

FENG LIN
versus
TAWANDA MUTARE
and
PORTIONS (PRIVATE) LIMITED
and
ZVIKOMBORERO GOMERA
and
KUDZAI LEO MAROWA

HIGH COURT OF ZIMBABWE
MHURI J
HARARE, 6 November 2023 and 8 May 2024

Civil Trial

Mr *C Chabvepi* for plaintiff
Mr *Chituramani* for 1st, 2nd, 3rd defendants
Mr *I Gonese* for 4th defendant

MHURI J: Plaintiff caused the issuance of summons against the defendants wherein he claimed:

1. Payment of an amount of US\$ 10 402.42 (ten thousand four hundred and two United States dollars and forty two cents) being the duty amount levied by ZIMRA on a vehicle sold to plaintiff by defendants.
2. Payment of car hire charges at the rate of RTGS 600 (six hundred RTGS dollars) per day from 18 December 2019 to the date of release of the vehicle from ZIMRA or to the date of full refund of the purchase price by defendants.
3. Alternatively, failing (1) above, the refund or payment of the full purchase price for the vehicle paid to the defendants by plaintiff as amplified in the declaration and agreement of sale.
4. An order that defendants pay costs of suit on an attorney and client scale.

This matter was referred to trial on 3 (three) agreed issues, namely

1. Whether or not plaintiff purchased the motor vehicle from the defendants.
2. Whether or not defendants are liable to refund plaintiff for duty, penalties levied, interest and car hire charges.
3. Whether first, second and third defendants sold the vehicle in question in their personal capacities.

The admissions made were:

1. That first, second and third defendants were paid the full purchase price of US\$ 22 000 by plaintiff.
2. That the vehicle was seized by ZIMRA (Zimbabwe Revenue Authority).
3. That defendants were notified of the seizure by Zimbabwe Republic Police (ZRP) and ZIMRA.
4. That defendants failed or refused to pay the sums demanded by ZIMRA.

The onus of proof on the first and the second issues was on the plaintiff and on the third issue on the first, second and third defendants.

In his opening statement at trial, plaintiff reiterated the claim as captured in his summons to wit, the recovery of costs incurred in paying for duty to ZIMRA, payment of penalties and storage charges, refund for car hire charges incurred for a period of approximately 2½ months. He needed not to show or prove the issues that were admitted.

Plaintiff led evidence for himself. He testified that he wanted to buy a motor vehicle and after looking for one, he saw and he was interested in a motor vehicle, a Toyota Fortuner at third defendant's car sale premises, Enterprises Car Sales at Enterprise Road and Selous Avenue Harare.

He saw an old man later known him to be Foya and told him that he liked the motor vehicle. He then signed the agreement of sale, paid the purchase price after he had been assured that the motor vehicle was clean and had no problems. He also verified on the agreement of sale, that it was endorsed that the motor vehicle was clean. He referred to the agreement of sale which is part of his bundle of documents. From the agreement of sale, he identified the names of the people he transacted with as Tawanda Mutare and Zvikomborero Gomera, (first and second defendants).

Plaintiff further testified to the fact when he was transacting with first and the second defendants they never disclosed that they were doing so on behalf of someone else, and that they never mentioned Ngonidzashe Taguta.

After making the payment, he then drove the motor vehicle home. It was in December 2019 when he went to Southerton Police Station to have the motor vehicle cleared for purposes of driving it to Mozambique, that the police detained the motor vehicle on the ground that customs duty had not been paid. The motor vehicle was then seized by Zimra. It was only released after he had paid the duty, penalties and storage charges. (US\$10 403). As from 18 December 2019, to 2 March 2020, plaintiff testified that he had to hire another car at US\$25.00 per day. He however is claiming this amount in RTGS as this was the currency in use at the time. (rate US\$1 to 24 RTGS) and that translated to RTGS 600 per day. He never got any assistance from the defendants at all in as far as those payments were concerned.

Under cross examination, by Mr *Chiturumani* for first, second and third defendants, plaintiff confirmed that the registration book bore the name of Kudzai Leo Marowa as the owner of the motor vehicle. He confirmed that the old man he referred to initially was Foya (now deceased). The person who identified which car was Tawanda Mutare after which he then went to Foya to make payment. He stated that he never met Zvikomborero Gomera (second defendant), never transacted with him but first defendant and Foya. He denied being shown the customs clearance certificate (C C C) but asked Foya if the car was clean to which Foya said it was clean.

He denied that the first, second and third defendants were selling the motor vehicle as agents of Ngonidzashe Taguta.

