitted new parts to the vehicle because they wanted to use it

/7...themselves

themselves and that a mistake had been made to put it up for sale, and that when they realised a mistake had been made, they withdrew the offer. We are of the view that had the learned trial judge considered the question of bonafide mistake, he would have arrived at a different conclusion. We are satisfied from the proven facts and the authorities relied upon by both parties, that a genuine mistake had been made and that parties were not ad idem. It follows therefore that the appellants were legally justified in withdrawing the vehicle from the sale when they discovered that the vehicle had been tendered through a mistake.

For the foregoing reasons the appeal is allowed and the finding of the learned trial judge is set aside. As regards the costs, we feel this was an internal affair between the employer and the employee and we order that each part pays its own costs.

.....

B.K. Bweupe
DEPUTY CHIEF JUSTICE

.....

E.L. Sakala
SUPREME COURT JUDGE

.....

M.S. Chaila
SUPREME COURT JUDGE