LOMBE CHIBESAKUNDA v RAJAN LEKHRAJ MAHTANI (1998) S.J. 39 (S.C.)

SUPREME COURT
NGULUBE,C.J., SAKALA,CHAILA,CHIRWA AND MUZYAMBA, JJ.S.
22ND APRIL AND 4TH SEPTEMBER,1998
(S.C.Z. JUDGMENT NO. 11 OF 1998)

Flynote
Commercial Law - Sale of Goods Act - Damages
Commercial Law - Sale of Goods Act - Conversion - When it is deemed to occur
Commercial Law - Contract of sale - Whether damages for breach can be coupled with extra damages for conversion of the same goods

Headnote
The respondent bought a car from the appellant in 1979 while the former was a diplomat. The car was never delivered to the respondent as the appellant's agent failed to ship the car to Zambia. An action ensued regarding the car which culminated in judgment in the respondent's favour hence the appeal.

p41

Held:
(i) The normal measure of damages for conversion is the market value of the goods converted

For the appellant: Mr M F Sikatana of Veritas Chambers and Mr J P Sangwa of Simeza, Sangwa and Associates
For the respondent: Mr A M Mushingwa, of Chali, Chama and Company

---

Judgment
NGULUBE, C.J.: delivered the judgment of the court.

For convenience, we shall refer to the parties by their designations in the court below, that is to say, the appellant as the defendant and the respondent as the plaintiff. The action was beset by incredible delays. The transaction giving rise to it started in December 1979 when the defendant agreed to sell and the plaintiff agreed to buy a Mercedez Benz car at a price of K32,500, a princely sum those days. The defendant was then a diplomat in London and the car was also there. The price was paid. The parties envisaged that this duty-free car would be shipped to Zambia where ownership would be changed either upon payment of duty by the purchaser or after lying in storage for the required period of customs exemption before it could change hands.

Things began to go wrong. The plaintiff collected the car in London in or about January 1980 and it was kept by his agent who did not ship the car to Zambia. Evidence on record showed that eight or nine months later, the plaintiff's agent attempted to register a change of ownership of the car into his name in England whereupon the authorities there took an extremely dim view and called upon the defendant to pay customs duty for selling the car to a non privileged person. The defendant was recalled and severely censured by the appointing authorities.

Meanwhile, she had in September, 1980, retaken the car and in April 1981 shipped it to Zambia, duty free. When asked by the plaintiff, she refused to again deliver the car and refused to refund the price, holding the plaintiff responsible for her loss of a diplomatic job and the embarrassing recall on disciplinary grounds.

The writ was issued on 9th June,1982, and after unsuccessful attempts at a settlement the judgment after trial was delivered nearly fifteen years later on 13th February, 1997. In the action, the plaintiff claimed in the alternative for a declaration that the car was his; for its delivery up or payment of its value and damages; or the payment of damages for conversion or for the breach of the sale agreement. The plaintiff obtained an interlocutory injunction to prevent the sale of the car to another and any use of it pending trial. At the trial, the plaintiff no longer insisted to have the car which had since suffered much wear and tear. The defendant counterclaimed asking for a declaration that she was entitled to keep the car and for damages for the loss of a lucrative diplomatic appointment.

In his judgment, the learned trial judge found that there was a breach of the agreement and that the defendant must refund the purchase price which was paid and also pay damages for the detention of the vehicle and for the breach of contract. The learned trial judge gratuitously described the defendant in unnecessarily harsh, uncomplementary and disparaging terms, using a lot of sarcastic and severe epithets. This was in the course of finding for the plaintiff and also in the course of dismissing the counterclaim. In the course of discounting the plaintiff's claim for delivery up of the vehicle, the learned trial judge stated that in 1982 the defendant obtained an injunction which had

enabled her to keep the car for the last eighteen years, which fact grossly disadvantaged the plaintiff. It was in fact the plaintiff and not the defendant who had obtained the injunction; a matter to which we shall return. The learned trial judge proceeded to convert the K32,500 into dollars at 1979 rates and found US$42,000 which was K54,600,000 at the rate prevailing at the time of judgment. The judge also decided that as he had not been guided as to what would be the damages for detention and breach of contract, he would award a similar amount, that is another K54,600,000 as damages, making a total of One hundred and nine million two hundred thousand kwacha, with interest at the current bank deposit rate from 9th June,1982, until judgment, a period of close to fifteen years.

There were grounds of appeal touching upon both the finding of liability under the two heads of the award and the quantum which was also a conversion and reconversion to and from American dollars. There was also a ground on the counterclaim, and the damages suffered as a result of the injunction obtained by the plaintiff. We received heads of arguments and oral arguments and submissions which we have considered.

One of the submissions called upon this court to frown upon remarks by the court below which attacked the character and person of the defendant. We have examined the record and can find no justification or occasion for the remarks complained of. Litigants are entitled to courteous treatment or at least to be treated in a civil manner by the courts. We can think of no occasion when it would be appropriate for the court to adopt abusive language attacking the personal character and derogatory of a party.