Under cross examination by Mr *Gonese* for the fourth defendant, plaintiff confirmed that he dealt with Tawanda Mutare and Foya, Tawanda being the salesman and Foya having prepared the agreement of sale and signed as witness. He maintained that there was never any mention of Ngonidzashe Taguta. In his belief, the Car Sale was the owner of the motor vehicle. He maintained that during the transaction the fourth defendant Kudzai Leo Marowa was never mentioned. Further, he stated that between September and December 2019 he did not make any effort to transfer the motor vehicle into his name because he had no idea how to do it as Foya never mentioned that to him. He maintained that he hired another motor vehicle as from 18 December 2019 to 2 March 2020 and was claiming RTGS 600 per day.

With the evidence of the plaintiff, plaintiff's case was closed.

Plaintiff gave his evidence well, although he was not clear as to who he initially dealt with when he got to the Car Sales, between Tawanda and Foya, his evidence was clear that he dealt

with both Tawanda and Foya. He did not exaggerate his evidence so as to nail the defendants. He exonerated second defendant stating that even though second defendant's name appeared on the agreement of sale, he never transacted with him. The same goes for the fourth defendant Kudzai Leo Marowa. Plaintiff categorically stated that fourth defendant was never mentioned during the transaction. He presented as a credible witness. He was adamant that he was never shown the customs clearance certificate during the transaction, he was told that the motor vehicle was clean, that there was no third party ever mentioned during the transaction and that the persons he transacted with (Tawanda and Foya) gave him the impression that third defendant was the owner of the motor vehicle and no one else. I do not find any reason to disbelieve him. He gave his evidence well, he was not shaken under cross examination at all.

After close of plaintiff's case, first, second and the third defendants opened their case. Their opening statement was to the effect that they sold the motor vehicle as agents. They were representing Ngonidzashe Taguta. As agents they are not liable for the transaction they did on behalf of their principal, therefore they must not be held liable.

First to lead evidence was Tawanda Mutare, first defendant. He testified that the motor vehicle was brought to the car sale by Ngonidzashe Taguta who wanted to do a swap deal. He took the Toyota Legend and left the Fortuner and that was after they had done the necessary checks with the police and Zimra.

It was his evidence that when plaintiff came looking for a motor vehicle to buy, they showed him the Fortuner and the registration book. The next day plaintiff came and he enquired if the motor vehicle was road worthy and he was shown the registration book and told that the motor vehicle was insured. It was after this that plaintiff made payment.

First defendant further testified that the motor vehicle was sold by the garage. Upon a follow up question he testified that he sold the motor vehicle on behalf of a customer Tafadzwa Mangere who had left it at the garage. The Fortuner was left by Taguta so that they could sell it but the proceeds of the sale they gave Tafadzwa Mangere.

He testified that his name appeared on the agreement of sale as the seller because he had been authorized by Foya.

Under cross examination, the first defendant stated that after the swap and top up Tafadzwa Mangere became the owner of the Fortuner.

When quizzed further about his earlier evidence, he stated that he was selling the motor vehicle on behalf of Taguta. He also stated that the principal was the garage and they sell as agents of the garage. He agreed that they did not disclose to plaintiff that they were selling on behalf of someone. On the question why second defendant's name was on the agreement of sale as seller, the response was that:

“We are the salesmen and in the event that plaintiff returns in my absence, Gomera would assist.”

Under cross examination by Mr *Gonese* for fourth defendant, he confirmed that he never had any interactions with the fourth defendant. He also confirmed that when Taguta brought the Fortuner, he was given the registration book, plates, insurance and license disc from Zinara. He confirmed that after the swap and top up deal Taguta no longer had any rights over the Fortuner and therefore could not be their principal. He confirmed that the motor vehicle was then their responsibility. He however stated that they were representing Mangere and yet in his plea he stated he was acting for Taguta. He confirmed that by endorsing his name and signature as seller he held himself out as the seller of the motor vehicle. He agreed that he, Foya and the Company constituted the sale of the motor vehicle as seller.

First defendant was a very poor witness I must say. He could not give coherent evidence. He was prevaricating, and his testimony was full of contradictions. In one breath he said he sold the motor vehicle as agents of Taguta, then as agents of Mangere and also as agents of the third defendant, in the agreement of sale he is endorsed as the seller. Nowhere is it indicated he was selling on behalf of a third party. Nowhere is it indicated he sold the motor vehicle as a sales person. He endorsed the name of the second defendant as a seller when the second defendant was not involved in the transaction at all. His reason for so doing that he wrote his name so that in the event that he is not available, plaintiff would get in touch with him is very hard to believe. Despite the fact that there was a procedure which he stated they followed when selling the motor vehicle on behalf of a third party, he did not record the Fortuner in the mandate book. He did not include the mandate in his bundle of documents to support his defence that they sold the Fortuner on behalf of a third party.

