

(790)

IN THE SUPREME COURT OF ZAMBIA

SCZ

APPEAL NO.170 of 2006

**HOLDEN AT NDOLA
2008**

SCZ Judgment No.36 of

(CIVIL JURISDICTION)

BETWEEN:

MAJORY MAMBWE MASIYE

APPELLANT

AND

COSMAS MPAMPI
RESPONDENT

CORAM : Sakala,CJ., Chibesakunda and Mushabati, JJS.

On 4th March 2008 and 5th June,2008

For the Appellant : Mr. V.K Mwewa of V.K. Mwewa and Company

For the Respondent: P. Kasonde of Patrick Kasonde and Company

JUDGMENT

Mushabati, JS., delivered the judgment of the Court.

Cases referred to:

1. ***Morgan Vs Griffith [1870-71] L.R 6 EX.70***
Zaza Vs Zambia Electricity Supply Corporation Ltd[2001]Z.R. 107

Legislation referred to :***Sale of Goods Act, 1893 - S.5(1)*****(791)**

This is an appeal against the High Court judgment of 7th July, 2006.

In this judgment, we shall refer to the appellant and the defendant as the plaintiff and defendant respectively, the designations they held in the court below.

The plaintiff and the defendant entered into a contract of sale in which the plaintiff agreed to supply the defendant with a Mitsubishi Rosa mini-bus at a cost of US\$16,000 or Zambian Kwacha equivalent. The defendant made a down payment of K30,000,000 or US\$7,500 and the balance was to be paid in full on delivery of the mini-bus. When the defendant failed to pay the remaining balance the plaintiff sued for specific performance demanding for the payment of the remaining balance of US\$8,500. She further claimed for damages for breach of contract in lieu of or in addition to specific performance.

The defendant counter-claimed for refund of K30,000,000 and K950,000 being down payments towards the costs of the mini-bus and purchase of some paint for painting the mini-bus respectively. He further claimed for loss of business, interest and costs.

The evidence in support of the claim was that the plaintiff was approached by the defendant's wife with a request, on behalf of her husband, to supply a 26 seater mini-bus to the defendant. The plaintiff advised Mrs Mpampi that a

30 seater mini-bus was better than a 26 seater one. During the discussions, the plaintiff told the defendant's wife that such a mini-bus would cost between US\$15,000 and US\$16,000.

(792)

Later, the plaintiff, accompanied by Mrs Muyunda, visited Mr and Mrs Mpampi at their home in Chingola where they finalized the supply of a Mitsubishi Rosa mini-bus after a down payment of K30,000,000 which was then equivalent to US\$7,500.

The plaintiff and Mrs Muyunda travelled to South Africa where, unfortunately, they found that the mini-bus they intended to buy for the defendant had just been sold. An effort was made to acquire one, from any other supplier, but all was in vain. The plaintiff communicated this fact to the defendant's wife by phone and she authorized the plaintiff to buy a Toyota Coaster Bus in place of Mitsubishi Rosa. The Toyota Coaster was later duly delivered to the defendant, who expressed happiness at its condition after he had taken it on road test.

The plaintiff suggested to the defendant that the mini-bus should be examined by a mechanic but he refused, saying he himself was a professional mechanic, who once worked as workshop foreman for Zesco. The mini-bus was then left in the custody of the plaintiff who promised to pay the remaining balance the following day. When the plaintiff and her friend went to see the defendant for the balance they were not given the money. Further efforts were made to get this payment but to no avail hence she decided to sue the defendant for the balance. In the meantime, the defendant had even registered the said min-bus as AAJ 4828 with a fleet

number KTK 310 on it despite the fact that the plaintiff still held on to the relevant documents pending full payment of the purchase price by the defendant. The documents were in the name of P.W.1, Mrs Muyunda, as she was the one who brought the mini bus in the country from South Africa.

(793)

The defendant also gave evidence and called two witnesses namely his wife, D.W.1 and Detective Inspector George Muya, D.W.2. The gist of the defence evidence was that the defendant gave K30,000,000 to his wife for purchase of a 30 seater Rosa mini-bus. The mini-bus was expected to be fitted with a television set and some curtains. She authorized his wife to finalize the sale as he had to leave for Lusaka. The defendant paid, apart from the down payment of K30,000,000, for the plaintiff's trip to South Africa. The plaintiff brought a Coaster mini-bus, with some dents on it, which they had not agreed on. The defendant expected the said mini-bus to cost less than K30,000,000. The two parties were then engaged into some discussions for a new contract, relating to the Coaster mini-bus, but failed to agree. The defendant then wanted to be furnished with the necessary documents but they were not given to him until the bus was impounded. The bus had by then been painted with the paint the plaintiff had sold to them at K900,000. He then put his fleet number on it, believing that it was going to be one of his mini-buses. The purchase price, of K30,000,000, was negotiated for by D.W.1. Regina Ziwa Mpampi, the defendant's wife. She was promised that she was going to be supplied a bus with a TV Set and curtains.