The first sustantive ground of appeal alleged a misdirection in the determination that there was a breach of contract committed by the defendant. It was argued that it was the plaintiff and not the defendant who was in breach because of the attempt to change ownership in the United Kingdom instead of shipping the vehicle to Zambia as was agreed. The learned trial

judge determined that the plaintiff failed to ship the vehicle because the defendant did not make the necessary documents available and this was the finding relied upon by counsel for the plaintiff. Having examined the evidence on record and the circumstances of this case, it appears to us that the transaction which had otherwise been agreed became clouded with side issues arising from the ill-advised attempt on the plaintiff's side to change ownership of an uncustomed car in the United Kingdom and the reaction of the defendant to apply some sort of self help remedy of keeping the car and the price paid when recalled from the diplomatic service. We have also considered the grounds, the arguments and the submissions on the question whether the car could have been ordered to be delivered up even at this late stage; or whether there was a breach by the seller or conversion of a car the property in which it was urged must be regarded as having passed to the plaintiff. Mr Sangwa and Mr Mushingwa made detailed and learned submissions for and against the determination below where the court found some sort of wrongful detention as well.

From the brief history of the facts outlined at the beginning, the evidence establishing the liability of the defendant was abundant. This was a transaction where money was paid on a consideration which had wholly failed on a contract

p43

of sale of a car. It follows that the right of the plaintiff - respondent to this appeal - to have the purchase refunded could not seriously be challenged on any account. It follows also that it would be unrealistic to concede to deliver up the car now, some nineteen years later or, reckoned from the issue of the writ, some sixteen years later. The defendant's position in the action had been to resist such a claim so that the concession made in the appeal to us comes rather late in the day. In a shortwhile we will return to the award made in respect of the refund of the price and the question which arises whether it is permissible to store the value of our money in a transaction expressed in Kwacha into some foreign hard currency and then to reconvert it back at current rates.

There was here a failure by the seller to deliver the goods sold to the buyer within the ambit of the relevant provisions of the Sale of Goods Act, 1893, which was a sufficient guide to the learned trial judge if he had chosen to refer to it. But before we deal with the measure of damages as directed by that Act, we wish to dispel immediately the submissions or notion that the damages for breach of the contract of sale can be coupled with extra damages for conversion of the same goods. The trial court made no finding and no determination on the ownership of the car as claimed in the pleadings but instead specifically declined to consider giving the car to the plaintiff. It follows that the car remained the property of the defendant. It followed also that there could have been no wrongful detention of the car when, contrary to the misdirection by the trial court, the plaintiff obtained an injunction quite early in the action to oblige the defendant to keep the car and not try to dispose of it. In any event, if there had been a conversion (which expression has in England assimilated even the former action in detinue) the normal measure of damages for conversion is the market value of the goods converted: see Hall v Barclay (1937) 3 ALL E.R. 620 where Greer, L.J., said:

> "Where you are dealing with goods which can be readily bought in the market, a man whose rights have been interfered with is never entitled to more than what he would have to pay to buy a similar article in the market."

As the learned authors of McGregor on Damages (15th Edition) put it in paragraphs 1306 et seq., the time at which the value is to be taken - according to the authorities cited - is the time of the conversion - Sachs v Miklos (1948) 2 K.B. 23 is authority for saying that, to the normal measure of damages for conversion may be added as a consequential loss any market increase in value between then and the earliest time that the action should reasonably have been

brought to judgment. In some cases in the past this court has taken the view that a civil action could reasonably be concluded and brought to judgment within a period of eighteen months. All the foregoing are obiter and do not apply since we find no conversion or wrongful detention on the evidence or record. We only refer to this to illustrate that even had there been this tort, the damages would have had to have been assessed following well established guidelines. They cannot be randomly plucked from the air.

In the case of a breach by the seller in not delivering the goods, the Sale of Goods Act, 1893, in Section 51 provides that the measures of damages is the

p44

estimated loss directly and naturally resulting in the ordinary course of events from the seller's breach of contract. The measure is to be ascertained, according to subsection 3, by the difference between the contract price and the market or current price at the time the goods ought to have been delivered or at the time of the refusal to deliver. The rationale appears to have been based on the duty to mitigate whereby the buyer would be expected to go forthwith into the market and purchase a replacement. This is where the buyer had his money in his hands. Where, as in this case, the buyer had paid, it is appropriate to quote a statement from paragraph 619 of McGregor (15th Edition):

> "But if a buyer of goods should pay the price in advance, there is some authority for the proposition that he is not required to seek a replacement in the market, as the seller has now possession of the money which the buyer should otherwise have used for a replacement, and that therefore he is entitled to claim damages in respect of any increase in the market value between the time of the breach of contract and the earliest time that the action should reasonably have been brought to judgment."

