CONSTANTINO MAGUTA
versus
WHEELER DEALER CAR SALES (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
PATEL J

Civil Trial

HARARE, 27 September 2011 and 26 January 2012

T. Tandi, for the plaintiff
B. Dhlakama, for the defendant

PATEL J: The plaintiff herein seeks the cancellation of an agreement between the parties for the sale of a motor vehicle and damages for breach of contract in the sum of US$6,500. The principal issues for determination are whether the defendant represented that it was the owner of the motor vehicle and whether it breached the contract of sale by not guaranteeing vacant possession of the vehicle to the plaintiff.

The Evidence

Constantino Maguta, the plaintiff, testified as follows. He knew the defendant firm as a seller of motor vehicles, both on its own account and on behalf of third parties. He had previously purchased a Toyota Corona from the defendant as its owner. On 17 July 2010, he went to the defendant's premises in Msasa and purchased a Nissan Double Cab for US$6,000. As is reflected on the written agreements of sale, he paid a deposit of US$5,000 on the same day and the balance of US$1,000 on 22 July 2010. He dealt with the owner of the defendant company, Emanuel Kawenya, and inferred from his conduct that the vehicle was owned by the defendant. He was not told that it belonged to any third party or shown any permission to sell it, nor was he shown the standard conditions of sale referred to in the agreements of sale. On 22 July 2010, he collected the vehicle and its keys and registration book from Kawenya. The registered owner in the book is shown as an unrelated third party. However, this did not concern the plaintiff as it was not unusual for ownership of a vehicle to change hands without the registration details being altered. Moreover, the book itself contains a warning that the book is not proof of legal ownership. The plaintiff then arranged for the vehicle to be towed away at a cost of US$50. Subsequently, on 14 October 2010, he

paid US$450 for having the vehicle engine overhauled by a repair firm. Later that month, he was visited by the police who said that it was a stolen vehicle and took it away to Southerton Police Station. He then asked Kawenya for a refund and was told that the money had been given to two individuals who had brought the vehicle to the defendant. These two, Tendai Nyamajiwa and Rumbidzai Mapeture, were later charged with theft of the vehicle from its owner, Loveness Chinomona. Nyamajiwa was convicted but Mapeture absconded. In the criminal proceedings, Kawenya gave evidence as a State witness. According to the State Outline, Nyamajiwa and Mapeture sold the vehicle to the defendant for US$6,000. Again, as summarised in the State's closing submissions, Kawenya himself testified that he agreed to purchase the vehicle from Mapeture after being persuaded to do so by Nyamajiwa, who was a fellow church member as well as being a friend.

Emanuel Kawenya is the Managing Director of the defendant company. His evidence was that the defendant does not purchase motor vehicles on its own account but only sells them on commission on behalf of third parties. The vehicle in question was sold to the plaintiff on behalf of Mapeture and the plaintiff was fully aware of that position. On the date of the sale, he ascertained by telephoning the Central Vehicle Registry that the vehicle was not a stolen one. However, he accepted that this was not standard procedure. He produced a permission to sell, dated 17 July 2010, which was signed by Mapeture and which authorised the defendant to sell the vehicle at a commission of 5%. Mapeture received US$5,000 from the plaintiff himself on the same day and the balance of US$1,000 paid by the plaintiff was collected by Nyamajiwa on 26 July 2010. The witness also produced the defendant's standard conditions of sale, paragraph 3 of which disclaims liability for any defect in title. This document was posted on the wall in the defendant's reception area. He could not recall whether it was specifically brought to the plaintiff's attention. He confirmed having testified at Nyamajiwa's criminal trial but denied having made the statements attributed to him in the State's closing submissions. He also disputed the correctness of the trial Magistrates' notes which record one Detective Ruzvidzo's evidence to the effect that Kawenya confirmed having bought the vehicle from the accused's accomplice. His own evidence is recorded as showing, though not very clearly, that the vehicle was sold on behalf of Mapeture.

Under cross-examination, he was unable to explain the admission in paragraph 1 of the defendant's Summary of Evidence that the defendant was in the business of

selling vehicles which belong to it and also to third parties. When re-examined, he confirmed this contradiction with his evidence-in-chief. Again, he could not explain why the payment of US$5,000 by the plaintiff directly to Mapeture was not mentioned in the defendant's pleadings or why the conditions of sale document was not listed in the defendant's Discovery Schedule, even though these were material aspects of its defence. Furthermore, he stated that he received the sum of US$300 as 5% commission from Mapeture, but was unable to produce any receipt for that amount. He also conceded that the agreements of sale *in casu* show that he signed them as the seller, without any reference to any sale on behalf of a third party.

My overall assessment of the plaintiff's evidence is that it was consistent and substantially in accord with his pleadings. His version of what transpired is plausible and generally credible. In contrast, Kawenya's evidence was riddled with material contradictions and multiple inconsistencies as between his testimony and the defendant's pleadings and the record of proceedings in Nyamajiwa's criminal trial. It is difficult to accept the submission that he acted in good faith at all times and was simply a victim of criminal conduct perpetrated by Nyamajiwa and Mapeture. The more likely scenario is that he was not entirely truthful when he was interrogated by the police and made conflicting statements at different times in order to suit the circumstances. In short, the discrepancies in Kawenya's evidence as the defendant's only witness do not favour the defendant's case.

