OLD MUTUAL SHARED SERVICES
(PRIVATE) LIMITED
versus
BRIGHTON SHADAYA

HIGH COURT OF ZIMBABWE
MUTEMA J
HARARE, 3 September, 2012

Opposed Application

G Chingoma, for the applicant
T Marume, for the respondent

MUTEMA J: The applicant seeks payment of US$13 917-00 from the respondent with interest at the rate of 6% per annum calculated from date of demand to date of payment in full.

What engendered the dispute is the following:

On 1 January, 2010 the applicant employed the respondent as a group procurement manager. In terms of clause 10 of the employment contract, the respondent was entitled to a company vehicle in accordance with the applicant's Group Management Motor Scheme. The respondent was accordingly allocated a Mazda B2500 registration number ABP 9 881. On 29 June, 2011, the respondent was given an option to purchase the company vehicle pursuant to a change in the Group Management Motor Scheme in terms of circular 9/2011.

The respondent accepted and signed the option to purchase the vehicle on 1 July, 2011. The material terms and conditions of the purchase agreement were these:

- Clause 1: Vehicle type: Mazda B2500 Eagle Double Cab, Registration No ABP 9881.
- Clause 2: Market value: US$13 917-00.
- Clause 3: A loan of $13 917-00 is offered to you.
- Clause 4: Loan interest rate of 6% per annum compounded annually and repayments to be made monthly through payroll.
- Clause 7: Security for the loan: to sign an affidavit which authorises the

company to recover the loan amount from terminal benefits including the pension; and authorise the company to take the car in the event there is still balance outstanding.

- Clause 9: in the event of service being terminated for any reason while the vehicle has not been fully paid for, to settle the balance within seven days from date of termination.
- Clause 14: to sign and date copy of this letter indicating on it whether you accept or decline this offer and return the copy to Operations Services Support Manager in writing. An intention to accept will have no effect until it is conveyed to the Operations Services Support Manager in writing.

On 6 July, 2011 the applicant terminated the respondent's employment contract on the grounds of alleged misconduct while the latter had not discharged any portion of the purchase loan. The respondent lodged an appeal with the Labour Court challenging his dismissal. The appeal is still pending.

On 19 August, 2011 the applicant's legal practitioners wrote a letter of demand to the respondent's legal practitioners spelling out the above material terms of the agreement of sale and calling upon the respondent to settle the balance of the loan plus interest, to sign the attached affidavit in fulfilment of Clause 7 (a) "and (sic) to return the car to our client per clause 7 (b) of the agreement within seven days of service of this letter."

The respondent's legal practitioners responded to the letter of demand on 30 August, 2011 in these words:

> "… It is our considered view that the hybrid contract of sale and loan agreement concluded on 1 July 2011 does not supersede the original contract of employment which our client and your client concluded. It is common cause that our client is challenging his (sic) termination of contract and it follows therefore that term number (5) (termination of employment contract for any reason) is also under challenge.
> … Since we have lodged an appeal against termination of our client's contract of employment with the Labour Court our client cannot comply with the provisions of the agreement of sale and loan agreement which he purportedly signed with your client. As such our client cannot settle the balance on the loan plus interest - he cannot sign the affidavit and cannot return the car to your client pending appeal."

In his opposition the respondent raised two preliminary issues, viz that the matter is *lis pendens* in view of his appeal that is pending before the Labour Court and that this court has no jurisdiction to entertain the matter since the dispute is purely labour-related.

At the hearing of the matter the point in *limine* that this court has no jurisdiction over the matter was abandoned on the authority of the Supreme Court decision in *Zimasco* (*Pvt*) *Ltd* v *Farai Maynard Marikano* SC 181/10 that it is only this court and not the Labour Court which can grant the relief sought.

Regarding the preliminary issue that the matter is pending before the Labour Court, the requirements for that plea of *lis alibi pendens* are now trite. In the case of *O'Shea* v *Chiunda* 1999 (1) ZLR 333 (S) at p 336 SANDURA JA had this to say:

> "The requisites of a plea of *res judicata* are set out in Hebstein & Van Winsen : *The Civil Practice of the Supreme Court of South Africa* 4th ed by Van Winsen, Cilliers and Loots at p 249 as follows:
>
> > 'The requisites of a plea of *lis pendens* are the same with regard to the person, cause of action and subject matter as those of a plea of *res judicata*, which, in turn, are that the two actions must have been between the same parties or their successors in title, concerning the same subject matter and founded upon the same cause of complaint'".

Applying this legal principle to the facts of the present case, it is clear that the plea of *lis pendens* must fail.

In the Labour Court the respondent is challenging his dismissal from employment. No more and no less. His appeal does not encompass the issue for my resolution in this court, viz whether or not he is obligated to settle the purchase price for the motor vehicle that was sold to him in an agreement concluded separately from his employment contract. In other words, the Labour Court is not going to make any determination on that issue because it is not before it and in any event, even if it was, that court has no jurisdiction over the issue. Even if the respondent were to succeed in his appeal in the Labour Court and is reinstated without loss of salary and benefits, he will still be obliged to pay the $13 917-00 pursuant to the loan agreement the parties concluded. Whilst the parties may be the same in both courts, the subject matter and the cause of complaint are not.