Further, I find as incredible the evidence that plaintiff asked whether the motor vehicle was road worthy, if that was the question, why would he answer that by showing him the registration book and telling him that the motor vehicle was insured. I find the plaintiff's evidence that he

enquired as to whether the car was clean and was told it was clean to be more credible than the first defendant's. This also goes to show why plaintiff was not shown the customs clearance certificate.

Overall, first defendant's evidence left a lot to be desired and cannot be believed.

Second defendant was the next to give evidence. He confirmed plaintiff's evidence to the effect that he did not deal with him as he was outside. He testified that he does not know anything to do with the motor vehicle transaction in question. He admitted that his name is on the agreement of sale. He explained this by stating as first defendant did that it was the procedure, so that in the event that the first defendant is absent he would assist.

Under cross examination he stated that it was an error to include his name in these proceedings as he was not there when the transaction was taking place. Asked why he entered appearance to defend if he was not served with the summons his response was that it was Foya who instructed the lawyer to do everything, he knows nothing about the case. He totally denied everything to do with these proceedings.

Under cross-examination by Mr *Gonese* for fourth defendant, he stated that he is only able to read shona and not any other language despite the fact that he is a salesperson. If an English-speaking customer comes, he refers him to the office. He is only able to read registration numbers. He insisted that it was Foya who was handling this case. He denied appearing before a commissioner of oaths and stated that the affidavit he is said to have deposed to, was fraudulently obtained. He maintained that the plaintiff does not know him and also that the person that brought the Fortuner does not know him as well.

In analyzing this witness evidence, it came out that in some respect, he was not being truthful, for example his evidence that he cannot read any other language except shona, that he could not read the name Leo because it was English but Marowa because it was shona, and that he can read the registration number and that if an English-speaking person comes in he would just refer him to the office. This is hard to believe, considering that he is one of the only two sales persons employed by third defendant and his evidence that his name was included on the agreement of sale, so that in the event a customer comes in the absence of first defendant he would assist. *In casu*, the customer, plaintiff (Chinese national) is an english speaking and not a shona speaking customer. However, despite some untruths in his evidence, plaintiff's evidence is the

evidence that exonerates him. Plaintiff's evidence was that he did not deal with second defendant during the entire transaction. He stuck to his testimony in this regard and to that end it is my finding that second defendant is not liable and the claim against him is to be dismissed.

The third defendant represented by one Nicholas Ndlovu was next to give evidence. Mr Ndlovu is a Director and the current chairperson of the third defendant.

His evidence was to the effect that the importer of the motor vehicle in question, Leo K Marowa, as per the registration book is the one who is supposed to pay duty. He is the one who is obliged to reimburse plaintiff. He testified that third defendant sold the motor vehicle as agents and it got commission. He could not testify much about the transaction in question as he had not assumed office with third defendant by then.

Under cross examination, his responses were anchored on what he was told by first defendant. He did not have first-hand information and to some of the questions, he did not have an answer. He confirmed that there was no mandate produced to confirm that the Fortuner was being sold on behalf of some other person as per their procedure. He confirmed that the agreement of sale showed three names, third defendant being one of them as sellers of the Fortuner and no other name. He confirmed that third defendant is bound by the contents of the agreement of sale which they prepared.

My analysis of Mr Ndlovu's evidence is that, this witness did not have much information about the transaction in question. He testified mostly about what he heard from first defendant as he only assumed office after the demise of Foya. This did not assist third defendant at all.

The last witness for defendants was Ngonidzashe Taguta. He testified that he is the one who brought the Fortuner from Mutare to the car sales and he dealt, with first defendant. He had bought it from fourth defendant who told him the Fortuner was properly cleared which information he also told first defendant. He was later told by first defendant that the Fortuner had been seized by ZIMRA for not having been properly cleared. He in turn contacted fourth defendant and told him about the seizure who told him he had given the money for duty to some agents for them to pay the duty. He was shown the Customs Clearance Certificate. He denied being the principal when the Fortuner was sold to plaintiff. He testified that fourth defendant was the one responsible for paying duty.

Under cross examination, he denied bringing the Fortuner for defendants to sell it on his behalf despite the fact that in his summary of evidence he stated that he was the principal. He agreed to be departing from the statement that says he was the principal. He insisted that first defendant was lying when he said in court that he was selling the Fortuner on his behalf. He denied certain paragraphs (142) of the summary of evidence and approved of other paragraphs (344). He denied having been shown the summons and stated he was just communicating with first defendant and not the lawyer. He never instructed first defendant on what to incorporate in the agreement of sale. He believed first defendant became the owner of the Fortuner after they had done their transaction when first defendant had sold him the Hilux in a swap deal with the Fortuner.

In analyzing this witness's evidence, I find that his testimony does not assist the defendants at all. He denied being the principal as stated in the summary of evidence. He testified that the transaction he did with first defendant, he became the owner of the Hilux and first defendant the owner of the Fortuner. He was not told of the owner of the Hilux and believed first defendant was the owner of the Hilux.