Representations as to Ownership of Vehicle

The written agreement between the parties, as embodied in two separate documents, is signed on behalf of the defendant as the seller and by the plaintiff as the purchaser. There is no indication whatsoever that the defendant was acting as an agent representing some other party. In effect, the defendant represented itself as the owner of the vehicle sold to the plaintiff. According to the parol evidence rule, a contract that has been reduced to writing is regarded as the exclusive memorial of the transaction in question. Consequently, save for certain limited exceptions, no extrinsic evidence may be adduced to prove the terms of the document or to contradict, alter or add to its contents. See *Union Government* v *Vianini Ferro-Concrete Pipes (Pty) Ltd* 1941 AD 43 at 47. In the instant case, in the absence of any special circumstances, the permission to sell produced by the defendant, even if it was genuine, falls into the category of inadmissible parol evidence.

Additionally, the evidence shows that Kawenya made various representations as to the vehicle's mechanical defects, as if the defendant were its true owner. More significantly, the plaintiff's evidence, which is more credible in this regard, was that the defendant did not at any stage disclose that it was acting on behalf of a third party. As a rule, where an agent fails to disclose his principal, the other party is entitled to sue either the agent with whom he contracted or the actual principal. See *Natal Trading and Milling Co Ltd* v *Inglis* 1925 TPD 724 at 727. Moreover, the agent, as the apparent or ostensible party to the contract, is estopped from denying his liability by reason of his conduct inducing the other party to believe that he was really the principal. See *O'Leary & Another* v *Harbord* (1888) 5 HCG 1 at 11, cited in Kerr: *The Law of Agency* (1972) at p. 188. In the present matter, there is no evidence to the effect that the plaintiff was actually shown Mapeture's permission to sell. If the defendant had produced it before the transaction was concluded, the plaintiff would probably have approached Mapeture directly in order to negotiate a lower purchase price. As for Kawenya's evidence that the plaintiff himself paid the initial US$5,000 to Mapeture, this appears to be a belated fabrication in light of its absence from the defendant's pleadings and the evidence at Nyamajiwa's criminal trial.

Having regard to all of the foregoing, I am satisfied on a balance of probabilities that the plaintiff has discharged the onus of establishing that the defendant, through Kawenya, represented to the plaintiff that it was the owner of the vehicle in question.

Breach of Contract

Before addressing this aspect of this case, it is necessary to deal with the conditions of sale referred to in the contract of sale and allegedly posted on the wall of the defendant's reception area. The plaintiff categorically denied having seen this document and there was nothing in the defendant's evidence to controvert this denial. Indeed, Kawenya could not recall whether it had specifically been brought to the plaintiff's attention. It must therefore be accepted that the plaintiff had no notice of the document, nor did he acknowledge its contents by signing it. It follows that the disclaimer from liability for any defect in title, as stipulated in paragraph 3 of the document, is not binding on the plaintiff and does not avail the defendant. See, with respect to disclaimer clauses and their validity and legal effect generally, *Mudukuti* v *FCM Motors (Pvt) Ltd* 2007 (1) ZLR 183 (H) at 188-191.

A fundamental premise of every contract of sale is that the purchaser should acquire ownership and/or peaceful and undisturbed possession of the thing sold, free of all encumbrances and the superior rights of other parties. In effect, the seller owes an implied duty to warrant or guarantee such ownership or possession and, if he fails to do so, he will be held to have breached the contract. See Hackwill: *Mackeurtan's Sale of Goods in South Africa* (5th ed.) at p. 164. This would be the position even where the purchaser voluntarily surrenders possession of the *merx* to a third party, provided he does so in circumstances where he cannot successfully contest the grounds upon which that party claims it. See *Garden City Motors (Pty) Ltd* v *Bank of OFS Ltd* 1983 (2) SA 104 (N) at 107, followed in *Kanokanga* v *Evans & Others* 2000 (2) ZLR 41 (H) at 48 & 50.

On the facts herein, the defendant clearly owed an implied duty to warrant ownership and undisturbed possession of the vehicle that it sold to the plaintiff. The plaintiff was then dispossessed of the vehicle by the police who seized it as a stolen vehicle, in accordance with their investigative duties and their legally unassailable powers of seizure. The defendant did not intervene to prevent this seizure, and the plaintiff was left with no option but to surrender the vehicle to the police. In the event, the defendant failed to guarantee unencumbered ownership and undisturbed possession of the vehicle, and thereby breached the contract of sale.

Damages for Breach

It is trite law that the purchaser under a contract of sale is entitled to claim damages for breach of contract, which are to be assessed at the time of the breach, the time of performance or the time of cancellation. See Visser & Potgieter: *Law of Damages*, at pp. 76-77, cited in *Munhuwa* v *Mhukahuru Bus Services (Pvt) Ltd* 1994 (2) ZLR 382 (H) at 388. Such damages include the full purchase price paid for the *merx* as well as ancillary wasted costs and expenses foreseen by the parties or incurred as a direct result of the breach. See Hackwill, *op. cit.*, at pp.176-177.

At the time of the defendant's breach *in casu*, the plaintiff had paid US$6,000 as the purchase price of the vehicle. He had also incurred further expenses, which were within the contemplation of the parties, in the amount of US$500 by way of towage charges and repair costs. There can be no doubt that he is entitled to the full amount that he claims pursuant to the defendant's breach of contract.

Disposition

In the result, judgment is granted in favour of the plaintiff as against the defendant in terms of the Summons. It is ordered that:

1. The agreement of sale concluded between the parties in July 2010 be and is hereby cancelled.
2. The defendant shall pay to the plaintiff the sum of US$6,500 together with interest thereon at the prescribed rate, reckoned from the 2nd of December 2010 to the date of payment in full, and the costs of suit.

Kantor & Immerman, plaintiff's legal practitioners
B. Dhlakama Attorneys, defendant's legal practitioners