As regards the merits, the respondent's contention is that the option to purchase the motor vehicle was not a purely commercial agreement but part and parcel of his employment contract which he signed on 13 November, 2009 whose clause 10 reads:

> "**Company Car**
>
> You will be eligible to participate in Group's Management Motor Scheme subject to the rules governing that scheme."

That scheme was governed by the 2004 Revised Management Motor Car Scheme Rules which *inter alia* stipulated that a company car allocated to an employee remained the company's property and when the car had fully depreciated it would be offered to the employee for purchase for an amount equal to 33.33% of the specified amount. It is pertinent to note, however, that this scheme was subsequently changed by Circular number 9/2011 which provided that employees in the category of the respondent who had hitherto been allocated company cars would be given the option to purchase the cars at market rate with effect from 1 July, 2011. This new arrangement led to the parties concluding the hybrid sale/loan agreement in question.

In view of the foregoing, it is idle therefore for the respondent to argue that this latter agreement was not a purely commercial agreement. The earlier arrangement of his contract of employment regarding company cars was superseded by the circular alluded to *supra* and the consequent loan agreement.

The hybrid purchase agreement constitutes a contract of sale which is *per fecta* in that the *merx* is identifiable (the Mazda vehicle), the *pretium* is specific ($13 917-00), the mode of payment was agreed upon – either via monthly deductions from salary or upon termination of employment for any reason, the respondent was to settle the balance within seven days from the date of termination, the parties were *ad idem* regarding the foregoing and the respondent appended his signature accepting the offer. The doctrine of sanctity of contract must be upheld. To this end, it may be salutary to pay heed to what the court said in *E Underwood & Son Ltd* v *Barker* (1899) 1 CH 300 (CA) at 305, so many eons ago:

> "To allow a person of mature age, and not imposed upon, to enter into a contract, to obtain the benefit of it, and then to repudiate it and the obligations which he has undertaken is, *prima facie* at all events, contrary to the interests of any and every country. Of course I am not speaking of contracts induced by fraud, duress or undue influence or impeachable on any other recognised ground of invalidity."

In the instant case, the sanctity of contract must be upheld for the sale agreement/loan agreement was a perfectly purely commercial agreement.

The second rung of the respondent's contention on the merits is that the applicant is not entitled to specific performance based on the option to purchase the motor vehicle agreement. The basis of this peroration is essentially that the contract i.e. the hybrid sale agreement was not *per fecta* because of the following:

(i) the vehicle is still registered in the applicant's name contrary to clause 6 which provides that the vehicle was to be registered in the respondent's name while the applicant retained the registration book till the loan was fully repaid;

(ii) the respondent has not yet signed an affidavit authorising the applicant to recover the loan from his terminal benefits including pension, in violation of clause 7 (a);

(iii) in terms of clause 8 the passing of ownership of the vehicle was to be symbolised by a formal hand over to the respondent of the car keys and the registration book. This has not been done; and

(iv) in terms of clause 17 the applicant was to balance off the respondent's motor vehicle allocation account as at 30 June, 2011 but this has not been done.

As already found above when dealing with the argument of whether the hybrid sale agreement was a purely commercial contract, that it indeed was and that the contract was *per fecta*, these four contentions raised *supra* should not and cannot detract from the *per fecta* status of the contract. The clauses cited as not fulfilled do not go to the root of the contract to warrant invalidating the contract of sale if not fulfilled. It should be noted that these clauses did not provide for time limits by when they should have been carried out, they were merely modes of implementing the perfected contract and were not carried out not because of either party's fault, but due to the termination of the employer-employee relationship on account of the respondent's misconduct. This happened five days following the conclusion of the hybrid sale agreement and the clauses complained of could not have been complied with by then. They were overtaken by events. The gist of the matter remains that the money was loaned to the respondent. He still retains the vehicle purchased by the loan which loan he has not repaid and was due within seven days of his dismissal from employment in terms of clause 9 of the agreement. The applicant is perfectly entitled to claim the amount as per that agreement. The principles relating to the limited discretion to refuse specific performance apply only where the creditor has another remedy such as a claim for damages at its disposal. In *casu* a claim for damages is not a remedy at the disposal of the applicant. The applicant is clearly entitled to its payment from the respondent who is enjoying the fruits of possession of the sold vehicle. It is idle to argue that the applicant cannot be paid its money before the respondent's appeal is disposed of by the Labour Court. It is now trite that a dismissed employee has no legal right to refuse to surrender a company car pending the resolution of his /her appeal by the Labour Court. By the same token he/she cannot refuse to repay a loan advanced to

him/her by the company that has become due and payable pending the resolution of his/her appeal by the Labour Court.

In the result, I make the following order:

IT IS ORDERED THAT:

1. Within ten (10) days of this order, the respondent pays to the applicant the sum of US$13 917-00 together with compound interest at the rate of 6% per annum calculated from the date of demand (23 August 2011) to date of payment in full.
2. The respondent to pay costs of suit.

Dube, Manikai & Hwacha, applicant's legal practitioners
Messrs Matsikidze & Mucheche, respondent's legal practitioners