With this last witness's evidence first, second and third defendants closed their case. Fourth defendant then opened his case. His opening statement was to the effect that he imported the Fortuner and disposed it to Ngonidzashe Taguta and therefore no longer had any rights of ownership to the motor vehicle. He was not involved in the sale of the motor vehicle by Taguta to the first, second, third defendants and subsequently by first, second, third defendants to plaintiff. He engaged agents whom he gave US\$ 6 000 for duty. There is no privity of contract between him and plaintiff as such he is not liable to compensate plaintiff.

In his evidence, fourth defendant testified that he got the Fortuner from South Africa and contacted one Lovemore Mafusire who is in the business of clearing and importing cars. He paid him US\$6 000 and US\$ 500 for duty and registration of the motor vehicle.

Mafusire then some days later sent him the Customs Clearance Certificate saying the clearance has been done. He also later got the registration plates and insurance and registration book. On some other day, he met Taguta who wanted the Fortuner and he sold it to him. The Fortuner was there after not his motor vehicle.

He later got a call from Taguta advising that the Fortuner had been impounded by Zimra and Taguta and himself came to Harare from Mutare to meet Foya. He testified that in his view,

plaintiff should have proceeded against first, second, and third defendants since he dealt with them and not him. He (fourth defendant) should have been sued by Taguta since he dealt with Taguta and not plaintiff.

Under cross examination, fourth defendant conceded that duty was not paid, plaintiff who was not the importer paid the duty and that it is the importer who has the obligation to pay the duty. He agreed that the actions of agents bind the principal. He also agreed that the claim includes him. Under re-examination, when he was asked to go to the root of the matter and point out why he believed he was not liable, his response was “am not the one who dealt with plaintiff. First, second and third defendants dealt with plaintiff.”

My analysis of fourth defendant’s evidence shows that he was included in the chain of events and therefore cannot be exonerated from liability. He was the importer of the Fortuner. He was obliged to pay the duty. He testified that he paid some agent to do that for him who then gave him the Customs Clearance Certificate which, Customs Clearance Certificate he did not include as part of his bundle of documents to show that he actually paid duty. He did not see it fit to call the agents to come and give evidence to support his case. In his evidence he testified that it is Taguta, who should have sued him and not plaintiff and if it was Taguta they could have talked. In any way, this is an admission of liability. The fact that it is plaintiff who caused the issuance of summons against him cannot exonerate him at all, as it is the plaintiff who ended up paying the duty and incurring other expenses arising from the failure by fourth defendant as importer to pay the requisite duty.

Overrally, on a balance of probabilities I find that plaintiff has proved his claim against first, third and fourth defendants. First defendant was an employee of the third defendant. He acted on behalf of third defendant in the whole transaction. First and third defendants held themselves out to plaintiff as the sellers.

It was not mentioned to plaintiff that there was a third party involved as the principal in this transaction. Verbally and in the agreement of sale first and third defendants assured plaintiff that the motor vehicle was `clean` meaning that everything was above board which position was not true. The evidence of first defendant as alluded to earlier is full of contradictions.

As regards the fourth defendant he was the root cause of the ensuing problems. He imported the motor vehicle, produced no proof Customs Clearance Certificate that he had paid the duty. He

gave the impression that if it was Taguta who had proceeded against him that would make sense and not plaintiff since he did not deal with him.

I find that the first, third and fourth defendants are jointly and severally liable to plaintiff's claim.

As submitted by plaintiff's counsel, this is one matter in which parties should have settled out of court. The defendants decided to fight tooth and nail to the end in such a matter which is an open and shut case. For putting such an unwarranted fight and putting plaintiff out of pocket prosecuting this case to finality over and above the expenses he incurred, the defendants will have to bear the costs on an attorney and client scale.

In the result, the following order is made:

1. That plaintiff's claim against first, third and fourth defendants jointly and severally, the one paying others to be absolved is granted on the following terms:
 - a) Payment of an amount of US\$ 10 402.42 (ten thousand four hundred and two United States dollars and forty-two cents).
 - b) Payment of car hire charges at the rate RTGS 600 (Six hundred RGS dollars) to be converted to ZIG per day from the 18 December 2019 to the date of recovery of the motor vehicle or to the date of refund of the full purchase price of the vehicle.
 - c) Alternatively, failing to comply with (a) above, payment or refund of the full purchase price for the vehicle US\$ 22 000 paid to the first and third defendants.
 - d) First, third and fourth defendants to pay costs of suit on an attorney and client scale.

Cyprian's Law, plaintiff's legal practitioners

Messrs Chiturumani Law Chambers, first, second and third defendants' legal practitioners

Messrs Gonese and Ndlovu, fourth defendant's legal practitioners