D.W.2, George Muya, investigated a report by the defendant that he had been sold a Coaster mini-bus without proper documents. D.W.2 summoned P.W.1 who later produced the relevant documents which were found to be genuine but in the name of Mrs Muyunda. The plaintiff refused to leave the documents with the Police. The mini-bus was later collected by court bailiffs

at Ndola after D.W.2 was through with his investigations.

(794)

At the conclusion of the trial the learned trial Judge dismissed the plaintiff's case and up-held the defendant's counter-claims, hence this appeal before us. The plaintiff filed three grounds of appeal. These were:

1. The learned trial Judge erred in law and fact when he made a finding that the appellant had committed a fundamental breach of the contract when she purchased a wrong bus from that agreed upon. This finding is in at variance with the evidence before court especially that the appellant contacted the respondent before she purchased a different mini bus.

The learned trial Judge erred in law and fact when he ordered that the appellant should refund K950,000.00 the amount the respondent paid for the paint sold to him by the appellant.

The learned trial Judge erred in law in awarding the respondent interest at 30 percentum from 23rd November, 2001.

Both learned Counsel submitted written heads of argument on which they entirely relied.

On the first ground, the learned Counsel for the plaintiff submitted that the evidence adduced by the plaintiff and her witness P.W.1 Joy Namfukwe Muyunda clearly showed that the Toyota Coaster mini bus was bought with the approval of the defendant's wife. The mini-bus was duly delivered to the defendant though he said he reluctantly accepted it through the persuasion of his wife. The defendant was entitled to abrogate the contract when he

realized that a different type of mini-bus was delivered to him. His failure to do so meant he had waived his right to repudiate the contract. The mini-bus was later used as a passenger vehicle because he had it registered with his fleet number, KTK

(795)

310, on it. The fact that the defendant took delivery of the said mini bus the contract was binding on him.

On the second ground of appeal the learned Counsel merely submitted that there was no basis for the lower court to have ordered the refund of the K950,000 which was the purchase price of the paint that the defendant bought from the plaintiff.

In response to the plaintiff's written heads of argument Mr Kasonde stated that the court below was on firm ground when it dismissed the plaintiff's claim because the contract was for the supply of a Mitsubishi Rosa 30 Seater mini-bus but the plaintiff instead supplied a Toyota Coaster mini-bus. The waiver that allowed the plaintiff to supply a Toyota Coaster mini-bus was made by D.W.1, Mrs Mpampi, who was not a party to the contract. There was therefore, no agreement between the plaintiff and the defendant for the plaintiff to supply a Toyota Coaster mini bus.

It was further argued that in fact, the waiver which was made orally was parol_evidence to a written document and so it could not be allowed to vary a written contract. The plaintiff did not only refuse to enter into a fresh contract but also failed to deliver the documents for the Toyota Coaster mini-bus. The defendant's acceptance of the Toyota Coaster mini bus was conditional in that it was subject to a fresh re-negotiated contract.

On the second ground of appeal it was argued that the court below was on firm ground when it ordered that the K950,000, paid for the paint, be refunded because the bus, which was the subject of the contract, was never delivered.

(796)

The plaintiff went on to the extent of detaining the said bus that was delivered. The painting of the said min-bus was done because the defendant believed that it was going to be theirs, as per evidence on record. It was finally argued that although the plaintiff had this appeal pending before this court she had begun to settle the refund the purchase price by installments and an application to that effect was pending before the Deputy Registrar.

We have carefully considered the submissions by both learned Counsel, the evidence on record and the judgment appealed against.

We have no doubt that the plaintiff and the defendant had entered into a valid contract for the supply, by the plaintiff, of a Mitsubishi Rosa Mini-Bus, a 30 Seater to be specific, to the defendant, at a price of US\$16,000 or its Kwacha equivalent. A down payment of K30,000,000 equivalent US\$7,500 was made and a balance of US\$8,500 was to be paid on delivery of the mini-bus.

It is also common cause that the plaintiff did not deliver the agreed upon mini-bus but delivered a different type, a Toyota Coaster. The defendant took delivery of the said Toyota Coaster mini-bus which he later painted with the paint that was bought from the plaintiff for that purpose.

It is also clear that a dispute arose over the payment of the balance on the purchase price.

The plaintiff contended in her evidence that when she found that the Mitsubishi Rosa Mini-Bus, she intended to acquire for the defendant, was sold to somebody else she communicated this fact to the defendant's wife and suggested to her

(797)

that in place of a Mitsubishi Rosa Mini-Bus she could supply a Toyota Coaster Mini-Bus to the defendant. Having so suggested to the D.W.1, the plaintiff was given green light to go ahead and acquire the Toyota Coaster Mini-Bus for the same price.

Indeed, on her return from South Africa, a Toyota Coaster Mini-Bus was delivered to the defendant. The defendant expressed satisfaction about it and promised to pay the balance but he never did so.