We respectfully endorse that statement. It follows that there will be judgment for the plaintiff or the refund of the price as well as for damages for the breach of contract only. It follows also that we set aside the computation of the refund of the price and the damages awarded below. In the case of the refund of the price and the attempt by the court below to store it in its 1979 dollar equivalent, it is appropriate to quote rather extensively from our judgement in Zambia Industrial and Mining Corporation Limited (in Liquidation) v Lishomwa Muuka S.C.Z. Judgment No. 1 of 1998 (unreported) where we said:

> "With regard to the submission that the price be translated into the present day value of the Kwacha of 1975, we note that the proposal is simply to convert the K60,000 in 1975 into its dollar equivalent at that time and then to reconvert the dollars back into Kwacha at today's rate of exchange. The letter from an Assistant Director at the Bank of Zambia to Mr Ngenda advises that K60,000 in 1975 at US$1 to K0.64 was equivalent to US$93,750; therefore at today's average rate of K1332.27 per US$1, this come to K124,900,312.50. An attempt was made and rejected - to store the value of a sum of money in the lawful currency of this country in its dollar equivalent in Apollo Enterprises Limited v Enock Percy Kavindele Appeal No. 98 of 1995 (unreported). In that case as in this case the contract expressed the relevant transaction in kwacha terms and this is what we said:
>
> "We have also given very anxious consideration to the submissions and arguments regarding the sudden and dramatic changes in the internal value of the Kwacha. The transaction was in kwacha terms and no question of any foreign currency damages or debt arises. We can find no authority for departing from the general rule that where the

p45

> loss is a money loss, the award to the plaintiff should be based on the value of the money at the time of breach in the case of contract rather than at the time that the loss was determined as in the case of tort. We would borrow from the language used by Scrutton L J in The Baarn (1933) P.251 (CA) and Denning L J in Treseder-Griffin v Co-operative Insurance Society (1956)2 QB.127 when we point out that a Kwacha in Zambia is a Kwacha whatever its international value; it is the constant unit of value by which we have to measure everything; prices of things may go up or down; other currencies may go up and down, but the Kwacha remains the same."

It was not suggested in the APOLLO case that the decline in the internal value of the Kwacha cannot be considered in appropriate situations. Indeed, the courts reflect this reality whenever general damages for non-pecuniary losses are awarded and also when guidance for an award is sought from the old case - precedents. When English precedents are referred to on the question of damages, this court has cautioned against simply converting pounds sterling into Kwacha at the prevailing exchange rate. To illustrate the goregoing, we refer to what was said in two cases: In Smart Banda v Wales Siame S.C.Z. Judgment No. 30 of 1988 we said:

> "We would like to give guidance to counsel so that claims for damages may be more easily settled between counsels in the future. Since the 5th of October 1985, there has been a devaluation of the Kwacha, and future awards for pain and suffering must take that devaluation into account. However, as we have emphasised before in this court, this is not a simple matter of multiplying previous awards by the amount to which the Kwacha has been devalued. Courts must take into account the general cost of living in this country and the real value that will be received. In calculating damages in future, therefore, awards should be less than what would result from a simple multiplication of previous awards as compared with the devalued Kwacha"

In Bank Of Zambia v Caroline Anderson And Another S.C.Z. Judgment No. 13 of 1993 we had this to say about English awards:

> "We confirm that in Zambia a simple multiplication of English awards by the current rate of exchange is not appropriate. The purchasing power of the pound and the kwacha and the quality of life that each currency is expected to buy is different in the two countries, and awards in Zambia will consequently be smaller."

What is said of a pound would apply equally to a dollar and to any other foreign currency. There is in our considered view clearly descernible from the cases ample authority and reason for disallowing attempts in transactions expressed in Kwacha to hedge against the

p46

depreciation of the internal value of our currency by notionally storing the same in a foreign currency at an earlier and more favourable rate of exchange and then reconverting the foreign sum at todays's rates. It is unrealistic to look at our currency in that fashion. Accordingly, we do not adopt that approach.

In the result, the sum to be refunded is K32,500 plus interest from the date of payment in December,1979, to the date of the refund. As to the appropriate rate of interest, we note that the amount has remained outstanding even during the days of dramatic devaluation and high interest rates. Both the money and the car were withheld by the defendant who had use of the

plaintiff's cash. A fair average rate of simple interest in this case is 100% per annum.

With regard to the damages under the Sale of Goods Act, 1893, as discussed herein, it will be necessary to refer to the assessment to the Deputy Registrar who has to ascertain the difference between the contract price and the market value of a similar car at the earliest time that the action should reasonably have been brought to judgment, namely eighteen to twenty four months after he issue of the writ. Of course, the parties are free to agree such market value, in default to be assessed by the Deputy Registrar as already indicated. The amount found will also carry simple interest at the rate already mentioned.

We revisited the counterclaim. Although the record does not show any detailed reasons, the learned trial judge was on firm ground when he discounted it for remoteness. In sum the appeal succeeds as indicated. In all the circumstances, each side will bear its own costs of this appeal.

Appeal allowed