On the other hand, the defendant said he took possession of the said mini-bus on the understanding that they were going to enter into fresh negotiations for the purchase price and that there was in fact no agreement between them over the purchase of the said mini-bus, which was delivered. The said mini bus did not have either a TV Set or Curtains in it.

The question before us is whether the parties had varied their earlier contract, so that the delivery of a different type of a mini-bus be treated as a breach of warranty and not of a condition.

The submissions on behalf of the plaintiff were to the effect that the defendant had waived his right to repudiate the contract when he accepted delivery of Toyota Coaster Mini-Bus.

On the other hand, Counsel for the defendant argued that the acceptance of the Toyota Coaster was conditional, subject to a fresh agreement over the purchase price.

(798)

It is clear to us that the agreement, though stated a specific type of a Mini-Bus which was to be supplied, was not for specific existing mini-bus but for any Mitsubishi Rosa 30 seater mini-bus. The desired bus was what we would term as “future goods” as per **Section 5 (1) of Sale of Goods Act, 1893**. A contract of Sale for “future goods” is valid under the cited provision of the law which, for ease of reference, we reproduce here.

The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller or goods to be manufactured or acquired by the seller after the making of the contract of sale in this Act called “future goods”.

We have, therefore, no doubt that the contract entered into by the plaintiff and the defendant, in this case, was a valid one. We are, however, faced with the fact that the agreed goods were not acquired. The question is the validity of the contract in the absence of the agreed goods. Our simple answer to this is that it was a voidable contract.

The contract having been voidable, the defendant was at liberty to repudiate the contract. The defendant did not, however, expressly do so. He took possession of the mini bus. He registered it and put his fleet number on it and painted it with the mini bus accepted colours. Surely, if a new agreement was to be agreed on, we find it strange that out of speculation the defendant would have gone ahead to paint the mini bus, put his fleet number on it and

have it registered.

(799)

We view the defendant's conduct as being consistent with what the plaintiff said to the effect that she had consulted the defendant's wife over the non-availability of a Mitsubishi Rosa Mini Bus, which was agreed upon and that defendant's wife did consent to the plaintiff's suggestion for her to supply a Toyota Coaster, in place of Mitsubishi Mini-Bus. In fact parol evidence, as was the case here, may be admitted to show that a written agreement is subject to a collateral oral warranty ***Morgan Vs Griffith (1)*** is followed.

The defendant's wife was not a complete stranger to this contract. She was the initial initiator of the contract between the plaintiff and the defendant. She first talked to the plaintiff and later introduced her (plaintiff) to her husband, the defendant. When the down payment was made, it was made through her because, according to the defendant's own evidence, he had to travel to Lusaka. So clearly it was not strange or surprising that the plaintiff could have consulted the defendant's wife, when she failed to talk to her (D.W.1's) husband and later took her instructions. In fact, she had been acting as defendant's agent in this matter. Her fresh instructions or consent to the plaintiff's suggestion for the supply of a different type of mini-bus had the effect of being a waiver. The defendant ratified this waiver by taking delivery of the mini-bus and even changed its original appearance by painting and registering it and putting on it his fleet number. We firmly believe that the original contract was valid, not rescinded and continued to bind on the parties.

We agree that with the plaintiff's submission that the non-delivery of a

Mitsubishi Rosa Mini-Bus and the delivery thereof of a Toyota Coaster Mini-Bus was treated by the defendant as a mere warranty which did not go to the root of the contract.

(800)

We have, therefore, no doubt that the defendant was still bound by the earlier contract. Had he refused to take delivery of the Toyota Coaster Mini-Bus, he would have been justified as having repudiated the contract and entitled to recover his money from the plaintiff. In fact there was evidence that the defendant had even used the said mini-bus.

The argument that the plaintiff did not have proper documentation for the said mini-bus was dispelled by the defendant's own witness D.W.2, Detective Inspector George Muya, to whom the documents were presented by the plaintiff after a complaint was lodged with the Police by the defendant.

In our view, the plaintiff was entitled to hold on to the documents as a way of enticing or forcing the defendant to clear off the remaining balance and not that she had no proper papers for the bus.

We are live to the fact that this court cannot lightly over turn a lower court's decision on facts unless the findings are perverse of the evidence on record – ***Zaza vs Zambia Electricity Supply Corporation Limited (1)*** is followed. In this case we find that the lower court misdirected itself both in fact and law.

We therefore, find that the lower court's findings cannot be up-held. The plaintiff's claim, which was dismissed by the trial court, is up-held. The findings for the defendants on the counter-claim for refund of the down payment is reversed.

The main appeal having succeeded we must simply say the defendant's counter claim for refund of K950,000, being the purchase price of the paint

(801)

supplied by the plaintiff to the defendant, cannot be sustained. It was properly supplied to the defendant and used by him.

The appeal is therefore allowed. Costs shall follow the event and in default of agreement they shall be taxed.

E.L. Sakala

CHIEF JUSTICE

L.P. Chibesakunda

SUPREME COURT JUDGE

C.S. Mushabati

SUPREME COURT JUDGE